Clayton Comments

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THE GOVERNMENT'S NEW PROPOSALS FOR THE HUMAN RIGHTS ACT
PART 3: AN ASSESSMENT

This article completes my analysis of the Government's proposals for reform of the Human Rights Act 1998, following Part 1 (outlining the proposals) and Part 2 (analysing the interaction with the common law, the UK Supreme Court, and the intention to sharpen the focus on fundamental rights).

This article considers three final themes of the proposals: (iii) preventing the incremental expansion of rights without proper democratic oversight, (iv) the role of responsibilities within the human rights framework, and (v) dialogue with Strasbourg.

III. Preventing the incremental expansion of rights without proper democratic oversight

The Government's Proposals next seek to prevent the incremental expansion of rights "*without proper democratic oversight*". These include limiting the duty on UK courts to reinterpret legislation enacted by Parliament, and clarifying restrictions on deportation, but also cover (para 232):

- respecting the will of Parliament when legislation is incompatible with the Convention rights;
- statements of compatibility;
- application to the devolved administrations;
- public authorities;
- extraterritorial jurisdiction;
- qualified and limited rights;
- deportations;
- illegal and irregular migration; and
- remedies.

Respecting the will of Parliament: s 3 of the HRA

The Proposals casts the debate about s 3 in terms of basic principle (para 233). It states that the balance struck between Parliament making legislation and how that legislation is interpreted by the courts sits at the heart of the UK constitution and argues that, in practice, the HRA has moved too far towards judicial amendment of legislation which contradicts, or is otherwise incompatible with, the express will of Parliament. The Government builds on its analysis (paras 116-123). It contends that s 3 compels the court to expand the scope of its interpretive duty beyond what is appropriate for an unelected body (para 235) and that a less expansive interpretive duty would provide greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues (para 236).

However, the Proposals note that the Independent Review did not support repealing s 3- having addressed this question in considerable detail in Chapter 5 of its Report. In fact, the Review concluded (para 118) that there "*was a broad and strongly argued view from the evidence that there was no basis on which to amend section 3 or 4 of the HRA. There was a strongly held view that the evidence supported the conclusion that UK Courts had not abused the use of section 3 and that section 4 had been used sparingly as Parliament had intended*". The Review considered a few submissions for no change (para 119), several reforms of s 3 and 4 (paras 120) and various other reforms (para 121).

The Review emphatically rejected the repeal of s 3 (paras 123-129). First, repeal is premised on a misconception, that the HRA has removed from Parliament its primary role in rights protection. The Review decided that the HRA has patently not done this and was careful to retain Parliamentary Sovereignty (para 124). Secondly, it rebuffed the idea that s 3 could properly be characterised as a Henry VIII clause- providing the Government with a power to amend primary legislation through secondary legislation (para 125). Thirdly, the weight of evidence before the Review supported the view that UK Courts have not misused s 3 to misconceive Parliament's intention in enacting legislation (para 126). Fourthly, repeal would significantly weaken the overall scheme of the HRA by removing one of the key means by which Convention rights are to be given their full effect in UK domestic law (para 127). Finally, such a repeal would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement (para 129).

The Government's Proposals say that it is minded to agree with the Review (para 237). Nevertheless, it believes that the Court's expansion of its interpretative duty warrants consulting on options for reform. The Proposals welcome comments on:

- *Option 1*- repealing s 3 altogether. This would mean that the common law presumption that Parliament does not intend to act in breach of international law, including treaty obligations, would apply. Where legislation was ambiguous, and a meaning that could reasonably be attributed to it was compatible with the Convention and other meanings were not, the compatible meaning would be preferred (para 239).
- *Option 2*- repealing s 3 and replacing it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. Appendix 2 sets out two possible drafts for illustrative purposes at p.98.

