THE PROTECTION OF HUMAN RIGHTS AND CONSTITUTIONAL REVIEW IN THE UK AND TAIWAN

Introduction

From March 2014 to February 2015, the Bingham Centre for the Rule of Law conducted a comparative study of the domestic application of international human rights standards and the constitutional review of legislative action in the UK and the Republic of China (Taiwan). This was funded by the British Academy International Partnership and Mobility Scheme 2013 and was undertaken jointly with the National Taipei University, funded by the Ministry of Science and Technology (formerly known as the National Science Council of Taiwan), with additional participants from University College London and the University of Leeds on the UK side. This report summarises conference papers presented as part of the project in London in May 2014 and in Taipei in October 2014. These provide an overview of the current legal frameworks for human rights protection and constitutional review; outline current topics of debate; and highlight thematic issues of particular relevance for both countries at the present time. The report offers comparative insights from the project and, by examining differences and similarities between the approaches of the UK and Taiwan to human rights and constitutional review, adds significantly to current debates in Taiwan and the wider Asia Pacific region.

Research Context

Given recent developments in both countries, we believed this was a timely opportunity to examine the topic of human rights protection and constitutional review. First, the UK’s constitutional framework has been significantly altered in recent years by the introduction of the Human Rights Act 1998 (HRA) which incorporates the European Convention on Human Rights (ECHR) into UK law and, in particular, gives British courts limited powers to review legislation for compliance with ECHR rights. The legitimacy of constitutional review -- and of the ECHR system more broadly -- is sometimes questioned in the UK: in 2012, an independent commission established by the government to investigate the creation of a UK Bill of Rights failed to reach a consensus on this issue; and, for example, the Conservative Party’s manifesto for the 2015 general election pledged that “The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in
the UK”.¹ Second, Taiwan adopted a constitutional bill of rights in 1947 and the institution of constitutional review has operated in the legal system since 1948. However, it is only in recent years that an effective constitutional court has emerged in the country. In 2009, although not a member of the United Nations (UN), Taiwan incorporated into domestic statutes the UN International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), and in September 2012, the government issued its initial report on their implementation.

Moving from the assumption that the UK’s experience of the HRA has the potential to contribute significantly to debates currently taking place in Taiwan on the legitimacy of constitutional review and the domestic application of international human rights standards, the project aimed to fill a comparative research gap that combines perspectives from both the UK and Taiwan, and indeed East Asia in general. Furthermore, the role of constitutional review and human rights protection in the context of the broader democratisation process in Taiwan is of great interest, along with the implications of the Taiwan experience for constitutional change in the region more widely.

The Protection of Human Rights and Constitutional Review in the UK

Colm O’Cinneide, Human Rights and the UK Constitution²

This paper contributes to the current debate about the influence exercised by the ECHR over UK law and the role given by the HRA to the British courts in protecting individual rights. It does so by evaluating the current state of UK human rights law and by considering how proposals to alter the existing legal framework (including the question of adherence to judgments of the European Court of Human Rights) will impact on the protection of human rights in the UK.

The first part of the paper examines the current system of human rights protection in the UK. It provides a historical perspective showing how respect for human rights has become part of the “UK’s culture of public governance”. It notes, however, that “[d]eep disagreement” often exists about what constitutes a violation of an individual’s human rights, in particular where a balance is to be struck with what governments claim to be in the public interest. However, given some of the problems that arise from wholly relying on the political process to ensure respect for human rights and the rule of law, courts have been given an increasing role. There are different views as to when and how the courts should intervene to protect individual rights and some comparative examples are given in the paper. In the UK, for example, “judges [are given] the authority to overturn acts of public bodies which violate basic rights while ensuring that the ultimate law-making authority remains in the hands of Parliament”.

