

M. J. Devaney,



24th January 2021

Dear Sir,

The Independent Human Rights Act Review

The IHRAR has invited views on the relationship between the domestic courts and the European Court of Human Rights, and the impact of the HRA on the relationship between the judiciary, the executive and the legislature. Although the Review's Terms of Reference are not concerned with the substantive rights contained in the Convention, I don't see how you can separate those rights from the two themes that you have identified. Therefore, instead of answering the specific questions that you have raised, I should like to offer my general views on the matter. I should make it clear from the outset that I am not advocating a reduction in rights. On the contrary, I think the list of rights should be increased. I also think that the wording of some rights could be improved.

"A Bill of Rights", wrote Thomas Jefferson, "is what the people are entitled to against government". As Harriet Harman put it recently, there needs to be an effective check on executive power. Drafted in response to the atrocities of World War 2, the original purpose of the European Convention was to protect the rights of Europe's citizens against the most serious violations of their human rights. Unfortunately, people's conceptions of their rights have become inflated for a number of reasons.

First, courts have developed economic and social rights using interpretive techniques such as the doctrine of implied positive obligations. You hear people demand freedom from all sorts of disadvantage. Rights impose duties on others and an inflated list of rights encourages a more intrusive political system. The Council of Europe's Social Charter already guarantees a minimum level of protection for social rights, and the allocation of resources ought generally to be a matter for government.

Secondly, there is no "horizontal effect" contained in the HRA but courts (which are "public authorities" under the HRA) are ruling on Convention rights in cases between private individuals.

Thirdly, the courts have been reading-down legislation to achieve the outcome that appears desirable in a particular case, often giving priority to the demands of a single individual or special interest group at the expense of the general community.

We need a British Charter of Rights. Human rights in Germany are enshrined in the Basic Law. In Ireland they are set out in the Constitution: if the Irish Constitution and the ECHA 2003 are in conflict, the Constitution prevails. Other countries like Canada and New Zealand have statutes setting out human rights. As has been said, the status of the Human Rights Act, and the issue of

what is binding on us, and how anything binding is to be implemented, is unclear and needs to be resolved. At a public law event in 2014, Dominic Grieve said, “if we’re really concerned about Strabourg mission creep, it should be the EU we should be focusing on, not the ECHR”. We’ve left the EU: that elephant has left the room.

The wording of the various rights in a British Bill ought to follow that of the ECHR with some amendments and additions (see paragraph 5 below and Annex A). As you know, the Convention was largely drafted by British lawyers and the substantive rights are for the most part akin to, or even expressly based on, rights recognised impliedly or expressly in English common law. Importantly, the Bill would command greater support in Parliament if the wording of the various rights largely followed that of the ECHR.

I should like to suggest a package of reforms to curb the law-making tendencies of judges in the field of human rights and check the escalating volume of rights claims against public bodies –

1. Territorial jurisdiction

The European Court of Human Rights has shown considerable sympathy for the personal or State agent authority model of jurisdiction but the exact parameters of the extraterritorial reach of the European Convention remain unclear. International treaties and conventions place limits on the behaviour of States outside their own territory and, in my view, the Bill of Rights should not apply to acts done abroad in the absence of full effective control.

2. Statutory interpretation

A Bill of Rights ought to give some guidance on how courts are to interpret its provisions. By way of example, Article 31 of the Vienna Convention on the Law of Treaties states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

The interpretive obligation under section 3(1) of the Human Rights Act 1998 should be weakened: use of the word “possible” gives courts too much discretion. I believe in the rule of law, not the rule of judges.

3. Incompatibility

The validity of primary legislation should remain beyond judicial control, and the courts should not have a universal power to strike down secondary legislation which appears to contravene prescribed rights.

4. Public authorities

The term “public authority” should be defined.

A court’s duty to construe legislation consistently with prescribed rights should not be an “act” (as now under of section 6(1) HRA). If not, judges will –

- a) continue to give horizontal direct effect to rights as between individuals, and

- b) disapply what were hitherto binding common law precedents if they decide they are incompatible with fundamental rights of an individual claimant.

5. Judicial activism

Judicial activism would be curbed if some rights were to be formulated with greater precision. I am thinking in particular of article 8 ECHR (the right to respect for private and family life) and article 2 of protocol 1 (the right to education).

The object of article 8 ECHR should be that of protecting the individual against arbitrary interference by public authorities¹, and more specifically:

- unauthorised interception of communications and intrusive surveillance,
- unreasonable search and seizure, and
- the misuse of personal data.

Article 8 as interpreted by the European Court of Human Rights has run out of control into areas it was never intended to enter. Courts are using the right to a private life as an excuse for restricting the freedoms of others, including the press. This important right needs to be re-drafted with greater precision.

