Independent Human Rights Act Review

Submission by CARE

CARE will focus our submission on evidence showing that the use of the margin of appreciation ("*the degree of flexibility accorded by the ECtHR to national authorities in fulling their obligations under the Convention*"[1]) has unduly brought domestic courts into matters of policy that should be determined by Parliament.

Duty on British judiciary to take into account ECtHR rulings and reasoning

The complexity of the role of the ECtHR in ruling upon Convention rights across all Member States of the Council of Europe is particularly apparent in the areas of tension between the domestic law of signatory states and Convention rights concerning morals, ethics, and religious views. Indeed, in recognition of the difficult moral issues involved concerning the right to life, the European Court of Human Rights affords a wide margin of appreciation to member states on both the beginning (*Vo v France*[2], *A, B, and C v Ireland*[3]) and end of life issues (*Pretty v United Kingdom*,[4] *Lambert v France*[5]). Still, the Human Rights Act (HRA) under Section 2 obliges British courts and tribunals to "take into account any judgement, decision, declaration or advisory opinion of the European Court of Human Rights" (ECtHR) as well as opinions and decisions of the Commission regarding a Convention right.[6] That is, UK courts must apply international legal reasoning from the ECtHR and can be required by ECtHR decisions, opinions, or judgements to determine additional rights and obligations that have not been introduced democratically through Parliament.

In our view, this 'taking into account' has been applied in ways that go beyond the scope it was intended for. ECtHR jurisprudence using the 'European consensus'[7] is both expanding Convention rights into new rights that often conflict with the views of that State's people (whereas we suggest that new rights are best introduced through domestic Parliaments rather than the Courts) and also restrictively interpreting other Convention rights.

To take the example of freedom of speech, free speech has become increasingly restricted for students, academics, and university staff at UK universities. Recent attempts to disaffiliate pro-life student groups from Student Unions at the Universities of Strathclyde,[8]Glasgow,[9] and Aberdeen[10] have been accompanied by examples of students' careers being impacted by Universities acting on the students' personal views outside of academics. For instance, Julia Rynkiewicz[11], a midwifery student, was banned from her hospital placement by Nottingham University, and faced expulsion from

1 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf.

2 See: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1047783-1084371&filename=003-1047783-1084371.pdf.

3 See: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-102332&filename=001-102332.pdf.

4 See: https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22003-542432-544154%22]%7D.

5 See: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-155352.

6 See: https://www.legislation.gov.uk/ukpga/1998/42/section/2.

7 See: https://www.coe.int/en/web/help/article-echr-case-law.

8 See: https://www.huffingtonpost.co.uk/entry/university-of-strathclyde-student-union-bans-pro-life-group-for-violating-students-safe-space_uk_5845420ce4b061fb97e5eddd.

9 See: https://www.heraldscotland.com/news/17241791.pro-life-students-glasgow-university-banned-becoming-official-club/.

10 See: https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-48334562.

11 See: https://www.telegraph.co.uk/news/2020/11/24/banned-catholic-pro-life-midwifery-student-wins-apology-payout/.

her degree and a four-month "fitness to practise" investigation due to her involvement in a pro-life student society. She has since won an apology and pay-out from the university.

This lack of respect for free speech is at odds with current UK policy priorities that are, for example, aiming to reduce censorship and cancel culture at universities.[12] The widening of Article 10 by the ECtHR to increasingly favour the right to take offence over the right to freedom of expression demonstrates one of the many ways in which the ECtHR may interpret Convention rights in a manner that conflicts with UK jurisprudence. This could be - and is - affecting the experience and professional lives of students in the UK who are being censored by their universities for their personal views, as in the case of Julia Rynkiewicz noted above. In line with this trajectory, what is or is not ruled as 'offensive' is moving away from the British Courts to the statutory interpretation of the ECtHR, which again is guided by the majority consensus of Member States rather than concern for the particular legal norms and political values of the United Kingdom. Taking into account the rulings and reasoning of the ECtHR that does not fully take into account the norms and values of the United Kingdom leads to a diminution of the legal rights of British citizens and undermines our own legal tradition.