The paper then considers the protection of rights within existing UK law and discusses three “layers” of rights protection – the common law and administrative law, the ECHR, and the HRA. The HRA is now “the primary vehicle” for human rights protection in the UK and the paper discusses some of the mechanisms by which it operates (the duty on public authorities in section 6, interpretation of legislation in section 3, and declarations of incompatibility in section 4). The paper contrasts the position in the UK to the “strike down” powers given to courts in some other

countries. The paper then sets out some case study examples of the functioning of the current system of rights protection both in cases where Parliament and the courts work together, and via the gradual development of the case law by the courts. The first part of the paper concludes by outlining some of the criticisms of the existing state of UK human rights law, noting in particular calls for a rethink of the UK’s relationship with the European Court of Human Rights and for the HRA to be replaced with a “British Bill of Rights”. The paper responds to some of these criticisms before turning to the institutional and structural criticisms in greater detail in the second part.

The second part then examines the relationship between the UK and the ECHR. It introduces the structure and functioning of the ECHR system of rights protection, including the development of the Court’s case law, its “living instrument” approach, the distinction it draws between absolute and qualified rights, and the doctrine of a “margin of appreciation”. The paper also considers the Court’s case law concerning the UK and its influence over the development of the common law in this regard. It then sets out some of the institutional and structural criticisms of the ECHR system, which call into question both the institutional integrity of the Court and the influence it exerts over UK law. It concludes that “the institutional integrity of the Court does not appear to be seriously in doubt” and “accusations that it is abusing its power… appear to be wide of the mark”. In addition, the paper considers that the structural relationship between the European Court of Human Rights and the UK “is not incompatible with the UK’s constitutional commitment to democratic self-governance and the primary of Parliament”. Finally, this part considers proposals for reform and the question of adherence to judgments of the European Court of Human Rights, concluding that “[g]ood reasons exist as to why the UK should be slow to refuse to comply with a judgment of the Strasbourg Court” and that “[m]ore may be gained by engaging with the Court than by undermining its central place in the European human rights architecture”.

Finally, the third part of the paper considers the HRA and the Bill of Rights debate in the UK. It starts by setting out the purpose, structure and functioning of the HRA. The paper considers how the courts have sought to strike a balance between rights protection and respect for democratic decision-making, for example, in their approach to section 2 HRA which concerns adherence of the UK courts to jurisprudence of the European Court of Human Rights. It comments that the “machinery of the Act also appears to have run relatively smoothly” since coming into force and considers the example of Parliamentary responses to declarations of incompatibility in this regard. The paper then turns to criticisms of the HRA and proposals for a new British Bill of Rights. In particular, it considers criticisms about the place of ECHR rights in UK law and suggestions that the UK should de-incorporate the ECHR, and then turns to various templates for a new Bill of Rights. The paper concludes that “[g]ood arguments exist against the introduction of a new Bill of Rights which limits existing rights protection”; that “[a] ‘Bill of Rights plus’ would expand the scope of rights protection in UK law, and has much to commend it”; however, “along with a ‘repackaged Bill of Rights’ and a ‘symbolic’ statement of rights and responsibilities, it would do little to meet many of the concerns expressed by critics of the HRA”. Therefore, and “given the relatively smooth functioning of the HRA thus far, it remains open to question whether replacing the HRA with a Bill of Rights would improve UK human rights law for the better”.

Overall, the paper comments that “the current state of human rights law in the UK is both compatible with constitutional principles and strikes a decent balance between respecting the British tradition of parliamentary democracy and protecting individual rights”. 
Looking at Taiwan in this context, it has been commented that while “dissatisfaction with and criticisms of the judiciary still abound”, the Taiwan judiciary “has undoubtedly become an effective institution guarding constitutionalism, the rule of law and the rights of individuals”. However, the risk of judicial politicisation and the need to improve the quality of judges have been identified as present challenges in Taiwan. We will briefly consider the first issue here; and the second issue will be discussed in a subsequent section of this report.

