Independent Human Rights Act Review 2021

Response to the Call for Evidence

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About the Author

I am an academic constitutional lawyer who has worked in the UK for twenty years, with ten years as a Tutorial Fellow and Professor of Constitutional Law at Oxford. In 2009, I published a book on the Human Rights Act 1998 called *Constitutional Review under the Human Rights Act 1998* (Cambridge University Press, 2009), which provided a detailed analysis of all the leading case-law on sections 2, 3 and 4 HRA.

Since then, I have published articles on emerging developments whilst working on a new book looking at the HRA in the context of the UK's constitution called *The Collaborative Constitution* (Cambridge University Press, forthcoming) which is due to be published towards the end of 2021. In this book, I provide a theoretical, doctrinal and comparative analysis of the leading trends and developments in protecting rights under the HRA, spanning beyond an analysis of the case-law to include a detailed examination of the role of the HRA during policy formation and legislative process. In terms of parliamentary engagement with rights during the legislative process, there is a particular focus on the operation of the Joint Committee on Human Rights (JCHR) which was set up shortly after the HRA came into force.

I have tried to keep my submission brief, with reference to further scholarship which contains more detailed analysis. Any queries related to this submission can be directed to [redacted]

Summary

I welcome this independent review of the HRA 1998 as a valuable opportunity to reflect on the impact and effect of the HRA on UK law over the last twenty years. Having studied all of the caselaw under the Act, as well as examined the political engagement with rights during the policy-making and legislative process, my conclusion is that the HRA 1998 has generally played a valuable and important role in improving the standards of rights-protection in UK law, whilst doing so in a way which respects the important role of government and Parliament in devising policy and enacting legislation in the public interest. **I do not recommend any changes in the current structure and framework.**

The initial purpose of the HRA was to 'bring rights home'[1] in the sense of providing meaningful remedies for rights-violations in UK law, thus obviating the need to spend considerable time, money and energy taking a case to the European Court of Human Rights in Strasbourg. The HRA has fulfilled this purpose. It has allowed the UK courts to adjudicate rights-claims in domestic courts, whilst simultaneously giving litigants an effective remedy in many cases where rights-violations have been found. If the HRA had not been in place, then those litigants would have had to go to Strasbourg to seek redress there. By providing a domestic filtering system for claims based on Convention rights, the HRA has succeeded in preventing a number of adverse rulings in Strasbourg.

During the twenty years whilst the HRA has been on the statute book, there have been some controversial cases which have caused consternation within the government and Parliament. This is to be expected. Occasional controversy or difference of opinion between the branches of government is not necessarily a sign that the system of rights-protection is not working or that it is in crisis. As the former Lord Chief Justice, Lord Bingham observed extra-judicially, in a system respects an independent judiciary, it is both inevitable and even 'desirable that judges should on occasion give decisions that are deeply unwelcome to the powers that be. There are … countries in the world where every judicial decision finds favour with the government, but they are not places where one would want to live'.[2]

Naturally, the flashpoints of controversy and conflict attract intense media coverage and popular interest. However, having completed an in-depth study of political responses to judicial decisionmaking under the HRA as well as an examination of the role of court rulings during the policy-making and legislative process, I conclude that the general, day-to-day political engagement with court rulings on rights is typically marked by an overall ethos of respect and compliance, not affront and defiance. The controversial decisions are the exception, not the rule. Beneath the fireworks of occasional controversy lies an altogether more humdrum, workaday dynamic of mutual respect, forbearance and collaboration.

[1] *Rights Brought Home: The Human Rights Bill,* White Paper Presented to Parliament by the Secretary of State for the Home Department, *October 1997* available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf*

[2] Tom Bingham, *Lives of the Law* (OUP, 2011) 146.

This is not to deny the inevitable, indeed the valuable constructive and creative tensions between the branches of government on matters of rights, as with all matters. Nonetheless, my assessment is that the interactive dynamic between the branches is fundamentally collaborative rather than conflictual in nature and that the delicate and carefully crafted balanced struck in the text of the HRA has helped that collaborative dynamic take hold. Beneath the occasional fireworks of controversy lies a more humdrum but ongoing practice of striving – and often succeeding – in giving effect to court rulings on rights as well as anticipating them ex ante in the policy-formation process.

THEME ONE: The Relationship between UK courts and the European Court of Human Rights

How has the duty to 'take into account' ECtHR jurisprudence been applied in practice? If there any need for amendment of section 2?

1. The duty to 'take into account' Strasbourg jurisprudence under section 2 HRA has been applied in a satisfactory manner. There is no need to amend it. The current injunction to take Strasbourg jurisprudence 'into account' strikes a good balance. Whilst falling short of a requirement to be strictly bound by Strasbourg case-law, it nonetheless requires the domestic courts to consider that jurisprudence carefully and evaluate its significance for the cases which come before them.
2. The requirement to take Strasbourg case-law into account makes good sense, given that the HRA gives domestic effect to the European Convention on Human Rights in domestic law. If the domestic courts took no cognisance of Strasbourg case-law, they would, most likely, diverge widely from the Strasbourg position on many issues. This would not help the UK to honour its international commitments to the European Convention on Human Rights. Nor would it succeed in achieving one of the HRA's main aims, namely, to give litigants an effective remedy for violations of their Convention rights in domestic law. If the domestic courts were frequently out of sync with Strasbourg - finding 'no violation' in cases where Strasbourg would find one - then litigants would end up going to Strasbourg to get redress there. This would undermine one of the main purposes of the HRA which was to provide effective remedies for violations of Convention rights in domestic courts.[3]
3. Therefore, the current wording in section 2 strikes a good balance. It prevents Strasbourg jurisprudence becoming a legal straitjacket which would inhibit domestic courts unduly from developing their own understanding of the Convention rights. But it also enjoins the courts to keep an eye on the Strasbourg case-law, engaging with it in a respectful and constructive fashion.

