1

Introduction

The Human Rights Act 1998, Parliament and the courts

When the Human Rights Act 1998 (hereinafter HRA) came into force, the then Home Secretary, Jack Straw, described it as 'the first Bill of Rights this country has seen for three centuries'.[1] Admirers of the Act claimed that it would transform society for the better, providing us with a fresh set of values for a godless age.[2] Others argued that the HRA provided 'a higher order framework, a constitutional order, which constrains all public institutions and is expected to constrain even the elected legislature itself'.[3] Sir William Wade suggested that the passage of the Act 'must certainly be regarded as one of our great constitutional milestones. It makes a quantum leap into a new legal culture of fundamental rights and freedoms.'[4] Naturally, the HRA also had its detractors. Whilst accepting that the HRA was 'the UK's Bill of Rights'[5] which was 'partially entrenched',[6] some Left-leaning academic lawyers questioned 'whether the primary responsibility for the articulation of [Convention rights] ought to be taken away from the normal political processes of representative government.'[7] Keith Ewing argued that the Act represented

> an unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental restructuring of our 'political constitution' . . . it is unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688.[8]

The particular source of consternation for lawyers like Ewing was 'the extensive shift of political authority'[9] to the judiciary. Sceptical voices from the Left were echoed in similar views on the Right, where the fear

[1] Speech, Institute for Public Policy Research, 13 January, 2000.
[2] Klug (2000); see also Feldman (1999b), 173, questioning whether the HRA could 'inject values which could fill the ethical vacuum at the heart of public life'.
[3] Jowell (2003a), 68. [4] Wade (1998), 532. [5] Tomkins (2001), 1.
[6] *Ibid.*, 2. [7] *Ibid.* [8] Ewing (1999), 79. [9] Tomkins (2001), 2.

of expanding the power of unelected and unaccountable judges, at the expense of the elected representatives of the UK Parliament, was no less strongly felt.[10] Right-wing sections of the media made wild predictions that, post-HRA, the courts would be clogged with unmeritorious cases, that serious crime would go unpunished and that judges would accede to every impractical and implausible claim in the name of human rights.[11] Needless to say, such dire predictions about the future impact of the HRA have not been borne out in practice.

What is interesting about the initial academic discussion of the HRA was that, despite fervent disagreement about the merits of the Act, both admirers and detractors alike seemed to agree on its immense constitutional and institutional significance.[12] They were all agreed that the HRA transferred extensive power from the legislature and executive to the judiciary, which in turn, placed constraints on public institutions, including the legislature itself. Moreover, they all agreed on the constitutional nature of those constraints. Both admirers and critics were happy to characterise the HRA as the UK's Bill of Rights.[13] Where they disagreed was whether this transfer (and the constraints it entailed) was a good or a bad thing. Naturally, this disagreement turned, in part, on different views about the character, competence and legitimacy of the legislature, on the one hand, and the courts on the other. One of the aims of this book is to contribute to this broader constitutional debate – by examining critically the nature and extent of the alleged 'transfer' of power to the judiciary, by subjecting both the interpretive method and the substantive outcomes of the HRA case law to critical scrutiny, and finally, by taking a stance on the normative argument about the desirability and legitimacy of giving the courts strong powers of constitutional review, which have the effect of constraining the law-making powers of the democratically elected legislature.

[10] Klug (2007), 704; Fenwick (2007), 142. For an overview of the political history of the 'Bill of Rights' debate, see Fenwick (2007), 141–56.

[11] For comment on the tabloid coverage of the coming into force of the HRA, see Steyn, (2000), 552; Lester (2002a), fn. 20; see also Sedley (2008), 20ff. The *Review of the Implementation of the Human Rights Act* conducted by the Department of Constitutional Affairs in July 2006, provides some examples of the myths and misperceptions which have grown up around the HRA which have 'undoubtedly had an accumulative and corrosive effect upon public confidence both in the Human Rights Act and in the European Convention on Human Rights itself', see 'Introduction by the Lord Chancellor' (Lord Falconer) at www.justice.gov.uk/docs/full_review.pdf, 5.

[12] Macklem (2006), 107.

[13] Tomkins (2001), 1; Lester (1998); Klug (2001), 370; Ewing (2004), 836; Fenwick (2007), 171; Wintemute (2006a), 209; Hiebert (2006), 7.

