Response to the Call for Evidence of the Independent Human Rights Act Review

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I have undertaken a gender-audit of the Human Rights Act as part of a British Academy-funded project.[1] This research revealed a number of ways in which the HRA has been useful for women and those of minority genders and sexual orientations. However, there are a number of limitations of the Act due to its structure (particularly its focus on public authorities to the exclusion of the private sector and private sphere) and substantive provisions, so it is unfortunate that this issue is outside the scope of this Review. I have nevertheless included some information on this at the end of my submission, but I begin by addressing questions (a) and (c) of Theme One and questions (a)(i) and (a)(iii) of Theme Two.

Theme One:
The relationship between domestic courts and the European Court of Human Rights

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

The duty to take into account ECtHR jurisprudence does not override the supremacy of Parliament. As such, any primary legislation that conflicts with a line of jurisprudence developed in the ECtHR and cannot be interpreted in a way that makes it compatible (under section 3 HRA) would take priority over the section 2 duty to 'take into account' the ECtHR jurisprudence. Likewise, any binding precedent from a higher UK court that contradicts the ECtHR jurisprudence would be applied instead. For example:

> 'Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision'.[2]

As Lord Slynn noted in an early case on the section 2 duty, the UK courts are not *bound* by ECtHR cases but they should 'take account of them as far as they are relevant', if for no other reason than the possibility that if they do not, the case will in all likelihood be taken to the Strasbourg Court, 'which is likely in the ordinary case to follow its own constant jurisprudence'.[3] Anything less than this will result in the UK defending more cases in Strasbourg at greater expense to both parties and with likely the same ultimate outcome as the UK Courts would have reached had they been able to take account of the ECtHR jurisprudence. In fact, the time and cost of taking cases to Strasbourg was one of the major reasons for the introduction of the Human Rights Act 1998:

[1] Nicola Barker 'From the Human Rights Act to the British Bill of Rights: A Feminist Critique' (2018-2019).
[2] R (RJM) v. Secretary of State for Work and Pensions [2008] UKHL 63, at 64, per Lord Neuberger.
[3] R v. Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, at 26.

> '… enforcing [the Convention rights] takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts – without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law….'[4]

The statistics on judgments against the UK in Strasbourg bear out the extent to which the duty on the UK courts to take into account Strasbourg jurisprudence has been implemented successfully by domestic courts. In 2020 only 4 applications to the ECtHR from the UK were deemed admissible, and the Court found a violation in only 2 of these cases.[5] This is remarkably few cases for any jurisdiction, but particularly for one with a population the size of the UK's.

In an early case, the House of Lords adopted a position that they should seek to 'keep pace' with ECtHR jurisprudence: 'no more, but certainly no less'.[6] This resulted in concerns that the ECtHR was being treated by the UK courts 'as a ceiling, rather than guaranteeing a minimum floor of rights'.[7] However, the UK Supreme Court has more recently taken the view that domestic courts may occasionally go further than the ECtHR jurisprudence where Strasbourg has not yet spoken[8] or where they reach a conclusion that flows naturally from the direction of travel of ECtHR case law.[9] This is consistent with the idea that the Convention is a living instrument and with the principle of subsidiarity, which recognises that domestic bodies are usually better placed to assess local conditions. It is also consistent with the UK courts' duty under section 6 HRA to give effect to the Convention rights as a matter of domestic law:

> 'Reticence by the courts of the UK to decide whether a Convention right has been violated would be an abnegation of our statutory obligation under section 6 HRA. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right…. I would firmly reject the suggestion that the decision of this court on whether the respondents enjoy a right under the HRA to claim

