

The Policy Exchange proposals



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Introduction

- The overarching concepts
- The Policy Exchange Judicial Power Project paper
- The themes from the paper:
 - The influence of the ECtHR
 - Who is the legislator?
 - Who balances rights / public interest?

The overarching concepts

- Appeal and review
 - *General Medical Council v Michalak* [2017] UKSC 71 para 20.
- Democratic dialogue
 - *R (UNISON) v Lord Chancellor* [2017] UKSC 51
 - Section 4 HRA
- Common law rights
 - ‘*Common Law Constitutional Rights*’, Elliott and Hughes (ed), 2021
 - *R v SSHD ex p Daly* [2001] UKHL 26

The real issue: where the balance lies

- The varying intensity of review
 - *Re SC v SSWP* [2021] UKSC 26 para 158
- Deference
 - *A v SSHD* [2004] UKHL 56
 - *R (Lord Carlile) v SSHD* [2014] UKSC 60

Policy Exchange Judicial Power Project

- The Judicial Power Project is run by the think tank Policy Exchange, which has argued that the inflation of judicial power unsettles the balance of the constitution.
- Its paper 'How and Why to Amend the Human Rights Act 1998', authored by Professor Richard Ekins (University of Oxford) and John Larkin QC (Former AG of Northern Ireland), with a foreword from Lord Sumption, is its submission to IRAL.

Legislative options

- Government's commitment to remain signatory to ECHR
- Do we need legislation at all?
- If so, should there be a new Bill of Rights?

Theme 1: Influence of the ECtHR

- Section 2 HRA: Court must “take into account” ECtHR jurisprudence
- Concerns:
 - Government should be free to depart from ECtHR jurisprudence
 - The Convention as a “living instrument”
- PE suggestion to limit the situations where public body can be found to have acted in contravention of Convention rights
- Consultation suggestion to widen the sources of guidance for the Court

Theme 2: Who is the legislator?

- Section 3 HRA: primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights “so far as it is possible to do so”.
- Concerns:
 - Judicial overreach, e.g. *Ghaidan v Godin-Mendoza* [2014] UKHL 30
 - Only works on pre-HRA statutes
- PE suggestion to limit to “so far as is consistent with the intention of the enacting Parliament or law maker”. Consultation suggestion to restrict any expansive approach.

Theme 2: Who is the legislator?

- Section 4: declarations of incompatibility
- Consultation proposal pushes dialogue model:
 - Increase scope of declaration of incompatibility
 - Database of judgments where section 3 applied

Theme 3: who balances rights / public interest?

- Is proportionality a legal or political test?
- Is the intensity of review or level of deference appropriate?
 - *R (Dolan) v SSHSC* [2020] EWCA Civ 1605
 - *R (Quila) v SSHD* [2011] UKSC 45
 - Due deference
- Proposal to give “great weight” to judgments of Parliament and decision makers

Conclusion

- A Bill of Rights at all?
- Where should the balance lie? Do you trust the judges?
- The scope of the issues

Thank you for listening

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