To the Members of the Independent Panel Reviewing the working of the Human Rights Act

Personal

I am a retired mental health social worker and best interests assessor (Deprivation of Liberty Safeguards) and trainer of social work students on placement. In this capacity I have read many Acts of Parliament (and of the Senedd of Wales), Codes of Practice and case law judgements that impinge on my social work practice.

I am continually impressed by the process of published court judgements, characterised as they are, for the most part, by a logical process and a weighing up of contrary arguments. We have a Supreme Court of which we can be justly proud.

I am also a member of the Religious Society of Friends (Quakers). We have long maintained our Testimony to Truth (among our other values).

Political background - general

The referral to the Independent Review should be set in its political context.

Politicians (Parliamentarians, Government Ministers) seek power in order to change things, or indeed to keep things the same. They may be influenced by the pursuit of personal gain or that of organisations from which they spring or which sponsor them. In theory, they are accountable to all their constituents, but in practice only at infrequent election times. They act, and they enact.

Judges, on the other hand, react. They deal with cases that come before them. They have no say as to which cases are presented to them. (They merely have discretion as to procedures.)

For some hundreds of years it has been appropriate to refer to the separation of powers between the executive, the legislature and the judiciary. Hence, there is some sort of balance. This balance is of the utmost importance and needs to be preserved. The very Terms of Reference *recognise* this.

The Human Rights Act and the connected European Convention on Human Rights *contribute* to this balance.

I need to elaborate: in this context, the right of the citizen to instigate a judicial review is also of the utmost importance, as it provides a check on overreaching by politicians and the opportunity for remedies of errors made or harm done.

Politicians are frequently annoyed, even infuriated, by the outcomes of judicial reviews that go against them; and they ensure that their reactions (and disputing of the findings) are well publicised.

But politicians are accountable, not only to the voters (and those who cannot vote, e.g. children) but also to the principles of the British Constitution. Our judges are one form of protection against abuses of the powers granted to the executive and to representative bodies, and indeed an essential one.

"Quis custodiet ipsos custodes" (Juvenal, Satire VI) – "Who guards the guards." Let us not forget this point. Yes, the guards need guarding, and at time guarding against.

To quote another well-known phrase or saying: "If it's not broke, don't fix it."

Background - specific

In recent years, successive UK Governments have been involved, demonstrably, in uttering lies, half-truth and misinformation – arguably on an unparalleled scale. One notorious example was the 2019 attempted prorogation of Parliament, declared unlawful by the Supreme Court, unanimously.

It is apparent that the present Government does not like the Human Rights Act and would like to weaken it and upset the "balance" mentioned above. This is to be resisted.

THEME ONE

How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2 of the HRA?

It is clear from the past dozen years of HRA jurisprudence that our courts (the Supreme Court in particular) have been in a continual dialogue with the European Court of Human Rights, and indeed have been successful in effecting change, i.e. in making the latter Court change its mind.

Our courts are not bound 100% by EurCtHR judgements – far from it. (See below for relevant early Supreme Court judgements, from which I quote.)

R v Horncastle 2009

11. The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.

Manchester City Council v Pinnock 2010

48. This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g R v Horncastle [2009]. … As Lord Mance pointed out in Doherty v Birmingham [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them.

On the basis of this evidence, I submit that nothing in our law should be changed – let us leave well alone. The grounds for change have not been met.

THEME TWO

Sec 3 acts as a brake on executive power.

Courts are cautious in practice. They observe deference and proportionality. Case law indicates this. Courts *avoid* policy choices.

Courts are interpreting legislation according to the Constitution. Their job is not just to follow the words, which may be *ambiguous*.

Indeed, I have read much badly drafted legislation (see, for example, the Deprivation of Liberty Safeguards, which one judge honestly said that he could not understand).

Declarations of Incompatibility (Sec 4) are made in practice very seldom. And Courts can quash secondary legislation only. (There have been four instances.) Where primary legislation is at fault, complainants have to wait for a remedy (in the hands of Government and Parliament).

Human Rights judicial reviews barely interfere with executive decisions at all. There have been fourteen cases in seven years. In Parliament there is often insufficient scrutiny of Statutory Instruments, as little or no time is allowed for debate.

There is therefore no evidence of judicial overreach.

Hence, there is no need for changes. Changes would only make matters worse, by upsetting the balance between those in power and the ordinary person.

David R Harries

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