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Raab & human rights: moving in the wrong direction?

It is time for the UK government to stop looking inward & restore its place as a global human rights champion, says Geoffrey Bindman

The newly published consultation paper on reforming the Human Rights Act 1998 (HRA 1998) has been dissected with incisive clarity by Michael Zander ('The assault on liberty updated', NLJ, 7 & 14 January 2022, p7). The proposals by the justice secretary, Dominic Raab, are the latest instalment of the government's authoritarian and xenophobic legal strategy. Other manifestations seek to restrict judicial review, the right of protest and freedom of expression, and extend the power to remove UK citizenship.

These and other challenges to judicial safeguards and the rule of law were foreshadowed in the 2019 Conservative election manifesto which promised a 'Constitution, Democracy and Rights Commission'. Instead, several separate commissions were appointed, but the overarching aim of liberating the government from legal and constitutional restraints, especially those imposed by an independent judiciary, is pursued unabated.

The report of the Independent Human Rights Act Review, chaired by the retired Lord Justice of Appeal Sir Peter Gross, was published on 14 December 2021, simultaneously with the publication by the justice secretary of the government's own proposals. Gross and his colleagues may well feel, as Zander suggests, that they have wasted their time. The consultation paper ignores their advice that there is little wrong with HRA 1998 and no good reason to replace it. Yet the government—though it has promised to consider views on its proposals until the end of March 2022—is evidently still intent on pursuing its ideologically-driven plan to replace HRA 1998 with a 'British Bill of Rights', diminishing the influence of the European Convention on Human Rights (ECHR) and flatly contradicting Gross's recommendations.

The cavalier dismissal of the independent inquiry echoes the recent rejection by the government of the almost unanimously hostile expert responses to its plan to curtail judicial review (see Michael Zander, 'The Faulks Review: Heads I win, tails you lose?', 171 *NLJ* 7919, p9). The repudiation of Gross on human rights reflects Raab's long-held views, articulated in his book *The Assault on Liberty: What Went Wrong with Rights*, published in 2009. This claimed an unhealthy growth in wasteful forensic arguments and judicial decisions based on the ECHR and HRA 1998. His remedy—replacing HRA 1998 with a 'British Bill of Rights'—forms the main plank of the government's current consultation paper. Hence its title: 'Human Rights Act Reform: A Modern Bill of Rights'.

In his book Raab did not, however, advocate withdrawal from the ECHR, as other members of his party have sought. Nor does the new consultation paper support withdrawal. Instead, its proposed Bill of Rights would reduce the influence of the ECHR and the European Court of Human Rights on UK courts. It would remove any obligation on UK courts to implement its principles or decisions. Why not go all the way and opt out? The only reason for keeping a token adherence to the ECHR seems to be to avoid jeopardising UK membership of the Council of Europe, of which the ECHR is a component.

We already have a Bill of Rights, which since 1689 has been the constitutional basis of parliamentary sovereignty. And in modern times, HRA 1998 is in practice the modern Bill of Rights to which Mr Raab aspires. We do not need another one.

There are really only two features which could arguably justify a 'British' Bill of Rights. One is that it could, as in the United States, and unlike the Human Rights Act, exclude amendment by a simple parliamentary majority. Secondly, it could add rights not covered by the ECHR or HRA 1998, of which the right to jury trial is the most notable. Do we really need so drastic a change for these doubtful benefits? The protection of jury trial is highlighted in the consultation paper; yet, inconsistently, at the time of writing the attorney-general is herself challenging the finality of a Bristol jury's acquittal of protesters charged with criminal damage of the statue of the slave-trader Colston.

In 2013, the government appointed an independent commission of experts to advise on a British Bill of Rights. It produced a thorough but equivocal report: the authors failed to agree, and the government took no action.

