Date: 4 March 2021
Re: **Submission to the Independent Human Rights Act Review**

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1 Introduction

1. ADF International is a legal organisation dedicated to protecting fundamental freedoms including the right to life, marriage and family, and freedom of religion. In addition to holding ECOSOC consultative status with the United Nations, ADF International has accreditation with the European Commission and Parliament, Organization of American States, and works with the Organization for Security and Co-operation in Europe and the Fundamental Rights Agency of the European Union.

2. Starting out as a treaty between non-communist European nations following the Second World War, the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention" or "ECHR") was ratified by the UK in 1951 and given further effect in the British domestic legal system through the Human Rights Act 1998 ("HRA"). The Convention provides a sound framework for protecting human rights and individual freedoms.

3. ADF International upholds and endorses these rights, recognizing the foundation they provide to democratic societies. As a legal advocacy organization, ADF International has litigated and acted as third-party intervenors in multiple European Court of Human Rights ("ECtHR") cases principally concerning Articles 8, 9, 10, 11, and 12.

4. While recognising the importance of individuals being able to argue their Convention rights in domestic courts, and the difficult and important role that the ECtHR plays in reviewing and judging Convention rights across the Council of Europe's forty-seven Member States, ADF International welcomes an independent review of the HRA at this time.

5. The Independent Human Rights Act Review (IHRAR) should assess existing constitutional mechanisms and processes and consider how these may be improved to better protect fundamental rights in the UK. This should include an assessment of any provisions in the HRA that too easily allow for a departure from the text and intent of the ECHR whether by the ECtHR itself (and then, how domestic courts should respond) or by domestic courts.

6. Our submission will, accordingly, focus on the evolving interpretation of the ECHR text (the so-called creation of new rights), the correct application of the margin of appreciation and the need for an explicit proportionality test in human rights legislation.

2 PART A: Has the correct balance been struck in the Human Rights Act in the relationship between the domestic courts and the European Court of Human Rights?

7. The European Court of Human Rights (ECtHR) has the challenging task of ruling upon the Convention rights of individuals across forty-seven States in the Council of Europe. No commentator or jurist would conclude that this task is simple. The ECtHR often faces extremely complex questions of domestic law and an asserted conflict between different Convention rights.

8. Tensions with Member States have arisen over controversial matters relating to family life, morals and ethics. Across Europe, and regardless of the margin of appreciation often afforded to States on these matters, controversial issues relating to marriage, abortion, euthanasia, reproductive technologies, and hate speech have, in recent years, been interpreted in an evolutionary manner by the ECtHR. This has heightened the tension with signatory governments and minority groups.

9. Under Section 2 HRA courts and tribunals "*must take into account*" all judgments, decisions, declarations or advisory opinions of the ECtHR, as well as opinions and decisions of the Commission, when determining a question connected with a Convention right. While the courts have recognised that this provision does not require ECtHR jurisprudence to be followed or applied unwaveringly by UK courts, the scope and construction of this section has since been an issue of judicial debate.

10. ADF International proposes that the IHRAR panel carefully consider the merits of amending the HRA to clarify whether the UK is obliged to follow or 'take into account' jurisprudence of ECtHR which significantly departs from the Convention's text. Secondly, where a margin of appreciation is afforded to the UK, it should be clarified that it is for Parliament to create any new rights or significantly alter the scope of existing provisions rather than the courts. And third, that the review consider the adoption of an explicit

proportionality test into human rights law. These matters are considered under the following headings:

(a) The ECtHR 'living instrument' doctrine has been used to expand Convention rights beyond the intent of the drafters and signatories.

(b) The concept of the margin of appreciation in complex moral and ethical cases has, at times, been applied domestically in a manner that is undemocratic.

(a) The effective protection of human rights in the UK will be enhanced by the adoption of an explicit proportionality test in law.

