Contact us: @LabourCHR | www.lchr.org.uk
Authors: Aladdin Benali, Henry Tufnell*
Reviewed: Matthew Turner

Labour Campaign for Human Rights

Submission to the Independent Human Rights Act Review

1. Foreword

"***I endorse the LCHR's submission to the Gross Review of the Human Rights Act. The HRA has been one of the greatest British legislative achievements and it protects us all. The scheme of the Act was carefully designed, and it strikes the right balance between ensuring that the courts can uphold the rights of individuals, while at the same time respecting Parliamentary sovereignty. Britain has always led the way in the protection of human rights both at home and internationally. To weaken or restrict its commitment to the HRA or to the European Convention would be a betrayal of our values***".

Sir Geoffrey Bindman QC

2. Overview

The Labour Campaign for Human Rights (**LCHR**) is proud of the Human Rights Act and the overwhelmingly positive impact it has had in the 20 years since its enactment. The Act has protected all of our rights and freedoms, but particularly those of the most vulnerable in society. We need it now more than ever, both to protect the rights of everyone in the UK – including the many victims of the COVID-19 pandemic – and to preserve Britain's international integrity.

Britain sits at a crossroads as we establish our new place in the world. However, LCHR's chief concern, as set out below, is that the Government hopes to use this review to take the teeth out of the Act. We fear this forms part of a wider project to systematically water down the essential safeguards of our democracy. Not only is judicial review currently under threat by a parallel review, but we have recently seen a raft of legislation that disregards and undermines human rights, such as the Overseas Operations Bill and the Covert Human Intelligence Sources (CHIS) Bill.

The Government cannot risk undermining domestic human rights protections if Britain is to set a new gold standard for human rights in a post-Brexit age. First and foremost, this must start by safeguarding universal, internationally recognised, fundamental rights in a robust way, not by politicising or "nationalising" them. Britain must lead the way on human rights, not curtail them.

As members of the Independent Human Rights Act Review, you have a serious duty in reviewing an Act of Parliament that sits at the very heart of Britain's uncodified constitution. The power you exercise today will have repercussions for decades to come.

Our response provides an analysis of the ongoing operation of the Human Rights Act in the context of its original objectives. These primary objectives are to:

Contact us: @LabourCHR | www.lchr.org.uk
Authors: Aladdin Benali, Henry Tufnell*
Reviewed: Matthew Turner

1. Operate as a *national* bill of rights which enshrines *international* obligations under the European Convention on Human Rights (section 2);

2. Set out a *higher law* whose broad principles would set the parameters of all other legislation and policy – past, present and future – except where Parliament explicitly, or by strong implication, has contrary intentions (section 3); and

3. Through the mechanism of the declaration of incompatibility (section 4), hold the executive to account in respect of human rights, without fundamentally disturbing parliamentary sovereignty.[1]

We believe these three fundamental aims have been met. The following responses are structured around the two themes of the call for evidence.

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

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

1. Introduction

The cardinal purpose of the Human Rights Act (**HRA**) is to allow domestic courts to rule on the application and interpretation of rights set out in the European Convention on Human Rights (**ECHR**) in the manner of a bill of rights. While European Court of Human Rights (**ECtHR**) judgments are binding upon the UK Government, UK *courts* have *no* obligation under the Convention to give them direct effect. The idea that domestic courts obsequiously follow Strasbourg jurisprudence is a myth.

We set out below that (i) domestic courts are not merely permitted to depart from Strasbourg case law, but are in fact *obliged* to take an independent approach in interpreting Convention rights, and (ii) domestic courts have applied the HRA assertively and independently in the manner of a bill of rights to protect people across the board, especially the most vulnerable.

2. The purpose and context of the HRA

In enacting section 2, it was the intention of Parliament to allow the UK courts freedom to establish a distinctly domestic (i.e., British) jurisprudence. In analysing Hansard, there is a clear intention for a distinction between '*following*' and '*taking into account*' (the final wording) in section 2(1).[2] The latter wording clearly preserves the domestic courts' independence, and the White Paper '*Bringing Rights*

---

* Aladdin Benali is the Head of the Human Rights Act Campaign at the Labour Campaign for Human Rights. Henry Tufnell is a barrister at 1 Crown Office Row with a particular interest in Human Rights law. Matthew Turner is a barrister and Chair of the Labour Campaign for Human Rights.

[1] Klug, Francesca. "The Human Rights Act: origins and intentions." (2012): 31-42.

[2] While binding authority now exists, the enacting history may be considered in remedying any statutory ambiguity (or *mischief*) in respect of section 2. Under the principle in *Pepper and Hart* [1993] AC 593, regard should also be given to the comments of the government spokesman promoting the Bill. While only of persuasive authority depending on nature and circumstances, considerable evidence for the correct statutory interpretation can be found from the relevant Parliamentary discussion in scrutinising the Bill.