When taking into account the jurisprudence of the ECtHR, how have the domestic courts approached issues falling within the margin of appreciation? Is any change required?

4. When an issue before the UK courts falls within the Strasbourg margin of appreciation – or is likely to do so - the domestic courts have tended to say that they are not precluded from evaluating the issue themselves.[4] The Strasbourg doctrine of the 'margin of appreciation' simply allows the States party to the Convention some flexibility and latitude in how they regulate the particular issue.[5] Therefore, the domestic courts are entitled to make the decision for themselves as to whether legislation complies with Convention rights, given that the domestic courts are better placed than the international court in Strasbourg to appreciate the local needs, circumstances and overall context in which the legal issue arises.

[3] On Section 2 HRA, see further Kavanagh, *Constitutional Review under the UK Human Rights Act 1998* (CUP, 2009), chapter 6 (hereinafter Kavanagh, *Constitutional Review*).

[4] *In Re G* [2008] UKHL 38; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[5] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation' (2011) 17 *European Law Journal* 80, 119; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, 2012). [6] Kavanagh, *Constitutional Review* (n 4), 149-50, 207-209, 323-324.

5. When the courts assess the issue of Convention-compatibility for themselves, they apply a doctrine of deference and respect which is analogous to, but not identical with, the Strasbourg margin of appreciation.[6] Therefore, even when domestic courts evaluate Convention-compatibility 'beyond the margin', they do not step outside their fundamental constitutional duty to treat the decisions of the democratically elected legislature with comity and respect.
6. For example, the domestic House of Lords has held that Northern Irish legislation prohibiting unmarried (heterosexual) couples from adopting children violated the Convention, even though it was possible that the Strasbourg court might have decided that the Northern Irish prohibition was within the State's margin of appreciation.[6]
7. I see no need to change this situation by amending section 2, or more generally for the courts to change their current position. There will be some circumstances where it is appropriate for the courts to decide that a law violates Convention rights even though the Strasbourg court might allow it under the margin of appreciation. However, the courts adopt a suitably cautious approach to this question, carefully evaluating whether it is appropriate for them to step beyond the margin. In the Northern Irish case concerning adoption, they judged it to be justified. However, there are other cases, such as the *Nicklinson* case[7] on the right to die, where the courts took account of the fact that the issue might lie within Strasbourg's margin of appreciation, treating it as a reason to tread carefully and cautiously before declaring that the Suicide Act 1961 violated the Convention.

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?

8. The current approach to the 'judicial dialogue' between the domestic courts and ECtHR is characterised by an approach based on mutual respect and a concerted effort towards enhanced mutual understanding.
9. One of the central purposes of the HRA was to ensure that rights would be remedied in domestic courts, thus obviating the need for litigants to go to Strasbourg and the Government to defend cases against the UK. But another advantage of having a domestic '*filtering system'* for rights claims is that it can allow the UK courts to make a decision about rights which is closely attuned to domestic circumstances and respectful of Parliament's wishes, whilst simultaneously explaining the particularities of the UK legal system to the court in Strasbourg.
10. There have been a number of important cases where this filtering system has worked to good effect, where the UK Supreme Court has found in favour of the government on issues such as paid political advertising,[8] hearsay evidence,[10] and life sentences,[11] whereupon the Strasbourg court has given a ruling in the UK's favour, partly because they have found the reasoning of the UK Supreme Court to be plausible and convincing. Without that domestic

[6] *In Re G* [2008] UKHL 38.

[7] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[8] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 31. [10] *R v Horncastle* [2009] UKSC 14 [11]; and *Al Khawaja v UK* (2012) 54 EHRR 23 [11] *Hutchinson v UK* (2016) 43 BHRC 667.

filtering system at the highest domestic judicial level, there is a danger that Strasbourg would find against the UK. Therefore, the domestic 'filtering system' provided by having the UK Supreme adjudicate an issue works well. It manifests a constructive 'judicial dialogue' based on mutual learning and reciprocal respect.

11. It is worth noting that the domestic decision on prisoner voting was not heard by the UK Supreme Court, but was instead the subject of a brief judgment in the High Court.[9] Counterfactuals are inherently risky. Nonetheless, I will venture to suggest that if the UK Supreme Court had delivered a full, reasoned judgment defending the UK position on this issue, this would have informed the Strasbourg ruling in *Hirst* in a way which might have headed the subsequent escalation of tension between the UK and the Strasbourg court off at the pass.[10] At the very least, the existence of a closely reasoned and meticulously argued judgment on this issue by a full panel of the UK Supreme Court would have certainly enhanced the Strasbourg court's appreciation of the sensitivities and particularities of this issue within the UK political and legal system. This may have made the Strasbourg court more amenable to considering widening the margin of appreciation on this issue.
12. Finally, one key feature of the Strasbourg jurisprudence is the fact that it gives considerable credence and respect to the parliamentary and governmental engagement with rights during the legislative process, when assessing whether the measure is proportionate.[14] Judge Robert Spano – the current President of the European Court of Human Rights – has described this approach as 'democracy-enhancing'.[11] It is certainly 'democracy-respecting'. In general, if it can be shown that domestic Parliaments and governments have engaged with the rights-issue in a meaningful way, this may lead the court to widen the margin of appreciation in relation to that issue.
13. There are multiple examples of this democracy-respecting approach at Strasbourg which I have documented at length elsewhere.[12] I will just provide two examples here. One prominent example is *Animal Defenders v UK*[17] concerning the ban on paid political advertising, where the Strasbourg court attached 'considerable weight' to the 'exacting and pertinent reviews, by both Parliamentary and judicial bodies, of the regulatory regime governing political broadcasting in the United Kingdom'.[18]
14. In *Friend v UK,*[13] the European Court of Human Rights upheld the proportionality of the Hunting Act 2004, rejecting the argument that the hunting ban violated Convention rights.

