THE JOINT COMMITTEE ON HUMAN RIGHTS INQUIRY INTO THE GOVERNMENT'S INDEPENDENT HUMAN RIGHTS ACT REVIEW

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The Joint Committee on Human Rights inquiry into the Government's Independent Human Rights Act Review

A Submission from Muslim Engagement and Development (MEND)

March 2021

MEND's contribution to the inquiry

This submission from Muslim Engagement and Development (MEND) to the Joint Committee on Human Rights (JCHR) inquiry into the Government's Independent Human Rights Act Review seeks to explore how the Human Rights Act (HRA) has advanced human rights in the UK, the relationship between domestic courts and the European Court of Human Rights (ECtHR), and the operation of the HRA with regards to the relationship between the judiciary, the executive, and the legislative branches of government.

MEND is a community-funded organisation that seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively. Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, election resources, briefings etc.).

Considering MEND's expertise in the protection of minority rights and those of Muslim communities in particular, we feel that we can provide constructive insights into the HRA and its operational value in society. As such, MEND hopes that this contribution may provide guidance to the JCHR in approaching the HRA in a manner that recognises the experiences of minority communities that rely upon its protections.

The JCHR is inviting evidence on a range of issues, with key questions to which MEND believes our expertise can make a valuable contribution:

1. Has the HRA led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their human rights?

2. What has been the impact of the HRA on the relationship between the courts, Government, and Parliament?

3. Has the correct balance been struck in the HRA in the relationship between the domestic courts and the ECtHR? Are there any advantages or disadvantages in altering that relationship?

Abbreviations

The European Court of Human Rights **(ECtHR)**

The European Convention on Human Rights **(ECHR)**

The Human Rights Act 1998 **(HRA)**

The Independent Human Rights Act Review **(IHRAR)**

Declaration of incompatibility **(DOI)**

Approaching the review

Democratic and free societies are built upon the ideals of equality, justice, and fairness. It is in line with these principles that we expect our governments and public bodies to act, and it is through these principles that we hold them to account when they do not meet this standard. Within this framework, the HRA is a valuable check on power and an important mechanism for mitigating and correcting intentional or unintentional state actions that jeopardise the values, rights, and freedoms that we hold dear. In other words, even the best-intentioned legislation and policies can occasionally overlook potential human rights implications and can threaten the equality we expect as citizens; whether that be impacts to our privacy, our access to education, our freedom to hold political or religious beliefs, or our protection from abuse.

The HRA allows citizens to access justice in these situations. Specifically, it allows courts to determine if human rights have been breached. If this is found to be the case, the courts can demand that any legislation that is incompatible with our human rights obligations be changed by the Government. This is a fundamental and objective protection against any government's abuse of power. However, recent times have seen the current Government's increasing hostility to the courts and indications that they wish to remove or restrict judicial scrutiny. If this were to happen, any potential human rights breaches and considerations to legislation would be subject solely to the decisions of Parliament – a body which cannot escape its politicised underpinnings and the subsequent infiltration of political agendas into any such decision.

Indeed, the HRA is an efficient and carefully calibrated model that embeds human rights protections within our legal and political system. Attempts to politicise and dilute it will only harm those it seeks to protect. To accurately assess the efficacy of the HRA, a review must provide a holistic and comprehensive overview of the HRA's operations since its enactment. However, the questions posed by the IHRAR are very narrow in focus and provide only for a superficial analysis of issues surrounding the separation of powers between the judicial, legislative, and executive branches of government and its relationship with the ECtHR – a focus that betrays the seemingly political underpinnings of the review itself. This fails to appreciate how the HRA has operated in practice and risks obscuring the important ways in which it has facilitated and protected victims of human rights breaches.

It is important to bear in mind that the HRA was meticulously drafted and ratified by Parliament to ensure the centrality of upholding the principles of parliamentary sovereignty. Thus, it has consistently proved to be a fundamental mechanism in negotiating the delicate balance between providing a check on power whilst simultaneously respecting the powers of the legislature. At the same time, it has played a valuable role in instilling a greater awareness of human rights obligations amongst the Government and public authorities and has been instrumental in enabling victims of human rights violations to seek redress.

Key conclusions

1. While the HRA is operating as intended, wider challenges endemic throughout the criminal justice system, including funding cuts to legal aid, create barriers for victims seeking justice.

