

**Written evidence from Professor Nicola Barker. School of Law and Social Justice,  
University of Liverpool (HRA0020)**

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?

I have undertaken a gender-audit of the Human Rights Act case law from 2000-2020 as part of a British Academy-funded project.<sup>1</sup> This research has revealed a number of ways in which the HRA has been useful for women and those of minority genders and sexual orientations, not least in holding public authorities to account for failing to protect against sexual violence.<sup>2</sup> I strongly concur with the observations of Baroness Hale, Lord Neuberger, and Dominic Grieve in their evidence to this Committee earlier this month on the operation of sections 2, 3 and 4 and offer no further elaboration on the points they made. Instead, I would like to respectfully suggest that the current terms of reference of the Government's Independent Review are misconceived if the aim is to determine how to better protect people's rights. Examining the HRA using a gender lens reveals significant gaps in the protection of women's rights under the Act. These gaps are not generally, however, found in the sections that are the focus of the current Review (sections 2, 3, 4) but rather in the public/private divide found in section 6, which orients the Act's focus on public authorities rather than private actors.

Section 6 was no doubt written in this way because the aim of the HRA was to provide a route to seek a remedy for ECHR violations in domestic courts, rather than having to first exhaust domestic remedies and then make an application to the European Court of Human Rights in Strasbourg. This was a time-consuming and expensive process. The HRA has provided an effective and useful alternative to that and, as a result, the number of cases brought against the UK in the Strasbourg Court has dropped significantly and the number of successful cases brought against the UK has dropped to the low single figures.<sup>3</sup> This is a remarkable achievement. However, as the operation of the HRA is to be reviewed, I would suggest that this ought to include consideration of the ways in which the UK could *improve* access to and the effectiveness of rights for all, rather than considering only how they can be restricted by limiting the existing powers of the UK courts. In other words, the ECHR should be seen as a floor rather than a ceiling on the protection of rights in the UK and one area in which we could and should go further in the HRA is through properly protecting women's rights by expanding human rights norms and standards to the private sphere.

Human rights are at risk from private corporations and private individuals as well as the State, especially where, as the UN Independent Expert has observed: 'Many transnational corporations are more powerful than States'.<sup>4</sup> This is particularly the case in relation to women, who rely heavily on contracted-out and privatised industries as both employees and service-users, and whose physical safety and economic security (amongst others) are more likely to be violated in the private sphere than in the public sphere. It is well-established that our understandings of human rights 'are built on typically male life experiences and in their current form do not respond to the most pressing risks women face'.<sup>5</sup> While the current focus in the HRA is on protection from actions by or on behalf of the state, it is the private sphere, whether the private market or the private family, in which women need most protection. As such, the HRA is much less effective in protecting women's human rights than it ought to be. This is partly attributable to the male-centric view of fundamental rights inherited from the ECHR itself, but the language and interpretation of section 6 exacerbates the problem.

Section 6 allows the HRA to be applicable to core public authorities and hybrid authorities. The latter includes private bodies which are exercising public functions, but they must act compatibly with the HRA in respect of their public functions only. This has left some vulnerable service-users without fundamental rights protection, most famously in a case where a local council had contracted with a private provider to fulfil its statutory duty to provide care for elderly residents. In that scenario, an elderly woman with Alzheimer's disease was subjected to eviction from her care home without consideration of her right to respect for her home (Article 8 ECHR) because the private care home was "simply carrying on its private business with a customer who happens to be a public authority".<sup>6</sup> In contrast, those who receive the same services directly from a state provider would still be protected under the HRA. This has created a two-tier system and in the context of austerity and increasing privatisation the more protected "public" tier is very small and shrinking rapidly. In this context, the distinction between the public and the private in the HRA is untenable.

