Submission to the Independent Human Rights Act Review

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1. This is my submission to the Independent Human Rights Act Review (IRAL) on Theme One of the Review, and more specifically the margin of appreciation as approached by UK courts and tribunals, but also touches on a key aspect of Theme Two, namely whether the HRA has led to the Courts being too involved in policy issues. I make this submission in a personal capacity.

The Domestic Courts and the Margin of Appreciation

1. Strasbourg has adopted a sensible, or, at least, politic approach of using the margin of appreciation to avoid ruling on sensitive ethical, moral, and social issues. Although the ECtHR's application of the margin of appreciation can be inconsistent in practice,[1] the issue for this Review to consider is whether the domestic courts have appropriately distributed this sovereignty dividend. Three cases decided by the UK Supreme Court and the Appellate Committee are instructive in that regard.

2. In *Re G*,[2] the House of Lords held that even if a matter fell within the UK's margin of appreciation the domestic courts could still hold that it is not compatible with the Convention rights. Baroness Hale said: 'if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment'.[3] Lord Hoffmann left things slightly more open, saying that it is for the UK courts 'to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch'.[4] However, he did not provide any guidance on when it would not go to the legislative branch.

3. *Re G* concerned a law in Northern Ireland which provided that only married couples could adopt. It was argued by an unmarried couple that this was discriminatory. Lord Hoffmann accepted that 'The state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by

[1] For an empirical account, see Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 Journal of International Dispute Settlement 199.
[2] [2008] UKHL 38
[3] [2008] UKHL 38 at [120]
[4] [2008] UKHL 38 at [37]

parents who are married to each other than by those who are not.'[5] but held that it was irrational to adopt a bright-line rule without exceptions.[6] As he put it 'it seems to me to be based upon a straightforward fallacy, namely, that a reasonable generalisation can be turned into an irrebuttable presumption for individual cases.'[7]

4. In *Nicklinson*[8] the Court was concerned with the prohibition on assisted suicide. This is another issue which falls within the scope of the margin of appreciation. All nine members of the Court agreed that the fact it fell within the margin of appreciation did not mean that the Court had no jurisdiction. However, they disagreed on how to distribute the margin of appreciation domestically. Lords Reed, Sumption, and Hughes concluded that given this was a moral question it would be constitutionally inappropriate for the court to decide this issue and so they should defer to Parliament.[9] As Lord Sumption put it 'The decision cannot fail to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide. This is entirely appropriate if the decision-makers are those who represent the community at large. It is not appropriate for professional judges. The imposition of their personal opinions on matters of this kind would lack all constitutional legitimacy'.[10]

5. Lord Clarke took a slightly more nuanced position. He accepted that the Courts could intervene if Parliament refused to consider the issue but if Parliament considered it then there would be no grounds for the Courts intervening.[11]

6. By contrast Lady Hale, and Lords Kerr, Wilson, Neuberger, and Mance, all thought that it could be legitimate for the courts to decide themselves. Baroness Hale and Lord Kerr decided for themselves in that case and reached the conclusion that the law was not compatible. However, Lords Neuberger, Wilson, and Mance decided to hold fire until after Parliament had considered the issue. But Lords Neuberger and Wilson were clear that the Courts could still find that the law was not compatible if Parliament did not 'satisfactorily'[12] address the issue. Lord Mance, however, was more circumspect and said that Parliament's judgment 'was entitled to considerable weight'.[13]

7. *NIHRC*[14] is the third case in the saga. This concerned Northern Ireland's near total ban on abortion. In *A, B, and C v Ireland*[15] the Strasbourg Court held that a total ban on abortion (with only an exception for the life of the mother) fell within the margin of

[5] [2008] UKHL 38 at [16]
[6] [2008] UKHL 38 at [18]
[7] [2008] UKHL 38 at [20]
[8] *Nicklinson v Ministry of Justice* [2014] UKSC 38
[9] [2014] UKSC 38 at [230]-[233] (Lord Sumption), [267] (Lord Hughes), [296]-[298] (Lord Reed).
[10] [2014] UKSC 38 at [230]
[11] [2014] UKSC 38 at [290].
[12] [2014] UKSC 38 at [118] (Lord Neuberger), [197] (Lord Wilson).
[13] [2014] UKSC 38 at [189]
[14] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27
[15] [2010] ECHR 2032

appreciation. Nonetheless, a majority of the UK Supreme Court concluded that it could itself legitimately decide the compatibility issues: namely whether it was compatible with Article 8 that there were no exceptions for cases of rape, incest, and foetal abnormalities.

