Submission to the Independent Human Rights Act Review

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1. I am a Professor of Law at the Faculty of Laws, University College London. I am also a Legal Adviser to the House of Lords Select Committee on the Constitution. I submit this response in my individual capacity.

2. I have conducted a range of studies on the Human Rights Act 1998, judicial dialogue, judicial restraint and justiciability in the last fifteen years.[1] I have, furthermore, experience of providing legal advice in relation to legislative scrutiny, and have investigated the law and practice of delegated law-making in some detail. In this response, I will focus not so much on the caselaw of the courts but on the constitutional and institutional role of the Human Rights Act 1998 and litigation thereunder.

3. My conclusions can be summarised as follows:

    - Section 2 has in practice served to reduce adverse judgments against the UK at the European Court of Human Rights and shifted much of the interpretive role to domestic judges. It should not be reformed or weakened (para. 14);
    - There is no principled case for amending section 3, no systematic evidence of its abuse, and no reason to believe that reliance on section 4 should or could play a compensatory role for a weakening of section 3. There is good reason to believe that such reform would upset devolution arrangements (para. 27);
    - Parliament and Government have responded to 23 declarations of incompatibility since the Human Rights Act 1998 came into force. This is a comparatively low level of legislative rights-review (paras 30-32);

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[1] JA King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act. In: H Hooper, M Hunt, and P Yowell (eds.) *Parliaments and Human Rights: Redressing the Democratic Deficit* (London: Hart Publishing, 2015) pp. 165-192. See also J King, 'Dialogue, Legality and Finality' in G Sigalet, G Webber, R Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (CUP 2019); J King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in NW Barber, R Ekins, P Yowell (eds), *Lord Sumption and the Limits of Law* (Hart 2016); J King, 'Rights and the Rule of Law in Third Way Constitutionalism', [2014] 30 Constitutional Commentary 101-126; J King, 'Institutional Approaches to Judicial Restraint' (2008) Oxford J Legal Studies 409-441; J King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101-124; J King, 'The Justiciability of Resource Allocation' (2007) 70 Modern Law Review 197-224.

- Remedial orders have become a significantly more prominent form of response to declarations of incompatibility in the las five years. This is a mixed blessing and worthy of further study (paras. 35-38);
- There is a systemic problem in excessive and unnecessary delay in responding to section 4 declarations. Principles governing such responses should be restated, better formalised, and observed more diligently – including by specifying timeframes for replies (para. 43);
- The democratic objection to the 1998 Act is misguided in view of the low number and restrained character of the cases decided under the Act, the generally cooperative parliamentary engagement with judicial remedies, the minimalist compliance often exhibited by Government in response, and especially in view of the profile of claimants succeeding in section 4 cases (para. 47 and Appendix 1); and
- The proposal that subordinate legislation should be treated like primary legislation under the 1998 Act is constitutionally tone-deaf. It misunderstands the nature of delegated legislation and overlooks the chorus of agreement on the accountability deficiencies of the current regime (paras. 41-51).

Theme 1 – The Relationship between UK courts and the ECtHR

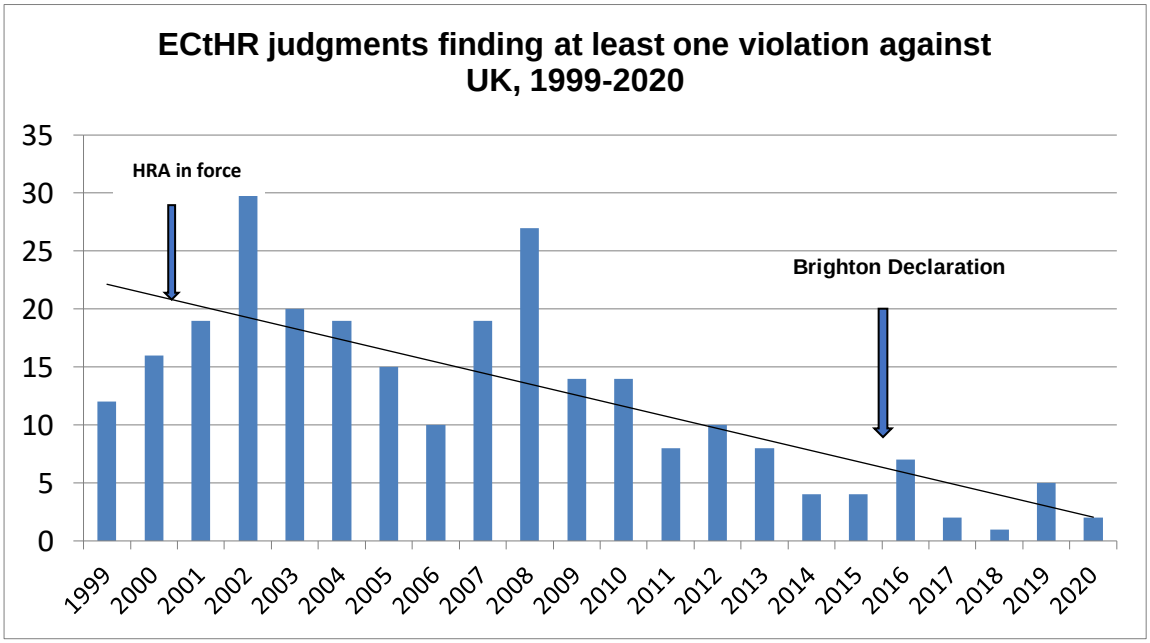
4. The original intention of the Human Rights Bill 1997 was not to create a British Bill of Rights, but rather to provide a remedy in UK courts for violations of the European Convention on Human Rights (the "Convention"). The connection between this idea and dialogue with the European Court of Human Rights (the "ECtHR" or the "Strasbourg Court") was the central purpose of the Bill as clarified in the White Paper:

> 'We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of caselaw on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions. United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed.'[2]

5. These views foresee quite accurately what has transpired since the enactment of the Human Rights Act 1998. The trend in adverse judgments against the UK in Figure 1confirms this.

[2] *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997), [1.18]. See also [2.5].

Figure 1



Source: Ministry of Justice's *Responding to Human Rights Judgments* (2020, CP 347) Table 3; verified against the ECtHR's Annual Analysis of Statistics Reports published on the Court's website.

6. While some years are anomalous due to many cases having been taken, sometimes in respect of the same issue, the overall trend in the decline is discernible and predates the adoption of the Brighton Declaration.

7. The question of whether this decline owes anything to the influence of domestic court reasoning is something examined in preliminary but as yet unpublished research conducted by myself and my UCL Laws colleague Professor Colm O'Cinneide in 2016, with the assistance of Ms. Daniella Locke and Dr. Stefan Theil.[3] We were cognisant of several speeches and articles by judges of the ECtHR in which claims about the importance of dialogue had been expounded.[4] Mindful of these, we investigated the

[3] The Research was conducted at UCL Laws between May 2016 and July 2016 and presented in a workshop on the proposals for a British Bill of Rights held on 25 July 2016 and attended by over 30 distinguished scholars, practitioners and parliamentarians. The study consists of interviews with judges and counsel, and an analysis of 82 cases in which no violation was found against the UK and 30 cases in which a violation was found. The aim was to establish whether national court judgments played an important role in the reasoning of the Strasbourg Court. Interviews with the seven judges were conducted confidentially by video interview between May – June 2016, led by myself or Prof Colm O'Cinneide, with key passages transcribed and analysed by Ms. Daniella Locke. The project was put on hold temporarily following the constitutional crises caused by the Brexit vote and Covid-19. The research was funded by a UCL Public Policy grant.

