Submission to the *Independent Human Rights Act Review*

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I. SUMMARY

Theme One: relationship between domestic law and Strasbourg

[1] Early in the life of the HRA, the House of Lords in interpreting Convention rights gave undue weight to Strasbourg jurisprudence, conceiving its role as the "modest underworker of Strasbourg".[1] However, over time the UK Supreme Court has gradually loosened the connection between HRA adjudication and Strasbourg case law. This is a positive development.

[2] But notwithstanding these developments Strasbourg jurisprudence continues to dominate the interpretation of the statutory rights under the HRA, which in turn gives rise to a number of concerns, which warrant modest amendments to the HRA.

[3] Specifically, amendments could usefully reiterate that Strasbourg cases are only one relevant consideration in fashioning the HRA jurisprudence. The domestic common law, domestic constitutional traditions, and judgments from other common law jurisdictions, are also relevant sources of norms and thinking that could usefully inform and enrich HRA adjudication. Drawing on these sources in interpreting Convention rights would help to weave those rights into domestic legal traditions, with the effect that rights are truly "brought home". Furthermore, consideration of this wider range of sources could lead to greater critical reflection by domestic courts on the Strasbourg jurisprudence; it has too often been the case that Strasbourg jurisprudence is simply read across to domestic law by domestic courts without normative evaluation or "vetting" of that jurisprudence.

[4] The HRA should be amended to explicitly provide that these domestic and comparative common law sources may be taken into account by courts in interpreting Convention rights. Moreover the Act should be amended so that Strasbourg jurisprudence is no longer a mandatory consideration, but one source of norms that domestic courts *may* take into account.

[5] One significant knock-on effect of the degree to which HRA adjudication is tied to the Strasbourg jurisprudence has been that the Supreme Court has begun to forge its own common law constitutional rights jurisprudence, and it clearly views this as a more

[1] Rawlings, 'Modelling Judicial Review' (2008) 61 CLP 95, 123. A phrase picked up by Lord Kerr: Lord Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?', Clifford Chance Lecture (25 January 2012) <https://www.supremecourt.uk/docs/speech_120125.pdf>.

attractive avenue for developing rights-protections. Thus, the Supreme Court has recently asserted the relative priority of its new constitutional common law rights jurisprudence, ahead of the rights under the HRA. With respect, the ordering is the wrong way around. The rights under the HRA are those rights considered fundamental to British society by the community's representatives in Parliament. These rights, being directly underpinned by a democratic mandate, ought to be accorded priority ahead of those rights asserted at common law by the (unelected) Justices of the Supreme Court.

[6] In this connection an amendment could usefully be made to the HRA or the Senior Courts Act 1981 requiring domestic courts in judicial review proceedings to first consider HRA claims, before considering other pleaded heads of claim, and resolve the matter on the basis of the HRA if possible. This could, along with the reforms suggested above (at [4]), have the side-effect of courts more seriously considering how common law thinking could inform the interpretation of rights under the HRA, rather than simply bypassing the HRA.

Theme Two: the impact of the HRA on constitutional relationships

[7] The courts have recognised some important limits on the judicial role in applying section 3, and many of the cases to apply section 3 have been sensibly decided. However, some of the principles enunciated by the courts to guide the approach to section 3 are problematic. Principally, that statutory text does not carry significant weight in the interpretive enterprise, and that section 3 may warrant the courts departing from the clear intention of Parliament as expressed in legislation. As such, modest amendments to section 3 are justified to ensure the judicial role is limited to interpretation, not legislation.

[8] In HRA claims against government the courts have generally struck an appropriate balance between the competing demands of rights-protection and affording the government freedom to pursue policies in the public interest. One of the principal positive impacts of the HRA has been to require government, when adopting policies, to ensure there is scope for consideration of the particular circumstances of individual cases so as to guard against undue unfairness to individuals, particularly in cases where the public interests underpinning the policy are not engaged. In consequence of these decisions the executive may continue to pursue its favoured policy aims, but it is required to do so in a way that is attentive to the potential for policies to cause individual hardship.

[9] It is important, when assessing the legitimacy of the judicial role under the HRA, to bear in mind that the courts do not exercise a supervisory, secondary jurisdiction under the Act, as they do on judicial review. Rather, under the HRA they are required to adjudicate personal legal rights. In consequence the constitutional bounds of their role under the HRA are legitimately different from their role in judicial review.

[10] The power of Ministers to promulgate remedial orders pursuant to section 10 of the Act is highly questionable in constitutional terms. The power should be repealed. Changes to legislation which affect basic rights should be subject to the rigours of the full legislative

process. More generally, more could be done to engage Parliament where courts find legislation incompatible with the HRA. To this end some reforms are proposed.

II. THEME ONE

[11] Theme One addresses the interrelationship between domestic UK courts and the European Court of Human Rights (ECtHR or Strasbourg Court). My focus in this regard is on the judicial treatment of section 2(1) of the HRA. That section only requires domestic courts, in interpreting the rights appended to the Act, to 'take into account' any relevant Strasbourg material. However, domestic courts have placed a gloss on this provision and given it, and Strasbourg jurisprudence, undue weight in decision-making under the HRA. There has been a shift over time towards loosening the connection between domestic and supranational human rights jurisprudence. This is welcome. But there remains an undue emphasis on Strasbourg cases, which has resulted in a number of problematic consequences.

The case law on section 2 – a very concise history

[12] It is useful to recall how the case law has developed over time. The summary that follows offers a very concise history of the House of Lords and Supreme Court's approach to section 2 and treatment of Strasbourg material in interpreting the Convention rights. It does not claim to be comprehensive, but picks out the main authorities to give a flavour of legal development over time. I break this account into three lines of jurisprudence:

a. First, the line of early cases under the HRA in which the House of Lords fashioned the so-called 'mirror approach', and conceptualised its role as being to mechanistically transpose Strasbourg jurisprudence into domestic law.
b. Second, a more recent line of cases in which the House of Lords, and then the Supreme Court, began to loosen the connection between domestic interpretation of Convention rights and Strasbourg jurisprudence, showing an increasing willingness to question and depart from Strasbourg decisions. This change arguably reflects a growing judicial confidence in adjudicating human rights claims, as the HRA has 'bedded in' over time. It also arguably reflects strong academic criticism levelled at the mirror approach, and a series of influential extra-judicial speeches expressing dissatisfaction with the mirror approach,[2] as well as the impact of strong dissenting judgments, such as that of Lord Kerr in *Ambrose*.[3] In addition it may not be a coincidence that the shift of approach came just as the House of Lords was replaced by the new Supreme Court, the boldness of decisions such as *Horncastle* arguably reflecting a new institutional confidence.[4]

[2] eg Lady Hale, 'Argentoratum Locutum: Is the Supreme Court Supreme?', Nottingham Human Rights Lecture 2011 (1 December 2011) <https://www.supremecourt.uk/docs/speech_111201.pdf>; Lord Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?', Clifford Chance Lecture (25 January 2012) <https://www.supremecourt.uk/docs/speech_120125.pdf>.
[3] *Ambrose v Harris* [2011] 1 WLR 2435.
[4] *R v Horncastle* [2010] 2 AC 373.

c. Third, a line of cases specifically addressing the question of whether domestic courts may 'go further' than Strasbourg. Albeit domestic courts have on a few occasions gone further than Strasbourg, it remains the case that the courts adopt a strangely cautious approach to stepping out beyond the Strasbourg jurisprudence – notwithstanding the more general loosening of the connection between domestic law and Strasbourg jurisprudence as illustrated by the second group of cases.

[13] The emergence of the mirror approach:

a. In *Alconbury* Lord Slynn said that domestic courts should follow any clear and consistent jurisprudence of the ECtHR.[5]

b. In *Ullah* Lord Bingham enunciated what became known as the 'mirror principle'.[6] That is, it is the duty of domestic courts to keep pace with Strasbourg jurisprudence as it evolves over time: 'no more, but certainly no less'.[7] The mirror principle proved influential and has cast a long shadow over the HRA jurisprudence ever since.

c. In *Al-Skeini* Lord Brown, in an influential[8] statement of principle, emphasised that domestic courts should not go further than Strasbourg, adopting a play on Lord Bingham's words in *Ullah*: 'no less, but certainly no more'.[9]

d. In *AF* Lord Rodger issued a striking one paragraph concurring speech, saying: 'Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum*, *iudicium finitum* - Strasbourg has spoken, the case is closed'.[10] Lord Hoffmann in the same case said that albeit he disagreed with the Strasbourg decisions, 'your Lordships have no choice but to submit'.[11] These statements illustrate the degree to which the UK courts conceptualised their role as being subservient to Strasbourg; *AF* arguably represents the high point of the mirror approach.

[14] The domestic courts begin to loosen the connection between domestic law and Strasbourg:

a. In *Animal Defenders International* Lord Scott in a separate judgment directly and explicitly raised for consideration the question of whether divergence from Strasbourg may be permissible.[12]

b. In *In re G* Lord Hope, while paying regard to *Ullah* and its progeny, memorably said that Strasbourg jurisprudence should not be treated as a straightjacket from which there is no escape.[13]

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[5] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [26].

[6] *R v Special Adjudicator, ex parte Ullah* [2004] 2 AC 323 at [20].

[7] Ibid.

[8] See eg *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 at [60], [93], [147].

[9] *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 at [106].

[10] *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [98].

[11] Ibid at [70].

[12] *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] AC 1312 at [44]-[46].

[13] *In re G* [2009] 1 AC 173 at [50].

c. In *Horncastle* the Supreme Court held that it could refuse to follow ECtHR jurisprudence, and seek a dialogue with Strasbourg, where supranational decisions had failed to appreciate or cut across important features of the domestic legal system.[14]

d. In *Pinnock* Lord Neuberger, in an influential statement of principle, articulated a seemingly wide range of bases on which domestic courts could refuse to follow Strasbourg.[15] These bases included where Strasbourg decisions were inconsistent with some fundamental procedural or substantive feature of domestic law. But legitimate bases for departing from Strasbourg could also include where the ECtHR's reasoning was flawed in some way, for example where a decision was based in a misunderstanding or had overlooked arguments or points of principle.

e. In *Chester* it was suggested the domestic courts could even depart from Grand Chamber rulings, albeit this would be an uncommon course, where some 'truly fundamental principle' was at stake, or there had been some 'egregious oversight or misunderstanding' by the ECtHR.[16]

f. In *Kaiyam* Lords Mance and Hughes said that the degree of constraint or freedom imposed by the obligation to take into account Strasbourg jurisprudence is context-sensitive, while it would be wrong to place too much weight on the 'egregious' descriptor in *Chester*, the implication being that some lesser flaw in a Grand Chamber judgment could potentially warrant a domestic court refusing to follow the Grand Chamber.[17]

g. In *Hicks* the Supreme Court refused to follow a decision of the Fifth Section of the ECtHR, on the basis that the ECtHR jurisprudence could not be said to be clear and consistent, but also because the Supreme Court simply disagreed with the ECtHR's reasoning.[18] Lord Toulson said: 'while this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make'.[19]

h. In *Hallam* a majority of the Supreme Court showed its willingness to act on the bases enunciated in *Pinnock*, departing from ECtHR case law on the basis that the Strasbourg court's reasoning was unclear and/or incoherent.[20] There was support for Lord Mance's view in *Kaiyam*, indicating the high threshold of 'egregiousness' posited in *Chester*, need not be reached before the Supreme Court will consider departing from the Grand Chamber.