2.1. A Domestic Response to the Undemocratic Expansion of Rights through the "living instrument" Doctrine

11. The framers of the Convention drafted it to ensure that the fundamental rights contained therein, for which a broad consensus exists within democracies, should be adopted and incorporated into the political and legal culture of Member States. It is submitted that those rights should be regarded as being essentially legislated for by the precise terms of the Convention and the original intentions of the democratically elected politicians who framed it on behalf of their respective peoples.[1] There are those, both domestically and at the Strasbourg Court, who regard the Convention as a 'living instrument' and rights as abstract adjudicative principles to be applied to cases where no settled law exists or to the reinterpretation or even overturning of existing law.[2] It is submitted that such judicial reasoning should generally be considered illegitimate in a democratic society, breaching the limits of what the text of the Convention, ordinarily and fairly understood, allows or is capable of accomplishing.

12. In using an 'evolutionary interpretative' method of legal analysis for Convention rights, the ECtHR surveys evolving social conceptions among what it considers to be a majority of signatories to the Convention and then, over time, entrenches these as norms within the ECHR framework. As a former ECtHR President summarized, the Court "*[interprets the text] by adapting it to the changes that have taken place over time – to changes in society, in morals, in mentalities, in laws [and] technological innovations and scientific progress*".[3]

13. However, the concern with this approach is that it can allow ECtHR judges to create or significantly expand rights beyond the text of the Convention (and indeed the intentions of the UK when ratifying the Convention). While the law undoubtedly must be flexible and

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[1] Sumption LJ, '*The Limits of Law'*, 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013.
[2] *Ibid.*
[3] Jean-Paul Costa, "*What are the limits to the evolutive interpretation of the Convention*?" Dialogues between Judges (European Court of Human Rights, Strasbourg. 2011), 5.

applied on a case-by-case basis to the particular facts at hand, this normal process of judicial reasoning can be distinguished from the creation of new rights. It is notable that some of the rights subsequently developed by ECtHR judges are not expressly mentioned in the Convention[4] and some were even expressly rejected by the original drafters.[5]

14. Lord Sumption conceived of the human rights structure created by the Convention as a set of rights that are enshrined in law and defined and understood in a restricted and non-expansive way, confining the courts to the strict interpretation of the letter and intended meaning of the law, and leaving broader issues of principle concerning how the legal and social order should be configured to the democratically elected representatives of the people.[6]

15. This approach, often termed by scholars as 'textualism', posits that a "legal provision must mean what it was taken to mean originally, i.e. at the time of enactment" and is closely aligned to 'intentionalism', which posits "that a legal provision must apply to whatever cases the drafters had originally intended it to apply".[7] Another more pointed way to describe the interplay between those who embrace the Convention as a 'living instrument' and those who urge an approach hewing as closely to the text as possible, is the gulf between models of judicial activism and judicial self-restraint.

16. The ECtHR has embraced an activist approach in emphatic terms, such as those used by Judge Sicilianos in the case of *Magyar Helsinki Bizottság v. Hungary.*[8] When referring to evolutive interpretation he states:

> this interpretative method allows the text of a convention to be continuously adapted to "present-day conditions", without the need for the treaty to be formally amended. The evolutive interpretation is intended to ensure the treaty's permanence. The "living instrument" doctrine is a condition sine qua non for the Convention's survival!

17. It is submitted that this interpretative ethic is, as described by Lord Sumption (above), occupying the ground on issues of the legal and social order which should be left to the democratically elected representatives of the people. Where the ECtHR engages explicitly in an evolutive interpretation it engages in an approach which is at odds with an interpretation of the text that is in accordance with the ordinary meaning of the words. The optimal interpretation, from a democratic legitimacy perspective, is in conformity with the internationally recognised rules of treaty interpretation, as contained in the Vienna

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[4] *Golder v. United Kingdom*, Application no. 4451/70.

[5] *Young, James and Webster v. the United Kingdom*, Application nos. 7601/76 & 7806/77.

[6] Sumption LJ, '*The Limits of Law'*, 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013.

[7] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press, 2007), 60.

[8] Judge Sicilianos, Separate Opinion, *Magyar Helsinki Bizottság v. Hungary* [GC], Application no. 18030/11.

