

Against Executive Amendment of the Human Rights Act 1998

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Richard Ekins



Human Rights Act 1998
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AMENDMENT OF

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Executive summary

On 20 March 2020, three days before the UK went into lockdown, the Joint Committee on Human Rights (JCHR) recommended that the Houses of Parliament approve the draft Human Rights Act 1998 (Remedial) Order 2019, which had been laid before Parliament on 15 October 2019. The JCHR concluded that there were no reasons why the draft order should not be agreed to by both Houses of Parliament and recommended that the draft order be approved. This conclusion was unsound. The Committee's recommendation – and the Government's draft order – should be rejected. The JCHR's responsibility is to consider whether it should bring the special attention of the Houses to any remedial order on the grounds, *inter alia*, "that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made". This paper argues that there are strong reasons to doubt that the draft Human Rights Act 1998 (Remedial) Order 2019 is *intra vires* and the draft order is an unusual and unexpected use of the statutory power under which it purports to be made.

The draft Human Rights Act 1998 (Remedial) Order 2019 was laid before Parliament on 15 October 2019. It replaces, and expands, an earlier draft order, proposed on 16 July 2018, which the JCHR had argued should be widened. The draft order is purportedly made under authority of section 10 of the Human Rights Act 1998 (HRA), which enables ministers to amend rights-incompatible legislation by executive order. The draft order purports to amend section 9(3) of the HRA, a section which imposes a statutory prohibition on a court making an award of damages in proceedings under the Act in respect of a judicial act done in good faith, save to the extent that damages are required to compensate a person for breach of Article 5(5) of the European Convention on Human Rights (ECHR). Article 5 is the right to liberty and security and Article 5(5) requires an enforceable right of compensation for unlawful arrest or detention. The statutory bar on awarding damages in respect of good-faith judicial acts is intended to preserve the principle of judicial immunity and thus to uphold judicial independence. The draft order was proposed in response to a judgment of the European Court of Human Rights in 2016, *Hammerton v UK*,¹ which had held that the failure of UK courts to award damages for a judicial act that involved breach of the Article 6 right to a fair trial meant that the UK had breached the Article 13 right to an effective remedy.

The draft order will not come into force unless and until it is approved by resolutions of each House of Parliament. This paper argues that the

1. (Application No. 6287/10), 17 March 2016

draft order falls outside the scope of section 10 of the HRA and is thus *ultra vires*. It should not have been put before Parliament and the JCHR should have brought the attention of the Houses of Parliament to its doubtful lawfulness. Properly understood, section 10 does not authorise ministers to amend the HRA itself. This statutory power, which is a so-called Henry VIII clause, should be interpreted only to apply to legislation other than the HRA, which is the empowering statute. The alternative interpretation cannot be squared with the firm practice of construing Henry VIII clauses narrowly and puts the integrity and coherence of the scheme of the HRA in doubt. The Government's understanding of the scope of section 10 of the HRA, to which the JCHR ought to have objected, would enable ministers to transform the Act and to disrupt the careful provision Parliament made for how and to what extent the ECHR is to be incorporated into UK law.

The draft order is very likely *ultra vires*. It is also of doubtful constitutional propriety. Even if lawful, amending the HRA itself would be an unusual and unexpected use of the section 10 power. If section 9(3) is to be amended, the Government should introduce a Bill to this effect, which would then be open to amendment. Neither the Government nor Parliament should simply assume that section 9(3) must be amended or repealed. The *Hammerton* judgment is open to question and the Supreme Court of the United Kingdom would not necessarily consider itself bound to comply in these circumstances; it is a mistake for Parliament and Government to be more compliant. Whether to amend section 9(3) raises important questions about judicial independence which warrant proper discussion and should not be bypassed by executive order, and JCHR acquiescence, especially when this consensus is premised on the dubious assumption that the HRA simply must be amended.

The Government should withdraw the draft order and the JCHR should make a further report, addressing properly the question of *vires* and the unexpected and unusual use of the power. If the Government presses ahead, the Houses of Parliament should withhold approval.

Damages under the Human Rights Act 1998

The Human Rights Act 1998 (HRA) partly incorporates the European Convention on Human Rights (ECHR) into UK law. The incorporation is only partial for the Act gives effect to the ECHR on the Act's own terms, setting out a scheme for how the terms of the ECHR, as well as the case law of the European Court of Human Rights (ECtHR), are to have effect in UK law. The Act does not provide that rights under the ECHR are to have effect in UK law without further enactment, in contrast to the way in which the European Communities Act 1972 incorporated rights under the European treaties. Section 1 defines "Convention rights" for the purposes of the Act to be Articles 2 to 12 and 14 of the Convention and Articles 1 to 3 of the First Protocol, all read with Article 16 to 18 of the Convention. Important provisions of the Convention, including Article 1 and Article 13 are omitted. These "Convention rights" are set out in Schedule 1 of the Act. Section 2 requires the courts, in deciding any question in relation to a "Convention right" to "take into account" the case law of the ECtHR insofar as the domestic court considers it relevant to the proceedings in question.