[15] The domestic courts remain cautious about going further than Strasbourg:

a. As illustrated by Lord Bingham's statement of principle in *Ullah*, and Lord Brown's influential statement in *Al-Skeini*, in the early years of the HRA the Law Lords demonstrated extreme reluctance to afford greater protection to rights in

[14] *R v Horncastle* [2010] 2 AC 373.
[15] *Manchester City Council v Pinnock* [2011] 2 AC 104 at [48].
[16] *R (Chester) v Secretary of State for Justice* [2014] AC 271 at [27].
[17] *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344 at [21]. And see *Re Application for Judicial Review* [2011] UKSC 20 at [93].
[18] *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9.
[19] Ibid at [32].
[20] *R (Hallam) v Secretary of State for Justice* [2020] AC 279.

domestic law than provided for in the Strasbourg jurisprudence. Though, there were exceptions, of which *Limbuela* is a prime example.[21]

b. The decision in *In re GC* suggested some movement away from the extreme position articulated by Lord Brown in *Al-Skeini*, a majority of the Law Lords going further than Strasbourg.[22] But notably this was a case where the matter fell squarely within the UK's margin of appreciation.
c. In *Ambrose* a majority strongly reiterated that domestic courts should not generally go further than Strasbourg.[23] This reiteration of the 'no less, but certainly no more' approach was particularly striking as there was no need to rely on that approach to dispose of the case: the majority had independent reasons for rejecting the claimant's argument. Lord Kerr however gave a powerful dissent, strongly criticising what he described as '*Ullah*-type reticence'.[24]
d. In *Quila*, a decision handed down days after *Ambrose*, the Supreme Court decided to disregard an ECtHR decision relating to the scope of Article 8, and in doing so afforded stronger protection to privacy interests in domestic law than contemplated by the given ECtHR decision.[25] The decision stands out as an extremely rare example where the Supreme Court felt confident to exceed the level of protection afforded by the ECtHR, and perhaps not coincidentally *Quila* is one of the most accomplished judgments of the Court under the HRA. But it should be noted that this was a case where the Strasbourg jurisprudence was not entirely clear nor consistent, as there were ECtHR decisions pointing in different directions. This smoothed the path for the Supreme Court to go its own way.
e. *Rabone* involved an advance on the then-current state of Strasbourg case law, extending application of the Article 2 operational duty.[26] But it was a rather modest advance which even Lord Brown, despite his famously strong disinclination to advance beyond Strasbourg, could sign up to, on the basis that it was patent that the Strasbourg court would agree with the Supreme Court's decision, and the judgment simply extrapolated out from existing ECtHR jurisprudence.
f. In *Moohan* a majority refused to go further than the ECtHR by holding the right to vote under the ECHR included a right to vote in referenda – as opposed to periodic elections.[27] This was again a case, like *Ambrose*, in which the majority had independent reasons for rejecting the claimant's argument, based on a textual analysis of the Convention. There were some statements among the judgments suggesting a greater willingness to advance beyond Strasbourg, but generally only where such a development flowed naturally from existing jurisprudence, as in *Rabone*.

[21] *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396.
[22] *In re G* [2009] 1 AC 173.
[23] *Ambrose v Harris* [2011] 1 WLR 2435.
[24] Ibid at [126].
[25] *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621.
[26] *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72.
[27] *Moohan v Lord Advocate* [2015] AC 901.

A welcome turn away from the mirror approach – but Strasbourg remains a focus

[16] The first point to observe is that the mirror approach, and the degree of emphasis placed on the Strasbourg jurisprudence more generally, is the product of a judicial policy choice. According to the plain words of section 2(1) Strasbourg jurisprudence is a mandatory relevant consideration. It is not a determinative consideration or an exclusive consideration, yet it has often been treated as such. Of course, over the last ten years there has been a significant degree of course correction, with the connection between HRA adjudication and Strasbourg jurisprudence being loosened, and the Supreme Court demonstrating a greater willingness to question and depart from Strasbourg decisions. Certainly, important statements of principle, such as that in *Pinnock*, suggest significant leeway for domestic courts to depart from Strasbourg jurisprudence.[28] But it must be borne in mind that the cases in which the Supreme Court has in fact departed from Strasbourg are a small minority of all cases adjudicated under the HRA, and in the majority of cases Strasbourg remains the touchstone, even if – as a matter of principle – the mirror approach does not exercise the degree of influence it once did.

[17] It is worth clearly stating the key reasons why the mirror approach lacks sound justification, and why the more general judicial preoccupation with Strasbourg under the HRA is unwarranted.

[18] One motivation for a strong focus on Strasbourg under the HRA is the idea that the ECtHR is the authoritative expositor of the Convention.[29] But when courts interpret the HRA they are interpreting a domestic statute; these rights may be called Convention rights, but they are rights enacted in domestic law in a statute passed by the Westminster Parliament.[30] As such it is a truism that the rights under the HRA are not the rights found in the ECHR, an international treaty. Therefore when domestic courts interpret the HRA rights, whatever interpretation they adopt, they cannot be said to be challenging the ECtHR's status as authoritative expositor of the Convention.

[19] That domestic courts, in their human rights judgments, are not invariably required to march in step with ECtHR jurisprudence, is reflected in basic features of the supranational system of human rights protection. The ECtHR conceptualises its role as a supranational institution that exercises a subsidiary, supervisory jurisdiction. Whereas national institutions have the principal responsibility for rights-protection. Therefore the domestic courts and the ECtHR have different roles – one primary, one subsidiary – and as such they may legitimately adopt different adjudicatory approaches and reach different outcomes on given issues. These different roles have been reemphasised in light of the huge backlog faced by the Strasbourg court: the court is not designed to function as a court of first instance. The subsidiary nature of the ECtHR's role is reflected in the doctrine of the margin of appreciation. That doctrine allows for the fact that member states may

[28] *Manchester City Council v Pinnock* [2011] 2 AC 104 at [48].
[29] *R v Special Adjudicator, ex parte Ullah* [2004] 2 AC 323 at [20].
[30] *In re McKerr* [2004] 1 WLR 807; *In re G* [2009] 1 AC 173 at [33]-[34].

legitimately adopt different approaches to particular issues, in light of varying domestic concerns and circumstances. The doctrine therefore provides some scope for member states to each forge their own path, albeit within limits.

[20] Linked to these different roles of domestic courts and the ECtHR is the idea of the Convention, and the associated ECtHR jurisprudence, as setting a 'floor' for human rights protection: the ECtHR's role as a supervisory supranational institution is to ensure a basic minimum of human rights protection. There is therefore nothing preventing the domestic courts from advancing further than Strasbourg; indeed the Convention system contemplates this. For this reason it is very difficult indeed to rationalise the Supreme Court's apparently strong reluctance to provide more generous protection to Convention rights domestically; to do so would be far less controversial than domestic courts directly challenging decisions of the ECtHR, which the Supreme Court has been increasingly willing to do. For example in *Hicks* the Supreme Court was willing to disregard an ECtHR decision, in order to afford less protection to the right to liberty under the HRA than envisioned by the relevant ECtHR decision.[31] But in *Jalloh*, where on the facts the common law provided greater protection to liberty than envisioned by the Strasbourg jurisprudence, the Supreme Court did not even contemplate 'levelling up' the protection afforded under the HRA, so that it cohered with that at common law.[32]

[21] One concern that underpinned enactment of the HRA was that the Act would save claimants the time and cost of going to Strasbourg in order to vindicate their rights; instead they could do so in domestic courts.[33] This is given as a reason in favour of the mirror approach – if courts depart from Strasbourg jurisprudence, and in consequence find against claimants, claimants will be forced to lodge an application with the ECtHR, undermining the purpose of the HRA. But there may be a wider interest at stake in certain cases, beyond that of the individual claimant, which means that there are good reasons why the case *should* get to Strasbourg. Such reasons might include that the UK courts consider that ECtHR jurisprudence on a given issue has taken an incoherent turn or that the ECtHR, in its decision-making, has neglected some feature of the domestic system. Also, the concern that deviating from Strasbourg cases would force a claimant to travel to Strasbourg does not arise in a case where a domestic court affords greater protection than Strasbourg and in so doing finds in favour of a claimant.

[22] It is true that part of the motivation for the HRA was to ensure greater compliance by the UK with its supranational commitments, and so the argument goes, if domestic courts do not closely track Strasbourg jurisprudence there is a risk of the UK being found in breach of the Convention.[34] But the matter is somewhat more complex. Not following

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[31] *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9.

[32] *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4.

[33] *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at [19]; *R (Hallam) v Secretary of State for Justice* [2020] AC 279 at [76].

[34] *In re G* [2009] 1 AC 173 at [35]; *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [70].

ECtHR case law will not necessarily lead to a finding of breach if the matter ultimately reaches Strasbourg. In many instances matters fall within the margin of appreciation,[35] and more generally the ECtHR might be more likely to afford deference to a domestic court in respect of the fact-sensitive proportionality calculus, within which local concerns may often be relevant. Decisions made in respect of particular member states may reflect contextual features peculiar to those member states; such decisions may have less relevance for the UK, and not provide a safe guide as to how the ECtHR would approach a given matter if the UK were respondent. Moreover the ECtHR jurisprudence is not set in stone for all time: the ECtHR has shown that it may be willing to reverse position or change tack, with or without a prompt from a member state.[36] In some cases where UK courts have refused to follow Strasbourg, this has resulted in a beneficial dialogue between domestic courts and the ECtHR, *Horncastle* being the paradigm example. The ECtHR also adopts a "living instrument" approach to interpretation of the Convention; as such the meaning of the Convention is dynamic, so that past case law may not be an accurate guide as to the approach the ECtHR will take in the future. Reinforcing this point, the ECtHR does not follow a system of precedent comparable to that which operates in domestic law.