[4] Among these can be cited Nicolas Bratza, "The relationship between the UK courts and Strasbourg" [2011] European Human Rights Law Review 505; Paul Mahoney, "The relationship between the Strasbourg court and the national courts" [2014] Law Quarterly Review 568: '[M] many cases coming from the UK Supreme Court (and its predecessor, the House of Lords), as well as from the highest courts of other countries, have illustrated a judicial dialogue accomplished through judgments in decided cases.'; President Dean Spielmann, Opening Speech at the Solemn Hearing of the European Court of Human Rights on the Occasion of the Opening of the Judicial Year, January 2014, available at www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf;; Robert Spano,

relationship between national court reasoning and the decisions of the Strasbourg Court in an analysis of caselaw and candid confidential interviews with seven judges of the ECtHR, including two who have held the position of President of the Court at some point in their judicial career (both of whose views are reflected below). Four of the seven judges had also issued prominent judgments in cases where they would have or did reject an attempt by the UK to have a national approach followed.

8. Not all were positive about the intense accent on 'dialogue' in recent writings about the relationship between national courts and the Strasbourg court, nor of the practice of push-back arising in the jurisprudence and politics of the UK courts. However, the overall thrust of the comments of these judges confirmed that the reduction in violations found in the cases decided against the UK was correlated with the quality of the reasoning found in the decisions of UK courts.

9. For example, one senior judge observed:

> *"So I would say yes, there is a direct correlation [with the trend on] the graph... first, that at least those cases that have come to Strasbourg in the last few years have been cases where the Convention issue has been heavily reasoned and fleshed out at a domestic level and, second, the judges here are more receptive to these kinds of arguments, to these kind of institutional, deferential, subsidiary- type arguments than perhaps judges in the past were receptive to."* (Judge A)**.**

10. The more precise mechanics of how weight was accorded to these judgments was fleshed out as follows:

> *"[If] it is clear that the courts [have] looked at the Convention issues, on the basis of the Convention, they cited the relevant case law, they genuinely tried to see whether the facts of this case fell on this side or that side of the proportionality line. That being so, applying the* Von Hannover *approach, there is no cause for us to go into the facts, whether or not we would have personally agreed with the approach the judges took."* (Judge B)

11. Several judges went further in singling out the UK courts as being distinctive in this respect:

- '*The interesting thing about the UK Supreme Court is the way they engage with Convention issues is in many ways the same way we do it here in Strasbourg. They have in many ways adopted the jurisprudential techniques that we are using, because they are so well-versed in the case law that when we get the cases I often ask myself, I mean, "what is left?"*" (Judge A)

- '*It is true that in recent years cases against the UK – adverse judgments have decreased – one reason is that the UK domestic judgments are so extremely well-reasoned, the quality is so high compared to other countries, that it is hard for Strasbourg to overrule*" (Judge B)

'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?' (2015) 33 Nordic Journal of Human Rights 1.

- '*If you look at the British cases, the judges [engage] much more extensively. The British are better versed in the application of the case law*." (Judge C)

- *'We are much more cautious about the reasoning of UK courts than other countries*' (Judge D)

12. Similar remarks are contained in all the interviews undertaken, even where frustration was at times expressed about the hubristic and at times demeaning attitude towards the Strasbourg Court and its judges sometimes available in the national UK discussion.[5] Such respect was accorded not (only) because of the brilliance of the domestic judiciary and bar, but primarily because the common law style of judicial reasoning ranks fidelity to the sources of law very high in the process of adjudication.

13. In our research, we also did not find that the UK courts slavishly apply Convention jurisprudence without feeling ready to expose either a feature of the national legal order that was not adequately appreciated in Strasbourg, or where a legal theory or balancing exercise adopted by the court was felt to be wanting. In this respect, an interview with one Treasury Counsel informed us of how national court reasoning functioned in such cases when representing the UK before the ECtHR.

> *'[We had a] case where we had a sort of fairly uphill struggle in the sense that we had … judgments basically against us from the Strasbourg Court. We tried to distinguish them, but if truth be told there wasn't really any distinction, so what we were really trying to was to get the Strasbourg Court to see that actually it had gone wrong. And when you're trying to persuade the Strasbourg Court that it's gone wrong - we have actually managed to persuade the Strasbourg Court on a number of occasions that it has gone wrong - you can't do that unless you can show the Court that your own courts are really conscientiously engaging with the jurisprudence, and understanding it and trying to make it coherent, and saying well actually there is another line of jurisprudence that the Court ought to follow here. So I think that if the domestic courts were to engage less than they do now with Strasbourg jurisprudence, that would deprive us, us being advocates who represent the UK in Strasbourg courts, of one very important tool that one can use to try and persuade the Court to agree with us.'*

14. The functional effect of section 2 of the Human Rights Act 1998 has been to shift a significant amount of the work of interpreting the Convention in disputes with the UK Government away from the Strasbourg Court and towards UK courts and tribunals. In so doing, it has improved the rate of success before the Strasbourg court and has also enabled the Government to persuade the Strasbourg Court to depart from its own jurisprudence where this has been found to not sufficiently appreciate some feature of the UK legal order. This has fulfilled the original intention of the Human Rights Act 1998.

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[5] Lord Hoffmann, 'The Universality of Human Rights' (19 March 2009) (available at https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/). The piece restates more forcefully earlier misgivings expressed in the otherwise laudatory essay on the Human Rights Act 1998, Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 Modern Law Review 159.

15. It is not evidently in the remit of this Inquiry to explore whether being a signatory to the Convention is itself something that ought to be reconsidered. Yet the occasional expressions of judicial dissatisfaction (both curial[6] and extra-curial[7]) may have perhaps precipitated a certain relaxation of the section 2 duty to keep pace with the Strasbourg court, even beyond the somewhat lax standard announced in the *Horncastle* judgment[8]

16. In my view it would be a very grave mistake for the UK to withdraw from the Convention, or, what is the same or worse, to challenge the authority of the Strasbourg Court to give the final determination of the meaning of Convention rights. Any further relaxation of the appropriate standard of interpreting section 2 beyond that found in the *Horncastle* case would entail such a challenge. The Convention plays a very important role in supporting a culture of rights throughout Europe, at some times through direct legal advocacy, and in others by providing a pan-European framework for a democratic rule of law state committed to human rights. Such frameworks are important across the region's universities, legal culture, and in the politics of opposition even in European countries currently run by authoritarian governments. Beyond the substantial protection of human rights afforded by the Convention in UK law and abroad, there is also a significant UK geopolitical interest in promoting the rule of law, human rights and cataloguing departures from them in a judicial fashion. These benefits come at a relatively small cost in sovereignty terms. While in 2020 the UK was subject to 4 adverse ECtHR judgments, this compared quite favourably with the experiences of Romania (85), Russia (185), Turkey (97) and Ukraine (86). As Sir Nicholas Bratza, former UK President of the ECtHR claimed, '[t]he withdrawal of the United Kingdom from the Convention would do untold damage to the system itself.'[9]

17. The attempt to further weaken the duty to keep pace with Strasbourg under recent judicial decisions is therefore a matter of regret. The approach taken by UK judges has earned the respect of Strasbourg judges. Any further relaxation of the standards in applying and departing from Strasbourg court caselaw will invite a showdown that the rule of law and the Convention itself requires be resolved by recognising the role of the Strasbourg court as the final arbiter.

