

# Human Rights Law Reform



How and Why to Amend the Human Rights  
Act 1998

Richard Ekins and John Larkin QC

Foreword by Lord Sumption



Human Rights Act  
1998 CHAPTER  
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# Foreword

Lord Sumption

Former Justice of the Supreme Court of the United Kingdom

The Human Rights Act 1998 was designed to entrench the rights protected by the European Human Rights Convention in the law of the United Kingdom and to make compliance with them reviewable by domestic courts. That much it has achieved. But it has also had a significant impact on the United Kingdom's constitution, a development which was anticipated when the Act was passed but received insufficient attention. The whole issue still receives less attention than it deserves.

This is because most people ask themselves the wrong question, namely whether they approve of particular decisions of courts applying the Act. Broadly speaking, judicial decisions about social issues, for example privacy, discrimination, same-sex relationships or social benefits have been welcomed by the public, although not always by governments or by specialists in the relevant field. Opposition to the Convention tends to focus on decisions about penal policy and immigration. The Act has certainly given rise to difficulty in all of these areas. However, the real question is a different and more fundamental one. How should laws be made for a democracy?

Policy Exchange's Judicial Power Project is controversial, as it is intended to be. But its publications have had the courage and the intellectual honesty to confront the questions which actually matter about human rights, without the evasions which have characterised discussion of the subject for so long.

The Human Rights Act is sometimes described as constitutional legislation. The Labour government which introduced it certainly thought of it that way, although the title of their White Paper (*Bringing Rights Home*) has not been justified in the two decades which followed. Viewed as part of our constitution, the Act gives rise to three main problems.

The first is that it treats broad areas of public policy as questions of law, and not as proper matters for political debate or democratic input. In *Scoppola v Italy* (No. 3) (2012) 56 EHRR 663, the European Court of Human Rights in Strasbourg declared the statute which barred serving prisoners from voting at elections to be incompatible with the Convention. Faced with a submission that it had been considered and approved several times by a democratically elected Parliament, they simply replied that it was a question of law and not a matter for Parliament or any other forum for democratic input. The suggestion that the electoral franchise is not a matter in which the representatives of the general body of citizens have any say, seems startling. But although rarely stated so bluntly, it is the

whole basis of the Convention.

This is a particular problem in the case of qualified human rights, i.e. human rights which under the terms of the Convention admit of exceptions where they are necessary in a democratic society for some legitimate purpose, such as the prevention of crime or the protection of public health or the economic well-being of society. These provisions of the Convention are attempts to grapple with the problem that values admirable in themselves commonly conflict. Almost all issues of public policy involve a choice between competing considerations, and sometimes compromise between them. This is the essence of government and legislation. It is necessarily a political question. But the Convention assigns this function to neither the government nor the legislature. It deals with it as a question of legal proportionality, requiring judges rather than elected representatives to assess the relative importance of the various values engaged before deciding which should prevail. Yet judges lack the information, experience and democratic legitimacy to make these choices.

The second major problem is the role of the Strasbourg court. The Court adopts an analytical method which is at odds with the way that international treaties are normally interpreted. It treats the Convention as a “living instrument”. This expression is shorthand for the process by which it devises additional rights by a process of extrapolation and analogy, which are thought to be desirable in modern conditions. These rights cannot be derived from the language of the instrument, were not usually envisaged by the states which signed up to it, and may not be acceptable to their citizens. Modifying the law in the light of later developments is an important function, but it is an essentially legislative function which requires some democratic legitimacy. It is a function which belongs to legislators, not judges. The judicial conferral of rights and imposition of corresponding duties which have not been adopted by the elected legislature and are for practical purposes incapable of amendment or repeal is a serious departure from basic democratic principle.

Thirdly, the Strasbourg court has gratuitously expanded the geographical and the temporal range of the Convention well beyond anything that was envisaged when it was made or the Human Rights Act passed. This has had particularly serious consequences for members of the armed forces. It has exposed them to official inquiries into historic incidents occurring many years before the Act was passed. It has also required the Convention to be applied to overseas operations in places such as Afghanistan, which are wholly unsuitable environments for the application of elaborate Eurocentric schemes of human rights law.

The difficult problem is what to do about all this.

It is not necessary to protect human rights by way of an international treaty. There are other ways to protect them which are more respectful of ordinary democratic principle. The United Kingdom chose to adhere to the European Human Rights Convention because its draftsmen (who were mainly English lawyers) believed that they were codifying rights that had been protected by law and constitutional practice in England for many

years. That belief was probably true of the Convention as drafted. The case made for signing up to the Convention was that it would spread the concept of human rights to other countries. This was a noble but unrealistic ambition. Effective rights protection depends on a complex mixture of law, institutional structure and political culture, which is peculiarly sensitive to a country's historical experience. The historical experience of the forty-seven countries of the Council of Europe is extremely varied. Some were ancient monarchies or components of the great European empires before their destruction in the First World War. Many were one-party states loosely controlled by the Soviet Union in the aftermath of their occupation by the Red Army in 1944 and 1945. Some were catholic, some protestant, and some without any strong religious identity. Some had authoritarian traditions. Others were liberal Parliamentary democracies. What is necessary to protect rights in a country emerging from totalitarianism or the chaos of war may not be necessary or even desirable in a mature democracy, with stable institutions and a long tradition of rights protection. The adoption of uniform principles applicable to every member state of the Council of Europe was always bound to be problematic. In practice the Convention has had most influence in the countries which are least in need of an international system of rights protection, and very little influence on those which routinely disregard human rights.

When the government commissioned the Independent Human Rights Act Review, it ruled out withdrawing from the Convention. It seems to have assumed that the problems generated by the Act could in principle be addressed by changing our domestic law without withdrawing. The present paper is a contribution to the review, and thus proceeds from the same premise. The authors propose a number of changes and argue that it is possible to change our law in ways that will improve the position. It is clearly right that the government's assumption and the premise of this paper should be tested before the more radical step is taken of withdrawing and enacting a purely domestic scheme of human rights law. But I doubt whether significant change really is possible within the framework of the Convention.

For nearly half a century before 1998 the domestic courts rarely noticed the Convention or the elaborate case-law of the Strasbourg Court. In theory we could revert to the pre-1998 position, or at least to parts of it. In theory the United Kingdom can repeal or amend the Human Rights Act 1998 so as to remove or modify the current system of domestic judicial remedies for human rights infringements. But it is questionable how much that would achieve. If the United Kingdom remained party to the Convention, the Strasbourg Court would retain jurisdiction over it and would continue to receive petitions from it. Any act of the UK government which was inconsistent with Strasbourg case-law would result in a petition to Strasbourg, which would deal with it in its usual fashion. Under Article 46.1 of the Convention the United Kingdom would still have an absolute obligation as a matter of international law to abide by Strasbourg's decisions in any case to which it was a party. Moreover,

Strasbourg case-law would continue to influence the United Kingdom's domestic law, because of the long-standing principle of English domestic law that so far as possible the courts will interpret statutes in a way which accords with the United Kingdom's international obligations. A situation in which the domestic law of the United Kingdom was persistently at odds with its international obligations would be extremely uncomfortable.

The Human Rights Convention is not an exercise in pooled sovereignty like the treaties constituting the European Union. It is a dynamic treaty operating under the auspices of autonomous international institutions. As it has developed over the past sixty years, it includes judicial procedures for broadening its scope and effect, into which none of the signatories have any input. It provides a mechanism for important features of our law to be determined by a small international elite which is not constitutionally answerable to any one, and certainly not to the British people. On the whole, it seems unsatisfactory for any state to assume treaty obligations whose future ambit is beyond their control and cannot be anticipated. It is dangerous for a democracy to outsource part of its legislative processes to a body outside its own constitutional order without retaining some significant influence on the outcome. These things inevitably consign to irrelevance many of the choices of the citizen body whom democratic governments are there to represent.

