LIBERTY

LIBERTY'S RESPONSE TO THE INDEPENDENT HUMAN RIGHTS ACT REVIEW CALL FOR EVIDENCE

MARCH 2021

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty has been providing legal advice and supporting landmark cases since 1934. Our substantial experience in bringing HRA challenges over the last 20 years means we are well placed to comment on the operation of the Act as well as the critical role it plays in upholding justice and accountability.

This submission was compiled with the benefit of advice from Jessica Jones, Eric Metcalfe, and Zoe Leventhal, who we would like to thank for their input.

Liberty's policy papers are available at https://www.libertyhumanrights.org.uk/issues/?formats=briefings-reports.

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EXECUTIVE SUMMARY

Introduction

Over the past two decades the Human Rights Act has played a significant role in giving individuals the power to enforce their rights in practice. We are deeply concerned that many of the proposals the review is considering would limit the ability of the courts to provide direct remedies when they find a human rights violation has taken place. These powers have been carefully constructed to protect parliamentary sovereignty while giving individuals ways to challenge Government decisions and realise their rights in practice. We urge the panel to affirm the importance of protecting the Human Rights Act in its current form. This would be a necessary step towards strengthening our human rights frameworks and making access to justice a practical reality across the UK.

The relationship between domestic courts and Strasbourg

Section 2 of the HRA has been carefully and deliberately constructed in a way which protects the independence of domestic courts. It gives primacy to the domestic adjudication of human rights principles by requiring UK courts to take account of ECtHR case law without being bound by it. In doing so it has led to a strong judicial dialogue between Strasbourg and domestic courts. We believe there is no case for weakening this relationship.

Sections 3 and 4 of the HRA

Together sections 3 and 4 of the HRA strike a balance between protecting parliamentary sovereignty and making sure that individuals can enforce their fundamental rights. Where it is open to judges to interpret legislation compatibly with Convention rights, section 3 provides an effective remedy to claimants. Where the courts are unable to read down legislation to be compatible, the most the court can do is make a declaration of incompatibility, alerting Parliament to the inconsistency. These arrangements already put Parliament at the centre of resolving human rights violations which engage with fundamental features of legislation and policy. We do not believe that changing this situation would secure any benefit. Instead, it risks leaving individuals without a remedy.

Designated derogation orders

It is essential that the remedies of declarations and quashing orders in respect of designated derogation orders made under section 14 remain available to the domestic courts. The Convention only envisages derogation orders being made in the most extreme circumstances. This makes it vital that the domestic courts are able to exercise a supervisory jurisdiction and ultimately to quash designated derogation orders if they find them to be unlawful.

Subordinate legislation

There is nothing novel or exceptional in the requirement for subordinate legislation to be compatible with the HRA. It has long been established that secondary legislation which breaches primary legislation is *ultra vires* and of no effect. It would be unjust to deny the victims of human rights violations effective redress by undermining the ability of the courts to deal appropriately with subordinate legislation.

Extraterritoriality

The case law of the domestic and Strasbourg courts on the extraterritorial application of the ECHR makes sure that public authorities are not given *carte blanche* to engage in human rights violations beyond the UK's borders. The current position has assisted in securing recourse for victims of human rights abuses at the hands of the UK State overseas, as well as securing justice for service personnel and veterans.

There is however a case for the ECtHR to re-evaluate its position on jurisdiction to address gaps in the current approach. The International Convention on Civil and Political Rights (ICCPR) approach provides a principled and coherent basis on which to assess the question of whether a state is bound by a particular human rights obligation.

Remedial orders

The remedial order process is working well in practice. The standard procedure has allowed for successive governments to more quickly correct legislation which is incompatible with the Human Rights Act, while maintaining Parliament's role in providing detailed legislative scrutiny. While there should always be careful scrutiny whenever governments make use of emergency powers, it is also clear that the urgent remedial order procedure is rarely used and is rightly regarded as a last resort. We see no need to modify the existing framework.

INTRODUCTION

1. Over the past two decades the Human Rights Act has played a significant role in giving individuals the power to enforce their rights in practice. It has allowed people to challenge restrictive policies, to be treated with dignity by public authorities and to secure justice for their loved ones. In many cases it has helped bring a culture of respecting human rights into hospitals, schools, care homes, and housing associations – changing the way that thousands of people are treated and supported.[1]

2. For the HRA to remain an effective tool for protecting human rights, it is vital that the rights it guarantees are enforceable in practice. We acknowledge the panel is not seeking views on the substantive rights protected by the Act. However we are deeply concerned that many of the proposals the review is considering would limit the ability of the courts to provide direct remedies when they find a human rights violation has taken place. For example, the power to interpret legislation compatibly with the HRA is an important route for individuals to secure effective relief without waiting months or years for legislative change. And the courts' ability to quash subordinate legislation provides an essential check on the power of the executive in a context where Government business happens increasingly through secondary legislation. These powers have been carefully constructed to protect parliamentary sovereignty while giving individuals ways to challenge Government decisions and realise their rights in practice.

3. Liberty believes that placing restrictions on the operation of the HRA would significantly impede individuals' ability to hold the state to account. From restrictions on legal aid to difficulties accessing judicial review, there are already significant practical barriers which stand in the way of people trying to access justice in the UK. Limiting the operation of the HRA risks returning us to a place where rights are difficult or impossible to enforce in practice, and where individuals cannot meaningfully hold public bodies to account. We would urge the panel to affirm the importance of protecting the Human Rights Act in its current form. This would be a necessary step towards strengthening our human rights frameworks and making access to justice a practical reality across the UK.

4. We would also urge the panel to listen to the concerns raised by organisations specifically focused on the protection of human rights in the devolved nations. The incorporation of the ECHR was a key element of the Belfast/Good Friday Agreement. Any steps to weaken the protections guaranteed by the HRA risk undermining this framework. Such steps would also risk unsettling

[1] For case studies of this wider impact see: Equality and Human Rights Commission, 'The impact of a human rights culture on public sector organisations, (2009).

the work to strengthen human rights protections in Scotland, where the HRA has been the starting point for a programme of major human rights law reform.

THEME ONE

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?

5. Section 2 of the HRA has been carefully and deliberately constructed in a way which retains and protects the independence of the domestic courts. It gives primacy to the domestic adjudication of human rights principles by requiring UK courts to take account of ECtHR case law without being bound by it.

