To what extent has the Human Rights Act 1998 strengthened the rule of law in the UK constitution?

The Human Rights Act 1998 (HRA), an Act introduced to give effect to rights from the European Convention on Human Rights (ECHR) in domestic legislation. Its introduction has affected many legal areas; especially the conceptions of the rule of law and their place in the UK constitution. To understand the effect of the HRA, it is first necessary to establish the initial status of these two concepts. Having established this, the extent of the impact of the HRA can be examined.

Rule of law and HRA

The concept of the rule of law has traditionally attracted two different interpretations.[1] In terms of the impact of the HRA, each interpretation, namely formal and substantive, invoke different outcomes concerning their consequent effect upon the UK constitution.

The formal approach adopted most prominently by Dicey, holds the fundamental tenet, '*those who make and enforce the law are themselves bound to adhere to it*'.[2] It is less concerned with the actual content or 'justness' of the laws themselves, but more in ensuring that there is equal subjection of all citizens under the given system. This positivist ideology separates the question of what law is, and what it ought to be.[3] Raz went onto add that laws created under the standard of the formal interpretation should be capable of acting as a guide to an individual's conduct. They should be prospective, guided by clear rules, with open access to the courts

[1] P. Craig - Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework (1997) PL 467
[2] Rule of law - <http://en.wikipedia.org/wiki/Rule_of_law> (accessed 29/12/04)
[3] Law and Ideology - <http://plato.stanford.edu/entries/law-ideology> (accessed 29/12/2004)

(containing an independent judiciary) and relatively stable.[4] This is not an exhaustive list of what the formal interpretation entails, but the latter two characteristics are of most interest to the HRA, especially Section 6. It introduces obligations for public bodies that were not previously evident in common law or statute. As such this raises issue with the continuity or stability of law.

Also of relevance are Dicey's views on the status of common law within the rule of law. He felt there was no need a Bill of Rights, because the general principle of the constitution is the result of judicial decisions determining the rights of the private person.[5] Effectively what is being stated here is that the common law is the guardian of the rights of the individual, as shown in the case of *Derbyshire County Council v Times Newspapers Ltd*.[6] Dealing with the right to express criticism of publicly elected bodies, the Court of Appeal held that the questioning by a newspaper of the official dealings of the council was legitimate criticism. Common law was the tool used to reach the conclusion, with it being decided that it was contrary to the public interest for public bodies to have a common law right to sue for libel. Although, the Court of Appeal did take guidance from Article 10 of the ECHR, the right was upheld in the formal tradition of the rule of law, based on judicial decisions. This is in contrast to the use of a codified document, in the style of the American 'Bill of Rights/ Constitution'. It is argued that potentially the HRA may come to fulfil some of the roles taken by these documents in their jurisdictions.[7]

Turning now to the substantive view, succinctly expressed by Le Sueur as a system:[8]

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[4] See n. 1 p469
[5] See n. 1 p474
[6] [1993] A. C. 534
[7] Loveland – Constitutional Law, Administrative Law and Human Rights: A Critical Introduction (Butterworths, 3rd Edition) pp56 & 621
[8] A. Le Sueur and M. Sunkin – Public Law (Longman Law, 1997) p148 (emphasis in original)

> that as well as imposing limits on the *way* government reaches its decisions, it also imposes limitations on the content of decisions that can be made. In particular, it has long since been argued that the rule of law reflects fundamental rights and liberties of citizens and therefore constrains action which adversely affects these rights and liberties.

Dworkin argues that the concepts of the formal rule of law and substantive justice are, figuratively speaking, two sides of the same coin. The theme of fundamental rights of the individual occupies an elevated status in the assessment of what law ought to include.[9] Sections 11 – 13 of the HRA, particular in their promotion of individual rights, appear to enhance this portion of the substantive interpretation.[10] The substantive interpretation is argued to be the more complete, whole version of the concept of the rule since it incorporates some formal tenets too.[11]

Put simply, it is not just a question of having a system of laws, but they need to be exercised within certain standards of justice. It is at this point that the rule of law strays into the territory of normative expectation of what law ought to be.[12] Case law demonstrating this principle is found in the instance of *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)*.[13] The case concerned former Chilean dictator, Pinochet and his arrest in London, under a warrant issued by a Spanish judge. Ordinarily, the Divisional Court would find that a former head of state was to be immune from civil and criminal proceedings in English courts, in respect of acts committed in the exercise of sovereign power. Yet, upon a rehearing of the case, the House of Lords decided that the charges in question were crimes against humanity and there was a universal jurisdiction to extradite or punish a public official for

[9] R. Dworkin – A Matter of Principle (Harvard University Press, 1985) p11
[10] Human Rights Act 1998 - available at <http://www.hmso.gov.uk/acts/acts1998/.htm>
[11] See n. 9
[12] G. S. Goodwin-Gill – Terrorism and the Rule of Law (Blackstone Chambers, 2001) available at <http://www.blackstonechambers.com/pdfFiles/Blackstone_GGG_TerrorismRoL.pdf>
[13] [2000] 1 A.C. 147

torture. The decision was qualified by the International Convention against Torture, Inhuman or Degrading Treatment, which did not extend immunity to heads of state.