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[9] *R (Pearson) v Secretary of State for the Home Department* [2001] HRLR 39.

[10] For an excellent overview and analysis of the various involutions of this saga, see Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 503.

[14] Kavanagh, 'Proportionality and Parliamentary Debates: Exploring some Forbidden Territory' (2014) 34 *Oxford Journal of Legal Studies* 443-479.

[11] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

[12] Kavanagh, 'Proportionality and Parliamentary Debates: Exploring some Forbidden Territory' (2014) 34 OJLS 443-479. The examination of the UK case-law on this issue is at 443-472; the examination of the Strasbourg jurisprudence is at 472-478. See also Alice Donald & Philip Leach, *Parliaments and the European Court of Human Rights* (OUP, 2016), 134-144 and chapter 7; Liora Lazarus & Natasha Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference' in Hunt, Hayley & Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015). [17] *Animal Defenders v UK* (2013) 57 EHRR 21 [18] Ibid [116].

[13] *Friend v UK* (2010) 50 EHRR 51

In doing so, it followed the reasoning of the UK House of Lords decision on that issue (*Countryside Alliance*),[14] giving considerable weight to the fact that

> The legislative measures in question in the present case were very recently introduced after extensive debate by the democratically elected representatives of the state on the social and ethical issues raised by the method of hunting in question.[15]

15. As Judge Spano characterises it, this dimension of the court's jurisprudence exemplifies 'Strasbourg in the Age of Subsidiarity'.[16] It demonstrates the Strasbourg court's awareness that it is a subsidiary, rather than a primary, defender of Convention rights. This emerging practice is part of the constructive dialogue between the UK courts and Strasbourg, where both courts take Parliaments seriously as constitutional actors who can engage with rights during the legislative process.
16. There are striking parallels between the UK and Strasbourg jurisprudence on this judicial approach of considering the level of parliamentary engagement with the proportionality question. It may well be that the developments in the UK case-law have been stimulated by the approach in Strasbourg.[17] This, too, shows that the domestic and Strasbourg courts often work in tandem and in a spirit of mutual respect.

[14] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 [47] Lord Bingham.

[15] *Friend v UK* (2010) 50 EHRR 51 [50].

[16] Ibid.

[17] Kavanagh, 'Proportionality and Parliamentary Debates: Exploring some Forbidden Territory' (2014) 34 *Oxford Journal of Legal Studies* 443-479; Philip Sales, 'The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights' in Mads Andenas & Duncan Fairgrieve (eds) *Tom Bingham and the Transformation of the Law* (OUP 2009) 180.

THEME TWO: The Relationship between Judiciary, Executive and Parliament

Does the HRA draw domestic courts unduly into questions of policy?

17. In many areas of the law concerning such diverse matters as housing, social security, employment conditions, healthcare, crime, immigration, banking and business transactions, the courts are obliged to adjudicate cases which inevitably impinge on questions of policy to some extent. This list includes cases concerning human rights. It is a perennial feature of adjudication - applicable to common law adjudication as much as statutory interpretation – that the courts will make decisions which may have an impact on public policy, sometimes a significant one. The more focused question, then, is whether the HRA has drawn domestic courts 'unduly' or inappropriately into questions of policy?
18. In assessing whether the HRA has had this unduly intrusive effect, or even whether it has led to an 'over-judicialisation' of the policy domain, we must bear in mind that even before the HRA was enacted, the UK courts had always relied on presumptions of statutory interpretation which they used to ensure that when legislation is enacted in general or ambiguous terms, the courts would interpret it in a way which was compatible with common law rights and also the rights contained in the ECHR.[18] Known as the 'principle of legality', this presumption meant that 'in the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended

    to be subject to the basic rights of the individual'.[19] The courts have long used this presumption to render legislation compatible with liberty and rights, often by injecting rights-protective values into a general, vague or ambiguous legislative text.
19. As Sir Rupert Cross observed in his canonical text on statutory interpretation, these traditional presumptions are 'expressions of fundamental principles governing civil liberties and the relations between Parliament, the Executive and courts. They operate as constitutional principles which are not easily displaced by statutory text.[20] As a former judge of the Judicial Committee of the House of Lords observed extra-judicially, 'the role of the courts in protecting fundamental rights was … part of our unwritten constitution before the Human Rights Act 1998 was enacted'.[27]
20. Even before and apart from the HRA, the courts have an important role in upholding rights, ensuring that when interpreting legislation enacted by Parliament, they do so in a way is presumptively protective of those rights. Indeed, there are long-established principles of statutory interpretation which allow the courts to imply qualifications into the literal meaning of wide and general words in order to prevent them having absurd or

[18] On the principle of legality as a precursor to the interpretive obligation under section 3 HRA, see Kavanagh, *Constitutional Review* (n 4) 95-108; see generally Mark Elliott & Kirsten Hughes (eds) *Common Law Constitutional Rights* (Bloomsbury, 2020).