Section 6 makes it unlawful for a public authority, which includes a court but does not include the Houses of Parliament, to act in a way which is incompatible with a Convention right unless primary legislation, or provisions made under the authority of primary legislation, require such action. When a breach of section 6 is established by way of proceedings under section 7, section 8(1) authorises the court to grant such relief or remedy as it considers just and appropriate. Subsections (2) and (3) stipulate that only certain courts may award damages and that no award may be made unless the court is satisfied, taking into account other relief granted and various other considerations, that the award is necessary to afford just satisfaction to the person in whose favour it is made. Subsection (4) requires the court, in determining whether to award damages and the amount of any damages, to take into account the principles applied by the ECtHR in relation to an award of compensation under Article 41 of the ECHR. However, section 9 makes special provision for proceedings under section 7 that are brought in respect of a judicial act, that is, where it is the act of a court that is alleged to have been rights-incompatible. Section 9(3) provides that:

In proceedings under this Act in respect of a judicial act done in good faith,

damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

Article 5 is the right to liberty and security. It prevents deprivation of liberty other than by lawful arrest or detention and imposes various procedural requirements in relation to arrest and detention. The significance of Article 5(5) is that it states in terms that “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.” Section 9(3) thus makes provision for an award of damages in relation to a judicial act only when this is required by Article 5(5); where the proceedings concern other Convention rights, the Act flatly prohibits an award of damages in relation to a good faith judicial act.²

In *Hammerton v UK*,³ the ECtHR held that there had been a violation of Article 6 of the Convention, the right to a fair trial, and that the failure to award damages in response to the violation itself constituted a breach of Article 13, the right to an effective remedy. The case involved good faith procedural failures by a judge, who, despite the absence of legal representation, found the applicant in contempt of court and committed him to prison for three months. The applicant was released automatically after serving half his sentence. The Court of Appeal subsequently allowed his appeal and quashed the findings and the sentence.⁴ The applicant thereafter brought proceedings for the tort of wrongful imprisonment and breach of his rights under the HRA. The proceedings were dismissed by Blake J on the grounds that good faith judicial acts are immune from suit at common law and section 9(3) of the Act prevents an award of damages for breach of Article 6, or for any breach save for breach of Article 5(5).⁵ Blake J held that a finding of contempt was inevitable and that imprisonment had been more likely than not. It was difficult to say that the applicant would not have been imprisoned but for the absence of legal representation, but it was likely that a much shorter sentence would have been imposed. The ECtHR relied on this finding to assert that the Court of Appeal’s ruling was not itself adequate reparation; some form of financial compensation was required.⁶ The Court repeats this assertion in concluding that there had been a breach of Article 13.⁷ The Court ordered payment of damages to the applicant, which the UK has since paid.

2. *Mazhar v Lord Chancellor* [2020] 2 WLR 541 at [67]

3. (Application No. 6287/10), 17 March 2016

4. *Hammerton v Hammerton* [2007] EWCA Civ 248

5. *Hammerton v UK* at [26-35]

6. *Hammerton v UK* at [136-137]

7. *Hammerton v UK* at [151-152]

The power to take remedial action

Section 10 of the HRA makes provision for a Minister of the Crown by order to make amendments to (including to repeal) legislation. This “power to take remedial action”, as the section is entitled, arises, according to section 10(1), either (a) if a provision of legislation has been declared by a UK court under section 4 of the Act to be incompatible with a Convention right or (b) if it appears to the Minister that, having regard to a finding of the ECtHR made after October 2000 in proceedings against the UK, a provision is incompatible with an obligation of the UK arising from the ECHR. Section 10(2) provides that the Minister who “considers that there are compelling reasons for proceeding under this section... may by order make such amendments to legislation as he considers necessary to remove the incompatibility.” Schedule 2 of the Act makes further provision for remedial orders, including authorising amendment of legislation by order without parliamentary approval in urgent cases (but making provision for the order to lapse if not later approved) or in other cases requiring parliamentary approval before the order comes into force.

