OXFORD PUBLIC LAWYERS' RESPONSE TO THE INDEPENDENT HUMAN RIGHTS ACT REVIEW

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EXECUTIVE SUMMARY

1. This document has been prepared by a group of leading public and constitutional lawyers who are members of or associated with the Oxford University Law Faculty, and who have engaged regularly, over many years, with the operation of the Human Rights Act 1998 ('HRA') in various capacities as academic commentators, practitioners, and judges.

2. **Our strong shared view is that there is no compelling case to amend the HRA, and that the proposed amendments would create real practical and constitutional problems.**

3. The HRA as currently drafted:

    a. Regulates the relationship between domestic courts in the UK and the European Court of Human Rights ('ECtHR') in a way which successfully achieves its espoused statutory intention of 'bringing rights home'. Its statutory structure enables UK judges, with close appreciation of the operation of UK law and constitutional arrangements, to adjudicate on questions concerning the practical application of European Convention ('ECHR') standards in the nations of the UK, informed, but not dictated to, by judgments of the ECtHR on the general principles which apply across all signatory states; and:

    b. Provides a fine and appropriately calibrated balance between the respective roles of the legislature, executive and judiciary in maintaining the enduring standards of the ECHR in domestic law and practice.

4. In our response to the Independent Human Rights Review ('IHRR') consultation, we:

a. Explain how, via the HRA, Parliament has created a balanced framework which achieves its twin goals of protecting Parliamentary sovereignty, while also ensuring an accessible domestic enforcement mechanism for human rights. In particular, the relationship between ss. 2, 3 and 4, s.19 and ss. 4 and 10 leave the ultimate authority for legislating in the face of any identified breaches of the ECHR to Parliament. (§§ 6-19: **Introduction: a holistic reading of the HRA in the light of its original rationales**).

b. Examine the case law concerning **the relationship between domestic courts and the ECtHR**), which shows that a flexible, constructive and two-way dialogue has arisen between domestic courts and the ECtHR as a result of senior judges' engagement with the ambit of s.2 (§§ 20-23: **Theme 1).**

c. Analyse **the impact of the HRA on the relationship between the judiciary, executive and legislature** by reference to the case law and conclude that there is no evidence of any structural problem with the HRA or any systemic judicial overreach. Indeed, the legislation gives judges a clear constitutional framework within which they can, and frequently do, articulate the respect owed to decisions of the elected branches of government on epistemic, institutional and constitutional grounds. (§§24-62: **Theme 2**).

d. Consider specific proposals for:

    i. repeal or amendment of s.3 (§§33-41);
    ii. reconsidering the interpretative relevance of s.4 and when courts should consider the making of declarations of incompatibility (§§42-46);
    iii. altering how courts address incompatible secondary legislation (§§47-54); and:
    iv. amending the territorial scope of the HRA (§§55-62).

5. **In each case, we conclude that there is no constitutional case for change, and that there are considerable practical and constitutional problems with the proposed amendments.**

I. INTRODUCTION: A HOLISTIC READING OF THE HRA IN LIGHT OF ITS ORIGINAL RATIONALES

6. The Terms of Reference ('ToR') start from the premise that the UK intends to continue to be a signatory to the ECHR and consequently to continue to be bound in international law to abide by its terms.

7. Thus, the issue is not whether the UK intends to continue to abide by the ECHR. Rather, the terms of reference for the IHRR are about domestic enforcement mechanisms.

8. The ToR identify two key themes for investigation:
    a. the manner in which the HRA regulates the relationship between domestic courts in the UK and the ECtHR; and
    b. the impact of the HRA on the relationship between the judiciary, the executive and the legislature in the UK.

9. In considering these themes, it is worth recalling the original rationales for enacting the HRA, which remain compelling. When the HRA was proposed, there were two clear imperatives: to preserve the core constitutional principle of Parliamentary sovereignty, while at the same time 'bringing rights home' by facilitating adjudication of Convention rights in domestic courts. According to the 1997 White Paper, *Rights Brought Home*,[1] the purpose of allowing people to enforce their Convention rights in the UK courts was to obviate the delays and expense of taking a case to the ECtHR in Strasbourg. Equally importantly, enabling courts in the UK to rule on the application of the Convention would mean that our judges would be able 'to make a distinctively British contribution

[1] Rights Brought Home: The Human Rights Bill (October 1997, Cm 3782).

to the development of the jurisprudence of human rights in Europe.'[2] Both rationales remain compelling.

10. The careful balance between the different sections of the HRA, reflecting the respective constitutional responsibilities of the courts, the executive and the legislature in the UK, was deliberately chosen to give effect to these complementary imperatives. Central to this was the way the different parts of the Act were drafted to work together, so that Parliament retained the primary responsibility for compliance with Convention rights and freedoms, but individuals were able to enforce their rights effectively in UK courts. Sections 2, 3 and 4, in particular, create an integrated framework to achieve these two goals. Section 2 regulates the relationship between the UK courts and the ECtHR and ss. 3 and 4 regulate the relationship between Parliament and the UK courts.

11. Section 2(1) provides that, in determining a question which has arisen in connection with a Convention right, the court must 'take into account' decisions of the ECtHR whenever relevant to the proceedings. *Rights Brought Home* emphasized that courts will be required to take account of relevant decisions of the ECtHR, but that these would not be binding.[3] This reinforces the aim of permitting UK judges to contribute to the dynamic and evolving interpretation of the ECHR without being bound firmly by ECtHR jurisprudence. It permits them to foster a dialogue with the ECtHR. Equally importantly, this approach facilitates an informed engagement with the principle of 'margin of appreciation' – especially in relation to Articles 8 to 11, which require the court to balance individuals' fundamental rights against the general interest.[4]

12. Sections 3 and 4 are closely linked to each other in the statutory scheme. Section 3 provides an interpretive provision which requires that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights" and

[2] ibid para 1.14

[3] ibid para 2.4

[4] ibid, para 2.5

section 4 provides that a court may make a declaration of incompatibility if it is satisfied that a legislative provision is compatible with the ECHR. Declarations of incompatibility do not affect the validity or operation of legislative provisions unless Parliament intervenes to address the issue. The two legislative provisions taken together establish a delicate balance between the judiciary and legislature, bearing in mind the two imperatives mentioned above. Only if the court decides that the proper reading of the legislative language of primary legislation is incompatible with Convention rights does it have the discretion to make a declaration of incompatibility. In those circumstances, it is a matter for the executive to decide if it will put a remedial order before Parliament, and for the legislature to decide if it wishes to amend the legislation so that it is compatible with the UK's international commitments.