## Summary

1. This paper is the text of the submission made on behalf of Policy Exchange's Judicial Power Project to the Independent Human Rights Act Review, chaired by Sir Peter Gross.<sup>1</sup> Since its foundation in 2015, Policy Exchange's Judicial Power Project has argued that the inflation of judicial power unsettles the balance of our constitution and threatens to compromise parliamentary democracy, the rule of law, and effective government. The enactment of the Human Rights Act 1998 (HRA) – and its reception by judges and lawyers – has been an important, but not the only, cause of the expansion of judicial power. It is right for the Government and Parliament to consider the merits of the Act and to conclude that it should be amended or even repealed. Parliamentarians should think carefully about the powers and responsibilities the Act confers on domestic courts and about the implications that this change in the role of courts has had on judicial culture more widely.
2. In reflecting on the HRA, it is important to distinguish human rights from human rights law. The law should undeniably respect, promote and secure human rights. The key question is whether or not the HRA is an effective means to this end. We argue that the Act puts courts in a difficult position, inviting and requiring them to address political questions which they may have neither competence nor legitimacy to address. The Act encourages political litigation, making important modes of governing subject to judicial challenge or control and destabilising legislation on which one should otherwise be able to rely. There is a strong case for repealing the HRA altogether, even if the UK remains a signatory of the European Convention on Human Rights (ECHR). However, at a minimum, the HRA should be amended to mitigate the constitutional problems to which it gives rise.

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1. The submission was made in early March 2021; it has been updated to take into account a small number of developments since that date. See further the new paragraph 22 below and nn17-18 and 24.

## Human rights and human rights law

3. In announcing the Independent Review of the Human Rights Act, the Government rightly says that it “is committed to upholding the UK’s stature on human rights; the UK contribution to human rights law is immense and founded in the common law tradition. We will continue to champion human rights both at home and abroad.” The statement goes on to say that the Government is committed to the UK remaining a signatory to the ECHR. The question of ECHR membership thus falls outside the Panel’s terms of reference. However, it is open to the Panel, consistent with the Government’s statement, to note that membership of the ECHR is not necessary for the UK to protect human rights and that on the contrary the UK’s history of rights protection has not required or involved submission to an international court or rights adjudication in the modern sense.
4. The common law tradition of which the Government speaks is a tradition in which courts have adjudicated disputes fairly according to law, law over which Parliament has had authority.<sup>2</sup> While the case law developed by courts is of course an important source of law, articulating many important rights, very many of our rights are, and all of them can be, articulated authoritatively in statute. These “legislated rights” are a main way in which Parliament, led by government and accountable to the people, secures the common good.<sup>3</sup> It is a mistake to think that the merits of Parliament’s lawmaking choices must be subject to judicial supervision if human rights are to be protected. On the contrary, for centuries, Parliament has been central to rights protection, with courts playing an indispensable but ancillary role.
5. There is a British model of rights protection, as scholars have long noted, which is common to many countries that have inherited the Westminster constitution, including Australia, Canada and New Zealand.<sup>4</sup> Canada adopted a Charter of Rights in 1982 and shifted from the British model to the North American model of rights protection. The New Zealand Bill of Rights Act was enacted in 1990, but that Act is much less radical than the HRA, partly because it is not nested within a complex legal order like the ECHR; in effect, New Zealand continues to adhere to the old British model. Australia has repeatedly rejected calls to enact a bill of rights at the federal level and while two states have enacted a statutory bill of rights, both are

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2. See further R Ekins (ed), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018) and R Ekins and G Gee, “Putting Judicial Power in Its Place” (2017) 36 *University of Queensland Law Journal* 375

3. G Webber and P Yowell (eds), *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018)

4. J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010), 79-80 and R Ekins, “Models of (and Myths about) Rights Protection” L Crawford et al (eds), *Law Under a Democratic Constitution* (Hart Publishing, 2019), 227

more limited than the HRA, partly because they would otherwise fall afoul of the constitutional principle of the separation of powers. In sharply amending or even repealing the HRA, the UK would remain in good company with Australia, Canada (before 1982) and New Zealand, as a country in which rights are protected by way of a parliamentary democracy that is robustly committed to the rule of law.

6. These points are important to belabour because the discourse about the HRA, including, sometimes, what is said about such legislation by senior judges or other jurists, often wrongly assumes that the HRA, or an equivalent instrument, is essential if rights are to be protected. In 2014, the President of the Supreme Court, Lord Neuberger, addressing the history of human rights and the UK across the last century, distinguished several different periods.<sup>5</sup> The first, before 1951, he termed “the dark ages”, in which rights were protected haphazardly and in which, after the Second World War, the UK risked falling behind its European neighbours. The second, he termed “the middle ages”, which ran from 1951 until 1966 when the right of petition to the Strasbourg Court was introduced. The period from 1966 until 2000 he termed “the years of transition” and from 2 October 2000, when the HRA came into force, we entered “the age of enlightenment”. With respect, and making due allowance for levity, this “history” is a fable, a mischaracterisation. Britain took a leading role in the drafting of the ECHR in 1950-52, and the Convention does little or nothing more than summarise the rights enjoyed by British citizens in 1950, partly by common law, partly by statute. Signing (and remaining party to) the ECHR and enacting the HRA were of course significant decisions. But they do not constitute a move from darkness to light. Instead, they mark a change in how rights are protected, with an international court established to oversee rights protection and, from October 2000, domestic courts authorised to do likewise, standing in judgment over decisions made by Parliament and government about how best to act. It is right to be cautious when a judge describes the growth of judicial power (often at the expense of legislative judgment) as a straightline progressive ascent from the dark ages to enlightenment.
7. The present submission does not address the question of whether the UK should leave the ECHR. But we do submit that it is entirely possible to amend, or even to repeal, the HRA without leaving the ECHR. The UK was, it will be remembered, a signatory in good standing for nearly 50 years before 2 October 2000. Continuing membership of the ECHR does not require the HRA be maintained in its current form or even at all. We explain this point further in the next section. For now, in thinking about HRA reform it is important to take note of how the Strasbourg Court has changed across the years during which the ECHR has been in force. In the late 1970s the European Court of Human Rights (ECtHR) introduced the so-called

5. Lord Neuberger, “The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience”, at a conference at the Supreme Court of Victoria, 8 August 2014

“living instrument” idea and began to interpret the ECHR in ways that could not be squared with the intentions of the signatories.<sup>6</sup> This interpretive disposition, in which the ECtHR effectively takes itself to be free to rewrite the terms of the Convention in light of changing state practice or its own sense of what justice requires, has been a main feature of the Court’s practice in recent decades.

