

Submission to the Joint Committee on Human Rights

20 years of the Human Rights Act

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1. Policy Exchange's Judicial Power Project considers the scope of judicial power within the British constitution. The ongoing expansion of judicial power increasingly corrodes the rule of law and effective, democratic government. The Project seeks to address this problem – to restore balance to the constitution – by recalling and making clear the good sense of separating judicial and political authority.

Summary

2. The Human Rights Act 1998 (HRA) is an important part of our constitution. It is right for Parliament to reconsider the merits of the HRA's enactment, to review the way in which the Act has operated in practice, and to decide whether it ought now to be amended or repealed. In our view, the HRA should never have been enacted – it threatened to compromise the rule of law, to politicise the courts, and to distort democratic deliberation, and each of these threats has been realised. In addition, while there was a rational case for the HRA as enacted, albeit not a case we find persuasive, the HRA as it has developed over the last 20 years increasingly departs from that case, which compounds the constitutional objections to its continuing legal force. The HRA's extra-territorial application and the willingness of domestic courts to go beyond Strasbourg in interpreting and enforcing convention rights are particularly problematic trends. We recommend that Parliament repeal the HRA or, at a minimum, move to amend the Act to help restore constitutional principle.

Three mistakes about the HRA

3. Defences of the HRA commonly trade on three related mistakes. The first mistake is to confuse the merits of the HRA with the question of whether the law should secure human rights. It is undeniable that the law should respect, promote and secure human rights. The question is *how* best to realise this end and in particular whether the HRA helps or hinders the realisation of rights and whether it does so by acceptable means.

4. The second mistake is to think that before the HRA was enacted human rights were not protected in the UK or were somehow in constant danger of violation. Prior to the HRA's enactment, the UK, like other similar common law countries, had a long and enviable (if inevitably imperfect) record of securing rights, and otherwise governing well, by way of parliamentary democracy. In this scheme, courts had a vital but narrow task, a task which the HRA has transformed (subverted) in important and problematic ways.

5. The third mistake is to think that the HRA is the main way in which our rights are now secured or protected. Human rights are primarily secured through the vast corpus of ordinary law, whether common law or statute, law for which Parliament is responsible. For example, the main protection for the right to life in the UK is not Article 2 of the European Convention on Human Rights (ECHR), incorporated into our law by way of the HRA. Instead, the main protection is the ordinary criminal law, especially the law of murder, as well as a host of other laws regulating acts that might imperil life. If Parliament were to repeal the HRA this would not abrogate the right to life. At best, the enactment of the HRA helps the law secure rights; it cannot conceivably be the main, or most direct, way in which this is achieved.

6. In evaluating the HRA, the question is not whether one is for or against human rights, but whether the HRA is a constitutional change which helps us protect rights without unacceptable side-effects for fundamental constitutional principle. In our view, there is no reason to think that the HRA helps the UK protect rights better than the pre-HRA alternative and the Act clearly compromises very important constitutional principles.

The reason for the HRA

7. In our view, Parliament should never have enacted the HRA. However, there was a rational case to be made for its enactment, namely that the UK faced a continuing problem of litigation before the European Court of Human Rights (ECtHR). The ECtHR often held UK law and practice to violate the terms of the ECHR, which was sometimes politically embarrassing and caused diplomatic difficulty. The ECtHR's rulings were often unjustified because the Strasbourg Court had clearly and openly departed from the terms of the ECHR, imposing newly invented legal requirements on states.

8. It would be open to the UK to refuse to comply with extravagant, unprincipled judgments of the ECtHR on the grounds that they constitute a fundamental departure from the terms of the ECHR. Lord Mance, in two Supreme Court judgments in 2014 and 2015, contemplated a similar principled defiance of wayward international tribunals. However, it is understandable that the UK sometimes conforms to such judgments to minimise diplomatic difficulties.