When legislation is incompatible with the Convention rights: ss 4 and 10 of the HRA

The Proposals consider amending one aspect of the declaration of incompatibility procedure (para 249). Under the HRA, declarations of incompatibility can only be made in relation to secondary legislation (like Regulations and Orders) where the Act of Parliament under which the legislation is made requires the incompatibility. Section 4 does not otherwise apply in

relation to secondary legislation. So, under the law as it stands, the courts can, amongst other things, declare secondary legislation invalid or disapply the provision in question: see e.g. *R(C) v Secretary of State for Justice* [2009] QB 657; *R(T) v Chief Constable of Greater Manchester Police* [2015] 1 AC 49; *R(R) v Secretary of State for Work and Pensions* [2019] 1 WLR 6430. The Government wishes to explore whether there is a case for providing that declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation (para 250).

However, the justification for amending the impact of s 4 on secondary legislation is difficult to understand. If the Government accepts that s 3 should not be repealed, then there is no principled reason to pursue this Proposal.

The power to make quashing orders

If enacted, Clause 1 of the Judicial Review and Courts Bill will allow courts to make quashing orders in judicial review proceedings by suspending the effects of the order for a limited period of time, or removing or limiting any retrospective effect of the quashing. The clause sets out a presumption that these powers will be exercised if it appears to the court that including such provision would, as a matter of substance, offer adequate redress. Clause 1(8) specifies a number of factors to which the court is required to have due regard (such as the nature and circumstances of the relevant defect; any detriment to good administration that would result from exercising or failing to exercise the power; the interests or expectations of persons who would benefit from the quashing of the impugned act; the interests or expectations of persons who have relied on the impugned act; so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act; or any other matter that appears to the court to be relevant).

Clause 1 will affect the available remedies where secondary legislation is held to be incompatible with the Convention rights in judicial review proceedings. The Independent Review recommended that these powers should be made available in all proceedings where secondary legislation is challenged under the HRA.

The Government welcomes views on the Review's recommendation (para 252). The approach to be taken may well depend upon whether the Bill of Rights is to be treated as ordinary legislation or whether it is still be accorded some constitutional status like the HRA- as eg in *Brown v Stott* [2003] 1 AC 681 at 703 where Lord Bingham described the HRA as being an "*important constitutional instrument*".

Remedial orders

Where a domestic court has made a declaration of incompatibility or there is an adverse ECtHR judgment, the incompatibility can be remedied by subsequent primary legislation or by a remedial order under s 10 of the HRA. Eleven remedial orders have been made under the HRA since 2000- three under the urgent procedure for making and

commencing an order before a draft is approved by Parliament.

The Government believes there should be a strong presumption in favour of using more commonly used parliamentary procedures when legislating to address legislative incompatibilities with Convention rights and wants to retain remedial orders under the urgent procedure only, to addressing urgent (and compelling) cases where leaving the law unamended, even for a short period, could be damaging (paras 253-258).

This recommendation could well delay rectifying Convention incompatibilities. This has damaging constitutional implications for s 3 cases but may have more significant implications for ECtHR judgments. The UK's 14 year delay in resolving Prisoners' Vote case (*Hirst No 2*) undermined the whole Strasbourg system. For instance, in 2017 Russia breached its obligation under Article 46(1) of the Convention by failing to abide by Strasbourg decisions- when its Constitutional Court ruled that it would be "unconstitutional" to pay Euros 1.1b to Yukos's shareholders, as required by the ECtHR in *OAO Neftyanaya Kompaniya Yukos v Russia*, Judgment 31 July 2014).

Statement of compatibility: s 19 of the HRA
Section 19 requires the minister introducing a Bill into Parliament to express a view on the compatibility of the legislation with the Convention rights, by making and publishing one of two statements before Second Reading of the Bill in each House. The minister must state either in his or her view that the Bill is compatible with the Convention rights (s 19(1)(a)), or that, although he or she is unable to make that statement, the government, nevertheless, wishes Parliament to proceed with the Bill (s 19(1)(b)).