[23] Further, issues will invariably arise before UK courts which the ECtHR has simply not addressed; what reason can there be for domestic courts to dismiss such a claim without considering the merits? In this connection 'going further' than Strasbourg does not always mean providing for greater rights-protection than provided for in ECtHR jurisprudence; it could simply involve determining a matter, which the ECtHR has not yet been called upon to adjudicate.

[24] An important motivation for passing the Act was so that British judges could give a lead to, and contribute to, the development of European human rights law; there are multiple statements to this effect from Lord Irvine and Mr Jack Straw, who led the Human Rights Bill through the respective Houses of Parliament[37] (and who both subsequent to the passing of the Act have said that it was never the intention that domestic jurisprudence should be so closely bound to Strasbourg jurisprudence).[38] If domestic courts conceptualise their role as being to loyally transpose ECtHR jurisprudence into domestic law, they shall be merely followers and lose the opportunity to make an important contribution to the European human rights system. Consider the *N* case, decided by the House of Lords in 2005.[39] Their Lordships followed certain ECtHR case law

[35] See eg *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at [70].
[36] Compare *Osman v UK* (2000) 29 EHRR 245 and *Z v UK* (2002) 34 EHRR 3 in relation to Article 6.
[37] HL Deb vol 583 cols 513-515 (18 November 1997) Lord Irvine of Lairg LC ('our courts must be free to try to give a lead to Europe as well as to be led'); HC Deb vol 307 col 770 (16 February 1998) Mr Jack Straw ('British judges will be enabled to make a distinctly British contribution to the development of the jurisprudence of human rights across Europe'). And see HL vol 582 col 1227 (3 November 1997) Lord Irvine of Lairg LC; Boateng and Straw, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] EHRLR 71, 72.
[38] Lord Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237; J Straw, *Aspects of Law Reform* (CUP 2013) ch 2.
[39] *N v Secretary of State for the Home Department* [2005] 2 AC 296. And see *N v UK* (2008) 47 EHRR 39.

concerning removal of foreign nationals who were suffering ill-health, despite expressing reservations[40] about the jurisprudence. In 2017 the Grand Chamber changed tack, adopting a position that at least some of the Law Lords in *N* seemingly preferred.[41] In the 2019 case of *AM (Zimbabwe)* the Supreme Court overruled *N* and adopted the ECtHR's revised approach.[42] If the Law Lords had not been as committed to loyally following the Strasbourg cases at the outset, and taken the step of departing from the ECtHR case law and explaining why, perhaps this would have prompted an earlier reconsideration by the ECtHR of its jurisprudence. It has been a positive development therefore that over time the Supreme Court has become more willing to depart from Strasbourg where it considers there are good reasons for doing so, and to engage the ECtHR in a mutually beneficial 'dialogue', the paradigm example being *Horncastle*.

[25] All of the foregoing points suggest the Supreme Court's move away from the mirror approach, and increased willingness to challenge ECtHR decisions which cut across domestic fundamentals or which seem illogical is to be welcomed. Yet the ongoing caution around going further than Strasbourg is difficult to understand – or justify.

[26] Importantly, if one looks beyond the 'canon' of high-profile House of Lords and Supreme Court cases directly addressing the relationship between domestic and supranational jurisprudence, it remains the case that Strasbourg jurisprudence continues to be the dominant source relied on by domestic courts in interpreting the statutory rights under the HRA, and is generally followed. As is discussed in the next section, this has led to problematic consequences.

[27] It is also notable that even in the main cases addressing the interrelationship of domestic and ECtHR jurisprudence, the trend has not all been in one direction. Consider the two most recent significant cases on the topic from the Supreme Court. A majority in *Hallam* decided to depart from Strasbourg jurisprudence. But notably Lord Reed, the Supreme Court's President, in his dissenting judgment expressed strong concerns that the Supreme Court should not so lightly depart from an entrenched body of ECHR authority, which he considered consistent and supported by the Grand Chamber.[43] And in the subsequent case of *AM (Zimbabwe)* Lord Wilson, speaking for the Court, said that while it is no longer always inappropriate to depart from Strasbourg, it remains the case that this will be 'highly unusual'.[44]

Some consequences of the preoccupation with Strasbourg

[28] Thus, the Supreme Court has, in a series of important cases, been more willing to depart from Strasbourg decisions. But those cases form a minority of cases decided under the HRA and it remains the case that domestic courts in general remain focused on

[40] As observed in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] 2 WLR 1152 at [17], [34].
[41] *Paposhvili v Belgium* [2017] Imm AR 867.
[42] *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] 2 WLR 1152.
[43] *R (Hallam) v Secretary of State for Justice* [2020] AC 279 at [175].
[44] *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] 2 WLR 1152 at [34].

Strasbourg decisions in HRA adjudication, so that Strasbourg material continues to dominate interpretation of the statutory rights under the HRA.

[29] There have been at least three problematic consequences that have followed on from the strong focus on Strasbourg jurisprudence under the HRA:

a. Tunnel vision
b. Normative vacuity
c. The HRA as second fiddle

1. Tunnel vision

[30] It follows from the near-exclusive focus of domestic courts on Strasbourg decisions that the jurisprudence of other common law countries has been nearly completely sidelined in HRA adjudication. In *Sheldrake* Lord Bingham, having recorded that counsel had led their Lordships through comparative common law case law, said:[45]

> 'In the result, I do not think I should be justified in lengthening this opinion by a review of the cases relied on. Some caution is in any event called for in considering different enactments decided under different constitutional arrangements. But, even more important, the United Kingdom courts must take their lead from Strasbourg. In the United Kingdom cases I have discussed our courts have been trying, loyally and (as I think) successfully, to give full and fair effect to the Strasbourg jurisprudence'.

Lord Rodger agreed with Lord Bingham's statement, saying that caution should be exercised when considering authorities decided under Commonwealth constitutions not modelled on the ECHR, and he recorded an instance where the European Commission on Human Rights had been presented with Commonwealth authorities but preferred to focus on ECtHR cases. He ultimately concluded that UK courts must march with the Convention.[46]

[31] The statements from *Sheldrake* represent a rather extreme approach which, with respect, verges on parochialism. Moreover it is not supported by the terms of the Act, as Lady Hale has observed.[47] Section 2 requires domestic courts to take into account Strasbourg material. The corollary of this is not that domestic courts may not take into account other materials. Section 2 does not specifically exclude any material from consideration. Nor does it provide that Strasbourg decisions are an exclusive or determinative consideration. It is true of course that comparative material must be considered in light of its constitutional context; this is simply an aspect of rigorous comparative analysis. But it does not follow that one cannot gain valuable insights from comparative materials. For example as Lord Reed has observed, comparative law can be a source of ideas, and of different approaches to legal problems, which might feed into

[45] *Sheldrake v DPP* [2005] 1 AC 264 at [33].
[46] Ibid at [58].
[47] Lady Hale, 'Argentoratum Locutum: Is the Supreme Court Supreme?', Nottingham Human Rights Lecture 2011 (1 December 2011) at 7 <https://www.supremecourt.uk/docs/speech_111201.pdf>.

local legal development; comparative law is 'an important tool in the judge's toolbox'.[48] And while there may be differences between jurisdictions such as the UK, Canada, New Zealand and Australia, there is also much which these jurisdictions share in common – specifically, a common, common law heritage.[49]

[32] The remarks in *Sheldrake* have not featured prominently in later case law. But it does remain the case that because the gaze of domestic courts is generally fixed on Strasbourg, they have often been blind to the potential relevance of comparative common law materials. Lord Reed has observed that the reason comparative common law materials have not been relied on to the same extent in public law as in private law follows from the European influence on UK public law.[50] In consequence UK courts, in adjudicating human rights claims, have failed to take full advantage of the potentially rich insights that might be derived from other systems. A case such as *Ambrose*, in which US and Canadian authorities played a useful role, demonstrates the benefit that might be derived from a wider perspective.[51] Similarly in *Bank Mellat (No 2)* the Justices derived significant benefit from Canadian authorities on the nature of the proportionality analysis.[52]

[33] The corollary of not engaging with the case law of other jurisdictions, and the fixation on Strasbourg, is that the UK has not, in the field of human rights law, had the leading role that it might have had in shaping transnational human rights jurisprudence and contributing to transnational judicial 'conversations' over human rights. For example as someone familiar with New Zealand jurisprudence, it is clear to me that it is now far more common for New Zealand courts to have regard to Canadian Supreme Court decisions under the Canadian Charter of Rights, than to have regard to UK jurisprudence in interpreting the rights under the New Zealand Bill of Rights Act 1990. Thus, the Lord Chief Justice in a 2010 speech aired the concern that the intense focus of domestic courts on Strasbourg could lead to the UK's standing as a leading common law jurisdiction being jeopardised.[53]

[34] A further point is that while there has been a great deal of thinking about how HRA and Strasbourg jurisprudence might shape the domestic common law, there has been very limited consideration of how the common law, and domestic law more generally,

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[48] Lord Reed, 'Comparative Public Law in the UK Supreme Court' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018) 254-255. On the benefits of considering comparative law see also: French, 'The Globalisation of Public Law: A Quilting of Legalities' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018).

[49] See Saunders, 'Common Law Public Law: Some Comparative Reflections' in Bell, Elliott, Varuhas and Murray (eds), *Public Law Adjudication in Common Law Systems* (Hart 2016).

[50] Lord Reed, 'Comparative Public Law in the UK Supreme Court' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018) 250ff.

[51] *Ambrose v Harris* [2011] 1 WLR 2435 (the Justices discussed in particular the US Supreme Court decision in *Miranda v Arizona* (1966) 384 US 436 and Canadian Supreme Court decision in *R v Grant* 2009 SCC 32).

[52] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39

[53] Lord Judge, 'The Judicial Studies Board Lecture 2010', Inner Temple, London (17 March 2010) at 8 <https://webarchive.nationalarchives.gov.uk/20131202213452/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-jsb-lecture-2010.pdf>.

could and should shape HRA jurisprudence. Evident in the jurisprudence under the HRA is a lingering idea of HRA adjudication as in some way being separate from the rest of domestic law. But as the domestic courts have themselves said, the Convention rights appended to the HRA *are* domestic rights, enacted under a domestic statute.[54] And as domestic rights, it is important that they "fit" together with other domestic norms and principles, so as to produce a coherent system of domestic law. This requires consideration of domestic law in HRA adjudication.

