

# Human right act essay sample



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Prior to Human Right Act 1998, European Convention Human Rights were not directly applied by the courts and while there were infringements of the rights enshrined in the ECHR an application have to make to the Strasbourg Court when domestic avenues had been exhausted. Therefore, Human Right Act 1998 was incorporated in UK in 2000 to bring ECHR rights to the English law and to ensure that the public authorities have due regard for Human rights. Undeniable, it has a substantial impact in UK as according to Jack straw “ these are new rights for new millennium. The Human Right Act is the most important piece of constitutional legislation the UK has ever seen.”

However, we must also recognise that as a consequence of the incorporation of ECHR in English law, it had also led to some political tension between the Legislative and the Judiciary. Judges often being criticised that go beyond their constitutional role as a “ interpreter” and hence violate the principle of parliamentary supremacy and Separation of power. This is because the ultimate purpose of HRA was designed to give judges a mandate to ensure that legislative and executive decision making is compatible with ECHR and at the same time, the HRA does not make judges into a lawmakers. The main challenge is thus for the courts to create a role which protects human rights but does not encroach on the elected parliament which will be discussed exhaustively below. Taken together, s3 and s4 provide a complete regime in dealing with legislation which is contrary to ECHR and give the courts the maximum power to uphold the convention rights.

However to say that by virtue of s3 and s4 , it had given excessive empowerment to the courts is over simplistic as there are limitation to the power of the courts. S3 only is deemed to be a teleological style of

interpretation to construe the legislation in a harmonious way in light with ECHR, however it only allow this interpretation when it is “ possible to do so”, and that when it is not possible, the court must make a declaration of Incompatibility under S4. It shall be noted that S4 does not invalidate and affect the continuity operation of the offending legislation. Hence, it can be said that Human rights Act had drafted carefully to preserve the parliamentary supremacy and doctrine of separation of power and at the meantime uphold the convention rights. However in the case of R v A , it appears that the Judiciary had gone beyond their constitutional role when Lord Steyn used S3 and strained the meaning of S41 Youth Justice Criminal Evidence Act 1999 which designed to protect rape victim and allow certain evidence into trial so that it was compatible with Art 6 of ECHR. Isn't his lordship had went far beyond what parliament had intended and upset the judicial balance.

As per lord Hope, the right things to do in this case is to make a Declaration of incompatibility, hence this case had indeed illustrate that there is an excessive empowerment of the judiciary . However, this should be deemed as an exception as it was the case after HRA incorporated in UK, and judges appeared to be confused as to the power given to them under HRA 1998. Looking at the subsequent cases, for example in Mental Health Review Tribunal, s73 was in violation of Art 5 And 6, and court could not change the meaning of S73 of Mental Health Act using the interpretative provision of s3, and therefore make a declaration of Incompatibility. Further , in S(care Order) 2001, even though judges in Court of Appeal strain the meaning of Children Act 1989 to make its proceeding compatible with Art 6 and Art8 ,

this decision nonetheless overturned by House of lords. According to Lord Nicholls , Court of appeal decision was so wrong as by doing so they had become a legislators rather than a interpreter which is not what parliament had intended. Therefore, for this instance, it can be suggest that there is indeed a constitutional balance and an effective protection of human rights act. Further, in *Belinger v Belinger*, a transsexual marriage was void under S11 of Matrimonial Act 1973.

The issue is that whether s3 allowed the House of Lords to read s11(c) of Matrimonial Causes Act in such expansive way to make it compatible with Art 8 and 12 which also in accordance with the Strasbourg decision in *Goodwin* . Lord Nicholls and Hobhouse was in the opinion that in this case, Mrs Belinger had raised a profoundly systemic question which concern the social policy and hence it was the parliament an elected democratic body to decide whether to change the law and not within the business of the judiciary and therefore a declaration of incompatibility was made and after few months, the parliament had enacted the Gender Recognition Act 2004 in regards with this issue. This once again illustrate that there is in fact a democratic dialogue between the government organs and hence archive effective protection of citizen rights and without crossing the boundaries.