Convention on the Law of Treaties[9] wherein the primary rule of interpretation of a treaty is the "ordinary meaning rule" at Article 31 (1):

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object or purpose. [10]

18. The Vienna Convention makes clear that where an interpretation of the text is reached under the 'ordinary meaning rule', preparatory works or legislative history is only to be used to interpret the meaning of a text where it is impossible to arrive at an interpretation under the ordinary meaning rule.[11]

19. Sir Gerald Fitzmaurice, the judge in respect of the United Kingdom at the ECtHR in the 1970s was a trenchant critic of the tendency, then emerging, of interpretating the text of the Convention in an expansive manner, where the judges "lose sight of principle in eagerness for specific results - however meritorious they may be in themselves - overreaches the still, small voice of the juridical conscience."[12]

20. His prescient observation that the text of Article 8 of the ECHR (right to private and family life) could, within certain limits, mean that "almost anything can colourably be represented as connected with or related to some other given thing, or as belonging to the same sphere of ideas" has been born out over time where Article 8 has given rise to procedural rights in relation to lethal drugs even in the absence of any substantive right,[13] a right to select disease free embryos for IVF[14] a right to same sex partnerships[15] among numerous others. Fitzmaurice was critical of such an approach to Article 8 in a Belgian case. His dissenting opinion in the case is a powerful exhortation to his colleagues to return to a restrained and textualist methodology in reading Article 8:

> ….the main, if not indeed the sole object and intended sphere of application of Article 8 (art. 8), was that of what I will call the "domiciliary protection" of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delaying and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another…. - Such, and not the internal,

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[9] Vienna Convention on the Law of Treaties (with annex) 1155 UNTS 331 (1969). Concluded at Vienna on 23 May 1969.
[10] *Ibid*.
[11] See Article 32
[12] *Marckx v. Belgium,* Application No. 6833/74, ECtHR 13/06/1979, Dissenting Opinion of Judge Fitzmaurice, at para 5.
[13] *Koch v. Germany*, Application No. 497/09, Judgment of 19 July 2012.
[14] *Costa and Pavan v. Italy*, Application No. 54270/10, Judgment of 28 August 2012.
[15] *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010.

> domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life ... home and ... correspondence" were to be respected, and the individual endowed with a right to enjoy that respect – not for the regulation of the civil status of babies.[16]

21. Judge Fitzmaurice decried the Strasbourg Court's attempt to impose uniform laws in matters such as the registration of parentage for children, stating that "States must be allowed to change their attitudes in their own good time, in their own way and by reasonable means, - States must be allowed a certain latitude." The Strasbourg Court has not heeded this advice and over the decades has failed to exercise judicial restraint when attempting to achieve certain outcomes in particular cases irrespective of the text of the Convention.

22. It is submitted that in order to respect the right of the people to have their democratically elected representatives resolve complex moral and ethical questions impacting the legal and social order, the courts of the United Kingdom should not have regard to judgments of the ECtHR which depart from a good faith interpretation of the text of the ECHR in accordance with the ordinary meaning rule as set out above. Such an approach would address the growing corpus of jurisprudence that the domestic courts are obliged to take into account under Section 2 HRA.

2.1.1. Recommendation

23. Amend Section 2 HRA to clarify that a domestic court shall not have regard to any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, where said judgment, decision, declaration or advisory opinion reaches a conclusion in a manner disregarding or contrary to the text of the ECHR, and/or in a manner ignoring a good faith interpretation of the ordinary meaning of the text of the ECHR.

2.2. Towards a Correct Application of the Margin of Appreciation

24. The doctrine of the margin of appreciation which is used by the ECtHR to afford a certain room for maneuver to States when interfering with Convention rights in particular cases, originates from the French phrase *marge d'appréciation*, and has been incorporated into the English language as a type of solecism, where the more accurate translations would be a 'margin of discretion or judgment.'[17]

25. At the Brighton and Copenhagen Conferences on reform of the ECtHR, Member States encouraged the Court to 'give greater prominence to' the subsidiarity principle and the

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[16] *Marckx v. Belgium,* Application No. 6833/74, ECtHR 13/06/1979, Dissenting Opinion of Judge Fitzmaurice, at para 7.
[17] Thorpe and Sedley LJJ in *Evans v. Amicus Healthcare Ltd* [2004] EWCA 727 [2005] Fam 1, [63].

margin of appreciation and to 'avoid reconsidering questions of fact or national law that have been considered and decided by national authorities'.[18]

26. However, which 'national authorities' are to avail of the margin of appreciation is in practice a question left unanswered by the Strasbourg Court. It is submitted that where the standard convention jurisprudence affords a margin of appreciation to the national authorities, Parliament is the most appropriate forum to resolve the complex moral and ethical issues that usually give rise to the requirement for a margin of appreciation.

