Human Rights Law as a Control on the Exercise of Power in the UK

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When one considers the notion of human rights, one may be tempted to describe them by reference to legal principles that indicate the assumption that such rights simply exist, without considering whether they may be rationally identified and interpreted.[1] The layman would argue that one need only to look at human rights law, which enshrine, and provide protection for, the human rights that academics and scholars seek to theoretically examine.[2] However, there is considerable complexity to any assessment of laws that seek to provide protection to human rights. Such assessment draws on the circumstances that lay testimony to the existence of a human right, and the manner in which it is interpreted and applied in various circumstances. The most important aspect of natural rights is that they provide a forum for discussing and legitimising the very existence of human rights law. Natural rights give rise to the assumption that particular, if not all, human rights, 'must be fulfilled without any exceptions…and cannot be overridden in any circumstances'.[3] Whether this utopian view of human rights protection may be achieved in practice, however, is another question. An individual's claim to any particular human right is rooted in some interest, and those subject to the right are under the positive and/or negative obligation to protect and uphold it.[4] A claim to a right operates to restrict, prohibit, or require a variety of actions, on the basis that they violate, infringe or promote it.[5] In practice, however, one is unlikely to be satisfied with such abstract, moral evaluations as to what human rights require. It is therefore necessary to consider the practical scope, operation and impact of human rights, to determine whether natural rights may be effectively converted into practical rights.

This essay critically examines the extent to which human rights law acts, in practice, as a control on the exercise of power in the UK. The operation of the European Convention on Human Rights 1950 (ECHR) and the Human Rights Act 1998 (HRA 1998), as well as their impact on the powers of Parliament and the courts will be focused upon. In examining the practical effect given to the rights enshrined in these documents, it will be argued that the claim that human rights law acts a as a control on the exercise of power is more symbolic than practical. This does not, however, mean that such law has not fostered a culture of accountability in preventing human rights abuses. In this respect, human rights law can be said to have *some* controlling impact on the exercise of power in the UK, although it is more apt to state that the exercise of power in the UK has a controlling impact on human rights law.

Human Rights Law and the Interpretive Authority of the Courts

The existence of human rights legislation is only as effective as the judicial institution that applies and interprets it.[6] In the context of the ECHR, then, section 2 HRA 1998 sets out the obligation of the UK courts, requiring that they 'take into account' the jurisprudence of the European Court of Human Rights (ECtHR) when considering issues pertaining to ECHR rights. Under section 3 HRA 1998, the courts must also ensure that domestic legislation is interpreted to ensure its compatibility with the ECHR, and may make a declaration of incompatibility if compatibility with the ECHR is not possible. The core purpose of sections 2 and 3 HRA 1998 is to ensure that Parliament does not pass legislation that contravenes ECHR rights, and could, on this basis, be said to significantly strengthen the discretion of the courts when interpreting law. However, there is no positive obligation imposed upon the courts to actually apply or follow ECtHR jurisprudence.[7] They are instead expected to 'ordinarily follow' ECtHR decisions.[8] There are occasions on which the UK courts have completely departed from judgements of the ECtHR, and in *Lyons,* it was emphasised that 'there is room for dialogue on such matters'.[9] There are also occasions on which domestic

judicial precedent has been amended or completely discarded, on the basis that they were not compatible with ECtHR jurisprudence and ECHR rights.[10]

It has been recognised that, in particular, section 2 HRA 1998 has motivated 'the Supreme Court to re-assess all its previous statements about the stance it should adopt in relation to' the ECtHR's jurisprudence.[11] On the other hand, domestic courts have explicitly stated that any particular principle of the ECtHR's jurisprudence should only be applied if it is sufficiently clear and consistently applied.[12] In *B and another v Secretary of State for Justice,* [13] the court also added that, only if Parliament obviously intended the domestic statute in question to be ECHR compatible, would ECtHR jurisprudence be followed. Therefore, there is clear reluctance amongst the UK courts to follow ECtHR jurisprudence when it conflicts with the will of Parliament, indicating the perpetual battle between Parliamentary sovereignty, the interpretive authority of the courts, and the human rights obligations arising from the ECHR. This is evidenced in the fact that the UK courts have, on occasion, departed from ECtHR jurisprudence that was clear and consistent.[14] This supports the claim that human rights law is, in practice, limited in controlling the exercise of power in the UK.