In the UK, there is a strong intellectual tradition of opposing any enhancement of judicial power in the name of protecting human rights. This tradition draws on many different sources. The first is an intellectual hostility in mainstream British legal and political thought to abstract statements of rights, famously dismissed by Jeremy Bentham as 'nonsense upon stilts'.[14] Dicey wrote that there is 'in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists',[15] but this was a strength rather than a weakness, because such rights may be constantly suspended. Dicey famously articulated another important source of opposition to Bills of Rights in the UK, namely, the belief that the existing political institutions – particularly Parliament – were perfectly capable of preserving the traditional liberties enjoyed by British citizens.[16] As a former Prime Minister once famously declared in a speech opposing a Bill of Rights for Britain: 'We have no need of a Bill of Rights because we have freedom.'[17] Belief in the value and importance of strong parliamentary government has been an important strand of British legal and political thought, which often goes hand in hand with scepticism about the desirability (and indeed, ability) of judges to enhance the protection of human rights and civil liberties.[18]

The historical belief in the ability of Parliament to protect civil liberties and the sense of complacency which sometimes accompanied it, were put under severe strain in the later part of the twentieth century. Commenting on the poor civil liberties record of governments during the 1980s, Keith Ewing and Conor Gearty suggested that the traditional political checks on government were insufficiently effective as a method of curbing the power of a determined and illiberal governing party: 'Mrs Thatcher has merely utilised to the full the scope for untrammelled power latent in the British constitution but obscured by the hesitancy and scruples of previous consensus-based political leaders.'[19] Moreover, there was an increasingly steady stream of cases brought against the UK before the European Court of Human Rights (hereinafter ECtHR) in Strasbourg. Perhaps this, more than any other fact, prompted the enactment of the HRA.[20] Writing just before the HRA was enacted, the then Home Secretary observed:

[14] Bentham (1843), 501. [15] Dicey (1959), 197–8. [16] *Ibid.*, 189–90.
[17] For discussion of this comment, see Irvine (2003a), 245. [18] Klug (2007), 702–3.
[19] Ewing and Gearty (1990), 7; Fenwick (2007), 159; Feldman (1999a), 166. For this reason, the HRA has been described as 'Thatcher's legacy' in Fenwick (2000), 9.
[20] See Irvine (2003a), 245ff.

> What marks out the UK's record [before the European Court of Human Rights] is the serious nature of the cases brought and the absence of speedy and effective domestic remedies. This record does little for the reputation of Parliament, government or the courts. It affects the UK's international standing on human rights as well as weakening the position of individual UK citizens.[21]

Although the Labour Party had traditionally opposed a Bill of Rights enforced by the courts, eighteen years of being in Opposition combined with various shifts in the political climate,[22] led them to adopt the 'compromise solution'[23] of incorporating Convention rights into domestic law. Their election manifesto in 1997 included a commitment to incorporate the European Convention on Human Rights (hereinafter ECHR) and, after winning that election with a huge majority, the new Labour Government published a White Paper entitled *Rights Brought Home*,[24] before introducing the Human Rights Bill to the House of Lords in the same year.[25] The Human Rights Bill was thought to be a key component of the unprecedented series of major constitutional reforms set in train by the Labour Government in that initial spirit of optimism which attended their first term in office.[26] Some would have liked to see the Act, and indeed the Convention rights, constitutionally entrenched against repeal or amendment on the model of the Canadian Charter, with the rights prevailing over inconsistent primary legislation, subject to the legislature employing a notwithstanding clause to make it clear that it intended to legislate inconsistently with the right.[27] However, the traditional belief in the importance and value of strong parliamentary government, as well as a degree of reluctance to hand over such power to judges, combined to make such a solution politically unfeasible.[28] As Francesca Klug commented:

[21] Boeteng and Straw (1997), 74. [22] Ewing (1999), 80ff. [23] Feldman (1999a), 169.
[24] *Rights Brought Home: The Human Rights Bill* Cm. 3782. For discussion of the White Paper, see Wadham (1997), 141–5.
[25] 23 October 1997.
[26] Bogdanor (2004), 246. Bogdanor lists fifteen constitutional reforms carried out by the Labour Government since 1997, including *inter alia* devolution in Wales, Scotland and Northern Ireland, reform of the House of Lords and the abolition of the office of the Lord Chancellor, noting that 'any one of these reforms by itself would constitute by itself a radical change', 243. Some commentators have observed that these constitutional reforms were not the 'fruits of a grand design' but a set of 'piecemeal and politically pragmatic measures', see e.g. Lester (2002a), 80.
[27] Feldman (1999a), 168–9.
[28] See Irvine (2003a), 98: 'I doubt that consent to the Human Rights Act could have been achieved if it gave the judiciary the right to strike down Acts of Parliament in whole or part'; see also Feldman (1999a), 169; Lester (2002a), 58.