This case concisely shows that English courts, applying a substantive theory of the rule, and adopting customary international human rights law. Of relevance to this issue, Section 3 of the HRA has now licensed the courts to interpret existing legislation in such a way to give effect to the ECHR in existing legislation. This is even at the risk using a linguistically strained interpretation to achieve this goal. But in connection with the substantive concept, it is consistent with the idea of trying to affect what law ought to achieve. However, Parliament's reluctance to incorporate Protocols 4, 7 and 12 of the ECHR (which contain substantive rights), does perhaps show some hesitancy in fully pursuing the substantive view.[14]

UK constitution and HRA

The UK has no codified written constitution. Instead, it has relied open the doctrine of parliamentary sovereignty as the bedrock of its constitutional arrangement. Loveland uses the following quaint description:[15]

> 'A statute, that is a piece of legislation produced by Parliament, is generally regarded as the highest form of law within the British constitutional structure. The British Parliament, it is said, is a sovereign lawmaker.

This conception of the constitution is based largely around the Diceyan theory on parliamentary sovereignty. It is a layered theory that involves both negative and positive limbs. The positive limb asserts that it is Parliament, and it alone, that makes or unmakes any law. The negative alternative states that the authority of law made by Parliament cannot be questioned by any British court (whose remit is to give effect to said law).

[14] http://www.dca.gov.uk/hract/hrafaqs.htm (accessed 07/01/05)
[15] See n. 7 p21

Yet increasingly, the foundations on which this argument has been built are being tested. The recent cases of *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* and *X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [16] relating to the detention without trial of foreign suspects at HMS Belmarsh Prison, call into question the continuing validity of the positive/ negative limb theory. This case raised the issue of the conflict of roles for the House of Lords. It is of course the second chamber of Parliament, involved in the creation of law. But it also has a further role as the final court of appeal for civil cases in the United Kingdom.[17] In this case the House of Lords, in its capacity as the highest court, took the decision to declare actions taken by the Home Secretary as being in incompatible with the ECHR. This decision was qualified on the basis of Section 4 of the HRA, which permits the judiciary to declare domestic statute incompatible with the ECHR. Lord Bingham - a senior law lord - said the rules were incompatible as they allowed detentions "in a way that discriminates on the ground of nationality or immigration status" by justifying detention without trial for foreign suspects, but not Britons.[18] The Home Secretary had ordered the detention of foreign nationals under Sections 21 and 23 of the Anti-terrorism, Crime and Security Act 2001.[19] The Act, amended in light of the events of 9/11 in the USA, was used as the authority permitting the detention of non-domestic suspects, without charge for an indefinite period. Yet upon appeal by nine detainees, the House of Lords found that such actions went against Section 5(1) of the ECHR, which is mirrored by Section 11 of the HRA. This was in spite of a 'Derogation Order' created by the Government, based upon Section 15 of the ECHR, loosely

[16] [2004] UKHL 56
[17] Houses of Parliament – <http://www.parliament.uk/works/lords.cfm> (accessed 03/01/05)
[18] Terror detainees win Lords appeal - < http://news.bbc.co.uk/1/hi/uk/4100481.stm> (accessed 02/01/05)
[19] See n. 18

reflected in Section 14 of the HRA.[20] It was intended that the Government would be able to justify carrying out the detentions, by invoking the Derogation Order, which declared a state of 'public emergency in the UK'.

This case shows that the use of Section 4, although not affecting the continuing validity of legislation, [21] openly raises doubt to this very issue. Although, Section 10(2) of the Act permits the Minister concerned to remedy the offending statute, there is a case that the weight of the doctrine of parliamentary sovereignty is lessened. With Lord Nicholls going as far as to call the legal basis for imprisonment without charge, 'anathema in any country which observes the rule of law',[22] the serious challenge to the traditional position must be considered.

Impact of HRA

When considering the formal interpretation of the rule of law it was noted how common law was traditionally the guardian of individual rights. It is now apparent that this situation has changed somewhat. *Marcic v Thames Water Utilities Ltd*[23] is a case that demonstrates the impact of Section 6 of the HRA. The Technology and Construction Court found Thames Water to be liable under Articles 1 and 8 of Protocol 1 of the ECHR, having found no liability under common law or existing statute.

