Clayton Comments

Richard Clayton QC

THE GOVERNMENT'S NEW PROPOSALS FOR THE HUMAN RIGHTS ACT
PART 1: THE PROPOSALS IN OUTLINE

The Conservative Party has opposed the HRA root and branch ever since its enactment. Manifesto commitments to overhaul the HRA were made in 2010, 2015, 2017 and 2019. In 2015 Prime Minister, David Cameron, said he was open to the "*nuclear option*" of withdrawing from the European Convention on Human Rights (the ECHR) to ensure the UK's highest court remains the "*ultimate arbiter of human rights*", although this was to be delayed until after the referendum on EU membership. The Government has now, however, confirmed that the UK will not leave the ECHR.

In December 2020 the Government announced it was setting up an Independent Human Rights Act Review chaired by Sir Peter Gross, the former Lord Justice of Appeal. On 16 December 2021 the Review published its final report. On the same day the Deputy Prime Minister and new Justice Minister, Dominic Rabb, announced a packet of proposals to launch a new British Bill of Rights.

The impact of these proposals will be profound. In this article I shall outline what the proposals will involve. I shall next assess the impact of those proposals.

The Independent Human Rights Review

The Review was set up to consider options for amending the HRA. Its terms of reference required it to examine the relationship between domestic courts and the ECtHR as well as the relationship between the UK courts, executive, and parliament. It then embarked on a consultation from 13 January to 3 March 2021 to call for evidence.

On 16 December 2021 the Review published its ***Independent Human Rights Act Review*** https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf
for Mr Raab to present to Parliament. The Review made several important recommendations for change:

- The Government should give serious consideration to developing an effective programme of civic and constitutional education in schools, universities and adult education.
- Section 2 of the HRA should be amended to clarify the priority of rights protection by giving statutory effect to the position developed in *Osborn v Parole Board* [2014] 1 AC 1115 and *Kennedy v Charity Co*mmission [2015] AC 435 so that the Courts would first apply UK domestic statute and common/case law first before interpreting a Convention right to take account of ECtHR case law.
- No change should be made to the Court's approach in s 2 in respect of the margin of appreciation.
- The idea of judicial dialogue between the British Courts and the ECtHR should continue.
- Section 3 should be amended to clarify the order of priority of interpretation. There should be increased transparency in using s 3 and an enhanced role for Parliament through the Joint Parliamentary Committee on Human Rights.
- The courts should have a discretion to make *ex gratia* payments when making a declaration of incompatibility.

- The Courts should have an additional power to suspend quashing orders or make them prospective only for the HRA (as well as for judicial review generally).
- The current position concerning the HRA's extra-territorial application was "*unsatisfactory*", reflecting a "*troubling*" expansion of the Convention's application. The Review recommended that this ought to be addressed by a national conversation advocated to the Review during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.
- Section 10 of the HRA should be amended to confirm that remedial orders cannot be used to amend the HRA itself as well as to improve parliamentary scrutiny of remedial orders. The Review, therefore, disapproved of the remedial order made in 2019 as a result of the ECtHR decision in *Hammerton v United Kingdom* (2016) 63 EHRR 23. A remedial order was made amending s 9(3) of the HRA- to enable HRA damages to be awarded in respect of a judicial act done in good faith which is incompatible with Article 6.

The rationale for the Government's HRA reforms

The Government responded to the report by setting out its own proposals to reform the HRA. It published a consultation paper the same day, ***Human Rights Act Reform: A Modern Bill of Rights*** https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf .

In his Foreword Mr Raab emphasises that the Government remains committed to the ECHR but must strike the proper balance of rights and responsibilities, individual liberty and the public interest, rigorous judicial interpretation, and respect for the authority of elected lawmakers. He describes the proposal in these terms:

> *We make far-reaching proposals for reform, with a particular focus on those quintessentially UK rights, such as freedom of speech and the right to trial by jury. We examine problematic areas, including the challenges in deporting foreign national offenders. We consider in detail the procedural framework of the Human Rights Act. And we look at the relationship between the UK courts and Parliament and the European Court of Human Rights in Strasbourg.*
>
> *We intend to revise and reform the flaws we have identified, and replace the Human Rights Act with a modern Bill of Rights, one which reinforces our freedoms under the rule of law, but also provides a clearer demarcation of the separation of powers between the courts and Parliament.*

The proposals in outline

The paper's Executive Summary sketches out its proposals as follows:

- The Bill of Rights will make sure a proper balance is struck between individuals' rights, personal responsibility, and the wider public interest. It will strengthen the role of the UK Supreme Court, preserve Parliament's democratic prerogatives in the exercise of the legislative function, and support the integrity of the UK, while respecting the devolution settlements (para 6).
- The Bill of Rights will continue to respect the UK's international obligations as a party

to the Convention and the UK will also continue to support further reforms to the ECtHR (para 7).

- The proposals are designed (para 8):
    - to make sure our common law traditions and Parliamentary sovereignty are respected, and to strengthen the role of the UK Supreme Court;
    - to provide a sharper focus on protecting fundamental rights;
    - to prevent the incremental expansion of rights without proper democratic oversight;
    - to emphasise the role of responsibilities within the human rights framework; and
    - to facilitate dialogue with Strasbourg, while guaranteeing Parliament its proper role.

The specifics of the proposals are then described (para 9).

- The Government will retain all the substantive rights currently protected under the ECHR and the HRA. Some rights like freedom of expression will be strengthened. Others like the right to trial by jury will be added, reflecting the UK's specific history and traditions.
- They will empower domestic courts to apply human rights in the UK context, taking into account our common law traditions and judicial practice amongst other common law nations, not merely the case law of the Strasbourg Court, and strengthen the primacy of the UK Supreme Court in determining the proper interpretation of such rights.
- They will provide greater clarity regarding the interpretation of certain rights, such as the right to respect for private and family life, by guiding the UK courts in interpreting the rights and balancing them with the interests of our society.
- They will implement a permission stage, similar, but not identical, to those in other branches of law, to ensure that spurious cases do not undermine public confidence in human rights.
- They will strengthen the courts' discretion when granting remedies for HRA breaches.
- They will restrain the ability of the UK courts to use human rights law to impose 'positive obligations' onto our public authorities without proper democratic oversight.
- They will make sure that the UK courts are not required to alter or interpret legislation contrary to Parliament's clearly expressed democratic will.
- They will provide more certainty for public authorities to discharge their functions without the fear that this will expose them to costly human rights litigation.
- They will safeguard the right to life and the absolute prohibition on torture, confirming that people should not be deported to face torture (or inhuman or degrading treatment or punishment) abroad, whilst ensuring that HRA rights cannot be used to frustrate the deportation of serious criminals and terrorists;
- They will recognise that responsibilities exist alongside rights, and that these should be reflected in the approach to balancing qualified rights and the remedies available for human rights claims; and
- The Government will enact a process, centred on Parliament, for assessing the implications of judgments from the ECtHR for the UK, including providing a "*democratic shield*" preserving Parliamentary sovereignty in the exercise of the legislative function.

The Government's proposals are complex and radical. Unsurprisingly, the devil is in the detail. I shall assess these next.

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The most striking Government proposal is to amend to the HRA will make it ECA minus, so that applicants will have to apply to Strasbourg to obtain the full effects of Convention rights. The likely result is that the proposal will transfer power from the domestic courts to the ECtHR- the very outcome the Government proposals are designed to achieve.

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