Theme II – The relationship between section 3 and section 4 of the 1998 Act

Section 3

18. In *Sheldrake v Director of Prosecutions,* Lord Bingham held that 'a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of

[6] *AF (No.3)* [2009] UKHL 28 at [98] (Lord Rodger): 'Strasbourg has spoken; the case is closed.'

[7] Lord Hoffmann, 'The Universality of Human Rights' (19 March 2009) (available at https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/).

[8] *R v Horncastle and others* [2009] UKSC 14. Excellent scholarly work has been done by leading constitutional lawyers such as Dr. Ed Bates and Professor Roger Masterman.

[9] N Bratza, 'The relationship between the UK courts and Strasbourg' [2011] European Human Rights Law Review 505, 507.

incompatibility under section 4 an exceptional course.'[10] It is an open question whether this view – also expressed by Lord Steyn in the *Ghaidan v Godin Mendoza*[11] - is the ideal course. But it highlights up front why tampering with the meaning and role of section 3 could have very significant consequences for the scheme of the 1998 Act as a whole.

19. It is common ground that the judicial interpretation of section 3 allows the law courts to 'to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.'[12] We should thus commence with the question of whether this approach actually did exceed the original intentions of the Government bringing the Human Rights Bill. The White Paper offers some insight, but does not resolve the matter. On the one hand, it observed that

> 'The Bill provides for legislation - both Acts of Parliament and secondary legislation - to be interpreted so far as possible so as to be compatible with the Convention. *This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision.* The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. This "rule of construction" is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations.'[13] [emphasis added]

20. This passage suggests two roles for the section 3 power. First, that it functions as a gloss or rule of construction applicable to all legislation such that compatibility with Convention rights should be deemed to be implied into any other legislative enactment. Second, that it should go well beyond the judicial power to take into account Convention rights when resolving legislative ambiguity. It is not clear, on this second point, whether it was intended by the Government that (1) the Bill merely provide a new a *duty* (rather than a power) to resolve the ambiguity compatibly with Convention rights, or instead, (2) that it impose a duty or power for courts to require even that unambiguous legislation to be read down or subject to the addition of words in order to comply with Convention rights. The general question here is whether the first of these two alternative readings goes 'far beyond' the common law rule. The latter view – which assumes the answer is 'no' and therefore must be rejected - has prevailed most notably in the *R v A* case,[14] affirmed in the *Ghaidan v Godin Mendoza* case, and has been the orthodox interpretation since.

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[10] [2005] 1 AC 264 [28].

[11] *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

[12] Ibid. at [32] (Lord Nicholls).

[13] *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997) [2.7].

[14] *R v A* [2001] 3 All ER 1.

21. On the other hand, the White Paper does makes clear that it was not intended that the Human Rights Bill in any way entrench itself, nor that it disturb the traditional doctrine of parliamentary legislative supremacy.[15] Does the strong interpretive presumption canvassed above impinge upon parliamentary legislative supremacy? The question is sometimes debated by constitutional scholars. My view is that it was constitutionally open to the UK Parliament in 1997 when it passed the Human Rights Bill to enact an interpretive presumption that allowed judges to read exceptions and even words into otherwise clear statutory wording to secure the application of Convention rights. The conclusion that judges reached about that interpretation I think was right, *provided* the authority for such a power is located in the statutory authority of section 3 rather than in an expansive reading of the common law. The first of the two alternative interpretations given above would have had far too little effect on the existing common law powers of interpretation to qualify as having provided the new scheme of protection promised by the Human Rights Bill and its fanfare. Vernon Bogdanor refers to the 1998 Act as 'the cornerstone of the new constitution.'[16]

22. Such a scheme, one including a robust interpretive presumption, is no more a departure from the contemporary doctrine of parliamentary sovereignty than is the creation of prospective Henry VIII powers, or the obligation under section 2(1) of the now repealed European Communities Act 1978 to disapply UK legislation that conflicted with EU law. In both latter cases, the Government or the courts relied on powers enacted in earlier statutes to disapply, modify or repeal primary legislation passed later in time. It is not relevant whether this is compatible with the strongly Diceyan orthodox position on parliamentary sovereignty. That position has not reflected the correct constitutional position in the UK for at least the last forty years. It remains true that Parliament can make or unmake any law. It has not been true for decades that 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'[17] Indeed, it was not even true in Dicey's own day, [18] a fact almost entirely omitted from his analysis.[19]

23. The view just expressed is neither radical, nor inherently pro-judicial. It is an account of the constitutional powers of Parliament to create robust rules of statutory construction, as well as an account of what Parliament did in 1998 when it enacted the Act. That the robust interpretive powers under section 3 are compatible with parliamentary sovereignty is also the view of the noted critic of common law judicial activism, Professor Jeffrey Goldsworthy of Monash University.[20]

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[15] *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997) [2.10]-[2.16].

[16] V Bogdanor, *The New British Constitution* (Oxford, Hart Publishing, 2009) ch 3.

[17] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Eighth Edition) (London: MacMillan, 1915).

[18] Committee on Ministers' Powers, *Report* (Cmd 4060, 1932) Annex III (citing nine examples, including a provision of the National Insurance Act 1911).

[19] In fact, Dicey acknowledged the creation of Henry VIII powers in the National Insurance Act 1911 in Footnote 8 of his introduction to the eighth edition of the book (published in 1915). He does not consider how to reconcile that power with his own account of legislative supremacy.

[20] J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) ch.5.

24. Even if the settled judicial interpretation of section 3 can be defended as constitutional, that does not answer the question of whether Parliament should repeal or amend the provision. The same point applies to the use of Henry VIII powers and the direct effect of EU law. Here, I feel the question is on the one hand pragmatic, and on the other one to be answered having regard to the broader scheme of the 1998 Act. The problem with the case for reform is that there is simply no dossier of evidence that section 3 has been abused in any consistent way. The cases typically raised in complaint are the *R(A)* case and the *obiter dicta* in *Ghaidan v Godin Mendoza*. These cases were decided nearly two decades ago and only the first that is consistently cited as an actual instance of the courts going too far (rather than saying they are prepared to go too far). Following up the application of such cases in legal databases shows that the strongest remedies foreseen in those early cases, instead of the superimposition of qualifications or exceptions into statutory language, finds expression in fairly few cases. These two old cases continue to be taught as the leading cases in public law curricula. It is open to the courts, and to the Secretary of State in interventions in such cases, to advocate a more moderate version of section 3 if the need is truly there.

25. The 2014 article by Christopher Crawford in the King's Law Journal explores whether there has been dialogue between Parliament and the courts under the powers exercised under section 3.[21] The analysis is fascinating and valuable, though I believe it under-reports the full extent of the caselaw decided under section 3. However, it must be borne in mind that the article is aimed at refuting the view that section 3 is intended to produce dialogue. The role of section 3 is not anchored in dialogue in the view of the courts, nor it seems in the view of the Parliament that enacted section 3 in the first place. The aim of section 3 is to create a general strong presumption of Convention compatibility wherever the scheme of an Act will permit it, typically by super-adding Convention compliance requirements into existing statutes. The democratic propriety of that exercise of section 3 powers is rooted in the authority of the 1998 Act, not in the exercise of any subsequent parliamentary approval or discussion of the judicial interpretation so given. Indeed, it appears to me plausible that most if not all the 59 cases listed in the appendix of Crawford's article could be precisely the kinds that the Government had in mind in bringing forward the Human Rights Bill.