> There was concern across the political spectrum, and in judicial as well as academic circles, that incorporating broad human rights standards into UK law would lead to the demise of the British system of parliamentary supremacy (or sovereignty) over the courts . . . Crudely put, the debate concerned whether an elected Parliament or unelected courts should have the *final say* in determining what the law should be in a democracy.[29]

The Labour Government wanted to 'bring rights home' by making Convention rights directly enforceable in domestic courts. In this way, they could give UK citizens effective remedies for possible breaches and obviate unnecessary (and politically embarrassing) applications to Strasbourg. However, they had to find a way of achieving these aims, whilst simultaneously reassuring MPs that Parliament would remain supreme. The result was the Human Rights Act 1998.

Aims, Structure and Themes

Under the HRA, the courts are, for the first time, empowered to review primary legislation for compliance with a codified set of fundamental rights, namely, those enshrined in the ECHR. The courts are given two main powers with respect to primary legislation: one is an interpretive power, the other is declaratory. Under section 3, they are placed under a duty to interpret legislation compatibly with Convention rights, 'so far as it is possible to do so'. If the interpretive route is impossible, they may then issue a declaration of incompatibility under section 4 HRA, which has no immediate impact on the validity of the legislation under scrutiny, but places the executive and legislature under considerable pressure to amend the legislation. In this book, the courts' powers to review primary legislation under the HRA shall be called 'constitutional review'.[30] This distinguishes it from their traditional powers of 'judicial review' with respect to public authority decision-making in administrative law. More importantly, it highlights the constitutional character of the courts' supervisory powers, and indeed, the constitutional importance of the HRA itself. By granting the courts the power to review primary legislation for compatibility with Convention rights, the HRA gives the courts a special responsibility with respect to the enforcement of Convention rights. It also places a premium on statutory interpretation as a means of achieving consistency with Convention rights, thus making explicit the

[29] Klug (2003), 126; Klug (2007), 703.
[30] For use of this term with reference to adjudication under the HRA, see Jowell (2000); Irvine (2003a), 246; Oliver (2003), 100; Palmer (2007), 33.

constitutional significance of statutory interpretation as an instrument of constitutional review. As Sir Rupert Cross observed in his classic work on statutory interpretation, written long before the HRA was on the statute books:

> The canons of interpretation represent a position taken by the judiciary on their constitutional role in relation to those who establish the political programme, those who have to carry it out, and those affected by it.[31]

The HRA strengthens the constitutional role of the courts, by allowing judges to determine the existence and content of the legal obligations flowing from Convention rights, in response to litigation. It makes rights and rights-based thinking more central to the constitutional agenda and therefore makes the courts a key participant in setting that agenda.[32] Many of the rights enshrined in the Convention have long found indirect and often implicit expression in the common law, some might say, in the 'common law constitution'.[33] To the extent that the courts now have an important role in guarding against the violation of Convention rights, judges help to ensure that legislation complies with fundamental constitutional principle.[34] The HRA calls upon the courts to act as constitutional judges and to review for compliance with principles of constitutionality.

The main aim of this book is to evaluate the nature, scope and legitimacy of the courts' powers of constitutional review under the HRA. Some commentators have argued that the HRA has elevated 'both the profile and influence of the higher courts'[35] and given the judiciary 'a newly reinvigorated position . . . in matters of public law'.[36] If this is true, then we need to subject this important constitutional development to critical scrutiny. The purpose of this book is to contribute to that enterprise. The courts' powers of constitutional review under the HRA are primarily framed by the combined workings of sections 3 and 4 HRA. In this book, I subject the case law applying those sections to critical scrutiny and, in so doing, seek to probe more deeply, the profound issues of constitutional theory underlying their application. Such issues include the constitutional relationship between Parliament and the courts and the constitutional significance of statutory interpretation, as well as broader questions about

