Written Evidence to the Independent Human Rights Act Review (IHRAR)

Colm Ó Cinnéide

Professor of Constitutional and Human Rights Law, UCL

Introduction

1. I am Professor of Constitutional and Human Rights Law at the Faculty of Laws, University College London (UCL). I have written extensively on certain aspects of the relationship between UK law and the European Convention on Human Rights (ECHR), and on legal rights protection within the UK constitutional framework more generally. I have also acted as Specialist Legal Advisor for the Joint Committee on Human Rights (JCHR) and the Women and Equalities Committee of the House of Commons on various aspects of UK rights protection.

2. In what follows, I make some initial comments on the main themes of the Review. I then briefly address the detailed questions set out in the Review's terms of reference, as listed in the call for evidence.

3. In essence, the main points made here is that the HRA mechanism as interpreted and applied by UK courts would appear to function reasonably well; that the case-law in this regard has settled down and become very stable, after some initial uncertainty; and that many of the specific reform proposals canvassed by the Review risk generating new layers of legal complexity, and destabilising existing case-law – for little if any real gain.

4. I have also submitted evidence to the Review as part of the 'Human Rights In Action' collective submission, relating particularly to issues of equality and non-discrimination. This submission is focused on the HRA mechanism, and the Review's request for detailed feedback on specific reform proposals.

General Comments

The Interlocking Design of the HRA

5. The Human Rights Act 1998 (HRA) was designed to make 'Convention rights' enforceable within UK law, and thus to expand legal protection for the rights of individuals in line with the requirements of the ECHR. However, it also aimed to maintain the ultimate supremacy of political decision-making within the UK constitutional system, as reflected in the principle of parliamentary sovereignty.[1]

6. This is a potentially difficult balancing act to achieve. The Act tries to strike that balance through the interplay between ss. 2-and s. 6 HRA. This interlocking statutory

[1] F. Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] *European Human Rights Law Review* 125.

mechanism has rightly been described as a clever piece of legal engineering. Certain of its key design features should be emphasised at the outset.[2]

7. By virtue of the requirement in s. 2 HRA to 'take into account' Strasbourg jurisprudence, the Act ensured that British courts would give weight to this jurisprudence in interpreting and applying Convention rights. British courts had been taking account of Strasbourg jurisprudence in applying common law rights (broadly defined) since the 1980s.[3] However, s.2 HRA established a formal link between ECHR jurisprudence and HRA case-law, reducing the role of judicial discretion in this regard. Judges were now positively authorised by Parliament to consider the Strasbourg case-law, putting this relationship on a more transparent, democratically-endorsed basis.

8. Furthermore, by establishing this S. 2 link, the Act in effect opened a channel between Strasbourg and the UK courts. British judges would be expected to 'take account' of developments within the ECHR case-law, while the Strasbourg Court would have the benefit of reasoned judgments applying Convention rights when it was called upon to adjudicate individual complaint coming in from the UK. This was intended to help ensure that the UK remained in general compliance with its obligations under the Convention, and to reduce potential discordance between UK law and Strasbourg standards.

9. The obligation set out in s. 3(1) HRA to interpret legislation 'as far as possible' so as to comply with Convention rights was similarly intended to minimise such discordance. It also had the objective of maximising individual rights protection, while affirming the existence of interpretative limits to the judicial capacity to read legislation in a rights-friendly manner. The final piece in the puzzle was the s. 4 'declaration of incompatibility' mechanism, taken together with the fast-track remedial mechanism set out in s. 10 HRA. This allowed British courts to flag up a clash between UK legislation and Convention rights, leaving it to the government and Parliament to decide how and whether to resolve any such inconsistency.

The Functioning of the HRA

10. Has the HRA functioned as it was designed to do? In my view, as a close observer of the case-law, it has. In the first few years of the Act's existence, certain issues arose. These related in particular to the relationship between the Strasbourg Court and British courts as framed by s. 2 HRA, as well as the interaction between ss. 3 and 4 HRA. Initial instability in the case-law was soon resolved – in a manner which I would regard as consistent with the scheme of the Act.

S. 2 HRA (Theme One)

[2] Much of what follows is adopted from C. O'Cinneide, 'Human Rights and the UK Constitution', in J. Jowell and C. O'Cinneide (eds.), *The Changing Constitution* (9th ed., OUP, 2018), 58-93.
[3] Lord Keith of Kinkel in *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534, at 550H-551A; Lord Cooke in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [30]; Lord President Hope in *T, a Petitioner* 1997 SLT 724.

