Submission to the Independent Human Rights Act Review Panel

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1. This submission addresses Theme One and Theme Two of the Review's Questionnaire. By way of background, my interest in international and constitutional human rights law is both academic and professional.

2. This submission is arranged in three sections. In **Section (1)**, I make some observations on the HRA and the concept of liberty in the British constitutional tradition, which are necessary to frame the analysis of the issues under review. In **Section (2)**, I consider the questions in Theme One, and in **Section (3)** those in Theme Two.

(1) The 'rights' and 'wrongs' of the HRA

3. From Magna Carta to the English Bill of Rights of 1688 and the Scottish Claim of Right of 1689, the idea of enshrining certain fundamental entitlements in law was central to British constitutional history, paving the way, directly or indirectly, for the adoption in the 1780s of the Bill of Rights in the US and the Déclaration des Droits de l'Homme et du Citoyen in France. Yet, while Britain deserved credit for inventing the concept of a bill of rights, it had failed to adapt it to the reality of modern government. The HRA set out to achieve this goal. Did it succeed?

4. When assessed in comparative terms, the HRA presented some original features reflecting the nature of the British Constitution. The main example is the declaration of incompatibility in section 4. Unlike constitutional bills of rights elsewhere (e.g. the US and Germany), the HRA preserves the principle of parliamentary sovereignty and does not confer the power on courts to quash ordinary legislation inconsistent with a constitutionally protected right.

5. It is important in this regard to reject crude understandings of the relationship between the authority of Parliament and the liberty of the invidual that are predicated on viewing the former as a threat to the latter. Such understandings may be based on the historical experience of countries where at some point the legislature ceased to operate freely and was effectively subjugated by a tyrannical power. But this is a feat that no executive has ever come close to accomplishing in Britain for well over three centuries.

6. When viewed in this historical light, it is not surprising that the modern British constitutional experience has been defined instead by the intertwining, rather than the juxtaposition, of what Benjamin Constant described as ancient and modern liberty.[1] In Britain, the liberty of the polity, embodied in the role and authority of Parliament, and the liberty of the individual coexisted and supported each other.

7. This nexus is evident in the Bill of Rights and the Claim of Right, with their emphasis on both "*undoubted rights and liberties*", which belong to individuals, and the "*laws and liberties of the Kingdom*", which reflect a collective sense of liberty. The words that perhaps best express the combination of political and individual liberty are found in the final paragraph of the Act of Settlement of 1701: "*the Laws of England are the Birthright of the People thereof*". The holder of this birthright is not the person but the people as a whole, while its object – the "*Laws of England*" – refers both to the body of legislative wisdom transmitted by previous generations and to the supreme power to legislate. While not an actionable right, this birthright is a fundamental statement of political and constitutional principle. Although the Union with England Act of 1707 did not use the same language in relation to the laws of Scotland, the terms of the provisions which preserved the distinctness of Scots Law (e.g. section XIX of the Act) evidence similar sentiments towards the law, viewed as the embodiment of a distinctive and proud tradition of liberty.

8. The British understanding of liberty prized tradition inherited under, and evolved through, the combination of legislation and the common law. As the 1688 Bill of Rights recited, the rights and liberties it was "*asserting and vindicating*" were "*ancient*"; or, as Parliament told Charles I in the 1628 Petition of Right: "*your subjects have inherited this freedom*".

9. Edmund Burke explained this very British idea of liberty, as both an individual entitlement and a collective inheritance through the law, in these terms:

> From Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom without any reference whatever to any other more general or prior right…

[1] Benjamin Constant, 'The Liberty of the Ancients Compared with that of the Modern', in *Political Writings*, Cambridge University Press (1988), 308-328.

> In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections; keeping inseparable, and cherishing with the warmth of all their combined and mutually reflected charities, our state, our hearths, our sepulchres, and our altars.[2]

10. The association of liberty with inheritance and tradition has important consequences. It instils a sense of ownership in the rights and liberties that is both individual and collective; and it connects the individual with past and future generations, avoiding the atomising effect of an entirely individualistic rights-based conception of liberty. The purpose of this association is not to diminish liberty with arguments about the primacy of society or community over the individual, but rather to deepen that sense of individual liberty by recognising in it a principle so important that it cannot be defined solely in terms of the benefits that it confers on each one of us. In a sense it can be said that this British understanding of liberty already anticipated and answered Karl Marx's fierce attack on modern human rights as the rights of "egoistic man". It also foreshadowed contemporary discussions in both international law and ethics about intergenerational duties, particularly with regard to the preservation of the environment.[3]

11. In the British tradition of liberty, ancient rights and liberties are sacrosanct legal entitlements that come with a moral and political responsibility: they should be guarded, treasured and held *in trust* for the future. The vehicles through which this inheritance is transmitted are Parliament and the common law. The fact that this moral and political responsibility is not legally enforceable does not diminish its importance. The British Constitution was always a combination of legal and political elements, premised on the awareness that indidivual liberty could not be protected exclusively through legal devices.

12. Why does all of this matter for a review of the HRA in 2021?

13. It does because, although the HRA has been a success in some respects, it has not in others. The problems – from the relationship between domestic courts and the European Court of Human Rights to the wider constitutional impact of the HRA – which the

[2] Edmund Burke, *Reflections on the Revolution in France*, Penguin Classics (1986), 119.
[3] See: Wilfred Beckerman and Joanna Pasek, *Justice, Posterity and the Environment*, Oxford University Press (2001); Burns H. Weston, 'The Theoretical Foundations of Intergenerational Ecological Justice: An Overview', 34 *Human Rights Quarterly* (2012) 251-266.