27. In cases where the 'margin of appreciation' is applied, the ECtHR gives a measure of deference to the state's assessment or interpretation of certain events, facts, actions, situations and any other phenomena within its own jurisdiction in the context of introducing a policy or rule which infringes on a Convention protected right. The width of the margin afforded to the State depends on, *inter alia*, the interests at stake, the context of the interference, the impact of a possible consensus in such matters, the aim pursued by the interference, and the degree of proportionality in the State's action.[19]

28. In cases which raise sensitive moral or ethical issues and where no 'consensus' exists among Member States of the Council of Europe on how to respond to the substance of the matters raised, the Strasbourg Court will (appropriately, we submit) refrain from imposing a particular or novel interpretation of the Convention in response to the complaint. In *Hamalainen v. Finland*, a case concerning a claim under Article 8 by a post-operative transexual whose officially recorded identity was changed from male to female, the Applicant wished to have an existing marriage to a woman recognised. At the time marriage in Finland was recognized as the union of one man and one woman, whereas civil partnerships were open to same sex couples. The Applicant refused the suggestion that the existing marriage be converted to a civil union which would have then been allowed after the change in recorded sex on the Applicant's official documents. The Strasbourg Court held that in the circumstances a wide margin of appreciation was to be afforded to Finland:

> In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one ... This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.[20]

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[18] Brighton Declaration at para 12(a). See also Interlaken Declaration, Action Plan at para 9(b); Izmir Declaration, Preamble at para 5; Brighton Declaration at para 11; Brussels Declaration at para 7.

[19] Spielmann, D., *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Cambridge Yearbook of European Legal Studies, vol. 14, 2012, pp. 381 – 418.

[20] *Hamalainen v. Finland* [GC], Application no. 37359/09, (ECHR 2014), § 75.

29. Lady Hale directly addressed the fraught question of where the institutional competence to reconcile rights within the margin of appreciation rests in such cases of a sensitive moral and ethical dimension, in a decision involving in the question of whether unmarried couples should be allowed to adopt.[21] She accepted that such cases raise questions of social policy and where such questions admit more than one choice, the court would ordinarily regard that choice as being a matter for Parliament. She phrased the question as one of how should the domestic courts respond where a provision in subordinate legislation is said to be incompatible with the Convention rights, but the European Court of Human Rights in Strasbourg might well regard the matter as within the margin of appreciation allowed to member states?[22]

30. Having seemingly acknowledged that the particular matters at issue in the adoption case would fall within the margin of appreciation according to the Strasbourg Court, Lady Hale then asks rhetorically if "the courts form their own view of the content of the Convention rights or should they leave it to the legislators?"[23] She notes that the Strasbourg Court "is no help with this: it is concerned only with the end product, not who made it …. Not whether that judgment should be made by the courts or by the legislature."[24]

31. Drawing from the HRA and the requirement for compatibility, Lady Hale held that the HRA required, in certain cases, that the courts should "go further" than the Strasbourg Court; "Hence, if there is a clear and consistent line of Strasbourg jurisprudence, our courts will follow it. But if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment."[25]

32. It is submitted that the approach favoured by Lady Hale introduces a further unpredictability in assessing when UK courts will defer to Parliament on a social, economic or ethical issue or seek to step in and rule that a Convention right has been violated.