Standing Orders require the JCHR to review each draft remedial order and to report to each House whether the special attention of each House should be drawn to the draft Order on any of the grounds on which the Joint Committee on Statutory Instruments may so report in relation to most other statutory instruments and whether the JCHR recommends the draft order be approved.⁸ The grounds on which Joint Committee on Statutory Instruments may report include, *inter alia*, “that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made”.⁹ In 2001, the JCHR set out a statement of principle on the making of remedial orders:

32. As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill. This is likely to maximize the opportunities for Members of each House to scrutinize the proposed amendments in detail. It would allow amendments to be made to the terms of the proposed amendments to the law during their parliamentary passage. (The procedure under section 10 of and Schedule 2 to the Human Rights Act 1998 does not allow for Parliament directly to amend either a draft remedial order or a remedial order—only to suggest amendments.) In many cases it may be easy to remove an incompatibility by means of a short Bill

8. House of Commons, Standing Orders, Public Business 2017, HC 4, 152(B), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, 72(c)

9. Joint Committee on Human Rights, *Making of Remedial Orders*, Seventh Report of 2001-02 Session, para.32

which could be drafted quickly and passed speedily through both Houses. Such a Bill may often be politically uncontroversial. Proceeding by way of a Bill may result in the incompatibility being removed far more quickly than would be possible using the non-urgent remedial order procedure, which (as we point out in our Sixth Report) could allow eleven months or so to elapse between the making of the declaration of incompatibility and the coming into effect of the necessary amendment to the law. Sometimes there may be good reasons for proceeding by Bill even where the matter is more complex. For example, if it is necessary to establish a regime of inspection, regulation, appeal or compensation in order to remove the incompatibility, or to authorize significant expenditure, in order to provide adequate and continuing safeguards for Convention rights, it might be preferable (constitutionally and practically) for those arrangements to be set out in a Bill rather than effected by way of subordinate legislation.

However, the JCHR went on to note, at paragraph 33, that there might be “compelling reasons” to proceed by way of section 10 if, without limitation: an amendment relates to legislation under major review, where a short bill to amend the legislation might be difficult or inappropriate; where the legislative timetable is fully occupied with important or even emergency legislation; where waiting for a slot in the legislative timetable might involve significant delay; or where the need to avoid delay is particularly pressing (as it might be when involving the life, liberty, safety or security of individuals) and the section 10 procedure would be likely to be faster than a short Bill.

The July 2018 proposal for a draft Remedial Order

On 16 July 2018, at which time the Rt Hon. David Gauke MP was Lord Chancellor, the Government announced its intention to amend section 9(3) in order to implement the *Hammerton* judgment.¹⁰ Strictly speaking, this rationale cannot stand because the judgment does not require amendment of section 9(3). It holds there to have been a breach of Articles 6 and 13 and orders payment of damages. The UK has paid the damages in question. The Government's July 2018 paper asserted:¹¹

The UK is obliged under Article 46 ECHR to implement adverse ECtHR judgments against the UK. Legislative change is required to address the finding of a violation of Article 13 ECHR in Hammerton as it was the result of a statutory bar on the award of damages under the existing section 9(3) HRA. No legislative change is required to remedy the finding of a breach of Article 6 ECHR because that resulted from a failure to follow guidance.

However, the UK has already implemented the judgment by complying with the Court's orders. The paragraph above misstates (inflates, overstates) the UK's obligation under Article 46. It might be more accurate to say that there is a risk that the UK will again be held to be in breach if or when subsequent cases (should they arise on the facts) come before the Court. The ECtHR has accepted that article 13 does not require that the Convention itself be incorporated directly into domestic law.¹² Failure to give effect to the *Hammerton* judgment (assuming it is correct) only gives rise to a risk of future breaches of the ECHR which may never materialise.

In any event, a different panel of the Court, or, better, the Grand Chamber, might reach a different conclusion to that in *Hammerton*, especially in view of limitations in how the UK case seems to have been presented and the thinness of the Court's reasoning on vital points. These points include whether the Court of Appeal's vindication of the applicant's Article 6 right amounts to an effective remedy, whether the importance of judicial independence warrants the statutory bar on damages such that the bar does not involve denial of an effective remedy, and whether Article 13 should be interpreted to require an award of damages in relation to Article 6 (or any other Article), when it is only Article 5(5) that requires an enforceable right to compensation.

