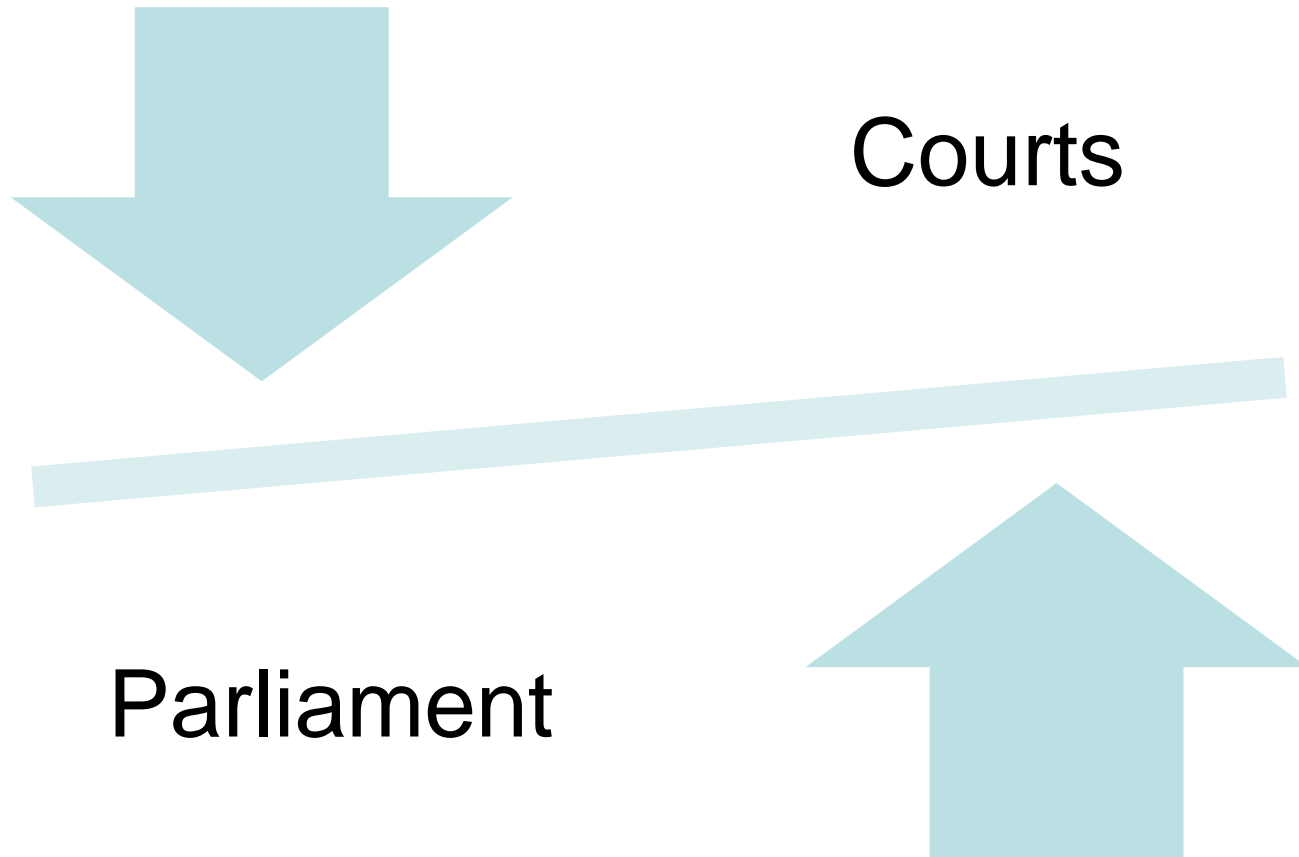


British Bill of Rights
Impact on the relationship between
Parliament and the Courts