As the ECtHR's interpretation of Convention rights has resulted in tension between Convention rights and British jurisprudence/legislation, and particularly as the ECtHR uses an evolutionary interpretation of rights that is distancing Convention rights from the original meaning of the Declaration, following our arguments above, we believe a textual approach in court decisions involving Convention rights would be best, in which there should be no requirement to put ECtHR judgements first.

Margin of appreciation

We will now consider how the domestic court's approach to matters falling within the UK's margin of appreciation has inappropriately involved domestic courts in highly sensitive ethical issues that are best left to Parliament to decide, such as assisted suicide and abortion. Such involvement is predicated on an alleged breach of the Human Rights Act even though UK law is, according to the ECtHR's case law, compatible with the Convention.

We would affirm that the delicate balancing of powers between executive, judiciary, and legislature is central to the upholding of human rights in the United Kingdom. The ECtHR's 'evolutionary interpretive' method of analysing Convention rights and its use of the 'European consensus' and 'living instrument' doctrines[13] have challenged this delicate balance by accentuating conflict between European judicial views and the domestic legal norms and political values of the United Kingdom, particularly regarding sensitive and contentious issues such as abortion, euthanasia, and reproductive technologies. This has, in turn, increased tension where, alongside the margin of appreciation in certain areas of sensitive national interest, the ECtHR is expanding existing Convention rights to create new rights that can directly influence and reshape the legal background to issues that currently fall within the margin of appreciation. These problems have been exacerbated by the expansionist attitude taken by the domestic courts to cases falling within the margin of appreciation.

12 See for example, a recent Parliamentary inquiry on freedom of expression: https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/120588/inquiry-launch-freedom-of-expression/.

13 Ibid.

As noted by the Council of Europe[14], "the concept of 'European consensus' refers to the level of uniformity present in the legal frameworks of the member States of the Council of Europe on a particular topic. The Court uses this principle both to justify a wide margin of appreciation given to the Member States in the absence of consensus, thus stagnating the development of case law, and to impose new standards, where there is a clear trend in most Member States, thus advancing the interpretation of the Convention [...] **Thus, if there is a consensus in Europe that goes against the respondent State's conduct in the case submitted to the Court for review, the latter can find a violation, asking the respondent State to align its conduct to the required standard."** [Emphasis added.] The margin of appreciation granted to Member States on moral/ethical issues is thereby diminished by this reliance on the 'European consensus' as domestic courts are obliged to consider pan-European views on controversial issues. The European consensus and the margin of appreciation afforded to individual states exist in contest, and their continually changing interaction is an unstable basis for the domestic legal and political resolution of issues of great public significance, such as abortion and assisted suicide. Whilst the reduction of the margin of appreciation is unfortunate, the margin of appreciation should be respected domestically.

Whilst we accept that, domestically, the benefit of the margin of appreciation should not necessarily automatically go to Parliament or the devolved Assemblies (if the matter is devolved), we are concerned that on difficult ethical issues, the courts are not deferring to the judgement of the elected branches. This is particularly evident in the cases of assisted suicide and abortion, which we will now examine in turn.

Example 1: Assisted suicide

In the case of *R (Nicklinson and another) v Ministry of Justice* (2014)[15], five judges held that the Supreme Court had the constitutional authority to make a declaration that the general prohibition on assisted suicide under UK law was incompatible with Article 8 of the Convention. Such division over the practical allocation of decision-making within the margin of appreciation on assisted suicide is concerning, and it should be reinforced that such highly sensitive and contentious matters are fundamentally issues of morality rather than legality, and, as such, should be reserved for Parliament to decide as the representative legislative body.[16] Notably we support the view of Lord Sumption that "the social and moral dimensions of the issue, its inherent difficulty, and the fact that there is much to be said on both sides make Parliament the proper organ for deciding it".[17]

Similarly, we would draw attention to the judgement of Lord Reed in this matter: "[T]he Human Rights Act introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy. Accordingly, it does not alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts."[18]