The July 2018 draft order was narrowly cast. It would have amended section 9(3) to permit an award of damages when proceedings for contempt of court are brought against a person, when that person is deprived of legal

10. Ministry of Justice, *A proposal for a Remedial Order to amend the Human Rights Act 1998*, July 2018

11. Ministry of Justice, *A proposal for a Remedial Order to amend the Human Rights Act 1998*, July 2018, p.7

12. *Smith v UK* (1999) 29 EHRR 493 at [135]

representation by way of a judicial act that is incompatible with his or her Article 6 rights, and when the person is committed to prison but would not have been committed, or would have spent less time in prison, but for the judicial act. The amendment was thus narrowly framed in response to the facts of *Hammerton*. Part of the reason for the narrow framing was the Government's recognition that the point of the statutory bar in section 9(3) is to protect the principle of judicial immunity, which is vital to judicial independence. While there is no question of judges being found personally liable for good faith rights-incompatible action (section 9(4) makes clear that any award of damages would be against the Crown), it is to preserve judicial independence that section 9(3) rules out an award of damages, save in relation to breach of Article 5(5).

The October 2019 revised draft Remedial Order

The JCHR reviewed the Government’s July 2018 draft remedial order and recommended that the order be widened in order to anticipate and to answer any other breaches of Article 13 which might arise from good-faith judicial acts.¹³ In its response to the Joint Committee’s report, on 15 October 2019,¹⁴ by which time the Rt Hon. Robert Buckland QC MP had become Lord Chancellor, the Government maintained that its 2018 draft order was sufficient to address the incompatibility identified in *Hammerton*. However, the Government’s response acknowledged that there might be something to the Committee’s view that section 9(3) might lead to a breach of Article 13 in circumstances other than contempt proceedings. The Government said that it remained of the view that widening the circumstances in which damages are available in respect of good faith judicial acts should be approached with caution in view of the risk to judicial immunity and thus independence. However, it concluded that it would be appropriate to widen the amendment to allow for an award of damages whenever a person is detained and but for a judicial act that is incompatible with Article 6 the person would not have been detained or would not have been detained for so long. The resultant 2019 draft order was laid before Parliament but has not yet been approved by resolutions.

The JCHR issued a call for evidence on the Government’s revised draft order on 16 October 2019, but the period for responses was cut short by the dissolution of Parliament. The JCHR issued a second report on 20 March 2020, where it noted that “the dissolution of Parliament combined with the length of time taken to establish Committees, has meant that we have moved quickly to report so as to scrutinise this draft Order and inform Parliament of our view before the Government moves the Order.”¹⁵ The JCHR welcomed the revised draft order and has recommended its approval.

Section 10(2) provides that the Minister may make an order only when he or she “considers that there are compelling reasons for proceeding under this section”. Are there “compelling reasons” to amend section 9(3) by executive order? This question may seldom be justiciable – it would be for the Minister first, and then the Houses of Parliament, to decide whether there are compelling reasons to proceed under this section. But if the Minister does not himself consider there to be compelling reasons, then the power simply does not arise. The July 2018 paper set out in some detail why the Government thought there were compelling reasons

13. Joint Committee on Human Rights, *Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019*, Fifteenth Report of 2017-19 Session, HC 1457, HL Paper 228, 21 November 2018

14. Ministry of Justice, *Response to the Joint Committee on Human Rights fifteenth report of session 2017-19: Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019*, October 2019

15. Joint Committee on Human Rights, *Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report*, Second Report of Session 2019-21, HC 148, HL Paper 41, 20 March 2020, at [12]

for the order:¹⁶

Under section 10(2) HRA, the Government is required to have “compelling reasons” for making an amendment by way of a Remedial Order. As mentioned above we are required to implement the Hammerton judgment, and must do so via an amendment to primary legislation, due to the existing statutory bar on the award of damages under the HRA. We have considered the best way to do this taking into account likely timescales, the impact of any long delay and the nature of the breach identified by the ECtHR.

The breach of Article 13 ECHR identified by the ECtHR relates to the availability of damages under the HRA for a judicial act done in good faith, and the right to an effective remedy arising out of a specific breach of Article 6 ECHR. While we are not aware of any individuals who are currently affected by this incompatibility, we consider that the nature of the breach, and our obligation to implement the Hammerton judgment, contribute to there being compelling reasons for making the necessary legislative change swiftly.

The alternative approach to a Remedial Order would be to make the amendment by way of primary legislation. However, we consider that the current pressure on the legislative timetable means there is little prospect of finding suitable primary legislation to make an amendment in the near future.

For these reasons we consider that there are compelling reasons for making the amendments by way of Remedial Order. A Remedial Order is the most appropriate legislative vehicle for implementing this judgment promptly while allowing parliamentary scrutiny of the measures proposed.

In its response to the July 2018 paper, the JCHR agreed that there were compelling reasons for the draft order and that use of the non-urgent procedure in Schedule 2 was appropriate. The Committee made no mention of the 2001 statement of principle that it is constitutionally preferable for primary legislation to be amended by way of primary legislation. The Government’s reliance on pressure on the legislative timetable would seem to entail that there will always be “compelling reasons” to proceed by way of section 10. Perhaps the Government tacitly relied on the demands that Brexit placed on the legislative timetable, but note that after the European Union (Withdrawal) Act 2018 was enacted, in June that year, relatively little primary legislation was enacted. Thus, one might question, and the JCHR might reasonably have inquired more closely, whether the Government, in July 2018, had set out truly compelling reasons to proceed by way of section 10.