Home', on which the HRA was based, and subsequent Parliamentary debates, confirm that the UK courts are *not* bound to ECtHR decisions.[3]

Moreover, as a number of academics have correctly argued, the HRA's pre-legislative history itself suggests that domestic courts are not merely *permitted* to depart from Strasbourg case law but are in fact *obliged* to make "*their* ***own distinctive contribution*** *to the development of human rights in Europe*".[4] Given the drafting of section 2 and its wider legislative context, there is no evidence that further amendment is necessary to clarify the UK courts' ability to diverge from ECtHR rulings.

3. The *municipal* approach

While some case law had erroneously sought to mirror Strasbourg, in recent years the UK courts have established a *municipal* approach that follows the courts' section 2 obligation to *independently* assert Convention rights in the manner of a bill of rights.[5] A key example is the case of *Horncastle*. The Supreme Court decisively rejected the argument for a merely subordinate domestic legislature. Lord Phillips observed that in:

> *"rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process … **it is open to this court to decline to follow the Strasbourg decision**, giving reasons for adopting this course."*[6]

But it is not only where domestic courts consider there to have been a poor appreciation of domestic law, the uncodified British constitution, or the facts of a case, where jurisprudence may depart from Strasbourg precedent.[7] Even where relevant Strasbourg authority exists, the courts have shown increasing willingness to reach independent decisions. An early instance of this approach can be seen in Laws J's dictum in *Runa Begum*:

> *"…the court's task under the HRA…is **not simply to add on the Strasbourg** learning to the corpus of English law… **but to develop a municipal law of human rights** … case by case, taking account of the Strasbourg jurisprudence as s2 [of the] HRA enjoins us to do."*[8]

This was an early indication of the shift to what is now identified as a *municipal* approach. This approach meets the intended function of the HRA to operate as a *domestic* bill of rights that enshrines *international* obligations and allows UK courts to develop a space of domestic jurisprudence.[9]

Further, the courts have often seen their obligation under section 6 HRA to act compatibly with Convention rights as further impetus to make determinations in the absence of Strasbourg authority. In *P v Cheshire West*, Lord Kerr expressed the court's duty as follows:

---

3 Parliament rejected an amendment to section 2 tabled by Lord Kingsland during the passage of the Human Rights Bill initially providing for domestic courts to be bound to follow ECtHR judgments. See Hansard, HL, Vol.585, col.755, February 5, 1998; Vol.582, col.1228, November 3, 1997; Vol.583, cols 511–515 November 8, 1997; Vol.584, cols 1270–1271, cited in "A British Interpretation of Convention Rights", lecture delivered on December 14, 2011 for the Bingham Centre for the Rule of Law, British Institute for International and Comparative Law. See Lord Irving, "A British Interpretation of Convention Rights" [2012] P.L. April 237.

4 Lord Chancellor Irving when introducing the Human Rights Bill to Parliament. See Hansard HL, 3 November 1997, col 1227.

5 Please refer to Appendix 1: The *mirror* principle. For academic arguments, see: Klug, Francesca. "The Human Rights Act: origins and intentions." (2012): 31-42; Ziegler, Katja S., Elizabeth Wicks, and Loveday Hodson, eds. *The UK and European Human Rights: A Strained Relationship?*. Bloomsbury Publishing, 2015.

6 *R v Horncastle & Others* [2009] UKSC 14

7 See also *R v Spear* [2002] UKHL 31 where the House of Lords declined to follow a previous Strasbourg decision (*Morris v UK* (2002) 34 E.H.R.R. 52) on this basis.

8 *Runa Begum v Tower Hamlets* [2002] 2 All ER 668 [17].

9 In *Rabone*, the court reached a decision notwithstanding the absence of ECtHR authority to that effect (*Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 AC 72), followed by Lord Neuberger in *Surrey County Council v P* [2014] UKSC 19; [2014] AC 896 [62].

> *"That statutory obligation, to be effective, must carry with it the requirement that **the court determine** if the Convention right has the effect claimed for, **whether or not Strasbourg has pronounced upon it**."*[10]

Domestic courts have fulfilled the purpose Parliament intended in the HRA – to take into account Strasbourg jurisprudence in the manner that reflects British culture and values. In multiple cases, domestic courts have strengthened Convention rights beyond ECtHR precedence. For example, in *EM*, the House of Lords went further than the ECtHR where there had been no relevant established jurisprudence, where it found EM faced a risk of a denial of the rights to a family life, despite there being no precedent "*to be satisfied in respect of any of the qualified Convention rights in any reported Strasbourg decision*".[11]

4. Britain, the HRA and the constitution

Ultimately, the concern regarding the domestic courts' adherence to Strasbourg is not a legal one, but a political one. The false depiction of a mimetic judiciary has been largely based on *political* notions of sovereignty, especially in the context of the UK's withdrawal from the EU.[12] The courts' 'dependence' on Strasbourg precedence has often been exaggerated for political purposes. However, ECtHR decisions adverse to any government's interests cannot be resolved by amending or repealing section 2 (or any other section for that matter). An inevitable consequence of the UK's commitment to the ECHR is judgments that occasionally disfavour the Government in order to protect individual rights, regardless of whether they come from a domestic or a supranational court.[13] This is the very purpose of a human rights framework in the first place.