11. Thus, in relation to s. 2 HRA and the duty to 'take account' of Strasbourg jurisprudence, Lord Bingham in *Ullah* indicated in 2004 that 'the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[4] This 'mirror principle' initially exerted a considerable degree of influence over the development of the HRA case-law.[5] However, it also attracted plenty of academic and judicial criticism, on the basis *inter alia* that it was out of sync with the precise wording of the s. 2 HRA 'take into account' obligation.[6] Subsequent jurisprudence has clarified this issue, with the Supreme Court making it clear that it would depart from Strasbourg jurisprudence in a number of different circumstances, most recently defined in *R (Hallam) v Secretary of State for Justice*.[7] A clear and consistent line of settled Strasbourg jurisprudence will generally be followed,[8] but even this rule of thumb is not absolute.[9]

12. In response, the Strasbourg Court has shown a willingness to look again at its previous judgments and to engage via a dialogic process with alternative interpretations of Convention rights put forward by the UK courts.[10] British courts have also shown some readiness to develop their own interpretation of Convention rights in situations where Strasbourg gives national authorities a 'margin of appreciation', or where the Strasbourg jurisprudence is under-developed.[11]

13. As indicated by recent evidence by Judge Spano, President of the European Court of Human Rights, to the JCHR, the relationship between UK courts and Strasbourg is now widely regarded as working well.[12] Furthermore, it reflects the precise, non-peremptory wording of S. 2 HRA – and arguably best suits the specific nature of Strasbourg judgments, which were not designed to be rigidly applied as binding

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[4] *R v Special Adjudicator, ex p. Ullah* [2004] UKHL 26, [20].
[5] See e.g. *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, where Lord Rodger commented at [98] as follows: '[e]ven 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.'
[6] See e.g. Lord Irving, 'A British Interpretation of Convention Rights' [2012] *Public Law* 237. (For a contrary view, see P. Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] *Public Law* 253–267.) See also Lady Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 (1) *Human Rights Law Review* 65–78.
[7] [2019] UKSC 2. For analysis of this judgment, see L. Graham, 'Hallam v Secretary of State: Under What Circumstances Can the Supreme Court Depart from Strasbourg Authority?', *U.K. Const. L. Blog* (4th Feb. 2019) (available at https://ukconstitutionallaw.org/). See also *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11.
[8] See e.g. *Manchester City Council v Pinnock* [2010] UKSC 45.
[9] *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36.
[10] See e.g. *Al-Khawaja and Tahery v UK*, Application nos. 26766/05 and 22228/06 [GC], Judgment of 15 December 2011 (responding to the judgment in *R v Horncastle* [2009] UKSC 14). See also *Hutchinson v UK*, App. no. 57592/08, Judgment of 17 January 2017, [GC]. For commentary, see N. Bratza, 'The Relationship Between the UK Courts and Strasbourg' (2011) *European Human Rights Law Review* 505–12; M. Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) *International and Comparative Law Quarterly* 557–84.
[11] *Rabone v Pennine Care NHS Foundation* [2012] UKSC 2.
[12] See Written Evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke, submitted to the Joint Committee on Human Rights, 17th February 2021, (JCHR/HRA0011), available at https://committees.parliament.uk/writtenevidence/22906/pdf/.

precedents within a common law system.[13] Some seventeen years after *Ullah*, and twelve years after the Supreme Court first explicitly refrained from applying a judgment of the Strasbourg Court in *R v Horncastle*, this approach to s. 2 HRA and to the Strasbourg/UK courts relationship more generally seems now to be well-established in the case-law.