The Government takes the view that a parliamentary debate under s 19 strikes the right constitutional balance between Government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies. The Proposals (paras 259-261), therefore want to consult on whether s 19 sets out the appropriate test, and, if not, how might it be improved.

Application to Wales, Scotland, and Northern Ireland
The Government will consult on whether the Bill of Rights strikes the correct balance between guaranteeing rights protection to all people across the United Kingdom and allowing for difference in the application and implementation of the rights framework according to the needs and preferences of the nations of the UK (paras 263-264).

Public authorities- s 6 of the HRA
The Government believes that the range of bodies and functions to which the HRA applies is broadly right and intends to maintain this approach. Nonetheless, it wishes to consider whether there is alternative drafting which might achieve broadly the same application of obligations under the Bill of Rights, but in a way which offers more certainty or clarity (paras 266-269).

Section 6(1) of the HRA makes it unlawful for a public authority to act incompatibly with rights, and the Bill of Rights will continue this approach. The Government also attaches importance to public authorities not being subject to litigation where they are acting to give effect to the direction and will of Parliament. This is recognised in section 6(2) of the Human Rights Act, which provides that an act will not be unlawful if the public authority did not, as a result of primary legislation, have any discretion compatibly with the Convention rights. The Government argues that this means s 6(1) could still require courts to compel the public authority to act in a way that is contrary to the clear will of Parliament.

The Government says that its proposed changes to s 3 will help to give public authorities confidence about how their duties will be interpreted by the courts (paras 270-273). But the Proposals suggest two further ways in which this problem might be tackled:

- *Option 1*- wherever public authorities are clearly giving effect to primary legislation, then they cannot be deemed to be acting unlawfully (para 274).
- *Option 2*- retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3 (paras 274-275).

However, the proposed changes to s 6(2) can only be justified if s 3 is amended. Importantly, however, the Government has stated that it is minded to agree with the Independent Review that s 3 should not be amended (para 237). It is, therefore, unclear whether it will pursue the proposed amendments to s 6(2).

Extraterritorial jurisdiction

Article 1 of the Convention provides that contracting states shall secure to "*everyone within their jurisdiction*" the rights and freedoms set out in the Convention. The HRA is, therefore, silent on its impact on activities abroad, leaving this to be determined by the courts. The Proposals describe how HRA and ECtHR case law has created uncertainty for the armed forces, because of the complex legal arguments involved (pages 44 to 45 of the Proposals).

The Government accepts that the extraterritorial application of the Convention means there is no unilateral domestic legislative solution to this issue- so that drafting the Bill of Rights which applies just to a restricted territorial basis will not resolve the issue at the international level. The Government argues that this issue needs to be addressed in Strasbourg, itself (paras 277-281). But Article 1 is unlikely to be amended by the Council of Europe promulgating a new Protocol.

Qualified and limited rights

The Proposals launch a full frontal attack on the way in which the HRA addresses qualified rights or restrictions on rights under Articles 5 and 6 (paras 282-291). It fundamentally questions the Court's approach to proportionality:

> *We consider that the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest. We want*

decisions regarding human rights to be taken in a fair and balanced way, which consider the needs of the individual who has claimed that their rights have been infringed but also ensures due consideration of the rights of others and the diverse interests of society as a whole

The Government wishes to give more guidance on how to balance qualified and limited rights and suggests two options:

- *Option 1*- clarify that when the courts are deciding whether an interference with a qualified right is "necessary" in a "democratic society," legislation enacted by Parliament should be given great weight, in determining what is deemed to be "necessary."
- *Option 2*- require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

Two draft clauses are contained in Appendix 2, p.100

Both draft clauses could potentially change the outcome a court will reach in particular cases significantly. But a statutory obligation to give great weight to Parliament is unlikely to breach Convention principles.