Through the development of a *municipal* approach, domestic courts have correctly taken section 2 as an instruction to apply and interpret Convention rights in the manner of a bill of rights. In other words, to take into account Strasbourg jurisprudence in a manner that reflects British culture and values. This has allowed the HRA to operate as a *national* bill of rights that effectively enshrines *international* obligations.

> *b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?*

Domestic courts have correctly addressed issues falling within the margin of appreciation in a manner consistent with their obligations under section 2 set out above in a). Please see Appendix 3 for further discussion.

> *c) 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*

---

[10] *P v Cheshire West & Chester Council & another*; (2) *P & Q v Surrey County Council* [2014] UKSC 19 [86]. This approach was followed in *DSD*, where Lord Kerr (with whom Lady Hale agreed) stated: "*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 of HRA.*"

[11] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 [18].

[12] See, for example, Dominic Cummings's Blog: "*we'll be coming for the ECHR… and we'll win that by more than 52-48…*"

[13] There is, of course, disagreement in respect to the whether the UK should remain a signatory to the ECHR. However, we understand that the Panel rightly understands this to be outside of the scope of Review. Please see Appendix 2.

> *jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?*

In recent years, there have been a number of instances of 'judicial dialogue' between domestic courts and the ECtHR. This dialogue has been beneficial to creating a symbiotic relationship between domestic courts and Strasbourg in contributing towards a developing international human rights framework.

A key example of judicial dialogue can be found in *Horncastle*, where the Supreme Court considered whether it was bound to apply a statement of principle in a previous ECtHR case set out by the Grand Chamber in respect of the precise issue that was before it.[14] The Supreme Court unanimously refused to follow the statement of principle. Lord Phillips considered UK determinations gave Strasbourg an opportunity to reconsider the particular aspect of the decision that is in issue:

> "*there takes place what may prove to be a* ***valuable dialogue*** *between this court and the Strasbourg Court.*"

In *Pinnock*, the Supreme Court further emphasised this need for a dialogue given that the domestic courts are not bound by Strasbourg, as we have stated above in a):

> "*This Court is* ***not bound to follow every decision of the EurCtHR****. Not only would it be* ***impractical to do so****: it would sometimes be* ***inappropriate****, as it would destroy the ability of the Court to* ***engage in the constructive dialogue*** *with the EurCtHR which is of value to the development of Convention law*"[15]

The UK's approach has helped shape ECtHR jurisprudence itself. This has motivated a number of academics to ask whether domestic courts '*follow or lead*' in European human rights law.[16] For example, Eric Metcalfe argues that subsequent case law has fulfilled the original expectations of the HRA set out by Lord Irving in 1997: "*our courts must be* ***free to try to give a lead to Europe*** *as well as to be led.*"[17]

For example, in *Animal Defenders*, the ECtHR appeared heavily influenced by the UK domestic court's analysis. This encouraged Strasbourg subsequently to depart from the approach it had taken in *Verein gegen Tierfabrik (VgT) v Switzerland*.[18] This approach was followed in subsequent case law.[19]

The role of domestic courts in shaping European human rights law was also clearly demonstrated in *Chester* by Lord Mance:

> "*dialogue with Strasbourg by national courts, including the Supreme Court, has proved* ***valuable*** *in recent years. The process* ***enables national courts to express their concerns***

---

[14] Previously, a number of Strasbourg cases had culminated in the decision of the Fourth Section of the ECtHR (the Chamber) in *Al-Khawaja* (2009) 49 EHRR 1. The UK Government had subsequently requested that the decision of the Chamber in *Al-Khawaja* be referred to the Grand Chamber under Article 43(1) of the ECHR. At the time, the Panel of the Grand Chamber had adjourned its consideration of *Al-Khawaja* awaiting the Supreme Court's consideration of *Horncastle*.

[15] *Manchester City Council (Respondent) v Pinnock (Appellant)* [2010] UKSC 45; [2009] EWCA Civ 852.

[16] See for, for example, Klug, Francesca. and Wildbore, Helen. (2010) 'Follow or Lead? The Human Rights Act and the European Court of Human Rights', European Human Rights Law Review, 6: 621-30.

[17] See also Eric Metcalfe, "'Free to Lead as Well as to be Led': Section 2 of the Human Rights Act and the Relationship between the UK Courts and the European Court of Human Rights", [2010] *JUSTICE Journal* 7(1), citing Hansard, HL vol.583, cols 514-515 (November 18, 1997);

[18] *Animal Defenders International v UK* [2013] ECHR 362; (No 24699/94) [2001] ECHR 4.