33. At the Supreme Court in *Nicklinson,*[26] the government argued that under the UK's constitutional settlement the determination of criminal law on the issue of assisted suicide was best left to Parliament. Lord Neuberger acknowledged that Parliament had been clear in its approval of a general prohibition of assisted suicide less than five years prior to the judgment, but nevertheless proceeded to say:

> it is self-evident that the mere fact that Parliament has recently enacted or approved a statutory provision does not prevent the courts from holding that it infringes a Convention right. By the 1998 Act, Parliament has cast on the courts the function of deciding whether a statute infringes the Convention. In a case such as the present, where the margin of appreciation applies, a court will only invoke this function where it has concluded that the issue is within

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[21] *Re P and others (AP) (Appellants) (Northern Ireland)* [2008] UKHL 38.
[22] *Ibid.* at 84.
[23] *Ibid*.
[24] *Ibid* at 119.
[25] *Ibid* at 120.
[26] [2014] UKSC 38.

> its competence, in which case the fact that Parliament has recently considered the issue, while relevant, cannot automatically deprive the courts of their right, indeed their obligation, to consider the issue.[27]

34. Such an approach disturbs the proper operation of the doctrine of the margin of appreciation. Properly understood, matters falling within the margin which concern sensitive matters of social or ethical policy are ordinarily for Parliament to provide an answer to rather than the courts.

35. In his dissenting opinion, Lord Sumption in *Nicklinson* set out three reasons why the issue of assisted suicide should be addressed by Parliament. The first was if the issue involves a choice between two fundamental but mutually inconsistent moral values, upon which there is no consensus in our society. Such choices are inherently legislative in nature. The second noted that it was important to consider the fact that Parliament had already expressed its views in the Suicide Act 1961, which was amended in 2009 without altering the principle.

36. The third recognised that the Parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas given the access Parliament has to a range of expertise and experience, more so than the adversarial litigation process is generally able to provide.

37. In our submission, Lord Sumption's approach aligns better with a proper understanding of the relationship between the ECtHR and domestic tribunals. The purpose of the margin of appreciation is to create space within which a democratic state can settle such sensitive questions. In the UK, the proper place for resolving such policy and legislative questions is the legislature. Therefore, Courts should not determine that rights exist which are not provided for by Parliament and in an area in which the ECtHR has found falls within the margin of appreciation. The ECHR was created to be a standard setter for liberal democracies in Europe.[28] This emphasis on effective democratic processes ought to be recognised by the Courts when applying the margin of appreciation doctrine to sensitive social and moral issues.

2.2.1. Recommendation

38. In areas of policy or law touching on sensitive moral and/or ethical concerns, which generally attract a margin of appreciation, the margin of appreciation should be expressly reserved for Parliament to address the issues involved.

2.3. Advancing an Explicit Human Rights Proportionality Test

39. It is submitted that this review should recommend an express incorporation into law of proportionality as a method of human rights adjudication in the United Kingdom. A

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[27] Id at 100.
[28] *The United Communist Party of Turkey v. Turkey*, (1998) 26 E.H.R.R. 121.

domestic doctrine of proportionality would, by implication, oblige parliament and the executive to consider less restrictive means of curtailing fundamental human rights when legislating for new restrictions or forming policy which has the effect of restricting rights.

40. The doctrine of proportionality developed by the German Federal Constitutional Court is instructive in the resolution of alleged breaches of human rights. The three parts of the proportionality test are the requirement of effectiveness or suitability, the requirement of necessity, and the requirement of proportionality in the strict sense.[29]

41. The first two elements are concerned with the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims. If an interference with a right proves to be unsuitable because less intrusive means were available, there is no good reason to sustain such an interference.[30] The third requirement, that of proportionality in the strict sense, concerns the relationship between the interests at stake. It requires that a reasonable balance should be achieved among the interests served by the measure and the interests that are harmed by introducing it.[31]

42. The courts in the UK have reiterated that proportionality in matters of human rights adjudication is not necessarily part of the domestic legal order. Where a litigant challenges the substance of a decision reached by the government, relying on the provisions of the HRA, the courts have held that the relevant test for judicial review is irrationality.[32]

43. While there exists some judicial support for a change from the common law test for judicial review (based on the underlying principle of rationality) to adopting a proportionality test in particular cases concerned with fundamental rights, such a change would require, at the very least, a new departure in the fundamental structure of judicial review by the Supreme Court.[33] Considering the "profound constitutional question of whether proportionality has superseded the doctrine of irrationality" that is a venture that thus far the courts have not embarked upon,[34] and so in the absence of any legislative measures on this issue, the courts have not "perform[ed] the "burial rights" of the doctrine of irrationality"[35] in favour of a structured proportionality test.