2. Provisions within the HRA appropriately maintain a delicate balance between respecting parliamentary sovereignty whilst ensuring courts have a means to redress human rights breaches.

3. The duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR is operating as intended and provides space for constructive introspection whilst respecting the domestic context.

"Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?"

The HRA has undoubtedly transformed the human rights landscape in securing and advancing the protection of human rights since it came into force. In particular, it has integrated human rights considerations within our legal and political frameworks and bestowed individuals, organisations, and groups with the means to seek justice through the domestic courts and hold public authorities and the Government to account.

The HRA has been instrumental in protecting the human rights of victims of rape, domestic abuse, and defamation, as well as vulnerable groups, including disabled groups and those from minority backgrounds. Without the HRA, many victims would be forced to endure a lengthy and expensive process in taking their case to the ECtHR, which for many would render a route to justice inaccessible. A recent poll conducted by Amnesty International found that almost 70% of adults believe the HRA provides an important safety net to be able to hold the Government to account when things go wrong.[1] This underscores the criticality of the HRA as a fundamental tool in the protection and enforcement of human rights.

However, whilst the HRA has been indispensable in making rights directly enforceable, there are wider barriers to accessing justice, including funding cuts under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. With regards to social welfare law, the total number of legal help matters started decreased from 316,993 in 2012/13 to a 76,416 in 2015/16 – a 76% drop in just 3 years.[2] This has meant that despite the ever-increasing need for legal assistance, removal of funding has denied vast swathes of society their rights to access justice. Furthermore, evidence has shown that the groups most dependent on legal aid, such as women, disabled people, and those from BAME backgrounds, have been disproportionately affected by these reforms, which further compounds existing disparities in accessing justice.[3] With legal recourse being financially inaccessible for many, the HRA thus often remains unenforceable in practice.

The current challenges hampering pathways to justice means human rights must be strengthened not diluted. In light of Brexit and the loss of the EU Charter of Fundamental Rights that provided important protections for non-discrimination, migrant, and labour rights, the reliance upon the HRA is all the more critical for the preservation of human rights in the UK. Therefore, we propose that any changes to the human rights framework must only be in pursuit of fortifying the powers contained within the HRA.

While the HRA is operating as intended, wider challenges endemic throughout the criminal justice system, including funding cuts to legal aid, create barriers for victims seeking justice.

"What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?"

The HRA maintains a delicate balance between respecting parliamentary sovereignty whilst ensuring courts have a means to redress significant human rights breaches. Concern amongst certain politicians and conservative think tanks[4] regarding the role of the HRA and ECtHR in expanding judicial powers at the expense of parliamentary decision-making are at best misguided. In reality, Sections 3 and 4 of the HRA fully protect and maintain the separation of powers whilst upholding the sovereignty of Parliament. Under Section 3, courts are required to interpret legislation as compatible with ECHR rights and, if they are unable to do so, issue a DOI under Section 4. Such powers are not legally binding. Indeed, under Section 3 interpretations can be overridden, whilst under Section 4, Parliament retains the freedom and

[1] "Amnesty International – Human Rights Poll 2021", *Comresglobal.Com*, 2021, https://comresglobal.com/polls/amnesty-international-human-rights-poll-2021/ .

[2] Lucy Logan Green and James Sandbach, *Justice In Freefall: A Report On The Decline Of Civil Legal Aid In England And Wales*, LAG Special Report (Legal Action, 2016).

[3] Amnesty International UK, *Cuts That Hurt: The Impact Of Legal Aid Cuts In England On Access To Justice* (London: Amnesty International UK, 2016).

[4] Michael Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible With Parliamentary Democracy In The UK* (Policy Exchange, 2016).

powers to ignore the declaration, overturn it, or take steps to amend legislation as they see fit. The relationship can therefore be best exemplified as an important collaborative process between the judiciary, the executive, and the legislature. While the courts adjudicate and assess cases to provide useful conclusions, it is the Government and Parliament which draws upon these conclusions if they wish to reshape policy. Ultimately, the authority remains with Parliament to decide if and how legislation should be amended. In reality, the courts display significant deference to Parliament, exemplified by the fact that only 43 declarations of incompatibility have been issued over the past 20 years.[5]

Provisions within the HRA appropriately maintain a delicate balance between respecting parliamentary sovereignty whilst ensuring courts have a means to redress human rights breaches.

Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?