9. The best case for the HRA is that it helps minimise the prospect of adverse ECtHR rulings. This is the sense of the slogan “bringing rights home”. The HRA was unnecessary as a means to ensure that human rights were protected and promoted in our law but it was necessary if our legal system was to anticipate and avoid the Strasbourg Court later ruling that our law breached its creative interpretation of the ECHR. This rationale is reflected in the structure of the HRA which works by introducing convention rights into our law and requiring those rights to be interpreted having taken into account Strasbourg’s case law. The mechanisms in the HRA, including section 3 (rights-consistent interpretation) and section 4 (power to declare legislation incompatible with convention rights), are best understood as ways to maximise conformity to the ECtHR’s case law and to signal to Parliament that the law as it stood was likely to be held incompatible by Strasbourg in subsequent litigation.

10. The HRA is in many ways an astonishing Act. It introduces vague convention rights and vague Strasbourg jurisprudence into our law. It requires other statutes somehow to be read consistently with these vague rights, the working out of which requires domestic courts to make political judgments (about what is or is not proportionate, about what is justified in a free and democratic society) and implicates courts in political controversies about how rights should best be protected. In enacting the HRA, Parliament was clearly willing to compromise existing constitutional principle to some extent. The Act imposes on our judges a radical new set of responsibilities in ways that would otherwise have been thought highly improper. Perhaps the saving grace of the HRA, in its originally conceived structure, was that the political role of UK judges would be minimised insofar as they understood their responsibility not to be to advance their own understanding of what human rights require but rather to follow the ECtHR’s lead and thus to minimise the likelihood that the UK would later be found to have breached the ECHR. This understanding of the HRA makes sense of its enactment, explains to some extent why Parliament chose to tolerate breaches of constitutional principle, and minimises the damage the HRA does to the idea of disciplined judicial power in our constitution. This analysis has been advanced by leading judges, including Lord Justice Sales (who from January 2019 will serve on the Supreme Court) and Sir Patrick Elias, formerly a Lord Justice of Appeal.

11. However, if the HRA was enacted primarily as a device to encourage Strasbourg compliance, as we suggest, it was clearly also an engine for political litigation and an instrument by which domestic courts can and have expanded their power. The impact of the HRA is best understood by looking in fact at how it has changed our legal order.

How the HRA in fact operates

12. The HRA as it operates today is not entirely consistent with what was enacted. This is partly because of imprecision in enactment, which left some matters open for judicial interpolation, and partly because of changing judicial opinion about how the HRA should be interpreted. The shift over time matters because it is the HRA *as it has become* that Parliament must now consider and evaluate.

Retrospective application

13. The HRA does not explicitly address its application to events that took place before enactment, although by implication its default application is prospective only. In a series of cases shortly after the Act came into force, the courts held that the HRA applied to events that came before, notwithstanding that this departed from the presumption of non-retrospectivity and was difficult to square with the structure and language of the Act itself. One implication of this change was to impose, after the fact, the ECtHR's ever-changing standards for investigation on deaths that long predated the HRA's enactment. The Appellate Committee of the House of Lords recognised their error in 2004, reversing its earlier holding about the temporal application of the Act, which is now held to apply to events that post-date enactment. Disturbingly, this sensible reading has been effectively undone, in relation to deaths caused by state agents, by an obscure later judgment of the ECtHR, which, despite the dissent of the late Lord Rodger, the Supreme Court has followed.

Extra-jurisdictional application

14. The HRA does not specify where it applies. Article 1 of the ECHR provides that the rights affirmed in the ECHR are to be secured to all within the member state's jurisdiction. The HRA does not incorporate Article 1. In 1998, when the HRA was enacted, it was clear that jurisdiction was a primarily territorial concept, with only very limited extra-territorial application. This was made even clearer by the ECtHR in *Bankovic* in 2002. In *Al-Skeini*, a majority of the House of Lords concluded that the HRA should apply to all those within the UK's jurisdiction, which meant some, but very limited, extra-territorial application. Lord Bingham, in minority, reasoned that the Act should not have any extra-territorial effect at all, because of the presumption that statutes only apply within the UK. The majority reasoned instead that the HRA should be understood to have the limited extra-territorial effect contemplated in the ECHR and confirmed in *Bankovic*. But in the next stage of the *Al-Skeini* litigation, the ECtHR abandoned this limited understanding of jurisdiction and adopted a standard that has extended the reach of the ECHR to the foreign battlefield. The HRA has duly been interpreted to follow suit, giving rise to thousands of lawsuits from Afghan and Iraqi citizens, including many combatants. This has taken the practical reach of the HRA a very long way from the position at enactment or throughout the first decade of its operation.