In order to more effectively consider the role of the UK courts in giving practical effect to the rights contained in the ECHR, it is necessary to examine their approach towards particular rights. Article 6 ECHR contains the right to a fair and public trial, within a reasonable period of time, by an independent and impartial tribunal. Article 6 ECHR has provoked a considerable volume of litigation, rendering it possible to examine its practical impact on the exercise of power in the UK. The right to access to a court or tribunal is rooted in the underlying need to enable individuals to challenge decisions made by a public authority, if it is considered that the procedures they have undertaken do not satisfy Article 6 ECHR.[15] However, this does not necessarily mean that any and all decisions may be challenged on the ground that they do not meet Article 6 ECHR standards. Article 6 standards may be satisfied if a decision can be reviewed by a court or tribunal which itself satisfies this provision. Article 6 ECHR is, on this basis, not absolute,[16] although it has been recognised that infringements of this right cannot undermine its essence.[17] This is compatible with the ECtHR's interpretation of Article 6 ECHR, which indicates that certain cases, such as unmeritorious cases, and those of minors, cannot be brought under this right.[18] Similarly, a claim under Article 6 ECHR may not be made where there is a legitimate interest in infringing this right, provided the infringement is proportionate.[19] This indicates that the mere existence of human rights law does not result in the absolute protection of said rights under all circumstances.

There is evidence that Article 6 ECHR has empowered domestic courts to curb the effect and impact of legislation. In the case of *A (No. 2),* ***[20]*** the applicant appealed his conviction of rape on the ground that evidence submitted against the victim regarding her sexual history was unduly declared inadmissible. The House of Lords held that the applicant's right to a fair trial under Article 6 ECHR would be infringed if the evidence was excluded, despite the fact that section 41 of the Youth Justice and Criminal Evidence Act 1999 provided for the exclusion of such evidence.[21] It is important to point out that Article 6 ECHR may be enforced directly through the domestic courts, and therefore applications need not be made to the ECtHR. In fact, it has been held that the ECtHR does not have jurisdiction to reopen or assess domestic decisions, or to substitute its own interpretation of domestic law or domestic judgements.[22] Thus emerges a further practical limitation upon the realisation of human rights law, and its ability to control the exercise of power in the UK. This is particularly problematic, considering the difficulty clearly expressed by domestic courts in derogating from the will of Parliament, and, as will be demonstrated below, the ineffectiveness of declarations of incompatibility.

Hurdles to Human Rights Protection

The most controversial UK constitutional principle in respect of the ability of human rights law to control the exercise of power is that of Parliamentary sovereignty (PS). The (traditional) doctrine of PS establishes Parliament as the sole law-making institution, enabling it to pass and repeal any laws, which cannot be questioned or invalidated by any other institution.[23] In a number of judgements, the courts have consistently upheld Parliament's legislative powers,[24] based on the need to recognise and maintain the distinction between the legislative powers of Parliament,[25] and the interpretive authority of the courts.[26] The controversy surrounding the doctrine of PS, however, is that it suggests that Parliament can pass laws that violate human rights, and that, therefore, human rights

law only controls the exercise of power in the UK to the extent that Parliament itself permits. To accept such a claim would be to dismiss all human rights law as merely symbolic, because Parliament could, at any time, simply reject to comply with, for example, the ECHR and ECtHR jurisprudence. The fact that the courts may only interpret legislation also suggests that they would be powerless to prevent such human rights violations. Moreover, Parliament could repeal the HRA 1998 at any time, rendering its human rights obligations under the ECHR obsolete.[27] Ultimately, then, human rights law only has effect in the UK because Parliament consents to its authority.