Review is called to consider stem from the failure, at the time of the adoption of the HRA, to appreciate that the challenge was not merely to enact a bill of rights that was fit for our times but one that was embedded in the distinctive British constitutional sense of liberty.

14. This failure is reflected in how the White Paper, entitled "*Rights Brought Home*", which introduced the Human Rights Bill in 1997, made what it described as the "*case for change*". This case was understood to boil down to three points: i) the common law protection of human rights is inadequate; ii) other European countries offer a superior protection of human rights because they have incorporated the European Convention on Human Rights; and iii) Britain should follow the example of these European countries.[4] The White Paper briefly noted that "[t]*he constitutional arrangements in most continental European countries have meant that their acceptance of the Convention went hand in hand with its incorporation into their domestic law*".[5] This cursory remark missed the central point about those constitutional arrangements in other major democracies: that fundamental rights are protected principally through constitutional bills of rights that are genuinely distinctive, rather than based on the copy-and-paste of provisions in a treaty.

15. Paradoxically therefore, the cure for what was understood to be, perhaps correctly, a British anomaly – i.e. the absence of a modern bill of rights – was a novel anomaly. In fact, contrary to its publicised purpose, the HRA did not follow the example of European countries or indeed of other liberal democracies. For major Western liberal democracies – the US, France, Germany, Israel or Italy – ground their constitutional protection of human rights in distinctive bills of rights, which are, more often than not, the product of wide-ranging and inclusive processes of consultation and constitutional debates. The same is true of more recent constitutional bills of rights, from South Africa's in the 1990s to Kenya's in 2010. This point was captured by a comment made by the Chair of the Norwegian Commission on Human Rights in the Constitution, which was entrusted with constitutional human rights reform in Norway around the same time as the UK Commission on a Bill of Rights under the coalition government was cayrring out its work. He explained that the British model of relying exclusively on Convention rights would have been unacceptable in Norway, and that courts there would have remained

[4] 'Rights Brought Home: The Human Rights Bill', CM 3782, October 1997, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf
[5] Id. at para. 1.4.

"*robust in adjudicating human rights cases under the Norwegian constitution rather than referring automatically to the Convention and the jurisprudence of the European Court of Human Rights*."[6]

16. By contrast, the HRA was predicated on the assumption that this kind of robustness would have been undesirable. The UK chose to proceed in a manner that made it an exception among major democracies: the constitutional protection of liberty for modern times was enstrusted to a list of rights that was not an original composition but a reprint. From the country that, as Tom Stoppard's Alexander Herzen says, "*invented personal liberty*", better might have been expected.

17. This remarkable lack of constitutional sensibility towards both British and comparative experiences was sometimes explained as a pragmatic solution to the problem that the UK would, in any event, be bound by the European Convention on Human Rights. But the same is true of all European states of course. Yet none decided to forfeit its distinctive bill of rights on this basis, or to deprive itself of the opportunity to enact one. Moreover, this so-called pragmatism brought about a confusion between the domestic and the international legal spheres, which section 2 of the HRA (on which more later) most acutely reflects.

18. Given the approach that was chosen, and with the HRA itself describing the rights it protected as "*Convention rights*", it is hardly surprising that the HRA came to be viewed by the wider public as a foreign import. Indeed, one of its architects remarked over a decade later that "*although the scheme works well for judges and lawyers and civil society, and for the devolved institutions, it does not command widespread public confidence*"[7] – a comment which raises the question whether there could be any sense in which a constitutional charter of fundamental rights can be said to work well even though it fails to command public confidence. What is bewildering is not that the British public failed to enthuse over "*Convention rights*" – but, rather, that anyone ever thought they would.

19. A riposte to these criticisms has sometimes been to suggest that the the European Convention should be thought of as a British document because British civil servants

[6] Commission on a Bill of Rights, Secretariat summary of a discussion at a Seminar held at All Souls College, Oxford, 21 March 2012, p. 11
https://webarchive.nationalarchives.gov.uk/20130206021312/http://www.justice.gov.uk/about/cbr/
[7] Lord Lester of Herne Hill QC, 'A Personal Explanatory Note' in Report of the Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, Volume 1, December 2021, p. 232.

and lawyers were closely involved in drafting it. But this riposte, too, evidences a poverty of constitutional thinking. The UN Charter, the UN Convention on the Law of the Sea – not to mention the many Constitutions of former British colonies written in Whitehall – also benefited from the contribution and drafting of lawyers and civil servants of British nationality. But this does not make any of those documents British *in a constitutional sense*. Those documents resulted from the work of individuals whose legal and cultural background may have indirectly influenced them; but they were not preceded by a UK-wide constitutional process, and cannot in any meaningful way be considered an expression of the UK polity, let alone endowed with the heightened legitimacy that pertains to true constitutional enactments.

20. These brief remarks on the original 'rights' and 'wrongs' of the HRA may be considered off-target in circumstances where the Review has not been asked to consider whether the HRA should be replaced with a British Bill of Rights, or indeed whether the Convention rights protected under the HRA should be amended. These remarks are however relevant to the issues under review – and acutely so. Sections 2, 3, and 4 are central to the operation of the HRA. The constitutional quality of the protection of human rights depends, to a large degree, on these provisions. An assessment of their functioning and of proposals to amend them is not a merely legal-technical matter. It must be proceed from an understanding of the nature of the problem that needs fixing.