The mirror principle

6. Since the HRA came into force, the way in which the domestic courts have applied section 2 has changed significantly. In the case of *Ullah*, Lord Bingham stated that domestic courts should "*keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*".[2] This 'mirror principle' was based on a view that the ECtHR is better able than domestic courts to provide an authoritative exposition of the Convention. However in recent years domestic courts have increasingly asserted the right to disagree with ECtHR jurisprudence where they believe it does not accord with domestic law or values.

7. In the 2009 *Horncastle* decision,[3] the Supreme Court departed from the ECtHR in strong terms. The Court declined to follow a decision of the ECtHR because in its view to do so would undermine the UK's entire approach to hearsay evidence in criminal trials. The Court concluded that the development of ECtHR case law had not considered the protections available in English common law which safeguard the right to a fair trial. The then President of the Supreme Court, Lord Phillips, stated:

> *"The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our*

[2] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.
[3] *R v Horncastle and Others* [2009] UKSC 14.

domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course."

Increasing independence

8. After *Horncastle*, the domestic courts have continued to move away from the mirror approach. In the case of *Pinnock*,[4] Lord Neuberger said:

> *"This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law. Of course, we should usually follow a clear and constant line of decisions by the ECtHR. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber… Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line."*

9. More recently, in the case of *Hallam,*[5] the Supreme Court declined to follow the ECtHR authority of *Allen v UK*.[6] The case related to the threshold for compensation for a period of imprisonment following a miscarriage of justice. In *Allen* the ECtHR had set out principles for when the threshold for compensation in such cases would breach Article 6. However, in *Hallam* Lord Mance stated "*I readily acknowledge that this might at first sight appear to be the implication of the ECtHR's thinking in… para 133 of the judgment in* Allen*. But the point has never been directly before or decided by the ECtHR and I am far from confident that its implications have been worked through in a manner which makes it acceptable, or that the ECtHR would conclude that [the statutory provision] is incompatible if the question were argued before it".* In the same case, Lord Wilson stated that the ECtHR had taken a wrong turn in respect of Article 6 and that the Supreme Court could deviate from it: "*I regard myself as conscientiously unable to subscribe to the ECtHR's analysis of the extent of the operation of Article 6(2) and thus to declare to Parliament that its legislation is incompatible with it*".

[4] *Pinnock v Manchester City Council* [2010] UKSC 45.
[5] R(*Hallam) v Secretary of State for Justice* [2019] UKSC 2.
[6] *Allen v UK* (2013) 63 EHRR 10.

The current position

10. The UK courts' approach to section 2 continues to evolve. This more expansive approach is a positive development that allows the domestic courts to make determinations with the advantage of their detailed knowledge of UK law and practice.

11. For example, in *Abdurahman*,[7] the Court of Appeal considered a case in which the claimant was convicted for helping one of the 21/7 bombers to evade arrest. The Grand Chamber of the Strasbourg Court had previously found that his right to a fair trial had been breached. However the Court of Appeal ruled that his conviction was not unsafe. It found that while it should "usually" follow a clear and constant line of decisions from the ECtHR, that "*It might, however, be right to depart even from a 'clear and constant' line of decisions if (i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle … But this should be viewed as guidance rather than a straitjacket. The degree of constraint the Strasbourg jurisprudence imposes is context-specific. Even where the Grand Chamber has endorsed a line of authority, it is not necessary for the domestic to court [sic] to conclude that it involved an 'egregious' oversight or misunderstanding before declining to follow it".*

12. The President of the ECtHR has endorsed the increasing independence of the UK courts; in a 2020 speech Justice Spano stated that *"when national authorities have in good faith balanced competing interests…the Court is increasingly ready to apply the rule that it will require strong reasons for it to substitute its judgment for the one adopted by the national authorities"*.[8]

13. Section 2 is operating as it was intended and there is no need for any amendment of the duty to take into account ECtHR case law. Its purpose was to allow for the UK courts to develop their own human rights jurisprudence, which is what has happened over the course of the last twenty years. As Lord Neuberger has stated, *"UK judges may well initially have been too readily prepared to follow decisions of the Strasbourg court, we are now more ready to refuse to follow, or to modify or finesse, their decisions, as we become more confident in forming our own views about Convention rights."*[9]

[7] *R v Abdurahman* [2019] EWCA Crim 2239.
[8] The Bonavero Human Rights Lecture, 20 February 2020; https://echr.coe.int/Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf.
[9] Lord Neuberger, Faculty of Law, National University of Singapore 2016; https://www.supremecourt.uk/docs/speech-160818-01.pdf.

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?

14. The doctrine of the margin of appreciation recognises that contracting states are best placed to determine how human rights should be applied and provides a further limit on the influence of the ECtHR. As Lord Bingham explained in *Kay v Lambeth London Borough Council* [2006] 2 AC 465:

> *"[I]n its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles, expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions."*

The ECtHR's use of the margin of appreciation

15. The margin of appreciation gives a contracting state scope to interpret and implement the Convention rights in accordance with its own laws, customs and traditions. It recognises that states will generally be in a better position to balance competing rights claims in the context of their own society. The extent of the margin afforded to a contracting State is decided on a case by case basis, depending on the right interfered with, the extent of that interference, and the social, political and cultural domestic factors across all contracting states.

16. The ECtHR has tended to defer more liberally to contracting States where it comes to making complex policy choices in matters of national security,[10] the application of socio-economic rights,[11] and immigration. It has given less leeway when considering absolute rights, such as the right to be free from torture, or rights that are of fundamental democratic importance, such as the protection of free speech.

Domestic courts and the margin of appreciation

17. The domestic courts have also shown deference to the executive and Parliament on the basis of the margin of appreciation. Wherever the domestic courts consider that an issue would be treated by Strasbourg as falling within the margin of appreciation, the domestic court will generally be reticent in finding the decision incompatible with the Convention. For example, in

[10] See, for example, *Ireland v United Kingdom* (App No 5310/71) [1978] ECHR 5310/71.
[11] See, for example, *Stec v United Kingdom* (65731/01) (2006) 43 EHRR 47.

Nicklinson,[12] the majority found that the prohibition on assisted suicide in the Suicide Act did not violate Article 8, because voluntary euthanasia was an issue which Strasbourg had approached as being within member states' margin of appreciation.