The Constitutional Court in Taiwan “has the exclusive power to review the constitutionality of laws and regulations” and “can only exercise the power of “abstract review”... and does not have the power to directly resolve cases brought by other courts or by individuals who have exhausted all available proceedings”;

however it may in exceptional cases review the application of legislation for example. In addition, it has been commented that judges in Taiwan are generally reluctant to exercise law-making powers; and that “[p]erhaps with only the exception of the Grand Justices, judges in Taiwan seldom interpret laws in ways that may amount to law-making, unlike their counterparts in common law systems”. However, judicial politicisation remains a challenge in Taiwan: “the Constitutional Court and administrative courts in particular have begun to intervene in political or policy disputes” placing “judicial integrity and independence at high risk”. The discussions currently taking place in the UK, outlined above, may therefore contribute to these debates in Taiwan.

Professor Ian Cram, The Protection of Human Rights in the UK Constitution: Freedom of Expression and Social Media

This paper highlights a thematic topic of interest in both the UK and Taiwan. Freedom House has commented that “Taiwan’s media environment is one of the freest in Asia” but warns that “political polarization, self-censorship, and indirect Chinese influence somewhat limit the diversity of opinions represented in mainstream media”. It also noted “rare violence against journalists covering protests and cyberattacks against an important media outlet that has been critical of Beijing” in 2014. In the wider Asia Pacific region, Human Rights Watch has recently reported that “[t]he Chinese government targeted the Internet and the press with further restrictions in 2014”, including limits on social media. Therefore it is interesting to consider the framework for the protection of freedom of expression in the UK, with a particular focus on the use of social media.

The first part of this paper provides an overview of the protection of the right to freedom of expression under the ECHR. It sets out key features of Strasbourg jurisprudence relating to Article 10 ECHR (freedom of expression), highlighting that protection includes “offensive” expression in order to allow space for minority and controversial opinions. In this respect, the paper contrasts protection against contents-based regulation of expression in the US Constitution, noting that in the US, it is “virtually impossible for the state to regulate speech by reference to its content”. The

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5 Jiunn-Rong Yeh and Wen-Chen Chang (editors) Asian Courts in Context (Cambridge: CUP, 2014) p149.
7 Jiunn-Rong Yeh and Wen-Chen Chang (editors) Asian Courts in Context (Cambridge: CUP, 2014) p165.
Paper also considers the special protection afforded to “political” expression in the ECHR system, as compared to other types of speech (commercial, artistic), highlighting the wider “margin of appreciation” afforded to national authorities in respect of the latter. Next, it considers some examples of where Convention protection was denied to extreme forms of political expression. The paper then turns to Article 17 ECHR (prohibition of abuse of rights) and considers cases where it has been used to deny Article 10 protection. The paper then examines key features of the HRA and some of the mechanisms by which it operates (for example, section 2 which concerns adherence of UK courts to jurisprudence of the European Court of Human Rights, the duty on public authorities in section 6, interpretation of legislation in section 3, statements of compatibility in section 19, and declarations of incompatibility in section 4).

The second part of the paper considers domestic laws in the UK affecting online expression, with particular reference to criminal laws, including the Malicious Communications Act 1988, the Communications Act 2003, the Public Order Act 1986, and the Protection from Harassment Act 1997, as well as guidelines issued by the Director of Public Prosecutions in this context, accompanied by case examples.

The paper concludes that “[t]he task of a liberal legal system is to draw appropriate boundary lines that facilitate vigorous and sometimes ill-tempered or poorly-humoured debate on matters of societal importance on the one hand, whilst discouraging personal and vindictive attacks on persons on the other”.