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[29] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, (Martinus Nijhoff, International Studies in Human Rights, Leiden, 2009) At pp. 69-72.
[30] *Ibid*. At p 164.
[31] Denise G. Réaume, *Limitations on Constitutional Rights: The Logic of Proportionality*, (University of Oxford Legal Research Paper Series, Paper No. 26/2009), available at <http://ssrn.com/abstract=1463853> at p. 10
[32] *The Queen (on the application of Solange Hoareau, Louis Olivier Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at 95.
[33] See, Coulson LJ, *Browne v. Parole Board of England and Wales* [2018] EWCA Civ 2024.
[34] Neuberger LJ, *R (Keyu and others) v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, at 131 to 133.
35 See, Dyson LJ, *R (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397, at [35].

44. Inherent in any assessment of the proportionality of a restriction on a fundamental rights protected by the HRA, is an examination of whether the most appropriate means of restriction was employed. If two means are equally suitable to promote a competing public interest principle but differ as to the extent they restrict a right, the choice of these means is irrelevant from the viewpoint of the competing principle, but not from the viewpoint of the right. In that case, optimisation requires the adoption of the less restrictive of both means.[36]

45. The assessment of less restrictive means of restricting rights inevitably invites judges to engage in an examination of administrative organisation, resource allocation etc. issues where judicial deference is normally afforded to the executive. However it is necessary "to distinguish the grounds for deference from its proper extent, [t]hat certain matters fall within the executive expertise is a reason for deferring, but not a reason for deferring greatly."[37] Jurists examining proportionality assessments by the ECtHR argue in favour of a variable intensity of review, that is a function of the seriousness of the limitation of the right in question, i.e. both its intrinsic importance and the degree to which the enjoyment of this right is denied, thus "the more serious a limitation of rights is, the more evidence the court will require that the factual basis of the limitation has been correctly established, and the more argument it will require that alternative, less intrusive, policy-choices are, all things considered, less desirable."[38]

46. With a few exceptions (such as the prohibition of torture or punishment without law etc.), the ECHR does not provide for absolute rights. In cases of qualified rights, where a public body is the decision maker, the fact it has identified a less restrictive means, not necessarily the least restrictive means, may be sufficient to establish disproportionality. Identifying and applying the least restrictive means is the obligation of primary decision-makers. The necessity principle is of course neutral with respect to choice when there are multiple alternative means that are not only less restrictive, but that do not restrict the right at all.[39]

47. There is no conceptual reason why a process of examining the means employed to restrict a human right, and the question of whether alternative options existed, should be entirely foreign to the system of judicial review in the UK. Judges have recognized the benefits inherent in a proportionality analysis, in so far as the terminology of proportionality introduces "an element of structure into the exercise, by directing attention to factors such

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36 R. Alexy, *A Theory of Constitutional Rights*, Oxford University Press, 2002, 67-69. The sequence of steps is also logical: suitability strikes out unsuitable means, necessity allows to compare suitable means, while the question whether even the least restrictive means is acceptable is a balancing question.

37 J. Rivers, "*Proportionality and Variable Intensity of Review*", Cambridge Law Journal 2006, (174) 201, at p.205.

38 *Ibid*.

39 E. Brems and L. Lavrysen *'Don't use a sledgehammer to crack a nut': less restrictive means in the case law of the European Court of Human Rights,* Human Rights Law Review 15 (1), 2015, 1-30, at p.3.

as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages."[40]

48. The introduction of an express requirement for proportionality would oblige parliament and the executive to consider alternatives; merely selecting a rational means to effectively satisfy a public interest or policy objective will not suffice, in particular where such a means may not be the less restrictive means available and may introduce a measure which goes too far in restricting protected rights and thereby become unacceptable.[41]

49. In view of the foregoing, a decisive move from the existing tests based largely on rationality criteria in human rights judicial review toward a more structured test of proportionality, incorporating an analysis of whether a restriction of rights considered and or could employ less restrictive means, would enhance human rights adjudication by ensuring a more nuanced and comprehensive consideration of the extent to which a human right is impacted by various legislative and policy choices.