[19] *Simms* 131

[20] John Bell & George Engles (eds) [Sir Rupert Cross], *Cross on Statutory Interpretation* (Butterworths, 1995) 166. For analysis of the constitutional role of the principle of legality and allied presumptions of statutory interpretation as a tool of rights-protection, see Kavanagh, *Constitutional Review* (n 4), 96-108, 296, 306;

[27] Johan Steyn, 'Deference: A Tangled Story' (2005) *Public Law* 346, 348.

unacceptable consequences.[21] Therefore, statutory interpretation in the pre-HRA era is not one where the courts mechanically applied legislative provisions with no concern about their compliance with constitutional norms or basic rights. We should be careful not to compare the HRA with a lost Eden where the courts never went against what parliament or the government intended. There has always been some room for the courts to adjust statutes to the demands of constitutionalism.

21. By enacting the HRA, Parliament gave the courts interpretive powers which were intended to go beyond these pre-existing modes of interpretation which depended for their operation on the existence of legislative ambiguity or generality.[22] Section 3 HRA enjoins courts to 'read and give effect' to all legislation compatibly with Convention rights whenever it is 'possible to do so'. The courts have interpreted this to mean that they should interpret legislation compatibly with rights, even if that would go against the strict, literal meaning of statutory provisions or would depart from the legislative intention of the Parliament which enacted the legislation.[23] It has been treated by the courts as a 'strong adjuration'[24] to interpret legislation compatibly with rights, whenever it is possible to do so.

22. However, the courts have nonetheless stressed that this power of interpretation is subject to important limits which the courts have observed from the very beginning of HRA adjudication. For example, the courts have consistently held that it will not be possible to interpret legislation compatibly with rights if it goes against a 'fundamental feature' of the legislation.[25] Therefore, the courts cannot depart from 'a clear and prominent feature'[26] of the legislation or 'change the substance of the [statutory] provision entirely'.[27] Any rightscompatible interpretation must 'go with the grain of the legislation'[28] and be compatible with 'its underlying thrust'.[29]

23. This is a significant constraint on the operation of section 3, ensuring that the courts respect the terms of the statutory framework they have to interpret and take cognisance of the limits of their interpretive function. If a proposed interpretation would require the court 'to radically alter the effect of the legislation'[30] or remove 'the pith and substance of the

[21] *R (Jackson) v Attorney General* [2006] 1 AC 262, [28]-[30], Lord Bingham

[22] *Rights Brought Home,* White Paper (n 1).

[23] *Ghaidan v Mendoza* [29], per Lord Nicholls; *Sheldrake v DPP* [2005] 1 AC 264, Lord Bingham. For closer examination of the leading cases on section 3, see Kavanagh, *Constitutional Review under the UK Human Rights Act 1998,* chapters 3 and 4; Kavanagh, 'What's so Weak about Weak-Form Review? The Case of the UK Human Rights Act 1998 (2015) 13 *International Journal of Constitutional Law* 1008, esp 1015-1020 (hereinafter 'What's so Weak?).

[24] *R. v. Director of Public Prosecutions, ex parte Kebilene* [1999] 4 All E.R. 801, Lord Hope.

[25] *Ghaidan* [33]

[26] *Re Z* [2015] EWFC 73 at [36], Munby P.

[27] *Ghaidan* [33]

[28] *Ghaidan* [33]

[29] *Ghaidan* [33]

[30] *Poplar Housing v Regeneration Community Association Ltd v Donaghue* [2002] QB 48, [73] Lord Woolf.

measure that Parliament had enacted',[31] then the limits of judicial interpretation have been reached.[32]

24. Another important limit articulated in the case-law is the requirement that courts should not make decisions 'for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation'.[40] This constraint articulates an underlying leitmotiv of the HRA case-law, namely, that whilst the courts have been given an onerous responsibility for upholding rights through statutory interpretation, they must do so in a way which respects the constitutional role of the Executive and Parliament. As Lord Bingham observed in one of the early HRA cases, one of the most 'important and uncontroversial principles' in the HRA case-law is that 'substantial respect should be paid by the courts to the considered decisions of democratic assemblies'.[41]
25. Therefore, whilst the HRA gives the courts some enhanced power to render legislation compatible with rights - if the statute and overall context will allow - this does not undercut the fundamental premise of the constitutional relationship between the branches of government, namely that this relationship must be based on an attitude of mutual respect and a vigilance to ensure that the courts do *not* intrude unduly or inappropriately in the legitimate decision-making of the Executive and Legislature.
26. The case-law under the HRA exhibits the courts' acute sensitivity to the role of the Executive and legislative branches in proposing and enacting policy. The leitmotiv of the case-law has hewed closer to the theme of 'due deference'[42] to the legislature on matters of controversial social and economic policy, than 'undue' interference with the political branches of government.
27. Former Lord Chief Justice, Lord Woolf, articulated the duty of respect and comity for the democratically elected legislature in one of the cases concerning reverse burdens of proof:

> Legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle pay, a degree of deference to the view of Parliament as to what is in the interest generally in upholding the rights of the individual under the Convention.[43]

Of course, as Lord Bingham clarified, 'the fact that a statutory provision represents the settled will of a democratic assembly is not a conclusive reason for uphold it'.[44] Otherwise, judicial evaluation of whether legislation complies with rights would be set at nought and rendered completely redundant. Nevertheless, Lord Bingham stressed that although it is not a conclusive reason 'a degree of deference is due to the judgments of the democratic assembly on how a social problem is best tackled'.[45]

28. So how has this respect manifested itself in the case-law? There is a huge academic literature on this subject.[46] But briefly stated, it manifests in the following ways. First, it means that when a court is confronted with an issue which seems to lie beyond their institutional competence, expertise and legitimacy, they will give great weight to the

[31] *Ghaidan* [110], [111], Lord Rodger.