Some academics argue that the above contentions relate to the traditional definition of PS, and that, while PS still has a certain degree of constitutional significance, it is no longer accurate to define Parliament as the sovereign lawmaker in the absolute sense.[28] This is largely based on the claim that the HRA 1998 has strengthened the interpretive powers of the courts, enabling the ECHR and ECtHR jurisprudence to have a considerable impact on the interpretation and effect of Acts of Parliament.[29] The paradox here is almost overwhelming, in that the HRA 1998 operates to limit, yet also lays testimony to, the legislative sovereignty of Parliament. This is most evident in the fact that the HRA 1998 protects the power of legislative amendment, and hence only Parliament may amend or repeal legislation that clearly violates human rights.[30] However, it is ultimately the courts that interpret, and hence give effect to, legislation, and therefore it could be said that the legislative sovereignty of Parliament has weakened in light of the judiciary's expanded powers of interpretation in light of human rights. According to this view, the law is simply 'what the judge says it is'.[31] However, the courts have clearly emphasised that their duty is to 'pronounce the law', and not to interpret it as they 'wish it to be'.[32] The courts have also explicitly declared that they 'could not hold…[an]…Act of Parliament invalid', even if it violates the ECHR.[33] This is further evidenced in section 7 HRA 1998, which states that the courts can only interpret legislation in a manner that is ECHR compatible, 'so far as it is possible to do so'.[34]

Section 4 HRA 1998 could be assumed to indicate that human rights law controls the exercise of power in the UK, because it enables the courts to make a declaration of incompatibility (DOI) for legislation that breaches the ECHR. However, the making of a DOI does not result in the invalidation or repeal of incompatible legislation.[35] Ultimately, a DOI 'is not binding on the parties to the proceedings in which it is made', and the courts cannot decline to apply the incompatible legislation in that specific case.[36] The authority and obligation to respond to a DOI lies exclusively with Parliament. This clearly indicates the endeavour to protect the doctrine of PS, and to ensure that the courts do not undermine the will of Parliament in respect of incompatible legislation. Once again, then, human rights law in light of even the DOI can be said to lack practical force, and hence its ability to control the exercise of power in the UK is symbolic rather than tangible.

On the other hand, the inability of the courts to do anything more than make a DOI suggests that Parliament intends (and allows, within limits) legislation to be interpreted in a manner that is ECHR compatible.[37] A DOI is deemed to be a measure of last resort, because, 'in almost all cases, the courts will be able to interpret legislation' in a rights compatible manner.[38] This is evidenced in the fact that only very few DOI's have been made to date; Parliament would rather enable the courts to exercise broad discretion in ensuring that legislation does not violate human rights, than be presented with the need to respond to a DOI.[39] Of the few cases in which a DOI was actually made, there was prominent and severe incompatibility between the ECHR and the legislation concerned, and no ability to rely on the margin of appreciation.[40] The margin of appreciation enables Member States to derogate, in limited circumstances, from certain ECHR obligations,[41] such as those concerning immigration.[42] The margin of appreciation is based on the notion that individual human rights should be balanced against national interests, and enables the former to be (proportionately) infringed in the quest to protect the latter.[43] In respect of the UK, then, this further lays testimony to the claim that human rights law controls the exercise of power in theory more than in reality. While Member States cannot utilise any means to further an important national interest due to the need for proportionality between the means implemented and the goal, the concept of proportionality is vague and open to wide interpretation.[44] There is indeed the increasing concern that 'the doctrine will increasingly become an open door for abusive limitations in the exercise of human rights'.[45]

Therefore, while it may appear to be the case that the DOI is a powerful tool in controlling the exercise of power in the UK, it is evident that such power is theoretical rather than practical. This is primarily because Parliament is under no obligation to act upon a DOI.[46] Alternatively, it has been argued that, even though there is no such obligation, the