The changeable content of convention rights

15. The meaning of convention rights has changed throughout the HRA's operation, with UK courts often changing how they understand rights, especially in response to new ECtHR rulings. One might say, reasonably enough, that the ECtHR's living instrument doctrine was firmly established by 1998 and in enacting the HRA Parliament was well aware that it was incorporating a changing body of rights. This is true but rather confirms that what had been adopted were not human rights as such but rather the changing opinion of a changeable court (or series of courts) as to what rights now require. Whether the HRA has been successful in protecting rights turns on detailed evaluation of the merits of this changing, inconstant and inconsistent, body of case law, the merits of which are inevitably political. It is false and incoherent to equate judicial rulings with what rights themselves truly require.

Going beyond Strasbourg

16. Early on in the life of the HRA, Lord Bingham articulated the so-called "mirror principle", whereby UK courts would understand convention rights in the same way that the ECtHR understood them. This principle, much criticised as it is, fits well with the rationale for the Act and has the advantage that it minimises domestic judicial discretion. The principle has been qualified in *Horncastle*, where our courts have contemplated at least a temporary departure from Strasbourg case law, where the ECtHR has misunderstood our law. More interestingly, and more worryingly, however, the principle has also been qualified, over the last ten years, by the willingness of many of our judges now to use the HRA to impose obligations on Government and on Parliament which go well beyond the standards the ECtHR takes to be required. This willingness to go beyond Strasbourg is a misuse of the structure of the HRA, in which some of our judges undermine settled law or intervene gratuitously in political controversy, not to minimise the prospects of the UK being held to be in breach of its international obligations but rather to advance their own views. This can be seen: in *Nicklinson*, where some judges were willing to denounce the UK's ban on assisted suicide despite it clearly being ECHR-compatible; in *Tigere*, where the majority imposed an extravagant new right to education; and in two very recent judgments arising out of Northern Ireland, in each of which a majority declared legislation a violation of rights despite being ECHR-compatible.

17. This trend in the Supreme Court, which is now increasingly well-established, is a major distortion of the HRA, compounding the damage that Act does to the constitution. Some might suggest that this trend is merely an example of UK courts contributing to European rights jurisprudence. This suggestion is mistaken. The trend is instead an example of our courts misusing the HRA to change the law or to cajole the political authorities to advance the judges' own preferences. Less objectionable, but still problematic, is the willingness of our courts at times to try to get ahead of Strasbourg, anticipating and thus adopting a problematic development before the ECtHR in fact makes such a decision. An example is *Smith v Ministry of Defence*,

where the Supreme Court anticipated what the ECtHR might later decide but had not yet decided. The problem here is that the Government has no recourse to the ECtHR and thus cannot easily contest the domestic judicial ruling. It would be better, as Lord Brown, then on the Supreme Court, noted, not to attempt to get ahead.

Rights-consistent interpretation

18. One of the HRA's main devices is the section 3 duty to interpret legislation consistently with convention rights when it is possible to do so. The meaning of this duty, and thus of the bounds of rights-consistent interpretation, have been much discussed. It is similar to the equivalent provision, section 6, of the New Zealand Bill of Rights Act 1990, on which the HRA is partly modelled. However, whereas section 6 has been interpreted only to permit reasonable interpretations, section 3 has been interpreted and developed to be a much more radical instrument. The highpoint of its misuse may be *R v A (No 2)*, where the House of Lords undercut entirely a recently enacted rape-shield provision, restoring the free judicial discretion to allow cross-examination of complainants in sexual offence cases which discretion Parliament had deliberately curtailed. The leading case on the meaning of section 3 is *Ghaidan*, in which the House of Lords expressly ruled out the need for ambiguity before a rights-consistent interpretation may be imposed. Indeed, the Law Lords contemplated and licensed departure from the words of the other statute *and* from what the legislature intended in enacting those words. On this view, section 3 authorises judicial lawmaking, with any statute open to amendment by the courts, provided the amendment is not too far-reaching. There are more sensible readings of section 3 available, but *Ghaidan* remains the leading case. In practice, it is very difficult to predict how or whether the courts will use section 3 to undercut a statute's intended meaning and effect. Regulations are often invalidated by this means and statutes are at times given inconsistent or artificial meanings. The limits of its application are more practical and political than legal.

