

Since sovereignty  
that parliament has  
"the right to



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Since the introduction of the Human Rights Act 1998 (HRA1998) which came into force in October 2000 this has made it far easier to enforce the European Convention of Human Rights (ECHR) in British courts. In addition, there has always been controversy in the political domain around the introduction of this Act to ensure that it did not detract from the doctrine of parliamentary sovereignty especially when courts were given new powers. This essay will look at the key provisions of the HRA 1998 in relation to parliamentary sovereignty and argue where or not it interferes on this doctrine. UK constitutional law has been established over many years, since as far back as the Magna Carta (1215) but is predominantly unwritten. Dicey described parliamentary sovereignty in his book Introduction to the Study of Law of the Constitution 1885 as “ fundamental law of the British Constitution”. He consequently defined sovereignty that Parliament has “ the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament”.

The ultimate statement that Dicey made was that “ no Parliament can bind a future parliament” which gave notion to preserve parliamentary sovereignty. The HRA (1998) imposed new obligations on Parliament when creating legislation and granted the judiciary new powers to interpret and challenge legislation. Although the Act incorporated the Convention into domestic law it did not confer any new rights upon citizens, but rather created a new bureaucratic method for enforcing those rights. Parliament continues to hold onto their power as the courts do not have the power to re-write legislation

therefore Parliament still remain the sole and supreme legislative authority within the constitution.

It is essential to examine the role of each relevant sections of the HRA (1998) and how they affect human rights and Parliamentary sovereignty. When the HRA (1998) was full enforced in October 2000, this gave domestically further effect to certain rights and freedoms protected by the European Court of Human Rights (ECHR). Section 2 of the HRA (1998) directs the courts to " Have regard to the jurisprudence of the different enforcement and supervisory bodies in Strasbourg". Section 2(1) has refined Parliamentary sovereignty by requiring courts or tribunals to ask determining questions which have arisen in connection with Convention rights to " take into account" the decisions of Strasbourg so far as it is relevant. Section 2 of the Act informs the courts to " have regard to Jurisprudence of the difference enforcement and supervisory bodes in Strasbourg" (1) whereas Section 2(1) expects courts to " take into account" decisions of Strasbourg eg (ECHR and Committee of Ministers) those which are relevant. The courts are not bound by this but only have to take account of the jurisprudence these organisations. The courts in R V Offen and others 2000 this attempted to interpret legislation in accordance with the ECHR by interpreting Section 2 of the Crime Act 1997 in accordance with the duty imposed by Section 3 of the HRA.

This section would not contravene the rights under Articles 3 and 5 of the ECHR if the courts applied it so that would not result in offenders being sentenced to life imprisonment when they did not contribute a significant risk to the public. It is clear from Section 2's language that the automatic life

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sentence was being imposed for the second serious offence committed by the offenders and not in relation to the earlier offence. Accordingly, the imposition of an automatic life sentence under Section 2 was not in breach of Article 7(1) of the Convention. Parliamentary intention under Section 3 shows that they may be two enacted intentions. One of them is in Section 3 and the other is found in other primary legislation.

However, under the rules of construction laid down by Section 3, the system of precedent has been affected. Section 3 allows the courts to determine if there is a prima facie case to establish that there has been an infringement of Convention rights. Section 3 affirms that “ so far as it is possible to do so primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.

When investigating case law, the decisions made in cases such as *R v A* and *Ghaidan V Godin-Mendoza* 2004 UK HL 30 need to be viewed in the context of the general development of jurisprudence in the wake of the Human Rights Act. This was the leading case under S 3(1) for interpretation of this clause. The case determined that the Rent Act 1997 appeared to exclude same-sex couples which therefore violated *Mendoza’s* Convention rights. The courts were able to use S3 (1) interpretation to remove the discrimination on same-sex couples.

Reading down means interpreting the clause in a manner which presumes what Parliament intended the court to have some jurisdiction. Therefore, if a judge then finds that there is no breach of the Convention then judges do not have to interpret anything further under S. 3 and therefore existing law

remains. This is seen in *Poplar Housing V Donoghue* 2001 3 WLR 183. The court has no power to declare an Act void, if it did, this would be a direct conflict with the supremacy of Parliament. However in *Re S (Minors) (Care Order: Implementation of Care Plan)* 2002 UK HL 10 2002 2 AC 291, the Court of Appeal held that elements of the Children Act 1989 were incompatible with Art 6. Subsequently a supervision procedure was read in by which essential milestones of a care plan were identified and “starred”.