In its response to the Government’s revised 2019 draft order, on 20 March 2020, the JCHR does return in more detail to the question of “compelling reasons”, noting the apparent inconsistency in the Government’s reasoning about whether a wider change to section 9(3) was

16. Ministry of Justice, *A proposal for a Remedial Order to amend the Human Rights Act 1998*, July 2018, p.8

required.¹⁷ The JCHR concludes that the inconsistency is only apparent, and quotes with approval and agreement “informal correspondence” with unnamed Ministry of Justice officials who assert:¹⁸

“although we initially drafted the amendment to address the narrow facts of Hammerton, which we considered, at the time, adequate to address the incompatibility identified by the ECtHR, we took into account the JCHR’s point that section 9(3) could lead to a similar breach of Article 13 in circumstances other than contempt proceedings (albeit rare circumstances) – leaving the possibility that the incompatibility would not be removed if the Remedial Order did not cover such circumstances. We are therefore of the view that the scope of the Remedial Order is within the vires of s. 10(2) HRA”.

It is striking that it is officials rather than ministers who seem to have given this “informal” assurance. While the *Carltona* principle entails that officials routinely act in the Minister’s name¹⁹, the draft remedial order is made in the Secretary of State’s name by the Parliamentary Under Secretary of State for Justice.²⁰ It follows that the exercise of the section 10 power to make a statutory instrument requires the Minister to have addressed his mind to the relevant considerations. Again: for the draft order properly to be made, the Minister himself must consider there to be “compelling reasons” to exercise the power. The problem may only be apparent, but the JCHR ought not to have been so easily satisfied. There is an apparent inconsistency in the Government’s reasoning, whereby it relies on *Hammerton* to justify the terms of the July 2018 draft order but then relies instead on the JCHR’s speculation about the implications that *Hammerton* may have in other cases to justify the revised order. More importantly, however, the JCHR has not considered the more obvious and pressing question of vires, which is whether section 10 extends to amendment of the Human Rights Act itself.

17. Joint Committee on Human Rights, *Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report, Second Report of Session 2019–21*, HC 148, HL Paper 41, 20 March 2020 at [28]

18. Joint Committee on Human Rights, *Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report* at [29]

19. *Carltona v Commissioner of Works* [1943] 2 All ER 560

20. For further discussion of the making of statutory instruments and the relationship between the Secretary of State and junior ministers, see Richard Ekins and Stephen Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 2020), pp. 36–37.

The draft Remedial Order is *ultra vires*

The Government's July 2018 paper made a brief argument that the draft order is *intra vires*, saying:²¹

We consider that the order-making power under section 10 HRA can be used to amend the HRA itself, given that the purpose of the power is to enable incompatibilities to be addressed.

The JCHR does not consider the question at all. The Government's assertion is highly questionable. The term "a provision of legislation" in section 10 is linguistically capable of being read to include a provision of the Human Rights Act, but might equally be read to convey "a provision of legislation, other than this Act". There are strong reasons to think that the latter proposition was what Parliament intended in enacting section 10. The Government's July 2018 paper simply asserts that because the purpose of section 10 is to address rights incompatibilities it should be read to extend to the Act itself. The purpose of section 10 is undoubted, but it does not follow that every means of achieving the purpose is thereby brought within section 10's meaning and effect, and there are strong grounds to reject the inference that it extends to amending the Act itself.

It bears noting that section 10(6) specifies that "legislation" in section 10 does not include a Measure of the Church Assembly or the General Synod of the Church of England. On the Government's analysis, this limitation could be undone by way of a section 10(2) remedial order if a judgment of the ECtHR suggested that a Measure was inconsistent with the UK's obligations. This point can be generalised. The entire scheme of the Act is liable to be undone by amendment on the Government's reading of section 10. The need for parliamentary approval would provide some protection, of course, but what section 10 puts to each House of Parliament are orders that can only be approved or rejected. And in urgent cases the power may be used to effect a change in the law, the consequences of which are not undone by the withholding of subsequent parliamentary approval for the order.

