Human Rights Act Reform: A Modern Bill of Rights

A consultation to reform the Human Rights Act 1998

Alex Goodman 3 February 2022

A consultation on reform of the Human Rights Act 1998 is running until 8 March 2022. A "Command Paper" has been produced to facilitate the consultation.

This paper considers briefly some of the difference the Bill of Rights is proposed to make and the explanations given in the Command Paper for some of the changes. Five topics are covered briefly: what will not change; sections 3 and 4 of the Human Rights Act 1998; article 8; the living instrument doctrine; and the Command Paper's approach to the costs and benefits of change.

What will Not Change

An important starting point in this consultation is that the new Bill of Rights will not change any of the text of the substantive rights currently protected. The Command Paper makes clear at paragraph 184:

> The rights as set out in Schedule 1 to the Human Rights Act will remain. We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.

The Consultation also confirms that the UK will remain a signatory to the European Convention on Human Rights and it is not suggested that complainants will be unable to take cases to Strasbourg.

However, while this is not a consultation about the substance of our rights, one of the intentions of the Bill of Rights is to allow for an autonomous articulation and application of the Convention rights in the UK so as to diverge from Strasbourg jurisprudence and to reframe the remedies available for violations in the UK. Ironically, one net effect of the development of autonomous understandings of rights will be to export more cases, and more power and authority back to Strasbourg.

The Command Paper's Understanding of Sections 3 and 4 of the HRA 1998

The Command Paper is critical of section 3 of the Human Rights Act 1998; Paragraph 116 says this:

> … the Human Rights Act requires the courts to **alter the meaning** of primary legislation in order to make it compatible with the Convention rights, whenever it is possible to do so (section 3). It is one thing for the UK courts to declare legislation incompatible with human rights, but quite another for them to be **required to revise that legislation**, in material respects, in order to ensure compatibility without there being any direct or meaningful Parliamentary oversight (emphasis supplied)

Sections 3 and 4 of the HRA certainly work in a unique way, as has been judicially recognised[1], but they do not operate as the Command Paper opines. Section 4 allows for declarations of incompatibility where legislation cannot be read in a way that is compatible with the Convention rights, but by section 4(6) a declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is give". Section 3 HRA 1998 provides:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights
>
> This Section…
>
> > (b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> >
> > (c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility

In other words, far from empowering and requiring courts to "revise" legislation, section 3 provides that incompatible legislation continues to operate even where it breaches Convention rights. Courts do not "alter the meaning" and "revise the legislation" to make legislation compatible: where they would have to go that far, they can instead make a declaration of incompatibility under section 4. Such a declaration does not affect the continuing validity of the legislation. It is left up to Parliament whether to make a remedial order under section 10 of the Act to address the incompatibility.

[1] *Wilson v First County Trust Ltd* [2004] 1 AC 816

This misunderstanding as to a perceived interference with parliamentary sovereignty pervades the Command Paper. The Paper suggests the part of government responsible for this consultation has not really understood that there is nothing in sections 3 or 4 that inhibit parliament from legislating contrary to the Convention. For example, at paragraph 154, n context of discussion about article 6 the paper states:

> We accept that government should be restrained by the protection of fundamental rights. The incremental expansion of rights into novel areas, however, creates a democratic tension with the prerogative of elected representatives to determine what may amount to finely balanced questions of public policy.

At paragraph 177, the conclusion is this:

> The shift of law-making power away from Parliament towards the courts, in defining rights and weighing them against the broader public interest, has resulted in a democratic deficit.

This seems inconsistent with how the Human Rights Act 1998 works. It always leaves it up to Parliament to legislate in ways that are incompatible with Convention rights if it wishes to. Parliament simply has to own up to the fact that is what it is doing and face scrutiny by the Joint Committee on Human Rights. Section 19 of the HRA 1998 requires the Minister in charge of a Bill to make a statement either that a Bill is compatible with Convention rights, or that the government wishes to proceed with the Bill in any event. The HRA expressly contemplates and permits incompatible legislation being passed by parliament and indeed governments have passed legislation that was expressly acknowledged to violate provisions of the Convention: for example the Communications Act 2003 was passed with a ban on political advertising in broadcast media that was accepted to be inconsistent with article 10 of the Convention (freedom of expression).