The House of Lords rejected this approach. Lord Nicholls argue that the interpretation was a matter for the courts but the enactment or amendment of status was a matter for Parliament (para. 39) and as such the court had “exceed the bounds of its judicial jurisdiction under s. 3 in introducing this new scheme” (para. 44)<sup>2</sup>. However, in *Bellinger V Bellinger* 2003 UK HL 21 was a case that was used to amend case law due to a declaration of incompatibility which resulted in the Gender Recognition Act 2004 being passed as a UK law. Instead S. 4 allows the courts to make a ‘declaration of incompatibility’ which in essence states that the Act of Parliament in dispute is ‘incompatible’ with human rights.

As a result, only High Courts and above can declare an Act void. Once S. 4 is instigated, it is then up to Parliament to amend or repeal the offending Act, if it chooses to do so.

However, they are not bound to make a declaration even if the provision is found to be a breach of ECHR. Section 4 in effect preserves parliamentary sovereignty by not allowing the courts to overturn legislation that is not compatible with ECHR. Lord Steyn felt that S4 should only be used as a ‘last

resort' but the courts have tended to abandon using Section 3 to make radical alterations to statute. In *Wilson v First Country Trust Ltd* the court of appeal refused to impose the words of a statute a ' meaning which they cannot bear' preferring to make a declaration of incompatibility under Section 4. Therefore, legislation remains in force unless and until Parliament choses to amend or revoke it.

Declarations of incompatibility have been very limited but a controversial example is *R (Anderson) V Home Secretary* 2002 4 All ER 108 in which the House of Lords confirmed that the Home Secretary could not decide the minimum period that a murderer must stay in prison. This brought into question Article 6, " the right to a fair trial" as a trial should be conducted by a judge not a politician. Parliament subsequently chose to implement this judgement through the Criminal Justice Act 2003. Section 4 of the HRA created the remedy of a ' declaration of incompatibility' and is applied where a court cannot interpret a statutory provision in a way that is compatible with a Convention right.

In *R v A*, Lord Steyn stated that a declaration of incompatibility " is a measure of last resort; it must be avoided unless is it is plainly impossible to do so". A declaration of incompatibility does not affect the validity of the legislation as stated in Section 4(6) (a) of the HRA (1998). In addition, a declaration is not binding on the parties to the proceedings in which it is made as stated in Section 4(6)(b).

Section 4 of the HRA cannot be said to encroach on Parliamentary sovereignty because a declaration does not invalidate the provision

concerned, as stated in Section 4(6). In addition, Parliament is not required to make remedial action; although it can do so under Section 10 of Schedule 2 of the HRA (1998). This means that Parliament's competence to enact any law is unimpaired, although a powerful restraint has been imposed upon its freedom to interfere with fundamental rights. Under section 19 of the Act, the Minister in charge of a Government Bill must make a statement about the compatibility of the Bill with the Convention rights upon the introduction of the Bill into each House of Parliament. Moving onto Section 6 here the Act defines the application of the Act to "public authorities" and makes it unlawful for a public authority to act against the Convention rights but it can be seen that the description of public authorities is rather vague and open to interpretation.

Only the courts have the power to determine the lawfulness of acts, decision and order of public authorities exercising public functions. Regarding the enactment of legislation, Section 19 of the HRA (1998) provides that a minister in charge of a Bill being introduced into Parliament will be required to make a statement of incompatibility prior to the Bill's second reading, indicating how the Bill complies with Convention rights. With regard to the judiciary, Section 19 statements do not bind courts to conclude that the legislation concerned is compatible, nor do they have persuasive authority as stated by Lord Hope in *R v A*. In addition, the relationship between the courts and Parliament mean that the likelihood of a statement ever being made is unlikely. Section 19 asserts Parliamentary sovereignty has been given more power, however it is limited as the Parliamentary based Joint

Committee on Human Rights have the final say on the matter. HRA (1998) is not entrenched and is subject to possible express repeal.

By incorporating this Act it does not appear, from the information and evidence available to directly challenge Dicey's concept of Parliamentary sovereignty or supremacy as Parliament is still able to make or unmake any laws which, includes Human Rights Act or any legislation that is directly incompatible with the Convention. Section 3 and 19 of the HRA (1998) have been seen as a profound tool which to a certain extent undermines the Sovereignty of Parliament. The Gov if it deems it appropriate to do so may refuse to take steps to remedy the incompatibility under Section 5 of the HRA (1998). Parliament may well be sovereign but as a matter of constitutional practice it has transferred significant power to the judiciary.