[4] Home Department, 'Rights Brought Home: The Human Rights Bill' HMSO. 1997. Cm.3782, para 1.14 (my emphasis).
[5] European Court of Human Rights, *Analysis of Statistics 2020* (January 2021) <https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf> [accessed 5 February 2021], at 61.
[6] R (on the application of Ullah) v. Special Adjudicator [2004] UKHL 26, at 20, per Lord Bingham.
[7] Jane Wright, 'Interpreting section 2 of the Human Rights Act 1998: Towards an indigenous jurisprudence of human rights' *Public Law* (2009) Jul. 595-616, at 599.
[8] Ambrose v Harris, Procurator Fiscal, Oban (Scotland) [2011] UKSC 43; Rabone v. Pennine Care NHS Foundation Trust (INQUEST intervening) [2012] UKSC 2; Surrey County Council v. P (Equality and Human Rights Commission intervening) [2014] UKSC 19; Moohan v. Lord Advocate [2014] UKSC 67; Commissioner of Police of the Metropolis v. DSD and another [2018] UKSC 11.
[9] Moohan v. Lord Advocate [2014] UKSC 67, para 13, per Lord Hodge.

compensation against the appellant should be influenced, much less inhibited, by any perceived absence of authoritative guidance from ECtHR'.[10]

This seems to me to be entirely the right approach. The principle of subsidiarity and the margin of appreciation has meant that the ECtHR has been relatively slow to develop its jurisprudence in relation to some issues. LGBT+ rights is a good example of this; the UK courts were able to find same-sex couples were family members before the ECtHR had (and indeed before the HRA came into effect).[11] Following the introduction of the HRA, the UK courts were then able to find a same-sex couple to be in a spouse-like relationship and thus entitled to similar treatment to cohabiting different-sex couples much earlier than the ECtHR did.[12]

As such, I would suggest that no reform is needed to section 2. However, if reform is to be considered it should be to explicitly endorse the current approach of the UK courts, in which they interpret the Convention in the same way as they would a statute from the UK Parliament, going further than the ECtHR jurisprudence when it is appropriate to do so. In other words, a revised section 2 could make it clearer that the Strasbourg jurisprudence is a floor, not a ceiling, and explicitly pave the way for the development of what has been termed 'an indigenous jurisprudence of human rights'.[13] This would also further the original goal of the Human Rights Act to 'bring rights home' and develop domestic jurisprudence on human rights.

<u>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?</u>

It was intended that judicial dialogue would be an additional benefit of the Human Rights Act, as evidenced in the White Paper on the Bill in 1997: 'British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.'[14]

This expectation has been borne out in the judgments of the European Court of Human Rights, which regularly consider the UK Courts' interpretations of the Convention and engage in dialogue with them. A good recent example of this is found in the dialogue that took place over a period of time on the issue of whole life sentences following the ECtHR judgment in

[10] Commissioner of Police of the Metropolis v. DSD and another [2018] UKSC 11, per Lord Kerr, at para 78-9.
[11] Fitzpatrick v. Sterling Housing Association [2001] 1 AC 27. In Karner v. Austria (2004) 38 E.H.R.R. 24 the ECtHR found a right to respect for their 'home' but did not find a same-sex couple to have a right to 'family life' under the Convention until Schalk and Kopf v. Austria (Application no. 30141/04) (Judgment: Merits and Just Satisfaction, 24 June 2010).
[12] Ghaidan v. Godin-Mendoza [2004] UKHL 30; Vallianatos v. Greece (2014) 59 E.H.R.R. 12; Oliari v. Italy (application nos. 18766/11 and 36030/11) (Judgment: Merits and Just Satisfaction, 21 July 2015)
[13] Wright, above.
[14] Home Department, 'Rights Brought Home: The Human Rights Bill' HMSO. 1997. Cm.3782, para 1.14.

Vinter and others v. United Kingdom (2013).[15] In *R v. McLoughlin* [2014][16] the UK Court of Appeal was able to take into account the judgment of the ECtHR in *Vinter* and clarify domestic law accordingly. Directly addressing the Grand Chamber's conclusion in *Vinter* that there was a lack of clarity in UK law, the Court of Appeal said:

> 'We disagree. In our view, the domestic law of England and Wales is clear as to "possible exceptional release of whole life prisoners". As is set out in R v. Bieber the Secretary of State is bound to exercise his power under s.30 of the 1997 Act in a manner compatible with principles of domestic administrative law and with Article 3. As we understand the Grand Chamber's view, it might have been thought that the fact that policy set out in the Lifer Manual has not been revised is of real consequence. However, as a matter of law, it is, in our view, of no consequence. It is important, therefore, that we make clear what the law of England and Wales is.'[17]

