HUMAN RIGHTS: ATTITUDES TO ENFORCEMENT

Submission by
POLICY EXCHANGE'S JUDICIAL POWER PROJECT

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1. Policy Exchange's Judicial Power Project considers the scope of judicial power within the British constitution. The ongoing expansion of judicial power increasingly corrodes the rule of law and effective, democratic government. The Project seeks to address this problem—to restore balance to the constitution—by recalling and making clear the good sense of separating judicial and political authority.

In the context of human rights, has the Government been too ready to criticize the courts in ways that affect judicial independence?

2. No: if anything the Government has been too reluctant to criticise judicial decisions in certain human rights cases, rather than too ready to do so.

3. The question suggests three false implications. First, it wrongly implies that there *have* been many examples of ministers criticising judicial decisions in human rights cases. In fact, there have been few recent examples.[1] One of the rare examples from recent years occurred in 2011, when the then Prime Minister and Home Secretary (David Cameron and Theresa May respectively) both said in the House of Commons that they were 'appalled'[2] by the UK Supreme Court's decision in *R(F)* that the notification requirements for sexual offenders under the Sexual Offences Act 2003 were incompatible with Article 8 of the European Convention on Human Rights ('ECHR'),[3] and indicated that they would 'make the minimum possible changes to the law' in order to comply with the ruling'.[4] This is a rare example of ministers publicly criticising

[1] Examples include criticism of the Strasbourg Court's decision in *Hirst v UK (No 2)* [2006] 42 EHRR 41; Theresa May's criticism of Article 8 case law in a speech at the Conservative Party Conference in 2011; criticism of the Strasbourg Court's decision on whole life sentences in *Vinter v UK* [2013] 55 EHRR 34; and criticism before, during and after the EU referendum campaign of the Court of Justice of the EU's case law under the EU Charter of Fundamental Rights.
[2] *Hansard*, Vol 523, Col 955 (16 February 2011) [David Cameron MP].
[3] *R(F) v Secretary of State for the Home Department* [2010] UKSC 17.
[4] *Hansard*, Vol 523, Col 959 (16 February 2011) [Theresa May MP].

judicial decisions in human rights cases; by and large, recent governments have not criticised the courts for decisions in human rights cases.

4. Second, the question might be taken to imply that ministerial criticism of judicial decisions is presumptively illegitimate. It is not. On the contrary, ministers have a duty to articulate their concerns about judicial decisions in human rights cases, both discrete decisions and larger patterns revealed by the case law. This is as true for human rights decisions as for any other type of case. This is so for two reasons. First, the ECHR makes most if not all rights decisions turn on what is or is not “proportionately” “necessary in a democratic society” for the protection of various individual, social and national interests, which it is a fundamental responsibility of Parliament and Government to assess, and about which judges as such have no superior competence and no democratic responsibility. Second, the structure of the Human Right Act (‘HRA’) recognises the scope for reasonable disagreement between politicians and judges on questions of rights. So, the critique of judgments in human rights cases by responsible members of Parliament and ministers is both inevitable and highly desirable. Indeed, it is inconsistent with democratic self-government to insist that ministers (or any other politicians) keep their criticisms of judicial decisions to themselves. After all, ministers and politicians must necessarily criticise the law in order to justify changes to the law—and when that law is encapsulated in judgments of the courts, then this is bound to involve criticising judicial decisions.

5. Moreover, measured criticism of unsound judgments is part of the responsibility that ministers, MPs and peers have for monitoring the changing contours of judicial power and the balance of the constitution more generally. This responsibility extends to responding when changes give too little weight to constitutional principles (such as the rule of law). As we see it, ministers in successive governments, rather than being too ready to criticise extravagant decisions in human rights cases, have been too slow to recognise that they have a duty to do so.