18. Recently there has been some divergence in how the domestic courts distinguish between the margin of appreciation (as shown by the ECtHR to contracting States) and the domestic concept of deference to the executive and Parliament. In *R (DA & Others) v SSWP*,[13] the Supreme Court grappled with this distinction and Lord Kerr provided a helpful summary of previous comments by the Supreme Court, explaining that while the margin of appreciation is not a domestic concept, UK courts should nevertheless accord respect to legislative choices:

> *"there is plenty of authority which acknowledges that measures falling within the United Kingdom's margin of appreciation, when viewed from the supranational perspective of ECtHR, will not necessarily survive judicial scrutiny on the national stage. In* In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill *[2015] UKSC 3; [2015] AC 1016, para 54 Lord Mance said: "At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level. … However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis".*

19. In *R (Steinfeld & Keidan) v SSDI,*[14] Lord Kerr had said that the approach of the ECtHR to the margin of appreciation "*is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified*". He went on to say that the domestic court cannot avoid determining whether any justification for a breach of Convention right has been made out, but can apply a degree of deference to the executive depending on the particular circumstances of the case. He also cited Lord Hope in *Kebilene* [2000] 2 AC 326:

> *"difficult choices may have to be made by the executive or the legislature between the rights of individuals and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on*

[12] [2014] UKSC 38.
[13] [2019] UKSC 21.
[14] [2018] UKSC 32.

democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention".

20. However, in *Z v Hackney Borough Council* [2020] UKSC 40 Lord Sales adopted the language of margin of appreciation to stand in for the deference of the Court to Parliament's judgement, stating:

> *"Where, as here, Parliament has had its attention directed to the competing interests and to the need for the regime it enacts to strike a balance which is fair and proportionate and has plainly legislated with a view to satisfying that requirement, the margin of appreciation will tend to be wider. A court should accord weight to the judgment made by the democratic legislature on a subject where divergent views regarding what constitutes a fair balance can reasonably be entertained."*

21. Whichever approach the domestic courts choose to take in cases concerning issues which fall within the 'margin of appreciation' the outcome is the same. It is clear that the domestic courts accord respect to the executive and defer to its decision-making on issues of policy-making, particularly in relation to "*high level financial decision[s]*"[15] and those concerning questions of "*moral and political judgement*".[16] By according greater deference in areas such as welfare benefits where "*the economic and social considerations feature very large*"[17] and in matters of national security, the courts have recognised that it is not their role to make complex policy choices, and that these choices should be left to Parliament and the executive. There is no justification for any change that would increase the deference to the executive.

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?

22. The careful construction of section 2 HRA has not only allowed for the development of domestic human rights principles, but has also encouraged dialogue, disagreement and greater appreciation in Strasbourg of UK judgments. Before the HRA was brought into force the ECtHR was tasked with determining the interpretation and application of the Convention in the UK; it is

[15] Rotherham MBC v. SoS BIS [2015] UKSC 6.
[16] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] AC 719.
[17] R (JCWI) v Secretary of State [2020] EWCA Civ 542.

now able to make those determinations lead by UK court judgments. This has provided for a constructive dialogue between the ECtHR and the Supreme Court.

23. Allowing for this dialogue was always the intention behind the HRA. The White Paper preceding the Human Rights Bill stated:

> *"The Convention is often described as a 'living instrument' because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention."*

24. There are a number of examples of domestic courts raising concerns as to the application of ECtHR jurisprudence, which have led to a change in direction by the ECtHR. In the 2009 *Horncastle* decision, the Supreme Court departed from the ECtHR on the question of whether the UK was in in breach of the right to a fair trial because of its approach to the use of hearsay evidence in criminal trials. The ECtHR subsequently reversed its approach in *Al-Khawaja,*[18] holding that the UK was not in breach of Article 6. In doing this they relied on the explanation provided by the Supreme Court about the safeguards surrounding the use of hearsay evidence.

25. Another example is the Grand Chamber judgment in *Animal Defenders International v United Kingdom*, a case about whether a blanket ban on political advertising was a proportionate restriction on freedom of expression, an area where the ECtHR would normally afford a narrow margin of appreciation. The ECtHR upheld the UK's ban and departed from its own earlier case law in the *VGT* case. The Court placed considerable weight on the nature of the consultation and evidence gathering process that Parliament undertook when considering the ban. Much of the evidence it relied on came directly from the House of Lords and High Court judgments in the case. Professor Jeff King noted:

> *"this case… represent[s] precisely the merits of UK judges scrutinising the State's arguments in UK courts, in Convention-rights terms and with due consideration of Strasbourg jurisprudence, before the issue travels to Strasbourg for consideration there".*[19]

26. This positive institutional dialogue is the direct result of the HRA, which allows UK courts to play an active role in the development of Convention rights. As an organisation concerned with the protection of civil liberties we will not always agree with the deliberations and outcomes that flow

[18] [2011] ECHR 2127.
[19] J King, 'Deference, Dialogue and Animal Defenders International' (25 April 2013) *UK Constitutional Law Blog* https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/.

from this dialogue in specific cases. However, we believe that the current framework plays an important role in strengthening the development of human rights principles in the UK.

Strengthening and preserving judicial dialogue

27. The UK has so far declined to sign or ratify Protocol 16 of the ECHR, which creates an optional system by which national courts can choose to seek advisory opinions on the interpretation of Convention rights. This is despite Protocol 16 having arisen from the reforms advocated for by the UK at the 2012 Brighton Conference. Protocol 16 would allow the Supreme Court to ask the ECtHR for advisory opinions on the cases before it, and in our view, would enable further constructive dialogue between the domestic courts before those cases reach the ECtHR.

THEME TWO

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

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

28. The Human Rights Act has been carefully constructed to give individuals a practical route to enforcing their rights through the courts, while preserving the proper role of Parliament in deciding questions of policy. Section 3 plays an important part in maintaining this balance.

29. By tasking courts with reading legislation compatibly with Convention rights, the HRA has provided a way for individuals facing human rights violations to gain effective relief. Courts can use their interpretive powers to correct a specific human rights violation. By contrast, issuing a declaration of incompatibility may lead to legislation which avoids future rights violations but will not by itself resolve the injustice faced by the original claimant. At the same time, section 3 is always subject to the constraint of parliamentary intent. Courts cannot make use of it to correct a rights violation if doing so would contradict a fundamental feature of the relevant legislation. This constraint means that the courts do not have the power to ignore or override the intentions of Parliament. In practice courts have been cautious, using section 3 to address narrow and specific rights violations, and issuing declarations of incompatibility where the rights violation engages more fundamental questions of policy.