8. By way of very recent example, the Strasbourg Court has added Article 4 of the ECHR to the list of convention rights that it has rewritten. In *VCL and AN v United Kingdom* (Applications Numbers 77587/12 and 74603/12, 16 February 2021), the Court has confirmed that not only does Article 4 impose positive duties to prevent slavery, and duties of investigation and punishment analogous to those it has created for Articles 2 and 3, but that it also imposes barriers to the prosecution of persons who claim to be trafficked.
9. Paragraph 111 of the judgment reads “Article 4 of the Convention reads, insofar as relevant: ‘1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.’” This leaves out only paragraph 3 which narrows the definition of “forced or compulsory labour”. But paragraphs 1 and 2 of Article 4 are in truth no more relevant to the outcome in *VCL and AN* than paragraph 3. The Court has simply recrafted Article 4 so as to articulate and extravagantly apply obligations that are its own creation and bear little relation to the obligations assumed by member states in 1950. All of this would have astonished those who agreed the text of Article 4. To say so is not to set barriers to what states can agree by way of human rights protection in treaties; it is to say – with some emphasis – that treaty-reform is the way in which additional or other human rights protections should be secured.
10. The ECHR as interpreted by the ECtHR has thus become a dynamic treaty, in which the terms of the treaty are developed (changed, rewritten) by the court over time. The ECtHR is not simply upholding timeless moral truths that were committed to writing in 1950. On the contrary, it is developing its own understanding about justice and good government. It must be acknowledged that the “living instrument” approach was a well-known feature of the ECtHR’s case law at the time the HRA was enacted, even if of course Parliament could not then predict how the Court would go on to reinterpret particular convention rights. Parliament in 1998 made a political judgement about the overarching question: would combining two logically distinct factors, the newly enhanced judicial role in protecting rights and the still newish doctrine of “living instrument” “interpretation”, be compatible with maintaining the institutional and democratic balance of our constitution. Parliament today is in a better position to make a new political judgement, better informed by 20 years’ experience, about the same question.
11. Though the two factors just mentioned are logically distinct, they are inter-related by well-known psychological and institutional

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6. For critical discussion, see essays by Lord Sumption, Lord Hoffmann and John Finnis in N Barber et al (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016)

tendencies. The living instrument doctrine was invented, not by the parties to the Convention or by democratic legislation, but by the same judges as had been entrusted in the 1960s with enforcing the rights programmatically declared in the Convention. It can be no surprise to anyone that the invariable implication and result of a new “living interpretation” of a particular article is enhanced jurisdiction and authority for judges to make decisions over what, up to that moment, were matters of democratic political responsibility. And, additionally, it seems fair to recall that in a celebrated lecture to the British Academy in 1978, urging a development such as Parliament 20 years later adopted in somewhat diluted form in the HRA, Ronald Dworkin predicted that “If law” – he meant judicially enforceable programmatic rights – “had a different place here, different people would have a place in the law” – people interested in deploying judicial power and action, rather than traditional political forms of debate and decision, to “make a difference to social justice.”<sup>7</sup> Again, this prediction has proved accurate.<sup>8</sup> The resulting constitutional balance, or imbalance, is a matter on which the country, through Parliament, is entitled – and would be prudent – to make a fresh judgment now.

12. The rational pragmatic case for enacting the HRA was that unless the UK were to withdraw from the ECHR, which would be problematic in foreign policy terms (and in relation to the peace process in Northern Ireland), the UK would continue to be exposed to the risk of litigation before the ECtHR, which in turn risked political embarrassment and diplomatic difficulty. The case is rational but not compelling because it raises questions about how best to handle the risks of ECtHR litigation and about the relative costs of defeat in Strasbourg and of making equivalent litigation possible in domestic courts. The claim often made in the run-up to the enactment of the HRA, that it would greatly reduce resort to Strasbourg, has not been convincingly verified by events.
13. The claim sometimes made that the Belfast Agreement requires the retention of the HRA can be dismissed swiftly. Nothing in the text of the Belfast Agreement or the British-Irish Agreement (the international treaty supporting the Belfast Agreement) required or requires the enactment of the HRA. The obligation to “complete incorporation into Northern Ireland law of the European Convention on Human Rights” was discharged fully by the enactment of sections 6 and 24 of the Northern Ireland Act 1998.
14. The questions noted in paragraph 12 above are difficult questions but they are emphatically not questions about whether one is or is not committed to human rights. The HRA was enacted in response to a perceived problem, namely the UK’s continuing exposure to ECtHR litigation. It is not required for the UK to be a country that is committed to human rights protection or that champions human rights at home or abroad. The UK has a long, admirable tradition of

7. R Dworkin, “Political Judges and the Rule of Law” (1980) 64 *Proceedings of the British Academy* 259, published later as chapter 1 of his *A Matter of Principle* (Harvard University Press, 1986).

8. On 27 January 2021, in oral evidence to the Joint Committee on Human Rights, in their inquiry into The Government’s Independent Human Rights Act Review, HC 1161, 27 January 2021, Q1, Lord Neuberger said:

“From the point of view of the judge of the courts, I think the Human Rights Act has injected a number of beneficial factors into the system. First, it has made judges—judges are inevitably and quite properly remote in a way, because that is what they have to be: detached—more aware of the ordinary, everyday concerns and problems of ordinary people, if I can call them this. They have to consider them more because of the human rights involved in those concerns.

**“It has also made the job of a judge much more interesting and worth while.** It has, and I do not think this can be denied, drawn the judges more into policy issues than they were before, but only to a limited extent, and provided that judges remember that they are not there to second-guess the primary decision-maker—the local authority, Ministers, executives, whoever it is—but merely to review their decisions if they call for a review, I do not regard that as a serious problem.

“I think that the human rights thinking has also injected fresh thinking into the judiciary generally, into our law, which is always beneficial. There is a danger of stagnation in any system.” (emphasis added)

As Lord Neuberger must know, in fact the HRA often requires, and/or has been taken to permit, judges to second-guess the primary decision-maker on the merits of the decision. But the point we note for now is Lord Neuberger’s apparent enthusiasm for the HRA on the grounds that it makes judging more interesting.

protecting rights by ordinary legislation, parliamentary democracy, and disciplined common law adjudication. In thinking about reform of the HRA, the robustness of this tradition should be front and centre.

# The relationship between domestic courts and the European Court of Human Rights

15. Before the HRA was enacted (and came into force), the jurisprudence of the Strasbourg Court was relevant to domestic courts only in marginal cases. Section 2 of the HRA of course requires domestic courts to take that jurisprudence into account and it would in any case be relevant because the HRA is “An Act to give further effect to the rights and freedoms guaranteed under the [ECHR]”, as the long title puts it. The “mirror principle” articulated most clearly in *Ullah* was a rational judicial response to Parliament’s apparent intentions in enacting the HRA.<sup>9</sup> While the principle clearly made some limited provision for domestic courts not to follow every Strasbourg judgment, it was clear that if the ECtHR had squarely addressed some point then UK courts would be bound to follow. The principle has come under considerable pressure in the last twelve years and it is clear that in a range of cases UK courts will be willing to depart from or go beyond Strasbourg. But the case law that has developed is not entirely coherent and there is a good case for legislative correction to avoid some problems to which this case law gives rise.
16. In a series of cases, the Supreme Court has made clear that it is willing to go beyond Strasbourg and to interpret convention rights in ways that are more restrictive of our government and Parliament than the restrictions the ECtHR itself recognises. The rationale for this departure from Strasbourg case law is sometimes said to be that when a case would fall within the UK’s margin of appreciation it falls to domestic courts to decide. But with respect this is misconceived. The margin of appreciation belongs to the UK not to UK courts. When some course of action falls within the margin of appreciation it does not fall afoul of the ECHR – the ECtHR would not or does not hold the UK to be in breach. If that is the case, domestic courts should not hold the course of action incompatible with convention rights. It is true that convention rights are statutory rights, but it does not follow that they can reasonably be interpreted more expansively than Strasbourg requires, especially if or when the ECtHR itself often goes beyond the terms of the ECHR.