6. Political criticism should be reasoned, temperate and directed towards the judgment itself, and not the judge(s) who rendered it. Hitherto, ministers have largely respected this norm. That is no accident. There are many rules (for example, *sub judice*) that help to ensure that political criticism does not cross the bounds of what is constitutionally permissible, as well as rules designed to ensure that criticism focuses on the judicial decision and not the individual judge (for example, the rule that MPs can only criticise individual judges via a substantive motion). At the same time, it is unreasonable and unrealistic to expect ministers to criticise court decisions as if they are lawyers or judges arguing about points of law in a courtroom. Politicians speak in a different register: it is entirely reasonable for them to use strong, emotive language to express their reactions to individual judgments. So, for example, there was nothing inappropriate when the Prime Minister and Home Secretary described themselves as ‘appalled’ by the Supreme Court’s decision in *R(F)*. This was a strong and muscular criticism of a judgment on a matter of high political

salience (sexual offences), but it was in no way improper, despite the furore that accompanied it.[5]

7. Third, the question implies that ministerial criticism of judicial decisions inevitably imperils judicial independence. This is mistaken. So far as we are aware, there is no empirical evidence in UK constitutional history to suggest that occasional ministerial criticism of judgments imperils judicial independence. Fortunately, our judges are made of sterner stuff (and any judge who feels pressured following ministerial criticism of this or that judgment is ill-equipped for judicial office). Judges can and do sometimes directly contemplate making orders directed *personally* at Secretaries of State and other ministers. What is more, judges enjoy independence precisely because politicians might otherwise seek from time to time to criticise them (or worse: to seek to improperly influence how they resolve particular cases). Secure tenure, protected remuneration, judicial immunity and so forth are the protections of judicial independence that the polity takes great care to provide in anticipation of the tensions that inevitably arise from time to time between ministers and judges. It is wrong—and, indeed, it is to misunderstand the idea of and reason for judicial independence—to insist that on top of this the polity must also prohibit ministerial criticism of judicial decisions. More bluntly put: judicial independence must not be used to squeeze out political criticism of judicial *decisions*.

8. Judicial independence is one of those slippery notions that is liable to become over-inflated. It is therefore vital to recognise that judicial independence does not prohibit (and nor is it offended by) any of the following political actions:

- legislating to reverse specific judgments that misinterpret or undercut statute;
- legislating to revise the effect of a judgment to prevent the adverse effects that would otherwise flow for those who had acted on what was previously a reasonable or accepted interpretation of the law;
- legislating to repeal or amend constitutional legislation such as the HRA;
- derogating from the ECHR under Article 15;
- legislating to oust judicial review in particular domains;
- legislating to restore greater ministerial involvement in judicial appointments;
- exercising existing statutory powers to respond to problematic judgments;
- declining to act upon ('defying') unjustifiable or extravagant declarations of incompatibility;

[5] It was reported that both the President of the Supreme Court and the Lord Chief Justice complained to the Lord Chancellor about these comments, with the Lord Chancellor subsequently writing to the Prime Minister and Home Secretary to remind them of the need to exercise restraint when commenting on judicial decisions.

- ensuring that the rule of law is not subverted by the need to conform to or implement dubious judgments of international courts, including decisions of the European Court of Human Rights ('ECtHR'); and
- withdrawing from the ECHR.

Have some judicial decisions gone beyond purposive construction to change the law in ways that Parliament did not intend?

9. If this question assumes that purposive construction never changes the law in ways that go beyond Parliament's intention, it is mistaken. Purposive construction can and sometimes does wrongly depart from what Parliament intended—above all by forgetting that Parliament often intends to pursue more than one purpose at once in a balanced relationship with each other and with other rights and interests. Such balancing of purposes, interests and rights, and choosing among reasonable alternative balances, is the stuff of political discourse and of sophisticated legislation in a mature democracy. Litigation and legal argumentation is usually a poor substitute for it, and not infrequently generates misinterpretations[6] However, we take the question to be a more general inquiry about whether in some cases the courts have interpreted statutes in a strained, inappropriate manner.