21. Moreover, notwithstanding the profound criticism about the original design of the HRA that I have briefly outlined, I am of the view that a wholesale replacement of the HRA with a new bill of rights would be an ill-advised and untimely step. The HRA has been part of our legal system for almost a generation now, and is becoming embedded in the legal and political culture of the UK as a whole and of the devolved administrations. With over two decades of interpretation and application by our courts, it is being integrated into the common law and the British constitutional tradition. The task of legislation at this point is to enable the healing forces of the common law to continue their good work while providing a clearer sense of purpose and direction, as well as to redefine the relationship between Parliament and the HRA in a manner that is more consistent with the British experience of combining political liberty and legislative sovereignty, on the one hand, with invididual liberty and human rights on the other. With these overarching objectives in mind, a focussed and carefully throught-out reform of the HRA could aspire to generate the public confidence that any constitutional bill of rights deserves and requires.

(2) Theme One: The relationship between domestic courts and the ECtHR

22. The Review has not been asked to consider the scope of the substantive rights protected under the HRA. Section 2, which does come under the terms of the Review, is however closely related to questions about the scope and content of the rights that are protected.

a) How has the duty to "*take into account*" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

23. Whatever the original intention behind section 2 may have been, its effect was to signal that, on matters concerning the interpretation of Convention rights, the European Court of Human Rights was, if not quite as the final arbiter *stricto sensu*, the better-placed body to judge. After all, the long title described that HRA as an Act "*designed to give effect to rights and freedoms guaranteed under the ECHR*", and so it is not that surprising that our courts interpreted the duty to take into account as tantamount to a presumptive duty to follow Strasbourg. As Lord Neuberger put it, "[w]*here … there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.*"[8] Given that the reverse is not true, i.e. the European Court of Human Rights does not proceed on the basis of a presumption that it ought to follow a clear and constant lines of decisions from the UK Supreme Court on Convention rights, there can be little doubt about the kind of hierarchical relationship that section 2 would in effect produce.

24. It bears noting in passing that this situation contrasts with the position in other European countries. In continental Europe, including in countries where the European Convention on Human Rights has been incorporated into domestic law, the primacy of the constitution, and the bill of rights it contained, has generally been affirmed. In Germany, for example, the Federal Constitutional Court held in the *Görgülü* case that:

> The guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a

[8] *Pinnock v Manchester City Council* [2011] UKSC 6, para. 48 (*per* Lord Neuberger).

restriction or reduction of protection of the individual's fundamental rights under the Basic Law.[9]

25. The status of the ECHR in French domestic law has been described as infra-constitutional. The position in France has been summarised as follows:

> According to the Constitution, the ECHR is superior to national law. With regard to the relationship between the ECHR and French constitutional law, however, the Council of State, in its judgement (plenary composition) dated 30 October 1998, *Sarran, Levacher et autres*, unequivocally affirmed that "*the superiority conferred upon international agreements by Article 55 of the French Constitution does not, in the internal legal order, apply to provisions of a constitutional nature*." The position of the Court of Cassation is the same.[10]

26. It is one thing to say "*your case-law can offer guidance*"; another to say "*we will generally follow your lead*". It is no answer to say that the UK is different because it does not have a written constitution in the German, French or American sense. Subjugation is not a price one should pay for being different.

27. Section 2, as it has been interpreted and applied, also creates a problem in terms of the rule of law in that it undermines legal certainty in at least three respects.

28. First, it creates confusion as to the body that is the final arbiter on matters of interpretation of fundamental rights on the plane of domestic law.

29. Secondly, while judicial dialogue is important, the premises on which that dialogue takes place matter, and Section 2 has contributed to generating the wrong premise. The ECtHR is the creation of an international treaty. It encompasses, as it must, individuals from a variety of legal traditions and cultures. It is not a common law court and does not, as such, approach legal reasonining and argument and, most importantly, precedent in the same way as a common law court. This is crucial because, while in other legal

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[9] BVerfG, Order of the Second Senate of 14 October 2004, 2 BvR 1481/04, para. 32 http://www.bverfg.de/e/rs20041014_2bvr148104en.html.
In that same case, the Court noted: "*There is, therefore, no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which the violation of fundamental principles of the constitution can be averted*." (para. 35). This point was affirmed recently in BVerfG, Order of the Second Senate of 15 December 2015, 2 BvL 1/12, para. 59, http://www.bverfg.de/e/ls20151215_2bvl000112en.html

[10] Elisabeth Lambert Abdelgawad and Anne Weber, 'The Reception Process in France and Germany', in Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2009), 116.

traditions legal certainty may be pursued in different ways, *stare decisis*, and the analytical rigour that it demands, is central to the way in which the common law seeks to fulfils this key value.

30. An illustration is the *Al-Skeini* case,[11] where the ECtHR in effect overruled its earlier judgment in *Bankovic* on the meaning of Article 1 of the Convention, but without offering any analysis or justification for doing so. As the then Master of the Rolls, Lord Dyson, put it, *Bankovic* had been regarded as the Grand Chamber's final word on extraterritorial jurisdiction,[12] and our courts had dutitfully followed the principles laid down in that judgment. *Al-Skeini* threw the law on this most important question into disarray at a time when, with British troops engaged overseas, clarity and certainty were of the essence; and the position remains uncertain to date.

31. Thirdly, the ECtHR's "*living instrument*" approach to the interpretation of Convention rights, combined with the general and open-eneded terms in which those rights are formulated, means in practice that it is all but impossible to predict where the boundaries will be moved next. Moreover, as a result of section 2 of the HRA, as Lord Bingham put it in *Ullah*,[13] [t]*he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time…*". The combined effect of "*living instrument*" and section 2 is thus not only uncertainty, but also a delegation of the key function of adapting rights to changing circumstances to Strasbourg, with domestic courts playing a role that is at best secondary and Parliament all but sidelined.

