JUDICIAL APPROACHES TO THE HUMAN RIGHTS ACT

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I. INTRODUCTION AND OVERVIEW

The case law generated in just over two years' operation of the Human Rights Act 1998 (HRA), enables stocktaking rather than definitive appraisal.[1] This article begins by recalling the markedly contrasting roles in United Kingdom law of the European Convention on Human Rights (ECHR) before and after the HRA, the better to appreciate judicial approaches to, and use of, the HRA in the areas surveyed. The second part of the article focuses on judicial use of key provisions of the HRA to interpret primary legislation said to conflict with one or more Convention rights and on judicial use of the power to make a declaration of incompatibility. It considers a selection of decisions, principally of the House of Lords and the Court of Appeal, which raise important points regarding the purpose and scope of the HRA as a constitutional document and indicate judicial uncertainty as to how the HRA should be conceptualised, interpreted and applied. With this emerging picture of a cautious and uncertain judiciary in mind, the final two sections of the article give detailed consideration to the post-HRA jurisprudence within two discrete areas of English law. Part III explores the impact of the HRA on judicial approaches to the clash between the freedoms of expression and assembly, on the one hand, and public order, on the other. Part IV considers the 'use and abuse' of the HRA and of Article 8 ECHR in private law family disputes. Finally, certain tentative conclusions as to the perhaps disappointing story of the HRA so far, will be proffered.

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[1] For other stocktaking see: Klug and O'Brien, 'The First Two Years of the Human Rights Act' [2002] *PL* 649; Klug and Starmer, 'Incorporation through the "front door": the first year of the Human Rights Act' [2001] *PL* 654; Ashworth, 'Criminal Proceedings After the Human Rights Act: The First Year' [2001] *Crim LR* 855; Clayton, 'Developing Principles for Human Rights' [2002] EHRLR 175; Clayton, 'The Limits of What's "Possible": Statutory Construction Under the Human Rights Act' [2002] *EHRLR* 559; Bonner and Graham, 'The Human Rights Act 1998: The Story So Far' (2002) 8 *EPL* 177; Wadham, 'The Human Rights Act: One Year On' [2001] EHRLR 620; Wadham and Taylor, 'The Human Rights Act Two Years On' (2002) 152 *New LJ* 1485; Gearty, 'The Human Rights Act One Year On' (2001) 10 *Nottingham Law Journal*, v–vii; Kilkelly, 'One Year On: Children and the Human Rights Act 1998' [2001] 182 *Childright* 9; McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 *ICLQ* 901; Wadham, 'The Human Rights Act: One Year On' [2001] Legal Action 1; Porter, 'Marking the First Anniversary of the Human Rights Act' (2001) 151 *New LJ* 1204.

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A. The Role in Domestic Law of the ECHR Prior to the HRA

Prior to the HRA, the British legal order was one of Parliamentary supremacy tempered by the courts evolving rules of interpretation that aided, to a degree, the protection of some basic freedoms.[2] One such rule was the presumption that Parliament did not intend to legislate so as to put the United Kingdom in breach of its ECHR obligations. Where legislation was ambiguous or unclear, so that one interpretation of the words used would comply with the ECHR but another would not, the court should adopt the former.[3] Where, however, the language was clear, it had to be applied by the courts, regardless of a violation of the ECHR. While the ECHR might properly be used to shape the common law, it did not enable the courts when reviewing the exercise of a discretionary power to require that its exercise conform to the ECHR—that would have been to incorporate the ECHR 'by the back door', an illegitimate exercise in judicial law-making.[4] Nor could judges make good deficiencies in the law that required the creation of institutions and procedures.[5] All the concerned judge could do was to make a plea that others (the executive/legislature partnership) should legislate to remedy the deficiency.[6] Successful recourse to the ECHR organs at Strasbourg using the right of individual petition afforded by its machinery was a potent means of securing legislative change.

B. The Position after the HRA

A key aim of the HRA was that of 'bringing rights home', enabling United Kingdom courts to do what had hitherto only been possible at Strasbourg. When the HRA entered fully into force,[7] it gave further effect, domestically, to certain of the rights and freedoms (the 'Convention rights') protected by the ECHR.[8] The HRA combines positive legal protection and enforcement of human rights with the preservation of parliamentary sovereignty. While, as is shown in Part II, their interpretative duties have been strengthened,[9] the courts remain unable to invalidate a statute by reference to human rights'

[2] *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158 (CA), per Laws LJ at para 70.

[3] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 All ER 720; see further McGoldrick, above n 1, at 903–5; Lord Hope, 'Human Rights—Where Are We Now' [2000] EHRLR 439, at 440.

[4] *Brind*.

[5] *Malone v Metropolitan Police Commissioner* [1979] Ch 344, per Megarry VC.

[6] Ibid.

[7] SI 2001 No 1815. The HRA came into force in respect of the Scottish Parliament and executive on the commencement of the devolutionary settlement: see Scotland Act 1998, s 29.

[8] The HRA does not incorporate Art 1 (the international obligation of the State to guarantee the protected rights and freedoms to those within its jurisdiction) and Art 13 (the right to an effective remedy). The view was taken that the HRA itself was the fulfilment of both of those Arts. See McGoldrick, above n 1, at 906–9.

[9] Section 3.

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norms.[10] Nonetheless, the political, moral and social pressure generated by what they can do in respect of incompatible legislation—issue a Declaration of Incompatibility—is likely to impact on that executive/legislature partnership in much the same way as (and arguably more powerfully than) an adverse decision of the European Court of Human Rights.[11] The HRA embodies a fast track procedure to allow amendment to primary legislation by a remedial order—a form of secondary legislation (on the model of those enabled by the European Communities Act 1972—ECA)—if it is thought necessary to act more quickly than possible by use of the primary legislative process.[12]

In *International Transport Roth Gmbh* (the 'lorry drivers' case), Laws LJ summarised the effect of the HRA as one building on developments in the common law so as to now provide

> a democratic underpinning to the common law's acceptance of constitutional rights, and important new procedural measures for their protection. Its structure, as has more than once been observed, reveals an elegant balance between respect for Parliament's legislative supremacy and the legal security of the Convention rights.[13]

Contrasting its effect with that of the Canadian Charter of Rights and Freedoms, which is one component in an overriding, 'supreme law' constitution, he characterised the HRA as moving our constitutional and legal orders to 'an intermediate stage between parliamentary supremacy and constitutional supremacy'.[14] Both he and Lord Steyn view the HRA as a constitutional instrument somewhat on a par with the ECA.[15] Less dramatically, however, Lord Clyde regards it 'as a procedural measure which has opened a further means of access to justice for the citizen, more immediate and more familiar than recourse to the court in Strasbourg'.[16]

This article seeks to shed light on just how far along this continuum of constitutional arrangements the British system has moved, from pure parliamentary supremacy towards constitutional supremacy. Despite such rhetoric, the answer to date is probably 'not very far'.

[10] Section 4(6).

[11] Under Art 46 of the ECHR States are bound to implement a judgment of the Court against them and the execution of the judgment is supervised by the Council of Ministers of the Council of Europe. The UK has always in response made some alteration in its law or practice, although there will inevitably be dispute as to whether the changes made went far enough. See McGoldrick, above n 1, at 920, 924–5.

[12] Section 10.

[13] [2002] EWCA Civ 158 (CA), at para 71; see also McGoldrick, above n 1, at 905–6.

[14] [2002] EWCA Civ 158 (CA), at para 71.

[15] *Thoburn v Sunderland City Council* [2002] 4 All ER 156, at 185, 188 (Laws LJ); Lord Steyn, 'Democracy Through Law' [2002] EHRLR 723, at 728–9, 731; Lord Steyn, 'The New Legal Landscape' [2000] EHRLR 549, at 550.

[16] *R v Lambert* [2001] 3 All ER 577, at 621 (para 135).

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II. THE COURTS AND PRIMARY LEGISLATION

When faced with primary legislative provisions allegedly conflicting with a Convention right(s), the courts have to interpret and apply several interlocking provisions of the HRA, engaging in a dialogue with the executive and legislature.[17] Section 2 enjoins them to have regard to ECHR jurisprudence. Section 3 mandates that, if at all possible, they should find an interpretation of the allegedly offending provision in the legislation that renders it compatible with the Convention right(s). If they cannot do so, they are empowered by section 4 to declare the offending provision in the legislation incompatible. Under section 6, courts, as public authorities, must comply with Convention rights. Since that section also states that courts will not breach that duty if the manner in which they have to act is dictated by an incompatible statute, it is arguable that section 6 as a whole mandates them to issue a declaration of incompatibility.[18]

A. The Requirement to Take Account of ECHR Jurisprudence

Section 2 is deliberately not binding: courts can depart from the ECHR jurisprudence. This reflects Strasbourg's lack of a strict system of precedent, recognises that many of its decisions are highly particularistic, and that some turn on the State's 'margin of appreciation', a doctrine not available as such to a national court, since it stems from the position of the European Court of Human Rights as an international tribunal.