10. Here, the starting point is to note that section 3 of the HRA conferred a new interpretative duty on courts to interpret legislation compatibly with convention rights, if possible. The leading case law on section 3 takes this duty to amount to a judicial power to amend the provisions of primary legislation, with retrospective effect, in order to arrive at an interpretation compatible with judicially defined 'convention rights'.[7] Interpreted in this way, section 3 requires the courts to flout the rule of law and to blur the distinction between the role of politicians and the role of judges. *R v A (No 2)* aptly illustrates the point. In this case, the House of Lords treated the section 3 duty as warranting adoption of an absurd interpretation of section 41 of the Youth Justice and Criminal Evidence Act 1999, a reading that in intent and effect upended Parliament's policy choice to exclude in all but the most exceptional circumstances evidence relating to a complainant's prior sexual activity in rape cases. Even if interpreted in a less expansive fashion, the interpretative duty under s3 requires courts to undertake a chain of reasoning that unsettles the law. In sum, the interpretative scheme developed under the HRA undermines the stability of meaning of other statutes.

11. The phenomenon of strained and even implausible interpretations of statutes is not limited to human rights litigation. In *Evans v Attorney General*, for example, five of seven judges in the Supreme Court quashed the Attorney-General's exercise of section 53 of the Freedom of Information Act 2000, which permits the Attorney General to override a decision by the Information Commissioner (or the Upper Tribunal on appeal) that the balance of public

[6] Judges in some cases have admitted to adopting interpretations that depart from what Parliament intends in order to "update" statutes: see e.g. *Yemshaw v London Borough of Hounslow* [2011] UKSC 3. This is wrong and ought not to happen.
[7] See, e.g., *R v A (No 2)* [2001] UKHL 25; and *Ghaidan v Godin-Mendoza* [2004] UKHL 3.

interest weighs in favour of disclosure of relevant information.[8] Three of the five Supreme Court Justices in *Evans* invoked the principle of 'legality' to undercut section 53 in a judgment that advances a wholly implausible reading of the statute. Their interpretation is in substance, though not in form, an outright defiance of what Parliament intended when it enacted section 53.

Has the concept of the ECHR as a "living instrument" meant that issues that are properly matters for Parliament are dealt with in litigation?

12. Yes. The ECtHR openly asserts its authority to remake the ECHR by way of the 'living instrument' notion. The ECtHR's invocation of this notion in individual cases is best understood as an admission that it is departing from the ECHR's agreed terms in a way that involves brazen lawmaking. Such disregard for the terms agreed in the ECHR is not mitigated by the various doctrines that the ECtHR has devised in an attempt to stabilize its unjustified law-making activities (for example, the doctrine of the margin of appreciation). The 'living instrument' doctrine offends against the rule of law, and legal certainty. It also leads to questions that ought properly to be decided by Parliament being decided in human rights litigation instead. A handful of the many examples include:

- abandoning the territorial idea of jurisdiction in Article 1;[9]

- inventing and then extending a procedural obligation under Article 2 (right to life) requiring states to investigate deaths that may have occurred in breach of the ECHR;[10]

- using the prohibition of torture and inhuman or degrading treatment in Article 3 to create a considerable corpus of asylum law even though the ECHR almost certainly was not intended to encompass a right to asylum;[11]

- extending the reach of Article 6's protection of the right to a fair hearing when determining 'civil rights and obligations' so that it has encroached upon many administrative decisions in the fields of immigration, social security and urban planning that would not previously have been considered to bestow civil rights and obligations;[12]

- departing in a great many ways from Article 8's original concern to protect an individual's private and family life and home from arbitrary government interference, including for example by taking 'private life'

[8] [2015] UKSC 21.
[9] See e.g. *Al-Skeini v UK* (2011) 53 EHRR 589.
[10] See e.g. *McCann v UK* (1996) 21 EHRR 97.
[11] See e.g. *Hirsi Jamaa v Italy* (2012) 55 ECHR 21
[12] See e.g. *Feldbrugge v The Netherlands* (1986) 8 EHRR 425.

to encompass activities of a professional or business nature and the 'home' to include business premises;[13]

- interpreting Article 11 to prohibit closed shop arrangements (under which trade unions and employers agree that employees must be members of a trade union as a condition of employment), even though the ECHR was carefully drafted to leave such arrangements intact;[14] and

- extending 'peaceful enjoyment of his possessions' in Article 1, Protocol 1 well beyond established property rights, thus licensing judicial challenges to vital public decisions about tax and spending.