The importance of effective remedies

30. The HRA was introduced with the explicit intention of 'bringing rights home' so that individuals have meaningful routes to enforce their rights in practice. Before the introduction of the HRA, individuals facing a breach of their Convention rights would need to take a case to the European Court of Human Rights. In 1998 that process would take on average five years and could leave individuals facing costs in excess of £30,000. By contrast individuals now have a clear route to challenge violations of their human rights in the domestic courts. This original intention of making rights enforceable has to be a key consideration when evaluating how effectively the HRA is working today.

31. The framework established across sections 3 and 4 of the HRA helps realise this goal while preserving the distinct roles of Parliament and the courts. Crucially courts are able to use

section 3 interpretations to provide direct relief to individuals who are facing human rights violations. Decisions made in this way have practically improved the lives of individuals in a way which would not have been possible before the introduction of the HRA. In *Pomiechowski* the defendants were able to proceed with an appeal against their extradition orders, after errors in processing their paperwork put their right to a fair trial in jeopardy.[20] As a result of the decision in *Ghaidan*, Juan Godin-Mendoza was able to continue to live in the house he had shared with his late partner.[21] In cases like these the courts' rulings meant that individuals could access justice directly. Declarations of incompatibility may lead to future change in the law, but they would not address the specific injustices that these people faced. A declaration of incompatibility is also a first step in what is often a lengthy legislative process, adding months or years to the process of securing justice. These delays are unnecessary in cases where courts can resolve the incompatibility in a way which is consistent with primary legislation and Parliament's intent.

Section 3 and parliamentary intent

32. Section 3 facilitates direct remedies for individuals but can only do so where the interpretation is consistent with parliamentary intent. In *Ghaidan*,[22] Lord Nicholls explained that Parliament *"cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve*". In the same case, Lord Rodger explained the limits of the section 3 duty:

> *"If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."*

33. It is simply not open to the courts to interpret legislation in a way that would be incompatible with what Parliament had intended. While section 3 allows the courts to depart from a literal application of the words of the legislation,[23] it respects the underlying intention of Parliament. If

[20] Pomiechowski v District Court of Legunica, Poland [2012] UKSC 20
[21] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557
[22] Ibid.
[23] *Vodafone 2 v HM Revenue & Customs* [2009] EWCA Civ 446

it is not possible to interpret legislation compatibly with Convention rights, then the court must instead consider making a declaration under section 4 HRA instead.

How section 3 has been applied in practice

34. As a consequence of the limits of section 3, the courts have taken a cautious approach which respects the fundamental features of the legislation in question. For example, in *Z (A Child),*[24] a single father of a child born to a surrogate mother in the US argued that the requirement in the Human Fertilisation and Embryology Act that an application for a parental order be "*made by two people*" should, under s.3 HRA, be read down to include single parents. However, the President of the Family Division held that "*[t]he principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout*" and that this reflected "*a very clear difference of policy which Parliament, for whatever reasons, thought it appropriate to draw both in 1990 and again in 2008. And, as it happens, this is not a matter of mere speculation or surmise, because we know from what the Minister of State said in 2008 that this was seen as a necessary distinction based on what were thought to be important points of principle*". The court found that to read down the legislation to permit a single parent to obtain a parental order would be "*to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation*". The court subsequently declared that the legislation was incompatible with Article 8 ECHR.

35. Another example is the case of *Kennedy,*[25] which concerned the absolute prohibition on the disclosure of court records under the Freedom of Information Act. The Supreme Court found that the legislation could not be read in a way which would permit disclosure subject to a public interest balancing test. Lord Mance held that such a reading "*would depart from the statutory scheme, and run contrary to the grain of the legislation*". Lords Toulson, Neuberger and Clarke similarly agreed that to do so would "*go against the grain of FOIA to override section 32(2) in circumstances which Parliament considered the matter should be for the courts and where there is a remedy through the courts*".

36. The courts have also shown that they are reluctant to rely on section 3 in cases which they believe call for "*legislative deliberation*".[26] The courts give substantial deference to Parliament and the executive in cases where correcting the rights violation would involve devising detailed

[24] *Z (A Child) (No 1)* [2015] EWFC 73.
[25] *Kennedy v The Charity Commission* [2014] UKSC 20.
[26] Alison Young, 'Ghaidan v Godin-Mendoza: avoiding the deference trap' [2005] PL 23, 31.

statutory frameworks and procedures, or where a court believes they cannot choose between several different section 3 interpretations without deciding on issues of policy.[27]

37. For example, in *Bellinger*[28] the House of Lords was asked to consider a provision of the Matrimonial Causes Act 1973, which did not recognise as lawful a marriage between a trans woman and a cisgender man. As the Court found that UK law was incompatible with the rights of trans people, it would have been open for it to make use of section 3. Instead it issued a declaration of incompatibility, noting that the Government had already announced an intention to bring forward legislation on the issue, and arguing that Parliament was better placed to consider the detailed questions of policy and administration involved. The following year, Parliament enacted the Gender Recognition Act 2004 which allows for many trans people to live and marry according to their affirmed gender.

38. We believe there is no case to amend or repeal section 3. None of the cases in the last twenty years in which the courts have relied on section 3 can be said to have resulted in a reading incompatible with Parliament's intention. Removing or modifying courts' powers to make section 3 interpretations would make it impossible for individuals to enforce their rights through the courts, including in cases where the remedy itself is straightforward and uncontroversial.

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

39. As we set out above, Liberty's view is that section 3 of the HRA should be retained in its current form and that reforming it would risk making it harder for individuals to enforce their human rights. We would also emphasise that making such reforms retrospective would only cause further confusion and harm.

40. It is a general rule of statutory construction that Parliament is "*presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears*". Retrospective legislation must also take care to avoid giving rise to a breach of the prohibition against retrospective criminal legislation under Article 7 ECHR.

41. Since the HRA came into force, it has been Parliament's intention that the courts should interpret all legislation compatibly with Convention rights so far as it is possible to do so. This means that

[27] Jan van Zyl Smit, 'HRA section 3 and the limits of purposive interpretation' [2007] Modern Law Review.
[28] *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

all primary and secondary legislation since then has been enacted or made in the knowledge that any incompatibilities may be fixed by the courts unless it would be contrary to the underlying intention of Parliament to do so. To repeal section 3 with retrospective effect would mean thwarting the continuing intention of Parliament from the date the HRA came into force and retrospectively alter Parliament's intention in relation to that legislation.