However, it should be noted that in the case of *Ghaidan V Mendoza*, judges did engage in a wide and expansive interpretation of the provision to make it incompatible with convention rights. This issue concern the ‘ protected tenant’ under Rent Act 19779 (as amended) , and House of Lords surprisingly held that ‘ spouse’ could be widely cover a same sex partner! It should be noted that it was surely not what parliament intended during the <https://assignbuster.com/human-right-act-essay-sample/>

enactment of the statute. However, in my opinion, It is more likely to be an extensive of human rights that was necessary in the circumstance, and in fact judges are moving in accordance with social times. Hence, this does not amount to excessive empowerment of the judiciary and instead a ‘ pragmatic empowerment’. Further, it should be noted that when doctrine of Judicial Deference kick in, human right of individual will then put aside, which form some sort of limitation to the Human Right Act 1998, and hence constrain the power of the judiciary. This is because judges are not elected and lack of democratic legitimacy and also because of some matters of high policy which involves national security, judges do not appear to be in a right position to interfere with the intention of parliament.

For instances, the case of R(Gallestagui) v Westminster City Council 2013, Court of Appeal ruled that the restriction imposed under Police Reform Act was not incompatible with ECHR because this restrictions were designed to prevent protestors camping with tents outside Parliament Square. Further in R v Chester and McGeoh, even though it was held in Hirst v UK that UK ‘ s ban on prisoner voting was incompatible with Art 3 of ECHR, nonetheless in both instance cases, Supreme Court refused to issue a declaration of incompatibility with the justification that the issue was under the consideration of the parliament , hence the court should wait for the democratic elected body to complete their consideration, in the meantime, ‘ there is no room for the Supreme court to play’. Hence, it shows that at the end of the day, judges still have to bow down for parliamentary supremacy and uphold the separation of power which limited the risk of empowerment of the judiciary.

However, there are also positive empowerment of the judges which is not intended by the parliament for example in the case of *Venables and Campbell v MBN*, law concern personal privacy has been developed. There also been giving of horizontal effect of convention right via S6 in the *Venable* case. Further there is also a change in the attitude of judiciary in regards to the issue concerning national security especially in the context of indefinite intention of foreign national which can be seen in the case of *R (Anderson)* , where the court recognized the need for a more complex understanding of democracy than merely accountability to the electorate which shows that the judicial uphold the convention rights, and issued a declaration of incompatibility even it was deemed to be a matter of high policy. Although, on the surface, judiciary had indeed crossed the boundaries, however this is a positive impact on rule of law and hence it can be argued as a practical empowerment. Recently, there is an issue rises in regards of the adoption of British Bill of Rights. it is recognise that it could give the courts the opportunity to go beyond the ‘ floor’ of Convention rights as interpreted in *Strasbourg* and reach for a “ ceiling” to supplement those rights with more appropriate rights which are relevant to UK’s needs. Further it could also allow an update to the ECHR which is recognised to be out of date and include those social economical rights such as Right to Free Education in the British Bill of rights.

However, in my opinion, the adoption of British Bill of Rights is not necessary in a guarantee protection of human rights as at the end of the day Bill of Rights have to give way to Parliamentary Supremacy. In conclusion, the interaction between s3 and s4 is a delicate political compromise framed in

deliberate manner by parliament to preserve the constitutional balance of power in the English judicial system. However, as the case law analysis above shows that the picture is neither simplistic nor clear cut. At times, the judges have indeed use s3 in an expansive manner to read the legislation in order to make in compliance with ECHR. There is also robust use of their powers with some consequence clearly unintended by parliament. However by large the constitutional balance of power has indeed been maintained and there are many cases which illustrate this doctrine of judicial deference to the will of the parliament , and at the meantime archive the effective protection of human rights. As Lord Irvine state in the “ The HRA : An analysis”, the courts have striven and have to a large extent succeeded in achieving a balance between scrutiny and deference ; individual and community and S3 and S4. Hence, it can be concluded that HRA does indeed succeeded in doing what it was designed to do so.