26. The scheme of the 1998 Act also cautions against reforming the section 3 power. Section 4 remedies have proved inherently weak. Dampening the potency of section 3 could render the overall scheme of the 1998 Act anaemic to the point that many will argue that the peculiarly British 'parliamentary bill of rights' is a pale imitation of a bill of rights, that we need 'strong form' rather than 'weak form' review. It would also become an open legal question whether sections 3 and 4 constitute an effective remedy for Convention rights violations under Article 13 of the Convention. More importantly, such tampering also risks destabilising delicate arrangements in place in Northern Ireland and Scotland. In both devolved constitutional arrangements, respect for Convention rights is a powerful constitutional and legal principle. Its erosion would upset settled cross-community arrangements in Northern Ireland and strengthen the nationalist case for Scotland's independence. In short, the refurbishment of the

[21] C Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 King's Law Journal 34.

Human Rights Act 1998 would pose a real threat to the long-term stability of the Union.

27. My conclusions are that there is no principled constitutional case for the repeal or amendment of section 3; no evidence of a systemic problem of abusing section 3 powers or producing perverse outcomes in the reported cases; that there are substantial reasons for believing that section 4 will not fill the remedial vacuum that any such reforms would create; and that weakening the overall scheme of the Act risks upsetting devolution arrangements at an already delicate time.

Section 4

28. I have previously published a study of parliamentary responses to section 4 declarations of incompatibility.[22] In that study, I compared the role of declarations of incompatibility with judicial strike-down powers in certain other countries, explored how litigation was working under the 1998 Act, and then analysed all the parliamentary debates held and committee reports issued in response to all examined legislative responses to section 4 declarations. My general conclusion in reviewing the parliamentary responses was that there was very little evidence of parliamentarians feeling that they had been dominated or judicialized by the UK courts. To the contrary, outside two particular cases,[23] there was plenty of evidence of collaborative understanding in working out remedies for Convention rights violations. That is a view that accords with similar work carried out by others.[24]

29. In this submission I have updated some of the data contained in that initial study by having regard to the most recent published list of judgments responding to human rights judgments. I share the information here with a view to showing that the number of declarations has been very modest, that there is little data of Parliament being dominated or judicialized by the courts in the process, but also that the very substantial delays and at times minimal compliance of the Government has shown section 4 to be a very limited form of quasi-constitutional remedy.

The General Picture

30. There have been a total of 32 final declarations of incompatibility, not overturned on appeal, since the Human Rights Act 1998 came into force. The responses have been diverse, as Figure 2 shows. In 5 cases, the declaration occurred after the remedial

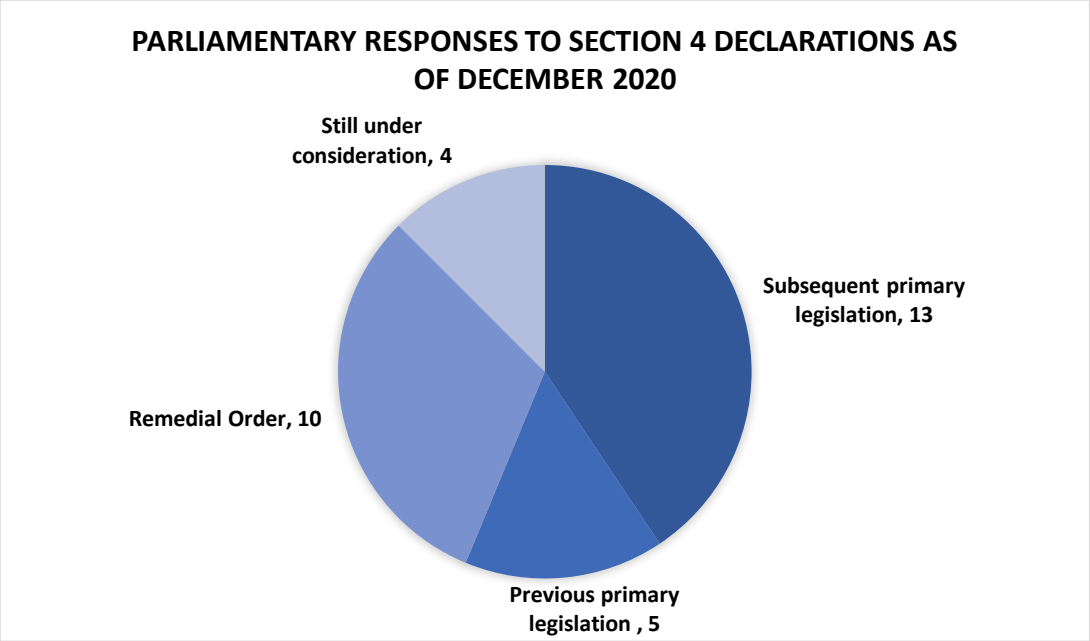
[22] JA King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act', in: H Hooper, M Hunt, and P Yowell (eds.) *Parliaments and Human Rights* (London: Hart Publishing, 2015) pp. 165-192.

[23] The two cases include the prisoner voting cases, the parliamentary ire over which was directed at the Strasbourg Court rather than UK courts, and the *Thompson* (sex offenders register) case, in which bellicose overtures to the press were followed by parliamentary affirmations of the duty to comply with the Supreme Court's judgment. For analysis see ibid.

[24] AL Young, 'Is Dialogue Working under the Human Rights Act 1998?' [2011] Public Law 773, 783–84; A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford, Oxford University Press, 2012) 138–39. Forthcoming work by Professor Aileen Kavanagh comes to a similar conclusion.

response had been given and 4 cases remain under consideration. **Therefore, Parliament or Government have responded to 23 declarations of incompatibility in the first two decades of the Act's life.**

Figure 2

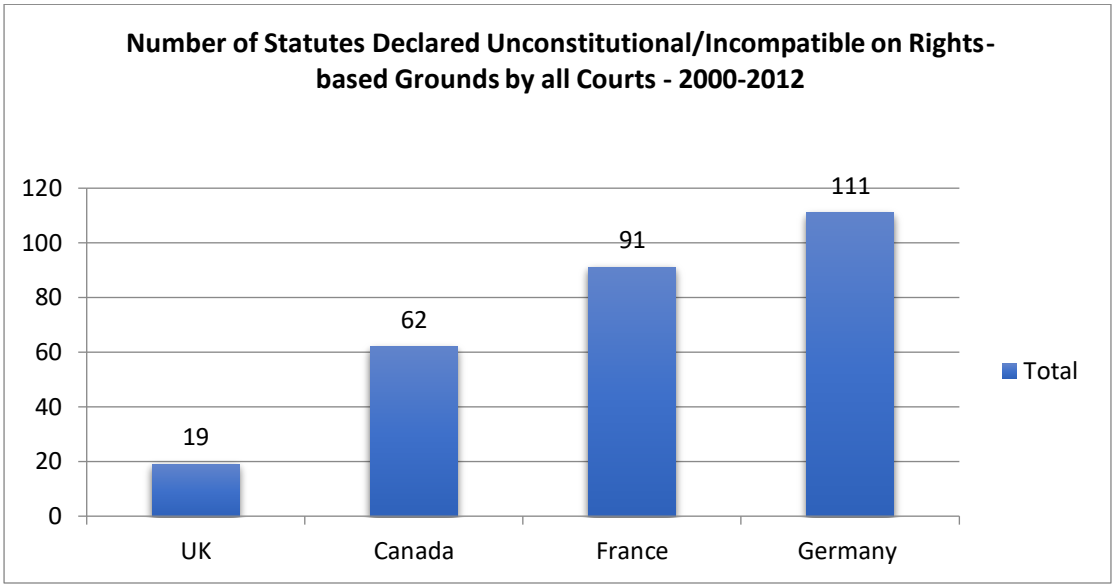


Source: Ministry of Justice's *Responding to Human Rights Judgments* (2020, CP 347) Annex A: Declarations of Incompatibility

31. In my 2015 study, I compared the overall volume of litigation to constitutional rights litigation finding statutes unconstitutional in certain other countries whose courts review the constitutionality of primary legislation for its compliance with constitutional rights. Some figures in this regard are provided in Figure 3, which compares the nearly the full range of rights-based judicial review cases taken under national charters of rights in each of the UK, Canada, France and Germany in the same time period.[25]

[25] Further methodological explanations about the way in which these figures were compiled are provided in J King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in H Hooper, M Hunt, P Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) at 189-192 (Methodological Appendix). Notably, the Canadian figures exclude cases decided by the courts of the province of Quebec that were not appealed to the Supreme Court of Canada.