[35] Indeed, that domestic principles are relevant to HRA adjudication is reflected in Lord Neuberger's statement of principle in *Pinnock*[55] (see [14](d) above) – if courts are to be alive to the question of whether ECtHR jurisprudence, if transplanted into domestic law, would undermine fundamental features of domestic substantive and/or procedural law, then surely domestic courts should actively and routinely consider relevant features of domestic law. Moreover considering relevant domestic law might bring into focus that the ECtHR jurisprudence is incoherent in some way or that some critical argument has been missed by the ECHR which, according to *Pinnock*, could warrant domestic departure from the Strasbourg jurisprudence.

[36] More generally there is a wealth of learning to be derived from the common law which could enrich domestic rights-adjudication, and which could flag important aspects of local context or local concerns which ought sensibly to shape legal development. Indeed, the current President of the Supreme Court has expressed frustration that counsel often seek to frame every public law issue as one to be analysed by reference to Strasbourg jurisprudence, while ignoring centuries of common law learning.[56] The importance of accounting for local concerns, including local legal contextual features, is reinforced by the fact that these may vary across the country. That this is so was flagged by Lord Reed in *Bank Mellat*, where there were suggestions that human rights jurisprudence could diverge *within* the UK based on concerns peculiar to each of the devolved nations.[57]

[37] *In re GC* provides a good example of a case which demonstrates how domestic principles, can inform the development of domestic human rights law.[58] In that case the domestic principle of the best interests of the child fundamentally and usefully informed and shaped the Court's approach; in turn the approach to children's interests under the HRA was rendered coherent with the general domestic approach.

[38] In contrast, *Rabone* and the domestic jurisprudence on the Article 2 operational duty more generally provides a good illustration of missed opportunities.[59] In *Rabone* Lord

[54] *In re McKerr* [2004] 1 WLR 807; *In re G* [2009] 1 AC 173 at [33]-[34].
[55] *Manchester City Council v Pinnock* [2011] 2 AC 104 at [48].
[56] Lord Reed, 'Comparative Public Law in the UK Supreme Court' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018) 253.
[57] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 at [75]. Note that this was a dissenting judgment.
[58] *In re G* [2009] 1 AC 173.
[59] *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72.

Mance vented his frustration that the ECtHR had not left certain matters pertaining to the operational duty to domestic courts.[60] But the main impediment to domestic courts drawing on domestic law and developing homegrown approaches to these issues under the HRA has not been the ECtHR, but rather the judicial self-denying ordinance associated with the mirror approach, and a more general preoccupation with Strasbourg – neither of which is demanded by the terms of the HRA. There is surely scope for domestic courts to draw on common law principles, such as domestic rules governing causation or principles governing breach of duty, in the context of claims based on the operational duty. Indeed, judges have observed that the operational duty, especially where it forms the basis of a damages claim, very much resembles a tort claim.[61] To integrate domestic principles in this way would not necessarily involve domestic courts departing from any Strasbourg norm or ruling; the ECtHR has not articulated detailed rules of causation or a detailed framework to govern breach (probably because it considers these to be matters for domestic courts in light of their own legal traditions). Rather it would involve institutional learning derived from the common law informing and enriching the development of broad principles derived from Strasbourg.

[39] *Jalloh* also illustrates a judicial mindset which sees the common law as not being relevant to HRA jurisprudence.[62] In that case the Supreme Court rejected the argument that the concept of liberty for the purposes of false imprisonment should be aligned with that under Article 5, which would have had the effect that a generally weaker degree of protection would be afforded to liberty at common law than had previously been the case. But there was no serious contemplation of the opposite proposition: that the level of protection under the HRA could be aligned to that at common law. In nearly every case the common law conception of liberty will result in greater protection than the Strasbourg conception. This is a paradigm example where common law thinking, specifically the common law's rich constitutional tradition of affording strong protection to liberty, could have informed the domestic development of human rights law under the HRA. But the idea that domestic law could shape the law under the HRA seems not even to have been contemplated. A large part of the explanation for this lies in the fixation with Strasbourg in the HRA context.

2. Normative vacuity

[40] Drawing on common law norms and thinking would help to address one further problem. That is, where domestic courts simply follow clear and consistent Strasbourg case law – which they generally will – their judgments often lack normative depth. This is because in the HRA context domestic courts have not generally conceptualised their role as being to exercise significant normative judgment. But rather the typical approach is for the court to recite the facts and decisions of multiple ECtHR cases, in order to show there

[60] Ibid at [121].
[61] Ibid at [108].
[62] *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4.

is a clear and constant line of authorities – with the legal position that finally emerges from this exercise then being read into domestic law.

[41] This approach can give rise to genuine legitimacy concerns, specifically because the Strasbourg court does not often offer an account of the normative underpinnings of, and justification for, given norms or principles that it adopts, reflecting that it does not approach its task in the same way as a common law court. The ECtHR's judgments are often characterised by a more declaratory approach – it will often simply state what it considers the legal position to be. As such norms may be read into domestic law, which are based in an obscure normative justification or an unsatisfactory normative justification. One would expect if a principle is to become part of UK law that there ought to be some normative evaluation of the relevant principle. Common law learning and comparative law could play an important role in this regard.

[42] In those cases where the Supreme Court has considered whether Strasbourg jurisprudence should be followed or not, and particularly in those cases where the Court has decided not to follow Strasbourg, the Court has engaged in substantial normative reasoning. Albeit even in cases where there is an open question as to what path the Supreme Court should take much of the judicial analysis is dedicated to unedifying debates over whether Strasbourg jurisprudence is sufficiently clear and consistent or not, which distracts from the more important question: whether a given interpretation of Convention rights is normatively desirable. Where there is no real question over whether the domestic court will follow the Strasbourg court's jurisprudence, for example because it is uncontentious that Strasbourg authority if clear and consistent, there has more often been limited normative consideration of the issues in play. But even in such cases the courts ought to elaborate a normative rationale for the principles being adopted. This would sure up the legitimacy of the norms being transposed into domestic law. It would also involve domestic courts contributing to European human rights law, this goal being one core driver for adoption of the HRA. Such approach would also have the more general and important benefit of development of a domestic framework of principle in relation to given doctrines or rights, which later courts could develop HRA law by reference to, in a coherent, normatively-grounded way. This would enrich the HRA jurisprudence.

[43] Indeed, it is strongly arguable that routine "normative vetting" is the necessary corollary of Lord Neuberger's statement of principle in *Pinnock*, which holds that domestic courts may reject Strasbourg decisions if based on a misconception or if the ECtHR failed to identify a critical argument.[63] The routine need for such normative vetting is also indicated by decisions such as *Hicks* and *Hallam*, which show that legitimate bases for rejecting Strasbourg decisions include the lack of coherence of such decisions, or that they lack proper justification.[64] These cases suggest that before *any* domestic court follows

[63] *Manchester City Council v Pinnock* [2011] 2 AC 104 at [48].
[64] *R (Hallam) v Secretary of State for Justice* [2020] AC 279; *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9.

Strasbourg, it should, as of course, conduct an evaluation of the relevant ECtHR jurisprudence and the reasoning on which it is based. This seems right, as domestic courts should be discerning about what norms are imported into domestic law – courts should be attentive to ensure incoherent propositions are not being transposed into the domestic legal order. Yet normative vetting is far from standard practice.

[44] The general habit, which is perhaps a hangover of the mirror approach, but which also follows from the continued force of Lord Slynn's statement of principle in *Alconbury*,[65] of courts loyally reading across clear and consistent Strasbourg jurisprudence has militated against an approach to Strasbourg material which routinely involves normative evaluation. Also militating against a more general practice of normative evaluation is the lack of judicial engagement with sources beyond Strasbourg – such as domestic or comparative common law – which could provide a prompt or touchstone for critique, and/or the tools for critical evaluation. Again, it is important to bear in mind that while the Supreme Court has in a number of high-profile cases increasingly pushed back against Strasbourg on normative grounds, those cases are atypical, and it remains the case that clear and constant Strasbourg jurisprudence will generally be followed.

3. The HRA as second fiddle

[45] Recently the Supreme Court has sought to develop a common law jurisprudence of fundamental rights.[66] This new jurisprudence has been coupled with the articulation of the so-called 'ordinary approach'.[67] The ordinary approach involves an assertion of normative priority among different fields of public law, and an "order of battle" for considering concurrent public law claims. According to the ordinary approach, in proceedings which include a claim based on the HRA, and a claim based on the new fundamental rights jurisprudence, a court must give priority to the later by considering the common law fundamental rights claim first, and if possible resolving the proceedings on the basis of that claim. It follows that the HRA is relegated to second place in the normative order of priority. It should be noted that albeit this is described as the 'ordinary approach' it was first asserted thirteen years after the HRA had entered force.

[46] The development of the ordinary approach, and the associated common law fundamental rights jurisprudence, are problematic for reasons that will be elaborated further below. But it is worth stating up-front that the principal reason the ordinary approach is problematic is that the HRA is a democratic statement of fundamental rights, passed by the polity's elected representatives, and for that reason it ought to have normative priority ahead of those rights asserted at common law by the (unelected) Supreme Court Justices.

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[65] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [26].

[66] eg *Pham v Secretary of State for the Home Department* [2015] UKSC 19; *Kennedy v The Charity Commission* [2014] UKSC 20.

[67] *R (Osborn) v Parole Board* [2013] UKSC 61 at [54]-[63]; *Kennedy v The Charity Commission* [2014] UKSC 20 at [46].