[19] See *R (Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3; *R (Haney and Others) v Secretary of State for Justice* [2014] UKSC 66.

> ***and, in an appropriate case*** *… to refuse to follow Strasbourg case-law in the confidence that the* ***reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg****."*[20]

Judicial dialogue is a fundamental part of the supranational human rights project that the ECHR initiated over 70 years ago. However, it is a two-way street and domestic courts have influenced the direction of the ECtHR, as well as the other way around.[21] The current system of dialogue is beneficial and productive. The UK should re-affirm its commitment to this system, and must not risk becoming the first mature democracy since the creation of the ECHR to water down its existing commitment to international human rights cooperation.[22]

[20] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [27].

[21] Discussion of extra-judicial comments from: Lord Neuberger "The incoming tide: the civil law, the common law, referees and advocates", the European Circuit of the Bar's First Annual Lecture, Gray's Inn, June 24, 2010, p.20; Lord Phillips Speaking at a press conference at the end of the Supreme Court's first full legal year, July 29, 2010. Lord Hope added "*we certainly won't lie down in front of what they [Strasbourg] tell us*".

[22] Please see Appendix 2 for details on the UK's ongoing commitment to the ECHR.

Contact us: @LabourCHR | www.lchr.org.uk
Authors: Aladdin Benali, Henry Tufnell*
Reviewed: Matthew Turner

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

In this response, we address the following sub-questions together as a whole:

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

i. 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)?

ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

iii. 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?

The central purpose of section 3 of the HRA was to create a higher law whose broad principles would act as a lens through which all law would be scrutinised, while still respecting the legislative authority of Parliament. This purpose has (1) been respected by the courts; and (2) sits within a carefully designed framework to preserve Parliament's sovereignty.

1. The courts' implementation of section 3: *A restrained interpretative approach*

Under section 3 HRA, domestic courts must seek to read and give effect to legislation in a way which is compatible with Convention rights "*so far as it is possible to do so*". The courts have repeatedly affirmed that section 3 authorises the interpretation, but not amendment, of primary legislation and have continued to operate under these principles.[23] The courts have developed a restrained approach that balances the intention of Parliament with the need to give effect to Convention rights.

A clear boundary (or "*outer limit*") of interpretation under section 3 has been set by case law.[24] These principles were authoritatively laid down in *Ghaidan*, where the court made abundantly clear the courts' role in interpreting legislation while respecting the legislature. In *Ghaidan*, the House of Lords interpreted the Rent Act 1977 as having been modernised to extend tenants' rights to gay couples. However, the House of Lords indicated that use of this interpretative power will go too far if it:

- Changes the substance of the provision completely;
- Runs counter to a fundamental feature of the legislation or to the underlying thrust or cardinal principle of it; in other words, if it goes '*against the grain*' of the original legislation;

[23] See, for example, *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 [39] (Lord Nicholls); *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545 [91] (Lord Hope); *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [112] (Lord Rodger).

[24] Please see Appendix 3 for further detail on early approaches, such as that of Lord Nicholls' objection in *Re S and Re W* [2002] UKHL 10 to block re-interpretations of fundamental features of statute that likely bring about far-reaching and major changes it the law.

- Contradicts provisions in the legislation;
- Repeals or deletes the language used in the legislation; or,
- Involves the court making decisions for which it is not equipped.[25]

It is difficult to argue that the courts have failed to respect the intended purpose of section 3. Rather, Parliament's intention is to allow judges a wide discretion to interpret statutes in line with Convention rights "*so far as it is possible to do so*". This allows the courts to address the *un*intended impacts or *uns*tated and *un*aware consequences of a statute that infringe on ECHR rights.[26] Arguably, the doctrine established in *Ghaidan* may have been *too* deferential to Parliament, especially given that it addresses legislation passed decades before the HRA.[27]

The courts' restrained approach to section 3 respects Parliament's legislative authority in itself. Regardless, even if this were not the case, it would still be difficult to argue that section 3 undermines parliamentary sovereignty. Parliament continues to have the power to reinstate and/or clarify any provision that it deems the courts to have interpreted in a way that encroaches on its legislative competence. Equally, if Parliament seeks to legislate to violate Convention rights, then it can do so by clearly stating this in the section 19 statement.[28]

2. The *last word: Declaration of incompatibility*

Section 4 is effectively an inbuilt mechanism that leaves Parliament with *the last word*.[29] It must be emphasised that a declaration of incompatibility does *not* ever require the legislature to change the law, even when judges declare that a statute breaches human rights.[30] With a model that does not fundamentally disturb the doctrine of parliamentary sovereignty, Parliament can actually play a key role in overseeing the operation of the HRA through the Joint Committee on Human Rights.[31] This process gives rise to a productive dialogue between *domestic* courts and the *legislature* in line with the key purpose of the HRA.