42. Any such change might affect the criminal liability of one or more individuals contrary to Article 7 ECHR, because it would involve interpreting the relevant statute in a manner that was incompatible with Convention rights. It would not necessarily be possible to foresee the effects of such a far-reaching measure on existing legislation which had already been interpreted by the courts compatibly with section 3 HRA.

43. For example, in *Waya*[29] the Supreme Court held that the requirement of section 6(5) of the Proceeds of Crime Act 2002 for a court to make a confiscation order should be read, consistently with s.3 HRA, as being subject to the proviso "*except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1*". If a person had their property confiscated under that provision and the judge failed to consider whether the seizure was proportionate, the person would be entitled to challenge the confiscation order on that basis. In the event that section 3 HRA were retrospectively repealed, however, the person affected would no longer have the right to challenge a confiscation of their property that was disproportionate. Arguably this would involve the imposition of "*a heavier penalty*" on a person than was applicable at the time, contrary to Article 7(1) ECHR. It is not clear what public interest would be served by such a measure.

iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

44. Together sections 3 and 4 of the HRA strike a balance between protecting parliamentary sovereignty and making sure that individuals can enforce their fundamental rights. Where it is open to judges to interpret legislation compatibly with Convention rights, section 3 provides an effective remedy to claimants. Where the courts are unable to read down legislation to be compatible, the most the court can do is make a declaration of incompatibility, alerting Parliament to the inconsistency. Unlike other jurisdictions, the courts have no power to strike down an Act of Parliament.[30] These arrangements already put Parliament at the centre of

[29] *R v Waya* [2012] UKSC 51.
[30] For further analysis see Kavanagh. A., (2015), 'What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998'.

resolving human rights violations which engage with fundamental features of legislation and policy. We do not believe that changing this situation would secure any benefit.

45. Under the HRA, courts are always required to first determine whether or not a provision of legislation is incompatible with Convention rights. As Lord Woolf held in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,[31] "*Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention)*".

46. Where a court finds that a provision of legislation is incompatible with Convention rights, it should attempt to give the offending provision a reading which is compatible with those rights, unless it is not "*possible to do so*" under s.3(1) HRA. As Lord Steyn noted in *Ghaidan*,[32] "*interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights*".

47. Requiring the courts to make greater use of declarations of incompatibility would mean asking them to more readily find that Parliament has breached Convention rights. This would force the executive to respond politically to a defect that could be remedied by statutory interpretation in line with Parliament's intention. This risks leaving individuals without effective remedies, even where the rights violation can be addressed by limited and straightforward changes which are consistent with the relevant primary legislation.

Parliament's role in responding to declarations of incompatibility

48. Even where the courts make a declaration of incompatibility under s.4 HRA, that declaration "*does not oblige the government or Parliament to do anything*". There is no requirement for that incompatibility to be put before Parliament, and as Lord Kerr noted in *Nicklinson*, a declaration under s.4 "*is merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act 1998 it is open to Parliament to decide to do nothing.*"

[31] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595.
[32] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

49. Despite this, the legislative response to a declaration of incompatibility has usually been to engage with and eventually remedy the problem. For example, in *Steinfeld*, following the Supreme Court's declaration of incompatibility, the Government adopted a Private Member's bill which addressed the incompatibility itself. In another example, in the case of *P* the Supreme Court found that the blanket and indefinite disclosure of multiple minor convictions or cautions was in breach of Article 8 and made a declaration of incompatibility. The Government subsequently amended the Police Act 1997 to remove the multiple conviction rule in relation to disclosure.

50. The role of Parliament under the current arrangements is relatively limited and at the discretion of the executive. The courts are willing to defer to Parliament when an issue calls for legislative intervention; where they do so, an obligation on Parliament to at least consider and even remove the incompatibility would enhance its role. However, where it is possible to interpret legislation compatibly the courts must be able to do so. Removing or weakening the ability of the courts to read down legislation would undermine the ability of individuals to obtain an effective remedy for a breach of Convention rights.

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

51. It is essential that the remedies of declarations and quashing orders in respect of designated derogation orders made under section 14(1) remain available to the domestic courts. The Convention only envisages derogation orders being made in the most extreme circumstances. This makes it vital that the domestic courts are able to exercise a supervisory jurisdiction and ultimately to quash designated derogation orders if they find them to be unlawful.

The limits on designated derogation orders

52. The Convention recognises that, in certain very limited and exceptional circumstances, states may need to take measures which may breach human rights. Article 15, derogation in time of emergency, permits governments in exceptional and limited circumstances the possibility of derogating, in a temporary, specific and supervised way, from their obligation to secure some of the rights and freedoms under the Convention. The use of this provision is governed by important procedural and substantive conditions. The right to derogate can only be invoked in time of war or other public emergency threatening the life of the nation. Any derogation from Convention obligations may only be to the extent strictly required by the exigencies of the situation. And any derogation must not be inconsistent with the state's other obligations under

international law. Article 15 further limits the availability of derogations by restricting the substantive rights which they can apply to. For example states cannot derogate from Article 2 except in respect of deaths resulting from lawful acts of war. They also cannot derogate Articles 3, 4(1) and 7.

The need for judicial oversight

53. Crucially Article 15 also requires that both the judicial and legislative branches exercise effective scrutiny over any derogation, providing for "*essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures*".[33] This makes it essential that courts can scrutinise whether:

    i. the relevant conditions of Article 15 are met,

    ii. the measure is proportionate and otherwise HRA compliant, and

    iii. the measure is otherwise lawful in domestic law in accordance with ordinary public law principles

54. The remedies of declarations and quashing orders must be maintained for the domestic courts to ensure that derogation orders are compatible with Convention rights, on the same basis as any piece of secondary legislation. This aspect of the court's ability to review and make appropriate orders was in play in *A & Others v SSHD*, when the House of Lords held that the measures permitting indefinite detention of foreign nationals was unjustifiably discriminatory and therefore a breach of Article 14 ECHR (as well as finding that the measures were not consistent with the UK's other obligations under international law). Without this remedy the Court's ability to review the derogation process would be rendered pointless, and the restrictions on Article 15 derogations meaningless.

55. The court procedure that makes such remedies available is in itself a remedy of last resort, with an important filter at the permission stage. These remedies are used sparingly, and with considerable caution by the courts, giving appropriate weight to the judgments reached by the primary decision-maker. Even when courts establish illegality, courts retain discretion over whether to make a declaration and/or a quashing order. Given this background, and the limited use of derogation orders and challenges to them, the remedies available remain both essential and appropriate.