In *Alconbury*, Lord Hoffman thought that if ECHR decisions

> compelled a conclusion fundamentally at odds with the distribution of powers under the British Constitution, [he] would have considerable doubt as to whether they should be followed.[19]

In the same case, however, Lord Slynn considered that judges should normally follow ECHR case law 'in the absence of some special circumstances'.[20] Speaking during the House of Lords' debates on the Bill, Lord Chancellor Irvine stressed that it might well be appropriate on occasion to exercise the power to depart from existing Strasbourg decisions, envisaging that in so doing British courts might well 'give a successful lead to Strasbourg'.[21]

This implies that the courts should not adopt a protection for rights that is

[17] Edwards, 'Judicial Deference Under the Human Rights Act' (2002) 65 *MLR* 859, at 866–8; Klug and O'Brien, above n 1, at 653–4.

[18] *Wilson v First County Trust* [2001] 3 All ER 229 (CA).

[19] [2001] 2 All ER 929, at 982 (para 76).

[20] [2001] 2 All ER 929, at 969 (para 26), applied by Wilson J in *R (on the application of Joanne Reynolds) v the Secretary of State for Work and Pensions* [2002] WL 237086 (para 17)]. See also *R v Secretary of State, ex parte Anderson* [2002] UKHL 46, para 18 (Lord Bingham), with particular respect to judgments of the Grand Chamber.

[21] HL Debs, vol 583, col 514 (18 Nov 1997).

below the 'floor' of protection afforded by ECHR jurisprudence. To do so would undermine the basic purpose of the HRA since the individual concerned, having exhausted domestic remedies, would merely use the right of recourse to Strasbourg.[22] Since United Kingdom law would probably then be brought back into compliance, this casts doubt on Lord Hoffman's remarks, quoted above. The ability to depart from the ECHR jurisprudence does, however, enable a court to build extra protection above that 'floor'. To that degree the HRA has some of the character of a freestanding Bill of Rights, rather than simply incorporating the ECHR.[23]

An examination of judicial decisions to date in the fields surveyed in this article shows the courts grappling (not always successfully or convincingly) with ECHR case law. But it also shows them willing to take account of constitutional jurisprudence from a range of common law jurisdictions. The cases surveyed in this article show them tackling the jurisprudence of the JCPC in respect of a range of Commonwealth jurisdictions, and case law from Canada, South Africa, and New Zealand.[24]

B. The Section 3 and 4 Relationship

Sections 3 and 4 envisage that a court will try to remove any incompatibility through interpretation and, should that not prove possible, to move on to consider whether to make a declaration of incompatibility. The cases suggest the following as sequential steps in decision-making:

> 1. Is there a breach of a Convention right? If not, the process ends there as far as the outcome of the case is concerned, although, of course, many judges have continued so as to enlighten us with their *obiter* comments on particular aspects of the HRA.[25]
> 2. If there is a breach, how should it be remedied using the HRA? A key question here is: does that breach (a) flow from the statutory wording itself so as to disclose an incompatibility in most cases, or is it rather (b) the product of using in a particular way a provision that would generally be compatible? If (b) the matter may better be tackled as a challenge to executive rather than legislative action and dealt with under section 6 (eg quashing the decision or the conviction: see *DPP v Percy* in Part III), rather than through stage three (interpretation).
> 3. Can a compatible interpretation be found using section 3?
> 4. If one cannot be found, consider whether to make a declaration of incompatibility.

[22] Lord Hope, above n 3, at 450.

[23] Klug, 'The Human Rights Act—A "Third Way" or a "Third Wave" Bill of Rights' [2001] 4 EHRLR 361, at 370.

[24] McGoldrick, above n 1, at 917–20; Ashworth, above n 1, at 870.

[25] See, eg, *JA Pye (Oxford) Ltd v Graham* [2001] 2 WLR 1293 (CA): extinguishing of title through adverse possession did not violate Art 1, Protocol No 1 ECHR); *R (on the application of Pretty) v DPP* [2001] 1 All ER 1 (HL) (Art 2 [right to life] does not preclude criminalising assisting a suicide nor give a right of self-determination in relation to life and death); *Matthews v Ministry of Defence* [2003] 1 All ER 689 (HL) (no breach of Art 6 by substantive rule precluding entitlement); *Poplar Housing* [2001] 4 All ER 604 (CA) (no breach of Art 8).

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A declaration of incompatibility is regarded as a measure of last resort to be avoided unless plainly impossible to do so.[26] The marked, but not unexpected, reluctance to make declarations of incompatibility makes the section 3 interpretative obligation central to the protection of Convention rights against unwarranted legislative incursion. The reluctance can easily be demonstrated. To date, in England and Wales, only nine declarations of incompatibility have been made. Only one has resulted in a remedial order,[27] and another in amendment effected by primary legislation (the same route that is likely to be taken to give effect to the declaration of incompatibility in *Anderson* (the lifers' tariff case).[28] Three were overturned on appeal,[29] and three others are the subject or possible subject of appeals.[30]

A number of factors—none of which are articulated in the case law—can be suggested as helping to explain the reluctance. In the first place, a declaration of incompatibility, while dramatic, is readily distinguished from the judicial invalidation of legislation found in many constitutions with a Bill of Rights since it affords no direct remedy to the litigant.[31] As a matter of law, the validity, continuing operation and enforcement of the provision in question remain unimpaired by the declaration, which is not even binding on the parties.[32] Until remedial action has been taken a court must apply the law as it stands.[33]

Secondly, especially with legislation enacted after the HRA, such a declaration represents a marked clash of opinion with that executive/legislative partnership. That legislation will have been given the ministerial stamp of compatibility by way of the section 19 ministerial statements accompanying its introduction in each House of Parliament. As judges recognised extrajudicially, before the HRA entered into force, such statements, while not binding

[26] *R v A* [2001] 3 All ER 1 (HL), per Lord Steyn at para 44; *Hooper* [2002] EWHC 191 (admin), at para 157 (Moses J); *Percy v DPP* [2001] EWHC Admin 1125, at para 12 (Hallett J); *Matthews v Ministry of Defence* [2002] CP Rep 26, at para 51 (Keith J); *R v W & B (Children)* [2001] HRLR 50, at para 50 (Hale LJ); *R (on the application of H) v Nottinghamshire Healthcare NHS Trust* [2001] EWHC Admin 1037, at para 56 (Bell J).

[27] *R v Mental Health Review Tribunal* [2001] 3 WLR 229 (CA) resulting in the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No 3712).

[28] *International Transport Roth GmbH v Secretary of State for Home Department* [2002] EWCA Civ 158; Nationality, Immigration and Asylum Act 2002, s 125 and Sched 8. *R v Secretary of State for the Home Department, ex parte Anderson* [2002] UKHL 46.

[29] *R (Alconbury etc) v Secretary of State for Environment etc* [2001] 2 All ER 929; *Matthews v Ministry of Defence* [2002] 3 All ER 513 (CA) an overturning upheld by the Lords [2003] 1 All ER 689; *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502.

[30] *Wilson v First County Trust* [2001] 3 All ER 229 CA; *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2002] EWHC 191 Admin; *R (on the application of Wilson) v IRC* [2002] EWHC 182 (Admin); Klug and O'Brien, above n 1, at 650 (n 10).

[31] I Leigh and L Lustgarten, 'Making Rights Real: The Courts, Remedies, and the Human Rights Act' (1999) 58 *CLJ* 509, at 536–8; Lord Lester, 'Developing Constitutional Principles of Public Law' [2001] *PL* 684, at 691.

[32] But see McGoldrick, above n 1, at 923.

[33] *R (on the application of the Secretary of State for the Home Department) v Mental Health Tribunal* [2001] EWHC Admin 849.

on them, ought to incline the courts to use their enhanced interpretative powers afforded by section 3 to strive to find a compatible interpretation. As regards pre-HRA legislation, government in any event would often assert in debate, or in preparatory material like White or Green Papers, that the Bill was ECHR compliant. Finally, of course, that task of interpretation—albeit now enhanced—can more readily be presented as but an extension of a traditional, and well-accepted, judicial role: less one of deciding what the law ought to be (the reality) than that of the technician ascertaining and following the will of Parliament (a useful smokescreen to disguise judicial powers of law-making).

