

Protecting human rights in the united kingdom



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The essay will refer to Section 3 of the Human Rights Act 1998 (HRA), the European Convention on Human Rights Act 1950 (ECHR) in the context of how are human rights protected. The essay will be split into two sections. The first section will be about the ECHR and the second section will be about the HRA.

Human rights are the basic freedoms that every citizen is entitled to.[1] The Council of Europe was created to protect the rights of the people and to help promote democracy after the atrocities of World War Two.[2] The Council then drew up a treaty known as the ECHR, and signed in 1950 but came into force 1953. Altogether it has been signed by 47 members. The ECHR has many 'Articles' that protect the basic rights. However these rights were not part of domestic law until the HRA was enacted in 1998. Between the ECHR being signed and the HRA being brought in 1998, UK citizens could only rely on their cases being heard in the European Court of Human Rights (ECtHR). Unfortunately, this was a lengthy process and also very expensive, resulting in very few cases being heard.[3] In 1975, the UK found the first finding of a breach of the convention, in *Golder v UK*. This resulted in parliament changing legislation to rectify the denial of solicitors to prisoners.[4]

The role of the ECtHR is to be the judicial organ, who oversees the enforcement of the ECHR. There are two ways in which rights can be enforced in ECtHR, the first being under Article 33.[5] This is when a state can bring a case against another state. This was seen in *Ireland v UK*. Ireland believed that Article 3 had been breached but it was held that it did not constitute torture.[6] Any citizen within a membered state can bring a case to the court, if they feel that their rights have been violated. The second is

under Article 34, when individuals can petition a case against a state.[7]This was seen in the case *Douglas v Hello! Ltd.* [8]This case dealt with the ‘horizontal effect’.[9]However, the House of Lords made a statement within the case of *Wainwright v Home Office*, stating that they was not making a new privacy right but just an expansion in the law of confidentiality in *Douglas v Hello! Ltd.* [10]

A person may only go to the ECtHR if all the domestic remedies have been exhausted first according to article 35.[11]This does not mean that the case will be heard, the court could still reject the case. Therefore, the ECtHR will be the last resort. The ECtHR rejects the literal rule sometimes because of the approach they took to *Fogarty v UK*. [12]This clearly states that the ECHR is a set of safeguards and will take them into account. Sometimes the decisions made by the court may need to make changes in national law. However, this isn’t always necessary due to parliamentary sovereignty.[13]

The convention recognises that the states themselves are more than capable of judging the laws for their own citizens. However, this can lead to problems. So to deal with this the ECtHR created the margin of appreciation. This allowed in certain circumstances, that they was given some flexibility on whether the measures taken were justified or not. This was shown in *Handyside v UK*. [14]This was concerned with an obscenity trial. It then developed that states have different morals and standards that make up societies. Therefore, they decided that each state should protect their own morals.[15]

When a case has been brought that raises a serious question that could affect the ECHR or protocols, Article 30 is invoked, so that the case can go to the grand chamber instead. There decision is final.

Under Article 15, it states that there are some derogation from the rights mainly in times of emergency such as: war and public emergency. However, there can be no derogation from Articles 3 and 4. Dworkin, a twentieth century theorist developed 'rights thesis'. He believed that law was not just based on rules but was also governed by principles, policies and general standards. Dworkin believes that every person should have equal rights. He regarded these rights as certain interests of the majority in which they regard as being valuable. He believed that then protections would be put into place to protect them, they include rules of law and legal principles. Dworkin believes that the courts are there in order to safeguard the rights of individuals within society. He states that once a person has a right, then it should not be able to disappear. If rights were to conflict with each other, then the rights of the individual must take precedent. He does however say that strong rights cannot be restricted, but other weaker rights may be restricted in certain circumstances when it is in the general interest.[16] You can also get limited rights which can be restricted according to the HRA in specific situations. Lastly, there is qualified rights. These rights can be interfered with if it is in the interest of the wider community or in order to protect other people's rights.[17]

The HRA entered domestic law in October 2000. Prior to 1998, there was no single document that stated the rights of the citizens. However, there were some documents such as the Magna Carta 1215, which confirmed some

rights. The domestic courts can only say that the provisions of a statute is incompatible with the Act because it is up to parliament to make the decision to change an Act.[18]

Section 1 states the convention rights and how they can be derogated from under Article 14 and Article 15 of the ECHR. It also refers to the rights as being 'given further effect'.[19] This was seen in *Re McKerr* when the HRA could not be taken into account because it was around at the time and there was no equivalent common law.[20]

Under Section 2 the domestic courts are not bound by the ECtHR. However, they must take the decisions into account.[21] In *Horncastle*, the judge allowed for hearsay evidence to be given in court and did not take into account a previous case *Al Khawaja and Tahery v UK*. [22] Where hearsay evidence was not allowed as it would breach Article 6 ECHR. This was also apparent in *R v Secretary of State for the Environment*, when the judges had to interpret Section 2 HRA otherwise the case would have gone to the ECtHR. [23] It was also shown in *Kay v Lambeth* that the HRA does not change the precedent in domestic courts.[24]

When a legislation has been passed or being made in the future, Section 3 states that interpreting legislations need to be taken into account. In order to give effect to the rights in the convention, all legislation needs to be read 'so far as possible'.[25] In relation to the courts and the rights, Section 3 implies that a purposive approach be adapted. Within Section 3 there is three techniques that are used to interpret statutes, in order to make them compatible with convention rights. They include: Reading in (adding words to

the statute), reading out (removing words from statute) and reading down (narrowing words with potentially broad meanings).[26]An example of reading in words is *R v A*. [27]The House of Lords had to interpret Section 41 HRA of the Youth Justice and Criminal Evidence Act 1999(YJCEA). This resulted in evidence of the complainants previous sexual history being entered into evidence.[28]One limitation of Section 3 is the extent in which clear words can be reinterpreted rather than issuing a declaration of incompatibility.[29]In *R v Lambert* the House of Lords re-interpreted legislation, even when parliament had made it clear what their intention was.

