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*Can the Human Rights Act survive?*

I've been doing my utmost to learn law for two years now and it's the depressing truth that the Human Rights Act 1998 is the only statute that I've truly come to understand. Every now and then, there's a case that illuminates my proverbial lightbulb or a simple statutory provision of which I can make sense (until I see the relevant cases, that is) but its only really with the HRA that I actually feel on stable ground.

So, its fair to say that I was a bit miffed when I saw tabloidy types calling for the repeal of (or at least serious amendments to) the Act. And annoyingly, tabloidy types have a way of getting what they want, despite their persistent, and often unintelligible, whining. But is the Human Rights Act really in danger? And, if it is, should we worry? I'll be honest; my gut reaction in wanting the Act to stay isn't part of a "free the world" crusade of mine – it comes primarily in not wanting to lose the sole smidgen of legal knowledge I've mustered in two years. However, there are obvious reasons aside from these selfish ones why I believe it would be a grave mistake for the Act to be abolished.

Human rights seem to have real PR difficulties in the age of terrorism. Not only this, but the Act which solidifies the idea in UK law has come in for much criticism. I applaud the introduction of the Act itself but, after careful (and perhaps overly cynical) inspection, it becomes increasingly apparent that the HRA has more holes than a second-hand sieve. Section 1 omits the wide-ranging equality protection guaranteed by Protocol 12, as well as ensuring no place in UK law for the ECHR's promise of an effective remedy. Section 2, interpreted as strongly as it has been, has arguably signified a significant loss of sovereignty of the UK courts to their Strasbourg counterparts, leaving the latter as the policy-making body that Lord Denning warned against in 1982. Section 3 borders on retrospective adjudication, while Section 4 gives no remedy, except an academic one. Section 6, if taken just a tad further, could have fully horizontal effect with serious repercussions for personal autonomy, meaning that the HRA, which aims to protect citizens from disproportionate state intrusions on their liberties, ends up imposing burdensome positive obligations on citizens to respect the rights of all others, and thus limits liberties in trying to promote them. Meanwhile, Section 19's attempted parliamentary control on the promulgation legislation in violation of Convention rights was shown by the Belmarsh case (and many others like it) to be a farce.

Yet in spite of these inherent flaws, I still believe the Act has been a force for good which we mustn't hastily dispose of. The flaws which are jumped on by the press are few in number and are easily explained. It is pretty certain (although I suspect they were never asked this specific question) that the drafters of the ECHR didn't intend for the Convention to afford KFC food to fleeing rooftop criminals and I can't see how the police could have been held in breach of the HRA had they denied him something to munch on. The flaw here is not with the Act itself, nor with the Convention and certainly not with the concept of giving everyone (criminals included) basic rights, but with the failure of the police to correctly understand the obligations the law places them under.

The major cries for the repeal of the Human Rights Act came after a case which was indicative of the aforementioned conflict between the will to appreciate rights and the need to repel terrorism. A decision in May to allow nine Afghan hijackers to stay in the UK was criticised as an “abuse of common sense”. However, there are in fact two decisions governing these men and the “abuse” describes a decision made without reference to the HRA. Ironically, the decision which did engage the Act was substantially unchallenged (with the government not appealing the decision). Reading the comments of those calling for the Act’s repeal made it clear just how little was known about the relevant law (The Sun even calling the ECHR a piece of EU legislation, a mistake forgivable among freshers, but no further). The comments made following the case echoed those made by many rights sceptics years before the promulgation of the HRA; that absolute rights for citizens undermines democratic law-making and that it leads to ludicrous results which block public interest in the name of individual selfishness, as per Marx. However, in spite of the HRA’s aforementioned flaws, rights sceptics have generally embraced the balance that the Act requires between formal democracy in the sense of majority rule and substantive democracy in promoting liberty, dignity and equality and conforming to minimum normative standards. This balance is simultaneously what makes the European Convention the most sophisticated rights charter on the market and what should have silenced the arguments levelled against the Act, had critics actually checked the very text they were censuring. For the last issue of *SvB*, Ronald Dworkin told me he wished the HRA had taken a stronger form (one, I suspect, more similar to that of the American Constitution) but I prefer the form we have adopted because it does give qualifications to many of its rights, which should quell many of the arguments laid against the concept of rights. As Richard Rorty has commented, the problem with human rights lies not in their existence as a social fact but with the claims they make to universal absolutes – the HRA and ECHR alike are directed precisely at comments like this, yet criticisms are made as if it had ignored them altogether.

A branch of jurisprudence debates the role of morality in the law. Yet, it almost becomes forgotten that even the positivists (who deny, to varying extents, that morality should form part of the way in which we identify laws) are not denying that the law is best when it is morally motivated. When the law explicitly asks judges to revert to moral considerations, the results should be more fair, nuanced and humane. The HRA asks judges to embark on a new moral venture, the sort one might think would be supported by laymen who often show concern for the lack of common sense that the rigid structure of law can often show. However, it starts from a point of departure with which would agree in principle but with which they will take issue once they really start to think; basic rights for all, no less so for suspected terrorists, ethnic minorities or for asylum seekers than for anyone else.

It is symptomatic of our press to attempt to vilify such a significant constitutional change, irrespective of any good it might have done. The challenge to the homophobic policies and practices of the armed forces in *Smith and Grady v UK* was only possible by the Convention incorporated by the HRA. Before the HRA, it was impossible to challenge an Act of Parliament, however large the infringement on basic rights. Now citizens can go to court and argue in the name of the abstract principles such as family life, privacy, inhumane treatment and the right to liberty. And yet, politicians seem willing to throw this away in the name of pressure from those who do not know the intricacies of what they are arguing and who conveniently ignore the justice which the HRA allows to prevail.

Nevertheless, politicians are busily planning reforms to the Act. Indeed, David Cameron wants a complete overhaul of the legislation, replacing it with a British Bill of Rights, ignoring the fact that the Human Rights Act is a peculiarly British addition to the human rights tradition, preserving parliamentary sovereignty and finding a place for violations based on democratic necessity, which would surely please Cameron if he dared to look it up. Cameron's plans seem to have been shelved for the meantime, no doubt helped by the Parliamentary Committee on Democracy calling the plans "nonsense". Meanwhile, John Reid changes his opinion on the Act as often as one might hope he changes socks but, fortunately, his reform plans seem to weaken with each passing day. The Lord Chancellor (or whatever we call him nowadays) seems the most sensible throughout this, generally praising the operations of the Act and stressing the need for greater training on the requirements of the legislation.

The Act gives the law a more humane dimension. No longer is it composed solely of rules which necessitate knee-jerk reactions when the facts engage them but there are abstract principles floating about, waiting to set right injustices. Not that the HRA averts all injustices, but it certainly goes in the right direction. It brings judges into unchartered territory within which they are still moving hesitatingly, careful of going too far, all too aware of the appropriate boundaries. But, in spite of concerns of them substituting their own judgments for those chosen by democratically legitimate sources, by showing deference where appropriate and being careful to make decisions of law, not of choice-led policy, judges should be averting major criticism. However, due to the enormous, liberalising effect of the Act, many conservatives are quick to criticise what they see as excessive, newly-authorized, judicial activism. But it is hard to point to too many wrong results which come as direct results of the Act and indeed, many just results, which wouldn't have been possible pre-1998, can be piled up.

And, what's more, I understand it. So let's keep it so I don't have to learn anything new. It's my last year. That would just be far too disruptive right now.