The ECtHR was then able to, in turn, take into account this explanation of domestic law from the Court of Appeal. In *Hutchinson v. United Kingdom* (2017), the Grand Chamber notes that:

> 'The Court considers that the *McLoughlin* decision has dispelled the lack of clarity identified in *Vinter* arising out of the discrepancy within the domestic system between the applicable law and the published official policy. In addition, the Court of Appeal has brought clarification as regards the scope and grounds of review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention can no longer be justified on legitimate penological grounds. In this way, the domestic system, based on statute (the 1997 Act and the Human Rights Act), case-law (of the domestic courts and this Court) and published official policy (the Lifer Manual) no longer displays the contrast that the Court identified in *Vinter*…. The statutory obligation on national courts to take into account the Article 3 case-law as it may develop in future provides an additional important safeguard. As the Court has often stated, the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities…. It considers that the Court of Appeal drew the necessary conclusions from the *Vinter* judgment and, by clarifying domestic law, addressed the cause of the Convention violation.'[18]

As a result, no violation of Article 3 ECHR was found in the later case. The Human Rights Act 1998, through the application of the section 2 duty to 'take into account' the jurisprudence of the ECtHR, facilitates this judicial dialogue between the domestic courts and the Strasbourg Court, and provides reassurance to the ECtHR that the UK will keep pace with developments in Strasbourg. As the UK is to remain a signatory to the ECHR and within the jurisdiction of the ECtHR it is imperative that this duty remains in order to preserve this dialogue. To weaken or remove the section 2 duty would be to weaken this important influence that the UK courts have on the development of Strasbourg jurisprudence.

[15] (66069/09, 130/10, and 3896/10) (Judgment: Merits and Just Satisfaction, 9 July 2013)
[16] [2014] EWCA Crim 188.
[17] [2014] EWCA Crim 188, at para 29-30.
[18] (57592/08) (Judgment: Merits and Just Satisfaction, 17 January 2017) (my emphasis).

Theme Two:
The impact of the HRA on the relationship between the judiciary, the executive and the legislature

The HRA was intended to create a 'human rights culture' at the heart of public administration and decision-making. In this aim it has been largely successful. My research has found that in terms of protecting women's rights, the HRA has been vital in providing a means to challenge failures of public authorities to exercise their duties in relation to issues such as sexual violence, domestic abuse, and human trafficking offences.[19] One example is in relation to the John Worboys case, in which the Supreme Court emphasised a clear duty on the police to demonstrate that they have undertaken an effective investigation in rape cases that is free not only of structural, or systemic, failures but also of serious operational failures.[20] A counter example cited by the Lord Chancellor in introducing this Review[21] is the role of section 3 in rolling back the intended protections for rape victims contained in section 41 of the Youth Justice and Criminal Evidence Act 1999. I will address this in my discussion of section 3 below.

The Act has not been wholly successful in protecting women's rights. However, the limits of its success reflect the limits of the substantive rights in the ECHR and the public/private divide in the Human Rights Act, rather than in the parts of the Act that are the focus of this Review. The fact that there is so much hostility to the HRA on the part of the current government, evidenced by this second review of the Act and multiple statements from senior figures within the government of a desire to 'repeal and replace' or otherwise significantly roll back the protections within the Act, is testament to its success in holding the executive branch to account. A Human Rights Act that is popular with government is unlikely to be one that is effective.

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

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)?

[19] See for example *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91; *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11. See also: Nogah Ofer, *Violence against women and girls: Protecting women's human rights and holding the state to account* (2017), online (pdf): *End Violence Against Women* <www.endviolenceagainstwomen.org.uk/wp-content/uploads/Human-Rights-Act-report-Oct- 2017.pdf>; Tania Pouwhare & Emily Grabham, "'It's Another Way of Making a Really Big Fuss' Human Rights and Women's Activism in the United Kingdom: An Interview with Tania Pouwhare" (2008) 16:1 Fem Leg Stud 97.