14 Ibid.

15 See: https://www.supremecourt.uk/cases/uksc-2013-0235.html

16 See: https://www.supremecourt.uk/cases/uksc-2013-0235.html.

17 Ibid.

18 Ibid.

Again, the delicate balancing of powers between executive, judiciary, and legislature is central to the upholding of human rights in the United Kingdom. As the above demonstrates, the challenge of balancing these powers is particularly evident in the case of euthanasia and assisted suicide. For background:

- Both euthanasia and assisted suicide are illegal in the UK; in England and Wales, for example, the former is regarded as either manslaughter or murder depending on the circumstances and is punishable by up to life imprisonment, and the latter is illegal under section 2 of the Suicide Act 1961, as amended by section 59 and Schedule 12 of the Coroners and Justice Act 2009, and punishable by up to 14 years' imprisonment.[19]
- The practical legal treatment of assisted suicide has been shaped by prosecution guidance from the Director of Public Prosecutions (DPP). The DPP revised their guidelines in 2014 for the prosecution of assisted suicide to recommend that such cases should be in the public interest, and may not be prosecuted on certain grounds, such as assistance wholly motivated by compassion.[20] The possibility of such prosecution both protects vulnerable people from abuse, such as the elderly, infirm, and those with disabilities, and provides for discretion on compassionate grounds.
- The Supreme Court, High Court, and Court of Appeal have each ruled that the judiciary is not an appropriate venue for debating the question of whether to legislate for assisted suicide in the future. As noted above in *R (Nicklinson and another) v Ministry of Justice* (2014), a majority of Supreme Court judges ruled that a declaration of incompatibility should not be made whilst Parliament was considering the matter. Parliament was best qualified to consider the matter of assisted suicide.[21] In *R (Conway) v The Secretary of State for Justice* (2018), the Court of Appeal determined Parliament to be a "better forum" than the judiciary for debating the legal position of assisted suicide.[22] In *R (Newby) v Secretary of State for Justice* (2019), the High Court rejected a judicial review of the current law concerning assisted suicide, judging that the court was "not an appropriate forum for the discussion of the sanctity of life".[23]
- The allocation of the issue of assisted suicide to Parliament rather than the judiciary has been recognised and reaffirmed in a number of written and oral Government pronouncements over the past year.[24] Indeed, Parliament has provided ample coverage to the issue of assisted suicide in recent years and consistently rejected attempts to legislate for assisted suicide. Most notably, the Assisted Dying Bill (2015) was roundly rejected by 330 votes to 118.[25] There have been two further Westminster Hall debates on this subject, in July 2019 and January 2020, which both failed to advance the legislative agenda of proponents of assisted suicide.[26]

Although the demarcation of assisted suicide as a matter for Parliament rather than the domestic courts has been confirmed in multiple recent statements from the Government, further clarity is

19 See: https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide; https://www.legislation.gov.uk/ukpga/Eliz2/9-10/60/section/2#reference-key-2cf99050ca2ede1b5b0d8086001e20be and https://www.legislation.gov.uk/ukpga/2009/25/section/59.

20 See: https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide.

21 See: https://www.supremecourt.uk/cases/uksc-2013-0235.html.

22 See: https://www.judiciary.uk/wp-content/uploads/2018/06/conway-judgment-27062018.pdf.

23 See: https://www.casemine.com/judgement/uk/5dd623be2c94e02de8458e4c.

24 For example, see: https://questions-statements.parliament.uk/written-questions/detail/2020-07-13/72856; https://hansard.parliament.uk/commons/2020-11-05/debates/A10D8E3C-C301-4163-890F-775B6E48F192/CoronavirusRegulationsAssistedDeathsAbroad; and https://questions-statements.parliament.uk/written-questions/detail/2020-11-03/110736.

25 See: https://hansard.parliament.uk/Commons/2015-09-11/debates/15091126000003/AssistedDying(No2)Bill and https://bills.parliament.uk/bills/1631/news

26 See: https://hansard.parliament.uk/Commons/2019-07-04/debates/EFD57ADB-AE18-4D6B-9DA8-CCDDF99D1D0A/AssistedDying?highlight=dying#contribution-83B8DB21-739E-4CD4-B87E-086881D4C39A; and https://hansard.parliament.uk/Commons/2020-01-23/debates/B0F8B659-0411-45E7-9341-05C2B3529102/AssistedDyingLaw.

needed for the future treatment of highly sensitive ethical and moral issues that fall within the margin of appreciation. The Human Rights Act should be amended to reflect that such matters come under the competency of Parliament rather than the domestic courts.