8. But, as Lords Reed and Lloyd-Jones put it, dissenting from that position: 'the court is invited, as an abstract exercise, to define categories of pregnancy in respect of which a termination must be legally available if the legislation is to be compatible with article 8. That approach requires the court to address a number of difficult issues: for example, whether to treat some categories of pregnancy differently from other pregnancies at all; whether, if so, to draw the line at foetuses with fatal abnormalities which will prevent their surviving until birth or for more than a short time after birth, or to include foetuses with serious but non-fatal abnormalities; whether to differentiate between healthy foetuses conceived as the result of sexual offences and other healthy foetuses; and whether, if so, to draw the line at foetuses conceived as the result of offences which were non-consensual, or to include those conceived as the result of consensual offences. These are highly sensitive and contentious questions of moral judgement, on which views will vary from person to person, and from judge to judge, as is illustrated by the different views expressed in the present case. They are pre-eminently matters to be settled by democratically elected and accountable institutions'.[16]

9. As they put it, the legitimacy of the courts is undermined when they consider those issues: 'At national level, it is equally important that the courts should respect the importance of political accountability for decisions on controversial questions of social and ethical policy. The Human Rights Act and the devolution statutes have altered the powers of the courts, but they have not altered the inherent limitations of court proceedings as a means of determining issues of social and ethical policy. Nor have they diminished the inappropriateness, and the dangers for the courts themselves, of highly contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions.'[17]

10. And yet that is what the domestic courts have done in this case. Looking back, such an outcome is not wholly surprising. The Human Rights Act did not provide any guidance on how the courts should approach issues falling within the margin of appreciation and neither did the first case that they considered (*Re G*), nor did the subsequent cases (including *Nicklinson* and *NIHRC*). There is still is no clear criteria for an intervention by the courts would be appropriate.

[16] [2018] UKSC 27 at [361]-[362].
[17] [2018] UKSC 27 at [344]

11. The ability of the domestic courts to make such determination makes even staunch defenders of the Human Rights Act uneasy. For example, Dominic Grieve QC recently told the Joint Committee on Human Rights that:

> The Court of Human Rights had said in the Pretty case that this was a matter for national legislatures because of the sensitivity of the moral and ethical issues involved, and when the harrowing case of Nicklinson came before them they declined to act but read the riot act to Parliament to say that Parliament should jolly well do something about this pretty quickly, because otherwise they might well come back and do it themselves.
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> I confess that left me slightly uneasy, because by its very nature the question is whether you should allow assisted suicide or not. Admittedly, there was already guidance and guidelines as to whether people were ever prosecuted for this. I had to grapple with this when I was Attorney-General, along with the then DPP, and they were difficult issues, but I thought we had resolved them quite well.
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> I did feel that if ever there was an issue to be decided by legislature it is whether it is permissible to assist somebody to commit suicide. **It goes to the very heart of people's moral and ethical beliefs, and it probably ought to be resolved within the democratic medium of debate.** As you will be aware, some European countries now allow it—indeed, some countries now essentially allow euthanasia—and there are other countries that do not and will not. I thought afterwards that I would not have minded if the court had simply flagged it up and said that it was a matter to which Parliament might wish to come back.
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> **Some members of the court [in *Nicklinson*] had a pretty clear view of what Parliament ought to do, and I thought that on that occasion they had probably gone further than I think they should have.** However, that is the only case I can think of where I felt that about a Human Rights Act issue, as opposed to feeling very clear about where the court was coming from and why it had done something, which illustrates that I do not think this is a serious problem.[18] (Emphasis added).

[18] Joint Committee on Human Rights Oral evidence (Virtual Proceeding): The Government's Independent Human Rights Act Review, HC 1161, 27 January 2021, available at: https://committees.parliament.uk/oralevidence/1603/html/ Q7.