[20] *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11.

[21] Robert Buckland, 'The Human Rights Act is not infallible; An independent panel will ask whether elements of the Act should change in accordance with our law' *The Telegraph* (7 December 2020).

The UK judiciary have been very restrained, some may say too restrained, in their respect for the separation of powers and their unwillingness to interfere in policy matters such as those involving allocation of financial resources or matters of national security, for example, which are regarded as better left to politicians.[22] The evidence of Lord Neuberger and Baroness Hale to the Joint Committee on Human Rights is particularly helpful in setting out where this boundary lies and how the judiciary have walked this fine line with the assistance of the carefully crafted provisions in sections 3 and 4.[23] These sections strike an appropriate constitutional balance between respecting the sovereignty of Parliament and upholding the rule of law in the form of the UK's international obligations under the European Convention.

Section 3 asks the UK courts to interpret domestic legislation in a way that is compatible with Convention rights, so far as it is possible to do so, and section 4 provides that if that is not possible the Court may issue a declaration of incompatibility. Both of these sections preserve Parliamentary sovereignty because neither have the effect of striking down legislation that is incompatible with the Convention, nor do they prohibit Parliament from passing incompatible legislation should it wish to do so. Instead, the declaration of incompatibility simply signals to Parliament that a provision is not compatible with the Convention and Parliament may choose to act on that advice or to ignore it. Similarly, if Parliament is unhappy with the way that a court has interpreted legislation under section 3 it may pass further legislation over-ruling that particular interpretation and clarifying the intended meaning of the relevant provision. To repeal or limit the courts' powers under section 3 would be to undermine the purpose of the Act in providing a route for people to seek assistance from the UK courts on human rights issues, rather than having to go to Strasbourg.

It is suggested by some that section 3 has allowed the Courts to stretch the meaning of legislative language beyond a reasonable interpretation. While section 3 does suggest that the courts interpret legislation if 'possible' rather than if 'reasonable' to do so, the courts are well used to interpreting legislation and generally reluctant to step into the shoes of the legislature by giving very creative interpretations. Significantly, Baroness Hale noted in her evidence to the Joint Committee on Human Rights that she could not recall being involved in any case where, having found an incompatibility and being faced with the choice between section 3 'interpretation' or section 4 'declaration', the Court did not choose the option that had been argued for by the government. Baroness Hale notes in particular that the government intervened in one case often used an example of a creative interpretation, *Ghaidan v. Godin-Mendoza*,[24] 'to argue very strongly' in favour of the interpretation that was given in that case. There is another example sometimes cited as an example of judicial over-reach, the case of the rape shield provision in *R v. A (Complainant's Sexual History)*,[25] as it was by Mr Buckland in his article in *The Telegraph* introducing the Independent Review:

[22] The most recent example is the case of Shamima Begum: R (on the application of Begum) v. Special Immigration Appeals Commission [2021] UKSC 7.
[23] Joint Committee on Human Rights, Oral Evidence: The Government's Independent Human Rights Act Review, HC 1161, Wednesday 27 January 2021; and Joint Committee on Human Rights, Oral Evidence: The Government's Independent Human Rights Act Review, HC 1161, Wednesday 3 February 2021.
[24] [2004] UKHL 30.
[25] [2001] UKHL 25.

> 'The HRA also brought with it the ability of the domestic courts to, in effect, rewrite Acts of Parliament to ensure that they comply with the ECHR. This has not always been limited to minor, uncontroversial technical changes. For example, in 2001, the HRA was used essentially to strike down the rape shield which had banned the cross-examination of rape complainants on their past sexual behaviour. The court held that this law was not compliant with the HRA as it infringed on the right to a fair trial, and used its power to rewrite this legislation, adding exceptions to the rape shield law.'[26]

However, it is very important to reiterate that the HRA does not in fact allow the courts to "strike down" legislation, nor does it give the courts supremacy over Parliament: it remains open to Parliament to legislatively over-rule a court's interpretation if it disagrees with it. That this government has chosen not to legislate to rectify the rape shield example, despite clearly being aware of it, suggests that it either does not really regard it as being as much of a problem as Mr Buckland implies, or it recognises that it is a problem but chooses not to do anything about the plight of rape victims potentially having to recount their sexual history in court.