The narrower reading of section 10 is supported by constitutional principle. Parliament should be slow to authorise a Minister of the Crown, or even Her Majesty in Council, to amend primary legislation by order and slower still to authorise amendment of the statute that confers a

21. Ministry of Justice, *A proposal for a Remedial Order to amend the Human Rights Act 1998*, July 2018, p.8

power to this effect. It follows that so-called Henry VIII clauses – statutory powers to amend primary legislation – are to be read strictly. Where there is any doubt about the scope of the power conferred upon the executive, it should be resolved by a restrictive approach.²² In particular, it must be close to impossible to imagine that Parliament would intend such a power to enable amendment of the power itself. (The Parliament Act 1911 is not a counter-example.²³) The various protections for the established constitutional order that explain the structure of the HRA, including the partial extent of its incorporation of the ECHR (if the Act “brings rights home” it does so in a limited way; again, compare section 2 of the European Communities Act 1972), should not be liable to be swept away by executive order.

This narrow reading is consistent with and supported by the limited express provision that the HRA makes for ministers to amend the Act by order. Section 1(4) authorises the Secretary of State to make amendments to the Act to reflect the effect, in relation to the UK, of a protocol to the ECHR. Section 14(5), which concerns derogation from the ECHR, requires the Secretary of State to make amendments by order to Schedule 3 of the Act consequent on a designated derogation order. Section 15(5), which concerns reservations to the ECHR, authorises the Secretary of State “to make such amendments to this Act” as he considers appropriate to reflect a designated reservation or its withdrawal or amendment. Section 16(7) requires the Secretary of State to make such amendments to the Act as he considers are required to reflect the withdrawal of a designated derogation. Each of these powers is strictly limited by way of the requirement to reflect the terms of a change in the UK’s relationship to the ECHR, changes which are themselves subject to parliamentary control. In other words, the Act makes limited, specific provision for its own amendment by order. This supports the inference that “a provision of legislation” in section 10 does not include “this Act”.

Again: the Act does not simply give effect to the UK’s obligations under the ECHR. Instead, the Act sets out a scheme for giving partial effect to those obligations, a scheme that includes important protections for the UK’s constitutional order. Section 12 provides further protections in relation to Article 10 (the right to free speech) and sections 14-17 make provision for the incorporation of convention rights in domestic law to be subject to the UK’s derogations and reservations to the ECHR. Section 22 establishes that subject to some limited exceptions the Act only applies to acts that take place after its commencement (this has partly been undone in relation to deaths occurring before the Act came into force, but the point otherwise holds). On the Government’s view, it would be lawful to use section 10 to apply the Act retrospectively to acts that took place before it came into force. It would also have been lawful for the Government to amend the territorial scope of the Act, relying on the ECtHR’s *Al-Skeini* judgment,²⁴ even if UK courts had otherwise followed Lord Bingham and concluded that the Act was intended only to apply within the territory of the UK.²⁵ The ECtHR’s *Al-Skeini* judgment relied on its interpretation of

22. *McKiernon v Secretary of State for Social Security* [1989] 2 Admin LR 133, approved by the House of Lords in *R v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198, 204F; *R (Public Law Project) v Lord Chancellor* [2016] AC 1531 at [25-28]; see further Christopher Forsyth and Elizabeth Kong, “The Constitution and Prospective Henry VIII Clauses” [2004] *Judicial Review* 17, 24-25

23. Richard Ekins, “Acts of Parliament and the Parliament Acts” (2007) 123 *Law Quarterly Review* 91

24. *Al-Skeini v UK* [2011] ECHR 1093

25. *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26

“jurisdiction” in Article 1 of the ECHR. Article 1 is not a “Convention right” within the HRA; the scope of the Act turns on parliamentary intention. If Parliament were to legislate to limit the extra-territorial scope of the Act, as I have recommended,²⁶ on the Government’s view any Minister of the Crown could simply repeal this legislation by executive order, relying on the incompatibility with the ECtHR’s reading of Article 1.

Article 13 is also not a “Convention right” in section 1 or Schedule 1 of the Act. It follows that no UK court could declare section 9(3) incompatible with Article 13. (The Government seems to have argued the contrary before the ECtHR, aiming to establish that the applicant had not exhausted his domestic remedies, but the Court rightly rejected the argument.²⁷) On the Government’s view, it would be open to a Minister of the Crown to use section 10 to incorporate Article 13 within the Act. This would be a very far-reaching change in the scheme of the Act. Parliament cannot have intended to authorise the scheme of the HRA itself to be undone by ministerial order in this way.