13. It is clear from *Rights Brought Home*[5] and the parliamentary debates at the time of the enactment of the HRA, that these sections were understood to work together. Section 3 was intended to 'go far beyond' the then current rule of interpretation, which only permitted account to be taken of the Convention in resolving an ambiguity in a legislative provision. Instead, s.3 requires courts to interpret legislation to uphold Convention rights unless the legislation itself is so clearly incompatible with the ECHR that it is impossible to do so.[6] This formulation gave legislative force to the judicial presumption – expressed in earlier case law – that Parliament intended to legislate compatibly with the UK's international law obligations, and was explicitly aimed at limiting the number of declarations of incompatibility under s.4. As the Lord Chancellor (Lord Irvine) explained during the course of his Second Reading speech in the House of Lords, "[w]e want the courts to strive to find an interpretation of legislation which is consistent with Convention rights so far as the language of the legislation allows and only in the last resort to conclude that the legislation is incompatible with them".[7]

[5] Ibid.

[6] ibid, para 2.7

[7] House of Lords Debate 1997, vol 583, col 535.

14. It should not be overlooked that if the courts interpret a legislative provision on the basis of s.3 in a manner that Parliament considers mistaken, Parliament is always able to overturn that interpretation by amending the relevant provision. At the same time, the interpretive provision provides an important vehicle to protect individual rights pending Parliamentary action.

15. The New Zealand Bill of Rights Act 1990 adopts a different interpretive approach: 'Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning should be preferred to any other meaning'.[8] Were the New Zealand formulation, which is narrower than s.3, to be adopted in the UK in place of s.3, the consequence might well be that declarations of incompatibility would be more frequent, an outcome that Parliament clearly sought to avoid when the HRA was introduced.[9] Moreover, this might force litigants in relevant cases to proceed to the ECtHR for further relief.

16. Thus, domestic courts which are familiar with the domestic landscape are able to adjudicate most cases based on the HRA, removing the need in most cases for claimants to go to the ECtHR to vindicate their rights. The ECHR requires litigants (through Article 13) to exhaust domestic remedies before bringing a case to the ECtHR, and only if a litigant is aggrieved concerning the findings of domestic courts about the application of Convention rights to their case, or with the response of Parliament to a declaration of incompatibility, can they choose to seek relief at ECtHR level. If the ECtHR subsequently considers that legislation is needed to correct the relevant breach, it is for Parliament to decide whether or not to comply with the UK's international-level Article 13 obligation. As a matter of domestic law, Parliamentary sovereignty is thus preserved.

17. Sections 2, 3 and 4 should also be read with s.6, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right,

[8] New Zealand Bill of Rights Ac t 1990, s.6.

[9] See also *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148 [8] where Lord Bingham observed "the courts are subject to an unusual interpretative duty designed to obviate the need for such a declaration save exceptionally".

unless it was acting to give effect to provisions of (or made under) primary legislation which could not be read or given effect in a way which was compatible.[10] Section 6 is particularly important to further the objective of bringing rights home, enabling Convention rights to be applied and judicially protected from the outset rather than awaiting the lengthy process of an application to and final determination by the ECtHR. In addition to protecting individual rights, this promotes clarity for public authorities, allowing national courts to provide clear decisions concerning what is lawful rather than waiting for completion of the ECtHR process.

18. Sections 2, 3 and 4 should also be read together with other provisions augmenting Parliament's primary role in respecting, protecting, and fulfilling Convention rights, especially s.19. Under s.19, the relevant Minister must make a statement before the Second Reading of any Bill that the provisions of the Bill are compatible with Convention rights, or that the Minister is unable to make such a statement but that the Bill will nevertheless proceed. The HRA as a whole should also be read in the context of the activities of the Joint Committee of Human Rights, which consists of members of both Houses and has the task of examining human rights matters within the UK, and of scrutinizing every government Bill for its compatibility with human rights.

19. In our view, Parliament in enacting the HRA devised a balanced framework for achieving its twin goals of protecting Parliamentary sovereignty, on the one hand, while at the same time allowing people in the UK who claim that their Convention rights have been impaired to approach domestic courts for relief rather than being required to petition the ECtHR.

[10] HRA sections 6(1) and (2).

II. THEME 1: RELATIONSHIP BETWEEN DOMESTIC COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

The ToR raise three questions in relation to the operation of s.2:

"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?

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?

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

20. Section 2(1) requires a court or tribunal to "take into account" judgments and decisions of the ECtHR when determining a question in connection with a Convention right. Lord Bingham read this in *Ullah* as meaning that "[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".[11] This has been widely cited, and labelled the 'mirror principle'.[12] However, the metaphor of "mirroring" ECtHR jurisprudence fails to accurately reflect the current approach of the domestic courts.

21. Later Supreme Court decisions have consistently emphasised that s.2(1) must operate subject to national-level considerations, including norms of, and constraints emerging from, constitutional law.[13] For example:

[11] *R v Special Adjudicator, ex p Ullah* [2004] UKHL 26, [2004] 2 AC 323, [20]. See, previously, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [26] (Lord Slynn) (note the qualification offered by Lord Hoffmann at [76]).

[12] E.g., *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7, [146] (Lord Kerr).

[13] On limits to s.2(1), see *Finucane*, ibid, [146] (Lord Kerr).

a. In *Pinnock*, Lord Neuberger emphasised that the Supreme Court was "not bound to follow every decision" of the ECtHR, and that while a "clear and constant" line of ECtHR decisions "should usually be followed", this was *provided* that their effect was "not inconsistent with some fundamental substantive or procedural aspect of our law", and that the reasoning "does not appear to overlook or misunderstand some argument or point of principle".[14]

b. Baroness Hale noted in *Keyu* (where ECtHR Grand Chamber case law was open to varying interpretations) that if clear and constant authority had yet to emerge, national courts should consider ECtHR principles alongside the "legal, social and cultural traditions of the United Kingdom" in trying to determine "where the answer lies".[15] Lord Neuberger stated that it was unnecessary to follow Strasbourg jurisprudence "slavishly",[16] while Lord Kerr noted that although a national court should be cautious without clear ECtHR guidance, it "should not be deterred from forming its own judgment" as to what the ECtHR would decide.[17]

c. In *DSD*, Lord Kerr rejected the idea that "where Strasbourg has not yet spoken, national courts should not venture forth".[18] A domestic decision concerning a HRA-based claim should not be "influenced, much less inhibited, by any perceived absence of authoritative guidance from the ECtHR".[19] For Lord Neuberger, "the fact that the Strasbourg court has consistently taken a different view" from that supported by the Supreme

[14] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, [48], further developed in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271, [27] (Lord Mance); *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901, [13]. Note also *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72, [112] (Lord Brown); *Re P (A Child)* [2008] UKHL 38, [2009] AC 173, [37]-[38] (Lord Hoffmann); *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, [291] (Baroness Hale).

[15] *Keyu*, (n 14), [291].

[16] ibid, [90].

[17] ibid, [235].

[18] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196, [73], developed at [75].

[19] ibid, [79]. See Lord Mance's critical analysis of relevant ECtHR case law at [142]-[151].