Example 2: Abortion

In *NIHRC*, a majority held that the then current Northern Ireland abortion law was incompatible with the right to private and family life guaranteed by Article 8 of the ECHR in its prohibition of abortion in cases of rape, incest, and fatal foetal abnormality.[27] The Court accepted that this issue fell within the UK's margin of appreciation but nonetheless held that it should not defer to the judgment of the democratically elected Northern Ireland Assembly. Instead, they held that they were better placed to decide the issue themselves.

Lords Reed and Lloyd Jones dissented and wrote that the court was invited to "define categories of pregnancy in respect of which a termination must be legally available if the legislation is to be compatible with article 8," which requires addressing "a number of difficult issues: for example, whether to treat some categories of pregnancy differently from other pregnancies at all; whether, if so, to draw the line at foetuses with fatal abnormalities which will prevent their surviving until birth or for more than a short time after birth, or to include foetuses with serious but non-fatal abnormalities; whether to differentiate between healthy foetuses conceived as the result of sexual offences and other healthy foetuses; and whether, if so, to draw the line at foetuses conceived as the result of offences which were non-consensual, or to include those conceived as the result of consensual offences. **These are highly sensitive and contentious questions of moral judgement, on which views will vary from person to person, and from judge to judge, as is illustrated by the different views expressed in the present case. They are pre-eminently matters to be settled by democratically elected and accountable institutions."**[28] [Emphasis added.]

Further, judges are not accountable to an electorate, and as Lords Reed and Lloyd-Jones argued in the case of *NIHRC*: "it is equally important that the courts should respect the importance of political accountability for decisions on controversial questions of social and ethical policy. The Human Rights Act and the devolution statutes have altered the powers of the courts, but they have not altered the inherent limitations of court proceedings as a means of determining issues of social and ethical policy. Nor have they diminished the inappropriateness, and the dangers for the courts themselves, of highly contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions."[29]

We wholeheartedly agree with the dissent of Lords Reed and Lloyd-Jones. The ECtHR affords members states a wide margin of appreciation to decide issues related to abortion. In the UK's constitutional arrangements, this issue has been devolved to Northern Ireland since the 1960s. This is in recognition of the difficult and sensitive moral and ethical issues raised. There was no justification for the courts deciding that they were better placed to decide these issues. This is both undemocratic and undermines the legitimacy of the courts.

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27 See: https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf.

28 See: https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf.

29 See: https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

At this stage it is worth responding to a submission made by the Human Rights Centre (HRC) of the School of Law at Queen's University Belfast. In paragraph 16 they note:

"We believe that domestic courts and tribunals have applied their discretion appropriately when dealing with issues which the ECtHR has confirmed are within a State's margin of appreciation. The clearest example of this as far as Northern Ireland law is concerned is the set of Supreme Court judgments in a case on abortion law brought by the Northern Ireland Human Rights Commission. There the Court said, by 4 to 3, that it was a breach of Article 8 of the ECHR (under which the UK has an area of discretion in the way it protects the right to a private and family life) for the law of Northern Ireland to criminalise abortion in situations where the woman has become pregnant through rape or incest; they also said, by 5 to 2, that it was a breach of Article 8 to criminalise abortion if a woman's baby had a fatal foetal abnormality. This is a classic instance of where a situation that was widely perceived as unjust was rectified directly because of the Human Rights Act: the Supreme Court's judgment led to new legislation being introduced to de-criminalise abortion in Northern Ireland."