Figure 3



Source: J King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in H Hooper, M Hunt, P Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

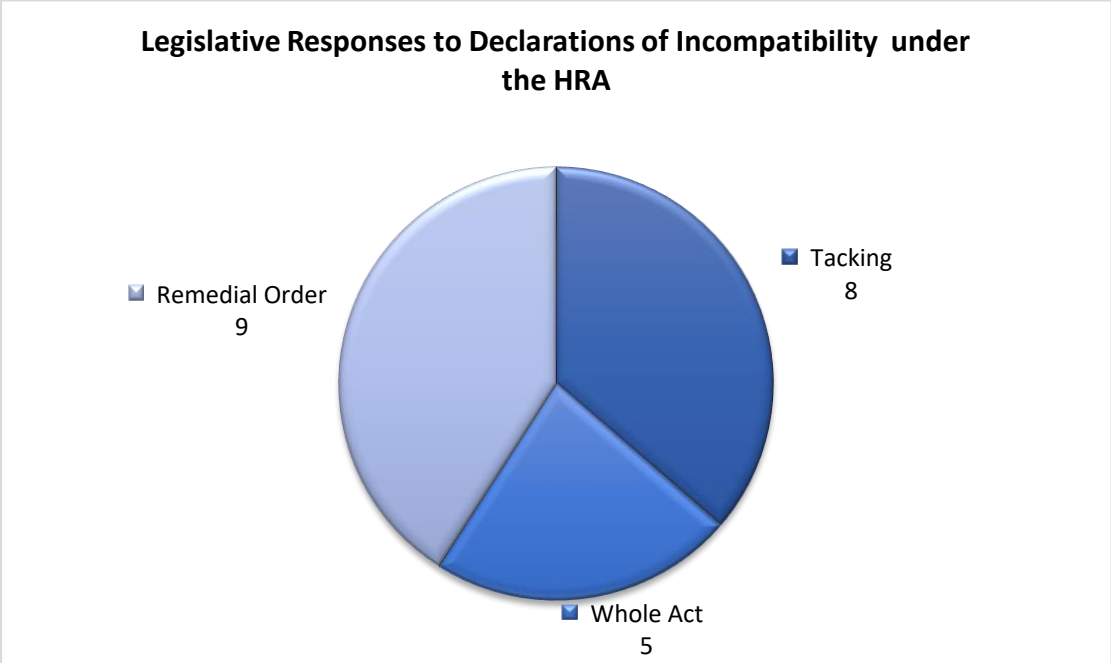
32. Canada and Germany are federal countries with a larger range of legislatures, though France is not. It is nevertheless clear that there is a substantially greater amount of rights-based constitutional judicial review of statutes in these countries, without the attendant perennial debates about the legitimacy of judicial review.

Types of Responses

33. On the whole, the figures demonstrate a Parliament only engaged rarely with the jurisprudence of the courts. This modest impact also helps to explain, in my view, why declarations of incompatibility have what Dr. Aruna Sathanapally observed to be a 'low profile'[26] in Parliament. Further evidence of the low profile can be seen in the data provided in Figure 4, which classifies each the parliamentary response to each of these 23 declarations. In my previous study, I noticed that the response to a declaration could either take the form of a remedial order, a whole act response, where the Second Reading debate could be preoccupied with the relevant rights-issue, or what I called a 'tacking response' in which the legislative response was tacked on to a bill that was in the main preoccupied with other issues. Such tacking often occurred at stages of legislative scrutiny where there was little discussion of the relevant rights issue. At the time of writing (2014), there had been 3 remedial orders, 3 whole act responses, and six tacking responses. Figure 4 sets out the present picture.

[26]A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford, Oxford University Press, 2012) 138–39.

Figure 4



Source: Ministry of Justice's *Responding to Human Rights Judgments* (2020, CP 347) Annex A: Declarations of Incompatibility

34. My conclusion in the earlier study was that whole act responses were best, followed by remedial orders, followed by tacking responses. This follows from the extent of parliamentary concentration on the scheme laid before Parliament. Remedial orders have their limitations, as I come to discuss, but my present views remain much the same.

Remedial Orders

35. The majority of responses to declarations of incompatibility have in last five years been made by laying remedial orders. The amount of legislative time accorded for debating remedial orders can be quite brief, and the orders cannot be amended during debates which can (though not always does) give the process an air of futility even if the discussion is concentrated on the rights-issue. The Lords debate on the draft Sexual Offences Act 2003 (Remedial) Order 2012, which remedied the incompatibility declared in the *Thompson* case (concerning the rights of sex offenders to request their removal from the sex offenders register) reads very well in Hansard. It is focused, careful and engaged with material points raised in the JCHR report. What Hansard did not report, however, was that there were fewer than ten peers in the room during the debate and more than one was evidently not paying attention to the discussion.[27] This concerned the response to a court case that 'appalled' both the Prime Minister

[27] These are based on the author's observations from the gallery during the debate, which is reported in HL Deb, 5 July 2012, vol 436, col 876ff. There are no official attendance records.

(David Cameron MP)[28] and the Home Secretary (Theresa May MP),[29] a sentiment echoed by the Labour Shadow Home Secretary (Yvette Cooper MP).[30]

36. In the Lords debate on the *Thompson* measure, the (now late) Lord Lester of Herne Hill spoke on behalf of the JCHR in making a number of points. One of them concerned the role and propriety of remedial orders.

> The Joint Committee on Human Rights has the special role of scrutinising draft remedial orders and reporting to both Houses and to the Government as to whether there has been proper compliance. What has happened in this case is extremely welcome. In our first report, we were critical of the first draft remedial order, as my noble friend the Minister acknowledged. Then, the Government responded by listening, and by giving effect to all of our main recommendations. In other words, the work of our committee-an all-party committee, and a beyond-party committee, since it is not controlled by the Government-influenced the Government in reshaping the order which is now before the House for approval today. If one reads the most recent government response to what we have done, dated March 2012, one finds each of our points identified, responded to, and heeded. That is a sign of mature Government, acting in a responsible way, being accountable to Parliament through this watchdog committee, and now in this debate, in both Houses, by affirmative resolution.[31]

37. However, this form of iterative parliamentary exchange was not Lord Lester's only reason for his stated preference for remedial orders over primary legislation. Another was that resort to primary legislation 'would make it harder to bring our legal system into compliance with the convention'[32] (i.e. political opposition would stop a response coming forward). For its part, the JCHR had previously reported on its preference for resorting to remedial orders because they could be used to 'remedy incompatibilities more swiftly.'[33] Whatever the merits of as swift response in a relatively less partisan (or cross-party) setting, it is not clear that the metaphor of 'dialogue' best captures what emerges from the process.

