Written evidence from the Human Rights in Action (HRiA) (HRA0070)

Human Rights in Action team
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Introduction

Upon the announcement of the Independent Human Rights Act Review (IHRAR), we decided to create the Human Rights in Action (HRiA) project to assess the effects of the HRA and consider whether there was a need to reform it.

As academic human rights experts who have observed, analysed and worked to promote the positive influence of the HRA in the UK, we were strongly motivated to join forces, with the ambition of providing comprehensive, evidence-based responses to the questions being asked by the IHRAR

We were particularly concerned about IHRAR's Terms of Reference, as one of us has explained here:

> The Independent Review marks a deviation from *direct* political aggression towards the ECHR, 'proceed[ing] on the basis that the UK will remain a signatory to the Convention', as stated in its call for evidence. But at the same time, it throws into question the UK's continued commitment to giving full effect to the rights and freedoms enshrined in the ECHR *domestically*, through the HRA.
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> Its terms of reference were framed against a politically polarised backdrop, with allegations the Human Rights Act allows the judiciary to undermine the executive and questions over the relationship between domestic courts and the European Court of Human Rights.
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> It is also counter-intuitive for a review of the Human Rights Act to fail to ask the cardinal question of whether the Act has succeeded in actually protecting human rights. The fact that the Act has indeed been a great success—the HRA and ECHR have revolutionised our human rights law—provides the strongest possible indication that the mechanism works.

The HRiA team brought together some of the foremost human rights experts, asking them the fundamental question of how the HRA has shaped UK law and UK courts over the last two decades. We were delighted to see that the JCHR terms of reference take this question, of whether the HRA has led to 'individuals being more able to enforce their human rights', as its starting point, providing a strong contrast to the IHRAR's terms of reference.

Drawing on 20 contributions by 26 experts, the HRiA team submitted a response to the IHRAR and took particular care to highlight the continuous positive impact of the HRA on human rights protection in the UK. The individual expert views are available on our website, which we will continue to update with new contributions.

The present submission draws on these contributions, and wider research, to highlight the positive impact of the HRA in respect of all of the substantive issues identified by the Joint Committee on Human Rights in its Inquiry on the IHRAR.

1. The HRA has led to individuals (and especially the most vulnerable individuals) being more able to enforce their human rights

1.1 The HRA has improved rights protection, in three key ways.

1.2 First, it has empowered individuals to hold the authorities accountable for the failure to protect human life.

> **1.2.1** In the context of coronial law, Leslie Thomas shows that the HRA has facilitated changes in inquests that are of benefit to families of deceased persons. For instance, drawing on European Court of Human Rights (ECtHR) jurisprudence, the Grenfell Tower inquiry has accepted that the right to life is engaged in respect of the fire that killed 72 people. Moreover, bereaved families can now demand the disclosure of key documents in inquests and they can, under certain circumstances, access legal aid. Thus, the HRA improved the effectiveness of the right to life guarantees in the UK.

> **1.2.2** Philip Leach demonstrates that the HRA enhanced the accountability of the authorities in cases of deaths at the hands of state agents or in respect of those who have been in the custody or care of the state. For instance, UK courts have held national authorities accountable, on the basis of ECtHR jurisprudence, for the failure to carry out effective investigations into the death of vulnerable offenders while in prison. Moreover, the government has introduced changes to law, policy and practice that ensure more transparency and accountability in investigations into the death of civilians during 'the troubles' in Northern Ireland.

1.3 Second, the HRA has ensured that the right to privacy is properly protected.

> **1.3.1** Dimitrios Kagiaros indicates that the HRA has improved domestic remedies available to individuals against unlawful interception of communications and surveillance at the hands of the Intelligence and Security services. Notably, the HRA created the duty for intelligence services to act in accordance with European Convention on Human Rights (ECHR) rights and a specialised Tribunal was established to handle cases of human rights violations perpetrated by the intelligence services.

> **1.3.2** As Julian Petley shows, UK courts have been aided by the HRA to shield individuals from illegitimate invasion by the media. Drawing on ECtHR jurisprudence on the right to privacy, the UK courts have established restrictions to the publication of details about individuals' consensual sexual activity, widened the

scope of the notion of breach of confidence, and elaborated a distinction between material which is in the public interest and material which may only interest sections of the public.

1.3.3 The right to fair trial provides another example of how the HRA has strengthened the protection of the rights of individuals in the UK. As Dimitrios Giannoulopoulos has shown:

'The decision of the Supreme Court in *Cadder v HM Advocate* had profound consequences for the law of custodial interrogation in Scotland. Applying *Salduz v Turkey* the Supreme Court held that compatibility with article 6 of the Convention required that contracting states organise their systems in such a way as to ensure that "a person who is detained has access to advice from a lawyer before he is subjected to police questioning". From this it followed that the relevant Scottish legislation, allowing for the detention and questioning of suspects for a period of up to six hours with no access to legal advice, was the very converse of what is required by the right to fair trial. As a result of *Cadder*, the Scottish Government rushed through emergency legislation, recognising suspects' right to have a private consultation with a solicitor before any questioning begins and at any other time during such questioning'.