Court "should not necessarily stand in the way of our coming to a contrary conclusion" if a good reason existed.[20] Lord Mance accepted that national courts "should not normally refuse to follow Strasbourg authority" nor "forge ahead, without good reason".[21] There were, however, cases "where English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority".[22] Where suitable Strasbourg-level clarity was missing, it "may be appropriate" for national courts to decide on the boundaries of Convention rights.[23]

d. In *Hallam*, Lords Mance, Wilson and Hughes emphasised the Supreme Court's dissatisfaction with the ECtHR's approach to Article 6 in relevant case law:[24] raising the issue of how s.2(1) could operate in such a situation.[25] Lord Mance deemed it "inappropriate to introduce into English law an interpretation' based on the ECtHR approach and going beyond that articulated in earlier national decisions.[26] Lord Wilson, while stressing his "high professional regard" for the ECtHR Bench, found himself "conscientiously unable to subscribe" to its analysis of Article 6.[27] Lord Hughes noted the "desire if at all possible to maintain consistency of approach" with the ECtHR, but that the national court's "ultimate responsibility' was to arrive 'at its own decision" concerning Convention rights in national law.[28] Even while dissenting, Lord Reed (supported by Lord Kerr) emphasised that to "take into account" ECtHR decisions did "not necessarily" mean to follow them: it might be "inappropriate to follow

[20] ibid, [91].

[21] ibid, [152], citing Lord Hoffmann in *Re P (A Child)*, (n 14), [36].

[22] *DSD*, (n 18), [153].

[23] ibid, [153].

[24] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279, [73] (Lord Mance); [84]-[86], [90], [93], [94] (Lord Wilson); [126] (Lord Hughes). See also [132]-[138] (Lord Lloyd-Jones). Contrast [174], [175], [191] (Lord Reed); [205] (Lord Kerr).

[25] ibid, [90] (Lord Wilson). See also [35] (Lord Mance).

[26] ibid, [74], supported by Lord Lloyd-Jones at [132].

[27] ibid, [94]. See also [93].

[28] ibid, [125]. See also [126], [127].

Strasbourg judgments" where "to do so may prevent this court from engaging in the constructive dialogue or collaboration between the European court and national courts on which the effective implementation of the Convention depends".[29]

e. More directly, Lords Kerr and Wilson spoke in *Moohan*, *Keyu*, and *DSD* of a 'retreat' from or substantial modification of *Ullah*,[30] with a "departure from a rigid application of the mirror principle" being "discernible".[31] Lords Mance and Wilson went further in *Hallam*, drawing on earlier *dicta* to suggest that the appropriate general approach was now one whereby the degree of constraint imposed by the words 'take into account' in s.2(1) was context-specific.[32] Lord Wilson questioned whether Lord Slynn's remarks in *Alconbury* – a foundation for Lord Bingham's position in *Ullah* – should properly have been seen as a general or absolute norm.[33]

22. Relative flexibility in the interpretation of s.2(1) has thus visibly emerged at Supreme Court level, notwithstanding the early characterisation of s.2(1) as a 'mirror'. That this should have been so is unsurprising. As noted earlier, Convention rights enter into national law through the HRA,[34] which operates subject to the norms of the national constitutional framework. Furthermore, the ECHR lacks any EU law-type notion of 'supremacy', and the ECtHR is often deferential to signatory states via the notion of the 'margin of appreciation': a principle which, as noted in frequent Supreme Court *dicta*, leaves national courts

[29] ibid, [172], citing *Kay v Lambeth* [2006] UKHL 10, [2006] 2 AC 465, [44], per Lord Bingham.

[30] *Moohan*, (n 14), [105] (Lord Wilson), approved by Lord Kerr in *DSD*, (n 18), [77], [78].

[31] *Keyu*, (n 14), [233] (Lord Kerr); see also *DSD*, (n 18), [77], [78] (Lord Kerr).

[32] (n 24), [72] (Lord Mance) and [89] (Lord Wilson), citing *R (Haney, Kaiyam and Massey) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344, [21] (Lords Mance and Hughes). Lord Wilson sought to locate Lord Neuberger's *dictum* from *Pinnock* (n 14), [48], within this formulation.

[33] (n 24), [87], [88], referring to *Alconbury Developments* (n 11), [26].

[34] E.g., *DSD*, (n 18), [75] (Lord Kerr); *Keyu*, (n 14), [229] (Lord Kerr), [287] (Baroness Hale). As an illustration, see *Al-Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531.

to determine by which institution a decision should have been taken at national level.[35]

23. During the HRA's time in force, national courts have also emphasised the constructive potential of a beneficial dialogue with the ECtHR concerning the requirements of Convention rights: something which may follow from initial disagreement but is attributable to the nature of the ECHR and the drafting of s.2(1).[36] While there are examples of the UK seemingly accepting that domestic standards fall short of ECHR requirements, these result from the obligations of membership – a constant – not the enactment of the HRA.[37] More deserving of emphasis, in relation to the HRA, are the examples during its time in force of dialogue producing an outcome ultimately (more) supportive of the interpretation eventually prevailing at national level: namely, in relation to hearsay evidence;[38] prisoners' voting rights;[39] and the tort liability of local authorities.[40] Such examples demonstrate that the relationship between the ECtHR and the national courts under s.2(1) is not one of subservience. It is better characterised as a subtle and nuanced dialogue in that it accords ample flexibility to the

[35] E.g., *Re P (A Child)*, (n 14), [32] (Lord Hoffmann), [119] (Baroness Hale), [129] (Lord Mance); *Keyu*, (n 14), [291], invoking *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 (Baroness Hale); *DSD*, (n 18), [153] (Lord Mance); *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] AC 624, [32]–[37] (Lord Carnwarth).

[36] E.g., *Pinnock*, (n 14), [48] (Lord Neuberger); *Moohan*, (n 14), [13] (Lord Hodge); *DSD*, (n 18), [91] (Lord Neuberger), [152] (Lord Mance). *Poshteh*, (n 36), provides an illustration of limits to dialogue in the absence of ECtHR Grand Chamber precedent. See also *Hallam*, (n 24), [94] (Lord Wilson).

[37] A good example is *Smith and Grady v United Kingdom*, Application nos 33985/96 and 33986/96 (27 September 1999), (1999) 29 EHRR 493.

[38] See *Al-Khawaja and Tahery v United Kingdom*, Application nos 26766/05 and 22228/06 (15 December 2011), (2012) 54 EHRR 23, responding to *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.

[39] See *Hirst v United Kingdom (No 2)*, Application no 74025/01 (6 October 2005), (2006) 42 EHRR 41; UK reports to the Council of Ministers (DH-DD(2017)/1229) and (DH-DD(2018)843); and Council of Europe acceptance (CM/ResDH(2018)467). This provides an example of political closure to 'dialogue' initially associated with litigation.

[40] Compare the approaches adopted to the analysis of the then formulation of the common law duty of care test (under the rubric of access to the civil courts under Article 6(1) in *Osman v United Kingdom*, Application no 87/1997/871/1083 (28 October 1998), (1998) 29 EHRR 245, and in the related judgments in *Z v United Kingdom*, Application no 29392/95 (10 May 2001), (2002) 34 EHRR 3 and *TP and KM v United Kingdom*, Application no 28945/95 (10 May 2001), (2002) 34 EHRR 2, responding to both the concerns expressed by some Law Lords, but also to the incremental development of the common law, in *Barrett v Enfield LBC* [2001] 2 AC 550, in *Phelps v Hillingdon LBC* [2001] 2 AC 619, and in *W v Essex CC* [2001] 2 AC 592. For analysis, see ACL Davies, 'The European Convention and Negligence Actions: *Osman* "Reviewed"' (2001) 117 LQR 521.

national courts to tailor Convention rights appropriately to national conditions.