Deference to other institutions

19. Applying the HRA requires courts to decide whether, and if so how far, to defer to the reasoning and decisions of other institutions, including Parliament, ministers and other bodies. The judicial willingness to defer varies wildly from case to case and from judge to judge. The division in the Supreme Court case of *Quila* is revealing, with a majority of the Court willing simply to reject out of hand the Home Secretary's view that a ban on entry for settlement of foreign spouses aged under 21 was a reasonable way to combat the evil of forced marriages. It is hard to answer Lord Brown's concern, in the minority, that the majority simply imposed their own view on a very tricky policy question, when they had no reason to know better than the Home Secretary. Likewise, Lord Justice Elias, as he then was, makes clear in a careful review of the impact of the HRA, that some judges are much more likely than others to take

seriously the competence and legitimacy of other institutions. The HRA has not entirely abolished the common law judge's long-standing concern about the propriety of making political judgments, but it has forced all our judges to engage in some questions for which they are ill-equipped, and it has encouraged some overconfident judges freely to overrule and interfere with other public bodies.

Undermining the Rule of Law

20. The HRA compromises the rule of law by unsettling the clarity and precision of our ordinary law. It does so by introducing into our law the convention rights, which are not framed with the precision one would require from ordinary legislation. It also heightens the relevance in domestic law of the ECtHR's case law about those convention rights which is also often vague, as well as unprincipled and inconstant. This body of legal propositions is not consistent with the rule of law. . The content of the rights themselves turns on a changeable body of case law, which is rife with judicial decisions about matters that are highly political and are not properly the subject of judicial decision.

21. The significance of the HRA is in part that it devalues statutes as a source of law, making case law, of our own courts and also of the ECtHR itself, relatively more important as a source of law. This is not good for the rule of law. The extent to which the resulting body of law is changeable and inconsistent is clear when one studies the twists and turns of the law surrounding the most commonly litigated convention rights, including the Article 8 right to respect for private life and the Article 6 right to a fair and public hearing. Our courts have often noticed the inadequacies of ECtHR rulings in both domains and have at times pushed back. This is understandable and may at times be desirable, but the whole state of affairs is clearly unsatisfactory and is very far from enforcement of clear, unquestionable right.

22. The HRA implicates judges in reasoning and action that is well beyond their competence and for which, aside from the enactment of the HRA itself, they have no legitimacy. Parliament should not require judges to undertake such reasoning or make such decisions. It should take responsibility itself for deciding what the law should be, and should not permit (or require) courts to undercut its decisions. Likewise, it is a mistake for Parliament to license courts to quash government decisions on grounds that require judges to consider the merits of policy-making or to consider questions that would otherwise be thought non-justiciable and inapt for determination by litigation. The problem is bad enough when judges conform carefully to the limits of the HRA as enacted. It is much worse when they go beyond its enacted scope and advance their own novel understandings of rights. Further, the problem does not stop with litigation directly involving the HRA itself. It is undeniable that the HRA has helped change the culture of judicial review of

administrative action more generally, with judges increasingly less careful about observing the limits of institutional competence and comity.

23. The HRA is a standing risk to legal certainty, with section 3 very often being a ground on which courts may twist and subvert the meaning of statutes or invalidate regulations altogether. There is often little assurance in any particular cases that the court will or will not deploy this technique. The interpretive technique which the HRA introduces, especially as developed by the courts since enactment, undercuts the rule of law. Thus, the Act often has the effect of weakening established legal rights. The High Court of Australia and the Supreme Court of New Zealand have both considered carefully the practice of the UK courts in relation to the HRA and have decided not to follow their lead. That is, in the family of statutory bills of rights, the HRA is clearly an outlier, authorising radical interpretations of other statutes and proving to be the most indifferent to maintenance of the rule of law.