Deportations in the public interest

The Government believes that public confidence in the HRA has been eroded when foreign criminals threaten to evade deportation, because their human rights are given greater weight than the public's safety and security. The Government will not deport an individual on Article 3 grounds. However, it intends to ensure that deportations of foreign nationals in the wider public interest are not systematically frustrated by new and expanding human rights claims, including under Articles 5, 6 and 8 of the Convention (para 292). Several Proposals are suggested:

- one option would ensure that the Bill of Rights addresses the limits on HRA grounds to prevent deportation – either through an overarching provision specifically addressing deportation, or on an article-by-article basis. For example, it could be clarified that certain rights, such as the right to family life, cannot prevent the deportation of a certain category of individuals, for example, offenders sentenced to a term of imprisonment, or persons involved in terrorist related activity (para 294).
- An alternative would be to ensure the courts respect Parliament's approved criteria that balance the public interest in deportation strongly against Convention rights. For example, if Parliament has passed primary legislation, or approved immigration rules that properly balance these matters, then deportation should be prevented only in accordance with that statutory scheme (para 295).
- A further alternative is to prescribe that deportation decisions can only be

overturned if the Home Secretary has obviously failed to take account of human rights considerations when deciding that deportation is in the public interest. The courts would not be permitted simply to substitute their own views for those of the Home Secretary (para 296).

Whether or not the Bill of Rights breaches ECtHR principles will depend on the way the legislation is drafted. But provided the domestic courts is entitled to consider all of the facts and circumstances in a particular case, the ECtHR is unlikely to overturn that decision.

Illegal and irregular migration

The Government also argues that elements of its Proposals for deportation apply equally to removing failed asylum seekers, and those who overstay their right to remain (paras 297-298). The second and third options could be applied to asylum removals; and the first could capture these cases insofar as the sentence length threshold is met. Other proposals in this consultation could also facilitate asylum removals, notably those that constrain the expansion of rights outside democratic control.

Remedies and the wider public interest

The Government believes that the compensation system can be used to make sure that the wider public interest is properly protected alongside individuals' rights (paras 299-301). It recommends that the Bill of Rights could set out several factors in considering when damages are awarded and how much including:

- the impact on the provision of public services;
- the extent to which the statutory obligation had been discharged;
- the extent of the breach; and
- where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

IV. Emphasising the role of responsibilities within the human rights framework

The Government aims to build an element of responsibility explicitly into the Bill of Rights by permitting UK courts to consider the claimant's conduct in deciding whether to award a remedy by empowering it to consider relevant past conduct, such as whether the claimant has respected the rights of others (para 307-308). The consultation is asked to consider:

- *Option 1*- that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
- *Option 2*- that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Under Article 46 of the Convention, States Parties are required to implement final judgments of the Strasbourg Court in cases brought against them. The implementation of judgments is overseen by the Committee of Ministers of the Council of Europe. The Government strongly believes that democratic responsibility for legislation, and the power to legislate, lies ultimately with Parliament and that this should be reflected in our arrangements for responding to Strasbourg judgments (paras 309-312).

The Government believes there should be a formal way for Parliament to play a stronger role in responding to Strasbourg cases when the Court makes a final adverse ruling against the UK by ensuring there could be a formal requirement for government to lay notice of such judgments before Parliament, for the purposes of enabling general Parliamentary consideration and allowing ministers to table a motion allowing for a specific debate, which may culminate in a vote where it is deemed appropriate. The Government intends that legislation affirms Parliamentary sovereignty in the exercise of the legislative function, in the context of adverse Strasbourg rulings (paras 313-315).

The Government is, therefore, proposing to change the procedure for giving effect to adverse ECtHR judgments. However, these changes will not affect the obligation under Article 46(1) of the Convention to abide by any ECtHR judgments.

Conclusion

The Proposals described in its ***Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998*** are designed to enact legislation which will work very differently from the HRA. The extent of those differences and the potential for conflict with the ECtHR will only become clear once the Government publishes its draft legislation.

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