[33] Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5, paragraph 1 of the European Convention on Human Rights CommDH (2002)7, paragraphs 5, 8 and 12.

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

How the HRA applies to subordinate legislation

56. There are four primary routes by which courts and tribunals have approached provisions of subordinate legislation that have breached the human rights of the people affected by them.

    a. Through section 3 of the HRA, subordinate legislation must be read and given effect in a way which is compatible with the rights protected by the Act, but only if this is not precluded by a provision of primary legislation.

    b. Public authorities such as courts and tribunals are required by section 6 of the HRA to take decisions which are compatible with the rights protected by the Act, unless prevented by a provision of primary legislation. As a result they must disapply incompatible secondary legislation.[34]

    c. Where provisions of subordinate legislation cannot be interpreted compatibly without going against the grain of the primary legislation, courts can issue a declaration of incompatibility.

    d. In some cases subordinate legislation which contravenes the rights protected in the HRA has been quashed. This reflects the way that any secondary legislation found to contravene a provision of primary legislation is invalid as a matter of basic constitutional law.[35]

57. The Supreme Court's judgment in the case of *RR v Secretary of State for Work and Pensions* [2019] UKSC 52 is the most recent authoritative statement of the relationship between the HRA and subordinate legislation. That case addressed the circumstances of a person in receipt of housing benefit whose human rights had been breached when he was subject to the bedroom tax, despite needing an additional bedroom in order to accommodate medical equipment for his

[34] For example, in *GR v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin) the High Court considered a case brought by a victim of serious and prolonged domestic abuse who required legal aid in order to resolve child custody and financial disputes with her ex-partner. She had been denied legal aid on the basis that the value of the house she owned jointly with her ex-partner was above the capital means assessment limit, even though she could neither sell the property nor borrow against it in order to fund her legal representation. *Inter alia,* Pepperall J took the claimant's human rights into account when deciding to interpret the relevant subordinate legislation in a way that enabled her to receive legal aid. The government responded by laying a statutory instrument which amended the relevant regulations in accordance with the judgment, with the relevant changes coming into force only two months after the High Court's ruling. The Explanatory Memorandum stated that the effect of the changes would *"result in a means assessment which more accurately reflects the capital a person has, thus better determining who is most in need of legal aid"* (https://www.legislation.gov.uk/uksi/2020/1584/pdfs/uksiem_20201584_en.pdf at para 7.9).

[35] See, for example, *A & Others v Secretary of State for the Home Department* [2004] UKHL 56.

disabled partner. In separate proceedings the relevant subordinate legislation had already been found to be incompatible with the HRA. The Supreme Court's judgment addresses whether he was automatically entitled to the benefit he would have received, or whether he needed to bring a separate HRA damages claim. The Court relied on section 6 HRA in finding that he was so entitled. As Baroness Hale explained at para 27:

> *"There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear."*

Respecting parliamentary sovereignty

58. The key thread running through all of the approaches taken by courts and tribunals to subordinate legislation is respect for parliamentary sovereignty. For example, section 3 HRA specifically provides that if a provision of subordinate legislation is mandated by a provision of primary legislation, then courts cannot overturn it.[36]

59. Consequently, there is nothing novel, exceptional or unconstitutional in the requirement for subordinate legislation to be compatible with the HRA. It has long been established that secondary legislation which breaches primary legislation is *ultra vires* and of no effect.[37] The HRA is a piece of primary legislation and it is therefore entirely appropriate both that subordinate legislation is required to be compatible with it and that courts and tribunals are empowered to make judgments on its compatibility. As Lord Bingham explained in his seminal judgment in the case of *A & Others v Secretary of State for the Home Department* ([2004] UKHL 56) at [42]:

> *"It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a*

[36] See *R (PLP) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531, [23], where Lord Neuberger noted that when quashing *ultra vires* subordinate legislation "the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned".
[37] See, for example, *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 and *Boddington v British Transport Commission* [1999] 2 AC 143.

case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate."

60. This approach to subordinate legislation still leaves Parliament and the executive with the final say. In *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 the Supreme Court disapplied a provision of subordinate legislation in the individual case before it, while recognising that it was for the Government to decide how to respond more generally. The Court rejected the claimant's argument that it grant a wider declaration, per Lord Wilson at [49]:

"Although the court's decision will no doubt enable many other disabled children to establish an equal entitlement, the Secretary of State must at any rate be accorded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital."

61. Courts have been notably cautious to avoid disrupting the wider frameworks and policies which surround subordinate legislation. It is clearly established that if an offending provision cannot be cleanly excised from a piece of subordinate legislation without disrupting the remaining statutory scheme, or that the offending provision cannot be interpreted compatibly without rewriting the legislation, then the provision should remain in force and courts should issue a declaration instead.[38]

62. In cases involving subordinate legislation, it is always open to the government to respond to a judicial ruling by introducing new subordinate legislation which avoids the relevant violation but still pursues their own policy agenda. Section 10 HRA provides for the accelerated remedial

[38] R. (on the application of SG and others) v Secretary of State for Work and Pensions [2015] UKSC 16, see at [230-231]; Francis v Secretary of State for Work and Pensions [2005] EWCA Civ 1303, see at [31]; Burnip v Birmingham City Council [2012] EWCA Civ 629 at [24] applying Francis (Court of Appeal found a breach of Article 14 ECHR in respect of housing benefit regulations and granted declaratory relief only); TP & AR No 1 v Secretary of State for Work & Pensions [2018] EWHC 1474 (Admin); [2019] P.T.S.R. 238 at [92] (granting declaratory relief in respect of the Universal Credit (Transitional Provisions) Regulations 2014 to allow Government to consider the appropriate changes to the scheme).

order procedure, which is available both where subordinate legislation is declared incompatible but also where subordinate legislation has been quashed or declared invalid and there is reason for urgency.

63. Removing courts' powers to determine and address the compatibility of subordinate legislation with the HRA would be a constitutional absurdity. Courts and tribunals would be compelled to apply subordinate legislation even though it breaches fundamental human rights and is contrary to primary legislation. To quote Lord Bingham: *"I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declares to be unlawful"* [39]

64. Finally, it is worth noting that there are real people behind the cases in which the Human Rights Act has been considered in relation to subordinate legislation, and there are significant obstacles already in the way of those seeking to vindicate their rights. Each year the Government brings forward thousands of statutory instruments but in the two decades since the HRA came into force there have barely been more than a dozen cases in which the courts have found subordinate legislation to be unlawful because of the HRA. Such cases are extremely costly and often take many years to come to a final conclusion. It would be deeply unjust to deny victims of human rights violations effective redress by undermining the ability of the courts to deal appropriately with subordinate legislation.