III. THEME 2: IMPACT OF THE HRA ON THE RELATIONSHIP BETWEEN THE JUDICIARY, EXECUTIVE AND LEGISLATURE

The ToR ask whether there should be any change to the framework established by ss. 3 and 4. In particular:

"Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?"

i. Three Preliminary Considerations

24. First: The question assumes that insofar as there might be instances where s.3 has resulted in legislation being interpreted in a manner inconsistent with the intention of Parliament, then the appropriate response might be to repeal or amend s.3. If, however, Parliament believes that what is posited in the ToR has occurred, then it can already amend reinterpreted legislation accordingly.[41] There is no evidence that this has been regarded by Parliament as a problem post 1998. Nor is there evidence that Parliament has felt any repeated need to amend legislation to restore 'original' legislative intent. This suggests that, in general, Parliament has felt content that s.3 has enabled courts to give the correct interpretation of legislation which reflects its intention to legislate in accordance with the UK's international legal obligations.

25. Second: There is a danger that the question as framed assumes the nature of the relationship between the HRA and subsequent statutes. The meaning of s.3 will be further considered below. However, let it be assumed that the meaning currently ascribed to these words by the UK courts is in accord with what

[41] It could, in doing so, make clear that: it believes that the statute is compatible with Convention rights; that it would in any event wish to proceed with the amended legislation in accord with s.19(1)(b); and that it would not accept a declaration of incompatibility to the contrary.

Parliament intended when it enacted the HRA. If this is so, then it follows logically that Parliament, when enacting later statutes, intended that their meaning should be subject to s.3 as presently interpreted by the courts, unless and until there is something to indicate the contrary. It also follows logically that when courts apply s.3 thus construed, they are not thereby acting inconsistently with the intention of Parliament when enacting those later statutes.

26. Third: The issue before the IHRR is the relationship between the judiciary, legislature, and the executive pursuant to the HRA. When pursuing this inquiry, it is, however, important to be fully cognizant of the judicial approach to HRA interpretation since the inception of this legislation, notwithstanding that this is not the subject of a specific question posed by the ToR. Space precludes detailed explication.[42] Suffice it to say for the present that the House of Lords and Supreme Court have repeatedly emphasized that deference/respect/weight should be accorded to the views of the legislature and executive when applying the HRA.[43] They have acted accordingly when deciding cases, affording such deference/respect/weight on epistemic, institutional, and constitutional grounds. The idea that UK judicial interpretation of the HRA has proceeded on the basis of wholesale judicial substitution of judgment on the matters that arise for determination thereunder, or that there has been systemic judicial over-reach, simply does not withstand examination. It is wrong when judged by the approach that has informed HRA adjudication for the last twenty years. There will inevitably be instances where some commentators believe that the courts made the wrong decision, either because they were too intrusive, or not intrusive

[42] For details, see Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) Ch. 20.

[43] See – of very many examples – e.g., *R v DPP, Ex p Kebilene* [2000] 2 AC 326; *Alconbury Developments*, (n 11); *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173; *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719; *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312; *Miss Behavin' v Belfast City Council* [2007] UKHL 19, [2008] 1 AC 719; *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] AC 700; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* (n 14); *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945; *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 WLR 4193; *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2019] AC 845; *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7

enough. This does not, however, mean that the commentator was correct in this respect. Nor does it signal the existence of any systemic problem that requires amendment to the HRA schema. The preceding point is exemplified by claims of judicial over-reach in relation to review of secondary legislation that are not sustainable conceptually or empirically, as shown by analysis of the case law.[44]

ii. Section 3: Case Law

27. The salient issue is the soundness of the judicial interpretation of s.3. The following considerations are pertinent in this respect.

28. *Legislative History*: The legislative history concerning s.3 is not entirely consistent.[45] The Lord Chancellor thought that it gave the courts broad power to interpret legislation whenever possible so as to be compatible with the ECHR.[46] It was not necessary to find an ambiguity.[47] In relation to statutes passed after the HRA, Parliament should be presumed to legislate compatibly with the Convention, and the courts should only find to the contrary where it was impossible to construe a statute in that way.[48] The Home Secretary, however, noted that the courts should not distort the meaning of statutory language so as to produce implausible meanings.[49]

29. *Case Law History*: In the early years of the HRA judges took different views concerning the interpretive leeway afforded by s.3. Space precludes detailed elaboration, but the essential difference can be summarised as follows. Lord Steyn took the view that s.3 could be used to render legislation compatible with the HRA in almost all instances: where there was a clear limitation of Convention rights stated in express terms, it would be impossible to use s.3; but for Lord

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[44] Joe Tomlinson, Lewis Graham and Alexandra Sinclair, 'Does Judicial Review of Delegated Legislation under the Human Rights Act 1998 Unduly Interfere with Executive Law-making?', U.K. Const. L. Blog (22nd Feb. 2021) (available at https://ukconstitutionallaw.org/)).

[45] Francesca Klug, 'The Human Rights Act 1998, *Pepper v Hart* and All That' [1999] PL 246, 252−255.

[46] *Hansard*, HL Deb., col 795 (24 November 1997).

[47] Lord Irvine, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] PL 221, 228.

[48] *Hansard*, HL Deb., cols 535, 547 (18 November 1997).

[49] *Hansard*, HC Deb., cols 421−422 (3 June 1998).

Steyn, s.3 could be used in other instances and obviate recourse to s.4.[50] Lord Hope gave a more cautious reading of s.3:[51] there was no need to identify an ambiguity or absurdity, but he emphasised that s.3 was only a rule of interpretation. A Convention-compliant interpretation would not therefore be possible if national legislation contained provisions that expressly contradicted the meaning which the enactment would have to be given to make it ECHR-compatible, or where the inconsistency followed by necessary implication from the UK legislation.

30. *Case Law --The Modern Approach*: The current approach to s.3 dates from *Ghaidan v Godin-Mendoza*,[52] which established the following three principles:

    a. Application of s.3 is not dependent on ambiguity in the legislation being interpreted. Thus, even if the meaning of the legislation was not in doubt when construed according to the ordinary principles of interpretation, s.3 could require it to be given a different meaning.[53] It followed that s.3 could require a court to depart from the unambiguous meaning which legislation might otherwise bear.[54]

    b. It was open to courts to read in words which changed the meaning of the legislation (whether primary and secondary) so as to make it Convention-compliant, subject to the constraint that this needed to constitute a 'possible' interpretation.[55]

    c. However, s.3 was subject to limits. Courts should not adopt a "meaning inconsistent with a fundamental feature of legislation".[56] The meaning imported "must be compatible with the underlying thrust of the legislation

[50] *R v A* [2002] 1 AC 45, [44].

