Independent Human Rights Act Review

Written Evidence by Robert Blackburn, QC (Hon), LLD

1 I am Professor of Constitutional Law, King's College London. I served as UK National Correspondent to the Council of Europe's Directorate of Human Rights, 1983-2008, providing periodic reports on UK domestic legislation, case-law, doctrine and parliamentary events of significance to human rights law.

2 My view is that the design of the Labour government's human rights reform in 1997-98 that produced the HRA was flawed by failing to keep to its earlier policy programme of a two-stage process. This would firstly incorporate the ECHR into UK domestic law, then secondly it would establish a commission within two years to prepare a UK Bill of Rights.[1]

3 The first stage of this process would enact legislation providing for judicial recognition of the articles of the ECHR and decisions of the Court of Human Rights and opinions of the earlier Commission which could apply in the judicial interpretation of the common law and statutory provisions.

In other words, individuals would not be empowered to bring legal proceedings on the basis of ECHR violations, but in judicial review and other forms of legal proceedings the ECHR together with its Court decisions and Commission opinions could be referred to in the legal reasoning of the courts. Where there existed a judicial discretion, or an uncertainty or ambiguity in the common law or interpretation of a statutory provision, the court could exercise its judgment in favour an individual's fundamental rights or freedoms.

4 The second stage of reform was to enact a Bill of Rights, prepared by a commission and presented to Parliament for agreement. The Bill would set out a UK version of fundamental rights and freedoms that would be compatible with and broadly similar to those in the ECHR and ICCPR but fine-tuned in its drafting to the UK's indigenous values and national circumstances.

These rights would impose statutory obligations of compliance on public bodies (and possibly companies) and make them actionable in the courts by individuals (and possibly companies) on the same standing as in judicial review (or possibly a victim requirement as in the HRA).

There would be an elevated status and priority for these rights, most likely envisaged as prevailing over later primary legislation unless a "notwithstanding clause" was inserted in the later Bill. The Bill of Rights itself would most likely be amendable on some special legislative process, such as an extended power of delay by the parliamentary second chamber.

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[1] *A New Agenda for Democracy* (Labour Party 1993, endorsed by conference 1994): reproduced in Blackburn, *Towards a Constitutional Bill of Rights for the UK: Documents and Commentary* (1999), doc. 112, which see generally on the historical, political and legal context out of which the HRA emerged.

5 However instead, the Home Office under Jack Straw conflated these two stages, making the ECHR actionable in the courts in similar fashion to a national Bill of Rights. In other words, they muddled the two concepts of incorporation of the ECHR and a national Bill of Rights. Some of the pressure groups including NCCL encouraged this as they feared Labour would run out of momentum in its reforming zeal and incorporation was all that was achievable; therefore, they believed, the more attributes of a Bill of Rights for the HRA the better.

6 The obvious problem with this, which the Labour Cabinet with its strong pro-European and internationalist outlook at that time seemed blind to, was that the HRA would soon come to be regarded as a European instrument operating directly within the UK, and its Convention rights seen as European human rights being pleaded in UK courts, rather than British rights. With Europe being the cause of so much division within the country and its two major parties, the HRA was constructed on unstable foundations.

7 I strongly wish the UK to remain in the Council of Europe and a signatory to the ECHR including the Court of Human Rights; and I strongly believe there is every benefit to the UK retaining its incorporation of the ECHR in the form described in para. 3 above.

8 However at the same time I believe the government should enact a UK Bill of Rights. Its essential elements should be those as described in para. 4 above.

9 The case for a UK Bill of Right, as with this Review of the HRA, should not be the exclusive preserve of lawyers and the legal profession; it is a matter of profound interest and concern for every citizen in the UK. The symbolic, educative and political advantages of a Bill of Rights, apart from its importance as a form of legal redress, would be considerable. It would become the primary reference point for learning and discussions about UK citizenship in schools. It would be the moral criteria on which parliamentary and media scrutiny and discussions were guided in considering new administrative powers sought by governments.

10 Enacting a Bill of Rights would be an opportunity to articulate the indigenous traditions of our legal and political systems, the progressive values our society and people seek to espouse (extending the articles of the ECHR in such areas as equality and non-discrimination, personal privacy, and the environment) and provide a UK statement of our citizens' rights and freedoms more closely attuned to our national circumstances. There would be a real value in a UK Bill of Rights that the HRA in its present form is failing to provide.

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