*Professor Sir Jeffrey Jowell KCMG QC, The Balance between Judicial and Executive Functions in the UK: Recent Reforms* 12

This paper primarily focuses on judicial appointments, and both Taiwan and the UK have recently undergone reforms in this area. The paper discusses the UK reforms and so a brief note here about the Taiwan system of judicial appointments: “Similar to most Asian jurisdictions, judges in Taiwan typically start as young law school graduates who pass competitive judicial exams and gradually climb to judicial seniority” and their “lack of experience prior to entering the judiciary and their subsequent bureaucratization have often been the target of judicial reform efforts”. 13 The Judge Act 2011 “diversifies the recruitment of judges to include experienced lawyers and law professors” and also “creates a judicial council under the Judicial Yuan that is in charge of judicial appointments”. 14 As this paper highlights, judicial diversity is also of concern in the UK at present.

This paper sets out the framework for the appointment of judges in the UK. It begins by setting out the position before 2005, when the judiciary were appointed by the Lord Chancellor. The paper discusses the overlapping functions of the Lord Chancellor at that time and the “secretive process of judicial appointments”, but observes that appointments were “undoubtedly carried out in a completely independent fashion”. Nevertheless, despite the independence in fact, the overlapping roles did not give the appearance of independence and post the entry into force of the HRA, it was decided to change the role of Lord Chancellor. The Constitutional Reform Act 2005 (CRA) provided that the Lord Chancellor would continue to be a member of the executive, with a new title of Secretary of State for Justice and Lord Chancellor, but would no longer sit as a judge or as

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12 Professor Sir Jeffrey Jowell KCMG QC (Director, Bingham Centre), Speech, Judicial Yuan, October 2014. Professor Jowell was sponsored by the Judicial Yuan and the National Taipei University.
Speaker of the House of Lords in its legislative capacity. The CRA also provided for the establishment of the UK Supreme Court (in place of the Appellate Committee of the House of Lords) and for the creation of a new independent Judicial Appointments Commission (JAC).

The paper then considers relations between the Lord Chancellor and the Lord Chief Justice. In place of the Lord Chancellor’s former functions as head of the judiciary, the CRA strengthens the position of the Chief Justice, now supported by a Judicial Office. They share responsibility for the appointment of the independent board running HM Courts and Tribunals Service; and in matters of judicial discipline. The composition of the JAC, the selection criteria for judicial appointments, including the definition of “merit”, the process of selection, and the (now limited) roles of the Lord Chancellor and Chief Justice in judicial appointments are then discussed.

The paper concludes that “[t]here seems now to be widespread support for many of the basic principles embodied in the current system, such as selection by a commission that is independent of the government, transparency, accessibility of the system to a wide range of candidates”, and that present debate concerns the issue of judicial diversity, especially in terms of gender; the balance between lawyers and others on the JAC; and the extent to which Parliament or political representation should be involved in the appointment of at least the higher judiciary.

**The Protection of Human Rights and Constitutional Review in Taiwan**

**Professor Frederick Chao-Chun Lin, A Practical Case for Judicial Review: Taiwan, Waldron and Beyond**

The topic of judicial review has recently been the subject of significant (and controversial) reforms in the UK. Most recently, for example, the Criminal Justice and Courts Act 2015 introduced changes which seek to address “what the government says to be the high number of costly and spurious judicial review claims”, however, concern has been expressed about “the damage that some of the proposals could do to the effectiveness of judicial review as a check on executive action”. It is therefore helpful to consider the approach to judicial review in Taiwan and, in this regard, it has been commented that “the practice of judicial review in Taiwan is majoritarian in the sense that it does not rule against popular majority opinion most of the time” and that the “majoritarian propensity of judicial review in Taiwan originates from the judiciary’s legitimacy crisis after democratization, which makes it more susceptible to public opinion”, so that “it seems pessimistic that the Court can play a role in leading political and social change in the future”.