38. At any rate, the possibility for swifter and more efficient action has not been borne out in practice. For instance, Lord Lester's glowing appraisal of the process following the *Thompson* judgment omitted the fact that the order being approved that day would come into force 27 months after the Supreme Court's judgment was given. And this was for a remedy which was in substance broadly consistent with the Home Secretary's promise that compliance would be in 'the most minimal way possible.'[34]

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[28] R Ford, 'Sex register ruling provokes an outrage' *The Times* (London, 17 February 2011) 5.

[29] HC Deb, 16 Feb 2011, vol 523, col 959.

[30] HC Deb, 16 Feb 2011, vol 523, cols 959-969.

[31] HL Deb, 5 July 2012, vol 436, col 885.

[32] HL Deb, 5 July 2012, vol 436, col 886.

[33] *Enhancing Parliament's Role in Relation to Human Rights Judgments* (2009-10, HL 85, HC 455) [22]-[24]. See also Joint Committee on Human Rights, *Making of Remedial Orders* (2001–02, HL 58, HC 473).

[34] HC Deb 16 Feb 2011, vol 523, col 961 (Theresa May MP).

The minister laying the order described it thus: 'The remedial order only provides a mechanism by which a sex offender can apply for a police review of whether they should cease to be on the [sex offenders] register.'[35] Looking more broadly, of the six remedial orders made since the Sexual Offences Act 2003 (Remedial) Order 2012, the average lag time between the final judgment and the remedial order coming into force has been 33 months.[36] This is indeed a more general problem, and perhaps the most important problem with the section 4 remedy under the 1998 Act.

The Problem of Delay

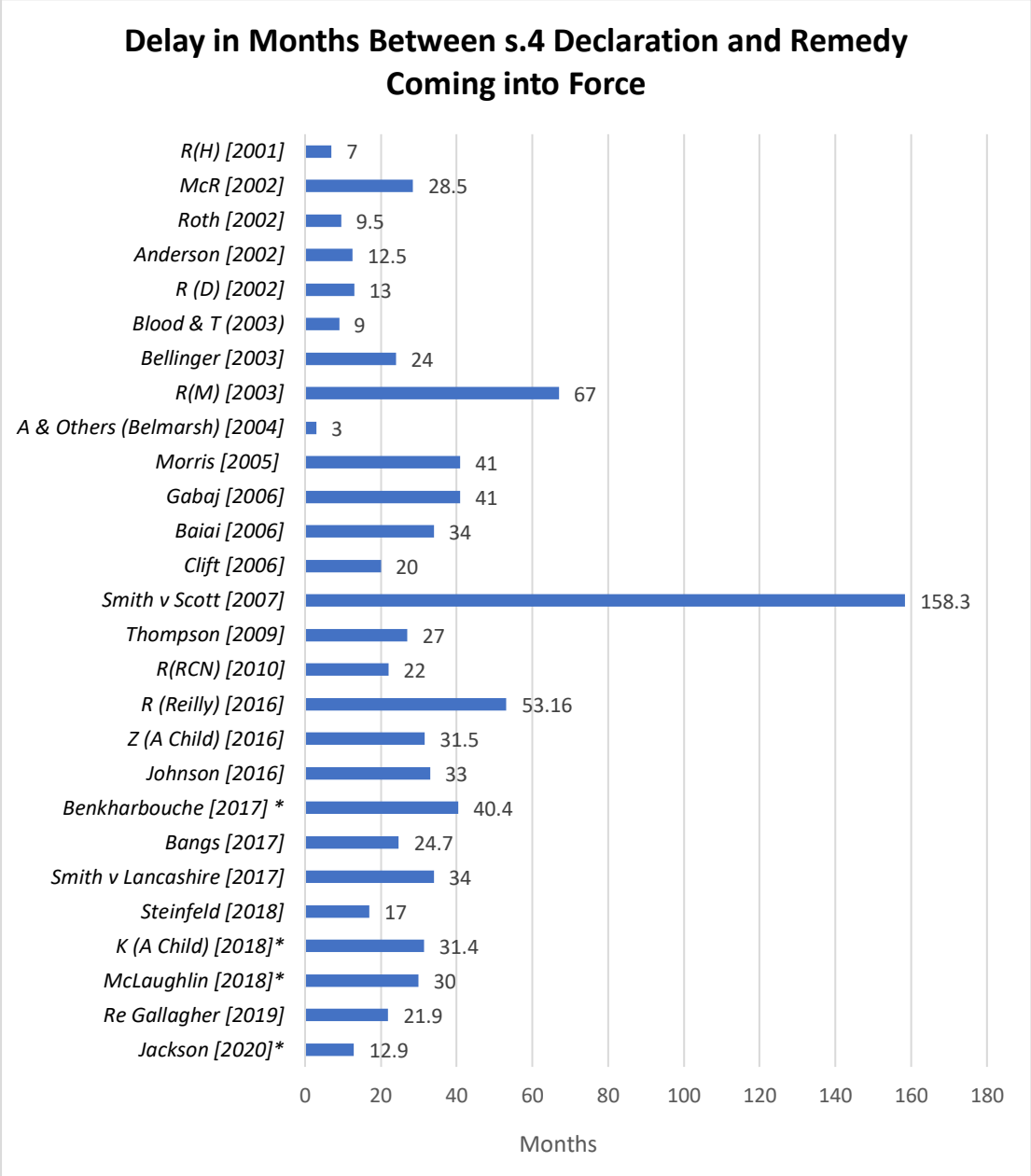
39. Several commentators have equated the declaration of incompatibility as functionally equivalent to the power enjoyed by foreign courts to strike down legislation when it is ruled unconstitutional. The basis for the view appears to be that every declaration of incompatibility has provoked a remedial response. Yet few have appreciated the extent of the delays under the Act. Figure 5 illustrates them.

40. Cases marked with an asterisk (*) are still presently still under consideration and intentions have been announced in some cases. It emerges from this picture that the average lag time between a declaration and the remedy coming into force is 31.4 months. Were we to exclude the exceptionally long delay in arriving at a legislative response to the *Smith v Scott* case (prisoner voting), the average delay is 26.5 months.

[35] HL Deb 5 July 2012, vol 738, cols 875, 876 (Baroness Stowell of Beeston, introducing the order in the Lords). The JCHR's recommendation that the review be conducted by an independent judicial authority was rejected. See Joint Committee on Human Rights, *Draft Sexual Offences Act 2003 (Remedial) Order 2012 (second report)* (2012-13, HL 8, HC 166) [14]-[17].