Ss. 3-4 HRA (Theme Two)

14. The relationship between s. 3 and s. 4 of the Act also caused some initial controversy. s. 3 HRA requires the courts to adjust their standard approach to interpreting statutes, by giving legislation a rights-friendly interpretation where 'possible'. However, in contrast to s. 2 HRA, the text of s. 3 HRA provides no real guidance as to how far the courts can stretch the meaning of a legislative text so as to achieve a rights-compliant interpretation. An excessively cautious approach in this respect risks unduly narrowing the scope of legal rights protection on offer under the HRA. However, if judges go too far in re-writing legislation, they risk trespassing on the domain of elected legislators.[14]

15. This potentially unstable dynamic generated some tensions in the HRA case-law. In the early case of *R v A (No 2)*,[15] the House of Lords essentially read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make it possible for evidence to be introduced as to the previous sexual history between the defendant and the victim in sexual offence trials where necessary to ensure compliance with the accused's right to a fair trial under Article 6 ECHR. Lord Steyn argued that it may be necessary under s. 3 to 'adopt an interpretation which linguistically may appear strained' and that a declaration of incompatability was a 'measure of last resort'.[16] In contrast, in the subsequent case of *In re S (Minors)*,[17] Lord Nicholls stated that 'a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.' [18]

16. Subsequently, in *Ghaidan v Godin-Mendoza*, the House of Lords interpreted the word 'spouse' in the Rent Act 1977 to include unmarried homosexual partners. Lord Steyn emphasized that s. 3 required the courts to adopt a 'broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved'.[19] But Lord Nicholls was a little more restrained in his analysis of the scope of s. 3:

[13] [2009] UKSC 14.
[14] I. Leigh and R. Masterman, *Making Rights Real: the Human Rights Act in its First Decade* (Oxford: Hart, 2008), Ch. 5.
[15] [2001] UKHL 25.
[16] Ibid, [12]–[13].
[17] *In Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10.
[18] Ibid. [39].
[19] *Ghaidan v Mendoza* [2004] UKHL 30, [41].

> [T]he mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under s. 3 impossible. Section 3 enables language to be interpreted restrictively or expansively … [However] the meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'.[20]

17. Following on from this, Lord Bingham in *Sheldrake v Director of Public Prosecutions* took the view that s. 3 should not be used to read legislation in a manner which 'would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation'.[21]

18. This general approach seems to have taken a firm root in the jurisprudence of the UK courts. In my view, much of the case-law over the last decade has been characterized by a certain degree of caution in the application of s. 3 HRA. The majority of the Supreme Court in *GC v The Commissioner of Police of the Metropolis* confirmed that, if a rights-friendly s. 3 interpretation of legislation was not incompatible with the presumed intention of Parliament in enacting the relevant statute or its text, then only 'exceptionally cogent' factors would justify a refusal to apply such an interpretation.[22] However, the initial 'gung ho' approach adopted in *R v A,* which attracted sharp political and academic criticism at the time, has largely fallen by the wayside.[23] S. 3 interpretation remains a crucially important tool in the HRA judicial arsenal. However, initial assumptions that s. 4 declarations of incompatibility would be rare beasts have proved to be unfounded.

19. The relationship between s. 3 and s. 4 HRA is inevitably going to be fluid. One person's illegitimate stretching of statutory language is another person's clear application of Lord Bingham's cautious approach in *Sheldrake*. However, it is striking that there has been little recent controversy about the application of s. 3 HRA – indicating perhaps that a more stable, sustainable and cautious approach is now followed by the UK courts in applying s. 3 HRA than *R v A* first indicated would be the case.

The Ongoing Debate about the HRA

[20] Ibid. [32]–[33].
[21] [2004] UKHL 43, [28].
[22] [2011] UKSC 21, [56] *per* Lord Phillips.
[23] I note from the 'precedent map' provided in respect of *R v A* by Westlaw that citation of this case as an authoritative precedent in relation to the application of s. 3 HRA has sharply dropped off throughout the 2010s. The last case where it was not directly applicable as controlling Supreme Court authority, i.e. outside the specific context of criminal evidence, was *Thomas v Bridgend CBC* [2011] EWCA Civ 862. Furthermore, anecdotally, several leading barristers practicing before the superior courts and specialising in HRA cases have indicated to me that they no longer cite *R v A as* an authoritative precedent in respect of the s. 3 interpretative obligation.

20. In general, I would thus take the view that the HRA statutory mechanism is being applied consistently with the general scheme of the Act – and that the main structural features of the HRA case-law of the UK courts are stable and relatively well-established. The same applies to much of the case-law relating to the substantive protection of rights under the Act. Indeed, in contrast to the uncertain state of much of common law judicial review, where for example there is repeated judicial disagreement as to whether proportionality review should be applied,[24] the primary features of the HRA case-law can be regarded as broadly settled.[25]

21. Of course, this has not stopped the HRA from being the subject of regular political criticism and calls for repeal and/or amendment. However, when it comes to the actual application of the Act, it is striking how little controversy has been generated by specific HRA judgments – or by the working of the HRA mechanism itself.