32. Again, it is no answer to say that such uncertainty would exist regardless of the HRA, because the UK is in any event bound by the ECHR. As a matter of basic principle, it is wrong to think that uncertainty on the plane of international legal obligations is best addressed by importing it into the domestic sphere. Doing so will risk causing damage to both the domestic and the international rule of law.

33. It is for the executive to manage treaty relations, and ensure compliance with the UK's international obligations. Where a treaty-based court or tribunal has produced a body of unclear decisions, State parties can seek to rectify the situation through a number of methods that arise exclusively on the international plane. They can, for example,

[11] *Al-Skeini v United Kingdom*, (2011) 53 EHRR 18.
[12] Lord Dyson, 'The extraterritorial application of the ECHR: Now on a firmer footing, but is it a sound one?', Lecture at Essex University, 2014.
[13] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at §20 (*per* Lord Bingham).

generate subsequent practice establishing agreement that can be relevant for purposes of treaty interpretation under Article 31 (3)(b) of the Vienna Convention on the Law of Treaty. They can engage with the ECtHR by filing third party interventions and inviting the Court to re-consider its jurisprudence, as the UK and a number of other States did in *Hanan v Germany*,[14] a case which concerned the interpretation of Article 1 of the Convention and the confusion generated by the ECtHR's conflicting judgments in *Bankovic* and *Al-Skeini*. As a last resort, State parties can amend the Convention, as they did for example with the adoption of Protocol 14 which amended Article 35(3)(b) of the Convention introducing a new admissibility criterion.[15]

34. It follows from the preceding analysis that there is, in my view, a need to remove the confusion that results, at least in part, from section 2.

35. One option is altogether to repeal the duty to take into account Strasbourg precedents in section 2. This would give a clear signal to our courts that the interpretation of the rights guaranteed under the HRA is a matter for them. The risk with this solution is that, given the general and open-ended terms in which rights are formulated, courts may be left in a state of uncertainty as regards the relationship with both Strasbourg and UK precedents.

36. To alleviate that risk, another option may be to limit the duty to take into account in a number of ways, e.g.:

    a) to clear and constant ECtHR case-law that is judged by our courts to be consistent with a correct application of the rules on treaty interpretation VCLT; or

    b) to clear and constant ECtHR case-law as of the date of entry into force of the HRA.

37. The fact that the duty to take into account is thus limited would not prevent the courts from considering other cases on the basis of any persuasive force their reasonining may be found to possess. The reference to the correct application of the rules on treaty interpretation would allow our courts to go behind the outcome of the ECtHR judgment,

[14] *Hanan v. Germany* (App No. 4871/16).
[15] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, *signed on* 13/05/2004, *entered into force* on 1/06/2010.

and consider the quality of its reasoning by reference to the rules that ought to have been applied. Our courts could, for example, conclude that the analysis in a dissenting opinion in an ECtHR judgment has greater force and should be adopted by our courts. This mechanism would ensure judicial dialogue with Strasbourg – but one between equals with their respective spheres, and centred on reasonining and argument rather than authority.

38. Two further legislative changes would be necessary to reset the relationship with Strasbourg in a manner that is sounded in terms of the British Constitution as well as more conducive to respect for the key rule of law values of certainty and predictability.

39. First, the long title of the new Act should identify legal certainty as one of the purposes the Act is designed to achieve. This would indicate to the courts that "*living instrument*" theory could not be applied to justify boundless proliferation of rights, and that, over time, precedential discipline over the interpretation of the HRA would have to take root no differently than would be expected in other areas of law.

40. Secondly, the words "*Convention rights*" should be replaced with "*fundamental rights*" or "*human rights*" throughout the HRA. This would indicate that the rights protected under the HRA are no longer to be thought of as ECHR creations, but that they are being naturalised, domesticated and re-purposed as constitutional rights in the British sense. Crucially, by re-classifying Convention rights as fundamental rights, Parliament would show that it is ready to own these rights in a fuller sense, but also that it is ready to play its legislative role in their evolution and development.

41. As mentioned above, under the current dispensation, the task of adapting fundamental rights to changing circumstances has been all but delegated to Strasbourg. As long as the rights protected under the HRA continue to be viewed as "*Convention rights*", the terms of that delegation may change only slightly but not fundamentally. Strasbourg will interpret and re-interpret these rights, and our courts will – more or less reluctantly – go along with it, with Parliament playing no role whatsoever in this process other than the passive role of being scrutinised.

42. Under the British constitutional model however, the task of adapating individual rights to changing circumstances must involve Parliament. Adaptation is to be achieved thorugh the combination of legislation with the slow and cautious gradualism of the

common law. To make sure that human rights are truly brought home, both Parliament and the common law must be actively engaged in their constant evolution.

43. Where Parliament and our courts fail to move in step with Strasbourg, an issue of compliance with the ECHR may at some point arise, albeit not necessarily so given that a) the issue may remain academic if no application is brought to the ECtHR and/or an application is brought by decided on a different basis (e.g. admissibility) than the one on which a divergence may have emerged; b) the ECtHR has been known to change its position (see *Hassan v UK*); and c) State parties can properly invite the ECtHR to overrule a precedent where they consider that the treaty has been misapplied (and indeed the UK has done so in its intervention in *Hanan v Germany*). If a divergence between the HRA, as interpreted and applied in the UK, and an ECtHR ruling nonetheless does crystallise, it will be for the executive and Parliament to decide how to deal with that situation. Our courts should however continue to follow their own precedent.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

44. The doctrine of the margin of State appreciation is one that operates in the sphere of international adjudication under a treaty. Attempting to import it into the domestic sphere would only worsen the category confusion between international and domestic law that section 2 induced. From the point of view of international law, courts are no less part of the State than the executive or Parliament. A domestic law version of the doctrine of the margin of State appreciation would thus fail at the level of basic definitions.