In my view, section 3 should not be amended or repealed. This is not necessary because it remains open to Parliament to legislate on the matter if it is unhappy with the interpretation given. Section 3 provides a mechanism for the courts to resolve an apparent inconsistency between the HRA and other primary legislation. It strikes the right balance between giving the courts the tools to resolve cases in this way where it is possible to do so and preserving Parliamentary Sovereignty.

This is not to suggest that there are no problems with the Human Rights Act that could properly be addressed in a review and Mr Buckland, with his example, stumbles upon one of them: it does not do enough to protect women's human rights. This is not, however, because of section 3 as he implies. It is because of section 6, which is inexplicably not included within the scope of this Review. It is also because of the narrow focus of the substance of the rights contained within the ECHR/HRA. I address these issues further below.

<u>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?</u>

The declaration of incompatibility was a carefully constructed mechanism to strike the appropriate balance between protecting the fundamental rights of unpopular minorities and preserving the doctrine of parliamentary sovereignty. It does not allow for an effective remedy for the individual who brought the particular case; only for future violations to be prevented, should Parliament choose to remedy the incompatibility. As such, it is preferable that the courts use their power of interpretation under section 3 if they are able to do so, in order to provide a just outcome in the case before it. It is only if they are not able to do this that a declaration of incompatibility should be used. If Parliament objects to the way in which the court has decided a case using its section 3 power of interpretation, it remains free to

[26] Robert Buckland, 'The Human Rights Act is not infallible; An independent panel will ask whether elements of the Act should change in accordance with our law' *The Telegraph*, 7 December 2020.

legislate to either remedy the incompatibility in a different way or to clarify that it intends for the incompatibility to remain unresolved. This is the situation that should, in my view, remain.

The Limitations of the HRA in Protecting Women's Rights

It is unfortunate that a review into the operation of the HRA does not consider its limitations from a gender perspective. Both the limited remit of the HRA in terms of its sole focus on the actions of public authorities, and that its substantive provisions exclude those that could more directly and effectively address the particular human rights violations more often suffered by women, mean that it replicates a male-centric view of human rights and is limited in its protection of women's rights to the extent that they differ from men's.

a) The Limitations of the Substantive Rights

The free-standing equality provision in Article 1 of Protocol 12 has not been ratified by the UK or included in the HRA. There are also few protections for socio-economic rights in the Convention. In a context where women's employment is often less well-paid and more precarious than men's employment, these rights are particularly important for women:

> 'Poverty exacerbates and deepens the inequality of members of already disadvantaged groups. Poor women get sex inequality writ large… [P]overty forces women to accept sexual commodification and subordination to men in order to survive…. They are more vulnerable to rape, assault and sexual harassment because they live in unsafe places, and they are not free to walk away from workplaces that are poisoned. They are not free to leave abusive relationships when destitution is the alternative.'[27]

The impact of state austerity and the privatisation of public services has been felt particularly hard by women for these, and other, reasons. As a result, it is important that areas such as housing, paid employment, and social security are also embedded with a culture of human rights that takes account of the specific gendered vulnerabilities faced by women, including as a result of childcare responsibilities.[28] The existing provisions in the HRA/ECHR have resulted in some success for those seeking to challenge the gendered and racialised impact of discriminatory policies such as the 'hostile environment',[29] as well as the 'bedroom tax' in the limited circumstances where domestic violence victims had been housed under a sanctuary scheme in which one room was converted into a panic room.[30] However, it is

[27] G. Brodsky and S. Day 'Denial of the Means of Subsistence as an Equality Violation' (2005) *Acta Juridica* 149, at p.162.