22. Thus, in his ground-breaking work analysing the parliamentary reception of s. 4 declarations of incompatibility, published in 2015, my colleague Jeff King noted that Parliament has responded positively to the overwhelming majority of such declarations, albeit not always promptly.[26] The only significant exception to that trend, namely the s. 4 declaration issued in respect of prisoner voting in *Smith v Scott* (applying the Strasbourg judgment of *Hirst v UK*),[27] was an exceptional case in several different ways.[28] King has also noted that parliamentarians do not appear to consider themselves bound to give effect to such declarations, though they tend to assume that considerable weight should be given to judicial determinations of the existence of an incompatibility between legislation and Convention rights.

23. Similarly, Professor Alison Young has also noted that, in her view, 'dialogue' between the courts and Parliament within the framework of the HRA is proceeding well.[29] Tomlinson et al have recently highlighted that it is rare for even statutory instruments to be struck down under s. 6 HRA.[30] They have also emphasising the existence of a form of judicial dialogue in that context, citing for example how the Supreme Court applied its remedial powers after making a finding of a breach of Article 14 ECHR in the case of *Tigere*.[31]

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[24] See e.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19
[25] O'Cinneide, 'Human Rights and the UK Constitution', n. 2 above.
[26] J. King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act', in H. Hooper, M. Hunt and P. Yowell, (eds.) *Parliaments and Human Rights* (Hart, 2015), 165-192.
[27] *Smith v Scott* [2007] SC 345; *Hirst v UK (No 2)* (2006) 42 EHRR 41.
[28] Ibid.
[29] A.L. Young, 'Is Dialogue Working under the Human Rights Act 1998?' [2011] *Public Law* 773; A. L. Young, *Democratic Dialogue and the Constitution* (OUP, 2017).
[30] They have identified only 14 such cases over the last seven years, despite the ongoing flood of statutory instruments being issued by ministers. See J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', *U.K. Const. L. Blog* (22nd Feb. 2021) (available at https://ukconstitutionallaw.org/))
[31] *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57. See also *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618.

24. None of this by itself will answer critics of the HRA who are concerned that it over-extends judicial power, or gives too much influence to the Strasbourg Court (even if mediated by how s. 2 HRA has been applied in the case-law). However, in relation to this wider debate, there are several additional points about the general functioning of the HRA that perhaps need to be taken into account.

25. First of all, it is striking how many HRA findings of a breach or non-conformity with Convention rights have concerned the rights of minority groups, in particular (i) non-voters such as immigrants, asylum seekers, prisoners and children; and (ii) marginalised or vulnerable social groups such as carers, persons with disabilities, specific categories of social welfare recipients.[32] This inevitably complicates claims that the HRA is inherently anti-democratic, or represents a trespass on the domain of politics: many of the beneficiaries of the Act are those least able to conventionally access the 'normal' domain of political clash and contestation.

26. Secondly, many successful HRA claims have involved issues that were not the subject of any sustained political debate or parliamentary scrutiny. King suggests that 37% of all declarations of incompatibility issued as of 2015 concerned statutes that were not the subject of any sustained legislative focus,[33] while Tomlinson et al have highlighted how many HRA judgments relating to the interpretation of statutory instruments have concerned secondary legislation that was not the subject of any meaningful parliamentary scrutiny.[34]

27. Thirdly, the HRA jurisprudence has been developing for twenty years, and now forms an integral part of the precedent framework for multiple different areas of law - including in particular the legal framework governing the rights of groups such as mentally ill persons, children in care, persons with severe mental and physical disabilities, and so on. In many areas, this HRA jurisprudence has brought greater conceptual clarity than the fuzzy common law standards that previously applied.[35]

28. Fourthly, a well-established dialogic relationship has been established between the UK courts and the European Court of Human Rights – while the UK record before the Strasbourg has notably improved over the last few decades. Since 2017, the number of applications against the UK has been the lowest of all ECHR member states, on a pro rata basis. Furthermore, in 2020, the UK only lost one case before the Strasbourg Court.[36]

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[32] King notes that a 'substantial majority' of HRA claimants whose cases end with the issuing of a declaration of incompatibility are from 'marginalised groups that do not enjoy favourable representation in Parliament': see King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act', 178. See also my evidence submitted to this review in relation to equality and non-discrimination rights, as part of the composite submission prepared by Human Rights in Action.