Section 6 creates liabilities for public authorities that previously did not, placing them under greater scrutiny. Yet the Act has created a complex situation where; Convention rights are directly enforceable against some bodies in respect of all their activities, but for some bodies the rights are only enforced on some of their public activities not

[20] Human Rights Act 1998 - Order 2001 (SI 2001/3644)
[21] HRA 1998 - §4(6)
[22] See n. 18
[23] [2002] Q.B. 929

private. Then there are those bodies where rights are not enforced at all, whose actions are entirely private. The critical issue is then to determine what function is of a 'public' nature? This is something that the HRA does not comment on, and as such it is reasonably argued that stability of law is reduced.[24]

Yet evolution and change have always been part of law. Dworkin makes the argument that at the base of the formal interpretation, there are in fact ideals of substantive justice.[25] Perhaps the HRA brings these ideals to the fore, and still retains respect for the procedures that surround their implementation. Section 8 permits the courts to award damages, when public bodies have breached Convention rights, or ability to amend secondary legislation (as far as primary legislation permits),[26] these substantive changes may actually have a stabilising effect. That is, there is a greater respect for the adherence to the procedures of law, because its substance has now changed and public bodies (and individuals for that matter) need to take heed of it more closely.

What can then be said of the substantive interpretation of the rule of law? Two approaches could be reasonably argued. Lord Irvine supported the notion that Section 3 now made it acceptable for the courts to strain the meaning of words or read into words which are not there'.[27] *R. v A (No.2)*[28] is one such case showing how Section 3 of the HRA caused Section 41 of the Youth Justice and Criminal Evidence Act 1999 to be read in such a way it gave effect to Section 6 (Right to a fair trial) of the ECHR. Section 3 of the HRA permits the courts to draw a 'possible' interpretation of legislation, in order that it follows the ECHR. Conceivably, the impact upon the

[24] K. D. Ewing – Human Rights Act and Parliamentary Democracy [1999] 62 MLR 79. Also see *Donoghue v Poplar Housing and Regeneration Community Association Ltd* [2002] Q.B. 48
[25] See n.1
[26] HRA – How it works - <http://news.bbc.co.uk/1/hi/uk/946390.stm> (accessed 07/01/05)
[27] See n. 7 p626 n. 3
[28] [2001] 2 W.L.R 1546

substantive interpretation is negative. By having this power to extend the 'possible' meaning of legislation, it gives the impression the courts are unwilling to try and cause any change to the substance of law (especially if this would infringe upon parliamentary sovereignty). The doctrine of deference, evoked by the courts when it is felt that national legislature and executive are better placed to make the difficult decisions caused by competing legal considerations than the courts themselves, adds weight to this position.

Yet an alternative approach does exist. As put by Lord Woolf:[29]

> (*there was a*) very sophisticated approach adopted by the legislator when making the European Convention on Human Rights part of our domestic law assisted. The legislator, instead of giving the United Kingdom courts power to strike down domestic legislation, limited the court's power to declaring that the legislation was incompatible with the Convention. The Act then provided a fast track enabling Parliament to remedy the situation.

In this instance the declaration of incompatibility is seen as a positive tool, when considered as part of a twin function, i.e. that of judicial remedies (Section 10). In adopting this reasoning the substantive theory of the rule of law is enhanced, since the HRA makes a direct impact upon what is contained in primary legislation and what it should achieve. Since the process is dependant finally on the actions of Parliament to remedy the law, it maintains the appearance of parliamentary sovereignty too. The European Court of Human Rights (ECtHR) has also adopted a 'margin of appreciation' as to how domestic courts in different Signatory States wish to give effect to the ECHR. UK courts are not approaching the issue of respecting the ECHR by merely asking whether a decision reached was one to which the decision maker could reasonably come (a formal approach). But as per, *R. (Daly) v Secretary of State*

[29] Speech by Lord Woolf at opening of European Court of Human Rights, Strasbourg, 23/01/03 – available at <http://www.dca.gov.uk/judicial/speeches/lcj230103.htm> (accessed 05/01/05)

for the Home Department,[30] the court concerns itself with the question of the pressing social need justifying any decision and whether the response is proportionate to the legitimate aim that is being pursued.[31]

The extent to which the rule of law has been strengthened depends largely on the interpretation to which one subscribes

In absolute response to the question, the HRA has strengthened the rule of law in the UK constitution to a great extent in some instances, and not as greatly on others. But a more subjective response depends on which interpretation of the rule is pursued. Each of them has been challenged in a particular way, but how important this is depends on how one values the ways in which they were strengthened.

[30] [2001] 2 WLR 1622
[31] See n. 29

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