C. Use of the Section 3 Interpretative Obligation

Section 3 requires, so far as is possible, primary legislation, whenever enacted, to be read and given effect in a way that is compatible with Convention rights. The section can be characterised idiomatically as a 'bend me, shape me' clause, treating legislation as highly malleable material that can be moulded through 'interpretation' to achieve a 'fit' with the intended receptacle (the Convention rights). But the metaphor can be reversed: there is also flexibility in the interpretation of the rights which may mean that stage three is never reached since compatibility has instead been achieved by a degree of reshaping of the right in issue. This, arguably, is an apt characterisation of the use of Article 8 ECHR in the Family Division (see Part IV).

The proper approach to the extension of the courts' traditional role by section 3 has received a great deal of parliamentary, judicial, and academic attention.[34] As regards the judiciary, one camp, in which Lord Hope and Lord Woolf CJ have been prominent, has been more cautious than another, exemplified by Lord Steyn's more radical approach. There is, however, much common ground. The difference between the approaches is to a degree foreshadowed in the language used to characterise section 3 and in their extra-judicial statements marking the entry into force of the HRA,[35] even where ostensibly the camps are essentially in agreement. For Lord Hope, section 3 is 'powerful' and novel ('quite unlike any previous rule of construction') [36] and an 'important and far-reaching new approach to the construction of statutes.[37] For Lord Nicholls of Birkenhead, it is a 'powerful tool'.[38] Lord Steyn, in

[34] See, inter alia, Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 *CLJ* 53, and the parliamentary sources cited therein; Edwards, 'Reading Down Legislation Under the Human Rights Act' (2000) 20 *Legal Studies* 353; Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 *Legal Studies* 340, at 346–52; Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process [1999] EHRLR 350.

[35] Lord Hope, above n 3, at 446, 450; Lord Steyn, 'The New Legal Landscape' [2000] EHRLR 549, at 550.

[36] *R v A* [2001] 3 All ER 1, at para 108.

[37] *R v Lambert* [2001] 3 All ER 577, at para 78.

[38] *Re S, Re W* [2002] 2 All ER 192, at para 37.

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contrast, describes it more far-reachingly as 'more radical' than rules that looked for a purposive and contextual interpretation.[39]

It is common ground that the duty in section 3 goes beyond the pre-HRA interpretative power as set out in *Brind*. Section 3 requires for its operation no ambiguity or uncertainty in the statutory provision under scrutiny.[40] It is an 'emphatic adjuration' by the legislature to find, where possible, a compatible interpretation.[41] Section 3, expressed in 'forthright, uncompromising language', is 'a powerful tool whose use is obligatory'.[42] The doctrine of precedent is discarded in that pre-HRA authority on the meaning of the legislative provision at issue is not binding on a court applying section 3.[43]

It is legitimate to read flexible words or phrases in the impugned provision so as to achieve compatibility. In *R v Offen*, the Court of Appeal (Criminal Division) considered the 'three convictions means life' provision in section 2 of the Crime (Sentences) Act 1997, a controversial provision deliberately reducing judicial discretion in sentencing. Departure from the mandatory life sentence was permitted only in 'exceptional circumstances'. Reading that consistently with the policy of protecting the public from serious and continuing danger, the provision was found to be compatible with Article 5 ECHR provided that term was read and applied so that, taking account of all the offender's circumstances, the fact that he was not a danger to the public was regarded itself as an 'exceptional circumstance', avoiding the imposition of a life sentence. The two camps agree that section 3 enables the reading down of express language so as to give it a narrower than usual construction.[44] Further, provisions can be implied and words read in.[45] So, in *R v A*, Lord Steyn read the 'rape shield' provision in section 43 of the Youth Justice and Criminal Evidence Act 1999 'as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Article 6 of the convention should not be treated as inadmissible'.[46] In *R v Secretary of State for the Home Department, Ex parte Aleksejs Zenovics*,[47] the Court of Appeal was faced with a provision in the Immigration and Asylum Act 1999 which limited an asylum seeker to one appeal in respect of a certified ground as regards a claim to be a refugee within the meaning of the Geneva Convention. Read literally it precluded an asylum seeker, whose claim to be a refugee failed,

[39] *R v A*, at para 44; affirmed by him in *R v Lambert*, at para 42.

[40] *R v A*, at para 44 (Lord Steyn), affirmed by him in *R v Lambert*, at para 42; *R v A*, at para 109 (Lord Hope); *R v Lambert*, at para 78 (Lord Hope).

[41] Ibid, Lord Steyn.

[42] *Re S, Re W* [2002] 2 All ER 192, at para 37 (Lord Nicholls of Birkenhead).

[43] *R v Lambert*, at para 81 (Lord Hope); *R v A*, implicit in Lord Steyn's judgment since his result is achieved by a method going beyond that applicable without s 3 HRA; cf Lord Phillips MR in *Ashworth Hospital Authority v MGN* [2001] 1 All ER 991 (CA), at 1008 (para 79).

[44] *R v A*, at para 44 (Lord Steyn), affirmed by him in *R v Lambert*, at para 42; *R v A*, at para 108 (Lord Hope); *R v Lambert*, at para 81 (Lord Hope).

[45] *R v Lambert*, at para 81 (Lord Hope); *R v A*, at para 45 (Lord Steyn).

[46] [2001] 3 All ER 1, at 18 (para 45).

[47] [2002] EWCA Civ 273.

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from making a claim to stay based on the ECHR. Accordingly the Court added at the end of the provision the words 'in respect of that claim' to make it clear that the preclusive effect only related to further appeals in respect of a certified ground. Schiemann LJ, giving the judgment of the Court, emphasised that a 'court will always hesitate long before, in effect, redrafting an Act. But there are times when not to do so will clearly give rise to a situation which Parliament cannot, in the judgment of the court, have desired.'[48] The words used can be expressed in different language to show how the provision is to be read as ECHR-compatible.[49] In *R v Lambert*, for example, Lord Steyn held that the words 'prove' and 'proves' in section 28 of the Misuse of Drugs Act 1971 were to be read as meaning 'giving sufficient evidence',[50] just as Lord Cooke in *Ex p Kebilene* had held that 'unless the contrary be proved' in section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 had to be taken to mean 'unless sufficient evidence is given to the contrary'. Lord Hope had cited as an earlier example of this approach some decisions by the Privy Council on Commonwealth Caribbean States' criminal codes.[51] In *Cachia v Faluyi*,[52] the Court of Appeal held that 'action' in section 2(3) of the Fatal Accidents Act 1976 should be construed as 'served process' rather than 'initiated process'. Doing so enabled the children of the deceased to serve another writ where an earlier one issued just before the expiry of the three-year limitation period, but not served, had lapsed, thus enabling effect to be given to the children's Convention right of access to the court to claim compensation for loss of dependency. To a degree, some of those cases might also be seen as illustrative of another legitimate approach—without altering the words used, the compatible effect can be stated. This may be another way of analysing Lord Steyn's decision in *R v A.* It also appears to be the basis for the decision in *R (on the application of H) v Nottinghamshire Healthcare NHS Trust and others.*[53] Finally, consistently with the HRA's preservation of parliamentary supremacy, there is agreement that the proper role of the courts applying section 3 is to interpret but not to legislate. The difficulty, however, is to identify the boundary between permissible interpretation and impermissible legislation. Section 3 is 'a strong canon of construction', not a 'supplanting mechanism'.[54] The two camps, however, are not at one on its location.[55]

[48] [2002] EWCA Civ 273, para 37.

[49] *R v Lambert*, at para 81 (Lord Hope); *R v A*, at para 45 (Lord Steyn).

[50] [2001] 3 All ER 577, at 605–6, paras 84–6 (Lord Hope).

[51] [2001] 3 All ER 577, at 606 (para 85).

[52] [2001] 1 All ER 221. The decision was followed in *Goode v Martin* [2001] 1 All ER 620 (CA), where s 3 HRA enabled a construction of CPR 17.2 (reading in the words 'as are already in issue') which would not have been available under previous rules of construction ('We now possess more tools for enabling us to do justice than were available before April 1999' [per Brooke LJ, at para 35]).

[53] [2001] EWHC Admin 1037.

[54] *R (on the application of Wooder) v Feggeter and Mental Health Act Commission* [2002] 3 *WLR* 591, para 48.