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

17. The point of the HRA, which is relevant to Parliament's lawmaking intention, was to give domestic effect to the UK's obligations under the ECHR, understood as a dynamic treaty, equipping domestic courts to minimise the extent to which UK law or policy would be likely later to be held incompatible with Strasbourg case law. In glossing the ECtHR's case law so as to find incompatibility where that Court has not, domestic courts misuse the structure of the HRA, a structure which compromises important constitutional principles (the rule of law, the separation of powers) for a specific and limited purpose, viz. minimising the prospect of later defeat before the ECtHR.<sup>10</sup> Domestic courts are increasingly approaching the HRA on the footing that it empowers them to develop a kind of British bill of rights chosen by our judges themselves, which would gold-plate the ECHR, imposing further limits on government and Parliament. The HRA should not be interpreted in this way and Parliament should make this clear.
18. There are reasons to be concerned about the ECtHR's misuse of its jurisdiction. However, in some cases at least, that Court's distance from member states encourages restraint, which one sees in its unwillingness in some cases involving Article 1P1 and Article 14 to hold that some policy or action breaches convention rights unless it is "manifestly without reasonable foundation".
19. The call for evidence invites submissions about the relationship between domestic courts and the ECtHR. One should recognise that this is a subset of the relationship between the UK and the Strasbourg Court, and it is important to consider also the position of the government and Parliament. If it is open to UK courts to depart from relevant ECtHR jurisprudence, it must be open likewise to government and, especially, Parliament to do so. Indeed, it should not be assumed that domestic courts (and in the end the Supreme Court) should be authorised or expected to manage the reception of the ECtHR's case law into UK law. Whether and how to receive that case law will in some cases raise political questions about how to manage the UK's relationship with international institutions, and other member states, and about the extent to which changing domestic law in response to some development in Strasbourg case law would threaten the public interest. These are not questions that domestic courts are well placed to answer or for which they are able to take responsibility. They are instead questions for government and Parliament.
20. In two cases in 2014 and 2015, addressing the reception of case law of the Court of Justice of the European Union (CJEU), the Supreme Court articulated grounds on which a domestic court might reject judgments of an international tribunal interpreting a treaty.<sup>11</sup> The first ground was if the judgment could not be squared with the UK's constitutional tradition; the second was if the international tribunal had acted outside its jurisdiction, by fundamentally misconstruing

10. R Ekins and P Sales, "Rights-consistent Interpretation and the Human Rights Act 1998" (2011) 127 LQR 217

11. *R (HS2 Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; *Pham v Secretary of State for the Home Department* [2015] UKSC 19

the terms of the treaty it purported to apply. This line of thought, which clearly takes inspiration from the German Constitutional Court's sometimes combative relationship to the CJEU, is relevant to how domestic courts relate to the ECtHR. It is relevant also to how government and Parliament relate to that court, providing grounds on which not lightly to accept an interpretation of the ECHR which cannot be squared with our constitution or which clearly departs from the terms of the ECHR and the intentions of the signatories. In many cases, application of the "living instrument" doctrine will clearly constitute this second failing. This is relevant to reform of section 2.

21. The House of Lords had good reason to articulate the mirror principle, not least since this principle minimised the opportunity for domestic courts to have to elucidate the content of convention rights without the benefit of Strasbourg jurisprudence, the identification of which is a relatively technical, lawyerly exercise. It is necessary, of course, for domestic courts to decide a case even when they are not sure what Strasbourg's position is, or if the Strasbourg position is unstable or in flux. This is different from the state of affairs in which the ECtHR has ruled that some question, such as whether a ban on assisted suicide constitutes a justified interference with Article 8, falls within the margin of appreciation, for what this means is that a ban on assisted suicide will not breach the ECHR. However, while UK courts have had good reasons to hew closely to Strasbourg case law in interpreting convention rights, they have in some cases wrongly attempted to get ahead of the ECtHR, anticipating what might be decided in a later case. Such decisions go beyond what the HRA should be understood to authorise and, relatedly, deny the Government the opportunity to contest before the ECtHR the asserted interpretation. The claimant can take his or her case to Strasbourg. If the Government loses in domestic court, it cannot contest the court's understanding in Strasbourg. This asymmetry, recognised by Lord Brown amongst others, is important in this context.
22. In *R (AB) v Secretary of State for Justice*, decided on 9 July 2021,<sup>12</sup> the Supreme Court cites Lord Brown with approval,<sup>13</sup> and goes on to say that "it is not the function of our domestic courts to establish new principles of Convention law". This is a welcome statement, and the judgment is an important development, with at least five judges, including Lord Reed, the Court's President, moving away from some of the excesses noted above. But the gap for asymmetric development is still left open with the instruction that domestic courts "can and should aim to anticipate, where possible, how the European Court might be expected to decide the case, on the basis of the principles established in its case law."<sup>14</sup> Further, while the judgment is, as we say, welcome and important, it is in another sense the latest in a series of shifts and changes in how our courts have understood the relationship with Strasbourg. There continues to be a strong case for

12. That is, just over four months after our submission was made to the Panel.

13. [2021] UKSC 28 at [56-57]

14. [2021] UKSC 28 at [59]

legislative intervention to settle this authoritatively.

23. Domestic courts have in some cases gone too far in attempting to march in lockstep with the Strasbourg Court. The territorial and temporal scope of the HRA has been misinterpreted by domestic courts who have endeavoured to minimise the prospect for dissonance between domestic human rights law and the ECHR as the ECtHR has developed it.<sup>15</sup> But while this is a plausible technique in relation to the convention rights themselves, which are given statutory force by section 1 and Schedule 1 of the HRA, it is not plausible in relation to the scope of the HRA, which Parliament did not intend to vary with changing ECtHR case law. On the contrary, Parliament intended the HRA to apply to events taking place before 2 October 2000 only in the limited circumstances specified in section 22 of the Act. Likewise, Parliament either intended the HRA to apply only within the territory of the UK or to have the very limited extra-territorial effect that was foreseeable at the time of enactment in 1998. While domestic courts for a time affirmed both propositions, both have since been overtaken by subsequent ECtHR jurisprudence, which domestic courts have wrongly relied upon to transform the scope of the Act.
24. UK courts are not in dialogue with the ECtHR save in an attenuated sense. It is true that if domestic courts depart from Strasbourg case law, it is possible that when a later case is brought before the ECtHR that court will adapt, changing its mind. But Strasbourg stands at the centre of all of the member states of the Council of Europe and cannot easily see itself as in a dialogue with the courts of each member state, even if sometimes it may be reluctant to allow a claim that requires it to disagree strongly with a domestic court that enjoys a strong reputation. While there is a sense in which a domestic court can talk to an international court more easily than government or Parliament can address the latter, whether or not UK courts happen to articulate “the UK’s position” this ought not normally be expected of them. While it may be expected where an ECHR challenge impugns some aspect of common law technique or practice, as in *Horncastle*,<sup>16</sup> it is much less likely when what is challenged is not of such direct interest to our judges, as may have been the case with prisoner voting for example. Hence, while one might hope that HRA adjudication might help prepare the ground for UK success before Strasbourg, this does not seem a bankable proposition, and there is a real risk that domestic judges may advance their own priorities or perspective, rather than UK national interests, which would otherwise fall to be determined by government and Parliament.