[51] *R v A*, ibid, [108]; *R v Lambert* [2002] 2 AC 545, [79]−[81]; *Re S (children: care plan)* [2002] 2 AC 291, [40].

[52] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

[53] ibid [29], [44], [67].

[54] ibid [30].

[55] ibid [32].

[56] ibid [33]; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

being construed".[57] Any word implied must "go with the grain of the legislation", and courts should not use s.3 to adopt an interpretation which they were ill-equipped to deliver, such as where that interpretation would bring about far-reaching change of a kind best dealt with by Parliament.[58]

iii. Section 3: Evaluation

31. It can be acknowledged that s.3 could be interpreted in more than one way, as apparent from the academic literature where there was a diversity of academic views.[59] The implications of this plurality of views should, however, be borne firmly in mind. We should be wary of those who castigate the courts as having given the 'wrong interpretation' to s.3 wherein the critique is based on unwarranted or unspoken normative assumptions as to what is the 'best view' of s.3. We should be equally mindful of critiques that purport to be premised on discernment of the legislative intent underlying s.3 where the critique is, in reality, based on a particular person's vision of what the legislature should have intended in this regard.

32. We submit that the approach in *Ghaidan* is balanced for the following reasons:

    a. The legislative history indicates that s.3 is not dependent on the existence of textual ambiguity in order for legislation to fall within its remit. This approach is entirely consistent with the pre-HRA 'principle of legality' established at common law.[60]

    b. The precise form of legislative wording should not be conclusive, when it comes to the application of s.3, for the reason identified by Lords

[57] *Ghaidan* (n 52), [33].

[58] *Re S (Care Order: Implementation of Care Plan)* (n 51).

[59] The literature can be found in Craig (n 42) Ch. 20, fn 88.

[60] *R v Secretary of State for the Home Department, Ex p Simms* [1999] 2 AC 115.

Nicholls and Steyn in *Ghaidan*: namely, that it would render the application of the provision a semantic lottery.[61]

c. There is no sound normative reason to distinguish between 'reading down' the wording of legislation and 'reading in' a particular word. There is no *a priori* reason why the impact of one would be greater or less than the other: the issue is whether the court is properly performing its obligation, as imposed by s.3, to read legislation so far as possible in accordance with Convention rights (the UK government having affirmed that it intends the UK to remain a party to the ECHR).

d. The *Ghaidan* approach is properly qualified by the insistence that the interpretation under s.3 must be 'possible', given the overall nature of the legislation, and that it must not go 'against the grain' of the legislation. It is also qualified by the condition that the issue is not one that should properly be left to Parliament, thereby precluding Convention-compliant interpretation where the *imprimatur* of Parliament was required for issues of significant societal import.

e. The courts have generally applied the *Ghaidan* approach sensibly in the subsequent case law.[62]

iv. Section 3 HRA: Possible Change: Repeal

33. The ToR present two options, repeal or amendment, which will be considered in turn.

34. The ensuing discussion is premised on the assumption that the repeal option would mean the removal of any interpretive obligation on the courts: they would no longer have the duty or power to interpret legislation to see if it could be made Convention-compliant. The courts would simply decide whether the legislation

[61] *Ghaidan* (n 52), [31], [49].

[62] The case law is discussed in Craig (n 42) Ch. 20.

was compliant with the Convention, and if it were not the court would have the discretion to issue a declaration of incompatibility under section 4.

35. The following points are pertinent in this regard:

    a. First: there is, as shown above, no evidence of any structural or systemic problem with the application of s.3 that warrants this far-reaching amendment to the HRA.

    b. Second: there would be difficulties with the drafting of such an amendment. While it would be possible to remove the existing interpretive duty, it would be considerably more difficult in drafting terms to preclude a judicial power to interpret legislation so as to be Convention-compliant; and indeed this would be contrary to the common law presumption of compatible construction which long preceded the introduction of the HRA.[63]

    c. Third: removal of such an interpretive power would, in any event, not be desirable. This is in part for the reasons in paragraph a. above; in part because it might preclude the courts from ever rectifying inconsistency between legislation and Convention rights; and in part because it would be constitutionally absurd for a statute concerning human rights to contain a provision preventing the courts from interpreting legislation in a rights-consistent manner. This would, moreover, deviate from the aims of bringing rights home and enabling UK courts to develop a distinct ECHR jurisprudence.

    d. Fourth: repeal of s.3 would diminish statutory protection for Convention rights as compared to that available at common law, where the courts, through the principle of legality, interpret legislation that is general or ambiguous to be in conformity with fundamental rights.

[63] See, for example, Michael Beloff and Helen Mountfield, 'Unconventional Behaviour? Judicial uses of the European Convention on Human Rights' [1996] European Human Rights Review 1.

e. Fifth: the removal of s.3 would not obviate the need for the courts to engage in statutory interpretation as to whether legislation infringed human rights. The court will necessarily have to decide how such legislation should be interpreted and they will employ canons of interpretation when doing so.

v. Section 3 HRA: Possible Change: Amendment

36. The salient issue is the nature of any such amendment and causality, in the sense of whether it would achieve the desired end. There are perforce a significant number of possible amendments. Consider, by way of example, the following.

37. Section 3 is amended to make clear that a statute can only be interpreted by the courts to be Convention-compliant where it is ambiguous; where the statute is not ambiguous, the court proceeds directly to s.4 and a declaration of incompatibility. There are, however, difficulties with such an amendment:

    a. First: determination of the existence of ambiguity would still reside with the courts.

    b. Second: it is axiomatic that a court will only make a declaration of incompatibility with Convention rights where it is satisfied that this incompatibility exists. There is, therefore, a significant possibility that the judicial power to interpret legislation for Convention compliance will reappear in the decision whether to make such a declaration.

    c. Third: it would entail an odd imbalance between common law and statutory protection for fundamental rights, since the former is applicable to general and ambiguous statutory language.

    d. Fourth: it is not clear that this would be regarded as complying with the ECHR by the ECtHR.

38. Section 3 might alternatively be amended so as to preclude the courts from 'reading in' and/or 'reading down' the legislative text. This would be problematic for the following reasons:

    a. It would not be easy to draft an amendment to have this desired effect.

    b. There is no normative justification for differentiating between reading in and reading down. The distinction between the two might well be linguistically fortuitous and in substantive terms there is no warrant for concluding *a priori* that one is more far-reaching than the other.

    c. This would entail a significant diminution of judicial protection as compared to the common law.

    d. There is no need for any such amendment given judicial application of the *Ghaidan* test.

vi. The Temporal Dimension of any Repeal or Amendment

"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?"

39. The first question: we do not, for the reasons given above, believe that amendment or repeal of s.3 is necessary or desirable.

40. If, however, this were to occur there is no reason why it should not apply to interpretation of legislation enacted before the amendment/repeal takes effect, assuming that the relevant interpretation occurred after the repeal/amendment took effect.