12. As Grieve points out, in cases of assisted suicide, it is true that the courts have pulled back from this position, at least for now,[19] But, as *NIHRC* shows, it is an issue which continues. It might be tempting to say that this is an issue which should be left the judges to resolve: after all, they pulled back in the case of assisted suicide[20] and of the seven justices who subsequently decided *NIHRC* (a majority of whom did *not* wish to pull back) only the two dissenters on incompatibility are still sitting. However, this would be a mistake. It has been 20 years since the HRA was enacted and the courts still have not developed a test (let alone a settled test) to decide when the margin of appreciation should go to Parliament and when it should go to the courts. There is no reason to think that they would now reach a settled position (let alone a satisfactory settled position). Furthermore, so long as this remains the position it invites litigation from groups which want to use the courts to change matters of social policy, and given how polarised those issues are whichever way the courts decide it runs the risk of losing legitimacy in the eyes of a section of the public. Parliament should therefore legislate to provide that, at the very least, in matters involving social and ethical policy which fall within the margin of appreciation the courts should not be able to declare the law to be incompatible.

The Costs of Involving the Courts

13. Sir Patrick Elias explained the consequences of the HRA, and in particular the fact that judges are required to conduct proportionality assessments themselves with a particular emphasis on the fourth limb (whether a fair balance is drawn), as follows:

> Moreover the exercise involves comparing values which are not truly commensurable — apples and pears. It confers upon the judges a potentially very wide power to interfere with decisions of the executive. How far they will choose to exercise that power will vary from judge to judge. **It depends on a number of factors, not least the judge's perception of the judicial role and its place in democracy and, it has to be admitted, his or her ideological leanings.**
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> Whatever the formal power conferred upon the courts by the Human Rights Act, no legislation can alter the fundamental institutional limitations of the adjudicative process or its weakness compared with the advantages enjoyed by the legislature. Moreover, judges must exercise a certain humility and be acutely sensitive to the dangers of making decisions which are better left to those who are politically accountable. **In particular, in my judgment the courts should be particularly reluctant to make decisions which interfere with the**

[19] See *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431 and *R (Lamb) v Secretary of State for Justice* [2019] EWHC 3606 (Admin).

[20] Although not entirely. When the Supreme Court refused permission to *Conway* [2018] EWCA Civ 1431 it left open the question of whether it would be appropriate for a Court to interfere: https://www.supremecourt.uk/docs/r-on-the-application-of-conway-v-secretary-of-state-for-justice-court-order.pdf

> **government assessment of national security, or which relate to issues of macro-economic policy, or contentious principles of social policy**.
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> They do not always do so. Professor Finnis, in my view justifiably, criticises the majority decision in Nicklinson for failing to respect the proper boundaries between the courts and Parliament. The issue was whether or not the law which forbids assisting someone to die should be a criminal offence. The majority came close to granting a declaration of incompatibility on the grounds that the particular provision in question, section 2 of the Suicide Act, infringed article 8, and Lady Hale and Lord Kerr would have done so. This was notwithstanding the fact that the issue had been debated on a number of occasions in Parliament who have been unwilling to repeal the section. Many people consider, rightly or wrongly, that society will be less cohesive and individuals subjected to undue pressure to end their lives, if this is permitted. They are alive and sympathetic to the genuinely desperate circumstances in which individuals can find themselves. They may be right or they may be wrong, but what gives judges any special insight to say that they are wrong? I would accept that the purpose of human rights law is sometimes to protect minorities from abuse of majority power. **But where a highly sensitive ethical issue has been the subject of heated and controversial political discussion, the courts must be particularly wary of resolving the debate and taking it out of the hands of the representatives of the people.**[21]

14. Sir Patrick Elias concludes with a dire warning: 'The HRA has in turn increased the power of unelected judges but it should not lead to government by judges. The question is whether in the exercise of those powers the judges have a sufficiently clear grasp of the limitations of the judicial process and of the importance of political accountability. Inevitably different judges will have different views about how they should approach human rights cases. An analysis of Supreme Court cases demonstrates that some are much more willing to use human rights arguments as a justification for attacking government power than others. My concern is that if the judges are perceived to be entering into the political arena, this will inevitably lead to a growing chorus for judges to be subject to political viewpoint-based scrutiny before appointment. That could lead to a politicized system of judicial appointments as currently exists in the United States. That would transform the very nature of the courts and even the judicial process itself. It is not a development I would wish to see.'[22]