[32] For a close examination of how the *fundamental features* constraint operates in practice, see Kavanagh *Constitutional Review* (n 4), 37-42, 59-62.

[40] *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [33].

[41] *Sheldrake*, [23], Lord Bingham.

[42] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs a Doctrine of Due Deference' in Bamforth & Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003); Kavanagh, *Constitutional Review* (n 4), chapter 7.

[43] *R v Lambert* [2001] 2 WLR 211, [16].

[44] *R v Lichniak* [2003] UKHL 47, [14].

[45] Id.

[46] For an overview of the main positions on this issue, see Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409; TRS Allan 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2016] *Cambridge Law Journal* 671; cf Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory (2010) 126 *Law Quarterly Review* 222

decision of the democratically elected legislature on what is required in the public interest.[33] They will allocate some presumptive weight in favour of the statute, not against it.[34] In a controversial case arising in the counter-terrorist sphere where the courts deferred to – and upheld - the government's decision, the courts emphasised that 'it was self-evidently right that national courts must give great weight to the views of the executive on matters of national security'.[35]

29. In *Animal Defenders,* the court rejected an argument that the Communication Act 2003 violated freedom of expression, despite the fact that the 2003 contained a blanket ban on paid political advertising, in part because the court gave 'great weight'[36] to the decision of the government and Parliament on how to tackle this controversial issue, in particular since 'it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy'.[37]

30. We should bear in mind that most cases brought against the Government under the HRA fail. It is only in a minority of cases where courts decide that the statute under scrutiny violates rights.

31. Another manifestation of the duty of democratic respect is that the courts tend to operate a variable intensity of review when scrutinising legislation for compliance with rights. In particularly controversial areas of policy, the courts will uphold the decision adopted by Parliament unless it can be shown to be 'manifestly without reasonable foundation'.[38] Clearly, this is a light-touch standard of review where courts will only intervene if the measure reaches a very high threshold of unreasonableness. This tempers portrayals of the courts as power-hungry actors determined to usurp the decisions of the political branches. In general, the courts treat legislation enacted by the democratically elected legislature with profound respect and only interfere with that in those situations where there is a clear violation of rights, which they are equipped to identify and, sometimes, remedy.

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[33] Kavanagh, *Constitutional Review* (n 4)*,* 169ff

[34] For the idea that deference operates as a 'weighting threshold', see Kavanagh, *Constitutional Review* (n 4)*,* 169-176.

[35] *Secretary of State for the Home Department v Rehman* [2002] 1 AER 123 at [31].

[36] *Ghaidan* [33]

[37] *Ghaidan* [33]

[38] *Hounslow London Borough Council v Powell* [2011] UKSC 8 [64].

32. On the issue of prisoner voting in the High Court, for example, Kennedy CJ explained when upholding the prohibition on prisoner voting that 'if the law falls within a reasonable range of alternatives the court will not find it over broad merely because they can conceive of a better alternative'.[39]
33. This highlights that whilst judicial decisions on rights certainly impact on policy to some degree, the courts generally carry out their role with an acute appreciation of the fact that their role is one of review, not substitution. Their sense of constitutional propriety reminds them that it is not the judges' role to devise new policy or to decide whether a particular policy is good, bad or indifferent. Their singular role is to establish whether policies comply with the law and with legal standards, including those embodied in the HRA. This does not preclude judicial scrutiny for compatibility with rights. But it is a form of scrutiny framed by the overarching judicial duty to respect the decisions enacted by the democratic legislature.
34. On a number of controversial issues of social policy, the courts have also gone to great lengths to ensure that they do not intervene precipitously on an issue which Parliament is about to tackle. Thus, in the *Nicklinson* case on 'the right to die',[40] a majority of UK Supreme Court held that despite having concerns that the current prohibition on assisted suicide might infringe the rights of some individuals, it would be constitutionally inappropriate and premature for them to make a definitive ruling on this controversial issue, given that the issue was already before Parliament and was an issue of social policy which democratically elected politicians were better-placed to evaluate.
35. This is just one of a number of cases where the courts held back from getting involved in controversial issues of social and political controversy. They have done so out of respect for the competence, expertise and legitimacy for the democratically elected legislature, but also out of an acute appreciation of the constitutional limits of the judicial role under the UK constitution.[41] As noted above, the Supreme Court *upheld* the Communications Act 2003 which prohibited paid political advertising, despite the fact that the leading Strasbourg caselaw at that time took a more critical stance towards such prohibitions.[42] Whilst it made a declaration that the law violated transgender rights, the Supreme Court *refused* to interpret the relevant legislation to remedy that violation, preferring instead to leave it to the legislature to devise a legislative framework which would best accommodate the competing interests involved.[43]
36. In paying this deference to Parliament, it is worth noting that the courts have also started to consider, and give weight to, the extent of Parliament's engagement with rights-issues during the legislative process.[44] If there is evidence that parliamentary actors have given attention to the rights implications of a legislative measure, i.e. by responding to a critical report of the JCHR or other parliamentary committee with a justification framed in terms of rights, the courts will sometimes give this weight in their adjudication. When it can be

[39] *R (Pearson) v Secretary of State for the Home Department* [2001] HRLR 39

[40] *Nicklinson* (n 5).

[41] Kavanagh, *Constitutional Review* (n 4), chapter 7.

[42] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 31

[43] *Bellinger v Bellinger* [2003] 2 AC 467

[44] I document the developing case-law on this issue in Kavanagh, 'Proportionality and Parliamentary Debates: Exploring some Forbidden Territory' (2014) 34 *Oxford Journal of Legal Studies* 443-479.

shown that Parliament has come to a 'considered democratic compromise'[45] on a difficult issue of social policy and has given careful consideration to the human rights implications, then the courts will treat that consideration with respect. This can have the effect of enhancing the role of Parliament in determining how a rights-issue may be addressed.[60] Indeed, the European Court of Human Rights in Strasbourg also gives weight to the 'considered decisions' of democratically elected legislatures, thus giving Parliament credence for its engagement with rights issues.