[47] What is the connection between this development, whereby HRA rights play second fiddle to common law claims, and the preoccupation with Strasbourg jurisprudence in interpreting the rights under the HRA? It is important to observe that there are a number of possible reasons for development of the ordinary approach.[68] But for the IHRAR's purposes what is relevant is that one important driver of judicial adoption of the ordinary approach is the extent to which HRA adjudication is dominated by Strasbourg jurisprudence. Put simply, the fact that HRA adjudication is so closely tied to Strasbourg jurisprudence has rendered common law adjudication comparatively more attractive:

a. First, if the courts can adjudicate a claim at common law, they do not have to deal with the complications of – and constraints imposed by – the Strasbourg jurisprudence as they would have to if the claim was dealt with under the HRA. The attraction of the new common law fundamental rights jurisprudence for the courts is that the courts can simply fashion those rights and the associated jurisprudence as they see fit. Thus, in *Osborn*, in articulating the ordinary approach, Lord Reed stressed that while the HRA is important, human rights law is not just about the judgments of the Strasbourg court, stressing that basic rights would also be protected by the common law.[69] In *Kennedy* Lord Mance, in elaborating the 'ordinary approach', said: 'Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake'.[70]
b. Second, the new common law rights jurisprudence is particularly useful to the Supreme Court in cases where it wishes to push further than Strasbourg. Creating rights, which are effectively analogues of Convention rights, at common law enables the courts to expand rights-protection beyond the Convention, but without having to address or justify the fact that they are pushing beyond Strasbourg – which they have been reluctant to do explicitly under the HRA. Thus in *Kennedy*,[71] which marks the beginning of the new common law constitutional rights canon, the Supreme Court relied on a common law right to freedom of expression to afford greater protection to free expression than afforded by the Strasbourg jurisprudence under the HRA. (Albeit there were good arguments, recognised by some Justices, for holding that the Strasbourg jurisprudence did in

[68] See Varuhas, 'Administrative Law and Rights in the UK House of Lords and Supreme Court' in Daly (ed*), Apex Courts and the Common Law* (Toronto 2019) 263-267; Lady Hale, 'UK Constitutionalism on the March?', Constitutional and Administrative Law Bar Association Conference (12 July 2014) 15 <https://www.supremecourt.uk/docs/speech-140712.pdf>.
[69] *R (Osborn) v Parole Board* [2013] UKSC 61 at [57]. And see Lord Reed, 'Comparative Public Law in the UK Supreme Court' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018) 253.
[70] *Kennedy v The Charity Commission* [2014] UKSC 20 at [46].
[71] Ibid.

fact provide the degree of protection argued for by the claimant). In *Unison*,[72] the Supreme Court pushed forward the law of access to justice in dramatic fashion by adding a 'systemic' dimension to the right. This goes beyond the Strasbourg jurisprudence – but the decision was based on the common law right of access to justice, with no mention of the HRA. These developments at common law are arguably a response to sentiments such as those expressed by Lord Hope in *Ambrose*: 'it is open to member states to provide for rights more generous than those guaranteed by the Convention. But such provision should not be the product of interpretation of the Convention by national courts'.[73]

c. Third, this new jurisprudence allows the courts to make use of the common law's intellectual resources and those of other common law jurisdictions, which has – as noted above – not been the practice under the HRA because of the courts' keen focus on Strasbourg in that context. Thus in *Osborn*, in elaborating the ordinary approach, Lord Reed cited with approval a passage of a judgment given by Lord Toulson which emphasised: the importance of the common law; that common law development did not come to an end with the passing of the HRA; *and that there is significant benefit to be gained from reliance on comparative common law authorities*.[74] Linked to these observations is a concern that the preoccupation with Strasbourg authority under the HRA was beginning to eclipse common law public law. Thus Lady Hale, in a speech, speculated that perhaps one reason for the new common law developments was a "simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten".[75]

d. The fourth point is a more delicate one, but must be addressed. The ordinary approach, and the allied common law jurisprudence, emerged around 2014/2015, a time of rising Euro-skepticism in ordinary politics, which of course culminated in the Brexit referendum. One might hypothesise that the turn to the common law and away from HRA adjudication, which is steeped in European jurisprudence, was an attempt by the courts to sure up the popular legitimacy of human rights adjudication by grounding it in the home-grown common law. Thus, for example, in an extra-judicial speech Lady Hale speculated (without giving a definitive opinion) as to possible reasons for the turn to the ordinary approach and the new common law fundamental rights jurisprudence. One of the possible reasons was: "a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public".[76] In another speech she recorded that some observers of the Court might take the view that "if we had [under the HRA] paid less attention to the Strasbourg jurisprudence, we would not have given human rights

[72] *R (Unison) v Lord Chancellor* [2017] UKSC 51.
[73] *Ambrose v Harris* [2011] 1 WLR 2435 at [17].
[74] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at [88], cited in *R (Osborn) v Parole Board* [2013] UKSC 61 at [61].
[75] Lady Hale, 'UK Constitutionalism on the March?', Constitutional and Administrative Law Bar Association Conference (12 July 2014) 15 <https://www.supremecourt.uk/docs/speech-140712.pdf>. Lord Reed, 'Comparative Public Law in the UK Supreme Court' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018) 253.
[76] Hale ibid 15.

such a bad name in certain quarters, because we could be seen to be having regard to British values, British mores, and British legal principles".[77]

[48] Thus, the degree to which HRA adjudication is steeped in Strasbourg jurisprudence has been a key driver of the assertion of the ordinary approach, by which the common law rights jurisprudence is accorded priority ahead of the HRA. To my mind, this is a further problematic consequence of the courts' near-exclusive focus on the Strasbourg jurisprudence under the HRA. It is problematic because the rights under the HRA are those rights Parliament, as the polity's representative, has declared to be fundamental to British society. It is those rights, underpinned by a direct democratic mandate, that ought to be afforded priority ahead of any novel rights the Justices have recently 'discovered' at common law. It is not for the courts to assert those rights they consider to be important ahead of those rights that Parliament has held to be fundamental. Statute is, after all, a higher order source of law than the common law. Further, the Supreme Court's new common law jurisprudence is controversial and raises serious legitimacy concerns.[78] The Court has elaborated no methodology for how these rights are discovered and selected for judicial protection; the courts lack the institutional and constitutional legitimacy to determine what rights are the most important to society; and the Supreme Court has made some very odd choices – for example, recognising the right to access court[79] and the right to free expression[80] as fundamental, but rejecting arguments that the right to life[81] and right to vote[82] ought to be recognised as common law constitutional rights. This is an odd sense of priority.

[49] Thus, to the extent that undue focus on Strasbourg has precipitated an approach which relegates the importance of HRA rights, and has spawned a highly controversial new common law constitutional rights jurisprudence, the focus on Strasbourg under the HRA is highly problematic.

[50] Moreover, all of the four concerns discussed above (at [47]) which drove the Supreme Court to relegate the importance of the HRA, and assert its constitutional rights jurisprudence ahead of the HRA, could have been addressed by the Supreme Court simply adopting a more enlightened approach to HRA adjudication, which is less dogmatically pre-occupied with Strasbourg. It is within the Court's control to for example integrate domestic and comparative common law learning into HRA adjudication to a greater degree. It is within the Court's control to integrate the UK's constitutional traditions into analysis of HRA claims to a greater degree. Indeed this was a motivation for passing the HRA, as previously 'British judges [were] denied the opportunity of building a body of case

[77] Lady Hale, 'Argentoratum Locutum: Is the Supreme Court Supreme?', Nottingham Human Rights Lecture 2011 (1 December 2011) at 9-10 <https://www.supremecourt.uk/docs/speech_111201.pdf>.
[78] See eg Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578, 582-589.
[79] *R (Unison) v Lord Chancellor* [2017] UKSC 51.
[80] *Kennedy v The Charity Commission* [2014] UKSC 20.
[81] *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10.
[82] *Moohan v Lord Advocate* [2015] AC 901.

law on the Convention which is properly sensitive to British legal and constitutional traditions'.[83] It is within the power of the Court to go further than Strasbourg under the HRA, informed by common law principles and thinking; as Lady Hale has said, 'There is no reason why either Strasbourg or the other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law'.[84] If the Supreme Court took these steps it would enrich the HRA jurisprudence, and weave that Act into the UK's common law and constitutional traditions, truly bringing rights home. It would produce rights that meld the best learning from the domestic legal system, comparative common law systems, and Strasbourg. The injection of common law learning into the HRA jurisprudence would also, one suspects, give the domestic courts a greater sense of 'ownership' of the HRA and HRA jurisprudence. Ultimately, as Lady Hale has said, speaking of the HRA, 'there is room for us to develop a distinctively British human rights jurisprudence'.[85]

[51] The foregoing brings to mind Oliver Wendell Holmes's famous observation that the life of the law has not been logic: it has been experience. The Supreme Court relegated the importance of HRA rights and has tried to controversially forge a whole new common law constitutional rights jurisprudence which threatens the Court's legitimacy, driven at least in part by the degree to which HRA adjudication is tied to Strasbourg. But the degree to which HRA adjudication is tied to Strasbourg is within the Court's control, and a different approach to HRA adjudication, which draws on a wider range of sources, could have been adopted so as to alleviate the concerns that seem to have driven the Court to the problematic 'ordinary approach'.

Reform

[52] The trajectory of thinking in the Supreme Court is away from the strictures of the mirror approach that have dominated the approach to adjudication under the HRA through a significant period of the life of the Act. Nonetheless the fact remains that HRA jurisprudence continues to be dominated by Strasbourg jurisprudence. While domestic courts should and naturally do have regard to Strasbourg, there is no justification for the degree of preoccupation with Strasbourg jurisprudence under the Act. This near-exclusive focus has had a number of problematic effects, including tunnel vision, normative vacuity, and relegation of the normative priority of the HRA.

[53] On balance a modest set of amendments to section 2(1) could play a useful role in communicating to the judiciary that there is scope to broaden the range of sources relied on in HRA adjudication. One possibility would be to include in section 2(1) reference to a wider range of sources which are relevant to interpretation of Convention rights such as the common law, domestic law more generally, and/or the UK's constitutional traditions.

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[83] Boateng and Straw, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] EHRLR 71, 72.

[84] Lady Hale, 'Argentoratum Locutum: Is the Supreme Court Supreme?', Nottingham Human Rights Lecture 2011 (1 December 2011) at 9 <https://www.supremecourt.uk/docs/speech_111201.pdf>.

[85] Ibid at 20.

Reference could also usefully be made to comparative common law jurisprudence. I would suggest that none of the materials referred to, including Strasbourg materials, should be framed as *mandatory* relevant considerations. Rather section 2(1) could be amended to provide that a court 'may' have regard to the enumerated sources. I suggest this in part because the current mandatory language of section 2(1) – '*must* take into account' – is arguably one important factor which led the courts to over-emphasise the sources currently enumerated therein. The opportunity should also be taken to make clear that a court could have regard to sources beyond those specifically enumerated in section 2(1). The Panel may wish to consider, by way of comparison, section 39 of the South African Constitution and section 32(2) of the Victorian Charter of Human Rights and Responsibilities Act 2006. I do not suggest that the content or even drafting of these provisions should necessarily be followed, but they offer illustrative examples of provisions which make reference to a range of possible sources which may inform interpretation of enumerated rights.

