Written evidence from Professor Merris Amos (HRA0019)

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1. Has the HRA succeeded in its aims as they were set out in 1997/98

1.1. Has the HRA improved individual rights in the UK rather than requiring litigants to go to the ECHR for justice. And, if so, has this improved citizens’ lives?

The HRA has fundamentally improved the protection of human rights through law for the people of the UK. Prior to the coming into force of the HRA it was almost impossible to seek a remedy in a UK court where a public authority had breached human rights as demonstrated by the record of the UK before the European Court of Human Rights (ECtHR). For example, from 1975 to 1984 there was no direct protection for human rights in law at the national level and almost every judgment of the Court was a finding of a violation of the Convention on the part of the UK eventually resulting in fundamental reform to law and practice. The record of the UK before the Court has improved exponentially. For example, in 2002, before the HRA had an impact on ECtHR applications, the UK was found to have violated the Convention in 30 out of 40 judgments. In 2017 the ECtHR only delivered five judgments concerning the UK and violations were found in only two judgments. In addition, it is clear that UK courts interpreting and applying the Convention rights as given effect by the HRA are having a marked impact on Strasbourg jurisprudence. For many years UK courts only had a one-way relationship with the ECtHR, almost always unable to exercise any influence at all on its jurisprudence. The coming into force of the HRA has allowed them to take an active part in decreasing the number of applications to the ECtHR found admissible and ensuring that the UK is not found in violation of the Convention. Beyond the statistical impact, British courts can now exert strong influence, changing the course of Convention jurisprudence for all Contracting States, and helping to ensure that where the UK wishes to maintain a national position on an important issue, such as its ban on political advertising, this is far more possible than might have otherwise been the case. Applications against the UK now considered by the ECtHR where a UK court has not had the chance to exert its influence are very rare. UK courts occupy an enviable position amongst the Contracting States to the ECHR and are clearly enjoying their golden age of influence.

The HRA has improved the lives of the people of the UK in numerous ways. Procedurally there are two important overarching impacts in relation to the qualified rights such as Article 8 (private life, family life, home) and Article 10 (freedom of expression). Public authorities, should they wish to interfere with Convention rights, must point to a clear legal basis for doing so. Secondly, this interference must be shown to be necessary. These two requirements have forced public authority decision makers to think carefully about what they are doing and ensure that there are very clear reasons for doing it. Requiring decision makers to demonstrate a clear legal basis for their decision making, and the reasons for their decision, often exposes extremely poor decision making, uniformed by evidence and motivated by political considerations rather than solutions compatible with the public interest. This impact is even more profound where the absolute rights such as Article 6 (fair trial) are at issue. This right has found particularly strong expression in recent judgments such as Unison [2017] UKSC 51 judgment. Here the Supreme Court unanimously concluded that fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals were incompatible with Article 6 because of the impact on access to justice.

Substantively the improvements the HRA has brought are so great as to be almost immeasurable. For example, Article 2 (right to life) has brought vastly improved inquiries into deaths; Article 3, as
illustrated by the recent DSD [2018] UKSC 11 judgment of the UK Supreme Court, has imposed a duty on policy to investigate effectively where allegations of serious sexual assault are made so as to prevent more women being harmed; the interpretation of Article 5 (right to liberty) by UK courts has meant that a better balance has been struck between rights of protestors and police where large demonstrations are held; and the application of Article 8 (private life) to state collection of private information has led to a rebalancing away from state intrusion towards the freedom of the individual.

1.2. Has the HRA been capable of adapting to changing times?

The HRA is remarkably flexible. The most significant issues affecting human rights protection which have arisen since 1998 have included: new methods of state surveillance; the contracting out of public services; austerity; immigration; and private sector intrusion into personal lives. There is now a considerable body of national human rights jurisprudence regulating most of these areas and ensuring that the balance is struck fairly between the public interest and the rights of the individual. However, that is not to conclude that the substantive rights offered protection could not be expanded upon, particularly in the light of rights being lost as a result of the non-inclusion of the EU Charter of Fundamental Rights in the EU Withdrawal Act 2018. For example, thought could be given to modifying Article 8 (private life) of the ECHR to incorporate the additional elements contained in Article 8 of the EU Charter (protection of personal data) which has been influential in UK jurisprudence.

