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Getting to grips with the Bill of Rights Bill

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# Your presenters



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## Introduction and Overview



# How did we get here?



- “Given the importance which [government] attaches to the maintenance of basic human rights in this country ... the time has come to “bring rights home.” (White Paper accompanying the Human Rights Bill 1997)
- “We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. (Conservative Party 2019 manifesto)
- The Bill was introduced into the House of Commons on 22 June 2022 by the Justice Secretary; second reading is set for 12 September 2022
- The Bill repeals the HRA: Clause 1; Sched.5, para.2
- The Government’s view is that it “will ... restore a common-sense approach to human rights in the United Kingdom ... context. The Bill will protect people’s fundamental rights while safeguarding broader public interest and respecting the will of elected representatives in Parliament.” (Explanatory Notes, §1)

# What will stay “the same” ...



- The UK will remain a State Party to the ECHR and the Bill gives effect to the same Convention rights as does the HRA (Clause 2(1))
- The courts will still be empowered to make declarations of incompatibility when they find domestic legislation to be incompatible with Convention rights (Clause 10)
- It will remain unlawful for public authorities to act in a way which is incompatible with Convention rights (Clause 12)
- It will remain open to persons who claim they are the victims of an act which is unlawful under clause 12 to bring proceedings under the Bill (Clause 13(2)(a))
- However, these similarities are superficial. The Bill is *designed* to offer lesser domestic rights protection:
  - The possibilities of legislation being found to be incompatible sits within a significantly different framework to that of the HRA
  - The Bill seeks to limit the ability of courts to read Convention rights generously
  - The duty on public authorities will be less onerous than under the HRA
  - Proceedings under Clause 13(2) will need permission: open only to a “victim” of the (proposed) act, where the court considers they have suffered (or would suffer) a “significant disadvantage”

# The Main Changes (1)



- The absence of an equivalent s.3 HRA interpretive provision:
  - The courts will no longer be required to read and give effect to legislation, as far as possible, in a way which is compatible with Convention rights (Clause 1(2)(b))
  - The courts are newly directed as to the (restricted) approach to be taken when considering an incompatibility question, including as to the approach to proportionality (Clauses 1(2)(c) and 7)
- The absence of an equivalent provision to s.2 HRA:
  - The courts will not be *required* to take into account ECtHR decisions, when determining a question which has arisen in connection with a Convention right
  - The Supreme Court is “the ultimate judicial authority on questions arising under domestic law in connection with the Convention rights” (Clause 3(1))
  - A court may not adopt an interpretation of a right that “expands the protection conferred by the right” unless it has “no reasonable doubt” that the ECtHR would adopt that interpretation if the case was before it (Clause 3(3)(a))
  - But the court “may” adopt an interpretation that diverges from ECtHR decisions (Clause 3(3)(b))



# The Main Changes (2)



- Positive obligations:
  - The court will not be permitted to adopt a “post-commencement interpretation” of a Convention rights that would require a public authority to comply with a positive obligation (Clause 5(1))
  - The courts are signposted to seek to limit the application of any “pre-commencement interpretation” which gives rise to possible positive obligations (Clause 5(2))
- Acts of Public Authorities:
  - The Clause 12(2) defence to a claim is broadly the same as the s.6(2) HRA defence
  - But the effect of repealing s.3 HRA, and the narrowing of the interpretation of Convention rights (see Clause 3) will broaden the ambit of the defence
- Declarations of Incompatibility:
  - The structure of the provisions promote the making of declarations over Convention-compliant reading of legislation; it is no longer the ‘nuclear option’
  - There is nothing in the Bill which suggests that remedial action will follow in cases where declarations are made

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Section 3 and common law  
constitutional rights





# Human Rights Act Reform: A Modern Bill of Rights Consultation Response



“The document outlines that the Government’s proposals will help strengthen our common law tradition”

“The Government wants to emphasise the importance of the development of rights under the common law. This would contribute to placing less emphasis on the role that decisions of the Strasbourg Court play in influencing UK courts.”

“the Government believes that section 3 of the Human Rights Act has resulted in an expansive approach with courts adapting legislation, rather than merely interpreting it. We think that a less expansive interpretive approach would provide greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues. We therefore believe that section 3 should be repealed, allowing the ordinary, common law principles of statutory interpretation to apply.”

# The link between section 3 and common law constitutional rights



## Section 3 HRA 1998

- the duty to interpret legislation in conformity with the European Convention on Human Rights
- The proposal: repeal section 3 of the Human Rights Act, meaning courts are no longer required to interpret domestic legislation “so far as it is possible to do so” compatibly with the rights protected under the Convention
- Why is section 3 so significant?
- What is the Government hoping to achieve by repealing it?

## Common law rights via the principle of legality

- Common law constitutional rights are human rights found at English common law, not in a codified treaty or legislation
- Some rights are firmly established, others are underdeveloped or non-existent
- They are enforced through the principle of legality and through other methods of statutory construction
- What does the Bill of Rights bill say about clcr?

# The repeal of section 3



- The Explanatory Notes states in respect of the Bill's repeal of section 3 HRA:  
*"7. [...] The Bill will restore the habitual manner in which the courts approach statutory interpretation. These measures aim to rebalance the relationship between the courts and Parliament by requiring that, where legislation cannot be read compatibly with the Convention rights using orthodox principles of construction, it should be for Parliament to address the same."*
- What is the 'habitual manner'?
- What about our obligations under the Convention?
- What is the link to declarations of incompatibility?