15. This Review is predicated on continued membership of the ECHR and continued existence of the Human Rights Act. Therefore, it is inevitable that domestic courts will

[21] Sir Patrick Elias, 'Comment' in *Judicial Power and the Balance of the Constitution* (Policy Exchange, 2018), p 77. Available at: http://judicialpowerproject.org.uk/wp-content/uploads/2018/01/Judicial-Power-and-the-Balance-of-Our-Constitution.pdf

[22] Sir Patrick Elias, 'Comment' in *Judicial Power and the Balance of the Constitution* (Policy Exchange, 2018), p 78.

have greater powers to assess the merits of decisions of the executive and Parliament. But the extent to which the domestic courts can do this, within the bounds of the ECHR, is not set out in the Human Rights Act. The courts, therefore, have had to figure out for themselves where the line is and how they should act within that line. However, it is clear that different judges approach this differently. As the Lord Chief Justice put it: 'All judges called upon to decide cases that occupy the intersection between judicial power and that of Parliament and the executive must work out for themselves where in the spectrum of judicial activism they lie. That such a spectrum exists cannot seriously be doubted. One need look no further than the nine judge decision of the Supreme Court in *Nicklinson* on assisted dying… to see its manifestation.'[23]

16. This situation is not ideal. As Sir Patrick Elias points out, there is a real risk that it could lead to judges being appointed because of their political views. The better response would be for Parliament to set out clearly where the limit is and not to give judges any more power than they absolutely need to have in order for the UK to remain ECHR compliant. As Sir Patrick, Lord Reed, and Lord Sumption have pointed out, it is both in the interest of democracy and in the interest of maintaining the legitimacy of the courts, that judges should not be able to rule on social and ethical issues.

17. It is true that there are some cases where Strasbourg affords a margin of appreciation on the basis that the national courts have conducted a very fact-specific proportionality assessment. For example, in *MGN v United Kingdom*[24] the House of Lords had conducted a very fact specific balancing of Articles 8 and 10 and the Strasbourg Court held that 'having regard to the margin of appreciation accorded to decisions of national courts in this context, the Court would require strong reasons to substitute its view for that of the final decision of the House of Lords'[25]

18. In those cases, it is arguable that a condition precedent of the availability of the margin is the fact that a court has conducted the balancing itself. However, those cases are miles away from instances where broad social and ethical judgments are made.[26] Therefore, in those instances the UK would not lose its margin of appreciation if the UK courts were prevented from assessing compatibility themselves. Hence, this proposed change could be implemented in full compatibility with the ECHR.

19. A further, related, issue is the increased use by the domestic courts of the fourth limb of the proportionality analysis under which courts ask themselves whether a fair balance has been struck between the rights and interests at play. As Lord Sales, writing extra-judicially, has pointed out 'the fourth limb of the proportionality template (what has

[23] Lord Burnett of Maldon, 'Foreword' in *Judicial Power and the Balance of the Constitution* (Policy Exchange, 2018), pp 8-9.
[24] [2011] ECHR 66
[25] [2011] ECHR 66 at [150].
[26] See the discussion about the various axes on which Strasbourg affords the margin of appreciation: P Sales, 'Proportionality and the Margin of Appreciation: Strasbourg and London', *General Principles of Law : European and Comparative Perspectives* (Hart Publishing 2017) 184–189

been called proportionality in the strict sense) has tended to become the most powerful aspect of the doctrine, in the way it is used by the Supreme Court. This tendency is highlighted by Elias in his extra-judicial discussion of the leading cases of *Lord Carlile of Berriew v Secretary of State for the Home Department*, *Nicklinson* and *R (SG) v Secretary of State for the Home Department*.'[27] One could now add *NIHRC* to that list.