The HRA controls executive power via accountability, not constraint. Importantly, the executive can ignore any reference under section 4. Declarations of incompatibility impose no legal obligations on the executive to put to the legislature a proposed change in the relevant law. The outcome of a refusal to amend legislation after a declaration of incompatibility may of course result in the case proceeding to Strasbourg. However, given the possible application by the European Court of the margin of appreciation (as stated in our response to Theme One) this would not necessarily result in a decision adverse to the Government. This has motivated a number of critics to argue that the operation of section 4 is *too* deferential to the executive.

---

25 *Ghaidan v Godin-Mendoza* [2004] UKHL 30

26 It is not clear that Parliament specifically intended for homosexual couples to have been excluded under the language of paragraph 2(2) Schedule 1 of the Rent Act 1977. Parliament may have overlooked it or thought that it had provided for it, but it had not manifested an intention to exclude it. See *Ibid* [86].

27 See for example Klug, Francesca (2003) Judicial deference under the Human Rights Act 1998. European Human Rights Law Review (2). pp. 125-133.

28 Under section 19 HRA, on publication, a Government Bill must be prefaced by a statement from the Minister responsible with a human rights opinion in respect of the Bill. The opinion must address whether, in his or her opinion, the provisions of the Bill are compatible with Convention rights.

29 Over 42 declarations of incompatibility have been made since the HRA came into force on 2 October 2000. See Ministry of Justice (2019) Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2018–2019.

30 See section 4(6)(a).

31 See 'The Klug Report: Report on the Working Practices of the JCHR', Francesca Klug, published in 'The Committee's Future Working Practices', Twenty-third Report of Session 2005-06.

Nevertheless, the HRA has played a key role in empowering the courts to hold the executive to account where they were previously unable to. The HRA preserves democracy, rather than undermining it. Central to this is the courts' ability under section 4 to empower Parliament to play an *institutional* role in implementing human rights.

LCHR is concerned that the Government's purported concern over the operation of sections 3 and 4 is motivated by a desire to *reduce* the powers of the independent judiciary in order to achieve *political* purposes. In other words, the Government's concern is not that the HRA frustrates the will of *Parliament*, but that it frustrates will of the *politicians* in Government. Not only is this evident from the Government's repeated attempts to circumvent Parliament by its use of prerogative powers, but also the current parallel review of the very mechanism that has successfully established constraints on this power – judicial review.[32] As Former Shadow Attorney General and Director of Liberty, Baroness Chakrabarti, has stated, "*are [the Government] not prepared to accept even this gentle model of constitutional protection for the people against our rulers?*"[33]

3. A democratic framework to expand common law principles of interpretation consistently

The question we should be asking is not whether the courts have interpreted statutes under section 3 in a manner consistent with the intention of Parliament. Instead, we should ask: '*what would an alternative interpretative framework be?*' To determine this, we must look at the historical position before the HRA came into force. In any common law system, the court's interpretive power combined with the doctrine of binding precedent, already gives the judiciary wide discretion to establish a system of fundamental values that applies to all laws. Section 3 merely strengthens and codifies these historic principles of interpretation that had been inconsistently applied.

The long-standing debate around the reach of the court in interpreting legislation existed well before the introduction of the HRA. For example, in *Rossminster*, Lord Denning's dictum in the Court of Appeal recognised a *principle of legality* that read a standard of rights into statute, stating that the duty of the courts so was "*to **construe the statute as to see that it encroaches as little as possible on the liberties of the people of England**.*"[34] However, Lord Denning's judgment was subsequently overturned. In the House of Lords, Lord Wilberforce saw such oversight as beyond the jurisdiction of the courts: "*The courts should not restrict or impede the working of legislation*." The principle of legality has since become a cornerstone of the common law, establishing a lens through which the courts interpret legislation in line with basic rights.[35] This reflects a set of values that are universal and fundamental to human decency.

The HRA establishes a clear and democratic framework that allows for these principles to be applied consistently, where previously there had been considerable inconsistency in relation to the enforcement of the common law. Lord Hoffmann noted in *Wilkinson* that:

> "*Just as the "**principle of legality**" meant that statutes were construed against the background of human rights subsisting at common law … so **now, section 3 requires them to be construed against the background of Convention rights**.*"[36]

---

[32] See the Government's Constitution, Democracy & Rights Commission.

[33] 'Warning: anti-justice stomach bug spreading', Shami Chakrabarti, The Times, 21 February 2011.

[34] *R v Inland Revenue Commissioners and others, ex parte Rossminster Ltd* (CA) [1980] AC 952; [1979] 3 All ER 385.

[35] Lord Browne-Wilkinson reflected this: "*basic rights are not to be overridden by the general words of a statute since the **presumption is against the impairment of such basic rights**", R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539 at 575. See also Lord Hoffmann in *R v Home Secretary, Ex p Simms* [2000] 2 AC 115.