[55] Klug and Starmer, above n 1, at 657.

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For the more cautious and, for the moment, the dominant camp, the boundary is crossed if, to achieve compatibility, the effect of the legislation has to be radically altered or the scheme rewritten. So, in *Poplar Housing*, had it been necessary to achieve compatibility, Lord Woolf CJ would not have been prepared to read the qualifying phrase 'if it is reasonable to do so' into a provision enabling a court to grant a possession order in respect of the house at issue, since, by significantly reducing the ability of landlords to gain possession, such a reading-in would defeat Parliament's objective of providing certainty—in short, it would involve legislating.[56] Similarly, in the lorry drivers' case, it was not possible to rewrite the scheme so as to leave out the offending burden of proof, the role of the Secretary of State, or so as to substitute a maximum penalty for the scheme's fixed penalty.[57] As Simon Brown LJ put it

> the Court's task is to distinguish between legislation and interpretation and confine itself to the latter. We cannot create a wholly different scheme (perhaps of the sort envisaged by Sullivan J below) so as to provide an acceptable alternative means of immigration control. That must be for parliament itself.[58]

Hence the recourse in that case to a declaration of incompatibility. In *Re S, Re W*,[59] Lord Nicholls of Birkenhead saw the Court of Appeal's introduction of a 'starring system', enabling ongoing court supervision of local authority care plans ('a newly created supervisory function'),[60] as a misuse of its 'judicial jurisdiction'[61] under section 3 'to introduce into the workings of the [Children Act 1989] a range of rights and liabilities not sanctioned by Parliament.'[62] He recognised that the limits of interpretation were increasingly difficult to discern in the modern legal world, but considered

> that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the provision compliant by legitimate use of the process of interpretation.[63]

Properly applying section 3 demands that a court identify the particular statutory provisions said to produce the incompatibility on normal interpretation. Doing so will help it avoid straying too far from its legitimate interpretative role.[64] This echoes Lord Hope's views. He thought in *R v A* that a court

[56] [2001] 4 All ER 604; see also *Adan v Newham LBC* [2002] 1 All ER (Brook and David Steel LJJ).

[57] *International Transport Roth GmbH v Secretary of State for Home Department* [2002] EWCA Civ 158 (CA), per Parker LJ, at paras 155–6, 180, 184.

[58] Ibid, at para 66. See also *Matthews v Ministry of Defence* [2002] 3 All ER 513 (CA), at paras 74–6.

[59] [2002] 2 All ER 192 (HL).

[60] [2002] 2 All ER 192, at 204 (para 42).

[61] [2002] 2 All ER 192, at 205 (para 44).

[62] [2002] 2 All ER 192, at 203 (para 35).

[63] [2002] 2 All ER 192, at 203–4 (para 40).

[64] [2002] 2 All ER 192, at 204 (para 41).

oversteps the boundary if its purported interpretation is contradicted by the entire structure of the challenged provision, there a rape-shield provision the structure of which aimed drastically to confine a previously inappropriately wide judicial discretion on the admission of evidence.[65] As he expressed it in *Lambert*, the line will be crossed where the effect of an 'interpretation' using section 3 is 'to overrule decisions which the language of the statute shows to have been taken on the very point at issue by the legislator'.[66] His Lordship considered that the task of interpretation using section 3 should, so far as possible, seek to preserve the integrity of statute law. This involved identifying the precise word or phrase producing, on ordinary construction, the incompatibility, and showing how it has to be construed to achieve compatibility, using an attention to detail comparable to that of the parliamentary draftsman amending a statute. So that, if the necessary amending words can readily be inserted, all well and good. If, however, their insertion requires such violence as to make the provision 'unintelligible or unworkable', it must be left to Parliament to amend or replace the incompatible provision in response to the court making a declaration of incompatibility.[67] In *Lambert*, the words 'for the accused to prove that' could be read (were it necessary to achieve compatibility) as 'for the accused to give sufficient evidence that'.[68] In contrast, in *Re S, Re W*, it was not possible to identify a specific offending provision in the Children Act 1989 which could be read so as to avoid incompatibility:

> On the contrary, the starring system is inconsistent in an important respect with the scheme of the 1989 Act. It would constitute amendment of the 1989 Act, not its interpretation. It would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material effect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children. Moreover, the need to produce a formal report whenever a care plan is significantly departed from, and then to await the outcome of any subsequent court proceedings, would affect the whole manner in which authorities discharge, and are able to discharge, their parental responsibilities.
>
> These are matters for decision by Parliament, not the courts. It is impossible for a court to evaluate these ramifications or assess what would be the views of Parliament if changes are needed.[69]

After such language, one might have expected a declaration of incompatibility being stated to be the appropriate court response. As shall be shown, surprisingly, this was not to be forthcoming. His thoughts on the amendment/interpretation dichotomy were, however, unanimously adopted by their

[65] [2001] 3 All ER 1, at 35 (paras 108, 109); see also his speech in *R v Shayler* [2002] 2 All ER 477 at para 52.
[66] [2001] 3 All ER 577, at 604 (para 79).
[67] [2001] 3 All ER 577, at 604 (para 80).
[68] [2001] 3 All ER 577, at 605 (para 84), 608 (para 94).
[69] [2002] 2 All ER 192, at 204–5 (paras 43, 44).

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Lordships in *Anderson*: reading out the role of the Home Secretary from the legislation on fixing the tariff for those subject to a mandatory life sentence, would not be interpretation but 'judicial vandalism'.[70]

Lord Steyn's approach to the courts' powers of interpretation under section 3 seems markedly different. Lord Hope, almost certainly, and Lord Nicholls, probably, would characterise as impermissively legislative or creative what Lord Steyn would regard as a radical, robust or sensible approach, reflecting Parliament's intention in enacting section 3 HRA.[71] In *R v A*, Lord Steyn was quite content to adopt an approach, which clearly takes him across the line set by his two eminent colleagues, involving in effect rewriting an evidentiary 'rape shield' provision to import such a degree of judicial discretion as to the admission of evidence of V's previous sexual behaviour with D as was necessary to achieve a fair trial. For Lord Hope and the present authors, that seemed to contradict the very intention of Parliament in enacting the provision and in rejecting alternatives from other jurisdictions and academic literature which afforded wider judicial discretion than the model enacted.[72] His Lordship did so on the basis that the mandate in section 3 necessitated at times a linguistically strained interpretation; it required

> the court to subordinate the niceties of the language of section 43(1)(c) [of the Youth Justice and Criminal Evidence Act 1999], and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances . . . [to achieve] the right of the accused to put forward a full and complete defence by advancing truly probative material.[73]

While the ramifications of so doing are not so polycentric as those identified by Lord Nicholls in *Re S, Re W*, it is submitted that they are so serious and controversial that it would have been better to declare the provision incompatible, leaving Parliament to consider reformulation in the light of a wider range of evidence and consideration of the issues than was available to the court, and to effect the same by primary legislation or, where urgent, a remedial order.[74] One reading of Lord Steyn's speech is that the section thus creates a rule of priority so that Convention rights override other legislation unless contrary to the express words of that other legislation.[75] In *Anderson*, however, he arguably implicitly recants, since he there accepted that section 3 'is not available where the suggested interpretation is contrary to express

[70] *R v Secretary of State for the Home Department, ex parte Anderson* [2002] UKHL 46, at paras 30 (Lord Bingham), 59 (Lord Steyn) and 81 (Lord Hutton), Lords Hobhouse, Nicholls, Scott, and Rodger concurring.

[71] In *J (R on the application of) v London Borough of Enfield and Secretary of State for Health* [2002] EWHC 432 (Admin), Elias J preferred the approach of Lord Hope (paras 61–6).

[72] [2001] 3 All ER 1, at 35–6 (para 109), per Lord Hope.

[73] [2001] 3 All ER 1, at 17–18 (paras 44, 45).

[74] see also Ashworth, above n 1, at 869.

[75] Clayton, 'Developing Principles for Human Rights' [2002] EHRLR 175, at 181.