[36] *R (on the application of Reilly (no. 2) and Hewstone) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413; *Re Gallagher* [2019] UKSC 3; *Z (A Child) (no. 2)* [2016] EWHC 1191; *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56; *Consent Order in R (on the application of David Fenton Bangs) v Secretary of State for the Home Department* CO/1793/2017; *Smith v (1) Lancashire Teaching Hospitals NHS Foundation Trust; (2) Lancashire Care NHS Foundation Trust; (3) Secretary of State for Justice* [2017] EWCA Civ 1916

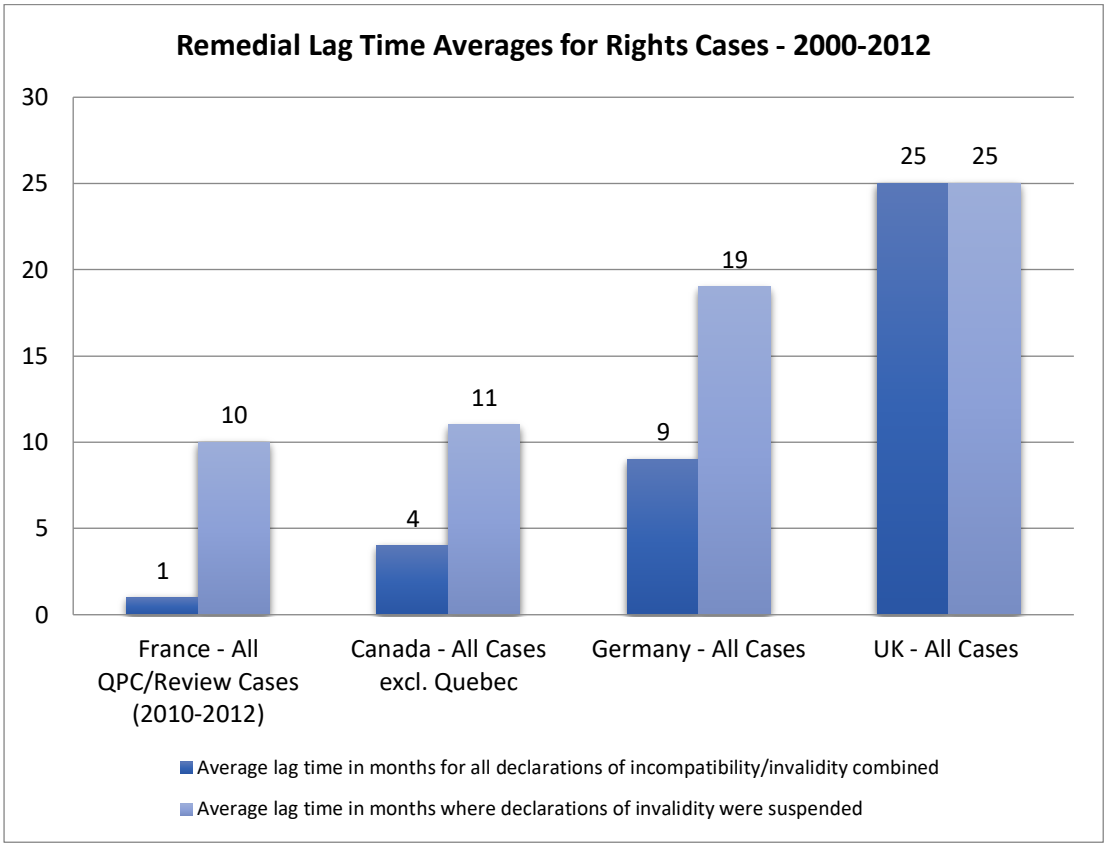
Figure 5



Source: Ministry of Justice's *Responding to Human Rights Judgments* (2020, CP 347) Annex A: Declarations of Incompatibility; further analysis of responses.

41. These delays are troubling and put in doubt the application of the maxim '*ubi jus, ibi remedium*' ('where there are rights, there are remedies') to the scheme under section 4. It is sometimes observed that in foreign systems of constitutional rights adjudication, there is a frequent practice of suspending the effect of a declaration of incompatibility so as to give the legislature time to devise an appropriate legislative solution. I have compared the cases in which such a power was used in my comparative dataset exploring the experience in Canada, France and Germany respectively. The impact on remedial delay is not equivalent. Figure 6 represents the results.

Figure 6



42. A key difference is that not all declarations of invalidity are suspended in the comparator countries. Furthermore, the time-window for the suspension of the declaration that is imposed by the court must be presumed material to how quickly a response is forthcoming.[37] Based on the snapshot given above, claimants in Canada, France and Germany are able to obtain relief much more quickly for legislative violations of their rights than they can in the UK.

43. For these reasons, it is doubtful whether the practice of responding to section 4 declarations of incompatibility section 4 has fulfilled the remedial function originally foreseen for it under the 1998 Act. The matter is important both in respect of affording just satisfaction to violations of Convention rights in the UK and in order to preserve the integrity of Britain's unique parliamentary bill of rights. **The Joint Committee on Human Rights and the Government should further develop and give effect to express principles to govern what remedial approach the**

[37] The lag time for responses to UK declarations of incompatibility are calculated up to the date on which the remedial provision came into force. The lag time averages for Canada, France and Germany, by contrast, are calculated based on the times stipulated in the court decisions. There will presumably be a gap between when remedial legislation entered into force and the date stipulated by the judicial decision, but any such difference would only exacerbate the differences highlighted by this chart. Notably, two German cases did not specify a timeline for implementation, and in some Canadian cases, the claimants returned to court for further extensions. Where the latter occurred, the total sum of months was calculated on the basis of the cumulative period allowed by the court.

Government will take following a section 4 declaration of incompatibility.[38] Such an approach at a minimum should require the Government to specify within a reasonable timeframe after the judgment whether it intends to proceed by way of primary legislation or remedial order. The principles guiding the choice should depend in part on whether the response entails legislative complexity and balancing, or a basic compliance with a straightforward requirement set out in the judgment. For both remedial directions, general service standards should be adopted so that responses are issued in a predictable fashion. It does not appear evident that more than one year is required to respond by way of remedial order or that more than eighteen months is required to respond with primary legislation. Exceptional circumstances could be detailed.

44. Even with such standards in play, there are still sound reasons to prefer a section 3 remedy to section 4, whenever 'possible.' The remedy is more immediate, more legally certain for other members of the public and for local authorities administering statutory schemes, and it offers a tangible remedy rather than a new and potentially protracted - perhaps even Kafkaesque - period of waiting.

Judicial Power, Democracy, and Marginalisation

45. It should be more or less evident in the analysis above that the scheme under section 4 has not been much of an imposition on Parliament. My previous study was in line with that of Dr. Sathanapally and Professor Alison Young – as well as the investigations by Professor Aileen Kavanagh into more recent cases.[39] Each of us has found that scrutiny of parliamentary debates reacting to section 4 declarations exhibited a fairly cooperative and collaborative attitude on the part of parliamentarians. Most of us expected the relationship to be much more conflictual. There was very little criticism of the UK courts, with the *Thompson* case being the high-water mark. A more frequent complaint was that there was insufficient time allocated for responding to the section 4 declarations.

46. The myth animating concerns about judicial power suggests, when put in its best light, that elitist and unelected judges are imposing their own policy preferences on democratically elected representatives. This may from time to time happen, or threaten to happen, but the picture it presents bears little relationship to the reality of litigation under the 1998 Act. At a doctrinal level, the judges tend to apply the principles worked out by the Strasbourg court and are resistant to expansive readings of such principles. Those principles, and the principle of their living tree interpretation,

[38] An excellent departure point is contained in the principles announced in Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (2009-10, HL 85, HC 455), 69-76. However, the Committee refuses to insist on temporal service standards and I believe that view should now be reconsidered. I am indebted on this point, as on many others on this theme, to advice from Mr. Murray Hunt, the former Legal Adviser to the JCHR and Director of the Bingham Centre of the Rule of Law.