Arguments for the severance of formal links with the ECtHR often cite the ECtHR's undue influence on domestic courts. However the Supreme Court is already the ultimate authority on adjudicating on the UK's human rights cases. Meanwhile, Section 2 of the HRA requires UK courts merely to "take into account" any decision of the ECtHR for cases pertaining to rights contained within the ECHR.[6] However, UK courts are not bound by this case law. Such cases do not set a precedent that UK courts are required to follow, rather, they must only consider them when deciding a similar case.

From the perspective of victims of human rights breaches, this relationship is a fruitful one that creates space for constructive introspection whilst respecting the domestic context. The ECtHR hears cases from 47 countries and cases concerning one country have resonance with issues found in the UK context. Consequently, the current system not only facilitates constructive dialogue between the UK courts and the ECtHR regarding the application of rights in the UK but does so in a way that allows for an implementation that is compatible with British traditions, cultures, and laws.

In R v Horncastle[7] the appellants called upon the decisions of the ECtHR (made previously in a similar case Al-Khawaja and Tahery v United Kingdom)[8] which upheld that that hearsay evidence would breach Article 6 of the ECHR: the right to a fair trial. However, the UK's Supreme Court dismissed the appeal, on the basis that under English law, hearsay evidence may be used as long as the relevant conditions under s.116 Criminal Justice Act 2003 are met; safeguards of the legal process, which the ECtHR failed to consider. The case confirms that Section 2 of the HRA strikes an important balance that allows domestic courts to depart from and disagree with the decisions of the ECtHR whilst facilitating beneficial insights, in this instance, which alerted the Grand Chamber to the specificities of legal procedures in the UK.

Thus, the HRA affords an interdependent and mutually beneficial system whereby just as domestic courts can take into account ECtHR jurisprudence, UK courts can equally exert influence on the ECtHR. As such, altering the current relationship may risk limiting the UK courts' ability to influence Strasbourg decision-making and counterproductively, may result in more cases against the UK reaching the ECtHR because this dialogue has been obstructed.

In its current state, the reduction in the number of UK cases being heard by the ECtHR is a testament to the importance and success of the HRA in remedying human rights cases. In 2020, only 0.7% of applications allocated to a judicial formation at the Strasbourg court were

[5] Ministry of Justice, *Report To The Joint Committee On Human Rights On The Government'S Response To Human Rights Judgments 2019–2020*, Responding To Human Rights Judgments (APS Group, 2020).

[6] *Human Rights Act 1998*, vol. 2, 1998.

[7] R v Horncastle and others (Apellants), [2009] UKSC 14.

[8] Al-Khawaja and Tahery v UK [2011] ECHR 2127

UK cases,[9] whilst in 2000 6% of all applications allocated to a decision body were UK cases. Even amongst those that do reach the ECtHR, it is rare that they result in a violation. In 2020 0.2% (2) out of all the 871 judgements given by the Strasbourg Court found a violation by the UK[10] a clear decrease since 2002 where the figure was 3.6%.[11] This suggests that the HRA has drastically reduced the frequency with which the ECtHR declares UK cases in violation of the ECHR as a result of the conclusions provided by the domestic courts.

Moreover, amendments to this section could result in legal uncertainty. With the Government's assertion that the UK will remain a member of the ECHR, it is the ECtHR that provides clarity in how the rights contained within the ECHR should be understood and what they mean in practice. Removing the obligation to consider the rulings of the ECtHR would, therefore, create confusion in the scope and application of these rights.

As such, there are few perceivable advantages to altering the current relationship. The critical role of the ECtHR in interpreting and protection rights in the UK should not be underestimated.

The duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR is operating as intended and provides space for constructive introspection whilst respecting the domestic context.

[9] European Court of Human Rights, *Analysis Of Statistics 2020*, 2021, https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf.

[10] Ibid

[11] European Court of Human Rights, *Annual Report 2002*, 2003, https://www.echr.coe.int/Documents/Annual_report_2002_ENG.pdf.

How MEND can assist parliamentarians, policymakers, and community stakeholders

- Providing briefings, information, analysis, and expertise on issues impacting Muslim communities.
- Arranging opportunities for parliamentarians, policymakers, and community stakeholders to engage with their local Muslim communities.
- Conducting research within Muslim communities.
- Connecting parliamentarians, policymakers, and community stakeholders to other local stakeholders.

If MEND can be of any assistance to your work, please feel free to contact info@mend.org.uk