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK?

When does the HRA apply outside of the UK?

65. The question of whether and how human rights law applies extraterritorially has gained increased prominence over the last two decades, with the rise of the use of state power through military interventions, the use of force abroad for counter-terrorism purposes, and the use of external border controls.

66. Article 1 of the ECHR states that all state parties shall "*secure to everyone within their jurisdiction the rights and freedoms*" set out in Convention.[40] As the Grand Chamber explained in *Al-Skeini*,[41] and the Court reaffirmed in *Ukraine v. Russia (re Crimea)*, jurisdiction is a threshold criterion.[42]

[39] Attorney General's Reference (No 2 of 2001) [2003] UKHL 68; [2004] 2 AC 72, 92.
[40] Article 1, European Convention on Human Rights.
[41] *Al-Skeini v United Kingdom* (Application No. 55721/07).
[42] *Ukraine v Russia (re Crimea)* (Applications Nos. 20958/14 and 38334/18).

The exercise of jurisdiction is a pre-condition that needs to be met in order for a public authority to be held responsible for acts which give rise to an alleged breach of a Convention right.

67. The applicable scope of the HRA, then, is a question of interpreting our treaty obligations. The Strasbourg court has interpreted jurisdiction under Article 1 ECHR as "*primarily territorial*",[43] but recognised other bases for jurisdiction exist where a state exercises effective control over an area outside the state's territory,[44] or physical control or authority over a person.[45] In relation to the extraterritorial application of the Convention to situations of armed conflict, the Strasbourg court was, in the recent decision of *Georgia v. Russia II,* at pains to recognise – and attach "*decisive weight*" – to the "*reality of armed confrontation and fighting*", when considering whether sufficient control existed to establish a jurisdictional link.[46]

68. Whether an alleged victim of a human rights violation falls within the UK's jurisdiction will therefore be a highly case specific and factual inquiry, hinging on 1) an analysis of whether a state exercises effective control over the territory of another state or 2) a careful analysis of the degree of physical power and control exerted over the individual prior to the alleged violation. In regard to the second category, the Court of Appeal has held that this requires a "*greater degree of power and control than that represented by the use of lethal or potentially lethal force alone*" – that there must be an "*element of control of the individual prior to the use of lethal force*" to bring that person within the scope of the Convention.[47] The Government conceded, however, that this does not mean that a person needs to be formally detained to be within the state's jurisdiction.

69. In any event, a finding that a person falls within the UK's jurisdiction does not automatically mean that a right has been violated. It invites further analysis, which will be fact and context specific. In the context of armed conflict, for example, the ECtHR has been clear that Convention rights have to be modified to take account of the reality of armed conflict overseas.[48] Further, reaching the conclusion that a right is engaged, or even that it has been violated, does not mean a state is responsible for securing the full range of human rights protections the Convention provides for. As the Grand Chamber expressly held in *Al-Skeini,* obligations under the Convention can be "divided and tailored" to apply to individual situations at the time of alleged violations.[49]

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[43] *Bankovic and Others v. Belgium and Others* (Application No. 52207/99).
[44] *Ilas cu and Others v. Republic of Moldova and Russia* (Application No. 48787/99).
[45] *Al- Skeini v United Kingdom* (Application No. 55721/07).
[46] *Georgia v Russia No.2* (Application No. 38263/08) para. 126.
[47] *Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for Defence* [2016] EWCA Civ 811.
[48] *Hassan v United Kingdom* (Application No. 29750/09).
[49] *Al-Skeini v United Kingdom* (Application No. 55721/07) para. 137.

How is the current system working?

70. The case law of the domestic and Strasbourg courts on the extraterritorial application of the ECHR ensures that public authorities are not given *carte blanche* to engage in human rights violations beyond the UK's borders. As the scope of states' activity grows in a globalised world, it has become untenable to maintain a rigid approach to territorial human rights obligations. The current legal position holds the UK Government, and its agents, to account for human rights violations in circumstances where they exercise spatial or personal control. These obligations have added importance where there is an imperative to remove legal vacuums, for example where states act abroad in circumstances where the threshold for International Humanitarian Law (IHL) to apply has not been met.[50]

71. The extraterritorial application of human rights norms also gives effect to the principle of universality, by rejecting the idea that people should be completely unprotected against arbitrary exercise of that power solely on the basis of their location. Universality is a foundational principle of human rights law. In assessing the question of when and how the ECHR applies, the Strasbourg and domestic courts have sought to balance the imperative to ensure universal protection against the need to avoid imposing undue burdens on states.

72. Given the Convention system and the HRA provide clear avenues to seek redress, the current position has assisted in securing recourse for some victims of human rights abuses at the hands of the UK State overseas, as well as securing justice for service personnel and veterans. For example, the civil claims selected to be the 'lead' cases in the Iraqi litigation provided a route to justice for victims of prohibited interrogation techniques, physical assaults and unlawful detention by British soldiers.[51] The Convention system offers particularly clear benefits to victims of violations of IHL, which lacks equivalent enforcement mechanisms. Similarly, it has enabled deceased soldiers' family members access to justice by taking claims under the HRA against the Ministry of Defence for their failure to provide proper equipment.[52]

Criticisms of the extraterritorial application of the HRA

73. Critics of the extraterritorial application of human rights law claim that the ECHR was only ever "*intended to regulate stable peacetime polities*" and has now been applied in times of conflict;[53] and that human rights law "*is supplanting and undermining the older and more suitable body of*

[50] For example in regard to targeted killings.
[51] *Alseran & Ors v Ministry of Defence* [2017] EWHC 3289 (QB).
[52] *Smith and others (Appellants) v The Ministry of Defence (Respondent), Ellis (Respondent) v The Ministry of Defence (Appellant), Allbutt and others (Respondents*) v The Ministry of Defence (Appellant) [2013] UKSC 41.
[53] Ekins, R., Morgan, J. and Tugendhat, T. (2015) Clearing the Fog of Law, Policy Exchange, at p. 26.

International Humanitarian Law".[54] However, Article 15 ECHR provides that a state may derogate from specified rights "*in time of war or other public emergency threatening the life of the nation*".[55] The Convention explicitly accommodates the possibility of war, permitting states to derogate from some, but not all, obligations, where it is necessary and proportionate.