41. The second question: there would, however, be very grave difficulties in 'undoing' previous s.3 interpretations already adopted by the courts. It would be

difficult to formulate such an amendment. There would in any event be three serious problems with any such change.

a. it would give the repeal/amendment to s.3 retrospective effect;

b. it could, depending on the nature of the interpretation thereby undone, involve very considerable problems of discerning the current meaning of the many statutory provisions that have so far been interpreted; and

c. it could have far-reaching second-order consequences and negative rule of law implications for those who have relied on the s.3 interpretation of the statute before it was altered by the change now being considered.

vii. Declarations of Incompatibility

"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?"

42. The precise import of this question is unclear.

a. If s.3 remains in some form, then it will definitionally precede s.4, and it is thus difficult to understand how, on this scenario, the declaration of incompatibility could be considered to be part of the 'initial process of interpretation'.

b. If s.3 is repealed then in formal terms, the determination of compatibility under s.4 becomes the focus of the judicial evaluation, subject to point 42 c below. However, it is difficult to see in what way this enhances the role of Parliament in deciding how any incompatibility should be addressed. The existing regime gives Parliament the final word in this respect. The repeal of s.3 would mean that Parliament would have this final say in all cases, but it is nonetheless difficult to see in what sense this is captured by the inquiry as to whether 'declarations of

incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort'.

c. Even if s.3 were repealed, courts would almost certainly engage in rights-consistent interpretation in deciding whether the legislation was incompatible with Convention rights, thereby obviating the need for recourse to any such declaration of incompatibility (as above). Where this was so Parliament would not at this point have the choice as to whether to accept the interpretation, although it could, as stated at the outset, amend the legislation if it so wished.

43. As things stand, ss. 3 and 4 interact both in the HRA and through judicial interpretation adequately. The current arrangement preserves Parliament's role in determining how incompatibilities should be addressed and is not in need of reform. The question appears to frame s.3 and s.4 in an 'either/or' or combative relationship. This misunderstands the delicate accountability ecosystem created by the HRA. This ecosystem achieves meaningful human rights accountability in a manner that respects the institutional roles of Parliament and the courts. The HRA does not place the courts and Parliament in an antagonistic relationship where each competes to stamp its own vision on the development of human rights. Giving meaning to open-textured human rights obligations is a challenging enterprise and the strengths of the inter-dependence of ss. 3 and 4 are apparent because they facilitate institutional collaboration. Both the courts and Parliament are fora where the concrete meaning of human rights can be deliberated. Taken together s.3 and s.4 recognise that courts and Parliament may have divergent understandings of how best human rights should evolve and develop. The HRA creates institutional space for each to articulate its understanding of human rights while at the same time giving priority to Parliament.

44. The interpretation and application of ss. 3 and 4 by the courts demonstrates a high degree of sensitivity to concerns about institutional role and competence. Section 3 requires the courts to interpret legislation 'so far as it possible to do so' to ensure compatibility with Convention rights. At the same time, s.3 places

a clear limit on the court. It cannot be used to radically re-interpret the legislation to guarantee Convention compliance, as discussed above. Judicial restraint is embedded into the exercise of s.3.[64] Regardless of whether the court concludes it can remedy legislation through interpretation, or whether it concludes it is beyond its institutional role to do so, the judicial process of *considering* s.3 remedies is of immense value. Under s.3, the court is directed to balance potential interpretations of the legislation that could bring it in line with Convention rights against the need for deference to the decisions of Parliament. In evaluating the applicability of s.3, the court can sharpen its analysis on the extent, magnitude or severity of the human rights violations, and it also can untangle and map out potential competing remedial routes for Parliament to consider.[65] Section 3 draws the judiciary into a more deliberative relationship with Parliament and the executive.[66] This is one of the vital strengths of s.3 as it allows courts to reflect in an open, value-based, dispassionate and transparent manner on the development of human rights. This in turn can positively sharpen debates within Parliament when deliberating on human rights.

45. If the court concludes that it is beyond its institutional role to remedy a human rights violation through interpretation, s.4 creates a further discretionary remedy. If the court concludes the legislation is incompatible with Convention rights 'it may make a declaration of that incompatibility'. The UKSC observed that the "circumstances in which such self-restraint [under s.4] should be exercised have not been comprehensively catalogued".[67] However, there is jurisprudence that holds that deference to Parliament is a relevant factor to guide issuing declarations of incompatibility, particularly to ensure that the court does not foreclose imminent Parliamentary debates.[68] This again emphasizes that the court's cognizance of institutional competence in remedying human rights

[64] *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, [130].

[65] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, [34]-[49].

[66] Sandra Fredman 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Right to Vote' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

[67] *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1, [57].

[68] *Nicklinson v Ministry of Justice* (n 35), [113]-[118].

violations. Section 4(6) clarifies that a declaration of incompatibility is not binding and does not affect the 'validity, continuing operation or enforcement' of the legislation in question. Section 4 guarantees that Parliament retains the final say or last word on the development of human rights. There is no procedural or legislative requirement on Parliament consequent upon a declaration of incompatibility. The fact that in practice, Parliament usually responds positively to s.4 declarations[69] reflects the strength of the partnership between courts and the legislature in addressing issues of incompatibility.

46. Moreover, it is incorrect to imply that courts through s.3 are overtaking the role of Parliament in the development and application of Convention rights, side-lining s.4. As of December 2020, there have been forty-three declarations of incompatibility, just over two a year on average.[70] There are also instances where, notwithstanding that the court considers legislation to be incapable of a reading compatible with the Convention, it has nonetheless refrained – in the exercise of its discretion – from making a declaration to that effect, because the incompatibility has been drawn to the attention of Parliament in an earlier declaration, and a subsequent one would serve no practical purpose given the ultimate constitutional responsibility of Parliament to decide whether or not to amend legislation.[71] Recently, there have been high profile uses of s.4, including in the context of heterosexual couples entering civil partnerships[72] and in access to abortion in Northern Ireland.[73] Furthermore, an examination of cases in which s.4 has been used by the courts, which include divisive aspects of human rights and national security or social justice, also indicates that the

[69] Aileen Kavanagh, 'What's So Weak about Weak-Forms Review? The Case of the UK Human Rights Act 1998' (2015) 13 International Journal of Constitutional Law 1008

[70] Lord Chancellor and Secretary of State for Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights' (2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf.pdf> accessed 8 February 2020.

[71] *R (Chester) v Secretary of State for the Home Department* (n 14), [39].

[72] *Steinfeld and Keidan* (n 69).

[73] The UKSC found the restrictions on access to abortion were incompatible with the Convention, but concluded that the Northern Ireland Human Rights Commission did not have standing to bring the claim: *Re Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27, [2019] 1 WLR 1125.

judiciary is highly sensitive to the need to respect the role of the democratic decision-making bodies.

viii. Subordinate legislation

"Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights?"

47. In the case of primary legislation which cannot possibly be read and given effect to in a way which is compatible with Convention rights,[74] the HRA makes clear that the 'validity, continuing operation [and] enforcement' of that legislation is unaffected.[75] In the case of secondary legislation, the Act is less clear on the consequences of a violation of Convention rights, and there has been a degree of argument regarding the proper approach. The Supreme Court has recently revisited the issue in *RR v Secretary of State for Work and Pensions*.[76] The case provides clear guidance as to the basic approach.