13. Some will welcome the outcomes achieved via the 'living instrument' interpretative approach, but others will not: rights are politically contested and subject to reasonable disagreement. The ECtHR should act like a proper court and limit itself to the terms agreed by the signatories to the ECHR rather than making new law in the course of adjudication. The expansion of rights involved in the 'living instrument' doctrine, if it is to be successful, requires the political leadership that judges cannot give. Judicial authority is not sufficient for achieving buy-in to new rights—and so, for that reason, the 'living instrument' notion puts the judiciary in the firing line. The question of what justice and right requires, how best to secure the common good, is properly for Parliament. The protection of rights is best realized through ordinary domestic law, where the content of that law is determined through political competition and parliamentary democracy.

Is the principle of subsidiarity that underpins the ECHR sufficiently respected and working effectively? Has the Brighton Declaration improved the way cases are handled at national or Strasbourg level?

14. The ECtHR is now meant to be operating in 'an age of subsidiarity', where it is supposed to defer to the decisions of national legislatures, provided those legislatures have considered the human rights implications of legislation. However, this shift in tonality has done nothing to wind back its extravagant case law over the last forty years. And it would be naïve to anticipate that the Brighton Declaration will prove to have had a substantial effect on the ECtHR's fundamental law-corroding doctrines and its substantive disposition of cases. There are reasons to believe that the ECtHR has pulled its punches in some politically sensitive cases involving the UK, as indeed noted (with ominous dissatisfaction) by one the Strasbourg Court's own judges in a recent dissenting opinion.[15] That the ECtHR is a somewhat politically aware court that at times calibrates its rulings to minimise political conflict leads some enthusiasts for human rights law to laud the ECtHR's political sensitivity. In

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[13] *Niemietz v Germany* (1992) 16 EHRR 97. Other examples are discussed in N. Malcolm, *Human Rights and Political Wrongs: A New Approach* (Policy Exchange, 2018) 66-68.
[14] *Young, James and Webster v UK* (1981) 4 EHRR 38.
[15] *Hutchinson v UK* [2017] (Dissenting opinion of Judge Pinto de Albuquerque)

truth, this sensitivity confirms that decision-making in Strasbourg is nothing like how domestic judges can and should contribute to the rule of law.

What are the implications of the recent Supreme Court judgment on fees in employment tribunals?

15. The Supreme Court's decision in the *UNISON* case raises some difficult legal and constitutional issues, issues which are neither clear-cut nor easily resolved.[16] That said, our view is that the Court wrongly invoked the principle of the rule of law in an attempt to upend a policy choice the merits of which were for elected politicians to decide. Contrary to the Court's approach in *UNISON*, it should not be assumed that the rule of law requires all policy to be vulnerable to second-guessing in the courts, unless such policy has been mandated by primary legislation. The decision leads to a potential for greater tension and misunderstanding between the courts on the one hand and Parliament and the executive on the other. In so far as it extends the reach of the courts into policy formulation and the management of the public finances, the decision creates a challenge for political and democratic decision-making. In so far as it imposes a "success test" for determining the legality of policy made and implemented by government and Parliament, it is objectionable for lack of certainty and predictability.[17]

To enforce human rights it is sometimes necessary for cases to be brought against the Government itself. When the Government is a defendant does it seek to use its power to interfere with legal professionals taking cases?

16. It is unclear what "*power* to interfere with legal professionals" the question has in mind. We are not aware of the Government attempting to influence, intimidate or interfere with opposing counsel in human rights law cases or any other cases. There has been controversy about alleged malpractice on the part of some lawyers involved in litigation *against* the Government arising out of military action in Afghanistan and Iraq, but this is being resolved, as it should be, by the relevant professional regulatory bodies.

Is there sufficient understanding (in Government, media and general public) of the role of the rule of law in ensuring that human rights are respected?