[31] Cross (1995), 4, 10.
[32] Although they are an important participant in setting this agenda, they do not have exclusive control over it. Parliament and the Executive also contribute to this task.
[33] Allan (2006a), 46.
[34] For use of the term 'constitutional review', see also Cooke (2004), 275; Joseph (2004); Jowell (2000), 671; Oliver (2003), 100.
[35] Tomkins (2002b), 202. [36] *Ibid.*

the nature of the British constitution and the legitimacy of constitutional review in a political system which prizes parliamentary sovereignty and the values of democratic participation. Judicial and academic debate over the scope of sections 3 and 4 HRA is a concrete manifestation of disagreement about these more fundamental issues. For this reason, I locate the doctrinal analysis of the HRA case law against the backdrop of concerns about the legitimacy of rights review in a democracy.

This book is divided into three parts. The first part charts the course of the case law applying sections 3 and 4 HRA. It evaluates the various judicial and academic attempts to articulate the alleged 'constitutional boundary' between sections 3 and 4. The central question animating this part of the book is: when is it right for the courts to flex their interpretive muscles under section 3, and when is it more appropriate for them to declare an incompatibility under section 4? This question is answered through a combination of detailed analysis of the case law, as well as broader theoretical reflections on the nature of interpretation and the constitutional significance of section 3(1) as a strong presumption of statutory interpretation. Part II sets these debates in the broader context of concerns about judicial deference and the acute power-allocation issues, to which constitutional adjudication under the HRA inevitably gives rise. The question underlying this part of the book is: how can the courts carry out their constitutional function to uphold Convention rights, whilst simultaneously exercising a constitutionally appropriate degree of judicial restraint and deference to the legislature? In other words, how can they balance the demands of judicial supervision and judicial deference? Questions about the nature, scope and justification for judicial deference have ignited intense academic and judicial controversy. Part II engages with those debates and evaluates their significance both for a theoretical evaluation of the nature of the judicial function, as well as for issues of practical application. Of crucial importance here is the case law which has arisen in the context of the Government's determination to wage a 'war on terror'. No one could have predicted that before the HRA was barely two years on the statute book, the terrorist attacks on the USA on 11 September 2001, would have generated such a critical testing ground for the UK Government's commitment to human rights protection.[37] The response of the courts when reviewing anti-terrorist legislation for

[37] Following the terrorist attacks in London on 7 July 2005, the Prime Minister, Tony Blair also suggested that he would consider seeking to amend the HRA if it proved to be an obstacle to the 'war on terror', see T. Blair, speaking at the monthly Downing Street press conference, 5 August 2005. (www.pm.gov.uk/output/Page8041.asp), cited in Elliott (2007b), nn. 100–1.

compliance with Convention rights in this fraught political context, is an important litmus test of the role and value of constitutional review.

Some commentators have described the acceptance into UK law of the doctrine of proportionality as one of the most profound changes brought about by the HRA.[38] Chapter 9 examines that doctrine in detail and highlights how it places a strong burden of justification on elected bodies to justify their decisions in light of human rights standards. It contributes to what many commentators have described as 'the culture of justification'.[39] The climate of constitutional justification in which the law now operates, also requires justification of the exercise of judicial power as much as any other power. The final part of this book responds to this justificatory challenge. Here, I tackle the big constitutional questions: the status of the HRA, the nature of the judicial powers under the HRA, the HRA's compatibility with the doctrine of parliamentary sovereignty and, finally, the underlying normative questions about the justification of constitutional review in a democracy. In the penultimate chapter of the book, I mount a justification for giving the courts strong powers of constitutional review. In the final chapter, I defend this against arguments rooted in democratic concerns.

This, in broad outline, is the main structure of the book. It does not seek to provide an exhaustive consideration of all the case law arising under the Act, still less an exhaustive account of how each substantive Convention right has been applied in the domestic courts. There are many other books which do precisely that.[40] The focus of this book is different. It is on the underlying questions of interpretive methodology and methods of judicial reasoning employed by the courts when carrying out their important constitutional functions under the HRA, as well as the constitutional legitimacy of those powers. As such, this book is intended as a contribution to British constitutional law, but also as a contribution to the broader literature on constitutional theory.

