



Grassroots for Europe Round Table #14 – 20 April 2021

Full Report – Not for distribution beyond Round Table Distribution List

Topic: The Rule of Law Under Threat

Chair:

- Irina von Wiese

Speaker:

- Jessica Simor QC

Introduction

With human rights and rule of law being under attack in the UK we would like to understand how this presents a threat to our democracy and what it means for this country both domestically and internationally.

Police, Crime, Sentencing and Courts (PCSC) Bill 2021

The current government has been introducing a tsunami of legislative changes and it is hard work to keep up with them all. The two biggest areas of current concern are the new Police, Crime, Sentencing and Courts (PCSC) Bill 2021 and the government's proposed revisions to Judicial Review.

The PCSC Bill makes important changes to the right to protest. The revision moves the offence of causing a "nuisance" from a Common Law principle to a statutory basis. However, the new law as it is currently defined extends scope to inconvenience, which could include anything. Whilst this change originates from a 2015 Law Commission review, which may be normally considered more objective, the source of the current proposition raises more controversy.

The sanction of a ten-year prison sentence is the biggest danger under the Act, as it will have a large "chilling effect," on the public, creating a substantial deterrent. The Bill places a great deal more responsibility at the hands of the police for interpretation and also gives the Home Secretary powers to define elements of the offence.

The Act is very long, comprising 307 pages and contains considerable revisions by amendment to previous statute, including the Police Reform and Social Responsibility Act 2015. It is a huge task to work through the new Act comparing it to the original statute to examine the intended effect of all the changes in PCSC. This format makes it difficult for anybody to review.

The new Act includes the Henry VIII clauses, which allow the Secretary of State to change regulations after the Act has been put on the statute book, without proper. This could lead to further areas of Parliament Square being cordoned off or removed from public access.

Judicial Review – Inquiries Act (2005) Faulks Review and Consultation

The government commissioned an independent review of the provisions for the right to challenge government decisions in the courts, through the process of judicial review. It concluded that the use of Judicial Review has not been politicised, despite government’s claims and the perceived prior stance of Faulks on the matter, due to his political background at Policy Exchange and as a Brexit supporter.

The current concerns are that the Faulks review, commissioned by Justice Secretary, Robert Buckland have been largely ignored by the latter. The government consultation launched in the wake of the independent examination of the Inquiries Act misrepresents the Faulks findings and suggests that their proposed reductions of the rights to review are justified, against the actual conclusions.

The main concern is the proposed “ouster” clauses, whereby the denial of the right to recourse to court action is effected by the legislation. The House of Lords is likely to object strongly to such clauses, as they did in the context of the Internal Market Bill, as they undermine a key element of the rule of law; the role of the Courts in interpreting the scope of their powers.

It was such an “ouster” clause that the House of Lords and the legal profession more widely objected to so strongly, under the government’s proposed Internal Market Bill. The Courts have ruled against “ouster” clauses, recently in the Privacy International Case. It appears that the Government is setting up conflict between the Courts and Parliament.

Human Rights Act 1998 (HRA) – Review and Consultation

The government has also commissioned an “independent” review of the Human Rights Act. It appears focused on Section 3 of the HRA. The specific remit is to examine the relationship between UK domestic courts and the European Court of Human Rights and to examine the impact of the HRA on the relationship between judiciary, executive and legislature.

The real purpose remains unclear since the review specifically says that it is not considering the UK leaving the Council of Europe and is committed to staying within the remit of the European Court of Human Rights. However, in so far as the review appears to be interested in whether the HRA should be amended to remove the obligation of courts to interpret the HRA in line with the Strasbourg jurisprudence, there is an apparent contradiction. If the domestic courts do not have the power to apply an interpretation to enable legislation to be read so far as possible in line with the Strasbourg jurisprudence then the UK is likely to be found to be in breach of ECHR law, i.e. international law. This is a matter of concern.

Details of the HRA review are attached:

[https://www.gov.uk/guidance/independent-human-rights-act-review#:~:text=The%20Human%20Rights%20Act%20\(%20HRA,a%20review%20into%20its%20operation.&text=the%20relationship%20between%20domestic%20courts,the%20executive%20and%20the%20legislature](https://www.gov.uk/guidance/independent-human-rights-act-review#:~:text=The%20Human%20Rights%20Act%20(%20HRA,a%20review%20into%20its%20operation.&text=the%20relationship%20between%20domestic%20courts,the%20executive%20and%20the%20legislature)

The Internal Market Bill (IMB) 2020

Part IV of the IMB was dropped at the end of 2020 to enable a deal to be reached with the European Union for the Trade and Cooperation Agreement (TCA). However, the government may seek to reintroduce this part if it believes it is unable to resolve difficulties with regard to Northern Ireland under the Protocol to the Withdrawal Act. The European Parliament’s accompanying resolution to the motion to approve the UK TCA sounds a note of caution and distrust with the government.