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15. See further R Ekins et al, *Protecting Those Who Serve* (Policy Exchange, 2019)

16. *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373

## Legislative options for reform of the domestic reception of Strasbourg case law

25. The Government's intention that the UK should remain a signatory to the ECHR does not make reform of the relationship between ECtHR case law and domestic law (and thus reform of section 2 of the HRA) impossible or impracticable. Several options are open, which we outline below. The object of reform should not simply be to clarify the relationship between the case law of the ECtHR and domestic law, although this is important. Instead, reform should address the problems that (a) in some cases the Strasbourg Court rewrites the ECHR and (b) in some cases domestic courts find against UK public authorities in circumstances in which the Strasbourg Court would not have done.
26. In addressing these problems, it would be a mistake, we say, for Parliament simply to repeal section 2 or to specify that domestic courts need not, or even cannot, take into account ECtHR case law. While appellate (or constitutional) courts in other ECHR member states may construe convention rights with relative autonomy, which may help them manage the reception of ECtHR case law, this is likely to be possible only because they work with a domestic bill of rights which is central to their constitutional order. The HRA does not enjoy that place in the UK's constitution and it should not do so.
27. Domesticating the ECHR by creating a British Bill of Rights would be a bad mistake, compounding the problem the HRA has created for the balance of the constitution, which we consider below. Whatever changes are made to section 2, whether of the kind we suggest or otherwise, they need to maintain the UK's commitment to the British model of rights protection. Parliament cannot address the problems noted above by authorising UK courts to decide freely how to construe convention rights or how to receive ECtHR case law. Indeed, if Parliament were to do so, it would likely worsen problem (b), the problem of UK courts pursuing their own law-reform agenda more aggressively than the ECtHR.
28. **Option 1:** Parliament should consider amending the HRA to provide that domestic courts may not find an act of a public authority to be incompatible with a convention right (thus breaching section 6) or legislation to be rights-incompatible (triggering sections 3 and

- 4) unless such a finding can be founded on a clear and consistent line of Strasbourg case law. Such legislation might specify that no act of a public authority, and no legislation, could be held rights-incompatible if the ECtHR would be likely to hold that it fell within the UK's margin of appreciation. This test might be expressed by amending section 6 to say that an act is to be regarded as incompatible with a convention right only if the ECtHR would consider the act not to be in accordance with law (sections 3 and 4 would require similar amendment) or that the act is manifestly without reasonable foundation.
29. **Option 2:** it would be open to Parliament to go further, adopting Option 1 but making further provision to the effect that domestic courts may find rights-incompatibility only when the Strasbourg case law in question does not clearly depart from the terms of the ECHR adopted by the member states. That is, in determining whether the ECtHR would be likely to find an act incompatible with convention rights, domestic courts would have to set aside cases in which this finding would turn on a glaring misinterpretation of the ECHR. Applying this test would thus require domestic courts to evaluate the extent to which Strasbourg case law could be squared with the ECtHR's jurisdiction under the ECHR and the text actually agreed by the Member States of the Council of Europe. This would, of course, give rise to a risk of friction but would be consistent with the principles articulated in the Supreme Court (and the Bundesverfassungsgericht) in relation to the CJEU.
30. **Option 3:** insofar as the ECtHR misconstrues its jurisdiction by treating the ECHR as a "living instrument", it would be open to Parliament to limit the reception of relevant Strasbourg case law into domestic law. Again, this would be consistent with the principles articulated by our Supreme Court in relation to the CJEU, principles which do not speak simply to the position of domestic courts. That is, Parliament might legislate to require domestic courts in construing convention rights to take Strasbourg case law into account subject to the controlling proposition that convention rights are to be interpreted consistently with the terms of the ECHR, understood not as a living instrument but as a treaty agreed between the signatory states which is to be construed in accordance with their lawmaking intentions as manifest in the text read in the context of its adoption. Parliament would thus specify a disciplined way in which UK courts should interpret the ECHR and receive ECtHR case law.
31. **Option 4:** it is open to Parliament to specify in terms that certain ECtHR judgments are not to be taken into account by domestic courts. Parliament might also amend the HRA to authorise the Lord Chancellor, or Her Majesty in Council, to add to a Schedule of the HRA problematic ECtHR cases that are not to be taken into account, or followed, in construing convention rights. This would leave to responsible ministers, accountable to Parliament, the question of how

developments on the international legal plane are to be take effect in domestic law and would also leave responsibility for dialogue with the ECtHR and the Council of Europe with government. Legislation to this effect might be limited to new judgments of the ECtHR. The statutory power would need to be subject to limitations to avoid prejudicing ongoing litigation and to prevent retrospective legal change. If a statutory power to this effect were introduced to the HRA, perhaps as a new section 20A, it should be protected from collateral HRA challenge by amending section 6(3) to specify that the new statutory power does not fall within the scope of section 6.

## The impact of the HRA on the relationship between the judiciary, executive and legislature

32. Adjudicating disputes under the HRA is sometimes a technical task, articulating and applying convention rights in light of relevant ECtHR case law. However, many of the central questions that arise in the course of modern rights adjudication (that is, in deciding whether section 6 has been breached and in applying sections 3 and 4 of the HRA) implicate domestic courts in reasoning that should not be for courts. In deciding whether an act of a public authority (or legislation that might authorise such an act) breaches a convention right, the domestic court will very often have to consider the proportionality of the act, policy or legislation.
33. While proportionality is sometimes framed as if it were a technical, lawyerly test, in fact it requires judges (or whoever is undertaking the exercise) to answer a series of political questions, about the legitimacy of the legislative objective, the suitability of the means adopted to that objective, and, especially, about the fairness of the balance to be struck between attaining that objective and the claimant's interest. There are important criticisms to be made about the doctrine of proportionality, including the risk that it may distort evaluation of public action. But the point we stress here is that the questions it poses are not questions that a court is well-placed by training or ethos to answer and they cannot be adequately answered without moral or political choice.
34. The HRA clearly provides opportunities for political litigation, with opponents of government policy or (past) legislative choices armed to challenge policy or legislation in the courts.<sup>17</sup> Even if most claims were to fail, this would be an unwelcome constitutional development. The structure of convention rights and the centrality of the doctrine of proportionality make it inevitable that courts will be drawn into political controversy, with litigation a rational means to enjoin the court to lend its authority to one's cause, either by declaring some policy or action to be unlawful or by declaring legislation to be rights-incompatible.
35. Whether an HRA claim is likely to succeed may turn to a considerable

17. This dynamic was recognised by the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 6, 9 July 2021 (again, decided four months after our submission to the Panel). Giving judgment for the unanimous court, Lord Reed says at [162]:

"In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process."

extent on which judges hear the claim, precisely because the law in question makes the lawfulness (or propriety) of public action turn on whether judges think it proportionate, which is an evaluation that turns on political disposition or policy preference as well as temperament. The outcome of human rights litigation is often finely balanced, such that changing one judge on an appellate panel might reverse the outcome. And defeat in an attempt to challenge public action is seldom the end, for claimants may rationally seek to renew litigation in later cases in order to place the question before a different panel of appellate judges. This is not a good state of affairs, confirming the extent to which modern rights adjudication can lack rigour and principle.

36. It is undeniable that the HRA provides judges with considerable power. Convention rights are imperfectly posited legal rights, which the HRA requires judges to first posit (make more specific or definite) for themselves, and then apply, in the course of adjudication. While Strasbourg case law may sometimes help limit the judicial discretion in play, there is clearly much room here for courts to choose freely. In requiring courts to interpret legislation consistently with convention rights, and in arming them to denounce legislation that cannot be so interpreted, the HRA makes it possible for these judicial choices about what should be done to take precedence over contrary Acts of Parliament, provided the court avoids doing too much violence to the statutory policy. And if legislation cannot possibly be interpreted consistently with the court's view about what should be done, the court has authority to denounce the legislation accordingly. These are not powers that courts have otherwise enjoyed in our constitutional tradition.
37. This expansion of judicial power obviously changes the balance of the constitution. Important questions that would otherwise have been for responsible ministers to decide are increasingly settled by court order or are framed by the threat of litigation. Important types of government action, including in relation to foreign policy, military action, prosecutorial discretion and control of the borders, are now carried out under inappropriately intrusive judicial supervision or are even taken over and decided directly by courts themselves.
38. It is true that courts will often temper the application of convention rights by deferring to the primary decision-maker. But whether and to what extent courts are willing to defer is not always predictable and is left to the courts themselves to decide. Different judges are more or less deferential, which compounds the uncertainty the HRA introduces into the law. But putting the point at its lowest, it is clear that the HRA has encouraged courts to be relatively less willing to defer to other institutions than in times past.
39. The HRA makes case law an increasingly important source of law, despite its instability and opacity. Human rights law, established by the interplay between judgments of the ECtHR and domestic courts,

displaces or glosses relevant statute, with courts taking up or having to take on a lawmaking role beyond the scope of their institutional competence. It is unsurprising if some of the law that is made in this way is not good law. But even if a court makes good law, it is liable to be displaced by a later court, for human rights case law is particularly open to change over time as the balance of judicial opinion changes.