48. *RR* arose against the background of an earlier Supreme Court ruling which held that the application of the 'bedroom tax' or 'spare room subsidy' Regulation[77] would, in some cases, violate the Convention rights of recipients of council tax benefit. *RR* raises the question of what approach the social security tribunals should take in future cases where application of the Regulation would violate rights, but the Regulation had not been repealed.[78] The Court of Appeal[79] had decided that the tribunals should continue to apply the rights-inconsistent Regulation, leaving individuals to pursue a claim in damages in separate proceedings.[80] The Supreme Court allowed the appeal. The judgment draws

[74] Human Rights Act 1998, s.3(2).

[75] Ibid, s.4(6).

[76] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.

[77] Housing Benefit Regulations 2006 (SI 2006/213), reg B13.

[78] The offending provision was repealed by Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017 (SI 2017/213); however, the measure did not have retrospective effect.

[79] *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548, [2018] 1 WLR 3429 (Leggatt LJ dissenting).

[80] Human Rights Act 1998, ss.7-8.

attention to the importance of s.6 of the HRA, which prevents public authorities from acting in a manner which is inconsistent with Convention rights. As the Supreme Court emphasised, courts and tribunals are explicitly brought within the ambit of this provision.[81] The Supreme Court considered that continued application of the rights-inconsistent Regulation by the tribunals would be inconsistent with s.6.

49. What emerges from *RR* is the basic starting point for determining the consequences of a finding that a secondary legislative provision violates Convention rights: pursuant to s.6, tribunals and other public authorities are required to "disregard"[82] offending secondary legislation in the course of decision-making where it is "possible to do so".[83] This starting point is founded on an important point of principle. Rights, in order to be meaningful, must be capable of being enforced.[84] *RR* provides a method by which courts, tribunals and public authorities can avoid the multiplication of rights abuses. It also avoids placing unreasonable obstacles, in the form of the need to bring multiple proceedings, in the way of individuals who seek to enforce their rights.[85]

50. It is important to recognise that *RR* confirms rather than creates this approach. The principle that courts should disregard rights-inconsistent secondary legislation in determining individual cases where possible had been applied in a significant line of cases prior to *RR*, and has not given rise to significant practical difficulties.[86]

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[81] ibid, s.6(3)

[82] *RR* (n 78), [22].

[83] Ibid, [30]

[84] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869, [66]-[85].

[85] See useful discussion in Joe Tomlinson and Alexandra Sinclair, '*RR v Secretary of State for Work and Pensions*: Empowering Tribunals to Enforce the Human Rights Act 1998' (2020) 83(3) MLR 652.

[86] *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250; *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303, [2006] 1 WLR 3202; *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117; *In Re G: Adoption (Unmarried Couple)* (n 66); *JT v First-tier Tribunal* [2018] EWCA Civ 1735, [2019] 1 WLR 1313.

51. It is also important to recognise that the Supreme Court in *RR* carefully added a caveat to its approach by emphasising that the duty of the decision-maker is to disregard rights-inconsistent legislation where it is "possible to do so". Here, the Supreme Court was recognising, that while in many (including the decided) cases, disregarding a provision of secondary legislation would not result in major practical difficulties, there might be unusual circumstances in which it might not be "clear how the statutory scheme c[ould] be applied without the offending provision".[87] Disregarding the provision in such a case could create considerable legal uncertainty and/or require the courts inappropriately to make policy choices about how the resulting lacuna in the legislative scheme should be filled.

52. The judgment in *RR* does not offer detailed guidance on the proper approach to be taken in such a case. It is, however, instructive to consider how courts have dealt with similar issues in other contexts.[88] *Salvesen v Riddell*[89] concerned an Act of the Scottish Parliament, which was found, over a decade after enactment, to violate Convention rights. The Supreme Court sought to strike a balance between ensuring proper redress for those whose rights had been violated, and ensuring legal stability for landlords and tenants whose rights were defined in the provision, through an order made pursuant to s.102(2)(b) of the Scotland Act 1998. The effect of the order was to declare that the offending provision was outwith competence and of no legal effect, but the coming into force of that order was delayed for 12 months. While the order in *Salvesen v Riddell* was made pursuant to s.102(2)(b) of the Scotland Act which applies only in challenges to Acts of the Scottish Parliament, the courts have achieved similar results in other contexts, through the exercise of remedial discretion. *Liberty*[90] and *Roadpeace*,[91] for instance, concerned primary Acts (and Regulations in the case

[87] *RR* (n 78), [30].

[88] The expected Supreme Court judgment on the appeal from *R (TN (Vietnam) v Secretary of State for the Home Department* [2018] EWCA Civ 2838, [2019] 1 WLR 2647 (concerning secondary legislation found to be ultra vires and structurally unfair) may also be instructive.

[89] *Salvesen v Riddell* [2013] UKSC 22, [2013] HRLR 23.

[90] *R (on the application of National Council for Civil Liberties (Liberty)) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin), [2019] QB 481 (for discussion see Jonathan Morgan, '"O Lord Make Me Put - But Not Yet": Granting Time for the Amendment of Unlawful Legislation ' (2019) 135(3) LQR 585).

[91] *Roadpeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin).

of the latter) which contravened EU law. In both cases, the courts issued remedial orders effectively leaving the offending provisions in play but directing the government to introduce measures within a particular time-period to remedy the unlawfulness.[92]

53. Section 8 affords the courts considerable remedial discretion in an unusual case where rights-inconsistent subordinate legislation could not be disregarded without creating considerable practical difficulties. [93] It is likely that in such a case the courts would exercise that discretion in a manner which minimised those difficulties.[94]

Is any change required?

54. The present law reflects a balanced approach to the various issues of principle and practice which are in play. The starting-point affirmed in RR, namely that courts, tribunals and others should disregard a rights-inconsistent provision where possible, ensures effective protection for Convention rights. This approach has been deployed across a significant body of case law without creating practical difficulties. Where practical difficulties have arisen in other, similar types of case the courts have successfully minimised them through the exercise of remedial discretion. It seems likely that the courts would use their broad remedial discretion under s.8 to achieve a similar end. Accordingly, no change is required.

[92] In *Roadpeace*, ibid, the judge invited further submissions on whether a time limit was needed and what would be appropriate.

[93] 'in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate' (s.8(1)).

[94] A recent empirical study suggests that courts do not usually issue quashing orders in relation to rights-inconsistent delegated legislation. See Tomlinson, Graham, & Sinclair (n 44).

ix. The Extra-territorial Scope of the HRA

"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?"