One terminological point should be clarified at the very outset. Whilst this book is centrally concerned with the relationship between Parliament and the courts, I avoid using the term 'the separation of powers'. This nomenclature is eschewed because it lends credence to a view which underestimates both the legitimate interaction between the three branches of government and the considerable overlap in the constitutional roles of each branch. So, in this book, I shall refer to the constitutional division

[38] Sedley (2002), 17. [39] Hunt (2003), 351; Steyn (2004a), 254.
[40] Clayton and Tomlinson (2000); Fenwick (2007); Lester and Pannick (2004); Amos (2006).

of labour between the three branches of government, but will refrain from describing it as a *separation* of powers. Of course, this is in no way to deny the importance of judicial independence for the effective exercise of constitutional review. It is simply to emphasise that in order to give a meaningful account of the relationship between Parliament and the courts, we should not overlook or marginalise the various forms of interaction, interdependence and collaboration which exist between them.

There is one important corollary of this view, which itself provides an important underlying theme of this book. This is that we should not consider the courts to be 'above politics'. The courts are political institutions and the power they wield is political in nature. In this book, I will argue that the ability of the courts to interact politically with the legislature and executive is part and parcel of their constitutional responsibilities under the HRA and a key component of their powers of constitutional review. The details of this claim will be worked out as the book progresses. For the moment, it suffices to note that when the courts review primary legislation for compatibility with Convention rights and decide either to interpret it compatibly with those rights or issue a declaration of incompatibility, the courts engage in constitutional politics. As the enactment of the HRA itself shows, constitutional politics is not entirely removed from the forces and pressures that shape 'normal politics' – but the politics of constitutional rights is nonetheless marked by special features, which will be spelled out in the final two chapters of this book. What distinguishes the courts' powers of constitutional review, is not that they are apolitical, but that they respond to, and engage with, a particular type of political concern, and do so in a particular way.

The scheme of the HRA

Before engaging with these broader themes, it may be helpful to outline the key sections of the HRA, which are relevant to the broad concerns of the book. The long title of the HRA declares that its aim is 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. The Convention rights are included in a Schedule to the Act,[41] thus providing the UK with a list of codified human

[41] The Schedule to the HRA includes all the substantive rights in the original Convention as well several rights contained in subsequent protocols. (Article 13 on effective remedies was omitted), Articles 2–12, Article 14, Articles 1–3 of the First Protocol to the Convention and Articles 1 and 2 of the Sixth Protocol. For further discussion, see Feldman (1999a), 170–3.

rights enforceable in domestic courts.[42] There are three principal means by which the HRA gives further effect to Convention rights in domestic law. The first is by making provision for rights-compatible interpretation and amendment of primary legislation in sections 3, 4 and 10. The second is by making it unlawful for a public authority to act in a way which is incompatible with a Convention right under sections 6–9. Finally, the HRA provides a way in which Convention rights can have an impact on the legislative process. This is contained in section 19.

The primary focus of this book is on the ways in which the courts ensure that primary legislation is Convention-compatible. Therefore, its main concern will be to evaluate the combined workings of sections 3 and 4 and the broader questions of constitutional theory generated by them. Of crucial significance is section 3(1), which provides that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. This interpretive obligation has been described as an 'emphatic adjuration'[43] to the courts. It applies to all legislation 'whenever enacted',[44] so that it affects both pre- and post-HRA statutes. Crucially, the application of section 3 'does not affect the validity, continuing operation or enforcement of any incompatible primary legislation'.[45] So, although the courts have the power to interpret legislation compatibly with Convention rights, they are not given the power to invalidate it. The question then arises as to when, and under what circumstances, a court will find it impossible to interpret legislation compatibly with Convention rights. This difficult question is not answered by the terms of the HRA.

However, the Act contains an explicit acknowledgement that it will not always be possible. Section 4(2) provides that 'if the court is satisfied that the provision is incompatible with the Convention right, it may make a declaration of incompatibility'. So, in contrast to section 3, which creates a judicial *obligation* to read and give effect to legislation compatibly with Convention rights,[46] section 4 gives the court a discretion (though not a duty) to issue a declaration of incompatibility.[47] Section 4 also specifies that a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is

[42] Note that section 2(1) provides that when construing those rights, the courts are obliged to 'take into account' decisions of the ECtHR and related bodies. This obligation will be considered in chapter 6.
[43] *R.* v. *DPP, ex parte Kebilene* [2000] 2 A.C. 326, *per* Lord Cooke. [44] Section 3(2)(a).
[45] Section 3(2)(b). [46] See 'must' in section 3(1). [47] See 'may' in section 4(2).