40. It is open to the Government to invite Parliament to enact legislation overturning judgments of the courts, including in the context of the HRA.<sup>18</sup> Parliament is responsible for the content of the law notwithstanding the new judicial role in making human rights law and in evaluating legislation for rights-compatibility. But limits on parliamentary time and scarcity of political capital makes it relatively difficult (costly) for Parliament to legislate to correct judicial lawmaking in this context or to decide freely for itself what should be done in the face of a declaration of incompatibility. This is not to excuse government or parliamentary inaction, but it is to doubt the assumption that the HRA does not unsettle the balance of the constitution because Parliament remains sovereign. It would be better for the HRA to be amended, or if need be repealed, in order to repair effective government, disciplined adjudication and robust parliamentary democracy. Human rights litigation tends to frustrate, or at least chip away at, all three.
41. The HRA also weakens the rule of law, by enabling claimants to invite the courts to unsettle legislation, to misinterpret Acts of Parliament and to quash, undercut or disapply secondary legislation. There are clearly cases in which section 3 is deployed to interpret legislation inconsistently with the intention of the enacting Parliament. This is openly admitted in the leading case of *Ghaidan*, which asserts a judicial power effectively to amend statutes (to impose a meaning on them regardless of statutory text or legislative intent) provided that the meaning the court imposes does not compromise a fundamental feature of the statute and can be imposed without legislative deliberation on the part of the court.<sup>19</sup> Not every case takes up the full radical potential of *Ghaidan*. Some cases, like *Wilkinson*, are reasoned much more persuasively and there is a narrow reading of section 3 which can be defended, consistent with legislative intent and the rule of law.<sup>20</sup>
42. In relation to statutes enacted before the HRA, section 3 serves as a general amendment, requiring the legislation to be read as if it had been enacted against the background of convention rights, with which Parliament probably intended to comply. In relation to statutes enacted after the HRA, section 3 cannot function in this way and should be read to inform the court's inference about what meaning was likely to have been intended. However, it is not always clear whether the courts will apply section 3 radically or narrowly and in a number of cases a new meaning is imposed upon a statutory

18. This is a basic proposition of our constitution. In practice, however, many commentators and jurists often question the legitimacy of legislating in this way. See for example the flurry of ill-considered commentary that arose in the wake of the report in *The Times*, on 6 December 2021, that the Government was considering inviting Parliament each year to enact legislation in response to particular judgments in the context of judicial review. For argument that Parliament should reverse some high-profile and constitutionally unsound judgments, see R Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 27 December 2020) and *How to Reform Judicial Review* (Policy Exchange, 19 July 2021).

19. *Ghaidan v Godin-Mendoza* [2004] UKHL 30

20. *Wilkinson v Inland Revenue Commissioners* [2005] UKHL 30

provision, consequent upon a finding that the alternative would be rights-incompatible, without any direct discussion about section 3 and sound interpretive technique. That is, the court takes the question of rights-incompatibility to be decisive, without attending to what should be the controlling question of what meaning Parliament intended to convey. Section 3 is relevant to this process of inference but should not lead judges to dispense with it.

43. Note that there are, unfortunately, important cases in which appellate courts have failed to attend to section 3 in contexts when it would have helped to support sound inference about what Parliament truly intended. Thus, the case law on section 3 is unsatisfactory in two senses, for in some cases it leads courts to undermine legislative intent and in other cases it is neglected when it should help lead courts to uphold legislative intent.
44. Whatever Parliament's intentions in 1998, the HRA is now a scheme for abstract review of the merits of legislation. In *R (Rusbridger) v Attorney General* [2004] 1 AC 357 at [21], the House of Lords noted the absence of any victim requirement in section 3 (and section 4) of the HRA. This has, over time, permitted the entirely proper victim requirements that are set out in section 7 to be uncoupled from proceedings which have as their object a direct attack on legislation: see *Re Close and others* [2020] NICA 20.
45. This has reach a stage of development where Lord Sales can say in *Re McGuinness* [2020] UKSC 6 at [88] that "Claims under the HRA for declarations of incompatibility in respect of statutory provisions are a familiar feature of the legal landscape ... The debate about whether a declaration of incompatibility should be granted is an exercise in review of the statute book against human rights standards".
46. Section 4 of the HRA was not intended to create (but, as Lord Sales illuminates, has become) "an exercise in review of the statute book". Section 11(b) of the HRA ought to have made it clear that the only claims based on the Convention are those that can be made under sections 7 to 9 of that Act, but section 4 has been judicially detached from its section 7 moorings and is subject only to the general (relaxed) standing requirement for judicial review.
47. The object of human rights litigation is sometimes to invite a court to interpret legislation in order to impose on it a new meaning, more to the liking of the claimants. In other cases, or in the alternative, the object is to invite the court to denounce the legislation as rights-incompatible, thus helping secure a political victory, which may later result in legislative or other political change. But often the object of human rights litigation is secondary legislation, which the court may quash if it finds it rights-incompatible or may declare to be rights-incompatible in relevant part, leaving it to the Government to decide how to recast the secondary legislation in order to remove (avoid) the incompatibility.
48. Some jurists argue that such human rights litigation is to be

welcomed, or at least not opposed, on the grounds that secondary legislation is simply waved through and that judicial challenge is likely to be the only serious scrutiny it ever receives.<sup>21</sup> With respect, this is misconceived. Parliamentary scrutiny, including anticipation of political controversy, is an important discipline on ministers, even if secondary legislation is almost never rejected outright. The courts are not well-placed to determine whether legislation, primary or secondary, is proportionate. The validity of secondary legislation, and the various acts taken under it, should not fall simply on the grounds that a court disagrees with the legislative choice in question, including because the court does not think a “fair balance” has been struck. These are not evaluations that courts are competent to undertake. In quashing secondary legislation, or declaring it incompatible (and thus unlawful) in relevant part, courts take on a function for which they are ill-suited, the exercise of which puts the rule of law in doubt.

49. The main reason to amend (or repeal) the HRA is to help restore the relationship between ministers, courts and Parliament which the Act unsettles. In removing from courts responsibilities that should never have been imposed upon them, Parliament would help to vindicate the rule of law and judicial independence. Such reforming legislation would also help to unwind wider changes in judicial culture that the HRA has helped bring about.
50. It is clear, as Sir Patrick Elias and others have argued, that the HRA has encouraged some judges to be relatively more confident, to be comfortable with letting slip the traditional disciplines on judicial power even when the HRA is not engaged.<sup>22</sup> This is a major constitutional problem. One sees it in the *AXA* case, for example, where Lord Hope simply asserts that protection of rights is for courts, whereas policy is for Parliament.<sup>23</sup> But in the British tradition, it is Parliament’s responsibility to oversee the justice of the law, to legislate to protect our rights, and not to abdicate this responsibility to any other body, including the courts. When judges misunderstand their place in relation to Parliament they are more likely to yield to the temptation to undercut statute or to take over questions Parliament has reposed to some other decision-maker. Reforming the HRA is thus important not only, even if primarily, in relation to the constitutional problems to which it directly gives rise, but also in relation to its wider contribution to judicial culture.