When a court has to make a decision, sometimes they find that the legislation is incompatible and therefore cannot be interpreted. The court will then decide to make a declaration of incompatibility under section 4 of the HRA.[30]The domestic courts under section 3 can exercise the interpretation clause. However, only certain courts can make a declaration. The main aim of Section 4 is to preserve parliamentary sovereignty.[31]An example of Section 4 is the case *Bellinger v Bellinger*. [32]This case was issued a declaration of incompatibility because it was clear the statute was incompatible with the ECHR

Under section 6 of the HRA it states that it is unlawful for any public authority to act in any way that is incompatible with the ECHR. Parliament cannot be a public authority because otherwise courts could interfere with parliamentary sovereignty. This was seen in *R v Chaytor* when members of parliament fraudulently claimed expenses.[33]However, there is no complete definition of a public authority within the act, so it is up to the judges to interpret who they think are a public authority.[34]As was the case *Aston*

Cantlow, the courts believed that a church council is not a public authority.
[35]

Overall, rights in the UK have been protected, whether it was written into domestic law when the Human Rights Act entered in 1998 or by going to the European Court of Human Rights.

[1]David Hoffman and John Rowe QC, *Human Rights In The Uk: An Introduction To The Human Rights Act 1998* (3rd edn, PEARSON EDUCATION 2010).

[2]Harris O'Boyle & Warbrick, *Law Of The European Convention On Human Rights* (2nd edn, Oxford University Press 2009).

[3]Alisdair Gillespie, *The English Legal System* (4th edn, Oxford University Press 2013).

[4]David Hoffman and John Rowe QC, *Human Rights In The UK: An Introduction To The Human Rights Act 1998* (3rd edn, PEARSON EDUCATION 2010).

[5]Article 33, European Convention on Human Rights

[6] *Ireland v United Kingdom* [1978] 1 WLUK 793; (1979-80) 2 EHRR 25

[7]Article 34, European Convention on Human Rights

[8] *Douglas v Hello! Ltd* [2005] EWCA Civ 595; [2006] Q. B. 125; [2005] 3 W. L. R. 881

[9]Claire De Than and Edwin Shorts, *Human Rights* (1st edn, Pearson Education Limited 2009).

[10] *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 A. C. 406; [2003] 3 W. L. R. 1137

[11]Article 35, European Convention on Human Rights

[12]Fogarty v United Kingdom [2001] 11 WLUK 555; [2002] I. R. L. R. 148; (2002) 34 E. H. R. R. 12; 12 B. H. R. C. 132; Times, November 26, 2001;

[13]Alisdair Gillespie, *The English Legal System* (4th edn, Oxford University Press 2013).

[14]Handyside v UK [1976] 12 WLUK 53; (1979-80) 1 E. H. R. R. 737;

[15]Claire De Than and Edwin Shorts, *Human Rights* (1st edn, Pearson Education Limited 2009).

[16]Alisdair Gillespie, *The English Legal System* (4th edn, Oxford University Press 2013).

[17]David Hoffman and John Rowe QC, *Human Rights In The Uk: An Introduction To The Human Rights Act 1998* (3rd edn, PEARSON EDUCATION 2010).

[18]David Hoffman and John Rowe QC, *Human Rights In The Uk: An Introduction To The Human Rights Act 1998* (3rd edn, PEARSON EDUCATION 2010).

[19]Section 1, Human Rights Act 1998

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[20] *Re McKerr* [2004] UKHL 12; [2004] 1 W. L. R. 807; [2004] 2 All E. R. 409

[21] Alisdair Gillespie, *The English Legal System* (4th edn, Oxford University Press 2013).

See Also Section 2, Human Rights Act 1998

[22] *R v Horncastle* [2009] UKSC 14; [2010] 2 A. C. 373; [2010] 2 W. L. R. 47

See Also *Al Khawaja and Tahery v UK* [2011] 12 WLUK 533; [2012] 2 Costs L. O. 139

[23] *R. (On the application of Holding & Barnes PLC) v Secretary of State for the Environment, Transport and the regions* [2001] UKHL 23; [2003] 2 A. C. 295; [2001] 2 W. L. R. 1389

[24] *Kay v Lambeth* [2006] UKHL 10; [2006] 2 A. C. 465; [2006] 2 W. L. R. 570

[25] Gary Slapper and David Kelly, *The English Legal System* (10th edn, MPG Books Ltd 2009).

[26] David Hoffman and John Rowe QC, *Human Rights In The Uk: An Introduction To The Human Rights Act 1998* (3rd edn, PEARSON EDUCATION 2010).

[27] *R v A* [2001] UKHL 25

[28] Section 41, Youth Justice and Criminal Evidence Act 1999

[29] Claire De Than and Edwin Shorts, *Human Rights* (1st edn, Pearson Education Limited 2009).

[30] Alisdair Gillespie, *The English Legal System* (4th edn, Oxford University Press 2013).

[31] Claire De Than and Edwin Shorts, *Human Rights* (1st edn, Pearson Education Limited 2009).

[32] *Bellinger v Bellinger* [2003] 2 AC 467

[33] Alisdair Gillespie, *The English Legal System* (4th edn, Oxford University Press 2013).

[34] David Hoffman and John Rowe QC, *Human Rights In The Uk: An Introduction To The Human Rights Act 1998* (3rd edn, PEARSON EDUCATION 2010).

[35] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 A. C. 546; [2003] 3 W. L. R. 283