Article 2 of protocol 1 ECHR is usually invoked on the ground that it bestows a right of access to education facilities, and schools and colleges are labouring under all sorts of demands from disruptive and unruly students. But a right to education ought to be centred on personal development or fulfilment through the pursuit of knowledge, i.e. intellectual inquiry and self-enrichment. I would add that, at a national level, welfare principles such as the right to what Franklin Roosevelt called “a good education”² are usually framed as obligations of society and the State rather than entitlements of individuals.

I would also advocate increasing the list of rights. Any new rights should, of course, be grounded in common law, key documents such as the Petition of Right 1628, the English Bill of Rights 1689, the Scottish Claim of Rights 1689, the People’s Charter of 1838, and the writings of John Locke, Caroline Norton, Millicent Fawcett etc. Judges would find it more difficult to justify widening the scope of protected rights if some of the obvious gaps in the ECHR are filled in.

Terms such as “torture, inhuman or degrading treatment or punishment” and “slavery” would, of course, need to be defined.

6. The doctrine of positive obligations

The imposition of positive obligations on the State to guarantee human rights in circumstances where State agents do not directly interfere has gone too far. Of course, some positive obligations are inherent in the text of the European Convention. The problem with positive obligations, however, is that their scope appears open-ended and the Strasbourg court “does not set general conceptual limitations for its interventions” in developing them: see D Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London, Routledge, 2011).

¹ See Article 12 of the Universal Declaration of Human Rights.

² State of the Union speech, January 1944.

Although the ECHR has not provided a general theory of positive obligations, it was said at an early stage in the development of the concept: "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual". States, of course, have a margin of appreciation in deciding where to strike this balance.

There should be a test for determining whether or not a positive obligation exists, with its elements fully spelt out in the Bill of Rights. The test should specify the full range of policy considerations to be taken into account (e.g. whether the obligation would involve imposing on the State significant additional expenditure, the practicability of any precautions that might have been taken, whether the obligation will encourage public authorities to act in an overly defensive or otherwise undesirable manner, the availability of alternative remedies etc.). If the test leads to results which are thought to be unacceptable, Parliament can legislate to re-draw the line.

7. Implied economic and social rights

Courts should not be allowed to imply socio-economic rights into a Bill of Rights which are absent from its text. Economic, social and cultural rights are guaranteed by the Council of Europe's Social Charter of 1961 and its supervisory system. The rights found in the Social Charter are not, however, judicially enforceable. There are good reasons for this. Unlike civil and political rights, economic and social rights are more dependent for their realization on the organization and resources of each State, and methods of implementation will necessarily vary from one country to another (as was said by Eleanor Roosevelt, Chairman of the UN Human Rights Commission). The potential boundaries of economic and social rights are difficult to define in the abstract. And the State is not the only institution through which these rights might be promoted.

8. Horizontal effect

The ECHR set up a code of behaviour enforceable against a State by its private citizens but there is no foundation for horizontal effect in any of its guarantees. The State should not be liable for ensuring that private rights between individuals are consistent with a Bill of Rights.

9. "Foreign cases"

Aliens should not be allowed to invoke qualified rights on the ground of the expected treatment to which they are likely to be subjected in another territory. The rights of aliens are adequately protected by the UN Convention on the Status of Refugees and other international instruments. As regards absolute rights, the courts should have no role in assessing the adequacy and reliability of Memoranda of Understandings on Deportation with Assurances. The Deportation with Assurances policy should, of course, comply with the Government's obligations under international law.

10. Justified limitations on qualified rights

The test of proportionality for implied limitations on qualified rights should be codified (see *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69).

11. Duty of citizenship

Epicurus advocated a life that avoided political engagement. However, in order to have a functioning society in which the members are able to live free from fear and want and enjoy freedom of speech and belief, it is necessary for people to engage in civic life.

The Preamble to the International Covenant on Civil and Political Rights states: “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”. Whilst I agree that “all rights to be preserved come from duties well done”³, I do not think the proposed Bill of Rights should include a general rule for individual behaviour in the community (a principle of brotherhood or fraternity). But it should say something about direct democracy and the duty of citizenship.

Incidentally, the drafting of a Preamble to a British Bill of Rights should not be left to lawyers.

In summary –

- We need a Bill of Rights that protects individual rights and freedoms against the power of the State;
- It is for Parliament to decide the appropriate reach of UK jurisdiction, not the courts;
- The law should, of course, establish social, economic and educational conditions under which the legitimate aspirations and dignity of the individual may be realised (see The Declaration of Delhi 1959, for example). But this should not be the purpose of a Bill of Rights;
- A Bill of Rights should not have horizontal direct effect between individuals;
- Discretion is both legitimate and necessary, and courts must respect the margin of appreciation that a State has provided that it is not absolute or limitless; and
- Increasing the list of rights and limiting the use of interpretive techniques would curb the scope for judicial creativity.

Yours faithfully,

M J Devaney

Annex A

When comparing the European Convention on Human Rights with documents such as the American Bill of Rights and even Magna Carta, it is noticeable that certain individual liberties are not expressly guaranteed. In particular -

Equality before the law⁴

Everyone is equal before the law.