[54] These reforms would ameliorate many of the problems with the domestic courts' current approach to HRA adjudication. The reference to domestic and comparative common law sources would encourage the courts to have regard to those sources. This would enrich the jurisprudence, and also help to weave the Act into domestic legal traditions, truly bringing rights home. The wider range of enumerated sources, beyond Strasbourg material, coupled with changing the enumerated sources from mandatory considerations to potentially relevant considerations, would also facilitate a looser connection between HRA adjudication and Strasbourg jurisprudence. It would serve as a statutory encouragement to the Supreme Court to continue the current trajectory of legal development, away from the strictures of the mirror approach. Consideration of domestic or comparative materials may also serve to prompt greater critical reflection on, and normative evaluation of, Strasbourg norms.

[55] As I have argued, the emergence of the 'ordinary approach' by which the Supreme Court's controversial new constitutional rights jurisprudence is afforded normative priority ahead of the democratically-sanctioned rights under the HRA is a serious cause for concern. Amendments should be introduced to reverse this order of priority. HRA rights, as rights underpinned by a direct democratic mandate, ought to be afforded normative priority. In order to achieve this an amendment could be made to the HRA or the Senior Courts Act 1981. It could be provided that in judicial review proceedings where a HRA claim is one of the pleaded claims, a court must consider the HRA claim first and if possible resolve the case on the basis of the Act. This would accord the Act the priority it warrants in the legal system's normative order, and it may also have the welcome knock-on effect of potentially checking the Supreme Court's controversial constitutional rights jurisprudence.

Damages

[56] I have not so far addressed the issue of the approach to damages under section 8 of the Act, on the basis that the call for evidence focused principally on section 2(1).

However, the approach to section 8(4) of the Act has proven even more problematic than the courts' approach to section 2(1). If the matter is within the Panel's remit then it is submitted that the Panel recommend repeal of section 8(4). What follows is a summary of a longer argument I have made in a chapter of my book, *Damages and Human Rights* (Hart 2016), against the mirror approach as applied to damages, and ultimately for repeal of section 8(4). That chapter, complete with extensive references, is **attach** to this submission.

[57] Relying on section 8(4) domestic courts have applied an even stronger version of the mirror approach in the context of deciding whether to award damages under the Act, and quantum, than in the context of interpreting Convention rights. And unlike in relation to Convention rights the Supreme Court has not, in relation to damages, moved to loosen the connection between domestic law and Strasbourg material. Rather, the Supreme Court has strongly reasserted the mirror approach in regard to damages.[86] In awarding damages under the Act, domestic courts are required, pursuant to the mirror approach mandated by the Supreme Court, to mechanistically replicate the Strasbourg Court's practice in awarding 'just satisfaction' under Article 41. Yet the Strasbourg Court explicitly says that its approach to compensation is not a model for domestic institutions, and domestic courts should draw on domestic traditions in awarding damages. In contrast to the Convention rights, Article 41 is not an Article that in fact binds the UK; it is directed inwards to the ECtHR's own remedial practices. The language of Article 41 itself indicates it is inapt as a basis for fashioning domestic remedies, as it explicitly only applies where domestic remedies are inadequate. Beyond this the Article 41 jurisprudence is deeply problematic. It suffers from very serious problems of inconsistency and incoherence, and is nearly completely unreasoned. Seeking to follow the problematic Article 41 jurisprudence has unsurprisingly led to a problematic domestic jurisprudence which mirrors most of the problems of the supranational jurisprudence. The domestic cases are replete with statements by lower court judges expressing their discontent with the mirror approach to damages, specifically as they are unable to discern any principles from Strasbourg to follow.[87] Moreover the language of section 8(4) differs from section 2(1) in that it refers to taking into account the 'principles' applied by the ECtHR. In this light the Supreme Court's approach of mechanistically replicating the *practice* of the Strasbourg Court is completely at odds with the terms of the Act.

[58] The Law Commissions, in their comprehensive report on damages under the Act, recognised the problems with the Article 41 case law and concluded that domestic courts should be led principally by domestic tort principles.[88] This would lead to a more principled domestic jurisprudence, drawing on the wealth of institutional learning offered by the domestic law of damages. It would also ensure that human rights claimants are not undercompensated relative to domestic standards; it is clear that Strasbourg scales are

[86] *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673; *R (Sturnham) v Parole Board* [2013] 2 AC 254.
[87] See Varuhas, *Damages and Human Rights* (Hart 2016) 272-274 (collecting quotes from lower court judges).
[88] *Damages under the Human Rights Act 1998* (2000) Law Com No 266/Scot Law Com No 180, Cm 4853.

extremely modest compared to those scales applied to identical losses domestically. The irony in this regard is that by following the Article 41 jurisprudence, domestic courts may end up applying such a modest scale of awards that domestic practice ends up breaching Article 13 of the Convention, which requires the UK to provide an effective remedy for violations. Reflecting these points lower courts have begun to reassert the relevance, and indeed primacy of domestic damages principles, in light of the deeply problematic nature of the Strasbourg Article 41 case law.[89] Of particular relevance in this regard is the judgment of Leggatt J, now Lord Leggatt, in *Alseran*.[90] It is also worth noting that another current Supreme Court Justice, Lord Burrows, has expressed support for application of domestic tort principles and scales.[91]

[59] Thus, if the issue of damages is within the Panel's remit, it is submitted that the Panel should recommend complete repeal of section 8(4). Such a reform is a matter of priority given the deep problems of principle and pragmatism that have emerged as a result of the mirror approach to HRA damages. The provision could usefully be replaced with one which directs courts to apply domestic damages principles.

III. THEME TWO

[60] Theme Two addresses the impact of the HRA on the relationship between the judiciary, the executive and the legislature. Herein I address the question of possible amendment of section 3; the relationship between the judiciary and executive; and remedial orders.

Section 3

[61] The first point to make about the interpretive injunction in section 3 is that it is *not* a 'remedy'. It is important to make this point as judges and commentators very often describe it as such (erroneously). The characterisation of section 3 as providing for a remedy is important because that characterisation may carry normative significance. In particular, if characterised as a remedy, it is a short step to invoking the fundamental principle of ubi ius, ibi remedium – where there is a right there is a remedy – which might be taken to suggest that wherever the plain meaning of legislation is incompatible with section 3, the courts must generally construe the provision to ensure the claimant does not go without a remedy. For an example of this type of reasoning see Lord Steyn's speech in *Ghaidan*.[92] This argument is typically reinforced by the allied argument that a declaration of incompatibility is not a real or effective remedy, so the only real way to remedy a legislative breach of rights, is to transform the meaning of the legislation so there is no longer a breach.

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[89] See Varuhas, 'Damages under the Human Rights Act' in Edelman, *McGregor on Damages*, 21st edn (Sweet and Maxwell, 2021) [50-009]-[50-017].
[90] *Alseran v Ministry of Defence* [2019] QB 1252 at [904]-[982].
[91] Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th edn (OUP 2019) ch 2; Burrows, 'Damages and Human Rights' in Nolan and Robertson (eds), *Rights and Private Law* (Hart 2012).
[92] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Steyn.

[62] A legal remedy is by its nature a response to a legal wrong. A legal wrong is a breach of a legal right or duty. However, when Parliament legislates in a way that is incompatible with Convention rights there is no legal wrong, because Parliament is supreme; it is under no legal constraint. It does not owe a legal duty under the HRA to act compatibly with Convention rights, and it follows there is no legal wrong where legislation is incompatible with rights. As such no legal remedy, in the proper sense of that term, can be given. By the same token a declaration of incompatibility is also not a remedy. Further, where courts stretch the meaning of statutory words to render them rights-consistent, pursuant to the interpretive injunction under section 3, the legislation was never rights-infringing. Given there can only be one authoritative reading of the legislation, it follows that the legislation on its one true interpretation does not, and never did, interfere with the given rights. As such it makes no sense to speak of "interpretive remedies" for "rights violations".

[63] Thus, once one understands the nature of a legal remedy, it is clear that invocation of the maxim that where there is a right there is a remedy, does not advance understanding of the proper place of section 3, including its proper place relative to section 4.

[64] Moving to the case law under section 3, there have been relatively few significant cases in recent times, especially at Supreme Court level. As will be discussed below, sweeping and controversial judicial statements emphasising the "radical" nature of the power conferred by section 3 in early decisions under the Act, such as *Ghaidan*,[93] remain good law, and are a cause for concern. But recently there have been few occasions for the Supreme Court to apply these principles.

[65] One important reason for the 'cooling off' of significant section 3 cases has been the Supreme Court's recent reinvigoration, and aggressive application of common law principles of interpretation designed to afford protection to common law rights.[94] In turn many cases that might possibly have been determined on the basis of section 3, have been determined on the basis of common law interpretive principles. This prioritisation of the common law ahead of HRA techniques is of a piece with the 'ordinary approach' considered under Theme One, above (at [45] onwards). It is worth noting that the new common law jurisprudence on interpretation, which in part has seemingly taken its inspiration from aspects of HRA law including section 3,[95] has raised significant legitimacy concerns.[96]

[66] The courts have acknowledged there are necessary limits on their role under section 3, so that there will be occasions where it is not possible to adopt a rights-consistent

[93] Ibid.
[94] Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578. The paradigm example is *R (Unison) v Lord Chancellor* [2017] UKSC 51.
[95] Varuhas ibid eg 600-604.
[96] Ibid 582-589, 604-613.

interpretation. This is reinforced by section 4, which specifically contemplates situations where a rights-compliant interpretation is not possible. The language of section 3, specifically the reference to "So far as it is possible to do so", similarly indicates that there will be occasions where rights-compliant interpretations are not possible.