It might be thought that properly understood, sections 3 and 4 of the Human Rights Act 1998 achieve precisely the balance which the Paper describes as desirable. Sections 3 and 4 preserve respect for the primacy of the legislature. All that the courts are doing in interpreting legislation compatibly with the Convention is seeking to implement the will of Parliament expressed through the HRA 1998 and through statements of compliance made when passing legislation.

Article 8

Although there is no intention to amend the substantive provisions in Schedule 1 to the HRA, it is clear that there is a desire to emphasise the interests of society over individual rights to

respect for home and family in Article 8. It is well established that interpretation of the HRA 1998 should strive to give effect to the general principle, 'inherent in the whole of the Convention', that it is seeking to strike a 'fair balance … between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights'[2] In the context of article 8 specifically, the assessment of proportionality must be applied having regard to the "overriding requirement" to "balance the interests of society with those of individuals and groups"[3]. However, the government expresses the view in the Command Paper that in some respects that balance is not being struck properly by the courts. Various examples are given in the Paper of cases where criminals who grew up in the UK or have roles as fathers to British children could not be deported. The paper says the intention is to:

> "Provide greater clarity regarding the interpretation of certain rights, such as the right to respect for private and family life, by guiding the UK courts in interpreting the rights and balancing them with the interests of our society as a whole (paragraph 282 onwards)"

The government asserts that despite its legislative changes seeking to tilt the balance away from individual rights, there remain "ongoing challenges" which "demonstrate the case for direct reform of the Human Rights Act" (paragraph 293). The Command Paper does not examine the effectiveness of measures already taken to diminish individual rights to resist deportation and this is an area where the legislature has been able to use the margin of appreciation afforded by Strasbourg to maximise the weight given to the interests of society in deportation through amendments in 2014, inserting section 117C of the Nationality Immigration and Asylum Act 2002. That provision is entitled "additional considerations in cases involving foreign criminals" and is reflected in paragraph 399 of the Immigration Rules. This provides for account to be taken of the following factors in weighing whether there is an article 8 case to resist deportation:

> (1) The deportation of foreign criminals is in the public interest.
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
> (4) Exception 1 applies where—
> (a) C has been lawfully resident in the United Kingdom for most of C's life,

[2] *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, ECtHR, at para 69
[3] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167

(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

The "margin of appreciation" is a doctrine by which the Strasbourg court recognises that national authorities are in principle better placed than an international court to evaluate local needs and conditions and that the machinery of the Convention is subsidiary to national systems[4]. Section 117C presents an illustration of the UK legislature using its margin of appreciation to tilt the balance between individual rights and the interests of society as far as it can in favour of the interests of society. Experience of representing individuals facing deportation in this context is that the exceptions are difficult to meet. For example, a thirty-year-old man with indefinite leave to remain, who has lived in the UK since childhood, who is convicted of dealing drugs and sentenced to four years imprisonment will have to show that: he is culturally integrated; it would be unduly harsh to deport him; and there are some more very compelling circumstances on top of those circumstances that outweigh the public interest in deporting him. Even if he had children deportation must be both unduly harsh and there must be very compelling circumstances.

A counterpoint to the perspective in the Command Paper might be that section 117C exhibits how parliamentary sovereignty has been *preserved* rather than undermined by the Human Rights Act 1998.

[4] *Hatton v United Kingdom* (2003) 37 EHRR 611, at paras 97–103 and 123.

The Objection to the "Living Instrument" doctrine

The Paper argues strongly against the Strasbourg "living instrument" doctrine which it says means that the Strasbourg court has developed rights in ways "going well beyond what the drafters and original signatories had intended or could reasonably have anticipated" (paragraph 47). Thus, in respect of *Hatton and others v United Kingdom* (2003) 37 EHRR 28 the Paper asserts the ECtHR stretched human rights so as to be "capable of stipulating environmental policy".