[39] AL Young, 'Is Dialogue Working under the Human Rights Act 1998?' [2011] Public Law 773, 783–84; A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, 2012) 138–39.

were sanctioned under the scheme of the 1998 Act.[40] At the level of who is taking forward the cases, the reality is that they are often persons who are politically marginalised. Such claims about rights and marginalisation (e.g. that rights protect minorities) are often made by students and theorists alike. **Appendix I** presents a brief overview of the profile of claimants who have obtained section 4 remedies. It is quite evident there that the claimants bringing cases under the 1998 Act are not well-heeled litigants re-fighting battles previously lost in the legislature. They are predominantly from groups that are proactively marginalised, disliked or misunderstood by a majority of electors or are formally disenfranchised. The remainder are from discrete sub-groups whose interests are marginal in the more benign sense of simply not having the numbers to advance their claims to the top of any party's agenda in Parliament.

47. **Between the paucity of cases, the generally cooperative parliamentary engagement with judicial remedies, the minimalist compliance often available to Parliament, and the profile of claimants succeeding in the courts, the charge that the Human Rights Act 1998 poses a serious threat to the democratic system seems particularly weak.** That constitutional rights-review poses such a threat in other countries, notably in the United States, is not at all doubted here.

Subordinate Legislation

48. I would add a few brief words in response to the query about whether the way the 1998 Act treats subordinate legislation is adequate. On one view, subordinate legislation are written general rules having the approval of Parliament and therefore is – as the word 'legislation' suggests – a close cousin of primary legislation. It should therefore attract the same treatment as does primary legislation under the 1998 Act. Clause 47 of Part V of the Internal Market Bill 2019-21, the whole of which was removed from what became the Internal Market Act 2020, included an amendment providing that 'regulations under section 42(1) or 43(1) are to be treated for the purposes of the Human Rights Act 1998 as if they were within the definition of "primary legislation" in section 21(1) of that Act.'[41] The proposal was rushed through at a late stage and was criticised as inappropriate by the Constitution Committee.[42]

49. I consider the argument that secondary legislation should be treated like primary legislation to be constitutionally tone-deaf. Secondary legislation is in reality a form of

[40] *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997) [2.5]: 'The Convention is often described as a "living instrument" because it is interpreted by the European Court in the light of present-day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.'

[41] Inserted at Report Stage in the Commons. See HC Deb, Vol. 681, Col 279 (29 September 2020).

[42] HL Constitution Committee, *The Internal Market Bill* (17th Report of Session 2019-21) HL 151 at [188]: 'These are important modifications to the scheme of the HRA. We are concerned that clause 47 seeks to alter the scheme provided in the HRA without wider consideration of its constitutional implications and compliance with the UK's international obligations under the Convention.'

executive action.[43] It is 'made' by the Government and not enacted by Parliament. Over three quarters of it is never debated in Parliament at all. This is widely understood. *Erskine May* reports in the present as well as past editions that '[c]riticism of the volume of delegated legislation and its lack of scrutiny by Parliament has frequently been made by committees of both Houses and by outsiders.'[44] In *Public Law Project,* the unanimous Supreme Court found that

> 'Although they can be said to have been approved by Parliament, draft statutory instruments, even those subject to the affirmative resolution procedure, are not subject to the same legislative scrutiny as bills; and, unlike bills, they cannot be amended by Parliament. Accordingly, *it is well established that*, unlike statutes, the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court.'[45] [emphasis added]

50. Statutory instruments have for these reasons always been subject to judicial review on account of their vires.[46] Removing them from the ambit of section 6 of the 1998 Act would mean they enjoy more immunity from the statutory scheme of rights protection than they do from the exercise of the common law. What such suggestions also fail to recognise is that the vast majority of statutory instruments could be, unlike primary legislation, remade to comply with a judgment in a matter of days and take immediate legal effect. For affirmative instruments, where the made-affirmative scrutiny procedure is not available as it typically is for urgently required instruments, the period could be a few weeks if not days.

51. The difference between primary and secondary legislation, and the notoriety of the accountability problems within the making of secondary legislation,[47] are such common ground in constitutional affairs at the moment that any suggestion of making it *less* accountable *by reason of* its democratic, legislative character should be politely but firmly shown the door. In my view, the fact that section 4(3) and (4) of the 1998 Act contemplate the possibility that some delegated legislation can be made statutorily exempt from the application of section 6 should not be read as a freestanding invitation to make it so. It should be treated in the same way the legal possibility of leaving primary legislation unchanged after a section 4 declaration is treated.

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[43] I have studied the question and its history somewhat carefully in J King, 'The Province of Delegated Legislation' in E Fisher, J King and A Young (eds), *The Foundations and Future of Public Law* (Oxford University Press, 2020) ch.9.

[44] *Erskine May* (25th edn) (2019) [31.3].

[45] *R (on the application of Public Law Project) v Lord Chancellor* [2016] UKSC 39 [22].

[46] *R v Halliday* [1917] AC 260 (HL); *Lipton Ltd. v Ford* [1917] KB 647; *Hudson's Bay Co. v Maclay* (1920) 36 TLR 469.

47 The best account of these contemporary problems is R Fox and J Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014). See further A Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in A Horne and G Drewry (eds), *Parliament and the Law* (Hart Publishing 2018); and HL Constitution Committee, *The Legislative Process: Delegated Legislation* (HL 2017–19, 225).

Conclusion

52. My general conclusion is that section 2 and 3 are largely working as they were intended to work and as they should work. Any further weakening of either would tamper with the coherence and integrity of the scheme of protection in the Human Rights Act 1998. Section 4 is not a brake on parliamentary democracy when judged by the scope of judicial interference, the reaction of parliamentarians, or the profile of claimants advancing the claims. What it clearly fails to offer, however, is a satisfactory remedy in view of the unnecessary delays that follow section 4 judgments. It cannot be relied on to carry additional remedial weight some might wish to see transferred from the approach currently taken under section 3. These deficiencies can and should be remedied by Parliament and Government working together to improve parliamentary responses. This would in turn serve to reaffirm the integrity of the UK's unique parliamentary bill of rights, and allow it to serve as a model for human rights protection that is an alternative to the more judicialized forms of strong counter-majoritarian control seen in other constitutional systems.

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Appendix 1 – Profile of Claimants Obtaining Section 4 Declarations

Source: Full citation data for the cases below is found in Ministry of Justice, *Responding to Human Rights Judgments* (2020, CP 347) Annex A: Declarations of Incompatibility.

Case	Claimant Group	Case	Claimant Group
R (H)	Mental Health Patients	*Roth*	Hauliers, lorry drivers
McR	Homosexual men	*Blood and Tarbauck*	Children of deceased fathers conceived by fertility treatment
Anderson	Prisoners	*Wilkinson*	Widowers
R (D)	Prisoners	*Hooper*	Widowers
R (M)	Transgender Persons	*Wright*	Care Workers
Morris/Gabaj	Mental Health Patients	*R (Royal College of Nursing)*	Care Workers
Baiai	Foreigners having non-CoE marriages	*Benkharbouche*	Service staff of foreign missions
Clift	Prisoners	*Z (A Child)*	Single parents
Smith v Scott	Prisoners	*Smith v Lancashire*	Unmarried Widows
Thompson	Convicted sex offenders	*Steinfeld*	Opposite-sex couples seeking civil partnership
R (T)	Persons subject to police cautions	*McLaughlin*	Widowers who are unmarried or not in a civil partnership with children
Reilly	Unemployed JSA recipients	*Jackson*	People not married or in a civil partnership
Gallagher	Persons convicted of minor offences / recipients of cautions	*Miranda*	Investigative journalists
Johnson	"Foreign" convicted criminals subject to deportation*		
Consent Order in R	"Foreign" convicted criminals subject to deportation*		
K (A Child)	Children of British fathers whose mothers are married to non-British citizen at time of their birth		

* = foreign: born of unmarried parents: father British citizen, mother foreign national