37. Looking at the case-law in the round - including a consideration of the cases where the courts have upheld legislation as well as those where the courts found a rights-violation - I conclude that the courts have been very careful not to interfere unduly, prematurely or inappropriately in matters of policy and have generally been successful in honouring their duty to uphold with rights, whilst simultaneously treating the decisions of the Executive and Legislature with due deference and respect.

Have the courts interpreted legislation in a manner inconsistent with the intention of Parliament in enacting it? If yes, should section 3 be amended?

38. When interpreting legislation compatibly with rights, the courts have held that their interpretive duty under section 3 may apply even if the resulting interpretations depart from the intentions of Parliament.[46] However, as noted above, the courts have been vigilant in ensuring that they observe the limits of the fundamental features of the legislation and that they will not interpret legislation in a way which removes 'its pith and substance'. More broadly, judges have worked hard to ensure that they do not make any decisions for which they are ill-equipped, thus recognising the relative competence, expertise and legitimacy of the democratically elected legislature. Moreover, there are many cases where the courts have drawn the line against a 'possible' interpretation under section 3, because it would violate the clear intention of Parliament or the unambiguous words of the statute.[47]
39. As the House of Lords clarified in one of the earliest cases under the HRA:

> Section 3 is concerned with interpretation … In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes and the amendment of statutes are matters for Parliament.[48]

40. **Therefore, I do not believe that section 3 would be amended, changed or repealed.** The courts have discharged their interpretive duty in a robust, but nonetheless respectful fashion, ever alert to the danger of interfering unduly or excessively in the policy domain of the Executive and legislative branches. Moreover, under the scheme of the Act, there is

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[45] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 [47] Lord Bingham.

[60] Kavanagh, 'Proportionality and Parliamentary Debates', 479.

[46] *Ghaidan v Mendoza* [2004] 2 AC 557 (hereinafter *Ghaidan*).

[47] *Ghaidan,* [33].

[48] *R v A* [2001] UKHL 25 [108] per Lord Hope; for examination of this distinction between interpretation and amendment, see Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259.

nothing preventing Parliament from enacting or re-enacting laws in the clearest of terms in order to prevent the operation of section 3.

41. Of course, enacting legislation which attempts to limit rights in ways that the courts have already declared to be incompatible with the Convention, may well be difficult and incur political costs for the proposing Government. In my view, this is an advantage – not a disadvantage – of the current scheme. It allows the UK Parliament to legislate as it wishes and does not legally prohibit them from doing so. However, it places the government under the political obligation to justify that action in Parliament and before the populace as a whole. As Lord Hoffmann observed in a case relying on the principle of legality which is analogous to the section 3 interpretive duty:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … The constraints upon its exercise are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.[49]

42. If section 3 were amended to weaken the powers of interpretation, say, by confining the application of section 3 to cases of statutory ambiguity, or to enjoin the courts to read and give effect to legislation 'where it is reasonable to do so' (as opposed to 'possible' to do so), this would lead to more declarations of incompatibility. Sections 3 and 4 ride in harness with each other. They are inextricably linked. A change in one will lead to a change in the other. Thus, if the interpretive possibilities under section 3 are curtailed, the consequence will be more declarations of incompatibility. That would have two negative consequences.
43. One would be that litigants who have succeeded in showing that their rights have been violated will not receive a remedy in domestic courts for that declared violation, because the declaration of incompatibility is merely declaratory whereas the interpretive power under section 3 changes the legal situation to comply with the litigant's rights, thus giving the litigant an immediate and effective remedy.[50]
44. The second negative consequence of having more declarations of incompatibility would be that more litigants would have to bear the burden of taking their case to Strasbourg where they are highly likely to win. This would result in more judgments against the UK before the European Court of Human Rights. The main purpose of the HRA was to remedy rights domestically in order to forestall unnecessary litigation in Strasbourg. Section 3 is one of the pivotal ways in which this aim is achieved.

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[49] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131; *Bank Mellat (No 2),* [55].

[50] For an account of the remedial differences between sections 3 and 4 and its impact on the judicial choice between both provisions, see Kavanagh, 'Choosing between Section 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v Mendoza'* in Fenwick, Phillipson & Masterman (eds) *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007) 114.

45. Therefore, section 3 prevents unnecessary adverse findings against the UK before the Strasbourg court, whereupon the UK Government and Parliament would be obliged in international law to change the law to comply with the Convention, whilst incurring the duty to pay damages to the litigant who suffered the rights-violation. Given that the IHRAR is carried out on the firm assumption that the UK will remain party to the European Convention, I believe that it is surely an immense advantage to the UK that these cases are remedied domestically rather than leaving them to the adjudication of an international court.

46. **I believe that no change should be made to the framework established by sections 3 and 4 of the HRA.** These sections were carefully crafted in order to give the courts enhanced powers to protect Convention rights, whilst preserving the traditional principle of parliamentary sovereignty. Thus, the courts were given the power to interpret legislation compatibly with rights 'where it is possible to do so', but if this is not possible, they can send a message to Parliament through the declaration of incompatibility that a piece of legislation violates the European Convention. Given that the declaration of incompatibility is not legally binding on the Government or Parliament, nor does it have any effect on the validity of the legislation under judicial scrutiny, it gives courts the power to alert the legislature to a potential rights-violation without giving it the power to compel compliance with the judicial ruling. This emphasises the centrality and primacy of the democratically elected legislature in the scheme of the HRA. It enhances the protection of rights without compromising on that democratic primacy.