45. At the domestic level, the relevant principles are those that concern the scope of prerogative powers, or doctrines of judicial restraint and deference towards the executive in certain spheres (e.g. foreign relations). As regards the application of the HRA, the focus should be on these principles of our Constitution, and of course, parliamentary sovereignty, rather than the doctrine of the margin of State appreciation which was developed in a different context and is simply unsuitable.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application

of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

46. Judicial dialogue between domestic and international courts is valuable. Domestic courts are however more likely to leave their mark if they engage in this dialogue from a position of institutional confidence, as the German Constitutional Court has generally done vis-à-vis both the ECtHR and the CJEU. By institutional confidence, I mean specifically clarity as to who is the final arbiter in its respective sphere. The ECtHR considers itself, and rightly, to be the final arbiter in the sphere of treaty relations under the ECHR. The German Constitutional Court has consistently defended its position as final arbiter in the German legal sphere even where a fundamental conflict arises between that sphere and the ECtHR or EU law. Section 2 of the HRA has impaired our courts' ability to engage in a judicial dialogue with Strasbourg from a position of institutional confidence.

47. I do not however believe for a second that the two amendments I am proposing – the repeal of the duty to take into account and the re-naming of "*Convention rights*" – would result in our courts becoming more insular in their approach to adjudication. Strasbourg case-law would continue to be referred to and relied upon, as is indeed regularly the case before our courts with the jurisprudence of other international courts and tribunals. UK courts would still attempt to interpret domestic statutes in a manner that is consistent with the UK's international obligations, on the basis of the presumption that Parliament would not have legislated in breach of those obligations. Specifically, our courts will still be reluctant to depart from clear, consistent and well-reasoned interpretations by Strasbourg. But it is one thing to do so under the hierarchical framework that, whether correctly or incorrectly, section 2 has in practice produced; it is quite another to do so untrammelled by such considerations.

(3) Theme Two: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

48. I will address the questions concerning sections 3 and 4 under Theme 2. Although the questionnaire did not refer to section 19, it is in my view necessary to consider this provision as part of an assessment of the impact of the HRA on the relationship between the judicial, the executive, and the legislature. I will conclude with a few brief remarks

on proportionality, which affects the operation of the entire HRA and cannot be ignored in an assessment of the constitutional impact of the HRA.

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

- **Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?**

49. At least since *Ghaidan v Godin-Mendoza*,[16] section 3 has been applied on the basis that it permits courts to adopt an interpretation of a statute that would be inconsistent with Parliament's intention. As Lord Nicholls said in that case, "[i]*n the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.*"[17]

50. In following the *Ghaidan* approach in *Gilham v Ministry of Justice*, a unanimous Supreme Court said:

> In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, the House of Lords held that the interpretive duty in section 3 of the Human Rights Act 1998 was the primary remedy. Section 3(1) reads: "So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights". In *Ghaidan v Godin-Mendoza* it was also established that what is "possible" goes well beyond the normal canons of literal and purposive statutory construction. Philip Sales QC, for the Government, argued (at p 563) that section 3(1)

[16] [2004] UKHL 30.

[17] Id. at para. 30. See also Lord Millet:

> I respectfully agree with my noble and learned friend Lord Nicholls of Birkenhead that even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, section 3 may require it to be given a different meaning. It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. (para. 67).

See also paras. 45-48 (*per* Lord Steyn) and paras. 118-121 (*per* Lord Rodger).

required a similar approach to the duty to interpret domestic legislation compliantly with EU law, so far as possible, citing *Litster v Forth Dry Dock Engineering Co Ltd* [1990] 1 AC 546. Both Lord Steyn (paras 45 and 48) and Lord Rodger (paras 118 and 121) agreed that what was possible by way of interpretation under EU law was a pointer to what was possible under section 3(1), citing Litster as well as *Pickstone v Freemans Plc* [1989] AC 66. Lord Nicholls referred to the "unusual and far-reaching character" of the obligation (para 30). He also emphasised that it did not depend critically on the particular form of words used, as opposed to the concept (para 31). Lord Rodger, too, said that to attach decisive importance to the precise adjustments required to the language of the particular provision would reduce the exercise to a game (para 123). The limits were that it was not possible to "go against the grain" of the legislation in question (para 121) or to interpret it inconsistently with some fundamental feature of the legislation (Lord Nicholls, at para 33, echoing *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291).[18]

51. Before considering what kind of amendments may be necessary, it may be worth recalling the analysis of the terms of section 3 that led to this position. Lord Nicholls said in *Ghaidan*:

> 26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.
>
> 27. Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.
>
> 28. One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.

[18] [2019] UKSC 44, para. 39.

> 29. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.

52. As is clear from the passages above, the reading that section 3 has been given turns on the use of the word "*possible*" which, while not free from ambiguity as Lord Nicholls said, did appear to justify a fairly wide-reaching application. Even with that in mind, however, it seems to me that the parallel with EU law was quite misconceived, given the very different domestic legal framework under which EU law was given effect. But what should be done now?