Undermining Parliamentary Democracy

24. The HRA compromises parliamentary democracy, placing political authorities under pressure to amend the law, when a court declares it to be incompatible with convention rights. The declaratory jurisdiction is certainly much better than an outright power to quash legislation, of the kind that Canadian and American courts enjoy. However, the declaratory power very often places improper pressure on one side of a political controversy, encouraging strategic recourse to the courts by parties in political dispute and encouraging some judges to advance their policy preferences (for a lifting of the ban on assisted suicide for example) by way of HRA litigation. The risk of the public misunderstanding the effect of a declaration is high, as indeed is the risk of misunderstanding by politicians, especially those who are not legally qualified. When a declaration has been made it is often reported that legislation has been found to be unlawful, which is misleading, if understandably so. In truth, the impugned legislation is fully lawful and constitutional and Parliament need not change the law. The court might well be wrong about the merits of the legislation. There should be no presumption, let alone a convention, that where a court issues a declaration under section 4 that the relevant legislation ought to change. However, the risks of misunderstanding are accentuated by the tendency of many legal commentators to denounce the decision by Government or Parliament not to change the law, in response to a declaration, as somehow contemptuous of the rule of law. Likewise, the risks of misunderstanding of a declaration, and consequent distortion of democratic deliberation, are greatly sharpened by the trend noted above, in which our judges are increasingly willing to go beyond Strasbourg in the course of HRA litigation.

25. We are stern critics of the HRA. But much of our analysis of the Act's nature and indeed of its constitutional consequences is shared by senior judges, who repeatedly

stress the extent to which the HRA has empowered domestic courts in relation to executive and legislature. Some judges are relaxed about this empowerment, others are delighted, and some are clearly concerned. It is clear that the HRA has sharply changed how many judges understand their constitutional role; the spill-over effect into judicial culture more widely has been very real. In short, the enactment of the HRA and its development over the last 20 years has unbalanced the Westminster constitution, requiring and encouraging courts to play an over-sized role in our public life, with damaging consequences for the rule of law, for the separation of powers and for the integrity of parliamentary democracy. Some might say that this is a cost worth paying to protect human rights from abuse. Our response is to say that the HRA was and is unnecessary to protect human rights, that it does not protect rights as such, but rather advances the preferences of judges (whether European or domestic), and that, ironically and perversely, it undercuts the rule of law, good government, and parliamentary democracy, which have long been the firm foundations on which the UK has secured human rights.

Options for reform

26. It would be reasonable for Parliament to repeal the HRA. The question of when the HRA is best repealed may turn on the dynamics of Brexit and the implications for the devolutionary settlements. These are important political considerations. Our point is that constitutional principle confirms that repealing the HRA would help restore the balance of the constitution, even if Parliament would need to take care to avoid courts recreating the substance of the HRA by way of novel common law rights. Repealing the HRA would not end the UK's subjection to the ECtHR of course but it would end the direct incorporation of problematic Strasbourg case law and strengthen the UK's capacity to defy that lawless court.

27. In the alternative, Parliament should amend the HRA. It would be reasonable for Parliament to restore the original design of the Act and to end the ten-year experiment, which is gathering pace, in going beyond Strasbourg. It would be reasonable also, if rather more likely to encourage friction with the ECtHR, for Parliament to require our courts in applying the HRA to confine themselves to interpretations of convention rights that are consistent with the text of the ECHR and the intentions of the signatory states. Section 3 should be amended to rule out radical misinterpretation of the kind contemplated in *Ghaidan* and section 4 should be amended also to make clear that the declaration does not establish that the impugned legislation is neither unlawful nor necessarily unreasonable. Parliament should also amend the Act to end its application to events that pre-date enactment and to limit its application to the territory of the UK or to the territorial understanding in *Bankovic*. There is good reason also for Parliament to specify how particular convention rights should be understood and to act in advance to protect its

legislation from being undercut by HRA litigation. This was the model reasonably adopted by Parliament in the Immigration Act 2014.