[33] Ibid.

[34] Tomlinson et al, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?, n. 30 above.

[35] This is true for example of equality jurisprudence more generally: for the limits of the common law in this regard, see C. O'Cinneide, 'Equality: A Core Common Law Principle – Or "Mere Rationality"', in M. Elliott and K. Hughes (eds.), *Common Law Constitutional Rights* (Hart, 2020), 167–192.

[36] Evidence of Judges Spano and Eicke, cited above at n. 12.

29. All of which suggests that claims that the HRA opens the floodgates for judicial intervention into the political sphere, or allows judges to second guess political judgments, or generates substantial legal uncertainty, or makes Strasbourg dominant over UK law should be treated with a degree of caution. Furthermore, there is a risk in changing the existing structure of the Act: it may destabilise existing areas of the law, and the UK/Strasbourg relationship, in ways that may have negative consequences – not least through generating legal uncertainty about the status of existing HRA or ECHR jurisprudence, or existing established judicial interpretation of statutes or statutory instruments.

30. A final general point should also be made about the HRA. It institutionalises core commitments set out in the Belfast Agreement relating to peace and governance in Northern Ireland – namely (i) the undertaking in para. 2 of the 'Rights. Safeguards and Equality of Opportunity' section of the Agreement on the part of the UK government to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention'; and (ii) the recognition in para. 5 of Strand One of the Agreement on devolved institution that the ECHR is an essential safeguard in this context. Any proposed reform to the HRA needs to take this dimension into account, in particular the commitment to incorporate the Convention and provide remedies for its breach.

Comments on Specific Proposals

31. When it comes to discussing reform of the HRA, there is always a danger of succumbing to kneejerk resistance to any interference with existing UK human rights law – or automatically invoking the 'principle of unripe time' to justify terminating the conversation. However, bearing the general comments made above about the current functioning of the HRA, it seems to me that many of the specific potential reform proposals that the Review is seeking comments on suffer from a combination of faults. To start with, some are solutions to problems that may in fact not exist. Furthermore, they risk generating legal uncertainty, and adding layers of unnecessary complexity. In what follows, I will respond briefly to some of these proposals (set out in italics).

Theme One – The UK Courts/ ECtHR Relationship

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

32. As set out above, the current relationship between UK courts and the Strasbourg Court, as framed by s. 2 HRA, would appear to work well – and to rest on a sound principled footing.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

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

33. As discussed above, there is now consistent case-law on how to apply s. 2 HRA. Given the development of this jurisprudence, and the way it has shaped HRA case-law over the last two decades, an amendment of s. 2 HRA risks generating legal uncertainty. For example, if the 'take into account' obligation is removed from the face of the Act, or replaced with an alternative form of words, then might this put a question mark over existing case-law precedents based on the existing approach?

34. Furthermore, UK courts also take ECHR jurisprudence into account in other contexts, e.g. in applying common law rights, or retained EU law. If the current wording of s. 2 HRA is altered, this might create odd inconsistencies between the extent to which Strasbourg jurisprudence is factored into the development of common law or retained EU law standards, and its influence over 'Convention rights' as incorporated under the HRA.

35. There is also the danger that altering the s. 2 HRA 'take into account' requirement would open up unnecessary inconsistencies between Strasbourg standards and UK law, eroding dialogue between UK courts and the ECtHR and encouraging more applicants to bring cases to Strasbourg. Any perceived dilution of the status of Strasbourg judgments in the UK might also weaken the ECHR mechanisms more generally across Europe – which is something best avoided.

36. This is an area where retention of the status quo would, frankly, seem like the obvious option. The situation might be difficult if the 'mirror principle' was applied inflexibly by the UK courts – but this is not the case, and has not been the case for over a decade.