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words *or is by implication necessarily contradicted by the statute*'.[76] Whether he sees his approach in *R v A* as an example of the latter is unclear, since he does not advert to that case. What is clear, whether the radical is thought to have rejoined the camp of the cautious or is keeping his options open, is the degree of freedom of manoeuvre section 3 HRA affords the judiciary.[77]

D. Declaration of Incompatibility: Interpreting and Applying Section 4: A Power or a Duty?

Under section 4, if a court of suitable seniority is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility.[78] A court, considering whether to make one, must give notice to the Crown so that the Crown can become a party to the proceedings and have, in consequence, rights of appeal.[79]

Section 4 is framed as giving the court discretion in the matter, rather than imposing a duty. In *Poplar Housing*, Lord Woolf CJ thought that the court would here be influenced 'by the usual considerations which apply to the grant of declarations',[80] while in *Re S, Re W*, Lord Nicholls stressed that ordinarily a declaration of incompatibility would only be granted to a victim of an actual or proposed breach of a convention right, and he did not regard the applicant raising the point as constituting a 'victim'.[81] Where, however, a court, having found that a statutory provision violates a convention right—a violation not removable through creative interpretation using section 3—has to rely on that provision to reject the claimant's case, then the court will be in breach of its section 6 duty to comply with Convention rights unless it invokes the protection of section 6(2) by making a declaration of incompatibility. In that situation, something akin to a duty to make such a declaration arises.[82]

It is abundantly clear that a statutory provision which in express words or in effect positively breaches a Convention right (eg, by authorising detention contrary to the terms of Article 5 ECHR, or by providing a non-independent decision-maker contrary to Article 6 ECHR) can be declared incompatible. In *Re S, Re W*, however, Lord Nicholls, delivering an opinion with which his colleagues hearing the case agreed, seemed to restrict the ability to issue a declaration of incompatibility to such cases. He took the view that the failure of a statute (the Children Act 1989) to afford certain people effective machinery to protect their civil rights in a court, may constitute a failure to comply

[76] [2002] UKHL 46, para 59 (emphasis supplied).

[77] Indeed, Young, above n 34, argues (without considering the case law) that s 3 sets no limits other than those determined by a 'sovereign' judiciary.

[78] HRA, s 4(1), (2). Subs (5) defines court to cover, for England and Wales, the High Court, the Court of Appeal and the House of Lords.

[79] HRA, s 5.

[80] [2001] 4 All ER 604, at 624 (para 75).

[81] [2002] 2 All ER 192, at 212–13 (paras 87, 88). See also *Hirst (R on the application of) v Parole Board* [2002] EWHC (Admin) 1592.

[82] *Wilson v First County Trust* [2001] 3 All ER 229 (CA).

with Article 6(1) ECHR, thus placing the United Kingdom in breach of its treaty obligations under the ECHR. He considered, however, that in such a situation a declaration of incompatibility could not be made, viewing the existence of a statutory lacuna as not, in itself, the same as an 'incompatibility' for the purposes of section 4.[83] He did, however, call for a wider examination of the matter by government or Parliament, presumably with a view to the removal of the lacuna—a rather submissive approach. Moreover, while his interpretation of section 4 is not untenable, it is a more restrictive reading than that given by other commentators on the HRA.[84] His restriction on the power to make a declaration of incompatibility is inapt for two reasons. First, it seems to suggest that the only effective recourse in such a case is to Strasbourg, which rather cuts against the aim of the HRA as bringing rights home and enabling United Kingdom courts to do here what judges in Strasbourg had been able to do for litigants.[85] In *Brogan v United Kingdom*, for example, the Court had no difficulty in finding that detention beyond 4 days without the detainee being taken before a court, breached Article 5(3) ECHR: the legislative scheme failed to provide for judicial supervision, providing only executive supervision. Similarly, in *Hunter v Southam*,[86] the Supreme Court of Canada held unconstitutional a provision authorising search by government officials because there was no requirement for prior authorisation through a judicial warrant. Those instances are more readily characterised as breaches by lacuna rather than by positive act. Secondly, the whole purpose of a declaration of incompatibility is to signal to the executive/legislative partnership that there is a problem with legislation; it does not invalidate the provision or scheme, which remains lawful and capable of operation and enforcement.[87] If that can be done where a single provision or a whole Act positively breaches the ECHR, why cannot the same signal be sent where the scheme omits to do something required by the ECHR? Viewed in this way, the declaration of incompatibility is merely a more formal, dramatic and public call for something to be done, putting rather more pressure on the law-makers to respond than an ordinary judicial plea for change; it is a legal device[88] which not only

[83] See also *R v Galfetti (Plinio)* [2002] EWCA Crim 1916.

[84] 'Thus if a court is unable to construe a statute in a way which is compatible with the Convention, the Act gives it the power to expose the problem by making a declaration that there has been a violation of Convention rights' (Wadham and Mountfield, *Blackstones Guide to the Human Rights Act 1998*, at 47); (Home Secretary Straw, 2R, 16 Feb 1998, col 780; Coppell, *The Human Rights Act 1998; Enforcing the European Convention in Domestic Courts*, at 48.

[85] See, eg, Lord Chancellor Irvine HL Debs, vol 582, cols 1228–9 (3 Nov 1997); *Rights Brought Home: The Human Rights Bill*, Cm 3782, Oct 1997, at para 1.19.

[86] [1984] 2 SCR 145.

[87] HRA, s 4(6); *R (on the application of the Secretary of State for the Home Department) v Mental Health Tribunal* [2001] EWHC Admin 849, at para 33; Lord Irvine LC, above n 85. 'A declaration of incompatibility will not itself change the law. The statute will continue to apply despite its incompatibility.'

[88] Feldman sees a close analogy with a petition of right: see Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *Legal Studies* 165, at 187.

enables the executive/legislative partnership to examine the matter further, drawing on a wider range of material than available to a court (something Lords Nicholls and Mackay called for), but importantly from the point of view of effectiveness, it opens up the fast track remedial order procedure in order to effect change.[89] In short, the approach suggested here would better reflect the principle of effectiveness central to the ECHR,[90] and it is to be hoped that their Lordships will in a future case revisit and reject that unnecessary and inapt restriction.

III. EXPRESSION, ASSEMBLY AND PUBLIC ORDER

With this overarching analysis of the judiciary's approach to the interpretation and application of the HRA in mind, the next part of this article looks in detail at certain examples of judicial reasoning within two specific contexts, the first being that of public protest, in which it appeared plausible to expect the HRA to have a strong impact—for a number of reasons. First, for the first time rights to the freedoms of expression and assembly under Articles 10[91] and 11[92] of the European Convention were made binding on public authorities under section 6. Secondly, Strasbourg has afforded quite a strong recognition to the importance of protest and assembly. The European Court of Human Rights recognised in the case of *Steel v UK*[93] that protest is a form of political expression, and it has always afforded a very high protection to such expression. The 'political speech' cases of *Sunday Times*,[94] *Jersild*,[95] *Lingens*,[96] and *Thorgeirson*[97] all resulted in findings that Article 10 had been violated and all

[89] Leigh and Lustgarten, 'Making Rights Real: The Courts, Remedies and the Human Rights Act' (1999) 58 CLJ 509, at 537; cf Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] *PL* 438, at 441–4.

[90] See R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2000), at 272–3.

[91] Art 10 provides: '1. Everyone has the right to freedom of expression . . . 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions as are prescribed by law and are necessary in a democratic society, in the interests of national security . . . for the prevention of disorder or crime . . . for the protection of the rights of others.'

[92] Art 11 provides: '1. Everyone has the right to freedom of peaceful assembly and to freedom of association . . . 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime . . . or for the protection of the rights and freedoms of others.'

[93] (1999) 28 EHRR 603; a violation of Art 10 was found in respect of interferences with public protest.

[94] *Sunday Times v UK* A 30 (1979).

[95] *Jersild v Denmark* (1994) 19 EHRR 1 concerned an application by a Danish journalist who had been convicted of an offence of racially offensive behaviour after preparing and broadcasting a programme about racism which included overtly racist speech by the subjects of the documentary.

[96] *Lingens v Austria* (1986) 8 EHRR 103 concerned with defamation of a political figure.

[97] *Thorgeirson v Iceland* (1992) 14 EHRR 843 concerned newspaper articles reporting allegations of brutality against the Reykjavik police.

were marked by an intensive review of the restriction in question. The Court also found in *Ezelin v France*[98] that the freedom to take part in peaceful assembly is so important that it cannot be restricted in any way so long as the persons in question have not themselves committed any reprehensible acts. In *Ezelin* the Court referred to 'the special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance'.[99]

In contrast, no common law right to demonstrate has been recognised: there has been no or little recognition in public protest cases of a human rights dimension. The pre-HRA decisions in *Duncan v Jones* in 1936 and *DPP v Jones*[100] in 1999 in the House of Lords exemplify this tendency.[101] Further, the domestic jurisprudence was largely uninfluenced by the Convention pre-HRA—unlike political expression in media. Again, this tendency to resist Convention-based arguments in this context was evident in *DPP v Jones*. But the fact that the domestic courts have shown themselves capable of affording great weight to political expression—in the context of media freedom—suggests that the possibility of change is apparent.