Many democratic countries protect fundamental rights through constitutions that are seen as living instruments: the US constitution was drafted a hundred years before the abolition of slavery, yet is now capable of protecting black people against discrimination. In the UK we do not have a constitutional document of that kind, but that "living" quality is praised in the Command Paper as a key component of the dynamism of the common law. The alternative to a living instrument would presumably be rights based on 1950s thinking where homosexuality was outlawed and women did not have equal rights in the workplace, where Watson and Crick had not yet discovered the double-helix structure of DNA and the digital age was far distant. It might be thought illogical that a Bill of Rights should *not* be a living instrument.

In support of the objection to the living instrument doctrine, the Paper cites *Hirst v The United Kingdom (No.2)* [2004] 38 EHRR 40 which concerned article 3, protocol 1, the duty to hold free elections. The Command Paper makes the point that when the UK signed the Convention it had a prohibition on voting rights for felons, a fact reflected in the travaux préparatoires of the Convention and in the minority judgments in the *Hirst* case.

The *Hirst* case was brought in the UK in 2001 and decided in Strasbourg in 2005. In response, in 2018 the UK proposed to the Council of Europe that prisoners on licence would be permitted to vote. That was accepted as remediating the breach and the case was closed. The change has been given effect without any legislative amendment and consists of guidance to prison governors and a leaflet issued to prisoners advising them of their voting rights. The government's estimate is that amendment would permit up to 100 prisoners on licence to vote at any one time[5].

Clearly, prisoner voting rights is an issue on which the UK parliament took a line that it simply did not accept there should be any compromise (despite the *Hirst* judgment). To that extent out

[5] Prisoners' voting rights (parliament.uk)

treaty obligation contained in Article 46 to take take "general measures in its domestic legal order to put an end" to the breach has led to a concession which is historically against the wishes of parliament. The case does therefore to a limited extent exhibit that compliance with the Convention limits the sovereignty of the UK Parliament to legislate in ways that are contrary to those minimum standards. But one also has to acknowledge that the UK has refused to legislate a response to the Hirst case for over twenty years. What was ultimately required so as to achieve what the Council of Europe saw as compliance did not involve any legislative action and was *de minimis* in practical terms.

However, the real issue with the reliance of the Command Paper on the *Hirst* case is that the history of that matter is all about the Convention and the Council of Europe: it has nothing to do with the Human Rights Act 1998. Parliament has not been forced to do anything it does not want by virtue of that domestic legislation.

Costs and Benefits

Question 29 of the Consultation is "what do you consider to be the likely costs and benefits of the proposed Bill of Rights?"

The Command Paper shies away from acknowledging any case in favour of the Human Rights Act or the status quo. There is no section on what the government considers to be the benefits of the Human Rights Act, for example to individuals whose liberty has been deprived and restored; to those safeguarded from inhuman treatment; to the transformative effects of non-discrimination. Nor does the Command Paper attempt to acknowledge or reflect diverse opinion on the Human Rights Act. Almost the only sources of authority cited are men with a long history of practice in the law: the late Sir John Laws, John Holbrook, Lord Sumption. I did not find any reference to the views of a woman in the Command Paper. Similarly, there has been no attempt to reflect the views of anyone from a minority or anyone who had been a victim of human rights abuse.

By contrast to the UK, every other democratic country protects fundamental rights in single written constitutions. Those constitutions usually have provisions which entrench fundamental rights through mechanisms like prohibiting them being changed without a referendum, or requiring a super majority in parliament, or two parliamentary votes either side of an election.

What all of those entrenchment provisions acknowledge is that part of the strength of fundamental rights is their immutability. My final observation on the cost/benefit analysis is that there does appear to be a number of significant misconceptions about the Human Rights Act 1998 that have impelled the consultation. Those in turn translate into a number of misconceptions about the significance and perceived benefits of the new Bill of Rights. Against that, the Command Paper has not thoroughly considered the benefits of the status quo and has not acknowledged that there is a strength in longevity and immutability of instruments protecting fundamental rights.

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