2.3.1. Recommendations

50. Incorporate an express requirement to adopt a robust doctrine of proportionality into human rights law.

3 PART B: Ensuring that every citizen can protect their fundamental rights

3.1. Addressing Access to Justice in Cases of Alleged Rights Violations for Litigants of Limited Means

51. The introductory paragraphs of the IHRAR Terms of Reference refer to an opportunity to "consider how the HRA is working in practice and whether any change is needed". The cost burden faced by litigants or potential litigants represents a significant impediment to the realisation of the rights protected in the HRA. Considering the extent to which citizens are able to hold public authorities to account is, therefore, the starting point for assessing the HRA's effectiveness in practice.

52. Lord Justice Jackson's *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs*,[42] published on 31 July 2017, proposed an extension of the 'Aarhus rules'[43] approach to cost for environmental cases to apply to all claims for judicial review. Had this proposal been adopted by the Lord Chancellor, all individuals pursuing a judicial review, including those representing matters of broader interest to other individuals, would have been eligible for a default £5,000 cap on costs liability for judicial review actions.

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[40] See Mance LJ*, Kennedy v. Charity Commission (Secretary of State for Justice*) [2014] UKSC 20 at 54.
[41] J. Gunn, "*Deconstructing Proportionality in Limitations Analysis*", Emory International Law Review 2005, (465) 495.
[42] Available at <https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>.
[43] The rules aim to incorporate the obligations under the Aarhus Convention requiring access to justice on environmental matters to be "be fair, equitable, timely and not prohibitively expensive".

Though Lord Justice Jackson refers to this as a 'modest proposal', it would have, if adopted, been a major stride forward in securing access to justice for those whose fundamental rights have been unjustifiably infringed and who are unable afford significant litigation costs, including the prospect of an adverse costs order.

53. Lord Justice Jackson's 2017 proposal was preceded by a more ambitious "Qualified one-way costs shifting" proposal in 2010.[44] He noted in 2017 that "the Government did not take up [his previous] proposal, but has never formally either accepted or rejected it. For present purposes, it is probably realistic to proceed on the basis that [qualified one-way costs shifting] in JR is not going to come." This was the context behind Lord Justice Jackson's 'modest' cost capping proposals.

54. In 2019, the government excluded costs capping orders from its consultation on 'Extending Fixed Recoverable Costs in Civil Proceedings'[45] saying:

> As both costs capping orders and legal aid are available for JRs (as well as the 'Aarhus' rules for environmental claims), we do not consider there to be an access to justice issue in respect of non-Aarhus JRs. Extending cost capping increases the risk of less meritorious JRs coming forward with increased costs to the government and other public-sector defendants.

55. In our submission, this position affords insufficient weight to the fact that the majority of victims of human rights abuses will not be eligible for legal aid given its strict criteria[46] and may also fail to meet the 'public interest test' required for cost capping applications as well as incurring significant expense before resolving such an initial application.[47]

3.1.1. Recommendation

56. ADF International would therefore urge the IHRAR to recognise, as part of its review, that rights must first be capable of being enforced if they are to be effectively realised and to recommend the concrete development of proposals for cost capping in cases concerning fundamental rights and where the implications extend beyond the immediate parties to the case.

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[44] Review of Civil Litigation Costs in 2010: Final Report, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.
[45] *Extending Fixed Recoverable Costs in Civil Cases:* Implementing Sir Rupert Jackson's proposals, available at <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixedrecoverablecostsconsultationpaper.pdf>.
[46] See *Liberty, R (On the Application Of) v. Director of Legal Aid Casework* [2019] EWHC 1532 where an applicant seeking to challenge the validity of a 'Public Spaces Protection Order' under section 66 of the 2014 Act on the basis that the PSPO unlawfully targets rough sleepers and therefore Poole did not have the power to make it.
[47] Section 88, Criminal Justice and Courts Act 2015.