The HRA openly accepts that there will be provisions of primary legislation, and secondary legislation made under the authority of primary legislation, that are rights-incompatible. The Act expressly preserves the validity of legislation that cannot be read and given effect in a way which is compatible with Convention rights (section 3(2)). While such legislation may be declared incompatible with rights, this declaration does not undermine the validity of legislation (section 4(6)). A declaration of incompatibility will not often, and may never, be an effective remedy for the purposes of Article 13. On the Government’s view, it has power by ministerial order to amend sections 3 or 4, effectively to authorise courts to quash rights-incompatible primary or secondary legislation. This cannot be right. The HRA itself is Parliament’s choice about *how*, and importantly to *what extent*, the Article 13 right to an effective remedy is to be given effect in domestic law. The ECtHR’s conclusion that the UK has failed to provide an effective remedy, perhaps because the HRA does not give direct effect to the terms of the ECHR or to the case law of the ECtHR, does not empower the Government to amend the terms of the HRA by ministerial order. Yet this is precisely what the draft order attempts.

The HRA is sometimes termed a “constitutional statute”, a term of art, coined by the late Sir John Laws in the landmark judgment of *Thoburn*.²⁸ While some statutes certainly form part of the constitution, the idea of the “constitutional statute” is a somewhat troubled one, notwithstanding its assumption by the Supreme Court in recent years. It is sometimes taken to mean that a later “ordinary” statute cannot repeal an earlier “constitutional” statute save by express words. In fact, *Thoburn* adds, and later case law repeats, that the repeal may also be by necessary implication, at which point the claim is really just that one should be slow to infer that in enacting a new statute Parliament intends to repeal an earlier, constitutionally significant statute. This is good interpretive practice. In relation to the HRA, the question of implied repeal practically never arises because the HRA anticipates inconsistency with later statutes and yields

26. Richard Ekins, Patrick Hennessey and Julie Marionneau, *Protecting Those Who Serve* (Policy Exchange, July 2019), pp.33, 35-36

27. *Hammerton v UK* at [124] and [146]

28. *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151

to the extent that inconsistency cannot be resolved by interpretation. In the present context, the constitutional significance of the HRA entails that one should be slow to infer that Parliament intended the Act to be subject to amendment by way of executive order rather than only by express, or at least clearly implied, parliamentary intention made out in primary legislation. That is, the classification of the HRA as a “constitutional statute” reinforces my argument that section 10 does not apply to the HRA itself.

In short, the whole scheme of the Act would be subject to amendment if and when ministers conclude that it is incompatible with convention rights, whether because of a UK court declaration (which cannot arise in relation to some Articles of the ECHR) or because of an ECtHR judgment (subsequent to the coming into force of the Act). Reading section 10 to authorise amendment of the HRA itself renders the Act radically unstable. This provides a powerful reason to infer that Parliament intended section 10 to refer to legislation *other* than the HRA itself. The section 10 power takes its place within the wider scheme of the HRA, which Parliament chose knowing full well that the ECtHR would often take the HRA to fail to amount to an effective remedy in terms of Article 13. The section 10 power does not entitle ministers to stand, with the ECtHR, in judgment on the scheme of that Act and to remake it by executive order. If the Government is to revise the terms on which Parliament chose to incorporate the ECHR it must persuade Parliament to enact primary legislation.

Putting the matter at its lowest, there are substantial grounds for holding that section 10 does not enable amendment of the Act itself. Note that Robert Craig has proposed a more far-reaching argument, by way of the principle of legality, that section 10 should not be interpreted to apply to any legislation that post-dates the Human Rights Act.²⁹ This argument fails, for the Act is surely intended to introduce a scheme for addressing incompatibilities in legislation, including legislation yet to be enacted, as they arise. While the Act may be inconsistent with the spirit of a constitution in which each Parliament is free to enact legislation it chooses,³⁰ it does not flout the doctrine of parliamentary sovereignty. Legislation enacted after October 2000 should be construed as subjecting itself to the section 10 power unless and until displaced, whether expressly or by implication. But though Craig’s argument does not persuade, the plausibility of his argument, which relies on the principle of legality, confirms that understanding section 10 to apply to the Act itself would be remarkable.

The JCHR should have concluded “that there appears to be a doubt about whether [the draft order] is *intra vires*” and should have alerted the Houses of Parliament accordingly. The Government should not proceed with a draft order of doubtful validity, even if it is true that the amendment would be unlikely to be challenged in subsequent legal proceedings. The Government should withdraw the draft order and accept that section 10 cannot be used to amend the HRA itself.

29. Robert Craig, “Why Remedial Orders Altering Post-HRA Acts of Parliament Are Ultra Vires”, UK Constitutional Law Blog, 21 December 2017

30. Richard Ekins, “Legislative Freedom in the United Kingdom” (2017) 133 *Law Quarterly Review* 582

The draft Remedial Order is unconstitutional

The JCHR should also have considered whether the draft remedial order “appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made”. For, quite apart from the *vires* of the remedial order, the Government should not propose amendments to the HRA by way of section 10. The JCHR’s general statement of principle in 2001, affirming that primary legislation ought to be amended by primary legislation, applies with even more force when the statute in question concerns the empowering statute, the HRA itself. (One would expect the Joint Committee on Statutory Instruments to report that an attempt to use a Henry VIII clause to amend the terms of the empowering statute was “unusual or unexpected”.)