20. Lord Sales points out that the use of this test is problematic: '**It is the part of the test which is least susceptible to rigorous legal-style analysis and most open to application of wide judgments by individual judges about what it is moral or legitimate for a state to do, and also judgments about what it is legitimate for judges to do**. **It is the part of the test where the judges may most clearly be making judgments, which could fairly be described as political**, in areas which have moved well beyond those in which there is any identifiable community consensus, or even an identifiable consensus amongst judges and lawyers regarding the standards to be applied. **This could have negative implications for both democratic principle and rule of law values**, if the judges seek to by-pass democratic decision-making procedures for dealing with fraught and sensitive political and moral disagreements and do so without any identifiable normative consensus to guide them and which would (in the manner explained by Fallon) allow ordinary citizens to know what to expect.'[28]

21. But as Lord Sales points out: 'This emphasis on the fourth limb is something of a recent departure, since it was not originally included in the classic domestic statement of the proportionality principle. It is also questionable whether the emphasis now given to it in the domestic cases finds much direct support in the Strasbourg case law. The ECtHR tends not to isolate the fourth limb in the same way when it applies the proportionality principle, although there are undoubtedly cases in which it has found measures to be disproportionate which can be fitted within this rubric.'[29]

22. It, therefore, seems likely that the United Kingdom could consistently with its obligations limit or, better, excise this fourth part of the proportionality test. Lord Sales, quoting Sir Patrick Elias, points out that the failure of the courts to pull back runs the risk of political appointments to the judiciary.[30]

[27] ibid 191 (internal citations omitted).
[28] ibid 192 (emphasis added).
[29] ibid 191–192 (internal citation omitted).
[30] ibid 192.

Conclusion

23. To conclude, I submit that under the HRA the power of the courts to make compatibility assessments should not be any greater than is strictly required to ensure the UK complies with the ECHR. More concretely, this means that:

    a. When matters fall within the margin of appreciation, domestic courts should not hold the measure is incompatible except if it is cases where Strasbourg affords the margin of appreciation on the condition that it is the domestic courts that carry out the compatibility assessments. In particular, on matters involving broad social and ethical judgements the courts should follow the approach of Lord Reed and defer to Parliament (or the devolved assemblies);
    b. The domestic courts should not use the fourth limb of the proportionality test, except perhaps in the very limited cases where Strasbourg might compel its use.

24. When courts make assessment about matters falling within the margin of appreciation or when they make use of the fourth limb of the proportionality test, they venture into judgements 'which can fairly be described as political.'[31] One suspects that supporters of the status quo are content because judges have generally made those determinations in a political direction which they approve of. For example, in assisted suicide the perception is that there are only two possible outcomes: either the courts defer to Parliament (and so there is a draw) or it holds the law is incompatible (i.e. a win).

25. This is not quite true, as under the approach of the majority in *Nicklinson* and *NIHRC*, a court could conclude that a law legalising assisted suicide does not strike the right balance between Article 2 and Article 8 (and is, therefore, incompatible) or that allowing abortion for Down's Syndrome up to birth (as opposed to the usual 24 weeks limit) is incompatible with the HRA.[32] Supporters of the status quo may think that this a remote possibility as most the judiciary shares their outlook. This is probably true, but it could change. As Judge Pinto De Albuquerque's judgment in *Parrillo v Italy* there are judges who take a more conservative stance.[33] Furthermore, many of the 47 countries of the Council of Europe are quite socially conservative, if they all appointed judges who shared their values the political direction of the Strasbourg would completely change. At the domestic level, the appointment system could end up changing and more conservative judges could be appointed to the apex court. None of this is beyond the realm of the possible.

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[31] ibid.

[32] The High Court recently granted permission for such a JR to proceed. The argument is that the law creates negative attitudes which impact people with Down Syndrome. It is argued that this engages their Article 8 rights and Article 14. https://dontscreenusout.org/press-release-woman-with-downs-syndrome-landmark-case-against-uk-govt-over-discriminatory-abortion-law-to-be-heard-by-high-court/

[33] That is not to say that Judge Pinto De Albuquerque is generally socially conservative, see his dissent in *Hutchinson v United Kingdom* [2017] ECHR 65, but on abortion and embryo research he has taken conservative positions.

26. In any event, even if it gives outcomes which one approves the end does not justify the means. This is about the rule of law (and not the rule of judges), legitimacy, and democracy and, as Lord Reed said, 'the dangers for the courts themselves, of highly contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions.'[34] As the sorry experience of the United States show, courts involving themselves in such issues can lead to the courts being seen (and indeed, becoming) political bodies. This is not a path we should want to go down.

[34] *NIHRC* [2018] UKSC 27 at [344]