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

37. I have not discussed this element of the HRA case-law in detail above. Sufficient to say, I regard the analysis of the 'margin of appreciation' issue set out by Lord Hoffmann in *In re P*[37] – and applied in later cases[38] - to be broadly correct. Any change to the existing situation has the potential to generate arid legal argumentation about the exact limits of the margin of appreciation. If the UK courts go too far for Parliament's tastes in developing HRA case-law within an area falling within the Strasbourg margin – as some have contended about e.g. the Supreme Court judgment

[37] *In re P and others* (AP) (Appellants) (Northern Ireland) [2008] UKHL 38, [32]-[38].
[38] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27.

in *Northern Ireland Human Rights Commission* case - then Parliament can always legislate to reverse those judgments.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

38. I lack the expertise to make suggestions about how the UK courts and the ECtHR could develop a closer dialogue, or indeed how the Strasbourg institutions more generally could work closer with all the different branches of government in the UK. My sense is that the current framework works well from a dialogue perspective, and that is not easy to identify obvious aspects that should be altered.

Theme Two – The Impact of the HRA on Separation of Powers

We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

39. The question of whether the courts have been 'unduly drawn into matters of policy' is a perennial issue across every aspect of public law – and indeed in multiple other areas of law. I would just draw the Panel's attention to the section of my General Comments above entitled 'The Ongoing Debate About the HRA', and in particular the remarks made there about the interesting lack of controversy about particular HRA judgments (as distinct from the idea of the HRA in general).

Specifically, we would welcome views on the detailed questions in our ToR:

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

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

40. *R v A* was arguably an instance of s. 3 HRA over-reach. However, as discussed above, it is generally not regarded as an authoritative precedent, and the approach of the UK courts to s. 3 has become much more cautious since then. Given that (i) *R v A* is twenty years old, and has been superseded by later precedents, and that (ii) it is difficult to identify obvious instances of s. 3 HRA over-reach since then, the case for amending or repealing s. 3 HRA would not appear to be particularly pressing.

41. Furthermore, it should be noted that it is not clear whether interpretation under s. 3 HRA differs significantly from the common law presumption set out in cases like *Simms* that legislation should be interpreted as not permitting an unjustified interference with common law rights, unless Parliament has expressly or by necessary implication provided for this.[39] Nor is it clear to what extent s. 3 HRA interpretation differs from the strong requirement to read national legislation so as to conform with the requirements of EU law, where applicable[40] – which presumably still applies to the extent it is carried over as part of post-Brexit retained EU law. Furthermore, just to add another dimension to the picture, there is the common law presumption that ambiguous statutory provisions should be read subject to the old common law presumption that parliament did not intend to breach the UK's treaty commitments.[41] This presumption would of course apply to the ECHR.

42. So, in other words, if s 3 HRA was to be substantially amended or repealed, then all these other interpretative presumptions would remain in play. Claimant lawyers would inevitably start to invoke them as a substitute for the s. 3 approach, in situations where they were potentially applicable. As a result, an amendment or repeal of S. 3 HR would be likely just to add to legal uncertainty, generate new legal distinctions, and complicate the job of courts. This would come on top of the issue of what to do with existing case-law where statutes were read subject to s. 3 HRA, and rights and expectations established thereby. (Discussed below.)

43. All in all, repeal of s. 3 HRA strikes me as something of a fool's errand. Perhaps its only upside would be to generate more revenue for the Bar. (Here, as elsewhere, it is important to remember that Parliament can always legislate to reverse a s. 3 HRA interpretation of which it disapproves – which would be the simplest solution to any interpretative over-reach.)

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

44. These two questions, taken together, further illustrate the minefield potentially opened up by a s. 3 HRA repeal. If this highly quixotic project were to be embarked upon, then there would be a pressing need for clarity as to which legislation would be affected – and in particular whether it would have retrospective effect. If it is only applied prospectively, then the vast majority of existing legislation would obviously remain subject to the former provisions of s. 3 HRA – which would limit the effect of reform. If applied retrospectively, then repeal of s. 3 HRA would have the potential to cause considerable disruption and legal uncertainty – including to private parties.[42]

[39] *R v Home Secretary, Ex parte Simms* [2000] 2 AC 115.
[40] Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 ECR 1891.
[41] *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL); *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.
[42] For example, the type of life tenancy involved in *Ghaidan v Mendoza* might be affected – with potentially very disruptive consequences.

45. It might be possible to preserve existing s. 3 interpretations. However it is not always clear when the courts have interpreted legislation in line with the specific requirements of s. 3 HRA, as distinct from applying the above-mentioned presumptions of interpretation in conformity with common law rights and international treaty commitments - or indeed applying a standard purposive approach to statutory interpretation. In other words, not every rights-friendly interpretation has been clearly branded as an application of the extended interpretative reach permitted by s. 3 HRA. By extension, this means it may be difficult to identify and 'rescue' s.3 interpretations for the purposes of preserving legal certainty, if s. 3 HRA if amended or repealed.