Ministerial Code and Nolan Principles for Standards in Public Life - The Home Office Inquiry into ministerial bullying of civil servants by the Secretary of State

The Ministerial Code and Nolan Principles are both guides and not legally enforceable per se. It has just been announced that the Senior Civil Servants' Trade Union, the First Division Association has been given permission by the High Court to challenge by judicial review the government's response to the internal inquiry into bullying at the Home Office. The initial complaint resulted in the Permanent Secretary's resignation, followed by that of the Prime Minister's adviser on standards and the ministerial code, when the report was produced, as the PM insisted on revisions being made to the report. This would constitute the application of Common Law to ensure that basic integrity and decency standards are enforceable by law.

Questions & Answers

Q1. Regarding "The Chilling Factor" in relation to the Police and Courts Bill. We have written a letter to Harriet Harman as Chair of the Joint Human Rights Committee. We and Professor Laurent Pech from Middlesex University noted that "fear of prosecution" as a deterrent is mentioned specifically by the European Convention on Human Rights. Can we have advice on the right to continue to protest and march?

Answer: It is an important line of attack. What is the point of a 10-year tariff in the legislation when no court will impose it as it is disproportionate? It exists to deter. The existence of the legislation may alone be challenged in the Strasbourg Court without anyone having to commit an offence. This is because its existence chills, i.e. does not 'guarantee' the right to freedom of assembly.

Whether Strasbourg will be willing to rule and whether that ruling will have an effect remains to be seen.

Q2. Are you going to be arrested if you sit down in outside the House of Commons and Parliament Square? How serious is single-person protest?

Answer: The problem is you don't know. 2011 Police Reform and Social Responsibility Act was to deter encampments which were set up to protest the Iraq War. From that Act, they could probably already arrest you. What is interesting is the discretion vs the arrest - that will be the change. Will this Act lead to a change in police conduct?

I can't advise what is likely to happen. You should not have to ask that question – that is the problem. That is the whole point. The state is required to guarantee your right to protest because it is a core element of democracy.

They have powers to do so under the Common Law Nuisance and they have numerous statutory controls that can be used already. The problem is that there are so many statutory powers and police can arrest under very wide powers, their exercise of that power is subject to political overview. It is a problem potentially for the police. It is going to be quite hard for the police.

Q3. Is there enough challenge from the legal community? Are political parties focused on this enough? What can grassroots protest do? There is too much going on for the public to care about some of this. We need clear responses to get the public to care.

Answer: It is really difficult for lawyers. Our job is to represent our clients and fight our cases and so we need to be seen to be above this fray. You want to do your job for your clients.

They have advocacy skills, the knowledge and are intelligent people so the lack of action by the legal profession on the legal aspects of Brexit is frustrating. Having said that, there can be no doubt that there are real concerns. At a meeting I arranged with the International Bar Association (IBA) Human Rights Committee for the Bar to discuss the domestic law dangers for the rule of law of the Internal Market Bill, 2000 barristers and lawyers attended. This demonstrates that there are plenty of concerned legal professionals out there.

Within the Lords, lawyers are powerful. Generally lawyers, if expect, think “this is not my job, why am I doing this? It is the job of Politicians and Labour to oppose.”

After four years of campaigning there should be leaders. We should have funding, comms help and for some reason it has disappeared. Campaigners have done fantastically well without them, but we cannot go onto the Today programme and in Parliament where is the scrutiny?

Q4. The Policing Bill is very difficult to read and there were lots of references to other legislation. I understand there is an incredible backlog in the consolidation of our Law Book. Is this obscuring our democratic workings? If MPs have to struggle so hard to understand it enables more easily the government to do what it wants.