However, under a 'minimalist' approach to the HRA, the courts, while pronouncing the margin of appreciation doctrine inapplicable, would be unlikely to take the further step of recognising and making due allowance for its influence on the Strasbourg cases applied, but would rely simplistically and solely on the *outcomes* of public protest and assembly decisions at Strasbourg—most of which are adverse to the applicants—without adverting to its influence on those outcomes. The *structure* of judicial reasoning would change but the outcome might not. Rather than focusing primarily upon the restrictions contained in civil and criminal law, the starting point would be the Convention rights in issue. Having found that protest engages Articles 10 and 11, paragraph 1, a court would then have to consider the exceptions within paragraph 2 of those Articles. The question of what was necessary in a democratic society would be open to interpretation, depending on the view of the Strasbourg jurisprudence adopted. At that point the outcomes of a number of decisions on protest and assembly, especially adverse admissibility decisions of the Commission,[102] could be relied on in pursuit of a minimalist approach; the fact that they were influenced by the margin of appreciation doctrine could be disregarded.

[98] A 202 (1991) at para 53.
[99] Ibid, para 51.
[100] [1999] 2 WLR 625; see Clayton, 'Reclaiming Public Protest: the Right to Peaceful Assembly' (2000) 63 *MLR* 52.
[101] See Fenwick and Phillipson, 'Public Protest, the Human Rights Act and judicial responses to political expression' (2000) *PL* 627–50.
[102] See *Pendragon v UK* Appl No 31416/96 (1998); *Chappell v UK* Appl No 12587/86 (1987) 53 DR 241; *Christians Against Racism and Fascism v UK* (1980) 21 DR 138; *Rassemblement Jurassien v Switzerland* Appl No 81291/78 (1980) 17 DR 93; *Rai, Allmond and Negotiate Now v UK*, 81-A D & R 146 (1995).

Under a maximalist or 'activist' approach,[103] judges would regard themselves as required to go *beyond* the minimal standards applied in the Strasbourg jurisprudence,[104] given that Strasbourg's view of itself as a system of protection firmly subsidiary to that afforded by national courts has led it, particularly in public protest cases, to intervene only where clear and unequivocal transgressions have occurred. Such a stance would recognise that, as a consequence, most of the cases on peaceful protest have *not* in fact required national authorities to demonstrate convincingly that the test of 'pressing social need' has been met. Furthermore, significantly, it would look for assistance to the general principles developed by Strasbourg[105] in other contexts, particularly that of political expression in the media. The freedom of expression dimension of public protest would be given domestic recognition, following *Steel;* the principles developed in the Strasbourg and domestic media freedom jurisprudence could be utilised in protest cases, thereby underpinning and guiding judicial activism.

The Convention allows leeway for these different approaches and, as will be indicated below, the HRA itself may do so. Where the common law is applicable in a protest case the judiciary would be expected to view themselves as bound to reach an outcome consistent with the Convention under section 6 HRA.[106] Approaches under the HRA to *statutory* public order law—and most public order law is statutory—might allow for either a minimalist or an activist stance. The courts could view the matter as one of interpretation under section 3 following *S (Children) (Care Order, Implementation of Plan), Re W and Re W (Children) (Care Order, Implementation of Plan, Re)*[107] and as a last resort could issue a declaration of incompatibility under section 4. *Or* even where statute was applicable, a court might conduct a free-standing enquiry into the question of compatibility of executive or judicial action under the statute by using section 6. Such use of section 6 might appear to create greater leeway for an application of the provision in the particular instance that was consistent with the Convention.

[103] Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation' (1999) 62 *MLR* 491, at 502–5.

[104] In the words of Judge Martens, '[the task of domestic courts] goes further than seeing that the minimum standards laid down in the ECHR are maintained . . . because the ECHR's injunction to further realise human rights and fundamental freedoms contained in the preamble is also addressed to domestic courts.' ('Opinion: Incorporating the Convention: The Role of the Judiciary' [1998] 1 EHRLR 3.)

[105] See Fenwick, above n 103, at 502–3. As the House of Lords recently stressed: 'in the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules' (*R v DPP ex parte Kebilene* [1999] 3 WLR 972).

[106] See the findings in: *A v B and C* [2002] 2 All ER 545; *Douglas v Hello!* [2001] 2 All ER 289 (admittedly, the *Douglas* case depended on an application of s 12 HRA which would not be applicable to common law crimes; it is unclear whether s 12 would apply to findings in relation to the breach of the peace doctrine which does not, as a matter of domestic law, create criminal liability).

[107] [2002] 2 AC 291. The case will be referred to as *S (Children), Re W*.

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In that light this article now considers two post-HRA public protest cases and raises some points about the impact of the HRA in this context. In the first, *Percy v Director of Public Prosecutions*,[108] the appellant was convicted of using threatening, abusive and insulting words or behaviour likely to cause harassment, alarm or distress contrary to section 5 of the Public Order Act 1986 (POA). Protesting against American military policy at an American air base, she defaced the American flag by putting a stripe across the stars and by writing the words 'Stop Star Wars' across the stripes. She put the flag on the ground and stood on it. The court found that her action had caused distress to American service personnel or their families and was insulting to the American citizens at whom it was directed.

The District Judge looked at the impact of Article 10 of the European Convention on Human Rights on section 5 POA. He emphasised that under Article 10(2) the right is qualified and considered the tests under Article 10(2). He regarded the risk of disorder here to be slight. His only concern, therefore, was as to the protection of the rights of others. The rights were those of American service personnel and their families occupying the base to be free from gratuitously insulting behaviour and their right to have their national flag, 'protected from disrespectful treatment'. He found a pressing social need in a multi-cultural society to prevent the denigration of objects of veneration and symbolic importance for one cultural group. Here the defendant's conduct was not the unavoidable consequence of a peaceful protest against the 'Star Wars' project, but arose from the particular *manner* in which she chose to make her protest.

On this basis the court found the restrictions and penalties attached by section 5 to the defendant's Article 10 right to freedom of expression to be necessary in a democratic society for the protection of the rights of others and 'proportionate to the need to protect such rights'.

On appeal the court took a similar structured approach but reached a different outcome. It is important to note that the case was argued for the appellant by a specialist human rights barrister—Keir Starmer. He originally sought a declaration of incompatibility between section 5 POA and Article 10. However, he accepted that the court's discretion to make a declaration of incompatibility under section 4 HRA is a remedy of last resort. It was also accepted that the use of section 3 is required only where the clear words of the statute demand in every case the determination of an issue in such a way that apparently violates a Convention right.

It was noted that section 5(3) POA provides the defence that the defendant's conduct was reasonable. The court accepted that the right to freedom of expression under Article 10(1) was clearly engaged and that it protects *in substance and in form* a right to freedom of expression which others may find

[108] 2001 WL 1612531 QBD, 21.12.01, High Court of Justice Queen's Bench Division Divisional Court.

insulting. The European authorities laid down that the justification for any interference with that right must be convincingly established and restrictions under Article 10(2) must be narrowly construed. The appellant's conduct in relation to the American flag was protected by Article 10 unless and until it was established that a restriction on her freedom of expression was strictly necessary. Protecting citizens of Britain and visiting foreign nationals from intentionally and gratuitously insulting behaviour, causing them alarm or distress, was accepted as a legitimate aim under Article 10(2).

The court considered the proportionality of the restrictions; but not other aspects of necessity. The message only became insulting because of the manner in which she chose to convey it; her use of the flag was of symbolic importance to some of her target audience. The court found that the District Judge had placed either sole or too much reliance on just the one factor, namely that the appellant's insulting behaviour could have been avoided. This approach gave insufficient weight to the presumption in the appellant's favour, thus failing to address the question of proportionality adequately. The conviction under section 5 POA was incompatible with the appellant's rights under the ECHR and was quashed.

