

Law Politics and the Future of the Human Rights Act

- Note of Middle Temple Seminar -
- 2 February 2012 -

1. Introduction

This is a note of a seminar organised by Professor Dawn Oliver as part of Middle Temple's seminar series in association with the AHRC-funded project on *The Politics of Judicial Independence in Britain's Changing Constitution* run by the Constitution Unit at UCL, Queen Mary University of London and the University of Birmingham. Those participating in the seminar had a professional interest in the issue, with contributions from a number of senior and former judges, politicians, lawyers and academics. The event was run under the Chatham House Rule and this short note reflects that. It is intended to give a general impression of some of the themes discussed.

2. Public Discontent with the HRA and a British Bill of Rights

Several speakers referred to the phenomenon of public discontent with the HRA. This discontent is mainly based on perception rather than substance but politicians will not ignore it. Some speakers suggested that there is deliberate political misunderstanding of the Act for political ends. One noted the irony that the government is currently cheering human rights everywhere in the world, except in Britain. Others argued that the HRA had never been properly explained and promoted by the government here, and that the Act has never been taken to heart in the way that bills of rights have been in other countries. Surveys routinely disclose very high support (approx. 90%) for human rights protections for individuals but there is a lack of understanding of the HRA itself. One speaker suggested simply rebranding the HRA as the 'British Bill of Rights'.

One participant sought to put the case against the HRA. He was sceptical about the Human Rights Act, pointing on the one hand to the fact that since its enactment we have had control orders and a great deal of other encroachment upon individual liberties. On the other hand, the HRA has led in some contexts to 'rights inflation'. However, others disagreed with the idea that the HRA was ineffective and argued that the situation for human rights in Britain was better with the Act than without it. The Act has led to the internalisation of human rights within the political process.

There was reference, both positive and negative, to the relationship between the HRA and democracy. One participant argued that the Act has not succeeded in bringing rights home: the balance between democratic decision-making and the protection of minority rights has not been achieved. Another suggested that you simply cannot reconcile representative democracy with human rights, but that this is not necessarily a problem. The Human Rights Act rests upon a reasonably successful atheoretical 'muddle' between these concepts. The HRA should not be regarded as a threat to the sovereignty of Parliament because in restating the principle it has preserved it.

Most speakers expected that the Coalition Government's Commission on a British Bill of Rights would not lead to the replacement of the HRA and would ultimately come to nothing. However, some worried that it would nonetheless lead to a weakening of the HRA itself. Others pointed out difficulties with the very idea of a British Bill of Rights. Because of Britain's international obligations under the European Convention, a British Bill of Rights could only be 'ECHR plus' – it could not take away aspects of the Convention but could merely add to them. In addition it is likely that developments in EU law will make the current British debate on the HRA redundant. The EU's developing competences in human rights law and its accession to the ECHR is likely to make European human rights norms directly binding on Britain through the EU system. The debate surrounding Art. 3 of the Convention is already a matter of EU law and the European Court of Justice appears to be taking an even more dynamic approach than Strasbourg.

3. The UK Courts and the Strasbourg Court

A number of speakers argued that the UK courts are not obliged to follow the decisions of the Strasbourg court in every circumstance, and that Lord Bingham's *dictum* to this effect in the *Ullah* case was wrong. The

Convention afforded a margin of appreciation to member states which the UK courts should make more use of. The current hostility to the HRA would be relieved if the UKSC ceased to follow Strasbourg in every case.

Participants also felt that the Strasbourg court itself should make better use of the idea of subsidiarity. Strasbourg should be much more selective about its own case load, selecting cases only where there was an issue of legal principle involved and not accepting cases where the issue was merely one of fact. It should enforce the requirement that national remedies should be exhausted and leave matters of fact and settled law to national courts to resolve. Adopting this approach would greatly reduce Strasbourg's very large caseload. Reference was also made to the fact that Strasbourg seems uninterested in the separation of powers in member states, whereas in the domestic political arena these issues become very important.

One speaker wished participants to bear in mind the successes of Strasbourg and argued that Britain should thank the court for developments such as the requirement that there be some controls on surveillance. Some referred favourably to the dialogue that occurred between the UKSC and Strasbourg in connection with the *Al Khawaja* and *Horncastle* cases. (This refers to the decision of the court of first instance at Strasbourg in *Al Khawaja* that British law on hearsay was incompatible with the Convention. Following the *Horncastle* case, in which the UKSC reiterated its view that British law on this point was adequate, the Grand Chamber of the ECHR agreed with the UKSC position in its hearing of the *Al Khawaja* appeal.)

One speaker noted that there is a potential for conflict with Strasbourg at some future point because of the structure of the HRA. Strasbourg regards declarations of incompatibility as an acceptable way to resolve conflicts with the Convention, provided that Parliament always acts upon them. However, the point of the 'incompatibility' procedure in the HRA was that Parliament need not always act upon a declaration.