[67] The difficult issue is how to define these limits. In this regard the higher courts have articulated a series of principles to guide courts in discerning where the limits lie.[97] The courts will not adopt an interpretation that cuts across or undermines a fundamental feature of a legislative scheme. Put another way, the courts will not adopt an interpretation that runs against the grain of the legislation or the essential purposes of the legislation. The courts will not seek to alter the plain meaning of statutory words where this would require the making of policy choices which the courts are not competent to make. They will not deviate from the plain meaning of a provision where this would require knock-on changes to other parts of the scheme. As discussed below, it would appear that these are the *only* limits on the court's role under section 3.[98]

[68] No one could seriously dispute that where an argued-for interpretation, which departs from the plain meaning of legislation, would give rise to complex policy questions, and/or would cut across the basic purposes of the legislative scheme, the courts should not adopt the given interpretation. Such cases are appropriately referred back to Parliament for consideration, via grant of a declaration of incompatibility. Thus in cases which implicate complex, politically-charged matters such as prisoner voting (*Chester*),[99] or assisted suicide (*Nicklinson*),[100] the Supreme Court has treated counsel's arguments for departing from the plain meaning of the relevant statutes, as a simple non-starter. In the recent case of *Smith*, which concerned the class of persons who may claim bereavement damages in fatal accident cases, the Court of Appeal similarly treated as a non-starter the argument that the Court should, through "interpretation", revise the class of entitled persons prescribed by the plain terms of the statute.[101] The Court emphasised that the statutory terms were clear and that the list of prescribed persons plainly reflected an intentional legislative choice. The Court said that the question of which class of persons should be entitled to bereavement damages, and which should not, implicated policy questions that were not for the court.

[69] It is important to observe that the judicially-articulated principles governing when the courts would be exceeding their legitimate role under section 3 are open to interpretation. Thus the Supreme Court has been divided in some cases over the question of what constitutes the fundamental purpose of a piece of legislation; the view taken on that question will then affect whether a rights-consistent interpretation can legitimately

[97] See for example the statement of principle in *Sheldrake v DPP* [2005] 1 AC 264 at [28].
[98] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 at [96].
[99] *R (Chester) v Secretary of State for Justice* [2014] AC 271 at [101].
[100] *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at [130].
[101] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 at [97]-[100].

be adopted.[102] In *Ghaidan* the majority considered that reading a provision that apparently referred to opposite-sex couples as referring also to same-sex couples was permissible, whereas Lord Millett in minority considered the issue implicated questions of social policy and that the majority's reading cut across fundamental features of the legislative scheme.[103] Given the open-endedness of concepts such as "fundamental features" or not going "against the grain" of legislation, there is significant scope for one's normative preferences to shape one's application of those concepts; for example the strength of one's desire to protect rights may (consciously or not) shape one's conclusion as to what is a fundamental feature of a given piece of legislation and whether a proposed rights-consistent interpretation cuts across that feature.

[70] Overall, is there a case for reform of section 3? On the one hand the more recent significant cases on section 3 that have reached the Supreme Court, such as *Nicklinson* and *Chester*, have not raised particular concerns. These were clear-cut cases, where it was obvious that the Court would exceed the limits of its legitimate role under section 3 if it were to accede to counsel's interpretive arguments. As noted there have been relatively few major section 3 cases in general. The likely reason is the Supreme Court's new-found preference for common law techniques; where those new techniques have been deployed the approach of the Supreme Court has been highly controversial.[104] One might therefore consider that more controversial cases of rights-consistent interpretation have been 'outsourced' to the common law.

[71] Despite this period of relative calm in the life of the section 3 jurisprudence, there remain reasons to consider reform, based on the expansive principles developed in the early case law under the Act – and which remain good law.[105] These principles, if followed through on, would in my opinion take the courts beyond their legitimate interpretive role into the realm of judicial legislation.

[72] Thus the section 3 interpretive duty has been said to impose a "far-reaching",[106] "radical"[107] obligation; courts should "strive"[108] to apply "rights-consistent" interpretations; there is a "strong rebuttable presumption" in favour of a rights-consistent interpretation;[109] "violence" can be done to language to ensure rights-consistency, so that the language is stretched almost to breaking point;[110] "considerable departure" from the plain meaning of words is permissible;[111] even if there can be "no doubt" as to the

[102] *R (GC) v Commissioner of the Police for the Metropolis* [2011] 1 WLR 1230. For discussion see Elliott and Varuhas, *Administrative Law*, 5th edn (Oxford 2016) at [7.2.5].
[103] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[104] Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578.
[105] See *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 at [96].
[106] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [30].
[107] Ibid [44].
[108] *R v A (No 2)* [2002] 1 AC 45 at [44]; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [46].
[109] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [50].
[110] Ibid [67].
[111] Ibid [119].

meaning of the legislation, its meaning can be altered;[112] the section applies even if there is no ambiguity;[113] the court may adopt a meaning that departs from the clear intention of the Parliament that enacted the given legislation;[114] and declarations of incompatibility are a "last resort" and "exceptional", and must be avoided unless it is "plainly impossible to do so".[115] Moreover it is said that the "*only* limitations"[116] on the judicial role are those that were introduced above (at [67]-[68]): that an interpretation may not undercut a fundamental feature of the legislation or make decisions for which it is not equipped; if those are truly the only limitations then, coupled with the generally expansive statements as to the court's role which permeate the section 3 cases, the courts have a very significant degree of power to alter the meaning of legislation to bring about rights-consistency. In light of these far-reaching statements it is perhaps unsurprising that courts elsewhere, specifically in New Zealand and Australia, have not followed the path of the UK courts, adopting a more moderate approach and observing that the UK approach would transgress the legitimate judicial role in interpreting legislation.[117]

[73] Part of the reason why UK courts may have gone further than their counterparts in the common law world is that they were influenced, in elaborating the approach under section 3, by the *Marleasing*[118] principle in EU law,[119] according to which courts may effect radical changes to legislation in the name of interpretation so as to ensure domestic law conforms with EU instruments, such as directives. It is true there is a linguistic echo of the *Marleasing* formulation in the terms of section 3. But it is to be remembered that the constitutional context in respect of EU law was different: EU law was supreme. Given EU law was supreme the normative force of parliamentary sovereignty as a check on how far interpretation could legitimately be taken may naturally have carried less weight: the supremacy of EU law was the normatively superior principle. But the HRA is not a supreme bill of rights, and parliamentary sovereignty should thus represent an absolute limit on how far the interpretive enterprise can be taken. To the extent the approach to section 3 has been influenced by the *Marleasing* principle, that was a category error.

[74] Why is the UK approach problematic? Consider the following. As discussed above (at [72]), the section 3 cases make clear that it *would* be permissible for courts to depart from the crystal clear meaning of words, and to radically alter the clear and unambiguous meaning of words. Indeed, in *Ghaidan* the majority strongly emphasised that weight should *not* be placed on the precise linguistic formulation of a provision, whereas Lord Millett in the minority considered that application of section 3 must at least in some part be linguistic. It was also clearly stated in *Ghaidan* that even if Parliament's intent is apparent, the court can adopt an interpretation that departs from that intention. As such

[112] Ibid [29].
[113] Ibid [44].
[114] Ibid [30], [50].
[115] *R v A (No 2)* [2002] 1 AC 45 at [44].
[116] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804 at [96] (emphasis added).
[117] *R v Hansen* [2007] 3 NZLR 1; *Momcilovic v The Queen* [2011] HCA 34.
[118] *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, 4159.
[119] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [45]. And see *R v Hansen* [2007] 3 NZLR 1 at [244]-[245].

it is entirely possible that the words and effect of a provision may be crystal clear, and that Parliament's intention is plain, yet an interpretation which departs from the plain meaning of the words, and the clear intention of Parliament, can be adopted.

[75] To see why these prescriptions are problematic consider the following. Assume that Parliament specifically turned its mind to a rights-issue, resolved that the balance between the given right and other interests should be struck a particular way in legislation, and clearly expressed this intention in statute. It would be possible – on the basis of the principles enunciated in cases such as *Ghaidan* – for a court to nonetheless adopt an interpretation that was distinct from that which emerges from the clear words of the statute and consideration of Parliament's intent. The problem with this is that it effectively means that outside cases which raise issues of fundamental purpose/features (see [67]-[68] above) Parliament could potentially be disabled from giving effect to its preferred balance of interests, because a court prefers a different balance – and is able to give effect to its preferred balance pursuant to its interpretive powers under section 3. In a democratic system characterised by parliamentary sovereignty it simply cannot be the case that Parliament is not able to give effect to its deliberate, preferred balance between rights and other interests. By definition a supreme Parliament must be able to, in the name of the polity it represents, deliberately adopt a particular view on human rights issues, and have that view respected and given effect by the courts, even if the courts would consider the view incompatible with Convention rights.

[76] Compare the traditional approach to the principle of legality at common law, which holds that if legislation clearly shows that Parliament has turned its mind to given rights-issues, and determined on a particular course, that the courts will respect that, whether or not the court agrees with the balance struck, and whether or not the ultimate effect of the legislation is to infringe rights.[120] Part of the rationale for this approach at common law is that it is democracy-enhancing: it encourages Parliament to engage with human rights issues in passing legislation – knowing that the courts will respect the balance struck if the legislation clearly evinces that Parliament has turned its mind to the relevant matter and determined on a given course.[121] This approach is closer to that which has been adopted in other common law jurisdictions such as New Zealand, where the New Zealand Supreme Court has laid comparatively greater emphasis on the clarity of the statutory words, and the intent of the enacting Parliament.[122]

[77] There are also rule of law reasons to respect clear expressions of parliamentary intent. If a citizen consults a piece of legislation they will naturally, if the meaning and intent of the provision appear clear, rely on that plain meaning. If courts routinely depart from the plain meaning of provisions, the rule of law is undermined – in that the meaning of provisions is not what they appear to be on the face of the legislation; indeed the meaning

[120] See eg *Raymond v Honey* [1983] AC 1. See further Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578.
[121] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131E-G.
[122] *R v Hansen* [2007] 3 NZLR 1.

imputed by the courts might be radically different from the plain meaning. It follows not only that citizens will not have fair warning of what the law demands, but also that law will be less effective in guiding action.

[78] In light of the foregoing it is arguable that some reform is warranted to re-iterate the fundamental constitutional boundary between interpretation and legislation, and to re-iterate that an aspect of this boundary is that clear expressions of parliamentary intention should be respected and abided. It is important to remember also that unlike at common law, under the HRA if a court concludes that legislation cannot be read in a rights-consistent way, the court does have the further option of granting a declaration of incompatibility so as to encourage Parliament to think again.