- Firstly, the Human Rights Centre here makes baseless assumptions in its account of the Supreme Court ruling on Northern Ireland abortion law in 2018.[30] They assume that the Supreme Court came to the correct conclusion as a direct result of the Human Rights Act, insofar as they "rectified" a "situation that was widely perceived as unjust". However, a poll made at the time of the last general election in 2019 found that 50% of Northern Ireland voters thought that abortion should only be permitted in cases where the life of the woman is in danger.[31] Indeed, there appears to have been a striking disparity between the wishes of the general public and the decisions by a small number of Supreme Court judges in this sensitive matter of abortion that carries significant ethical, moral, and social consequences. In this sense, it is again baseless to describe such a ruling as the rectification of an injustice, if that sense of injustice cannot be shown to have been shared by a majority of the Northern Irish population and if, in fact, the available polling data suggests the opposite to be true. For those people, it is hard to shake off the feeling that *NIHRC* was a case about four or five judges who personally happened to support greater abortion provision deciding that their views were more important than 50% of the population of Northern Ireland.

- Secondly, there is no regard in the Human Rights Centre's response for the possible objections that the Court should not have made this finding as the matter fell within the margin of appreciation and so was compatible. Nor is there any consideration of the (lack of) institutional compliance of the Court in making such a determination. They unfortunately seem to assume that just because the Court reached a conclusion they agree with, this makes it right or legitimate. But that is plainly not so; the end does not justify the means.

- Thirdly, it is important to note, *contra* the Human Rights Centre, that the findings of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) report on abortion in Northern Ireland was more significant than the aforementioned ruling of the

[30] Ibid.
[31] See: https://www.liverpool.ac.uk/media/livacuk/research/heroimages/The-University-of-Liverpool-NI-General-Election-Survey-2019-March-20.pdf Table 36.

Supreme Court in leading to the decriminalisation of abortion in Northern Ireland last year.[32] [33] Indeed, the law which Westminster passed, s.9 of the Northern Ireland Executive Formation Act, explicitly referred to the CEDAW Committee report and required its implementation. It is worth noting that the CEDAW report itself went beyond what the Supreme Court held. The Supreme Court thought that a ban on abortion in disability cases was compatible but the CEDAW Committee did not. It is also noteworthy that in forming this conclusion the CEDAW Committee went beyond the text of the CEDAW Convention (which should define its remit) which does not mention abortion.

Conclusion

The domestic courts have held that they can find something to be incompatible with the ECHR even when the Strasbourg Court has held that it is compatible with the ECHR as it falls within the margin of appreciation. The Human Rights Act was enacted so that individuals could enforce their ECHR rights in the domestic courts, but giving the domestic courts the ability to find that there is an incompatibility when Strasbourg thinks there isn't does not advance that policy goal. Instead, especially in light of the sorts of issues that fall within the margin of appreciation, it forces the UK courts to make determinations about highly sensitive issues which are not appropriate or legitimate for the courts to determine.

It is true that a complaint made against the HRA in general is that, due to the proportionality test, it requires the courts to rule on the merits of UK laws and policies. The defence that is usually advanced is twofold. First, the courts are only doing what Parliament asked them to do. Second, although they involve looking at the merits of policies these are still legal issues.

However, neither of those defences apply to the determination of matters falling within the scope of the margin of appreciation. First, there is nothing in the HRA which tells the courts "you must make a finding on compatibility even in cases falling within the scope of the margin of appreciation". Second, such questions are no longer legal questions. In a normal HRA matter the domestic courts ask themselves "in light of its case-law, what would Strasbourg say of this measure?" That is a legal question, albeit one which is laden with policy considerations (given the proportionality test). But in cases falling within the margin of appreciation, the answer is that Strasbourg would say that it is compatible. Asking any further question crosses the law/politics boundary.

As, Lords Sumption, Reed, and Lloyd-Jones pointed out in Nicklinson and NIHRC: if judges are to decide themselves whether laws concerning abortion or assisted suicide strike the right balance, this will come down to their own personal moral judgment about the issues at stake. Yet, judges are not appointed based on their moral or religious views, nor are they appointed based on their expertise on moral reasoning; rather they are appointed based on their legal expertise. Therefore, it's highly inappropriate for them to opine on such matters; in addition it makes the outcome of cases dependent on who happens to hear such cases, which undermines confidence in the judiciary.

