

The Independent Human Rights Act Review Round Table

with

The Law Society of England and Wales (Roundtable 2)

Date: 24th March 2021 – 15:30-17:30

Attendees

IHRAR Panel & Officials	Law Society Members and Officials
Sir Peter Gross	Laura Carlisle
Alan Bates	Jessica Gladstone
Sir Stephen Laws	Harry Balfour-Lynn
Professor Tom Mullen	Sophie Kemp
John Sorabji	Alison Saunders
Gethin Thomas	Alexandra Agnew
Oliver Burrows	Miles Geffin
Noah Thorold	Neil O'May
Millie Rae	Kim Harrison
	Hazel Blake
	Ellie Cumbo
	Libby McVeigh

This roundtable was facilitated and attended by the Law Society. However, the views expressed by attendees were their own and do not necessarily represent the views of the Law Society.

Civil Education

On the topic of civil education, the following points were made by members of the Law Society:

- There needs to more education around what the Human Rights Act (HRA) actually does and how it operates to challenge misconceptions. Media representations of human rights are unhelpful, as is the Government's rhetoric.
- The more sensationalist cases skew public opinion and detract from the wider benefits of the HRA.
- UK courts and the judiciary should take the lead in helping inform public opinion. A body of casework shared online would help in this endeavour.
- The IHRAR provides an opportunity to change the narrative in the public discourse on the impact of the HRA.
- Coronavirus has helped people realise their individual rights and how they are protected, perceptions are slowly changing in this light.

Impact of the HRA

On the general impact of the HRA and the suggested priorities of global business, the following points were made by members of the Law Society:

- While the HRA is not perfect, there is not sufficient evidence pointing to a need for amendment. The HRA strikes a carefully constructed compromise between competing interests, such that amendment risks upsetting the fine balance.

- The HRA is good for global business, it provides certainty and consistency sought by companies investing in the UK, and UK companies operating abroad.
- The fallout from amendments to the HRA could provide uncertainty and act as a deterrent for business to invest in the UK.
- Whilst the UK has always been an attractive place to do business, even before the HRA was introduced, changes to the current status quo could risk providing instability and could be seen as a signal of a change in direction from the UK Government.
- The growth of a human rights culture has occurred since the introduction of the HRA, which has enhanced the UK's reputation as an attractive place to do business. Many businesses now have a business and human rights department, and many advisors on human rights weren't there 25 years ago. The landscape has changed in the last 25 years. Any step back or inconsistency would not be beneficial for the UK.
- In a survey from the Bingham Centre and Hogan Lovells in 2014 on the priorities of where to conduct business, 88% of senior executives of multi-national companies stated that a strong commitment to the rule of law was either "essential" or "very important" in relation to foreign investment. The HRA contributes to this image of respect for the rule of law. Human rights and adherence to the international legal standards are sticking points for most multi-national companies.
- The willingness of the Supreme Court to consider human rights abuses by corporations in overseas jurisdictions has a positive impact on the image of the UK's adherence to rule of law and responsibility on human rights. The Law Society committed to share the Bingham Centre/Hogan Lovell Survey on attitudes of business leaders towards the importance of rights protections in a jurisdiction.

Common Law

On the topic of the common law, the following points were made by members of the Law Society:

- One participant remarked that there is not enough emphasis on common law, and it is a shame to see the common law not given the weight it had previously. It would be useful and important for the common law to be expressed more prominently and forcefully in judgements that engage the HRA.
- The more domestic courts express the importance of common law, the more influence we have.
- It is still open for domestic courts to follow UK statutory and common law – cases such as adoption law in NI or *Animal Defenders International v United Kingdom* show the relevance of national context in deciding cases under the HRA.
- The Strasbourg jurisprudence could be used to bring about changes in the common law.

Judicial Dialogue

On the topic of judicial dialogue, the following points were made by members of the Law Society:

- *R v Horncastle* is the best example where dialogue between domestic courts and the ECtHR took place, highlighting the flexibility of the current approach.
- The Law Society committed to sharing a note by Kingsley Napley relating to the Convention and the Common Law in the area of criminal law.

Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by members of the Law Society:

- Consistency across jurisdictions is important for businesses. Deviation from the European Court of Human Rights (ECtHR) jurisprudence could produce uncertainty.
- Section 2 could include a requirement for Courts to explain why they have chosen to take into account the ECtHR jurisprudence.
- Section 2 in its current form provides a necessary link to the ECtHR in a modest way. It provides legal certainty and consistency across borders, whilst also allowing for divergence so not as to impinge on parliamentary sovereignty.
- Without section 2 in its current form, the inconsistency across jurisdictions would produce uncertainty and could lead to the UK being a less desirable place to do businesses. Section 2 assists in keeping the UK aligned with other Council of Europe members.
- The duty to “take into account” ECtHR jurisprudence is a well-balanced formulation; it allows for judicial dialogue and divergence in certain cases where necessary.
- Whilst it is the case that courts could still pay regard to ECtHR jurisprudence if section 2 was repealed, its removal might act as a signal that they should not do so.
- Support was expressed for the decision in *Ullah* and for the evidence given by Baroness Hale to the JCHR: the HRA balance was right and there was no good reason for amending it.

Theme Two of the Terms of Reference

On the topic of the second theme of the ToR, the following points were made by members of the Law Society:

- There is a delicate and sensible balance between parliament and the courts. It provides supervisory powers to the courts. The duty to make section 19 statements when introducing legislation shows clearly the intention behind the HRA was to make all legislation compatible with the European Convention on Human Rights (ECHR).
- Sections 3 and 4 do not act as a Henry VIII power provided to the courts; parliament is not bound act on a declaration of incompatibility; such declarations only act as a signal to parliament that the courts believe there to be incompatibility with the ECHR. There are examples where parliament has decided not to follow the same line of reasoning as the courts.
- The judiciary do not exceed their constitutional role. The Independent Review of Administrative Law concluded that government and parliament should be confident that the courts will trust and respect their powers and decisions.
- The current balance between sections 3 and 4 provide access to a swift remedy for people when they feel their rights have been curtailed by legislation. Post-Brexit, section 3 is the only route for companies who no longer have access to EU protections. Companies don’t want to wait for a ECtHR judgement if possible, so an immediate remedy via section 3 is desirable.
- Parliament often takes too long to respond to section 4 declarations, so there should be an option for the courts to write to parliament or the Joint Committee on Human Rights to ensure a swift resolution.
- The extra-territorial jurisdiction of the HRA contributes to the UK’s image as a country that has respect for the rule of law.

- The ECtHR has made modest contributions to the extra-territorial application of human rights; in any event, the wider international frameworks on human rights would still apply if we chose to deviate from the Convention.
- One of the aims of the HRA was to avoid cases going the ECtHR (thereby to bring rights home), if the UK adopts a different approach to other signatories of the Convention, more cases would go to the ECtHR, which would go against the initial intention of the HRA.
- The Law Society committed to sharing the ECtHR decision in *Georgia v Russia (II)* to emphasise their points relating to the extra-territorial jurisdiction of human rights.