³ Mahatma Gandhi.

⁴ Chapter 40 of the Great Charter (Magna Carta) 1215, Article VI of the French Declaration of the Rights of Man 1789, An Agreement of the Free People of England (Article 13) 1649, Petition of Right 1628, John Locke *Second Treatise of Government* 1690, Caroline Norton *English Laws for Women in the Nineteenth Century* 1854.

No one shall be exempt from the laws of the State or from the ordinary course of legal proceedings.

This complements Article 1 of Protocol 12 to the Convention.

Punishments equal to offences⁵

Penalties for criminal offences shall be proportionate to the seriousness of the crime and the culpability of the offender. Sentencers may only depart from the principle of proportionality in the case of violent or sexual offenders who present a serious risk of harm to the public.

The sentencing of offenders shall be done openly by independent and impartial tribunals.

Protection against self-incrimination (under Article 6 of the Convention)⁶

No one shall be compelled to testify against himself or to confess guilt.

[Statutory exceptions to the right to silence should be allowed where there is no question of ill-treatment of a suspect.]

Right to liberty

The words “and shall be entitled to trial within a reasonable time” etc. in article 5(3) should be replaced with “and shall be released pending trial unless there are relevant and sufficient reasons to justify his continued detention.”⁷ The right to a speedy trial is protected by Article 6(1).

With reference to paragraph 1(e), detention will be justified only where an individual poses a threat to himself or to others. The reference to vagrants should be deleted.

There should be a new paragraph 1A: There must be a sufficient relationship between the ground of detention and the place and conditions of detention.

There should be a new paragraph 3A: For the purposes of article 5.1(e), the mental disorder or disease must be of a kind or degree warranting compulsory detention. The validity of continued detention depends upon the persistence of such disorder or disease.

The following sentence should be added to paragraph 4: It is for the authorities to show that a person satisfies the conditions for compulsory detention.

⁵ Charter of Henry I, Chapter 20 of the Great Charter (Magna Carta), English Bill of Rights 1689, Article VI of the American Bill of Rights 1791, An Agreement of the Free People of England (Article 21) 1649.

⁶ Article V of the American Bill of Rights 1791, Article 14(3)(g) of the International Covenant on Civil and Political Rights 1976, An Agreement of the Free People of England (Article 16) 1649, Petition of Right 1628.

⁷ See *Wernhoff v Germany* (1979-1980) 1 E.H.R.R. 55 at para. 12.

Right to be present at trial (under Article 6(3) of the Convention)⁸

[Right] to be tried in his presence.

The defendant himself can waive this right, wholly or in part.

Unlawfully obtained evidence (under Article 6 of the Convention)⁹

There must be an effective procedure during a criminal trial by which to challenge the admissibility of evidence that has been obtained unlawfully or in breach of the rights and freedoms set forth in this Convention.

Right to free elections (under Article 3 of Protocol 1)

Elections should be free and direct.

Right to bodily autonomy (or integrity) (under Article 3 of the Convention)¹⁰

No one shall be subjected without his free consent to medical or scientific experimentation.

The right of individuals to refuse medical treatment should also be respected provided that they have sufficient mental capacity and their decision is free and informed. Special protection should be given to vulnerable people including children.

Right to own property¹¹

Everyone has the right to own property alone as well as in association with others.

Right to petition government¹²

Everyone shall have the right to petition government for the redress of grievances.

Freedom from arbitrary government¹³

No laws shall be made without the authority of the legislature.

The State shall not suspend laws or the execution of laws without the consent of the legislature.

Universal suffrage¹⁴

⁸ See, for example, *Poitrimol v France* (1993) 18 EHRR 130, at p 146, para 35; *Pelladoah v Netherlands* (1994) 19 EHRR 81, at p 94, para. 40; *Lala v Netherlands* (1994) 18 EHRR 586, at p 597, para. 33.

⁹ See *Schenk v Switzerland* (1991) 13 E.H.R.R. 242 at para. 47.

¹⁰ Article 3 European Charter of Fundamental Rights, *Airedale NHS Trust v Bland* [1993] AC 789.

¹¹ Article 17 of the Universal Declaration of Human Rights 1948, John Locke *Second Treatise of Government* 1690.

¹² English Bill of Rights 1689, the Scottish Claim of Rights Act 1689, Article I of the American Bill of Rights 1791.

¹³ English Bill of Rights 1689, Petition of Right 1628, John Locke *Second Treatise of Government* 1690.

¹⁴ People's Charter of 1838. "Every man that is to live under a government ought first by his own consent to put himself under that government" - Colonel Thomas Rainborough, Putney debates, October 1647.

Every citizen who is of or over the age of 18 years has the right to vote in elections to the legislature of the State.

[Legitimate restrictions should be permitted on the right to vote.]

Right to be elected¹⁵

Every citizen who is of or over the age of 18 years is eligible to be elected as a member of the legislature of the State.

¹⁵ An Agreement of the Free People of England 1649.