17. It is certainly important that Government, media and general public—as well as MPs and peers—appreciate the rule of law and understand the contribution it makes to justice and the common good. However, it is also important that judges and lawyers understand the ideal of the rule of law and, especially, recognize the limitations it places upon judicial action and the proper uses of litigation. The primary values of the rule of law are accessibility, intelligibility, clarity and predictability. There is insufficient understanding amongst many in the legal community that these are values that should be applicable in advance of judicial consideration of the operation of the law.

[16] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[17] These points are developed at length in a forthcoming paper by Sir Stephen Laws prepared as part of Policy Exchange's Judicial Power Project.

There is a tension between these rule of law values and producing the best and most just result in every individual case – how that tension should be managed is not a legal question for lawyers, but a question for society more generally to consider and decide.

18. Moreover, many lawyers and some judges mistake the rule of law for the rule of judges. That is, they take the principle of the rule of law to require judicial oversight of all state action, including the merits of primary legislation and extending further and further into domains once exclusively reserved to the executive (such as foreign policy). Many lawyers are also willing to manipulate legal materials to make new law in the course of adjudication or otherwise to invite departures from the discipline of settled law in order to attempt to secure political consequences they think preferable.

19. The rule of law is vital to secure human rights. However, human rights law and practice is far too cavalier about the rule of law, constantly inviting and sometimes requiring the courts to unsettle existing legal rights, to impose novel and far-fetched interpretations on statutes, and to make the outcome of legal challenge turn on judicial policy preferences. It seems to us that the Government and Parliament often act to maintain the rule of law, including in the face of threats to the rule of law from judicial action. The media and the public doubtless vary in their understanding of the rule of law, but often rightly perceive that human rights law is a device that enables law to be remade in adjudication in ways that bypass or overbear Parliament and which privilege the preferences of legal elites over the interests and considered judgments of the public.

Is criticism from some parts of the media a problem or a healthy manifestation of free speech?

20. Robust media criticism of judgments is a healthy sign of a polity that scrutinises carefully the exercise of public power. Such criticism is especially warranted if the polity in question is experiencing an expansion of judicial power that has largely taken place without public discussion or consent. There are risks in this criticism of course, namely that it may be ill-informed or excessive or unfair. However, media interest in and criticism of judgments should be encouraged. It will, we think, be very rare for judges to warrant personal criticism or for personal criticism to be made out in the media. The "Enemies of the People" outcry following the Divisional Court's judgment in the Article 50 litigation was an uncommon example of unwarranted personalised criticism. It attracted a very critical, extensive and broadly adequate media response in turn. Judges should not be personally abused in the press and such abuse is very rare; certainly they experience nothing at all like the personal invective that MPs and candidates for office routinely experience. It also bears noting that some media commentary is problematic insofar as it uncritically praises judges, demonising criticism of courts and collapsing concern about the expansion of judicial power into allegations of populism. Some parts of the media are at times insufficiently critical of

inappropriate judicial action, uncritically relaying the conventional wisdom amongst the legal establishment.

Is there a perception that there are some rights which are not given sufficient weight compared with others and does this affect willingness to attempt to enforce those rights?

21. This 'perception' is, we think, real. Moreover, it is justified. Human rights law is politically loaded and in its enforcement and application in the courts is all too open to the currents of political opinion and so forth. This is not to allege or suggest any kind of partisanship, but rather suggests that the concerns of judges and lawyers are regularly getting a priority in the weighting of rights. Rights that seem to have lost out in this perhaps unconscious judicial weighting include most obviously rights to religious liberty and free speech, which have not been protected as robustly as one would expect in view of their express statutory reinforcement in the Human Rights Act itself. Relatedly, in *Doogan*, an established, clear statutory right to conscientious objection to participation in abortion was cut down by the Supreme Court, which did not do its duty and uphold that statutory right, or consider the applicants' conscience rights under the ECHR or consider the relevance of the principle of legality.[18] It is hard to avoid the conclusion that this was motivated either by a concern to avoid politically controversy, which is not a reason for a court not to uphold settled legal rights, or by a lack of sympathy for the claimants, something that ought to be utterly irrelevant to a court's action.

[18] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.