[79] In my view a significant reason why courts have adopted such a potentially far-reaching conception of their powers under section 3 is the "So far as it is possible to do so" formulation. Whether or not this was the intent, courts have interpreted this as requiring them to "strive"[123] for a rights-consistent reading of provisions – courts should reach as far as they possibly can to impose a rights-consistent meaning on legislation, regardless of the clarity of the words used and the intent evinced by those words. It might not be a coincidence that in jurisdictions which do not adopt the "as far as possible" formulation, courts have adopted a more moderate interpretive approach. This has been the case in New Zealand, where section 6 of the New Zealand Bill of Rights Act 1990 provides: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

[80] Another issue with section 3 is that, apart from the "So far as it is possible" formulation, it provides for no further express limit on how far courts can legitimately alter the meaning of legislation. And the open-endedness of the single "So far as it is possible" limit has allowed the courts significant leeway to set the bounds of their role under section 3, and they have adopted an expansive conception of their role. Compare for example the Victorian Charter of Human Rights and Responsibilities Act 2006 which, in section 32, expressly provides for a further limit, in addition to what is "possible": "So far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights".

[81] It follows from the above that the "So far as it is possible to do so" formulation should be amended or removed, and that some limitations should be explicitly provided for in the terms of the legislation to reinforce the proper interpretive role of the courts. For example, a new provision might exempt from the scope of any interpretive principle situations where Parliament's intention is clear, and/or where the words of the provision are clear. One possible way of framing such a provision might be to prescribe that

[123] *R v A (No 2)* [2002] 1 AC 45 at [44] (section 3 places a duty on the court to strive to find a rights-consistent interpretation); *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [46].

ambiguity in the terms of the provision to be interpreted is required before a court may adopt a rights-consistent interpretation. One might argue that this is too restrictive an approach. But it should be borne in mind that the courts can be expected to interpret any reference to "ambiguity" narrowly, given the importance of the goal of rights-protection, so that such provision would be less restrictive than it would appear on its face. Such a provision however would serve the important purpose of reinforcing that clear words should be abided and not departed from.

[82] Lastly a potential counter-argument is that these sorts of amendments, if enacted, would more often lead to successful challenges against the UK at Strasbourg. But as discussed above (at [22]), the issue is more nuanced: that an aspect of domestic law is not in perfect conformity with Strasbourg jurisprudence, does not necessarily mean the UK will be held in breach if the matter reaches Strasbourg. Further, Strasbourg has shown it is willing to respect and accord weight to considered balances struck in the terms of legislation, given the normative weight such balances carry – having been struck by the people's elected representatives.[124]

Judiciary and executive

[83] In my view the HRA has worked well as it applies to regulate the acts of executive government and other public entities. In claims involving challenges to executive acts or policies the courts have generally struck an appropriate balance between rights-protection and affording the executive freedom to pursue policies in the public interest. Of course there are cases where I might disagree with the precise balance struck by the courts, but generally the courts have done a good job in mediating this difficult clash of concerns.

[84] One of the most important impacts the HRA has had is in respect of blanket policies. The courts accept that in certain circumstances it may be justifiable for government to adopt blanket policies, and it is open to government defendants to lead evidence to justify such policies. But in a series of cases the courts have found that blanket policies operate in an unjustifiably blunt fashion causing significant hardship and misery to particular individuals, in circumstances where the public interests underpinning the policy are either not engaged or not weighty.[125] In other words individuals have suffered needlessly. The result of these rulings has been that the executive must develop more nuanced approaches to policy. This does not deprive the executive of the capacity to pursue the policy agenda it considers to be in the public interest. Government may still pursue its given policy goals, but in doing so it must build into the policy framework opportunities for consideration of individual cases so as to ensure against unwarranted individual hardship. This is a welcome development.

[124] See eg *Animal Defenders International v UK* (2013) 57 EHRR 21.

[125] Two of the most prominent examples are: *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621; *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53. And see, for an excellent example from the ECtHR: *S and Marper v UK* (2008) 48 EHRR 50 (and *R (GC) v Commissioner of the Police for the Metropolis* [2011] 1 WLR 1230).

[85] A more general point that should be made, which is often passed over, concerns the nature of the judicial role in HRA claims against government. The point is important as it is relevant to evaluating the legitimacy of individual decisions made under the Act and the general judicial approach to adjudication of HRA claims. The crucial point is that whereas courts exercise a supervisory, secondary jurisdiction in judicial review proceedings based on common law grounds, the courts under the HRA are charged with a different task: adjudicating statutory individual legal rights.[126] Where the court exercises a supervisory function, it is performing a checking function, supervising a decision which is properly for another person, the executive decision-maker. As such the court must not enter the merits, as the merits are for the executive decision-maker designated by Parliament. But where legal rights are at stake, as under the HRA and in other legal contexts such as the law of torts, the court's role is different. Within the separation of powers it is courts that have *primary* responsibility for adjudicating legal rights – adjudicating rights is the quintessential judicial function – and as such courts under the HRA do not exercise a secondary reviewing jurisdiction. As a court exercises the primary power of decision in respect of HRA rights, it must decide for itself whether a right is breached and whether an interference is justified.[127] In doing so it transgresses no constitutional boundary; its role is similar to that of a court in a tort claim where a court must determine for itself whether private rights have been breached and whether a defence can succeed.

[86] Of course it does not follow that the court pays *no* regard to what the executive decision-maker has to say. In evaluating the justifiability of interferences with Convention rights the courts will afford weight to the considered views of the defendant, in light of their comparatively greater institutional expertise, and any evidence led in support of pleaded justifications.[128] This is very similar to the weight that would be given to the views of medical practitioners in medical negligence litigation, given their expertise in relation to medical diagnosis and treatment. To the extent the decision-maker has sought to engage with rights-questions in the course of making a decision or formulating a policy, this will likely lead the court to afford greater weight to the decision-maker's views.[129] In turn this incentivises engagement by officials with rights-norms, and the integration of those norms into their decision-making. But because the court is engaged in the

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[126] See Varuhas, 'Taxonomy and Public Law' in Elliott, Varuhas and Stark (eds), *The Unity of Public Law?* (Hart 2018) 63-78. And see: JNE Varuhas, 'Against Unification' in Wilberg and Elliott (eds), *The Scope and Intensity of Review* (Hart 2015).

[127] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 at [12]–[15], [30]–[31], [37], [44]; *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100 at [29]–[31], [68]; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *Tweed v Parades Commission* [2007] 1 AC 650 at [55]; *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at [46], [61], [91]; *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 at [13], [52]ff; *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [124]; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60 at [57], [105], [115], [137], [152].

[128] *Huang* ibid [16].

[129] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 at [37].

adjudication of personal legal rights, it ultimately and rightly retains the final say over the scope and nature of rights, and questions of breach, justification and remedies.

Remedial orders

[87] The call for evidence asks whether any amendment should be made to section 10 of, and Schedule 2 to the HRA regarding remedial orders. In my view these parts of the HRA should be repealed. Remedial orders allow Ministers to amend legislation without having to pass amendments through the ordinary legislative process. These are in effect Henry VIII powers and are automatically constitutionally suspect. But they are particularly inappropriate where the subject-matter of the amendments relate to very basic aspects of our constitutional framework – namely, human rights. Matters relating to such basic matters should always be dealt with through the ordinary legislative process. Moreover it is often the case that human rights matters raise highly contested social, political, moral and economic issues in respect of which reasonable people disagree and in respect of which elected representatives, and citizens more generally, ought legitimately to have a voice. Matters of such moment require the full rigour of the legislative process, which is importantly a public process, which provides opportunity for public engagement. It cannot be right that matters such as whether and on what basis judges should be immune from damages liability for human rights violations[130] – a matter which implicates constitutional fundamentals – or the question over the class of persons who may legitimately claim for bereavement damages where a loved one has died[131] – which implicates difficult questions of social policy – should be addressed by a Ministerial order. That is not to treat these matters of high principle (and policy) with the normative importance they deserve.

[88] It is true to say that remedial orders are subject to the positive resolution procedure, and that the JCHR does excellent work scrutinising such orders. But that abridged process is no substitute for the full rigour of the ordinary legislative process, which provides for multiple debates, for members to move and debate amendments, for greater public input and engagement, and greater engagement with experts who may possess important insights. Ultimately, the abridged process prevents full engagement by Parliament and the public with important human rights matters.

[89] The remedial orders scheme sends the wrong signal about the role of Parliament in relation to human rights matters. It suggests that human rights are principally for the courts, and where a court finds a breach the only role for Parliament is to rubber stamp an order promulgated by a Minister to give effect to the court's view. As I have emphasised, human rights matters touch on some of the most fundamental issues in our society, and over which people may have strong and legitimate disagreement. It is entirely possible, and entirely legitimate, that Parliament may take a different view from the courts on human rights – which very often depend on subjective value-judgements.

[130] *Hammerton v UK* (2016) 63 EHRR 23. See *Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report*, HC 148/HL 41 (20 March 2020).
[131] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804. See *Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report*, HC 256/ HL 62 (18 May 2020).

Further, in some cases a Minister might seek in their proposed amendments to circumvent or not fully implement a court ruling; in such a case the government should face the sort of intensive scrutiny that attends the ordinary legislative process.

[90] More generally more could be done to engage Parliament in human rights matters. For example section 92K of the New Zealand Human Rights Act 1993 provides that where a declaration of incompatibility is made the relevant Minister must present a report to Parliament bringing the matter to the attention of the House, and present a report providing advice on the Government's proposed response. Allied changes could include a requirement standing orders that the Minister make an oral statement to the House, so as to speak to and take questions on the reports he or she presents to the House, and there could also be provision in standing orders for a mandatory debate in the House on the matters raised by the declaration. These changes would put human rights matters emerging from the courts on Parliament's radar. Provision for questions to the Minister and a debate would ensure that the government has a taste of Parliament's views before leading an amendment, which would then – assuming the repeal of the remedial orders regime – be subject to the full rigours of the legislative process. If the government were acquiescing over legislative amendments, then at least, if the proposed reforms were in place, the Minister would have had to address the matter in the House of Commons, and there would have been a debate in respect of the matter, so that parliamentarians would be alive to the relevant issues, and more likely to call government to account if amending legislation were not forthcoming.

[91] Lastly, it might be argued that even if the foregoing points are accepted, the remedial orders regime should be retained for "technical" amendments. But one problem lies in defining what is a technical or less important amendment. A second problem lies in the fact that it is hard to characterise issues relating to the nature, scope, and limits of basic rights as technical in nature. If the matter was purely technical or minor it probably could have been addressed by the court pursuant to section 3, in which case no declaration of incompatibility would have been necessary in the first place.

Attachment: JNE Varuhas, *Damages and Human Rights* (Hart 2016) ch 5 ("Human Rights Damages and 'Just Satisfaction': The 'Mirror' Approach").

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