Wednesday 15 February

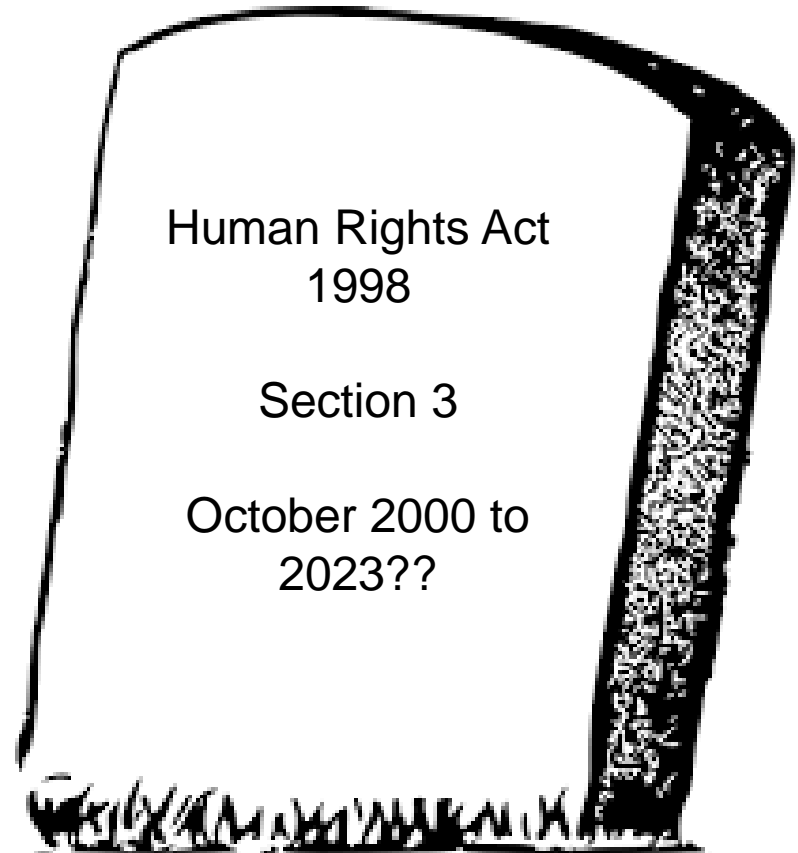
Prof. Alison L Young

Relationship between Parliament and the Courts



Relationship between Parliament and the Courts

- RIP section 3 Human Rights Act 1998
- Preservation (and slight expansion) of declarations of incompatibility
- Increase in Deference



Relationship between Parliament and the Courts

- Repeal of Section 3
 - Clause 1(2)(b) ‘courts are no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights’
 - Clause 40 (1) ‘The Secretary of State may by regulations make transitional or saving provision in connection with the coming into force of any provision of this Act’
 - Clause 40(2) ‘The power conferred by subsection (1) includes power to amend or modify any primary or subordinate legislation so as to preserve or restore (to any extent) the relevant judgment of a court’
 - Clause 40(3) – makes it clear that this extends to preserving a judgment that interprets legislation ‘that appears to have been made in reliance on section 3 of HRA 1998.’

Relationship between Parliament and the Courts

- The Free Speech ‘exception’...
- Clause 4(1) ‘When determining a question which has arisen in connection with the right to freedom of speech, a court must give great weight to the importance of protecting the right’
- BUT NOT
 - Criminal proceedings to determine whether legislation is incompatible with Convention rights
 - Whether disclosure of information would be in breach of confidence
 - When determining right to enter or remain in the UK or citizenship
 - When the question affects national security

Relationship between Parliament and the Courts

- Preservation of Declarations of Incompatibility
 - Clause 10: ‘the court may declare that the provision is incompatible with the Convention right’
 - BUT broader element for subordinate legislation
 - DoI for ANY subordinate legislation. Under section 4 this is limited to situations in which ‘the primary legislation concerned prevents removal of the incompatibility’
 - Clause 26: Power to the Secretary of State to make regulations ‘if there are compelling reasons’ to amend legislation when this is necessary to remove the incompatibility.

Relationship between Parliament and the Courts

- Deference
- Clause 7
 - applies when the court is determining whether an Act is compatible with Convention rights and whether a public authority is acting contrary to Convention rights and has to determine whether the Convention rights strike an appropriate balance between different policy aims, different Convention rights, or between Convention rights of different persons the court MUST
- 7(2)(a) ‘regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance’
- 7(2)(b) ‘give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament’

Relationship between Parliament and the Courts

- Deference on steroids??
- Or a response to *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26
 - ‘If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court’s assessment, because of the respect which the court will accord to the view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation.’ [182]

Relationship between Parliament and the Courts

- Possible backfire...
- 7(2)(a) 'regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance'
- 7(2)(b) 'give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament'
- 'strikes an appropriate balance'
 - So is this ONLY for the fair just and reasonable component of proportionality and NOT for suitability and necessity?

Relationship between Parliament and the Courts

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