A Bill of Rights for Britain?

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A legal revolution took place in Britain when the Human Rights Act came into force. This Act makes what Home Secretary Jack Straw has described as: 'the most significant statement of human rights in domestic law since the 1686 Bill of Rights'. This law is a central part of an extensive programme of constitutional reform and modernization instituted by the Government of Tony Blair, which has included devolution to Scotland and Wales, reform of the House of Lords and new freedom for the Central Bank. The Human Rights Act means that, for the first time, the United Kingdom will have what is in effect a modern and enforceable Bill of Rights.

Incorporating the ECHR

The Act incorporates as a part of British domestic law the provisions of the European Convention on Human Rights (ECHR). As is well known, the ECHR is the most important European human rights instrument covering the classic civil and political freedoms.

While the United Kingdom was one of he first signatories to the ECHR, making compliance with the Convention an international obligation of the United Kingdom, it is only now that its provisions can be directly enforced by domestic courts. Until the introduction of the Act (and allied legislation relating to devolution powers), British courts could not apply the ECHR directly, even when satisfied that there was a contravention. At best, the ECHR could be used as an interpretative tool in cases of legislative ambiguity, but as the Court recognized, this gave no help to the victim of a contravention of the ECHR where the legislation was plain.[1]

The only direct redress for the victim was a right to take the Government to the European Court of Human Rights in Strasbourg under the individual right of petition (allowed by the United Kingdom since 1961). However, as this right could only be exercised after all domestic avenues of appeal had been exhausted (and this could take several years), the road to Strasbourg was a long and expensive one.

This has now changed and, where a court in the United Kingdom finds a relevant act to be unlawful, it is directly empowered to 'grant such relief or remedy, or make such order, within its powers, as it considers just and appropriate'. This could include the granting of compensation for violation of a Convention right under the Act or by allowing it to be relied on in other legal proceedings, eg as a ground for the exclusion of evidence or as some other defense.

Role of legislation

One of the most controversial questions in the debate over incorporation of the ECHR was the role that the courts would be given in relation to legislation. There were serious constitutional objections to providing the courts with the full power of judicial review to strike down the legislation passed by Parliament. The United Kingdom is not a federal government cloaked only with such powers as its constituent parts have given it but a sovereign government as understood in classical international and public law: Parliament as the sovereign body, legitimized by its election by the people. This concept of parliamentary sovereignty does not fit easily with the idea that judges may strike down what the sovereign body has done. Moreover, there was a very great fear that giving the judges that power would politicize them by setting them up against the elected government.

The solution found to this problem, which drew carefully on recent experience of these issues in Canada and New Zealand, was elegant. First, the courts are given a very strong power of interpretation which will have the effect in all but the most blatant cases that the court will not need to consider striking down legislation because it will interpret the legislation as consistent with the Act and human rights. Secondly, the court, while able to strike down purely secondary legislation, cannot strike down primary legislation. It cannot therefore disapply an Act of Parliament (or the part of secondary legislation directly required by primary legislation) and therefore put itself in direct conflict with Parliament. It can, however, make a declaration of incompatibility which will trigger a political and public requirement in practice for the Government to act.

Likely effects of the Act

Large sums have been spent on judicial training to enable the judges to be ready for the expected onslaught of Human Rights Act cases. But the Act has already shown its effects in Scotland where it has, for all intents and purposes, been in effect for some time. Challenges have been made there in particular to aspects of the trial system. Perhaps the most dramatic was a successful challenge to the whole system of part-time judges. Many other challenges are expected in the United Kingdom as lawyers get to grips with the new powers that the Act gives the courts and test to the limit the compatibility with the ECHR rights of much current UK legislation and practice.

Everyone needs to be human rights lawyer now.

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[1] See, eg *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.