[36] *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 [17-18]; See also e.g. Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' [2009] 125 Law Quarterly Review 598.

There are a number of examples of historic failures to safeguard individual liberties that would almost certainly have been avoided had Convention rights been read into statute under section 3. For example, in *Liversidge v Anderson*, the courts interpreted statute to allow the Government to detain without trial based on little more than suspicion. The majority of the House of Lords accepted the Home Secretary's interpretation provided his belief was an honest one.[37] There is little doubt that section 3 would now require any detention to be based on objective standards of "reasonable suspicion" under Article 5(1)(c).[38] A similar approach was already seen in a number of more recent cases predating the HRA, such as *Hosenball* and *Cheblak*.[39]

The HRA now establishes on a democratic footing fundamental values already subsisting at common law. Section 3 ensures that the courts have guidance on how to interpret legislation in line with universal and fundamental principles. It acts as a *last line of defence* which keeps human rights a central consideration in statutory interpretation. Section 3 is considered to have strengthened the courts' obligations to enforce these principles, having "*extended the reach of section 3 of the HRA beyond that of the principle of legality*".[40] While the courts' application of these interpretive principles has been restrained, the constitutional balances contained within the HRA remain largely deferential to the executive and leave Parliament with *the last word*.

Conclusion*: An effective constitutional balance*

Any change to section 3 would likely amount to a significant constitutional upheaval. Amendment would not change the law in relation to section 3, but also sections 6(1) and 4. A HRA without section 3 risks resulting in section 4 being either:

(i) *Overused* in the absence of the court's ability to harmonise Convention rights with statue. This paradoxically risks being more embarrassing for the executive and results in slower change with no remedy for claimants.

(ii) *Underused* as judges become increasingly reluctant to make a declaration of incompatibility unless the legislation outright contradicts a Convention right. This may lead to an increase in legislation that is incompatible with Convention rights.

Finally, the HRA simply cannot be a bill of rights without section 3. If the Government wishes to overturn the provision or narrow the Act to a point of impotence, then it must acknowledge that it does not support the constitutional principle of a bill of rights at all. It would, however, be nonsensical to reduce the HRA to a shell of an act if the UK is to remain committed to the ECHR. Notwithstanding any change to section 3, the ECtHR still retains final appellant jurisdiction, increasing the chance that unsuccessful claimants would turn to Strasbourg.[41]

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

[37] The courts allowed unilateral discretion to imprison any person if he had "reasonable cause to believe" that such a person had hostile intentions under the Home Secretary was empowered under Regulation 18B of the Defence Regulations (issued under the Emergency Powers (Defence) Act 1939), *Liversidge v Anderson* [1942] AC 206.

[38] A "reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. See, a.o. *Selahattin Demirtaş v. Turkey* (no. 2) [GC]; *Fox, Campbell and Hartley v. the United Kingdom*.

[39] *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 2 All ER 319.

[40] Lord Phillip in *HM Treasury v Ahmed & Others* [2010] 2 WLR 378

[41] As stated, above the UK's status as a signatory to the ECHR is not within the purview of this review. In any event, such a decision should be reserved for a transparent process subject to Parliamentary scrutiny.

No change required.

c) *Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?*

No change required.

d) *In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?*

The current jurisdictional scope of the HRA is absolutely *essential* in ensuring that those subject to human rights violations at the hands of UK public authorities have the *same* legal rights, whether at home or aboard. This framework is especially important as Britain forges ahead to establish a values-driven foreign policy that prioritises human rights in a post-Brexit world. [42]

The HRA has now established a scope of jurisdiction wider than Strasbourg case law by covering instances where the UK's "control and power" is exercised. Perhaps where this has been most important has been in protecting British servicepeople serving overseas. In *Smith, Ellis and Allbutt v Ministry of Defence* the Supreme Court considered the circumstances in which the armed forces operate and held unanimously that serviceman relinquish almost total control over their lives to the state.[43] Accordingly, deaths of servicemen in the battlefield fall within the jurisdiction of Article 1, regardless of whether servicepeople are operating in areas outside of the control of the contracting state.

The rights that have been established under the HRA in respect of jurisdiction are now more important than ever. There is no doubt that the Government wishes to eliminate the risk of legal challenges in respect of its conduct oversees. For instance, we have recently noted concerns that the Overseas Operations (Service Personnel and Veterans) Bill raises the barriers to prosecute personnel accused of murder and torture, with the Government required to consider derogation from our human rights standards in overseas military operations.[44] The Joint Committee on Human Rights has criticised this approach and the Bingham Centre for the Rule of Law stated that the Bill risks criminals "*getting away with murder*".[45] Any change to the current HRA's jurisdiction severely risks obstructing the only recourse for victims of serious human rights violations at the hands of UK public authorities.