# The common law: rhetoric vs reality



- Analogy to what happened in the 1980s and 1990s
- No homogenous mass; is there a list?
- Undue 'confidence' in strength of the common law, which does not offer anything near the same level of protection as the European Convention on Human Rights:
- Right to free speech and *Somerset v Stewart*
- But: interpretative mechanisms post *Simms* and *UNISON*, positive obligations, and link to ECHR
- Nothing new and, in any case, a misunderstanding of what we already have?

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**Treatment of positive obligations  
in Clause 5 of the Bill of Rights Bill**



# Positive obligations conferred by Convention Rights



- “an obligation to do any act” placed on a public authority: Clause 5(7)
- Well-established examples:
  - *Osman v United Kingdom* (2000): Operational duty under Article 2 requires public bodies to protect an individual whose life is at risk from the criminal acts of a third party in certain circumstances
  - Inquests: Procedural duty under Article 2 to carry out a thorough, independent and effective investigation into a death engaging the duty to safeguard life (e.g. deaths in state custody)
  - *Zehentner v Austria* (2009): Article 8 requires persons without capacity specific legal protections in proceedings involving their home
  - *Thlimmenos v Greece* (2000): Article 14 can, in some circumstances confer a positive obligation to treat persons differently if their circumstances are sufficiently different by virtue of their status



# Effect of Clause 5 Bill of Rights Bill



Pre-commencement

Commencement Date

Post-commencement

Clause 5(2): Where interpretation would require a public authority to comply with a positive obligation, the court must give great weight to the need to avoid applying an interpretation that would:

impact ability to perform public functions

conflict/undermine public interest in allowing public authorities to use their own expertise allocating resources

require police to protect individuals involved in criminal activity

Require inquiry/investigation to higher than reasonable standard in all circumstances

affect operation of primary legislation



ECtHR develops interpretations imposing any positive obligation on public authority

Clause 5(1): Court may not adopt an interpretation that would require a public authority to comply with a positive obligation



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Remedies





# Declarations of Incompatibility



## Clauses 10 and 25

**Heavy reliance  
on declarations**

**Clause 10(1)(b)  
permits but does  
not require a  
declaration**

**No assumption  
that Parliament  
will act**

- Brings the courts and Parliament into more direct conflict
- Will inevitably mean more applications to the ECtHR (especially as a declaration of incompatibility is not an effective remedy for the purposes of Article 35(1) ECHR, so is not a remedy that must be exhausted)



# Damages – may be awarded for breach



## Clauses 17 and 18

Only if (a) suffered loss or damage & (b) required for just remedy

**Must not award more the ECtHR would**

**“Great weight” to minimising impact on PA’s ability to perform functions**

- Part of the suggestion of ‘undeserving’ claimants (a theme with clause 6 on prisoners; clause 8 on deportation; clause 15 permission filter requiring both ‘victim’ and ‘significant disadvantage’ or ‘wholly exceptional public interest’)



**So, what does all of this mean for public law litigation?**

# Environmental Law



**Air quality and  
Articles 2 & 8;  
Article 14?**

**Climate change and human  
rights**

- Relies on the positive obligations under Articles 2 and 8 (eg *Urgenda*)
- Or on interpretation (eg *Friends of the Earth Net Zero Challenge*)

**New rights?**

- Healthy environment
- Ecocide



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Housing law



# Housing & Convention rights

## An overview



- **Possession claims**

*Dacorum BC v Sims* [2015] A.C. 1336

*Manchester City Council v Pinnock* [2011] 2 A.C. 104

- **Allocation schemes**

*Z v Hackney LBC* [2020] 1 W.L.R. 4327

- **Homelessness**

*Ali v Birmingham CC* [2010] 2 A.C. 39

*Ncube v Brighton & Hove Council* [2021] 1 W.L.R. 4762

- **Compatibility:** e.g.

*Poplar HARCA v Donoghue* [2002] QB 48 – s21/arts. 6 & 8

*McLellan v Bracknell Forest BC* [2002] QB 1129 – Its/arts. 6, 8 & 14

*Sheffield CC v Smart* [2002] H.L.R. 34 – non secure tenancies/art. 8

*Begum v Tower Hamlets LBC* [2002] 1 W.L.R. 2491 – s202 review/art. 6

“**Inside Housing**” 25/10/21

Representing one group of bereaved families, survivors and residents, Danny Friedman QC argued that the fire at Grenfell was a “human rights disaster”, as multiple human rights were “breached” and “those breaches were causative”.

# Bill of Rights Bill

## Some potential impacts on Housing law



- No interpretative obligation as with s3, HRA
  - *Haringey LBC v Simawi* [2019] P.T.S.R. 615 – CA [2020] P.T.S.R. 702
  - *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557
- No s2, HRA obligation to take a/c of ECtHR jurisprudence
  - *Z v Hackney LBC* [2020] 1 W.L.R. 4327
- “Downgrading” of positive obligations (clause 5)
- Promotes Parliamentary supremacy/impact on incompatibility
- Will it have wider interpretation impact – e.g. re Equality Act?

# “Ameliorating” factors



- Bill gives effect to the same set of Convention rights as the HRA
- Equality Act 2010
  - discrimination
  - *Akerman-Livingstone v Aster Communities* [2015] A.C. 1399
- Discretionary requirements
  - possession claims
  - injunctions
- UK will still be a party to the ECHR
- Public authorities remain obliged to act in accordance with the Convention rights





# Cornerstone Books





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