Director of Public Prosecutors v Jones,[109] an interesting contrast to *Percy*, concerned an animal rights demonstration at Huntingdon Life Sciences. A condition had been imposed by a senior police officer under section 14 POA regarding the area where it could take place. The defendant had been charged with an offence in not complying with the condition on the basis that she had failed to remain in the designated demonstration area. At first instance it was accepted that certain of the terms of the notice were unlawful because they were not related to the place of an assembly, but to *the route*. These were not conditions imposable under section 14. Certain conditions were however lawfully imposed under section 14. The magistrates concluded that severance was not possible. On appeal Lord Justice Auld considered that it was, so that those conditions which were not invalid afforded a basis for conviction. The HRA was not mentioned! Admittedly, the appeal was on narrow grounds. Nevertheless an interpretation of section 14 POA by reference to section 3 HRA was not considered; nor did the court appear to view itself as having any duty in relation to the Convention rights. It simply did not recognise that the case had a human rights dimension. The magistrates had found that it was very important to give protesters clear directions as to behaviour which could be found to be unlawful. If protesters are presented with conditions, some of which are in fact unlawful, uncertainty may be created as to the parameters of the assembly.

The case concerned a protest in the form of an assembly; therefore Articles 10 and 11 paragraph 1 were engaged, and the possibility of creating uncertainty suggested that it might be difficult to show that the interference with

[109] [2002] EWHC 110 Admin QBD.

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those rights was proportionate under Articles 10 and 11 paragraph 2; also, the other tests under paragraph 2 might not have been met. The net result is that assemblies may seek to adhere to unlawful conditions imposed by the police on the basis that the members of the assembly cannot be certain at the time whether the conditions are lawful or not. Assemblies may take place under limitations that are not in fact in accordance with the law. The result is unlikely to encourage the police to take particular care when imposing conditions. The court ignored the duty to interpret restrictions on the Article 10 and 11 rights narrowly. It failed to appreciate that the HRA was relevant.

What conclusions can be drawn at this very early point in the post-HRA era from these two decisions as to the courts' approach to public protest? The use of the HRA itself in *Percy* is interesting. The key finding was that due to the HRA the Convention had to be taken into account: where protest is in question there seems to be a preparedness evident from *Percy*, although not of course from *Jones*, to look to Article 10. In other words, protest is not merely being treated as a form of disorder as it often was in the past, but as an exercise of freedom of expression. The freedom of expression dimension of protest is being recognised—even afforded weight—when the case is properly argued before a court. It might be thought that this is hardly a revolutionary finding in the HRA era, but *Jones* demonstrates that the freedom of expression dimension can still be completely ignored: the whole question can be treated merely as an exercise in statutory interpretation or based on an analogy with such interpretation. Thus, the use of the Convention means that differentiation is being created in public order law between disorder or obstruction or trespass generally, and public protest which creates those effects—a differentiation which is not present in the provisions themselves.

That differentiation was achieved, however, in *Percy* on the basis of section 6 HRA; it could be said that that approach is in line with the incremental style of English judicial reasoning, that is, a style which reveals a reluctance to decide more than is necessary to address the particular issues in the instant case. Instead of reinterpreting the whole statutory provision under section 3 HRA, it is only necessary under section 6 to look at the particular arrest and prosecution. Arguably, a more secure differentiation would be based on section 3 since once a certain reading of a provision had occurred in a higher court that interpretation would be used in a subsequent case. The use of section 6 as in *Percy* relates to the particular instance, whereas the use of section 3 relates to the power itself. The proper approach, it is contended, is to apply section 3 to the statutory provision in question where a Convention issue appears to arise. This approach can now be viewed as the correct one according to the obiter findings of the House of Lords in *S (Children), Re W*. In any event, the approach in *Percy* appears to be a doubtful one since it by-passes the scheme in sections 3 and 4 of the HRA; this approach is likely to change due to the findings in *Re S, Re W*.

On the other hand, the *Percy* approach creates greater leeway for activism

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than does reliance on section 3 since under it there need be no close reference to the statutory provision in question. In *Percy* the provision was that of section 5 POA; in that instance the defence of reasonableness under section 5(3) created a gateway to the Convention argument, but this was not made clear: the argument concentrated on the Convention issues, not on whether the appellant had demonstrated that her conduct was reasonable. That the state had breached her Article 10 rights did not in itself demonstrate that her conduct was reasonable. Indeed, the inclusion of a defence of reasonableness as a means of giving effect to an accused's Convention right is flawed, since for her to be able to exercise the right she must demonstrate that she acted reasonably. This approach stands the Convention stance on its head; under paragraph 2 of Articles 10 and 11 it is for the state to demonstrate that the interference with the primary right(s) is justified. By relying on section 6 the court avoided this problem.

If section 3 were used instead the problem would clearly arise—the question would be: how can an 'interpretation' of a defence of reasonableness afford proper recognition to the Article 10 and 11 rights? Obviously, the POA was not drafted with the Convention tests in mind and the recognition it impliedly affords to freedom of assembly and protest under section 5(3) is both wholly inadequate and imprecise. Depending on the question before the court, it is contended that in seeking to confront this problem a court should first ask whether, prima facie, the statutory tests under the public order instrument in question are satisfied, applying them in the usual way to the factual situation, as established by the evidence. If it appears that they are not satisfied, that is the end of the matter. If they are satisfied (or if the question arises on appeal by the defendant), the court should then consider what its duty under section 6 HRA demands, structuring the reasoning by reference to the Articles 10 and 11 paragraph 2 tests; it should then seek to find pathways to fulfilling it within the statutory tests (under the relevant public order instrument) using the interpretative obligation under section 3. Such pathways should include interpretation of the provisions governing the mens rea and actus reus as well as the interpretation of any possible defences. If the pathways are found to be inadequate to allow the court to satisfy its section 6 duty it should rely on section 3(2) and section 6(2) in finding that the legislation is incompatible with the Convention right, and should be applied in the particular instance. A declaration of incompatibility could then be made under section 4, probably triggering remedial action under section 10. If this were not forthcoming, an application would be likely to be made, at some point, to Strasbourg.

The *Percy* approach, if sustained in future, would have implications for other public order provisions; many use the imprecise defence of reasonableness. It appears that under section 6 HRA a court could ignore the actual wording of the defence and merely apply the Article 10(2) tests, whereas under section 3 a court would have to engage in an interpretation of the wording of the defence (and, if possible, other provisions as indicated). *Percy* seems to

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have assumed that there is a choice between two modes of judicial reasoning—one under section 6 and one under section 3. In relation to certain public order provisions, however, the use of section 3 would be problematic. For example, section 68 of the Criminal Justice and Public Order Act 1994 has often been used against protesters, particularly environmental activists. Section 68 contains no defence and therefore the use of section 3 HRA would not provide much room for imposing a Convention-friendly reading on section 68. It might appear from the *Percy* approach that section 6 could be used instead—where a conviction would breach Article 10 it would be in accordance with the court's duty under section 6 to quash it—but since there is no obvious gateway to this reasoning under section 68 it would appear to be inapplicable. It is argued that a court cannot say—under section 6—the powers are incompatible with Article 10 or 11 but since their *application* in this instance would lead to a conviction in breach of a Convention right, our duty under section 6 allows us to conduct a free-standing enquiry into the question whether the conviction would or does breach Articles 10 or 11. If that were possible, section 6(2), allowing the public authority to act to enforce the incompatible primary legislation, would be marginalised. As argued above, the scheme in sections 3 and 4 HRA would have to be used instead. This approach to the HRA would leave section 6(1) no role where an incompatible statutory provision such as, for example, section 68 was in question (and this would be in accord with Parliamentary intention in passing the HRA). If the provision was one of doubtful compatibility, such as section 5 POA, then there would appear to be two available HRA routes to use to ensure compatibility—the one taken in *Percy* or the more thorough-going one of reinterpreting the provision itself—to make it Convention compliant under section 3. It is suggested—and *Percy* bears this out—that the latter is the less attractive route to a number of judges[110] but that they will now have to accept it reluctantly, due to the findings on the point in *S (Children), Re W*. The further possibility is that they will fudge the question whether they are relying on section 3 or section 6.[111]

What conclusions can be drawn from these two decisions as to the courts' approach to the Convention itself? A minimalist and an activist approach were envisaged above; commentators did not envisage an approach as in *Jones* of completely disregarding the HRA and Convention. It is suggested that *Jones* illustrates, even in the post-HRA era, the problem that has bedevilled public protest jurisprudence in Britain. The reasoning on the Convention in *Percy*, on the other hand, follows the structure outlined above. Thus the first question for the court concerned the scope of Article 10; the court had no trouble in finding that the protest fell within Art 10(1); the fact that it was offensive did not preclude that finding, following *Handyside v UK*. The court also made the

[110] See *Brown v Stott* [2001] 2 WLR 817.

[111] See the reasoning of the House of Lords in *Ashworth Security Hospital v MGN Ltd* [2002] 4 All ER 193.

point that Article 10 protects both the content and the *form* of protest, and the presumption in favour of freedom of expression applies even where only the form is in question—a significant point.

