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"DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS AND POPULAR SOVEREIGNTY IN EUROPE"

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"PROCESSES OF DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS BESIDES POPULAR SOVEREIGNTY: A COMMENT"

by
Mr Richard CLAYTON
(QC, Barrister, London,
Associate Fellow at the Centre of Public Law,
University of Cambridge, United Kingdom)

1. It has been a great privilege attending the seminar and participating in the debates. I very much enjoyed the paper given by Mr Kaarlo Tuori. Although I know rather less about the structure protecting human rights in Finland than I should do, Mr Tuori's paper helps to emphasise how diverse the systems we have put in place in various Council of Europe countries to maintain human rights.

2. One of the principal themes that has generated argument during this Unidem seminar is whether the judicial protection of human rights is in conflict with the idea of popular sovereignty (as embodied in the democratic process). However, it seems to me that some of the speakers have overstated the position and there are two brief points I want to make.

3. First, it is not difficult to achieve human rights protection which does not trespass on the legislative prerogatives, as the Human Rights Act in the UK demonstrates. Secondly, the suggestion that the democratic system protects oppressed minorities so as to make redundant judicial remedies for human rights breaches is, on analysis, very hard to sustain.

4. As is well known, the fundamental legal principle and political fact which runs through British constitutional law is the idea that no act of the sovereign legislature (comprising the Queen, the Lords and Commons) could be invalid in the eyes of the courts, that it is always open to the legislature, so constituted, to repeal any legislature whatsoever and that no Parliament could bind its successors.[1] The traditional formulation of parliamentary sovereignty now needs modification to reflect Britain's membership of the European Community[2] and the idea that it is the courts themselves who police the doctrine.[3]

5. Nevertheless, the principle of parliamentary sovereignty is critical to the constitutional settlement that led to the enactment of the European Convention via the Human Rights Act 1998. Under the HRA the Courts have no power to override Parliament or to strike down statutes. Instead the courts have a power under section 3 of the HRA to interpret legislation so far as possible to be compatible with Convention rights. As Lord Nicholls stressed in *Ghaidan v Godin Mendoza*, section 3 has an unusual and far-reaching character; it may require the court to depart from *the* unambiguous meaning that legislation would otherwise bear.[4] If, however, the conflict between a statutory provision and the Convention right cannot be overcome, the court has the power to make a declaration of incompatibility.[5]

6. The upshot is that the courts can defeat legislative intent either by a strained statutory interpretation or by making a declaration of incompatibility. But Parliament retains the last word. Unlike the American Supreme Court whose views on constitutional rights can only be overturned by a complex process of constitutional amendment, it is always open to the British legislature to reverse the decisions of the courts under the HRA. As a result, the principle of parliamentary sovereignty has been preserved; and the HRA avoids the spectre of judicial supremicism which the American system has created.

7. No doubt all of us benefit from sharing the different experiences of how human rights can be carried into effect by domestic legislation. But the HRA provides a model to show there is no necessary conflict between the courts and the legislature over human rights.

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[1] Sir William Wade, 'The Basis of Legal Sovereignty' [1955] CLJ 172, 174.

[2] See *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1990] ECR I–2433.

[3] See *R (Jackson) v Attorney General* [2006] 1 AC 262, particularly, Lord Steyn at para 102 and Lord Hope at para 107.

[4] [2004] 2 AC 557, para 30.

[5] Under section 19 of the HRA.

8. I next want to say something about an assumption made by some of those speakers who have criticized the role of the courts for usurping democratic functions by adjudicating on human rights. Of course the HRA (like all human rights instruments) has been used to good effect by powerful and wealthy elites; and it is difficult to see how any mechanisms can be created which overcome or prevent this phenomenon.

9. But I think that the value of providing human rights which are enforceable by the courts has a deeper importance. The principal beneficiaries of human rights are the politically dispossessed: minorities, gypsies, prisoners or suspected terrorists and so on. They have no stake in the political process because there seldom are any votes for politicians who champion their cause.

   Take, for example, the important Grand Chamber decision in *A v United Kingdom* which decided that suspected terrorists had an irreducible fairness right to see the case against them which is said to justify their detention.[6] Although it would be reminiscent of Kafka's *Trial* to subject any detainee to such treatment, it is simply inconceivable that such fairness rights would be expressly enacted by Parliament. In fact, the House of Lords were rejected this principle when it was argued before it- until prompted by the Strasbourg court,[7] underlining why international courts have such a vital residual role in protecting human rights.

[6] Judgment 19 February 2009.

[7] *Secretary of State for the Home Department v MB* [2005] 2 AC 738 in which three of the four Lord Law Lords making up the majority favoured remitting the case to the first instance court for reconsideration (Baroness Hale, Lord Carswell and Lord Brown); only Lord Bingham took the view that the concept of fairness "imports a core, irreducible minimum of procedural protection" involving disclosure to the controlee of the thrust of the case against him: see paras 41 and 43. However, following the Grand Chamber decision in *A* a panel of nine judges in the House of Lords adopted Lord Bingham's approach: see *Secretary of State for the Home Department v AF (No 3)* [2009] 3WLR 74.