It would be better constitutional practice for the Government to accept that amendments to the Act should be by way of primary legislation. Whatever one’s views about its merits, the HRA is an important constitutional measure. If the Government wishes to amend section 9(3), it should introduce a Bill, open to amendment and likely to receive the full measure of parliamentary scrutiny and attention. In defending its use of section 10, the Government presents the draft order as straightforwardly required by the UK’s international obligations and not warranting parliamentary time for primary legislation. The former claim is wrong, as argued above, which undermines the latter claim. The Government assumes that the law must change, viz. that the UK effectively has no choice. Parliament should reject that assertion and consider for itself the merits of the matter. It follows that the Government should withdraw its draft order and adopt instead a policy of not using section 10 to amend the HRA. Otherwise it will be conceding that governments yet to come would be acting legitimately in using section 10 to reverse legislative changes that limit the temporal or territorial scope of the HRA, or to transform in other ways how the Act works.

In relation to the specifics of this draft order, note again that the ECtHR in *Hammerton* does not set out an impressive case for its conclusion that the statutory bar in section 9(3) means that the UK failed to provide an effective remedy to the applicant, still less that the bar is unjustifiable all things considered – that is, in light of its implications for judicial immunity and judicial independence (which the ECtHR simply did not consider, perhaps because of the limited diet of argument put before it by the UK). It is not sensible for decisions about the merits of section 9(3), and about its implications for judicial immunity and independence, to be outsourced to a panel decision of the ECtHR, let alone a panel decision where the relevant

questions are not squarely considered. The Supreme Court would certainly consider itself free, under *Horncastle*,³¹ to resist the ECtHR's judgment, setting out a reasoned case why the Court's holding misunderstood UK law and/or should be reconsidered. It is not obvious why the Government has simply surrendered the point or why it proposes to invite the Houses of Parliament to treat this important constitutional change as routine.

Whether to permit damages to be awarded for human rights breaches arising out of good faith judicial acts requires careful thought about the constitutional position of courts in a common law system, the implications for the independence of judicial decision-making, the adequacy of other remedies available to those wronged by unjustified judicial acts, including vindication of rights on appeal and/or by way of judicial review, and the implications for public funds of permitting damages claims against ministers in wider circumstances than at present. The JCHR asserts that "it is difficult to understand why the requirements of judicial independence should mean that in a case where a judge has made sufficient errors to violate an individual's human rights, that individual should be deprived of an effective remedy from the State."³² On the JCHR's view, it would seem that section 10 should simply have been used to repeal section 9(3). But this simply is to reject Parliament's considered view in 1998, in enacting the HRA itself, that the only circumstances in which an award of damages should be made in relation to a judicial act are when the express terms of Article 5(5) require as much.

I take no view on the merits of the question. My point is that whether to amend the HRA in response to *Hammerton*, or whether to amend or repeal section 9(3) more generally, is not a straightforward question and should not be assumed, let alone by taking the UK's international obligations to mean that there is nothing to discuss or that it would be a mistake to consider the matter on its merits. The New Zealand Supreme Court, in *Attorney-General v Chapman*,³³ refused to hold that damages were available for judicial breaches of the New Zealand Bill of Rights Act 1990. The Court's concern was that to permit proceedings for damages for judicial breach would chip away at the independence of adjudication, an independence important to the rule of law. This may be an unsound argument – Chief Justice Elias in dissent thought it was – but the point is not obvious. Neither the draft order nor the deliberation of the JCHR do justice to the gravity of the questions in play, simply assuming that the Act must change to avoid further Strasbourg litigation.

It would be open to the Houses of Parliament to make these points, to insist upon a proper discussion on the merits, and to withhold approval of the draft order until such a discussion had been held. However, the need for such a discussion is a reason for the draft order to be withdrawn – or if not withdrawn to be rejected by the Houses of Parliament – and for a Bill to be introduced to amend the Act. Alternatively, the question of whether to amend or repeal section 9(3) should be taken up as part of the Government's programme of human rights law reform, perhaps as part of the remit of the proposed Constitution, Democracy and Rights Commission.

31. *R v Horncastle & Others* [2009] UKSC 14

32. Joint Committee on Human Rights, *Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report* at [55]

33. [2012] 1 NZLR 462



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