Understanding the British Human-Rights Debate

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The Human Rights Act 1998 (HRA) is the closest thing that the United Kingdom has to a constitutional bill of rights. But that highly relative statement conceals the chasm that separates the position in which the UK finds itself under the HRA from that which is occupied by constitutional democracies that possess written constitutions incorporating bills of rights. The existence of that chasm is revealed by the fact that the HRA is not merely the subject of political controversy, but by the fact that it today faces an existential threat. Its repeal is now firmly on the political agenda following the election of the first single-party Conservative Government since the HRA’s enactment — and so too is British withdrawal from the European Convention on Human Rights (ECHR) itself, to which the HRA gives domestic effect. Such changes — as the new Government has already realised — will not necessarily be easy to accomplish in political terms. But as nothing more than an ordinary Act of Parliament, the HRA’s repeal can be secured with a degree of legal ease that stands in stark contrast to the difficulties liable to attend the excision from a written constitution of its bill-of-rights provisions.

Whether repeal of the HRA or withdrawal from the ECHR would be good or bad things (assuming that they are amenable to such a binary form of classification) is not the concern of this paper. Those are certainly questions upon which reasonable minds can differ, as Graham Gee points out in his article in this volume. Rather, the aim of this piece is to situate the human-rights debate within its broader context by examining the concerns that animate it and by considering — in necessarily preliminary and highly tentative terms — where it might lead.

Perhaps surprisingly, identifying the concerns that underlie and account for the present debate in the UK is not a straightforward matter, the objections raised, often vociferously, against the existing human-rights regime being wide in scope and often diffuse in nature. Nevertheless, two broad — and related — themes can be identified. The first involves the characterisation of the HRA as a threat to democracy, on account of the way in which it gives a louder voice to judges and entails a commensurate reduction in the influence of politicians. That such an argument should be made is paradoxical, since part of the raison d’être of the HRA is the maintenance of the sovereignty of the UK Parliament. By denying courts any power to strike down Acts of Parliament that are inconsistent with rights and instead limiting courts to issuing legally non-binding “declarations of incompatibility”, the HRA places no domestic-legal obstacle in the way of Parliament’s doing precisely as it wishes.

It does, however, give rise — or at least draw attention — to two other forms of obstacle. First, an adverse judicial ruling may create considerable — sometimes irresistible — political pressure in favour of the reform of rights-incompatible legislation. Second, such a ruling will likely have implications that sound not only within but beyond the domestic-legal realm in which Parliament reigns supreme. This is so because the HRA is ultimately a conduit that affords a substantial profile in domestic
constitutional law (and politics) to the ECHR. And of course the ECHR — and judgments in respect of it handed down by the Strasbourg Court — are binding upon the UK as matter of international law. In this way, domestic courts’ judgments rendered under the HRA in effect anticipate the future possibility — indeed, likelihood — of binding decisions in Strasbourg. So while Parliament might be free as a matter of UK law to ignore a declaration of incompatibility (or to legislate so as to reverse a judicial interpretation of a statute that secures compatibility with the Convention), a different picture emerges when the matter is viewed through the lens of international, rather than domestic, law. On this analysis, then, the HRA sits in tension with — even if it does not baldly contradict — the doctrine of parliamentary sovereignty, since it domesticates international norms that are binding upon the UK on the international plane.

It is at this point that the first set of concerns vis-à-vis the HRA intersect with the second, the latter being essentially Eurosceptic in nature. Although finding expression principally in opposition to British membership of the European Union — which is to be the subject of a referendum within the next two years — Euroscepticism also views with suspicion the ECHR and its enforcement by the Strasbourg Court. According to this narrative, the objection to the HRA-ECHR regime is not — or is, at least, not only — that judges are equipped undemocratically to impede elected politicians’ ability to pursue their — and so, assumedly, the majority’s — perception of the public good. Rather (or in addition) and (so this argument goes) worse, foreign judges are interfering in the UK’s internal affairs by foisting upon it an external conception of human rights that cuts across substantial popular domestic opinion.

What, then, might be the solutions to these (perceived) problems? That is, unsurprisingly, a matter of perspective, the appropriate way forward inevitably turning upon one’s view as to whether there is a problem in need of resolution and, if so, what exactly that problem is. By way of conclusion, three positions will be briefly sketched.