Answer: I completely agree. There is an incredible backlog of consolidation of law, and it is out of the reach of most MPs to keep an eye on everything. Lawyers have access to the on-line legal reference database Lexis which disentangles some of the complexity of the cross references. MPs don't have this. They cannot see the cross references to future acts only what has already been passed. Getting information to MPs so they can scrutinise properly is difficult – MPs have not got the time to scrutinise complex law properly, especially the Withdrawal Act but also the Police Bill. Government could give MP's a full copy of the original text, as revised and the amendments given, with highlighted areas. This would enable a much easier reading of the impacts of changed wording for non-experts.

I have no doubt that the MPs would not have had time to review the Withdrawal Act. They didn't have time to read it. There is also a problem for the EU as well. The production of legislation is too complex now and a problem for democracy.

Q5. A question on International Law and the various attempts of the Government to breach the Northern Ireland Protocol and this is not just the Internal Markets Bill. It was also attempting this year to unilaterally extend the grace period before certain customs checks were introduced between N. Ireland and Great Britain. What is going to happen going forward if the government continue to breach the International Law (N. Ireland protocol)? What can we do as the opposition as well?

Answer: Domestically there is nothing that one can do obviously you would need to look at the Withdrawal Act in detail to see if there is a challenge. Unless you can find some domestic illegality (failure to use a power required by the legislation) you wouldn't have a domestic law route. There may be a way and it is complex.

It maybe there is a domestic legal route. The other way will be for the EU to take action. They were talking about tariff and legal responses. It is going to be very unpleasant and difficult and not good for Britain and EU companies will suffer as well.

Pragmatically the EU may decide for their own benefit it is better to keep it at a diplomatic level and to let it go.

The government has decided not to impose border checks on imports, according to the agreed timetable from July and has extended the grace period until January 1st, 2022 as a minimum. See attached Institute of Export summary: <https://www.export.org.uk/news/555851/Government-delays-new-controls-on-GB-border-with-EU-in-response-to-business-concerns-and-Covid-19-.htm>

Dr Monica Horton's Contribution

This morning the plenary proceedings for the ratification debate in the European Parliament highlighted:

1. There is clear distrust of Johnson and his Government amongst MEPs.
2. There are number of calls for enforcement action against UK in case of breaches of the Withdrawal Agreement (Rule of Law, Human Rights, Trade).
3. The European Parliament is going to have a strong role in the monitoring of The Agreement – its role has not finished.
4. They have given consent to the ascent of the Trade & Cooperation Agreement and they have appended letters from the scrutiny committees, which although are not allowed to amend the Treaty, have formally attached their opinion papers to the approval motion in the form of a consolidated resolution.

MEPs are very clear that they want the specific concerns about the UK conduct to date to be formally noted and their willingness to take enforcement action to have a deterrent effect on those proposing potential breaches of the Agreement.

Q6. Steven Peers, Professor, School of Law, University of Essex, shared that the EU is threatening retaliatory action against breaches by removing criminal law co-operation agreements under the deal if the UK moves away from the European Convention of Human Rights under the review. This is likely as if we pull away from the Convention we would no longer be guaranteeing a fair trial so countries would be less likely to extradite. Are there any particular people we grassroots could approach?

Answer: It makes total sense, if we are going to pull out of the Convention on Human Rights then we won't be guaranteeing at the standard required for Human Rights. Why would they co-operate with us?

Q7. You mentioned that there are effective individuals in House of Common and Lords?

Answer: There are a lot of lawyers in the Lords who are effective. In the Commons it is very difficult to see what is effective. It is very difficult to pass motions, with the small size of the opposition e.g. there are no LibDem trained lawyer MPs.

Attendees

Irina von Wiese (Chair)
Jessica Simor QC (Guest Speaker)
Anna Bird (EM)
Anna Damski (Suffolk for Europe - Save British Farming)
Else Kvist (New Europeans)
Fiona Godfrey (British in Europe)
Fiona Wishlade (Glasgow for Europe)
Gareth Steel (UKPEN & The Register)
Julie Ward (AEIP)
Prof. Juliet Lodge (Women for Europe)
Mike Buckley (Labour for a European Future)
Richard Corbett CBE (EM)
Richard Wilson (GfE & EM)
Sandra Khadhour (Keeping Channels Open)
Sharon Leclercq-Spooner (Pro-Europa)
Tamsin Shasha (GfE)
Caroline Kuipers (Coordinator)
Dr Monica Horten (RT Team)
Colin Gordon (RT Team)
Jonathan Harrison (RT Team)
Sarah Dodgson (RT Team)
Jo Pye (Zoom Admin)

Next Meeting

Tuesday, 25 May at 5pm