[28] See for example in the South African context: L. Chenwi and K. McLean '"A Woman's Home is Her Castle?" – Poor Women and Housing Inadequacy in South Africa' *South African Journal on Human Rights* 25, 517; S. Fredman 'Engendering Socio-Economic Rights' (2009) *South African Journal on Human Rights* 25, 410; B. Goldblatt 'The Right to Social Security – Addressing Women's Poverty and Disadvantage' (2009) *South African Journal on Human Rights* 25, 442.

[29] *R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), [2019] 4 All E.R. 527.

[30] JD v. United Kingdom; A v. United Kingdom [2020] H.L.R. 5.

notable that the latter case was an application to Strasbourg after having been unsuccessful in the UK courts, and that it is a very narrow victory for women in a particular set of limited circumstances. Disabled people and single parents, for example, have been repeatedly unsuccessful in their attempts to use the HRA to challenge the discriminatory impact of social security reforms in both the UK and Strasbourg.[31] These types of issues are generally seen as policy considerations outside the scope of the courts' jurisdiction under the HRA/ECHR, yet they are at the heart of some of the most serious structural disadvantages faced by women in the UK and, as such, ought to be more effectively addressed by a human rights regime that seeks to take gender equality seriously.

b) The Public/Private Divide and the Privatisation of Family Justice

The HRA has also been of limited use to women who would seek to challenge the gendered impact of reforms such as those that have effectively privatised access to justice in most family law matters. Women's human rights are most at risk within the private sphere, most notably within the family. This is particularly the case in a context of cuts to public services which could offer some protection, and without which the responsibility for providing care to other vulnerable family members, generally undertaken by women within the family, is further privatised. This privatisation of care, in turn, makes carers (the vast majority of whom are women) economically vulnerable on the breakdown of relationships and it is imperative that these vulnerabilities are taken account of in the family justice system. However, reforms to family law and legal aid have virtually eliminated access to legal representation for private family law matters and encouraged private settlement of disputes outside of the court system, with few protections for potentially vulnerable parties including victims and survivors of domestic abuse.[32]

This privatisation of family conflict should fall within the existing provisions of the HRA; access to justice being clearly within the ambit of Article 6 ECHR and there being an arguable discriminatory effect on the grounds of sex contrary to Article 14 EHCR. There is further an arguable case that the situations created by these law reforms in which survivors of domestic abuse may be subjected to cross-examination by their abuser as a litigant-in-person is also a violation of Article 3 ECHR.[33] Yet, the HRA has played a very limited role in challenging this continuing violation of fundamental rights that disproportionately impacts women.

The place at which the public/private divide is drawn in the HRA makes the 'public' encompassed by the Act so narrow that it evidently did not occur to lawmakers at the time of these family law reforms that the gender equality implications of limiting access to justice in a wide range of family law matters, from divorce to child arrangements to the validity of prenuptial agreements, might make these provisions incompatible with the HRA. It does not appear to have occurred to them that there might be gender equality implications of

[31] See for example: R. (on the application of DA) v. Secretary of State for Work and Pensions, R (on the application of DS) v. Secretary of State for Work and Pensions [2019] UKSC 21; Secretary of State for Work and Pensions v. Carmichael [2018] EWCA Civ 548; JD v. United Kingdom; A v. United Kingdom [2020] H.L.R. 5.

[32] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the Children and Families Act 2014.

[33] See for example S. Choudhry and J. Herring 'A Human Right to Legal Aid? – The Implications of Changes to the Legal Aid Scheme for Victims of Domestic Abuse' (2017) *Journal of Social Welfare and Family Law* 39:2, 152.

withdrawing legal aid, encouraging (private) mediation over (public) access to family courts, or that these implications might matter. In my view, a human rights framework that does not force these issues to at least be considered is one that does not take women's rights sufficiently seriously.

c) The Public/Private Divide and the Privatisation of Public Services: The Limits of Section 6 HRA

Section 6 provides that the Act focuses on the actions of public authorities rather than private actors. Section 6 was no doubt written in this way because the aim of the HRA was to provide a route to seek a remedy for ECHR violations in domestic courts, rather than having to first exhaust domestic remedies and then make an application to the European Court of Human Rights in Strasbourg. This was a time-consuming and expensive process. The HRA has provided an effective and useful alternative to that and, as mentioned above, as a result the number of cases brought against the UK in the ECtHR has dropped significantly and the number of successful cases is in the low single figures.[34] However, I would suggest that any review into the operation of the HRA ought to include consideration of the ways in which the UK could *improve* access to and the effectiveness of human rights for all, rather than considering only how they can be restricted by limiting the existing powers of the UK courts under sections 2, 3, and 4.