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. My answer to this question is 'no' for the reasons outlined above. When the courts issue a declaration of incompatibility, this then leaves it up to the government and Parliament to remedy the rights-violation if they so wish. But whilst the declaration of incompatibility may lead to prospective legislative amendment, this is often no use for the litigant before the court. The declaration of incompatibility is 'remedially empty'[51] as far as most litigants are concerned. In that situation, the litigant is still entitled to take their case to Strasbourg, whereupon the Strasbourg court is highly likely to find in their favour. Therefore, if the declaration of incompatibility were treated as a first rather than a last resort in judicial reasoning, this would merely postpone, but not prevent, an eventual adverse finding in Strasbourg.[52]
48. Nor should it be assumed that the government and Parliament will always want to have a greater role in carrying out this remedial work. In litigation under sections 3 and 4, it is worth noting that the Government often argues in favour of an interpretation under section

[51] Kavanagh, 'What's So Weak?' (n 30).

[52] Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 *Legal Studies* 340; Kavanagh, *Constitutional Review* (n 4) 285, 325. [68] For further analysis of this phenomenon, see Aileen Kavanagh, 'What's so Weak about Weak-Form Review?' (2016) 13 *International Journal of Constitutional Law* (I.CON) 1008, 1022-1023; Jan Van Zyl Smit, 'Statute Law: Interpretation and Declarations' in David Hoffman (ed.) *The Impact of the UK Human Rights Act on Private Law* (2011).

3, instead of a declaration of incompatibility under section 4.[68] Commenting on this practice extra-judicially, Lord Phillips observed that in his judicial experience, the bold and creative use of section 3 has

suited [Government Ministers] rather well. Ministers do not like declarations of incompatibility. Provided that the main thrust of their legislation is not impaired they have been happy that the courts should revise it to make it Convention-compliant, rather than declare it incompatible. In my experience, Counsel for the Secretary of State usually invites the court to read down, however difficult it may be to do so, rather than make a declaration of incompatibility.[53]

49. Lord Phillips' account is supported by other judges who have noticed a similar trend. Thus, in an extra-judicial lecture, Lady Hale noted that 'Ministers usually prefer us to solve an incompatibility problem for them rather than make a declaration of incompatibility',[54] even if that required 'heroic feats of interpretation under section 3'.[55] In fact, in some cases, the courts have rejected the government's strenuous arguments in favour of a section 3 interpretation, on the basis that the interpretive solution proposed by the Government would stretch the statutory language 'well beyond breaking point'.[56] Thus, the courts have sometimes had to resist the government's arguments because they decided that the issue was more appropriate for Parliament to address the issue through legislation, than it was for the courts to try to remedy it using the limited remedial tools afforded them through interpretation.[57]
50. As I have argued in earlier work, whilst we might easily assume that the Government and Parliament are very keen to have the last word on questions of rights, sometimes the Government does not want the last word and is quite happy to let the courts make those decisions, thus obviating the need for the government to rectify the problem through legislative or policy means.[58]
51. Why might the Government prefer a section 3 interpretation over a declaration under section 4? After all, a declaration leaves the government and Parliament free to deliberate about how or even if it wishes to tackle the issue. One reason is that time is scarce in the legislative timetable and if the courts solve the problem at source, it is one less problem for the government to address.
52. Another reason is that the Government 'may not want to incur the political costs involved in the headline-grabbing damning verdict involved in a declaration of incompatibility and would prefer the courts to adjust and modify the legislative provision through the relatively invisible means of judicial interpretation'.[75]

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[53] Lord Phillips, The First Lord Alexander of Weedon Lecture, *The Art of the Possible: Statutory Interpretation and Human Rights* (Apr. 22, 2010), *available at* https://www.supremecourt.uk/docs/speech_100419.pdf.

[54] Lady Hale, 'What's the Point of Human Rights', *Warwick Law Lecture 2013*, available at https://www.supremecourt.uk/docs/speech-131128.pdf6

[55] Hale, id, 6; see eg *Secretary of State for the Home Department v AF* (2009) UKHL 28.

[56] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344 [156].

[57] *Roth,* id. [66]

[58] Kavanagh, 'What's so Weak?, 1022

[75] Kavanagh, 'What's so Weak?' 1022.

53. Although we may be tempted to assume that the government and Parliament would wish to have the last word here and seize control over all issues concerning rights, the reality is that they may not want to bear the full brunt of political criticism that legislation does not respect rights. Instead, they may prefer to leave controversial decisions about rights to the courts where they can be dealt with under the political and public radar.
54. On this basis, I am assuming that the government would not wish to see more declarations of incompatibility in preference to the existing system where the court first tries to interpret legislation compatibly with rights, whilst treating the declaration of incompatibility as a matter of last resort.