55. Parliament's intention in passing the HRA was to require UK public authorities to comply with their international legal obligations under the ECHR to secure the benefit of the Convention to everyone 'within [the UK's] jurisdiction'; that is, wherever governmental authority is exercised. It did not intend that the HRA should apply exclusively within the territory of the United Kingdom. Section 6(1) renders it unlawful for a public authority to act in a way which is incompatible with a Convention right. The scope of the HRA is determined by the exercise of public power by a 'public authority' and not by geographical territory. In taking this view, Parliament followed the approach of the ECHR. The ECHR defines the scope of Convention rights on the basis of 'jurisdiction', not territory. Article 1 of the ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

56. There is extensive case law on the extra-territorial jurisdiction of states under Article 1.[95] The ECtHR has said that the state's jurisdiction is primarily, *but not exclusively*, territorial. A finding of extraterritorial scope is "exceptional" and requires special justification under two criteria.[96] The first criterion is that of "effective control" by the State over an area (spatial concept of jurisdiction) and

[95] See *Cyprus v Turkey* (1975) 2 DR 125; *Loizidou v Turkey*, Application no 15318/89 (23 March 1995), (1997) 23 EHRR 513; *Cyprus v Turkey*, Application no 25781/94 (10 May 2001), (2002) 35 EHRR 30; *Banković and Others v Belgium and Others*, Application no 52207/99 (12 December 2001), (2007) 44 EHRR SE5; *Issa and Others v Turkey*, Application no 31821/96 (16 November 2004), (2005) 41 EHRR 27; *Ocalan v Turkey*, Application no 46221/99 (12 May 2005), (2005) 41 EHRR 45; *Medvedyev and Others v France*, Application no 3394/03 (29 March 2010), (2010) 51 EHRR 39; *Al-Skeini and Others v The United Kingdom*, Application no 55721/07 (7 July 2011), (2011) 53 EHRR 18; *Jaloud v The Netherlands*, Application no 47708/08, (20 November 2014), (2015) 60 EHRR 29; *MN and Others v Belgium*, Application no 3599/18 (5 May 2020); *Georgia v Russia,* Application no 38263/08 (21 January 2021).

[96] See, e.g., *Al Skeini v United Kingdom* (n 97), [131]; *MN v. Belgium* (n 97), [102]; *Georgia v. Russia* (n 97), [114].

the second that of “state agent authority and control” over individuals (personal concept of jurisdiction).[97]

57. The spatial concept of jurisdiction is met where the state exercises effective control of an area outside of its territory. This control may be exercised directly – through the state’s own armed forces – or through a subordinate local administration.[98] The personal concept of jurisdiction is met when a state’s agents exercise “physical power and control over the persons in question”.[99] This threshold is met where the context is a situation of arrest or detention,[100] and probably is met where there is some other relationship of “proximity” between the state agent and individual in respect of isolated and specific acts.[101] It is not met in respect of actions undertaken in what the ECtHR calls the “active phase of the hostilities” in an international armed conflict.[102] Moreover, the ECtHR has rejected the idea that “anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby ‘brought within’ the ‘jurisdiction’ of that State for the purpose of Article 1 of the Convention”.[103] Finally, the recent decision of the Court in *M.N. v Belgium* and the very recent decision in *Georgia v Russia* indicate a cautious approach to the scope of jurisdiction under Article 1.[104] Such a cautious approach is consistent with how the ECtHR has dealt with other issues related to the extraterritorial application of the Convention.[105]

[97] *Georgia v Russia* (n 97), [115].

[98] *Catan and Others v Moldova and Russia*, Application nos 43370/04, 8252/05, 18454/06 (19 October 2012), (2013) 57 EHRR 4, [106]-[107]; also [116].

[99] *Georgia v Russia* (n 97), [127]. See also *Al-Skeini v United Kingdom* (n 97), [149].

[100] *Georgia v Russia* (n 97), [131].

[101] ibid [132].

[102] ibid [138].

[103] *Banković v Belgium* (n 97), [75]; *Georgia v Russia* (n 97), [134].

[104] *MN v Belgium* (n 97), [125]; *Georgia v Russia* (n 97), [144].

[105] See in relation to the interaction of the Convention with international humanitarian law, *Hassan v United Kingdom,* Application no 29750/09 (16 September 2014), [2014] 9 WLUK 388.

58. The link between the HRA and Article 1 of the Convention was confirmed by the Supreme Court in *Al-Skeini*.[106] Lord Rodger's judgment puts the matter clearly: "…section 6 [of the HRA] should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention, but outside the territory of the United Kingdom".[107] It follows that the scope of the HRA is that of the scope of the Convention rights under Article 1.

x. Extra-territorial Scope: The Implications of the Current Position

59. As above, the scope of Convention rights is determined by Article 1. Any attempt by the UK to reduce the territorial scope of the HRA, contrary to the ECtHR's case law, although technically possible, would create an important discrepancy between the remedies and accountability afforded by the HRA and the obligations to which the UK has subscribed under the ECHR, so that some rights, due to the circumstances of the alleged violation, could be litigated only in Strasbourg. This would signal a major substantive departure from the original purpose of the HRA. As Lord Hope put it in *Aston Cantlow,* the purpose of the HRA is "to provide a remedial structure in domestic law for the rights guaranteed by the Convention".[108] The HRA did not intend to reduce the scope or content of Convention rights. Reducing the scope of protection would fragment the protection of Convention rights in a way not envisaged by the HRA.

xi. Extra-territorial Scope: Is There a Case for Change?

60. We cannot see any positive reason *for* change. We consider it appropriate for a state that wishes to operate under the rule of law that its public authorities should

[106] *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153.

[107] Ibid [59]. See also Baroness Hale [86], Lord Carswell [96], Lord Brown [150]; see also *Smith & Ors v The Ministry of Defence* [2013] UKSC 41, [2014] AC 52, Lord Hope [27[-[55].

[108] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and Another* [2003] UKHL 37, [2004] 1 AC 546, [44].

be accountable for their actions abroad, under the conditions set out by the Strasbourg Court and under the terms of Article 1 ECHR.

61. There are good reasons *against* change. Most importantly, the system of the European Convention will continue to put pressure on the UK to give Convention rights some extra-territorial scope. If s.6 was amended to limit its geographical scope of application (without the UK leaving the ECHR altogether), the UK would remain bound on the international plane to secure the rights of those individuals within its jurisdiction under Article 1.[109] Moreover, any attempt by the UK to unilaterally exclude certain actions of public authorities (e.g. its armed forces or its diplomats) from the scope of Convention rights will in all likelihood contravene Article 13, which requires signatory states to provide an 'adequate remedy' before national authorities.

62. In conclusion, if the UK removed the extra-territorial scope of the HRA, it would be acting against the overwhelming consensus not only under the ECHR, but also more broadly in international law.[110] While its international human rights obligations would remain unaffected, its reputation for being an advocate of human rights and its international standing would be seriously diminished.

[109] See also Article 13 ECHR.

[110] UN Human Rights Committee, 'General comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add.13, para 10; UN Human Rights Committee, General Comment No. 36, Article 6 (Right to Life' (2019) CCPR/C/GC/36, paras 22, 63; UN Committee on Economic, Social and Cultural Rights, 'General comment No. 24, State obligations under ICESCR in the context of business activities (2017) E/C.12/GC/24, para 28.