The inclusion of courts and tribunals in section 6 gave rise to speculation at the time of its enactment that the HRA may have indirect horizontal effect,<sup>7</sup> allowing the Act (through the duty on the courts to uphold Convention rights) to be used in the private sphere. However, the courts have adopted a restrictive interpretation of public authority despite the reasonably broad language in the Act itself, and the Supreme Court now appears to have precluded the possibility of indirect horizontal effect, at least in some circumstances.<sup>8</sup>

Women's rights are most at risk within the private sphere, most notably within the family. This is particularly the case in a context of cuts to public services which could offer some protection, and without which the responsibility for providing care to other family members, generally undertaken by women within the family, is further privatised. This privatisation of care, in turn, makes (women) carers economically vulnerable on the breakdown of relationships and it is imperative that these vulnerabilities are taken account of in the family justice system. However, family law reforms have virtually eliminated access to legal representation for private family law matters and encouraged private settlement of disputes outside of the court system, with few protections for potentially vulnerable parties including victims and survivors of domestic abuse.<sup>9</sup> This privatisation of family conflict should fall within the existing provisions of the HRA, access to justice being clearly within the ambit of Article 6 ECHR and there being an arguable discriminatory effect on the grounds of sex contrary to Article 14 EHCR. There is further an arguable case that the situations created in which survivors of domestic abuse may be subjected to cross-examination by their abuser as a litigant-in-person was also a violation of Article 3 ECHR. Yet, the HRA has played a very limited role in challenging this continuing violation of fundamental rights that disproportionately impacts on women. The place at which the public/private divide is drawn in the HRA makes the 'public' encompassed by the Act so narrow that it evidently did not occur to lawmakers at the time of these family law reforms that the gender equality implications of limiting access to justice in a wide range of family law matters, from divorce to child arrangements to the validity of prenuptial agreements, might make these provisions incompatible with the HRA. It does not appear to have occurred to them that there might be gender equality implications of withdrawing legal aid, encouraging (private) mediation over (public) access to family courts, or that these implications might matter. In my view, a human rights framework that does not force these issues to at least be considered is one that does not take women's rights sufficiently seriously.

While the HRA has clearly had some positive impact on gender equality, and it remains ‘an essential tool’ for women to, for example, challenge policing failures with regard to domestic abuse, sexual violence and human trafficking offences,<sup>10</sup> it has hardly lived up to its promise of ‘bringing rights home’ for women. Where it largely falls short is in its failure to move beyond the public/private divide. To the extent that the HRA reinforces the public/private divide, it is problematic for women; both carers and those cared for, and both within the family and within paid employment. If the HRA continues to enforce human rights only in the public sphere and not the private it will remain of limited use in relation to women’s human rights. If the Act is to be reviewed, this should be its focus.

19/02/2021

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<sup>1</sup> ‘From the Human Rights Act to the British Bill of Rights: A Feminist Critique’ (2018-2019).

<sup>2</sup> See e.g. *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11.

<sup>3</sup> Case statistics by country are available here:

<https://www.echr.coe.int/Pages/home.aspx?p=reports/factsfigures&c=> [accessed 18 February 2021]

<sup>4</sup> UN General Assembly, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Impact of economic reforms and austerity measures on women’s human rights’ (73<sup>rd</sup> Session) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/229/04/PDF/N1822904.pdf?OpenElement> [accessed 27 January 2021], para 8.

<sup>5</sup> Hilary Charlesworth, ‘What are “Women’s International Human Rights”?’ in Rebecca J Cook (ed.) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) at 59.

<sup>6</sup> *YL v Birmingham City Council* [2007] UKHL 27, at para 27.

<sup>7</sup> See e.g. HWR Wade, “Horizons of Horizontality” (2000) 116:2 LQR 217; Murray Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” (1998) Pub L 423.

<sup>8</sup> *McDonald v McDonald* [2016] UKSC 28.

<sup>9</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the Children and Families Act 2014.

<sup>10</sup> Nogah Ofer, *Violence against women and girls: Protecting women’s human rights and holding the state to account* (2017), online (pdf): *End Violence Against Women*

<[www.endviolenceagainstwomen.org.uk/wp-content/uploads/Human-Rights-Act-report-Oct-2017.pdf](http://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Human-Rights-Act-report-Oct-2017.pdf)>