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21. J Tomlinson et al, “Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?”, UK Constitutional Law Blog, 22 February 2021

22. Lord Justice Elias, “Are Judges Becoming Too Political?” (2014) 3 *Cambridge Journal of International and Comparative Law*, 1

23. *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46

## Legislating to restore the balance of the constitution

51. There is a very strong case for amending the HRA. But in addition to legislative change, we would encourage the Panel to affirm, and to recommend that the Government and Parliament affirm, a set of constitutional principles relevant to how and by whom human rights are protected in the UK. The principles might include the following propositions:
- a. Rights should be specified, rather than open-ended and general, such that they are in a fit state to be upheld by independent courts in the course of adjudication;
  - b. The content of rights should not be determined, with retrospective effect, in the course of adjudication, by way of free or open judicial choice;
  - c. Parliament and responsible ministers are entitled to leadership in legislation and policy formation and courts should have at most a secondary role in highlighting decisions that seem to them to be manifestly ill-founded; and
  - d. The judicial role in relation to human rights should be disciplined by law in order to minimise (i) the arbitrariness that will otherwise arise from differences in judicial politics and temperament and (ii) disruption of established legal norms.

These principles would help anchor and justify particular legislative changes.

52. The HRA should be amended to require courts in determining what convention rights require, and thus whether they have been breached in some particular case, to take into account a range of relevant factors, which would encourage deference to the institutional competence and democratic legitimacy of the primary decision-maker (especially Parliament itself and responsible ministers) and would require the court to recognise the importance of clear rules, administrative simplicity and legal certainty. It is true and important that in many cases these factors are taken into account but they should be given legislative imprimatur, which would help address their neglect in other cases.
53. Parliament should amend or repeal section 3. There is a strong case simply for repealing section 3. This would minimise some of the worst excesses the HRA has enabled and would help stabilise the statute book and thus vindicate the rule of law. Courts would remain free to read statutes on the premise that it was unlikely that Parliament intended the legislation it was enacting to violate convention rights.

For, convention rights would remain statutory rights and thus would form part of the context against which Parliament legislated and the HRA would remain an Act that (partly) incorporated the ECHR, such that ambiguities in other legislation would be likely to be resolved in ways that would avoid placing the UK in breach of its international obligations. In contrast to section 3, this process of inference would be much less likely to be distorted or rendered artificial by a de facto assumption that rights-compatibility trumps legislative intent.

54. If Parliament chooses to amend rather than to repeal section 3, the object of amendment should be to forbid courts from departing from, or misconceiving, the intention of the enacting Parliament. As matters stand, section 3 in some cases amounts to a Henry VIII clause, authorising courts to make amendments to other statutes, amendments that in contrast to Remedial Orders made by ministers under section 10 are unlikely ever to be considered or approved by Parliament. Section 3 should be replaced with a rebuttable presumption about legislative intent (similar to the state of affairs that would arise if section 3 were simply repealed or indeed had never been enacted).
55. Parliament might consider following the precedent of section 32(1) of the Charter of Human Rights and Responsibilities in the State of Victoria in Australia, which provides “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.” However, this is still an imprecise formulation and does risk courts choosing to abandon the means the legislature has chosen to attain some end, substituting an alternative means that seems to the court to be rights-compatible. But the choice of means is as much a legislative responsibility (and purpose!) as is the choice of ends, and abstract “purposive” interpretation threatens the rule of law. Note that in reading section 6 of the New Zealand Bill of Rights Act 1990, which is the equivalent to section 3 of the HRA, New Zealand courts have expressly rejected the *Ghaidan* approach and have ruled that only reasonable interpretations, viz. interpretations that are grounded in the enacting Parliament’s intentions, are open for adoption.<sup>24</sup>
56. In reframing section 3 to avoid its misuse, Parliament might specify that “Unless the context otherwise requires, legislation should be read and given effect in a way which is compatible with convention rights”, or “So far as is consistent with the intention of the enacting Parliament or relevant lawmaker, legislation should be read...”. Either change, or a change to similar effect, would make much clearer to courts that section 3 informs a process of inference about the meaning of the statutory text, and thus about the meaning that the lawmaker intended to convey by uttering that text in its context. Such change is needed in order to stabilise the statute book and vindicate the rule of law.
57. Repealing or amending section 3 raises the question of what

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24. The leading authority on point had been *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR 1. However, on 7 October 2021 – that is, seven months after our submission was made – the New Zealand Supreme Court seems to have adopted a much more radical approach. In *Fitzgerald v R* [2021] NZSC 131, the Court, by majority, undermined Parliament’s authoritative decision to enact a so-called “three-strikes” sentencing regime. This was not attractive legislation (see further R Ekins and W Brookbanks, “The Case Against the ‘Three Strikes’ Sentencing Regime” [2010] *New Zealand Law Review* 689) but it should have been for Parliament to amend or repeal, not for the courts to cut down or displace under the guise of interpretation. The judgment indicates both the dangers of a radical approach to rights-consistent interpretation and the instability of a more moderate approach, which is at risk of collapse. See further A Geddis and S Jocelyn, “Is the NZ Supreme Court Aligning the NZBORA with the HRA?”, UK Constitutional Law Blog, 1 December 2021.

provision, if any, Parliament should make for the application of this change to legislation enacted before the amendment or repeal takes effect. Parliament should make consequential amendments to other (older) legislation insofar as is necessary to save specific section 3 interpretations that are either reasonable on the merits or cannot be removed without needless uncertainty. That is, the Government and Parliament should review and address legislation that section 3 seems to have been taken effectively to amend.<sup>25</sup> It is true and important that between 1998, or October 2000, and the date on which amending legislation receives royal assent, Parliament will have legislated against a background that includes the HRA. But as argued above, repealing section 3 will restore a focus on legislative intent to which this background is relevant, but in which it is not open to courts to override Parliament's apparent legislative intent in the name of convention rights.

58. The HRA should be amended to prevent secondary legislation from being quashed or undermined in its application on the grounds of rights-incompatibility. If secondary legislation falls outside the scope of the empowering Act, it will of course be ultra vires and rights-compatibility will be relevant to the question of scope. But save insofar as it informs inference about the scope of primary legislation, the HRA should not be a ground on which to quash or disapply secondary legislation, the validity of which is important to the rule of law.
59. Section 21(1) should be amended, substituting a new definition of 'legislation' for the existing definition of 'primary legislation'. The point would be to widen the category of legislation the validity of which cannot be challenged under the HRA. It will be noted that an Order in Council amending a provision in an Act of Parliament is already treated as primary legislation; this means, for example, that a substantial body of the legislation made for Northern Ireland by Order in Council, despite being formally subordinate legislation, is treated as primary legislation for the purposes of the HRA. Quite apart from the general proposition that legislation should be amended by other legislation and not by judicial determination, there does not appear to be any good reason in principle why the protection currently afforded to Northern Ireland Orders in Council that amend provisions in Acts of Parliament should not be extended to all subordinate legislation, including the Acts of the devolved legislatures, having that effect.
60. In the event that courts conclude that secondary legislation is rights-incompatible, or requires or permits an act that is rights-incompatible, the HRA should permit courts only to make a section 4 declaration of incompatibility and should not permit courts to quash the secondary legislation in question. This legislative change would also set aside the Supreme Court's judgment in 2019, which made clear that rights-incompatible secondary legislation was invalid ab

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25. R. Ekins, "Rights-consistent interpretation and (reckless) amendment", UK Constitutional Law Blog, 24 January 2013

initio and thus did not require court proceedings to find or declare invalidity.<sup>26</sup> Relatedly, section 6 should be amended to specify that ministers and others exercising secondary lawmaking powers do not breach the HRA in making secondary legislation that a court may find, and declare, to be rights-incompatible.