For many years in discussions concerning a possible bill of rights for the UK it has been suggested that the range of rights protected under the HRA is insufficient to deal with a variety of threats to human interests. For example, the Northern Ireland Human Rights Commission suggested in its 2008 report that given the history of Northern Ireland, there needed to be a much stronger right to equality and prohibition from discrimination and that the right to freedom from violence should also be given consideration. The Joint Committee on Human Rights in its 2008 Bill of Rights report recommended the inclusion of rights to health, education, housing, an adequate standard of living and the right to a healthy and sustainable environment. Increasingly the UK is out of step with other liberal democracies in not offering stronger legal protection to a broader range of human rights.

1.3. Has the provision making it unlawful for public bodies to act in a way which is incompatible with a Convention right had an effect (a meaningful impact)?

Section 6 of the HRA, which obliges public authorities to act compatibly with the Convention rights, is the core feature of the HRA. Whilst it is assumed by many that the HRA only concerns declarations of incompatibility issued pursuant to section 4 of the HRA, the real essence of human rights protection provided by the HRA is this section 6 duty imposed on public authorities, including government ministers. As noted above, this ensures that decisions are backed by law, are properly reasoned and are based in evidence rather than politics or ideology. Section 6 has had a profoundly important impact on the protection of human rights.

1.4. Is Article 13 ECHR, the right to an effective remedy, adequately protected in UK law?

One of the main problems with the effectiveness of the HRA is that the section 4 declaration of incompatibility is not considered to be an effective remedy by the ECHR although it has not yet found a violation of Article 13. Rather than re-visit this debate, it is accepted that this is the best that can be achieved under current constitutional arrangements and that at present declarations of incompatibility are always eventually implemented.
2. Have any of the concerns raised about the HRA been realised or have there been any unforeseen consequences?

2.1 Has there been a shift of power from Parliament to the judiciary? And, if so, has this had a meaningful impact?

On coming into force the HRA immediately resulted in a shift of power from an international court, the ECtHR, to national courts and a **re-balancing of power between the executive, legislative and judicial branches to bring the UK into line with almost all other liberal democracies**. Most arguments about the HRA affording too much power to the judiciary move little beyond the traditional critique of the role of courts in human rights adjudication and offer no new empirical insights or reflect in any detail upon the very limited use of sections 3 or 4 of the HRA in practice. For example, Heydon [2014] LQR 392, with no supporting evidence, concludes that the legislature’s ability to define rights is superior to that of the courts. Similarly, with no evidence, Sales [2016] PL 456 declares that the ‘indirect participation of everyone through deliberation in Parliament’ may be more likely to provide ‘better protection’ than courts ‘for the political equality of citizens and equal respect for their interests in the law-making process’. But neglects to mention potential claimants under the HRA who might have no vote including serving prisoners, those aged under 18, and, at least in the Brexit Referendum, EU nationals living in the UK.

There is also considerable evidence pointing in the opposite direction. For example, following a rigorous review of human rights immigration judgments, Wray [2013] PL 838 has concluded that even though the government was forced to modify its policy in several areas, powers were used ‘cautiously and with a strong sense of constitutional propriety.’ In her view, the ‘court almost always checked executive not legislative power and grounded its decisions in statutory authority.’

Any changes to the HRA which reduced the ability of courts to address violations of human rights contained in primary legislation would clearly not provide for effective remedies where human rights are threatened by Parliament. This would ensure that Parliament’s interpretation of human rights, despite any political motivation, was even more difficult than it is under the HRA to remedy. It would also place the UK in direct breach of Article 13 of the ECHR.

2.2 Have policy makers been unduly limited by the HRA?

Public authorities making and implementing policy must comply with the rule of law including the HRA. Where a public authority would like to make and implement a policy and this has implications for Convention rights, this will impact upon how that policy is shaped. The HRA does not prevent the state from combatting terrorism, for example, but requires that a fair balance is struck between individual rights and the public interest. There are numerous examples of public authorities making carefully reasoned decisions which are eventually found by the courts to be compatible with the Convention rights. For example, the carefully reasoned decision making of the Home Secretary excluding a prospective speaker from entering the UK was upheld by the Supreme Court in the **Lord Carlile** [2014] UKSC 60 judgment. Where the public authority has engaged in a thoughtful and evidence based balancing process, this is respected by courts.