53. One option is to amend section 3 with a view to giving effect to what Lord Nicholls regarded as a "*tenable interpretation*" (at para. 28 in the passage cited above) even under the current wording – i.e. to limit the operation of Section 3 to cases where there is ambiguity in the legislation. I would have some sympathy for this view, but it may be too narrow an approach and may, moreover, have the unintended consequence of increasing scope for section 4 to be applied. A better solution may be to replace the word "*possible*" with "*reasonable*". In *Ghaidan*, their Lordships appeared to accept that the use of this term would have narrowed down the scope for remedial interpretation under section 3.[19]

- **If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?**

54. Extending the effect of an amendment of section 3 to past cases would risk creating uncertainty. I would favour a solution that leaves earlier section 3 'read-downs' unaffected. It may be necessary for Parliament to specify that this would be the case to avoid any uncertainty. It would of course remain open to Parliament to legislate to override past specific read-downs of legislation based on section 3.

[19] See para. 44 (per Lord Steyn); para. 67 (per Lord Millet).

- **Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?**

55. This strikes me as a very bad idea. It would: a) encourage abstract review of legislation; and b) transform the function of adjudication from an exercise where the focus is the interpretation and application of the law, to one where the focus would become the 'judging' of the law.

b) The constitutional impact of the notion of incompatibility in terms of both section 4 and section 19 of the HRA

56. I now turn to consider the wider issue of the constitutional impact of incompatibility, and whether section 4 and section 19 may benefit from reform.

57. There was probably always a risk that section 4 (and indeed, *mutatis mutandis*, section 3) would pave the way for abstract review of legislation as a result of the pursuit of mere declarations of incompatibility by individuals who cannot even claim to be directly affected by the legislation in question. To some extent that risk has materialised, although actual declarations of incompatibility under section 4 remain relatively rare.

58. The fact that the remedy is merely declaratory may have had the unintended consequence of attenuating the nexus with the threshold requirements in section 7. It may be helpful in this regard to clarify in legislation that claimants seeking declaration of incompatibility must meet the victim requirement in section 7, i.e. that they have to demonstrate some kind of personal injury, harm or prejudice as a result of the legislation they deem to be incompatible.

59. This clarification of the operation of the HRA would sit well with the amendment to the admissibility criterion for applications to the ECtHR following the entry into force of Protocol 14 in 2010 and the manner in which this amendment has been applied by the ECtHR. In addition to claiming to be victim of a violation in terms of Article 34 of the ECHR, applicants to the ECtHR must now also show that they have "*suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and*

provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" (Article 35(3)(b)).

60. As regards the "*significant disadvantage*" element of admissibility, the ECtHR has held that this"*criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court*".[20]

61. As regards the subsidiariary element of admissibility, i.e. the final words of Article 35(3)(b) requiring that a case must have been duly considered by a domestic tribunal, the ECtHR interprets it as follows:

> Lastly, as to whether the case was "duly considered by a domestic tribunal", the Court first reiterates that in the *Holub* case (see *Holub v.Czech Republic* (dec.), no. 24880/05, 14 December 2010) it held that the term "case" referred to in Article 35 § 3 (b) of the Convention is to be distinguished from the terms "application" or "complaint". Rather, it corresponds to the notion of the "case" in the sense of an action, claim or request that was submitted to the domestic courts. It is the "case" understood in that way that has to be "duly considered by a domestic tribunal" for the purposes of Article 35 § 3 (b) of the Convention. That being so, the Court notes that in the present instance the applicant's "case", that is the action for eviction brought against her and her counterclaim, was "duly considered" by the first- and the second-instance courts and by the Constitutional Court.[21]

62. In *Holub*, the Court was even clearer in its reasoning that the requirement that a case be duly considered by the domestic court did not mean that the domestic case should have been based "*on the those complaints that have subsequently been submitted to the Court*" ("*… sur les griefs tels qu'ils sont ensuite soumis à la Cour*").[22]

63. A more stringent approach to standing for claimants seeking declarations of incompatibility under section 4 should not therefore increase the risk of more applications passing the admissibility test in Strasbourg. A claimant who fails to satisfy the victim requirement before our courts would almost certainly fail to meet the same test in Strasbourg and, *a fortiori*, s/he would not be able to show "*significant disadvantage*". Nor would s/he be able to rely on the plain fact that the human rights complaint has not been considered by the UK courts to overcome that failure.

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[20] *Galovic v Croatia*, Application no. 54388/09, para. 72.
[21] Id. at para. 76.
[22] *Holub v Czech Republic*, Application no. 24880/05 (There is no English version of this Decision).

64. I now come to the statements of incompatibility under section 19 and their relationship with section 4.

65. At present, ministers in charge of a Bill have two options. They can either make a statement of compatibility under s.19(1)(a), or make a statement under s.19(1)(b) to the effect that, although no statement of compatibility can be made, the government still wishes Parliament to proceed with the Bill.

66. For a statement of compatibility to be made, ministers will have to be satisfied that the provisions are more likely than not to be compatible with Convention rights. This approach was set out in 1999 by the then Home Secretary, Jack Straw, in the following terms:

> If a section 19(1)(a) statement is to be made, a Minister must be clear that, at a minimum, the balance of argument supports the view that the provisions are compatible. Lawyers will advise whether the provisions of the Bill are on balance compatible with the Convention rights. In doing so, they will consider whether it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the EuropeanCourt of Human Rights in Strasbourg. A Minister should not be advised to make a statement of compatibility where legal advice is that on balance the provisions of the Bill would not survive such a challenge. The fact that there are valid arguments to be advanced against any anticipated challenge is not a sufficient basis on which to advise a Minister that he may make a statement of compatibility where it is thought that these arguments would not ultimately succeed before the courts.[23]

67. A statement under section 19(1)(b) does not, in theory, preclude the government from subsequently defending the legislation as compatible. There is indeed at least one precedent where the government did so successfully. A statement under section 19(1)(b) was made in respect of the Communications Act 2003, as it contained provisions that were not believed to be consistent, on the balance of argument, with ECtHR case law at the time. The legislation was however defended successfully in Strasbourg and eventually held to be compatible with Article 10.[24]

68. Nonetheless, the present situation is problematic and highly unsatisfactory for at least two reasons.

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[23] Written Answer of 5 May 1999 (HC Hansard, col. 371).