Taking back control

The aim of HRA 1998, as the then home secretary, Jack Straw MP, said on its introduction was to 'bring rights home'. The ECHR is a treaty, and not part of domestic law. Hence complaints of breach of Convention rights could only be determined by the European Court of Human Rights in Strasbourg and enforced by the mechanism established by the Council of Europe. As the United Kingdom is bound by the Convention in any event, it is hard to see why anyone would object to a measure which simply allows implementation by our own courts instead of compelling those seeking it to make the journey to Strasbourg. It could be seen merely as 'taking back control'.

Nor could this addition to the powers of the domestic courts be sensibly regarded as an alien intrusion, since the Convention rights were for the most part created out of long-established principles of English law. And the Convention itself is in large part the work of British lawyers and politicians, including Winston Churchill and especially David Maxwell Fyfe (Viscount Kilmuir), a Conservative Lord Chancellor, who is credited with much of its content. Maxwell Fyfe was greatly moved by his experience when, as attorney-general, he prosecuted at Nuremberg. It shaped his influential commitment to legally enforceable human rights which he pursued until the end of his life.

That commitment was continued by subsequent Conservative leaders. It wavered when the ECHR made some contentious decisions. The court had ruled in *Chahal v United Kingdom* (1996) 23 EHRR 413 that no one could be deported to a country where they were likely to face torture. This could

prevent the deportation of non-UK citizens convicted of terrorism. More recently, the court upset some British politicians by declaring unlawful the UK's blanket denial of the vote to all those serving prison sentences.

That concern was shared by other member states. It led to reconsideration by UK parties to the Convention of the doctrine of 'margin of appreciation' which had already long recognised that particular conditions and traditions could justify some departure from the Convention and its interpretation by the court. Similarly, the doctrine of subsidiarity places the burden of compliance with the Convention primarily on the member states. These principles have now been expressly written into the Convention by protocol 15 which came into effect in 2015. In addition, where tensions arise between domestic courts and the European Court of Human Rights, informal discussion and reconciliation can take place at a judicial level. Both the restriction on deportation where there is a risk of torture and the issue of prisoners' voting rights have now been resolved, apparently without any lasting dissatisfaction.

Backwards not forwards

All this leads to the conclusion that the government is not motivated by the desire to remove weaknesses in the law, but by an increasingly isolationist mindset at the very time when international commerce, climate change, the spread of disease, and even the very survival of life on the planet demand maximal commitment to international co-ordination and jurisdiction.

On the domestic front, the justice secretary has already promised to address the shocking delays and underfunding of legal aid and the court system. But he needs to be more ambitious. The government must take seriously the ground-breaking report of the World Bank and the International Bar Association ('A Tool for Justice: The Cost Benefit Analysis of Legal Aid', September 2019), which demonstrated that spending on legal aid more than pays for itself by reducing the burden on other public services.

This conclusion has been recently been reinforced for the UK by a report to the Community Justice Fund ('Defending the public purse: The economic value of the free legal advice sector', September 2021) which makes the remarkable assertion that the average net benefit to the Treasury for each client helped is £8,000, while the average cost of advice provision is just £510 per person.

Raab's first promise in his new job was to 'cut crime, reduce reoffending, and protect the public.' These are vital tasks but need to be only part of a wider and equally urgent agenda. This is to reverse the UK's withdrawal from the quest for international justice pursued in the measures listed at the beginning of this article.

The government must not throw away Britain's long-established role as champion of the rule of law and human rights worldwide. The government's retreat in the opposite direction is indefensible. It betrays a proud tradition. It is inward-looking and cowardly.

In contrast, much is being done through voluntary efforts to address human rights violations and uphold international law in conflict-ridden parts of the world (see my article 'The rule of law belongs to everyone', 171 *NLJ* 7944, p9). The government can do much, by supporting and itself pursuing legal action against perpetrators of abuses through the International Criminal Court and through domestic courts. A viable future for our country and our planet demands a positive and creative attitude to the law, not the negativity of present government policies. NLJ

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