74. While the volume of cases coming before the courts has increased in recent years as the UK has increasingly engaged in military operations overseas, the European Commission on Human Rights recognised the possibility that States may be responsible under the Convention for acts abroad as early as 1965.[56] In 1995, the ECtHR found a state's responsibility might arise when, as a consequence of military action, it exercised effective control over an area outside its national territory.[57] Courts and commentators have for decades acknowledged that human rights law continues to apply during armed conflict.[58]

75. Critics have also raised concerns about how the extra-territorial application of human rights law affects military operations. However, there is no evidence to suggest a causal connection between the application of human rights law and military effectiveness. In practice domestic courts and the ECtHR have given states a wide latitude when it comes to military decision-making.[59] Impartial judicial scrutiny pursuant to human rights law standards is not a threat to the Armed Forces. It can be a practical benefit, providing a roadmap for proper processes around planning military operations, and prompting states to maintain impartial mechanisms to assess and address allegations of wrongdoing.

The case for change

76. There is a strong case for the ECtHR to re-evaluate its position on jurisdiction. While the Strasbourg and domestic case law has denied states a completely free hand to engage in abuses of Convention rights beyond their borders, it is unduly restrictive. By relying on the concepts of spatial and personal control the case law has left a protection vacuum in situations where states use kinetic force but do not have territorial control. In practice, this may lead to unsustainable and incoherent outcomes. It cannot be right that when the Russian State murders a dissident on Russian soil it is a grave breach of Russia's human rights obligations, but when Russian State

[54] Ibid, at p.9.
[55] Article 15, ECHR.
[56] Prior to 1998 the European Commission on Human Rights decided on the admissibility of a complaint to the ECtHR as part of a three-stage process.; *X v Germany* (Application no. 1611/62).
[57] *Loizidou v. Turkey* (Application No 15318/89).
[58] See, for example, the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2.
[59] For further analysis see A. Sari., (2014) 'The Juridification of the British Armed Forces and the European Convention on Human Rights'.

agents poison Sergei Skripal and his daughter in the UK, Russia's human rights obligations are not engaged.

77. In 2018, the Human Rights Committee adopted the position that the key question in interpreting the concept of jurisdiction with regard to the International Convention on Civil and Political Rights (ICCPR) is not one of state control over the person or over the territory in which the person is located, but one of control over the person's "*enjoyment of their right to life*".[60] The ICCPR then applies to those whose right to life is "impacted" in a "*direct and reasonably foreseeable manner*".[61] This is a principled and coherent basis upon which to assess the question of whether a State is bound by a particular human rights obligation.

78. Adopting this approach would not mean placing an excessive burden on states. Firstly states could be held responsible for the breaches of the negative duty to *respect* human rights, in circumstances where it may not be under a duty to *secure* rights.[62] Secondly, while a state's obligations under one right might be engaged in a particular circumstance, it does not mean that every other right will be engaged. Thirdly the flexible and context specific nature of the Convention framework means that the substance of the analysis as regards whether a particular right was breached will be informed by the environment in which the state is operating.

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

79. The remedial orders process is working well. It has been used by Government to make straightforward and uncontroversial changes to both primary and secondary legislation in order to correct human rights violations without needing to wait for significant parliamentary time. We see no need to modify it.

80. The remedial order process is one route available to the Government in order to address a declaration of incompatibility, but it is not the only option. Of the 43 DOIs made between 2000 and July 2020, only 9 (21%) led to remedial orders. In the majority of cases the Government addressed the incompatibility by bringing forward primary or secondary legislation, with Parliament playing its usual role. This is an important part of how the HRA has worked in practice.

[60] Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, para 63.
[61] Ibid.
[62] This is the approach advocated by Professor Milanovic in his seminal text on this issue. See *Milanovic, M., (2013). Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press (OUP).

81. Where the Government does make use of the remedial order process, there are a number of requirements which allow for detailed parliamentary scrutiny. Under the standard procedure, a draft remedial order must be laid before Parliament for two periods of sixty days and then approved by resolution of both Houses before it can be made. The relevant minister must provide a statement of reasons for using the remedial order process, along with information detailing the incompatibility which the order intends to resolve. When the draft order is first laid before Parliament, the initial period of sixty days allows time for parliamentarians to make representations and for ministers to amend the draft order in the light of those representations. When ministers lay the order a second time, they must provide details of any amendments and a summary of any representations they have received. This two-step process gives Parliament a significant role in checking and amending remedial orders. It also gives Parliament the final say, as an order will not come into effect unless it is approved by a resolution of each House.

82. By contrast the "urgent" procedure allows a minister to make an order before laying it before Parliament. The order will cease to have effect 120 days after it was made unless it is approved by a resolution of each House. Like the standard procedure, Ministers are still required to lay the order for two periods of sixty days and to provide a summary of representations after the first period. We believe that such emergency powers must only be used as a last resort, in situations where there is an urgent need to correct a rights violation and where the issue is unlikely to be politically contentious.

83. Successive governments have been cautious in making use of the urgent procedure. It has only been used on one occasion, in the exceptional circumstances arising from the decision in *R (H) v Mental Health Review Tribunal for North and East London Region & the Secretary of State for Health* [2001] EWCA Civ 415. This case concerned a person who was detained under the Mental Health Act and who in order to be discharged was required to prove to a mental health review tribunal that the conditions for his detention were no longer met. The court issued a declaration of incompatibility, holding that section 73 of the Mental Health Act contravened the Human Rights Act since it placed the burden of proving that the patient was no longer suffering from a mental disorder warranting his detention on the patient himself. The Government chose to use the urgent remedial order procedure on the basis that any case which concerned the liberty of the individual should be regarded as urgent, and that the change in the law required to address the incompatibility was simple and uncontroversial.[63]

[63] See the Secretary of State for Health's explanation of the use of the urgent procedure in response to concerns raised by the Joint Committee of Human Rights in this instance:
https://publications.parliament.uk/pa/cm200102/cmstand/deleg9/st020411/20411s01.htm.

84. There should always be careful scrutiny whenever governments make use of emergency powers, however it is clear that the urgent procedure is rarely used and is regarded as a last resort. In practice we believe the current framework strikes the right balance. The remedial order process has allowed for successive governments to more quickly correct legislation which is incompatible with the Human Rights Act, while maintaining Parliament's role in providing detailed legislative scrutiny.