A first school of thought holds that, at the most, any problem that exists is one of perception or appearance. To the extent that the Commission on a UK Bill of Rights — an expert group established by the previous Coalition Government — managed to arrive at any clear conclusions, it held that the HRA suffers from an image problem. On this view, the HRA has been the victim of a highly effective campaign of misinformation waged by its critics. The solution, the Commission thought, lay in what might unflatteringly be described as a rebranding exercise: that is, the replacement of the HRA with new legislation — perhaps with the word “British” somewhere in its title — that would be similar in substance to the HRA whilst allowing for a fresh start. Such an argument, however, is an unpalatable one for a politician — as opposed to a detached observer — to make, since it presupposes that the public is doubly foolish on account of its misperception in the first place of the existence of a problem and its capacity to be tricked by the replacement of the HRA with essentially similar legislation.

A second possibility, then, would be to replace the HRA with legislation that did not merely bear a different title but which was also substantively distinct from its predecessor. It is clearly possible, as a matter of domestic law, for Parliament to legislate so as to reduce British judges’ powers in human-rights cases. Nor should it be supposed (as it sometimes mistakenly is) that to do so would necessarily be incompatible with ongoing British membership of the ECHR regime. Many other States that are parties to the ECHR possess domestic bills of rights rather than HRA-like legislation that directly and
exclusively relies upon domestic invocation of Convention rights. And, after all, the UK was a party to the ECHR for several decades before it got around to enacting the HRA. However, that said, reform only on the domestic level could only ever hope to address the first of the two sets of concerns sketched above. In other words, while British judges’ wings might be clipped — whether by way of weakening their remedial powers or by, in the first place, requiring them to approach the interpretation of the Convention in ways that might fail to pass muster in Strasbourg — the possibility of litigation in the European Court would remain.

It is for this reason that a third possibility is now countenanced. Giving evidence in July 2015 to the House of Commons Justice Committee, the Secretary of State for Justice, Michael Gove, was asked whether the Government’s proposals concerning human rights presupposed that the UK would remain a party to the ECHR. In response, Gove said that while it was his “hope” that the UK would not withdraw, he “could not give a one-hundred per cent guarantee” that the UK would remain a party. This candid response implicitly acknowledges two things. First, it recognises that a significant part of the argument made against the UK’s existing human-rights system stems from concerns about the involvement of European judges who are able to interfere (as it is seen from this perspective) in domestic affairs. Second, Gove’s position arguably also acknowledges that the other set of concerns — relating to the relative authority of domestic judges and politicians — can only be fully addressed if the UK’s human-rights system is uncoupled from the ECHR’s institutional machinery. For as long as the UK remains subject to that machinery, a court, rather than Parliament, will have the final say when questions arise about the legality of legislation that impinges upon rights.

In this way, therefore, the two sets of concerns that are raised against the existing system are inextricably linked. The Eurosceptic perspective involves implicit advocacy of the dejuridification of human-rights protection, since once the possibility of binding judgments rendered by the Strasbourg Court is removed from the picture, any — necessarily purely domestic — human-rights regime would inevitably be constrained by the doctrine of parliamentary sovereignty. And the analysis cuts the other way, too, democratic concerns about overjuridification being ultimately addressable only if Strasbourg’s capacity to issue binding judgments is undermined or removed. The upshot, then, is that thanks to the nature of the UK’s constitutional architecture — and, in particular, to the sovereignty principle that lies at its heart — the democratic and Eurosceptic objections to the HRA converge so as to form two faces of a single coin. The perceived problem of undue judicial power arises only because, in the first place, the Strasbourg machinery stands behind domestic courts’ powers, investing their HRA judgments with a degree of legal bite that sits uncomfortably with the notion of judicial subservience to a sovereign legislature.

Chris Grayling, Michael Gove’s predecessor as Justice Secretary, said that the aim underlying the Government’s human-rights agenda is to make “our Supreme Court supreme again”. The reality, however, is that the proposed reforms would be likely to underscore the supremacy not of the Supreme Court, but of Parliament, by ridding it of the shackles implied by membership of the Convention regime. Whether that ambition is a good one may be contestable. What is not, however, contestable is that is an ambition of that nature which ultimately underpins the Government’s reform agenda.