[24] See *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159; *not* followed in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312; *Animal Defenders International v UK* (2013) 57 EHRR 21.

69. First, notwithstanding the experience with the Communications Act, an admission of likely incompability is almost certain to damage the prospects of successfully defending the case before domestic courts or the ECtHR. At a minimum, it results in poor optics for the government, which may not be very damaging in cases that do not attract much public attention, but would certainly be in many others.

70. Secondly, the assessment of compatibility that is required now is too black-and-white. It misses the point that the ECHR *is* a treaty and and the ECtHR is *not* a common law court. I have explained before why these are fundamental misconceptions, and I will add just one observation: under the rules in the Vienna Conveniton on the Law of Treaties, the subsequent practice of States is a factor that may, and sometimes must, be taken into account for purposes of interpretation. There may be a proper sense in which the ECHR can be described as a "*living instrument*", but it is not the one the ECtHR has in mind when it uses this expression. The point is that the UK, like every State party, must be able to participate in this process without tying its hands in advance.

71. Furthermore, a corollary of the "*living instrument*" doctrine as the ECtHR understands and applies it is that its jurisprudence can and does evolve. I have mentioned the example of the ECtHR jurisprudence on the scope of extra-territorial jurisdiction under Article 1. Another example of acute relevance to UK policy is the relationship between the ECHR and the law of armed conflict. The ECtHR changed tack in *Hassan v UK*, and accepted the *lex specialis* role of the latter in a far more purposive way than it had done before.[25]

72. If the government, for example, chose to legislate on the basis of an approach to Article 1 that reflects the stricter test in *Bankovic* rather than the far vaguer or more uncertain one in *Al-Skeini*, it would currently have to do so on the basis of a statement under section 19(1)(b). This would however do great damage to the Government's entirely proper attempts to defend the *Bankovic* test, which is not only regarded as being consistent with UK policy and interests, but is also considered sounder as a matter of principle and legal analysis by some scholars (myself included). As long as the Government considers that its interpretation of a treaty is tenable and that it can respectably maintain that position even before the ECtHR, it should not be forced in

[25] *Hassan v UK*, Application no. 29750/09.

effect to abandon that position in the legislative process because of the either/or nature of section 19.

73. One option for reform would be to drop section 19 altogether. Parliament would form a political and legislative view as to the human rights impact of particular bills on the basis of debating the merits of those bill. It would then be for the courts to decide whether the legislation is incompatible or not.

74. A different option is to add a third type of statement to section 19: a statement of 'qualified compatibility'. Such a statement would be made by ministers in circumstances where they cannot certify compatibility on the balance of argument based on the case-law at the time, but are still of the principled view that the legislation would be compatible with fundamental rights.

75. Such a statement of qualified compatibility could be properly made by ministers for example where: a) Strasbourg case-law is not settled; b) where that case-law is inadequate on a common law standard and/or inconsistent with a correct application of the rules on treaty interpretation and is, as such, open to challenge in our courts (as well as in Strasbourg); c) where the government has taken the policy decision to challenge a particular line of Strasbourg decisions on the principled basis that the ECtHR got it wrong, as the UK government, alongside others, has done in the past;[26] and d) where, while UK case-law may suggest, on balance, incompatibility, the government wants to invite Parliament to legislate on the basis that, notwithstanding such case-law, Parliament should endorse the principled view that the fundamental rights it affirmed in enacting the HRA (and the subsequent amendment thereto) are not inconsistent with the proposed legislation. Parliament would thus be invited to take the legislative policy decision to clarify the meaning of fundamental rights.

76. Admittedly, scenario d) is different from the others, insofar as it could lead to a legislative abridgement or expansion of a fundamental right. That, of course, is what can happen now in respect of Convention rights, if Parliament is invited to proceed on the basis of a statement under section 19(1)(b). The difference is that, in the case of a statement of qualified compatibility, Parliament would not accept the premise that its legislation is contrary to fundamental rights, which is what it must do if it proceeds on the basis of a statement under section 19(1)(b). Parliament would instead exercise its

[26] *Hanan v Germany*, Appliction no. 4871/16.

proper legislative function to clarify the scope and meaning of a fundamental right it enacted.

77. In cases where no respectable argument of compatibility is available, or where Parliament cannot be credibly be invited to legislate on the basis that it is clarifying the scope of a fundamental right, the proper course would continue to be the making of a statement under section 19(1)(b).

78. As regards the relationship with section 4, it seems to me that the better view of the present situation is that a statement of compatibility can be issued in respect of legislation adopted on the basis of a section 19(1)(b) statement. This is because, as discussed above, it is possible for the government, in theory at least, to defend that legislation as compatible on the basis that there is an argument to this effect that is respectable enough to be pursued in court, but was not sufficient for purposes of a statement of compatibility.

79. Section 4 may be of more practical significance for legislation adopted on the basis of a statement of qualified compatibility. It would still be open to courts to make a declaration of incompatibility under section 4 but, in doing so, they would have to consider the extent to which the new legislation may change the assessment of compatibility given Parliament's principled stance.

80. These changes may help address one of the central prolbems with "*Convention rights*" under the HRA identified above, namely that their interpretative evolution is now almost entirely a matter for Strasbourg. The correction that is required is to ensure that these fundamental rights are brought home in a genuine sense, and this means creating a framework that allows both Parliament and the common law to be actively engaged in their constant evolution.