The HRA and ECHR role were, in other words, paramount, in challenging the status quo and enhancing individual rights, even in an area where the UK has long been ahead of the curve vis-a-vis its European partners; the Police and Criminal Evidence Act 1984 had introduced substantial procedural guarantees for suspects when questioned by the police, yet the situation in Scotland remained unchanged until the Supreme Court applied *Salduz* in *Cadder*.

1.4 Moreover, the HRA has enhanced legal protection of minority and marginalised individuals and groups.

1.4.1 For instance, Anna Lawson, Maria Orchard, Beverley Clough, Luke Clements and Oliver Lewis discuss how the HRA has strengthened the human rights of people with disabilities. Human rights litigation has led to the introduction of rigorous policies that regulate the circumstances under which people with learning disabilities can be legitimately deprived of their liberty. Moreover, the principle of non-discrimination has proven valuable in challenging government regulations on eligibility to disability-related benefits and forms of disability-related discrimination that are not covered by the Equality Act 2010.

1.4.2 Reuven (Ruvi) Ziegler notes that the HRA has increased judicial scrutiny over executive policies and primary legislation that impact the immigration status and the rights of seekers of international protection. For instance, the HRA has been instrumental in upholding the right of asylum seekers to access basic services, such as health care and shelter, and in halting deportations that would place ineligible asylum seekers at risk of torture, inhuman or degrading treatment. Therefore, the HRA empowers migrants against government's attempts to leave them destitute and to deport them in violation of their ECHR rights.

1.4.3 In the context of the legal prohibition on assisted suicide, Nataly Papadopoulou shows that judicial interpretation of the HRA has prompted the introduction of an offence-specific policy that enables prosecutors to recognise the role of compassion when deciding whether to bring a case for a reported assisted suicide. Although the ECHR does not prescribe the Contracting Parties to introduce assisted suicide in their legal systems, the presence of the HRA ensures that human rights and human dignity are always relevant considerations in developing relevant policies.

1.4.4 Loveday Hodson demonstrates that sexual minorities in the UK have benefitted from the dialogue established by the HRA between UK courts and the ECtHR. For instance, the House of Lords decided to read down a statutory provision in order to protect the ECHR rights of a surviving partner from an unmarried same-sex relationship. Likewise, the HRA has empowered national judges to shape the scope of the prohibition of sexual orientation discrimination in the provision of goods, facilities and services.

1.4.5 Frank Cranmer shows that the dialogue between UK courts and the ECtHR has had a positive influence on the protection of religious rights and freedoms in the UK. For instance, drawing on ECHR rights, UK courts held that a chapel affiliated to the Church of Scientology satisfied the statutory conditions to be recognised as a place of meeting for religious worship. Likewise, the ECtHR jurisprudence has influenced the way in which Employment Tribunals deal with cases of alleged discrimination on religious grounds. On this basis, Cranmer concludes that the HRA has improved the willingness of domestic courts to uphold the right to manifest religious beliefs.

1.4.6 As Jonathan Cooper points out, the HRA is the only statutory framework that permits the recognition of the right to dignity and, as Natasa Mavronicola observes, the incorporation of the ECHR into UK law via the HRA is essential to protect the human dignity of everyone in the UK, including those who are deemed dangerous or otherwise marginalised. For this reason, amending the HRA risks to dilute the protections afforded to individuals against the sidestepping of their dignity and to compromise the UK overall commitment to human rights.

2. The HRA has ensured that human rights are embedded in police and military forces and in criminal justice, improving the practice of public authorities

2.1 Contributors to the HRiA project show that the HRA has improved how police and military forces balance the competing duties to guarantee public safety and to protect citizens' individual rights.

2.2 Brice Dickson describes the profound and beneficial impact of the HRA on policing in Northern Ireland. Notably, human rights protection is now recognised as the main purpose of the Police Service of Northern Ireland and the Northern Ireland Policing Board regularly assesses police performance regarding human rights. Moreover, a number of reforms have been made to the criminal justice system with the aim to bring it in line with the requirements of the HRA. Dickson notes that the HRA has contributed to create a culture in which individuals feel that their human rights are valued by public authorities. Thus, the operation of the HRA in its current form plays a vital role in maintaining the peace in Northern Ireland.

2.3 The HRA has also enabled UK courts to clarify the extent to which police forces are allowed to use novel technologies for the prevention of serious crime. Michael Abiodun Olatokun discusses how UK courts have found specific advanced surveillance techniques to interfere with the right to respect for private life. The awareness that the use of certain surveillance techniques raise human rights issues has shaped the actions of the police. For instance, police forces now conduct more information campaigns to make the public aware of the technologies they may deploy.