2.3 Has the power of the executive increased?

Some have argued that the HRA has provided a blueprint for executive interference with rights that should be regarded as absolute. There has been dissatisfaction, for example, from some elements of the media that Article 10 (freedom of expression), as given further effect by the HRA, has not granted it an absolute right to freedom of expression. Whilst it has resulted in some advantages, making it possible for the media to bring legal proceedings seeking to vindicate their right to
freedom of expression, or to use it as a shield when interferences with freedom of expression arise, there are also clear disadvantages.

However, it is not possible for the media to put forward a convincing case that in the interpretation and application of the HRA, the UK judiciary has been biased against it. The case law has developed in this way as a direct result of the nature of Art.10 which is, and has always been a Convention right qualified by other rights and interests. It does not enshrine an absolute right to freedom of expression and has not been interpreted or applied by UK courts or the European Court of Human Rights to produce this result. Nevertheless, there are clear advantages if the subject matter is a matter of public interest and responsible journalism has been exercised. In such instances, the case law demonstrates that the courts are almost always willing to find in favour of the media.

3. Could the HRA be improved?

Before making any changes to the HRA, it is important to determine what purposes national human rights protection through law should fulfil. Since the White Paper concerning the HRA Rights Brought Home: The Human Rights Bill was published in 1997, there have been a number of reports discussing the legal protection of human rights at the national level in the UK some of which touch directly on this question. These include: the 2007 report from JUSTICE; the 2008 report of the Joint Committee on Human Rights; the 2008 report of the Northern Ireland Human Rights Commission on a bill of rights for Northern Ireland; the 2009 Labour Government consultation paper Rights and Responsibilities: Developing our Constitutional Framework; the 2012 report of the Commission on a Bill of Rights; and the consultation paper published by the Conservative Party in 2014. Utilising these reports, and the relevant scholarship, the following purposes for national human rights protection through law are suggested:

- An effective constraint on the exercise of power in order to protect human rights.
- An important mechanism to assist a State to comply with the legal commitments it has made at the international level.
- An indication, both nationally and internationally, of what a State stands for (symbolic value).

It is also assumed that the UK remains committed to its obligations in international human rights law; is keen to fill any gaps in human rights protection resulting from Brexit; and also willing to explore how human rights law might avert the negative consequences of austerity policies and rising inequality.

With these purposes, and assumptions, in mind, it is clear that the HRA could be improved in the following ways:

- As noted above, protection for additional human rights could be included such as health, education, housing, an adequate standard of living, and the right to a healthy and sustainable environment. As a starting point, some could be declaratory and operate as a guide to Parliament in its law-making role.

- It is possible to ensure that Parliament plays a far greater role in scrutinising laws for human rights compliance by writing this into the HRA. In determining compatibility, national courts and the ECtHR play close attention to how carefully Parliament has considered the human rights implications of a bill. It is by enhancing this process that Parliament’s power could be increased without comprising the effectiveness of the HRA. For example, Sales [2016] PL 456 argues for a more formal requirement for ‘detailed human rights impact assessments’ to be presented by government in relation to proposed legislation and for the dedication of a set amount of parliamentary time to debate the human rights implications of a bill. This was also an important feature of the Joint Committee’s 2008 Report which included recommendations on ‘reasoned’
statements of compatibility, making explicit the power of legislative override and the possibility of a timetable following a declaration of incompatibility.

- Concern continues to grow at the exercise of enormous power by non-state actors. For example, the ‘gig’ economy or the new economic model leaves many unprotected. Furthermore, the rights of the traditional workforce will be far more vulnerable as a result of Brexit and the loss of EU protection. Private sector actors have access to and control over masses of private information. The HRA only has direct application to public authorities and those bodies which exercise functions of a public nature. It has indirect application to the private sector via the section 3 duty to interpret primary legislation compatibly with Convention rights, so far as it is possible to do so, and via the duty on courts to act compatibly with Convention rights when developing the common law. Consideration could be given to extending the reach of the HRA to some aspects of private sector decision making.

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