61. Wider protection should be given to public authorities that act in accordance with domestic legislation. As noted above, Parliament should amend section 21(1) to expand the definition of primary legislation to include within that category all subordinate legislation that amends an Act of Parliament. But it would be preferable if section 6(2)(b) were amended by reference to the existing categories of subordinate legislation to give protection to public authorities who, for example, are acting in faithful discharge of a duty imposed by an Act of the Scottish Parliament, or Northern Ireland Assembly. Plainly, it should be possible to challenge the vires of such subordinate legislation but it does not appear right in principle to castigate public authorities for acting in accordance with legislation of this stature which enjoys the working presumption of validity.
62. Parliament should amend section 4 to make clearer that a declaration sets out the court's opinion on rights-incompatibility. This change would help to avoid declarations being misunderstood as settling finally whether legislation is inconsistent with convention rights or will certainly be found by the ECtHR to breach the ECHR. That is, the proposed change would signal more clearly that the court's evaluation of rights-compatibility may be open to challenge if, for example, one takes a different view about the act's proportionality. Ministers and Parliament might still often choose to change the law in response to a section 4 declaration, but this would more clearly be for them to decide, thus helping put to rest the misapprehension – or assertion – that there is an emerging constitutional convention that Parliament is somehow obliged to amend legislation that has been denounced.
63. There is a case, as we have suggested above, for repealing sections 3 and 4 so that section 6 becomes unassailably the HRA's main remaining operative provision. In adjudicating section 6 claims, the court would still have to determine whether relevant legislation could or could not be applied to the case before it in a way that was compatible with convention rights as the court understood them. This would leave to government and Parliament responsibility for responding to this holding, including by deciding how far any rights-incompatibility extends and thus what legislative changes if any should be made in response. The advantage of this amendment of the HRA would be that it would rule out the practice of abstract review of the statute book, in which the point of litigation is to secure a section 4 declaration (perhaps as an alternative to a section 3 interpretation of the relevant legislation).
64. There are advantages to retaining a modified section 4, which provides

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26. *RR v Secretary of State for Work and Pensions* [2019] UKSC 52

courts with a means to signal apparent rights-incompatibility (in primary legislation or, if our proposals are adopted, in otherwise valid secondary legislation and perhaps in derogation orders) while leaving to government and Parliament responsibility for making any changes. If section 4 declarations are properly understood, it is at least possible that they may inform legislative deliberation without distorting it. (We are sceptical about the prospects for section 4 working in this way, partly because of the experience of the past twenty years, but section 4 is an intelligible feature of the HRA which Parliament may wish to retain, provided it is subject to further discipline.) However, section 4 should be a remedial option that arises in the course of proceedings brought by an alleged victim of an unlawful act, rather than a standing means to question Parliament's exercise of its lawmaking authority. Parliament should amend section 4(1) to specify that the section "applies in any proceedings to which section 7 applies", which would rule out abstract challenge to legislation.

65. Section 14 of the HRA makes provision for designated derogation orders to be made, regulating the exercise of the UK's Art 15 right to derogate from the ECHR in certain circumstances and making provision for its effect on domestic law. The exercise of that right has been challenged in HRA litigation and is likely to be challenged again in future. This rather defeats the purpose of derogation and improperly empowers domestic courts to determine whether an important protection within the ECHR can be effectively exercised, either with effect in international law or in domestic law. Parliament should consider amending section 6(3) of the HRA to provide that making a designated derogation order is not an act of a public authority for the purposes of the HRA. Alternatively, Parliament should specify that designated derogation orders fall within an expanded definition of primary legislation, and so cannot be quashed for rights-incompatibility but can only be declared rights-incompatible per section 4.
66. Having said this, the most likely ground of challenge to a designated derogation order is not that the order itself breaches convention rights, or that in making the order the minister acts in breach, but rather that the order should be quashed in judicial review proceedings, perhaps on the grounds that it turns on an error of law, and in particular about the meaning of Article 15 itself. Section 14 could be amended to specify that it is for the minister alone, accountable to Parliament, to decide whether the test in Article 15 is satisfied. That is, Parliament could enact an ouster clause specifying that no court would have authority to question a designated derogation order. This would, of course, be highly controversial, but would be consistent with the constitutional orthodoxy that whether or not to derogate from the ECHR is for the Government, representing the UK in the international realm, freely to decide. It should not be open

- to domestic courts, for example, to conclude that derogation is only lawful if the war in question is a war that threatens the life of the nation, as Lord Sumption intimated at one point.
67. Section 10 of the HRA is a Henry VIII clause of sweeping effect. It is subject, rightly, to parliamentary control, but it would be better, in terms of constitutional principle, if the Government had rather less power to amend primary legislation by order. In 2001, the Joint Committee on Human Rights affirmed various principles relevant to when a Remedial Order should be made under section 10 or when instead a Bill should be introduced to amend the primary legislation that had been declared rights-incompatible. Those principles are not scrupulously observed and there is good reason to consider amendment to require legislative change to be secured by way of primary legislation. It would also be advisable to specify that section 10 may not be used to amend the HRA itself.<sup>27</sup>
  68. In enacting the HRA, Parliament made clear that it applies only to events arising after 2 October 2000, subject to the exception set out in section 22(4). The Act should be amended to restore this limited temporal scope, which is now observed in the breach in relation to deaths taking place before 2 October 2000. Domestic courts have extended the temporal reach of the HRA, making it in effect retrospective, and this should now be undone by legislation. Parliament should specify that the HRA does not apply to acts or omissions taking place before the HRA came into force, which includes acts taking place after 2 October 2000 concerning or in respect of acts or omissions before that date. Parliament might usefully specify that in particular proceedings cannot be brought alleging breaches of Article 2 in relation to deaths taking place before 2 October 2000 or breaches of Article 3 in relation to acts taking place before 2 October 2000.<sup>28</sup>
  69. Relatedly, Parliament should legislate to address (reverse) the judicial expansion of the territorial scope of the HRA. The Act's extra-territorial application is unjustified and clearly constitutes a departure from Parliament's lawmaking intention in 1998. In this way, convention rights have been extended abroad, following the deployment of UK forces, including in contexts where their only relevant control over claimants is the ability to exercise military force. This extension abroad is anomalous and unprincipled, giving rise to major practical problems for effective overseas operations. It subjects UK forces to an unsuitable legal regime, effectively displacing the law of armed conflict, and equips opponents of UK foreign policy to challenge the operations of UK forces in the field in London courtrooms. Some HRA claims have also been brought by UK forces, or the families of fallen soldiers. Amending the HRA to limit, or to end altogether, its extra-territorial application is necessary to avoid implicating courts in adjudicating disputes for which their processes are ill-suited and which may compromise national security.

27. See further R Ekins, *Against Executive Amendment* (Policy Exchange, 2020)

28. For draft amendments to the HRA to limit temporal and territorial scope see "Appendix: Amending the Human Rights Act" in Ekins et al, *Protecting Those Who Serve* (Policy Exchange, 2019), 35-36.



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