2.4 Conall Mallory and Stuart Wallace show that the application of the HRA to military operations overseas is beneficial for both soldiers and victims of British military operations abroad. The HRA guarantees the human rights of British soldiers stationed overseas and it enables bereaved families to seek justice against the failure of the Ministry of Defence to protect soldiers overseas. For instance, following judicial litigation under the HRA, the Ministry of Defence changed its policies to ensure that British soldiers deployed overseas receive adequate and effective equipment. The HRA also enables victims of British military operations to obtain justice and it does not lead to 'vexatious' human rights litigation against British armed forces. Mallory and Wallace point out that investigative and prosecutorial obligations flowing from the HRA are not the cause of soldiers facing repeated investigations into their past conduct during operations overseas. Rather, these investigations are a consequence of the institutional failure to properly investigate incidents at the time they occurred.

3. The HRA ensures a balanced relationship between the Courts, Government and Parliament

3.1 Contributors to the HRiA project see the current relationship created by the HRA between the judiciary, the executive and the legislature as essentially positive for four key reasons.

3.2 First, as Cooper and Conor Gearty argue, the HRA enhances the accountability of all branches of government without unsettling the primacy of Parliament. The judiciary, the executive and the legislature are all required to protect human rights, but the HRA does not prohibit Parliament from legislating in ways that may challenge human rights jurisprudence. Similarly, the HRA allows public authorities to act in a way which is incompatible with a ECHR right, if, as the result of one or more provisions of primary legislation, the authority could not have acted differently (section 6). Hence, the HRA gives primacy to the principle of parliamentary sovereignty.

3.3 Second, judicial interpretation of the HRA has favoured a dialogue between domestic courts and Parliament. Although section 3(1) of the HRA enables UK courts to interpret and give effect to primary legislation and subordinate legislation in a way which is compatible with human rights, Gearty notes that this provision has been interpreted as warranting only a reading of a provision under scrutiny that is consistent with the purpose of the underlying statute. Thus, judicial interpretation of the HRA has not drawn the domestic courts unduly into questions of policy but has established constraints to the interpretive capacity of UK courts.

3.4 Third, the architecture of the HRA establishes an appropriate framework to hold the government to account in respect of human rights. Under section 19 of the HRA the government must say whether its new legislation is compatible with the human rights

enshrined in the HRA. Similarly, in the event of a declaration of incompatibility under section 4 of the HRA, the government is required to consider whether the impugned law should be brought into line with the provisions of the HRA that it violates. As Gearty points out, the government is not compelled to amend existing legislation or withdraw Bills that are incompatible with the HRA, but these provisions require the executive to include a consideration of human rights in its decision-making.

3.5 Fourth, Dickson shows that the HRA has been influential in ensuring a constructive relationship between branches of government in Northern Ireland. Notably, the Assembly and government departments are prohibited from passing laws that violate the HRA and all district councils in Northern Ireland must comply with the HRA, in order to avoid discriminatory decision-making in communities that remain divided. The HRA is strongly supported by all political parties and Dickson warns that any change to the HRA risks undermining the peaceful interaction between branches of government in Northern Ireland.

4. The HRA creates a balanced relationship between the domestic courts and the European Court of Human Rights

4.1 A key aspect addressed by contributors concerns how the duty created by the HRA for the domestic courts to 'take into account' ECtHR jurisprudence is working in practice.

> **4.1.1** As Gearty points out, this provision enables domestic courts to consider the ECtHR jurisprudence but does not to bind the outcome of individual cases. Helen Fenwick and Roger Masterman note that the development of human rights in the UK was initially based on the assumption that the ECtHR jurisprudence had to be absorbed into domestic law. However, in recent times domestic courts have rejected the ECtHR approach in an increasing number of circumstances and have taken the ECtHR jurisprudence into account in a more contextual and critical way. Thus, the HRA has facilitated a balanced relationship between UK courts and the ECtHR.

4.2 Several contributors dispute the claim that the HRA facilitates the subordination of national institutions to the ECtHR.

> **4.2.1** As Kanstantsin Dzehtsiarou demonstrates in respect of prisoners voting, the HRA does not force legislators to follow every judgment of the ECtHR by the letter. Rather, as Alan Greene shows in the context of terrorism and other emergency situations, national authorities enjoy a degree of discretion in deciding how to balance questions of public interest and human rights protection. Thus, the HRA empowers UK courts to address human rights violations and the possibility to obtain justice at the domestic level reduces the number of individuals petitioning the ECtHR. On this basis, Kagiaros warns that a watering down of the HRA to lessen the influence of the ECtHR would probably have the opposite effect and invite further supervision by the ECtHR itself.
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> **4.2.2** The HRA has established a fair and constructive relationship between UK courts and the ECtHR. In taking into account ECtHR jurisprudence, UK courts do not encroach upon the powers of the executive or Parliament but, as Stella Coyle argues, give effect to values, principles and rights that are fundamental in British law and society. Thus, in light of the positive relationship created by the HRA between the

domestic courts and the ECtHR, Colm O'Cinneide, like many of the contributors to the HRiA project, urges caution in disturbing this now settled framework.

Conclusion

The various submissions to the HRiA project demonstrate that the HRA has improved the protection of human rights in the UK, it has not distorted the balance of power between different branches of government, and it does not undermine the sovereignty of the UK Parliament. The authors of the HRIA project make a compelling case for rejecting any attempt to dilute the impact of the HRA.

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