32 See: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22693&LangID=E#:~:text=In%20a%20report%20published%20today,legal%20abortion%20or%20to%20carry; https://hansard.parliament.uk/Commons/2020-06-08/debates/b341df65-8362-48b6-a65e-a80e5835eccd/Abortion(NorthernIreland)(No2)Regulations2020?highlight=cedaw#contribution-956983D0-26D5-47E8-939A-FD5107FA7C85 and https://www.legislation.gov.uk/uksi/2020/345/contents/made.

33 See: https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

It is also sometimes said that if the UK courts did not decide themselves issues falling within the margin of appreciation, then the UK would lose the benefit of that margin. That defence fails. Firstly, Strasbourg was giving the UK a margin of appreciation before the HRA was enacted. Secondly, even in cases where the Courts did not carry out a compatibility assessment themselves, Strasbourg confirmed that it was within the margin of appreciation. For example, in Nicklinson the majority did not end up carrying out a compatibility assessment because Parliament was about to consider the matter.[34] Nonetheless, the Strasbourg Court in Nicklinson and Lamb v United Kingdom confirmed that the matter fell within the margin of appreciation. Third, this defence only works in the very limited cases where Strasbourg affords a margin of appreciation but only on the condition that the domestic courts carry out their own compatibility assessments, but these are not all of the cases falling within the margin of appreciation. Cases concerning conscience issues are certainly not in that category.

It is further worth noting some defenders of the ability of the courts to give a ruling in this context may claim that declarations of incompatibility do not matter as the elected branches are not obliged to act. Yet in the context of Northern Ireland, this is not quite true, as the competence of the NI Assembly is limited by the ECHR, though it remains to be seen how a court would deal with a case where the NI Assembly does something which does not breach ECHR (because it is within the margin of appreciation) but which the domestic courts do not consider strike the right balance. In any event, the current situation does not address the concerns for the legitimacy of the courts which comes from them ruling on those issues.

The current context also has the effect of either weakening the power of a declaration of incompatibility or of affording undue prominence to the personal views of the judges. Normally, when a declaration of incompatibility is made, Parliament is faced with a clear choice: do we want the UK to be in breach of its international obligations? Yet, in cases within the margin of appreciation, a declaration of incompatibility is much more ambivalent: while the legal status quo may be compatible with the UK's international obligations under the ECHR, a group of sitting judges decide that a different balance is preferable. It is unclear why Parliament should care about such a declaration, given that it does not indicate the UK to be in breach of its international obligations, and the declaration of incompatibility thereby loses its normative force. The danger, however, is that this affects how Parliament sees other declarations of incompatibility, and so might weaken the normative force of these, which might indicate an outstanding breach of international obligations.

Conversely, Parliament may not realise the difference between the legal significance of these two sorts of declarations, and so might mistakenly think that a declaration within the margin of appreciation has normative force. This, however, would be very undemocratic as it would assign a particularly great weight to the personal views of the judges who happened to be hearing the case.

Overall, the desired reform would - in cases that the ECtHR rules as falling under the margin of appreciation - be to prevent the courts from ruling that a measure is incompatible with the rights listed in Schedule 2. If this is not directly possible, this bar should at the very least apply where broad social, moral and ethical determinations are involved. If that is not possible, we recommend the amendment

[34] But as stated above it is concerning that two justices did carry out such an assessment and that a further three thought it was legitimate for them to do so (albeit not at that very moment).

of the HRA to prevent the application of the usual HRA/Northern Ireland Act/Scotland Act/Wales Act remedies in such cases and instead restrict the courts to a new type of declaration clarifying that the law is compatible with ECHR, as it falls within the margin of appreciation, and that the domestic courts personally believe the balance should be struck differently and more democratically. This would have the merit of making it clear to Parliament that the law is compatible with ECHR and that even if it does nothing, this does not affect the UK's international obligation. That solution, whilst being democratic, would however not be ideal as it would still involve the courts opining on sensitive ethical issues with the risks to the legitimacy of the courts identified by Lords Sumption, Reed, and Lloyd-Jones.

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