---

[42] Initially, under the ECHR a person could exceptionally make a claim for acts that have occurred outside the geographical jurisdiction of a contracting state. The test for jurisdiction under article 34 is that an application against that state before the ECtHR may be brought by: "***any person**, non-governmental organisation or group of individuals claiming to be a victim of a violation [of a Convention right by a contracting state]*". ECtHR case law originally established an essentially territorial notion of jurisdiction, with extra-territorial recognition limited to very specific circumstances. See *Bankovic v Belgium* (2001) 11 BHRC 435.

[43] [2013] UKSC 41.

[44] Labour Campaign for Human Rights. Statement: A Triple-Threat to Human Rights and the Rule of Law: the Internal Market Bill, Overseas Operations Bill and CHIS Bill.

[45] UK Human Rights Blog. Overseas Operations Bill: Getting Away With Murder – Dr Ronan Cormacain.

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

No change required. Please see Appendix 5 for further discussion.

-- END OF SUBMISSION --

Contact us: @LabourCHR | www.lchr.org.uk
Authors: Aladdin Benali, Henry Tufnell*
Reviewed: Matthew Turner

List of Appendices

1. The *mirror* principle

While some subsequent case law had erroneously sought to mirror ECtHR case law, our research found that recently domestic courts have moved towards establishing a *municipal* approach that implements the courts' section 2 obligation to independently assert Convention rights in the manner of a bill of rights. Historically, there is evidence of a *mirror* approach whereby national courts sought to match Strasbourg interpretations of Convention rights. Initially, this did appear to stray from the intention originally set out by Parliament.

The *mirror* approach was first authoritatively formulated in *Alconbury*, in which Lord Slynn stated:

> "*In the absence of special circumstances it seems to me that* ***the court should follow any clear and constant jurisprudence of the European Court***"[46]

The courts had subsequently taken Lord Slynn's observations to develop a *mirror* approach in a number of circumstances. Perhaps the most radical formulation was in *Ullah* in which Lord Bingham stated the courts' section 2 duty to be:

> "***to keep pace with the Strasbourg*** *jurisprudence as it evolves over time,* ***no more, but certainly no less****."*[47]

Arguably, similar approaches have been taken in subsequent cases, including *AF*, in which Lord Rodger notably remarked: "*Strasbourg has spoken, the case is closed.*"[48] The *mirror* approach has, however, subsequently faced considerable judicial criticism.

Recent case law has departed from the view that national courts are (as good as) bound to slavishly follow any clear decision of the ECHR relevant to a matter before them. Had the *mirror* principle been maintained, it could be argued that the purpose of the HRA in respect of the courts' obligations under section 2 had not been satisfied. But that is not the case. As Roger Masterman puts it, we now have a "*Mirror Crack'd*". [49] Please see our response to Theme One a) above.

2. The UK's commitment to the ECHR

Under ECHR, all member states are under the obligation to "abide by" judgments of the ECtHR in cases against them. Any provision for further departure from the interpretative obligations set out in section 2 would still allow recourse to ECtHR upon a decision contrary to the ECHR. Under Article 46(1) ECHR:

---

[46] *R (Alconbury Developments Ltd) v SS for Environment, Transport and the Regions* [2001] UKHL 23 [26]. Emphasis added, as in subsequent quotations. Arguably, even this interpretation is not a determination on the meaning of section 2 as such, but rather practical guidance for subsequent jurisprudence, advising the court that if it does not follow Strasbourg, it: "*is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence*."

[47] *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

[48] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2009] 3 WLR 74; See also Lord Brown in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, and Lord Phillips in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29 1 AC 1.

[49] UK Constitutional Law Association. Roger Masterman: The Mirror Crack'd.

> *"The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."*

The UK continues to remain bound to the ECHR. In Part 3 Article LAW.OTHER.136(2) EU-UK Trade and Cooperation Agreement, the UK is obliged to continue its obligations under the ECHR:

> *"if this Part is terminated on account of the United Kingdom or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification.*

3. The *margin of appreciation*

The doctrine of the 'margin of appreciation' is a central part of ECtHR jurisprudence. While not included in the original text of the ECHR or '*traveaux préparatoires*', the margin of appreciation is affirmed by States party to the ECHR in the 'Brighton Declaration' on the Future of the ECtHR.[50] The European Court has acknowledged that national authorities are in principle better placed to evaluate local needs and conditions than an international court.[51] As Lord Hope comments:

> *""In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the **judiciary will defer, on democratic grounds**, to the considered opinion of the **elected body or person** whose act or decision is said to be incompatible with the Convention"* [52]

The extent of the margin of appreciation will vary according to such factors as the nature of the Convention right in issue, the importance of that right for the individual and the nature of the activities involved in the case.[53] Baroness Hale's expressed the approach in *Re P* that:

> *"[I]f 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**.*[54]

Similarly, the section 2 obligation to "*take into account*" Strasbourg jurisprudence demonstrates that Parliament has indicated that an equivalent to the margin of appreciation should be applied by the domestic courts.[55] In *re McKerr*, Sales J stated:

> *"the domestic courts **are** required to interpret the Convention rights by applying **the same margin of appreciation** … as the ECtHR would apply when assessing the lawfulness of conduct of the national authorities from the perspective of an international court."* [56]

However, while there is certainly a *relationship* between the margin of appreciation doctrine and the discretion of the domestic courts, it is not certain that these two doctrines are *the same*.[57] For

---

50 Available at https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
51 *Buckley v. United Kingdom* (1996) 23 EHRR 101, 129 [74-75].
52 *Regina v Director of Public Prosecutions, ex parte Kebilene and others*: HL 28 Oct 1999
53 The margin of appreciation afforded to the UK under ECtHR jurisprudence to the extent it is binding on the UK Government is beyond the scope of this response. As discussed in our analysis of section 2, while ECtHR judgments are binding upon the UK Government, UK courts are not obliged under the Convention to give them direct effect.
54 [2008] UKHL 38 at [120].
55 See also Lord Hope in *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326 at 381.
56 [2004] UKHL 12; [2004] 1 WLR 807 [54].
57 Mark Elliot. Public Law for Everyone. Is the margin of appreciation something that domestic courts should be applying?

domestic courts, there is no relative disadvantage of evaluating local needs and conditions insofar as it is their role to do exactly that.

Notwithstanding the margin of appreciation, there is little doubt that the courts must take into account Strasbourg judgments, including where they apply a margin of appreciation. But, as we have stated in our response in a), the courts must (and do) address issues falling within the margin of appreciation exercising their discretion where necessary. [58]

4. A teleological approach

Judicial interpretations of the obligation under section 3 varied in the initial years of the HRA. For example, in *R v A*, the court considered section 41 of the Youth Justice and Criminal Evidence Act 1999 in respect of the defendant's right to a fair trial under Article 6 ECHR.[59] Lord Steyn described the interpretative obligation under section 3 as *"a strong one"*, and held that:

> *"It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings … Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to* ***strive to find a possible interpretation compatible with Convention rights*** *…* ***In accordance with the will of Parliament as reflected in section 3*** *it will sometimes be necessary to* ***adopt an interpretation which linguistically may appear strained.*** *The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions."*

This teleological approach was justified by a commitment to find compatibility. Lord Hope reasoned for a more restrictive use of the power in section 3 on the basis of the apparent intention of Parliament in enacting the provisions of the Youth Justice and Criminal Evidence Act 1999 in the first place.

However, interpretations under section 3 have subsequently been reversed by higher courts, where they have been deemed to have fallen beyond the jurisdictions of the courts. In *Re S and Re W,* Lord Nicholls set out initial guidance on the courts "*outer limit*" of interpretation under section 3:

> "*The Human Rights Act reserves the amendment of primary legislation to Parliament … Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes are matters for Parliament … it is sufficient to say that a meaning which departs substantially from* ***a fundamental feature*** *of an Act of Parliament is* ***likely to have crossed the boundary between interpretation and amendment.*** *This is especially so where the departure has* ***important practical repercussions which the court is not equipped to evaluate****."*[60]

Lord Nicholls' approach blocks re-interpretations of fundamental features of statute that likely bring about far-reaching and major changes it the law. This has subsequently been largely adopted by the courts. A similar approach was taken in *Bellinger v Bellinger*.[61]

5. Remedial orders

Under section 4, where courts find a provision incompatible with a Convention right and so make a declaration of incompatibility, a Minister of the Crown "*may by order make such amendments to the*

[58] See, for example, *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39.
[59] *R v A (Complainant's Sexual History)* (No 2) [2001] 2 WLR 1546.
[60] [2002] UKHL 10.
[61] [2003] UKHL 21.

primary legislation as he considers necessary", where the primary legislation under which secondary legislation was made needs to be amended to remove the incompatibility in the subordinate legislation. This power to take remedial action, contained within section 10 of the HRA, applies when (i) a domestic court finds an incompatibility with the ECHR and (ii) when the Minister considers a provision of legislation incompatible with the Convention 'having regard to a finding of the European Court of Human Rights.'

A remedial order may be made by two procedures set out in Schedule 2 HRA.

- Standard procedure, which requires, *inter alia*, a draft amending order to be laid before Parliament for 60 days before being approved by both Houses of Parliament.

- For urgent action, the order may be laid before Parliament for approval after it is made, Schedule 2, para 4.

This process strikes a careful balance between robust scrutiny of legislation and Parliamentary sovereignty. It puts the impetus on the government to take another look at the law to remove the incompatibility. The declaration clearly signals to the Government that the relevant laws should be changed to comply with the UK's obligation under the ECHR and leaves Parliament with the *last word*. Please note that where the Government's fails to take remedial legislation and administrative action to provide an effective remedy for the individual may give the claimant recourse to the ECtHR, as all effective domestic remedies would have been exhausted.