46. More generally, the legal certainty issues that would be generated by a s. 3 HRA amendment or repeal are formidable. Before embarking on this legal magical mystery tour, it may be worth considering whether the existing state of ss. 3-4 HRA jurisprudence really justifies such a step – especially if the target of such a measure is the type of over-extended interpretative approach applied in *R v A*, which however is not the approach currently adopted by the UK courts – or as been for the best part of two decades. (See my comments on this at ftn. 23 above.)

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

47. I would have four concerns with this proposal.

48. First of all, it would present individual claimants with an additional legal barrier to overcome before succeeding in their HRA claim. Even if they established the existence of breach of Convention rights, they would be required to circumvent arguments that individual relief should be denied in their case on the basis that the court should not use its s. 3 HRA powers and instead issue a declaration of incompatibility (even if the s. 3 interpretative option was open to the court). This could become a substantial obstacle to individuals vindicating their rights – and act as a disincentive to claimants bringing claims, even in situations where their rights were being breached. In general, it could considerably weaken the scheme of the HRA.

49. Secondly, such a proposal would encourage attempts by claimant lawyers to circumvent the limitation it would impose on s. 3 interpretation by invoking the other interpretative presumptions discussed above. (The presumption of no interference with common law rights; no breach of retained EU law; no breach of international obligations). This would add further complexity to the case-law.

50. Thirdly, it would risk opening up new discordance between national law and Strasbourg standards. King has noted that Parliament is often slow to respond to

declarations of incompatibility, even ones that are not politically controversial.[43] So a denial of otherwise available s. 3 relief pending Parliamentary resolution risks perpetuating ongoing situations of non-conformity with the ECHR – which will encourage more claimants to go to Strasbourg seeking relief.

51. Fourthly and finally, it would load more responsibilities on Parliament, which as King notes often struggles to engage meaningfully with existing declarations of incompatibility as things currently stand.[44] In practice, this proposal might end up granting wide discretion to the executive to determine when remedial measures for established Convention breaches would be discussed by Parliament – effectively giving Ministers the power to exercise *de facto* control over how findings of Convention breaches are handled. This seems to me to generate obvious rule of law concerns, and to have the potential again to dilute rights protection in the UK.

52. Given such concerns, I would again argue that tinkering with the ss. 3-4 HRA mechanism should only be done where clear defects in its functioning can be identified – which I am not convinced has been done.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

53. I am not sure what exactly is contemplated by this proposal. If the idea is that HRA remedies should be limited in respect of measures introduced on foot of derogation orders, I would highlight the concerns about (i) generating discordance with Strasbourg standards and (ii) conferring wide remedial discretion on Ministers, discussed immediately above. The derogation mechanism itself acts to insulate government responses t emergencies to some extent from judicial challenge under the HRA: additional insulation at the remedial stage would not appear to be warranted as well.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

54. In my general comments on the functioning of the Act, I referred to the work of Tomlinson et al on the Act's impact on delegated legislation.[45] Given their authoritative research findings, I see no real need for tinkering with the HRA mechanism in this area.

[43] King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act', in H. Hooper, M. Hunt and P. Yowell, (eds.) *Parliaments and Human Rights* (Hart, 2015), 165-192.
[44] Ibid.
[45] See J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021) (available at https://ukconstitutionallaw.org/)).

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

55. I lack particular expertise in this area, so will leave detailed commentary on this point to others. I would however note two points: (i) ECHR jurisprudence on this point is evolving,[46] so it might be prudent to avoid unnecessary legislative reforms in this area; and (ii) any legislative reform that formally limits the reach of the HRA in this regard risks setting up an overt discordance with Strasbourg standards, which should ideally be avoided.

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

56. Greater parliamentary scrutiny of remedial orders would be welcome, and should be encouraged. King's work discusses some details of this issue.[47] In my view, a key issue is the allocation of parliamentary time in the Commons and Lords to debate such orders.

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[46] See App. no. 38263/08, *Georgia v Russia (II*), Judgment of 21 January 2021.
[47] King, n. 43 above.