making of a DOI would 'almost certainty prompt' an amendment of the offending legislation.[47] Indeed, Parliament responded to a DOI made in *R (T) v Chief Constable of Greater Manchester Police and Others,* ***[48]*** on the ground that the statutory obligation to self-disclose prior criminal convictions[49] was not compatible with the right to private and family life contained in Article 8 ECHR. The logic underlying the DOI is moreover based on the fact that, to allow the courts to amend incompatible legislation would be to allow an unelected institution the power to make law. On this basis, the ability of the courts to exercise legislative powers could, in and of itself, present a threat to human rights.[50] The courts themselves have recognised this – in *Ghaidan v Godin-Mendoza,* ***[51]*** the House of Lords refused to interpret incompatible legislation (the Rent Act 1977) in a manner that would render it compatible. It was reasoned that such interpretation would give the statute a meaning that was not consistent with its fundamental aim. In this respect, the DOI protects the legislative supremacy of Parliament, and prevents the courts from making law.[52] On the other hand, it is perplexing that the DOI is not accompanied by a legal obligation to respond.

The existence of procedural mechanisms, such as the DOI, the margin of appreciation and derogations, have an overall negative impact on the extent to which human rights law could be said to control the exercise of power in the UK. The overall existence and practical impact of human rights is undermined by these principles, because they enable Member States to derogate from, infringe, and violate human rights in a variety of circumstances. This causes the scope and rigour of human rights law to become fragile at best. For example, the margin of appreciation is not mentioned in the ECHR, and has rather been developed by the ECtHR on an ad hoc basis,[53] rendering its scope, interpretation and application somewhat elusive. Furthermore, the fact that a number of rights contained in the ECHR are subject to derogations during a time of emergency under Article 15 ECHR enable collective rights to be prioritised over individual rights. Such derogations mark the complex and difficult relationship between the sovereignty of Member States, and the authority of the ECHR and ECtHR jurisprudence. In light of such obstacles that any particular right must overcome in order to be upheld, it is evident that the theoretical notion of human rights protection under the ECHR is considerably more expansive than the practical protection of human rights.

Conclusions

In theory, the human rights law example of the ECHR, and its application through the HRA 1998 in the UK, indicates that the ability of human rights law to control the exercise of power in the UK is more evident in theory than in practice. Firstly, the ability of the courts to interpret legislation that complies with the ECHR and ECtHR jurisprudence is limited, and can only go so far in preventing human rights breaches. Secondly, the DOI, although it does often result in remedy, does not impose the legal obligation upon Parliament to provide such a remedy. Finally, human rights protection is subject to a number of further hurdles, such as the margin of appreciation, and the derogations provided for in the ECHR itself. While human rights law appears, on its surface to act as a control on the exercise of power in the UK, the reality is considerably different. In essence, then, human rights protection, when it comes into conflict with the exercise of power, only becomes realised to the extent that Parliament permits. It is perhaps more apt to state that the exercise of power in the UK acts as a control on human rights law, which is concealed beneath the guise of various controls and limitations, which are powerful in theory, but are severely lacking in practice.

Notes

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[2] L Hunt, *Inventing Human Rights: A History* (Norton 2007) 26.

[3] A Gewirth, 'Are there any Absolute Rights?' in *Theories of Rights* (J Waldron ed, OUP 1989) 92.

[4] D Hoffman & J Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (4th edn, Pearson 2013) 11-12.

[5] R Costigan & R Stone, *Civil Liberties and Human Rights* (11th edn, OUP 2017) 5.

[6] C McCrudden, 'Common law of human rights?: Transnational judicial conversations on constitutional rights' [2000] 20 Oxford Journal of Legal Studies 4, 504.

[7] *Doherty v Birmingham City Council* [2008] UKHL 57.

[8] *Jones v Saudi Arabia* (2006) 2 WLR 1424, Lord Bingham, [1435].

[9] *Lyons* (2003) 1 AC 976, [46]; *Spear* (2003) 1 AC 734.

[10] S Foster, *Human Rights and Civil Liberties* (3rd edn, Pearson 2011) 150-151.

[11] L Irvine, 'A British interpretation of Convention rights' [2012] 12 Public Law 237, 1.

[12] *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] 2 WLR 1389, Lord Slynn, [26]; *Manchester City Council v Pinnock* [2010] UKSC 45.

[13] *B and another v Secretary of State for Justice* [2012] 1 WLR 2043, [60].

