

W201 The Individual and the State

Study notes on the effect of the Human Rights Act 1998

What difference does the Act make?

Lord Irvine, the former Lord Chancellor, has described the effect of the Act as “introducing another system of law to be applied alongside traditional common law principles”.

The scale of the change should not be underestimated.

We know that in the area of human rights we have found that the principle of parliamentary sovereignty (a new parliament can repeal or replace any law including one dealing with human rights) runs counter to the whole idea of fundamental human rights (which deserve entrenchment or special protection and represent a higher law).

In the past in the absence of a bill of rights UK courts had developed a system of “negative liberty” or “residual rights”. This meant you had the freedom (not the right) to do whatever was not prohibited by statute or common law. The result was a very fragmented area of the law formed by piecemeal and unrelated restrictions.

Until 2000 when a UK court examined a case involving human rights it started by looking to see if statute or common law prohibited the action or freedom claimed or if a remedy existed. That usually was an end to the matter. The court never went on to consider whether the result infringed a positive and important human right or whether the state’s action or response in the case in question even if lawful offended the doctrine of proportionality (ie represented the use of a sledgehammer to crack a nut).

The difference

All this has changed. Courts now **start** by examining the positive human right clearly set out in the Convention.

Lord Irvine confirms this

“unlike the old Diceyan approach where the court would go straight to what restriction had been imposed, the focus will first be on the positive right and then on the justifiability of the exception” Allen & Thompson page 442.

There are several reasons why with the passage of time the change will gather momentum.

1. Public awareness

For the first time human rights in the UK are contained in a document that can be read understood and debated in school or university or elsewhere. A public consciousness and awareness of the rights available will lead to an increase in the number of cases brought to assert those rights.

2. Judicial awareness

A new generation of judges schooled in the new legal principles and interpretation techniques are now emerging.

For example Lord Steyn in **Ghaidan v Mendoza** 2004 Lords said of Section 3 of the Human Rights Act 1998 that it “requires a broad approach, concentrating among other things, in a purposive way on the importance of the fundamental right involved” (the expression “wife or husband” in the Rent Act 1977 was interpreted using Section 3 to include a same sex partner).

3. New scope for judicial “interpretation”.

The system of ministers being required to make statements of compatibility as they bring forward each new piece of legislation will over a period of time give judges much greater scope for interpreting the law in accordance with the Convention.

First judges will no longer have to find an ambiguity before the Convention rights become relevant.

Secondly because of the statement of compatibility a judge will be entitled to assume that parliament did not intend to cut across a Convention right and the door will be open to construing statutes to comply with the Convention.

To quote Lord Irvine once again

“As we move away from the traditional Diceyan model of the common law to a rights based system, the effects will be felt throughout the common law and in the very process of our judicial decision making. This will be a healthy and dynamic development in our law.” Allen & Thompson page 442.

The position was summed up by Lord Hope in **R v DPP ex parte Kebilene** 2000 Lords “It is now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary”.

Do convention rights apply between private litigants?

This is sometimes expressed as - does the Convention have horizontal effect?

The convention itself (generally) is not limited in the way it expresses rights (ie it doesn't specifically relate most of them to public authorities or private litigants).

The Act states that so far as it is possible to do so primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

Nothing is said about interpreting common law which will usually govern the position between private litigants.

Lord Irvine believes the effect will be felt “throughout the common law”. He said “We also believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention, not only in cases involving other public

authorities but also in developing the common law in deciding cases between individuals.” Allen & Thompson page 449.

Allen & Thompson (page 447) sets out arguments that including courts in the definition of public authorities in the Act means courts will apply Convention rights to common law to comply with their duty under the Act.

If this is correct (and some commentators don't agree) then the position seems to be that Convention rights can be invoked in any litigation. Support for the proposition that the Convention rights have horizontal effect is to be found in the case of **Douglas v Hello** 2001 C A where it was held that Article 10 (Freedom of Expression) and Article 8 (Privacy) applied between one private party to litigation and another (followed on the horizontal effect point in **Thompson and Venables v News Group** 2001 Div Ct).

There is also a provision for a special procedure in which damages may be granted if a public authority is involved in breach of a Convention right. This is set out in Sections 6 7 & 8 of the Act.

Conclusion

The Act gives judges the green light to adopt a more robust approach to interpreting both statute and common law.

They are now receiving encouragement to look increasingly at the **merits** of decisions of public authorities (and to test the decisions against the principles contained in the Convention) and not just at how the decision was reached.

“This Bill will therefore create a more explicitly moral approach to decisions and decision making; will promote both a culture where positive rights and liberties become the focus and concern of legislators administrators and judges alike; and a culture in judicial decision making where there will be greater concentration on substance rather than form.”

Lord Irvine 1997 at page 488 in Allen & Thompson.

The future

The Equality Act 2006 has created a Commission for Equality and Human Rights. This involved the merger of the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. It has power to support individuals bringing cases under equality or discrimination legislation but no power to support free standing human rights cases where there is no equality or discrimination element.

A new development – constitutional statutes?

In **Thoburn v Sunderland City Council** 2002 C A Laws LJ (obiter) said:

“Ordinary statutes may be impliedly repealed. Constitutional statutes may not.”

He described the Human Rights Act 1998 as a constitutional statute.

Although obiter and presently standing alone this claim represents the robust way some senior judges are thinking.

The first inroad into implied repeal came with EU law. Implied repeal is the doctrine that where a later statute accidentally conflicts with an earlier statute Dicey's theory of parliamentary sovereignty requires the later statute to prevail (thereby reflecting the supremacy of each new parliament). For EU law as long ago as 1981 Lord Denning recognised that an earlier statute (the European Communities Act 1972) prevailed in **Macarthy's Ltd v Smith** 1981 C A and later the same outcome was seen in Lord Bridge's judgment in **Factortame No 2** 1991 Lords.

Interestingly for the Human Rights Act reliance on a wider theory of exclusion of implied repeal by virtue of its status as a constitutional statute may not be crucial. This is because of the terms of the power of judicial interpretation in Section 3 which states that courts **must** construe all legislation (including later legislation) in a way which is compatible with Convention rights in so far as it is possible to do so. In the rare situation where an accidental conflict with a later statute could not be met by judicial interpretation the court could make a Declaration of Incompatibility in the expectation that the later statute would be amended by parliament.

If a theory of 'constitutional statutes' for which implied repeal is excluded is further developed by the courts it will not so much break new ground in the area of human rights as reinforce the existing effect of the Human Rights Act.