Human rights are at risk from private corporations and private individuals as well as the State, especially where, as the UN Independent Expert has observed: 'Many transnational corporations are more powerful than States'.[35] This is particularly the case in relation to women, who rely heavily on contracted-out and privatised industries as both employees and service-users, and whose physical safety and economic security (amongst others) are more likely to be violated in the private sphere than in the public sphere. It is well-established that our understandings of human rights 'are built on typically male life experiences and in their current form do not respond to the most pressing risks women face'.[36] While the current focus in the HRA is on protection from actions by or on behalf of the state, it is the private sphere, whether the private market or the private family, in which women need most protection. As such, the HRA is much less effective in protecting women's human rights than it ought to be.

Section 6 allows the HRA to be applicable to core public authorities and hybrid authorities. The latter includes private bodies which are exercising public functions, but the HRA applies in respect of their public functions only. This public/private divide has left some vulnerable service-users without fundamental rights protection, most famously in a case where a local council had contracted with a private provider to fulfil its statutory duty to provide care for

[34] Case statistics by country are available here: https://www.echr.coe.int/Pages/home.aspx?p=reports/factsfigures&c= [accessed 18 February 2021]

[35] UN General Assembly, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Impact of economic reforms and austerity measures on women's human rights' (73rd Session) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/229/04/PDF/N1822904.pdf?OpenElement [accessed 27 January 2021], para 8.

[36] Hilary Charlesworth, 'What are "Women's International Human Rights"?' in Rebecca J Cook (ed.) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) at 59.

elderly residents. In that scenario, an elderly woman with Alzheimer's disease was subjected to eviction from her care home without consideration of her right to respect for her home (Article 8 ECHR) because the private care home was "simply carrying on its private business with a customer who happens to be a public authority".[37] In contrast, those who receive the same services directly from a state provider would still be protected under the HRA. This has created a two-tier system and in the context of austerity and increasing privatisation the more protected "public" tier is very small and shrinking rapidly. In this context, the distinction between the public and the private in the HRA is untenable. As others have noted: 'to achieve a human rights culture, the state must always remain responsible for those entitled to [public] services…. It would be a tragic irony if citizens gained more rights against the state only to have the state slough off its responsibilities to the most vulnerable.'[38]

The inclusion of courts and tribunals in section 6 gave rise to speculation at the time of its enactment that the HRA may have indirect horizontal effect,[39] allowing the Act (through the duty on the courts to uphold Convention rights) to be used in the private sphere. However, the courts have adopted a restrictive interpretation of public authority despite the reasonably broad language in the Act itself, and the Supreme Court now appears to have precluded the possibility of indirect horizontal effect, at least in some circumstances.[40]

While the HRA has clearly had some positive impact on women's human rights, it has hardly lived up to its promise of 'bringing rights home' for women. Where it largely falls short is in its failure to move beyond the public/private divide. To the extent that the HRA reinforces the public/private divide, it is problematic for women; both carers and those cared for, and both within the family and within paid employment. If the HRA continues to enforce human rights only in the public sphere and not the private it will remain of limited use in relation to women's human rights. This should be the focus of a review of the Act, not those provisions in sections 2, 3, and 4 that are working well.

[37] *YL v Birmingham City Council* [2007] UKHL 27, at para 27.
[38] Helen Carr & Caroline Hunter, "YL v Birmingham City Council and Others" in Rosemary Hunter, Clare McGlynn, & Erika Rackley, eds, *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) at 325-6.
[39] See e.g. HWR Wade, "Horizons of Horizontality" (2000) 116:2 LQR 217; Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act" (1998) Pub L 423.
[40] *McDonald v McDonald* [2016] UKSC 28.