[14] B Hale, 'Argentoratum locutum: Is Strasbourg or the Supreme Court supreme?' [2012] 12 Human Rights Law Review 1, 68; *Horncastle* [2009] UKSC 14.

[15] DJ Harris, M O'Boyle, EP Bates & CM Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th ed, OUP 2018) 376.

[16] *Steel & Morris v UK* (App. No. 68416/01) (2005) 41 EHRR 40, [61].

[17] *Ashingdane v UK* (App. No. 8225/78) (1985) 7 EHRR 528; *Markovic and Others v Italy* (App. No. 1398/03) (2007) 44 EHRR 1045.

[18] *Ezeh & Connors v UK* (App. Nos. 39665/98, 400086/98) [2004] 39 EHRR 1.

[19] *Osman v UK* (App. No. 23542/94) (2000) 29 EHRR 245.

[20] *A (No. 2)* [2001] UKHL 25.

[21] See also: *Jasper v UK* (App. No. 27052/95) (2000) 30 EHRR 97.

[22] *Locabail (UK) Ltd v Waldorf Investment Corp and Others* [2000] HRLR 623 CD.

[23] AV Dicey, *Introduction to the Study of the Law of the Constitution* (RE Michener ed, 8th edn, Liberty Find Inc 1982) 52.

[24] *Burmah Oil Co v Lord Advocate* [1965] AC 75; *Madzimabuto v Lardner v Burke* [1969] 1 AC 645.

[25] *Edinburgh & Dalkeith Railway Co v Wauchope* [1842] 8 Cl & F 710.

[26] *British Railway Board v Pickin* [1974] AC 765.

[27] D Sartori, 'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' [2014] 29 Tul. Eur. & Civ. LF 47, 51.

[28] C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (OUP 2016) 108.

[29] A Harel & A Shinar, 'Between judicial and legislative supremacy: A cautious defence of constrained judicial review' [2012] 10 IJCL 4, 955-956.

[30] *Re (S) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, Lord Nicholls, [39].

[31] O Holmes, *The Common Law* in *The Fundamental Holmes* (R Collins ed, CUP 2010) 145.

[32] *Ashford v Thornton* (1818) 106 ER 149, Lord Ellenborough, [155].

[33] *Madzimbamuto v Lardner-Burke* [1969]1 AC 645, [723].

[34] HRA 1998, section 3(1).

[35] N Kang-Riou, 'Confronting the Legalisation of Human Rights: A Counterpoint' in*Confronting the Human Rights Act 1998: Contemporary Themes and Perspectives* (N Kang-Riou, J Milner & S Nayak eds, Routledge 2013) 11.

[36] HRA 1998, s. 4(6).

[37] I Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (8th edn, OUP 2018) 542-543.

[38] House of Commons, *Parliamentary Debates,* 16 February 1998, Jack Straw MP, col 780.

[39] L Hoffmann, 'Human rights and the House of Lords' [1999] 62 Modern Law Review 2, 161.

[40] *Wilson v First Country Trust Ltd* [2001] EWCA Civ 633; *R (Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State* [2005] EWCA Civ 1184.

[41] *Greece v UK* (App. No. 176/56) [1956] 25 ILR 168.

[42] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158.

[43] HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff 1996) 13.

[44] H Davis, *Human Rights Law* (4th edn, OUP 2016) 98-99.

[45] I De la Roasilla Del Moral, 'The increasingly marginal appreciation of the margin-of-appreciation doctrine' [2006] 7 German Law Journal 611, 612.

[46] I Leigh & R Masterman, *Making Rights Real: The Human Rights Act in its First decade* (Bloomsbury Publishing 2008) 118.

[47] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill,* Cm 3782 (Stationery Office 1997) 2.10.

[48] *R (T) v Chief Constable of Greater Manchester Police & Others* [2014] UKSC 35.

[49] The Police Act 1997 and the Rehabilitation of Offenders Act 1974.

[50] *R (Carson) v Secretary of State for Work & Pensions* [2005] UKHL 37.

[51] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

[52] *R (Jackson) v Attorney General* [2005] UKHL 56.

[53] K Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart 2015) 234.

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