81. A further option would be to provide for a declaration of incompatibility on a higher standard (e.g. "*manifest*" or "*fundamental*" incompatibility or "*incompatibility with the essence of a right*") in respect of legislation adopted on the basis of either a section 19(1)(b) statement or a qualified compatibility statement. This idea would have some affinity with a the German Constitution which provides, under Article 19(2), that "[i]*n no case may the essence of a basic right be affected*". When faced with legislation adopted by Parliament notwithstanding incompatibility or qualified compatibility, courts would thus still have the opportunity to warn Parliament about the impact of the

legislation on human rights when this seems to them particularly severe, while leaving to Parliament the question of how, or whether, the legislation should be changed.

c) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

82. This is the area where, as briefly discussed above, the ECtHR jurisprudence seems to have abandoned the cautious position in *Bankovic* but in a manner that is far from well-reasoned and has creates great uncertainty. There is a strong rule of law case for bringing clarity to the domestic legal position by legislating on this issue, and doing so on the basis of the sounder analysis of the law developed by the ECtHR in *Bankovic* and applied by the House of Lords in *Al-Skeini* (but subsequently qualified or overruled by the ECtHR in its decision on *Al-Skeini*).[27]

d) Proportionality

83. Any review of the constitutional impact of the HRA cannot ignore the role that proportionality has played and continues to play. I have written on this topic before and will not set out my arguments in full here again.[28]

84. Proportionality entered the UK legal systems via the HRA, but its role now stretches to the common law.[29] It took only two decades for us to move far beyond the position envisaged by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*,[30] namely that proportionality could become an additional ground of judicial review over time. The issue of common law proportionality is not one for this Review, but HRA proportionality is. It bears recalling that there is one major jurisdiction that has failed to show any enthusiasm for proportionality in the context of fundamental rights review: the United States. The US Supreme Court never adopted proportionality "*as a constitutional concept which can stand on its own and which applies in different*

[27] Al-Skeini v United Kingdom, (2011) 53 EHRR 18. Or Supra n.12.
[28] Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality', in Rowan Cruft, S. Matthew Liao, Massimo Renzo (eds.), *Philosophical Foundations of Human Rights*, Oxford University Press (2014), 341-360.
[29] E.g. *Pham v SSHD* [2015] UKSC 19.
[30] *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, p 410.

fields of the Bill of Rights".[31] Of course, the US Constitution's Bill of Rights "*mostly contains no limitation clauses*" and uses instead a categorization system of judicial scrutiny in protecting the rights enumerated.[32] In American constitutional jurisprudence, "*the limitation of a constitution al right is not based upon any specific, or ad hoc, balancing between the marginal social benefits in fulling the legislative purpose and the marginal social harm caused to the constitutional right*".[33]

85. The difference between these two approaches can be illustrated with the example of direct and intentional incitement to violence, which is not permissible under either the First Amendment or Article 10 of the ECHR. On the US analysis, direct incitement falls outside the boundaries of free speech. It is categorically different: one simply does not have a right to intentionally generate speech that incites violence and is likely to cause it imminently.[34] On the ECHR approach to rights, there are instead two steps: the starting point is that the Convention right is *prima facie* engaged; the next step is to justify its limitation in cases of incitement to violence under the proportionality test. This two-pronged approach distinguishes "*between the scope of the constitutional right and the extent of the right's realisation*".[35]

86. Such differences are not a matter of sophistry. Analysis is important. It shapes the way in which we think about law and about rights. A consequence of the ECHR approach to human rights is that their scope is, at first, generously defined in the knowledge that the exercise of the right can subsequently be restricted. Unsurprisingly, fundamental rights defined, interpreted and applied in this way become "*ubiquitous*".[36] But ubiquity is not a virtue. It dilutes human rights. And it creates a situation where individuals have rights which are engaged on a very low threshold, but are then subject to the Damocles' sword of proportionality. Where the sword will fall then depends, to a large extent, on the subjective, when not altogether arbitrary, balancing of the measure and its consequences. Human rights ubiquity also risks generating an unhealthy public culture of rights and liberty, defined by the combination of wide entitlement followed by disappointment.

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[31] Aharon Barak, Proportionality: Constitutional Rights and Their Limitations, (Cambridge University Press, 2012), 207.
[32] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge University Press, 2012), 509.
[33] *Id.* at 512
[34] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[35] E.g. see Barak, *Proportionality* p. 45ff.
[36] Robert Alexy, 'Constitutional Rights, Balancing and Rationality', 16 *Ratio Juris* (2003) 133.

87. A fundamental problem with the HRA is that the traditional British sense of liberty and rights remains probably closer to the category-based sense still reflected in the US jurisprudence on the Bill of Rights (albeit the categories may be different). The passenger on the Clapham omnibus is not likely to think that you have a right to speak words that deliberately and directly incite violence, but that a limitation of that right is proportionate when weighed against the consequences. He is more likely to consider that you do not have any such right to begin with.

88. To appreciate the constitutional impact of the HRA, and the root causes of its failure to command public confidence, we must confront these fundamental problems. The solution is not necessarily the adoption of a legislative standard of review other than proportionality, which in any event the Review may consider to be beyond its remit. What may however be achievable is the adoption of a series of focussed amendments that would: a) bring the HRA firmly within the confines of common law gradualism and subject to the rigour and discipline of precedent; and b) re-define the role of Parliament in this field from examinee to key player, alongside the common law, in interpreting and developing fundamental rights.