Political Responses to Judicial Declarations

55. Though there is no specific question on the political response to declarations of incompatibility under the HRA, I believe that it is nonetheless pertinent to the IHRAR, given that it is a key indicator of the nature of the relationship between the branches of government under the HRA.
56. In the last 20 years, there have been 33 final declarations of incompatibility.[59] Of these, five were issued in relation to legislation which, at the time of the judgment, was no longer in force. A number of those declarations followed shortly after adverse decisions of the European Court of Human Rights.[77] Either way, the number of declarations of incompatibility issued by the courts averages at about 1.5 per year. This is a low figure. It bespeaks the caution and care the courts take before issuing such declarations.
57. Although the declarations of incompatibility are not legally binding, they have resulted in legislative or policy change in almost every single case in which they have been issued. The only potential outlier is the declaration of incompatibility on prisoner voting, which followed from the Strasbourg ruling in *Hirst.* The UK has now made minor administrative and policy changes to the regulation of prisoner voting, effectively allowing a small number of prisoners who are not serving a prison sentence, to vote. The European Commission has now accepted this as complying with *Hirst.* Therefore, if we code this decision as compliant with the Convention, we have a perfect rate of compliance, albeit with a small number of declarations currently awaiting decision about how to comply.
58. I have conducted an empirical analysis of the political responses to all the declarations of incompatibility since the HRA has been enacted, examining all the parliamentary debates, parliamentary Committee reports and amendment stages of the legislative process where the remedial response to the declaration of incompatibility was considered.[60]
59. Whilst the more detailed analysis which emerges from this study will be published in my forthcoming book,[61] I will nonetheless flag some of the relevant findings here. As is wellknown, there have been a number of high-profile declarations of incompatibility which have attracted controversy both in the media and in Whitehall, if not in Westminster itself.

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[59] Ministry of Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2019-2020', available at https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2019-to-2020 [77] See e.g. *Bellinger v Bellinger* [2003] 2 AC 467.

[60] The more detailed results of this empirical analysis are due to be published in my forthcoming book *The Collaborative Constitution* (CUP 2021), chapter 9.

[61] *The Collaborative Constitution* (CUP 2021), chapter 9.

These include the *Belmarsh Prison case* (concerning the detention without trial of non-citizens terrorist suspects); the *Thompson case* (concerning a periodic review for those on the Sex Offenders Register for life); and the declaration of incompatibility concerning *prisoner voting* following the *Hirst* judgment.

60. Whilst these declarations attracted intense media focus and seemed to be controversial in government circles, they were very much the exception, not the norm. In almost all the other cases, the government and Parliament accepted the declarations of incompatibility and complied with them, without animosity, reluctance or resistance. Instead, the general political response to declarations of incompatibility bespoke a collaborative rather than conflictual dynamic. The general attitude – though not inveterate or univocal – was one based on a recurrent acknowledgment that in a country based on the rule of law, politicians should treat judicial decisions with comity and respect.
61. The identification of a collaborative rather than conflictual dynamic as the day-to-day pattern of political engagement with the courts is borne out by all the other existing empirical analyses of political responses to declarations of incompatibility.[62] As Professor Jeff King of UCL observed: 'The parliamentary record displays an attitude that has been predominantly accepting of and collaborative with the courts' role',[63] although he notes some minimalist responses and also considerable delays in giving effect to the declarations.[64]
62. One question which arises is whether the governmental and parliamentary consideration of rights questions has been 'over-judicialised' or has been dominated or supplanted by an excessive concern with the case-law, thus crowding out full political deliberation on the broader ethical, moral, political and social concerns which underpin legislation which implicates rights.
63. In my analysis of the role of rights during policy-development within the Executive, and parliamentary consideration during the legislative process, I conclude that whilst the Executive and Parliament generally strive to comply with leading judgments of the UK and Strasbourg courts, as well as anticipate how the courts will decide cases in the future, the process has not become 'over-judicialised' or riveted on legal issues, to the exclusion of broader political, ethical and social considerations. The case-law is one important consideration, but it does not dominate or supplant political consideration.
64. When signing off on the Ministerial Statement of Compatibility under section 19, the Minister retains considerable discretion about whether to claim compatibility. Though informed by legal advice and giving it due weight, the final call on whether to claim compatibility reflects a broader political evaluation which is not hamstrung by legal advice or the court rulings which may underpin that advice. My conclusions on this point are supported by the leading empirical analysis of parliamentary engagement with rights in Whitehall and Westminster.[65]

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[62] Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act', in Hunt, Hooper & Yowell, *Parliament and Human Rights*; Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP, 2012); Young, 'Is Dialogue Working under the Human Rights Act 1998?' [2011] *Public Law* 773.

[63] King, id.

[64] See also Sathanapally, *Beyond Disagreement,* 224.

[65] Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (CUP, 2015), chapter 7.

65. As regards parliamentary engagement with rights issues, I saw very little evidence of significant 'policy distortion'[66] of the legislative agenda or legislative deliberation by virtue of cases decided under the HRA. Indeed, during parliamentary debate, it was difficult to find any in-depth engagement with the case-law on human rights. Again, my conclusions based on analysis of parliamentary debates and Committee Reports, including the iterative exchanges between the Government and the Joint Committee on Human Rights are that judicial decisions featured in parliamentary and governmental deliberation, but in no way could be said to dominate that deliberation.[67]
66. This conclusion is also bolstered by other leading empirical analyses of the issue. As Dr Sathanapally observed in an empirical analysis based on her doctoral thesis at the University of Oxford on this issue, judicial decisions on rights 'did not replace political with courtcentred conceptions of human rights, but rather gave parliamentarians additional support for rights-based arguments in some circumstances'.[68] This chimes with my own analysis. Whilst being alert to the danger that legal arguments could dominate – and thereby impoverish – the deliberative quality of parliamentary debate, I agree with Sathanapally and Professor King that judges do not have an 'overpowering role'[69] in Westminster parliamentary debate. My conclusion is that the fear about over-judicialisation of the policymaking and legislative process is exaggerated and not borne out by the empirical evidence.

[66] Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 Mich. L. Rev. 245 (1995).

[67] Kavanagh, *The Collaborative Constitution* (CUP, 2021, forthcoming), chapter 4.

[68] Sathanapally, *Beyond Disagreement,* 199

[69] Sathanapally, *Beyond Disagreement,* 133; King (n 80).