Against this background, Professor Lin’s paper considers the practice of judicial review in Taiwan and other relevant jurisdictions, in light of a recent academic paper on the subject. It comments that Professor Jeremy Waldron’s paper, ‘The Core of the Case against Judicial Review’, breaks new ground on an old turf and brings us into a new and fascinating world of judicial review. The significance of this paper not only lies in its delicate and exquisite analyses, but also can be found evident in the new wave of debates following it. Moreover, the significance of Professor Waldron’s

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15 The Bingham Centre is grateful to Professor Lin and his colleagues for the summaries of their papers provided here. For further information about the events, see: [http://www.laws.ucl.ac.uk/event/constitutional-review-taiwan/](http://www.laws.ucl.ac.uk/event/constitutional-review-taiwan/) and [http://www.biicl.org/event/1038](http://www.biicl.org/event/1038). See abstracts and biographies here: [http://www.biicl.org/documents/294_abstracts_bios.pdf](http://www.biicl.org/documents/294_abstracts_bios.pdf).

16 Professor Frederick Chao-Chun Lin (Professor of Law, National Taipei University), Conference Paper, London, May 2014.


paper is inherent in its transnational characters. Relying on this background, this paper would like to scrutinise Professor Waldron’s arguments in terms of the already existing practices of judicial review. This is simply because Professor Waldron has stressed that his analysis on judicial review is independent of a particular jurisdiction. More importantly, if his theory cannot make reasonable explanation of some common practices which have existed in Taiwan as well as in other nations in the world, the essence of his theory cannot but fail to some extent.

Dr C V Chen and Dr Ting-Chi Liu, From Rule by Law to Rule of Law: A Century’s Challenge on Both Sides of the Strait

This paper considers the development of the rule of law in Taiwan and mainland China, and concludes with observations about the type of cross-strait collaboration needed to further the rule of law in both countries. In this context, the UK Prime Minister has described the rule of law as one of the “building blocks that take countries from poverty to prosperity”. He has also spoken about the need for “a radical new approach to supporting what [he calls] “the golden thread” of conditions that enable open economies and open societies to thrive: the rule of law, the absence of conflict and corruption, and the presence of property rights and strong institutions”. It is therefore interesting to consider the development of the rule of law in new democracies such as Taiwan.

This paper comments that it has been more than a century since the modernisation of China’s legal system began in the early 1900s. During that time, China slowly morphed from a monarchy to a republic, and strove to establish a modern legal system. The conflict between the Nationalist government and the Communist Party, however, has divided the country since 1949. The Republic of China (Taiwan) and the People’s Republic of China (mainland China) differ not only in their political systems but also on how they realise the rule of law. This paper aims to review and analyse this hundred-year pursuit of the rule of law starting from rule by law on both sides of the Taiwan Strait. It concludes with an observation of the type of cross-strait collaboration required to meet the challenges of furthering the rule of law in the future.

Judge Chen-Chou Hsu, Taiwan’s Experience in Implementing the ICCPR: Focusing on its Impacts and Challenges for Criminal Court Judges

This paper considers Taiwan’s experience in implementing the ICCPR. It has been noted that “while key legislation and important reforms have been undertaken … over the past decade, urgent steps are still needed to bring human right practice in line with international standards”. In 2009, Taiwan incorporated the ICCPR and the ICESCR into domestic law. The incompatibilities between the Covenants and existing domestic legislation are expected to be solved by the court, which is empowered by the relative Act to interpret statutes and to prefer a meaning compatible

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19 Dr C V Chen (Chairman and Managing Partner, Lee and Li Attorneys-at-Law and Adjunct Professor of Law, National Chengchi University) and Dr Ting-Chi Liu (Assistant Professor of Law, National Chengchi University), Conference Paper, London, May 2014.
22 Judge Chen-Chou Hsu (High Court of Taiwan), Conference Paper, London, May 2014.
with the Covenant without clear demarcation. This paper surveys about 1,000 criminal judgments referring to the ICCPR or General Comments after the enactment of the Act, and concludes that the Act has already changed the landscape of criminal law practice. It is also important for the Court to be aware of the implied limitations, to advance the rights and freedoms guaranteed in ICCPR and General Comments without impinging on legislative power and the authority of Constitutional Court. Where the Court finds its hands are tied, it bears the responsibilities to send signals to other agencies or Congress in its judgments.

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