The Court then set out to apply the familiar tests under Article 10(2). It made little attempt at precision in relation to the meaning of the 'rights of others' exception—the right in question appeared to be one not to see a flag being stood upon or defaced. Unfortunately, this imprecision can also be found at Strasbourg—in, for example, *Steel v UK*.[112] There seems to be a clear determination in UK judges to continue to interpret this expression broadly,[113] despite the often-reiterated acceptance of the need to afford the paragraph (2) exceptions a restrictive interpretation. In moving through the paragraph (2) tests the court did not consider the 'necessary in a democratic society' question—except in relation to proportionality. Possibly the domestic courts are less comfortable with the more open-ended concept of necessity than they are with that of proportionality as an aspect of necessity. The reasoning on the key question of proportionality was fairly sound although not extensive. In most protests a different manner of presenting the protest could have been used—to say that she could have chosen a different form clearly gave no weight to protection for her freedom to express her protest in a striking and more effective fashion.

No mention was made in relation to the application of Strasbourg jurisprudence of disregarding the margin of appreciation aspects of the decisions; this is typical of judicial reasoning under the HRA. But very significant aspects of the jurisprudence, such as the findings in *Handyside* that were uninfluenced by the doctrine, were relied upon. So possibly the court could be said to have evaded—albeit unconsciously—a reliance on the doctrine since it relied on those findings and not on the outcome in the case. In eschewing, correctly, an *overt* reliance on the doctrine, the court did take quite a hard look at the question of proportionality. Thus the *Percy* approach could be said to exhibit elements of the approach termed activist.

In conclusion it is contended that *Percy* exemplifies—albeit not in a radical fashion—the change of emphasis that has occurred under the HRA in the judicial approach to public protest. Taking *Jones* and *Percy* together it cannot be said with confidence that where a protester can hardly be said to have behaved reprehensibly (clearly, there was no such behaviour on the part of the protester in *Jones*) freedom of assembly and of protest must prevail, but the likelihood that the freedom of expression dimension of protest will be recognised is now higher.

[112] (1999) 28 EHRR 603, para 109.

[113] See Laws LJ's findings in *The Prolife Alliance v The British Broadcasting Corporation* [2002] 2 All ER 756.

IV. FAMILY LAW, WELFARE, AND THE HRA

The final part of this article examines the main trends in judicial reasoning under the HRA in the context of family law disputes, particularly private law disputes relating to children. Although there are some notable exceptions, the search for emerging trends in judicial reasoning in mainstream family law cases has generally produced disappointing results.[114] In many cases 'judicial reasoning under the Human Rights Act' is most conspicuous by its absence. The attitude of many members of the family bench and the higher appeal Courts when called upon to apply Convention rights to family law matters has been cautious and defensive—even openly hostile. Most disappointing, however, has been the marked failure by the judiciary to really engage with (i) the legislative requirements of the HRA and (ii) the demands of the European Convention and its jurisprudence, in cases which impinge upon the rights of family members.

A. Attitudes to the HRA Leading up to Implementation

A defensive and conservative approach to the HRA in the context of family disputes was by no means inevitable. Jane Fortin, a leading family law academic, wrote with enthusiasm about the new opportunities the HRA would present for family lawyers:

> Implementation of the European Convention on Human Rights presents all family lawyers with a considerable challenge. The prospect of radically adjusting the common law by adopting an entirely different approach to legal thinking is an exhilarating one.[115]

Lord Justice Ward, writing extra-judicially in 1999, was equally enthusiastic:

> The Human Rights Act 1998 is bound to have a tremendous impact on the development of child and family law. . . . The implications will so stretch the ingenuity of practitioners and strain the imagination of the judges that this book . . . will become the vade mecum not only for the family lawyer seeking to master the practical significance of this momentous development in our law but also for the judges and justices who will shape it.[116]

Commentators anticipated that if a 'maximalist' approach were adopted to the HRA it could prove to be a catalyst for change in a number of key areas of family law. Popular contenders for early reform in the private law context

[114] The following analysis will focus on cases dealing with typical private law family disputes ie intra-familial adoption and applications under the Children Act 1989 relating to residence, contact and the upbringing of children.

[115] J Fortin, 'The HRA's impact on litigation involving children and their families' *Child and Family Law Quarterly*, vol 11 (3), 1999, 217, at 255.

[116] *Foreword* to H Swindells, A Neaves, M Kushner, and R Skilbeck, *Family Law and the Human Rights Act 1998* (Bristol: Family Law, 1999).

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included parental responsibility, residence and relocation disputes and the making and enforcement of contact orders.[117]

However, the first signs of 'judicial strain' came early, with not all members of the judiciary sharing Ward LJ's enthusiasm for adopting an ingenious and imaginative approach. In *Re F (Minors) (Care proceedings: Contact)*,[118] a case decided just before the HRA came into force, Mr Justice Wall sent out a strong message to the family bar emphasising the importance of keeping any overactive imaginations or creative urges in check. The case concerned an application by the Local Authority for permission to terminate contact between three children and their mother under section 34(4) of the Children Act 1989. The application was successful and the mother appealed on the grounds that the making of the order was an infringement of her Convention rights under Articles 6 and 8. The main thrust of her argument was that the application authorising the Local Authority to terminate contact was premature and that the granting of the order effectively rendered a decision going to the heart of her 'family life' an administrative one, against which she would have no effective judicial remedy. Wall J was clearly not impressed by these submissions, holding that whilst the Children Act had to be read and given effect in a way that was compatible with Convention rights, it was for the *English courts* applying *English criteria of fairness and justice* to decide whether those rights had been breached. These comments seemed to indicate a certain lack of empathy with the European Convention and the jurisprudence of the European Court of Human Rights. This apparent reticence about Strasbourg was later made absolutely clear, with Wall J remarking that he would be 'disappointed if the Convention were to be routinely paraded in such cases as a makeweight ground of appeal, or if there were in every case to be extensive citation of authorities from the European Court of Human Rights, particularly where reliance was placed on cases pre-dating the 1989 Act, such as *W v United Kingdom*'.

Re F was a public law case. With respect to family disputes with no public law dimension there were even stronger signs of disquiet among the judiciary about the potential 'use and abuse' of the HRA once implemented. In the case of *Re A (Permission to Remove Child from Jurisdiction)*,[119] Buxton LJ attempted to launch a pre-emptive strike against those who were hoping that the Convention in its application to private family law disputes would prove a catalyst for change. *Re A* concerned an application by the child's mother, opposed by her father, to remove the child permanently from the jurisdiction to New York. As Ward LJ pointed out in the course of his judgment, a number of conflicting rights under Article 8 of the Convention were engaged. On the one hand, for the Court to grant leave and allow the child to be removed from

[117] Generally, H Conway, 'The Human Rights Act 1998 and Family Law—Part Two' January [2000] Fam Law 30 and Swindells *et al*. op cit, at 90–6, esp at 93.
[118] [2000] 2 FCR 481.
[119] [2000] 2 FLR 225.

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the jurisdiction would interfere with the right of the father and the child to respect for their family life. On the other hand, for the Court to refuse leave and prevent the child's mother living and working in a country of her choosing would interfere with her Article 8 right to respect for private life.[120] Given the existence of these competing rights under the Convention, Ward LJ concluded that the HRA would not necessitate any change to the established approach to such disputes under domestic law.[121] It was, however, the judgment of Buxton LJ which had the potential to be of much wider significance. The applicability of Article 8 of the Convention to private disputes between family members had never really been seriously questioned.[122] The State and all its institutions, including domestic Courts hearing private family law cases, were already under both negative and *positive* duties in international law to take all appropriate measures to secure effective respect for Article 8 family life rights, even if the dispute was one between two private individuals.[123] Sections 3 and 6 HRA simply incorporated these negative and positive obligations into domestic law. However, despite the clear requirements of the HRA and the substantial body of Convention jurisprudence supporting the 'indirect horizontal effect'[124] of the Convention to private family disputes, Buxton LJ was unconvinced, stating in an *obiter* comment:

> I think it is doubtful, and no case has been put before us to suggest otherwise, whether difficult balancing questions of that sort fall within the purview of the Convention at all.[125]

Fortunately, this suggestion was quickly put to bed by the Court of Appeal in *Payne v Payne*,[126] another case concerning leave to remove a child permanently from the jurisdiction, with Butler-Sloss P and Thorpe LJ tactfully holding that subsequent developments, notably the decision of the European Court in *Glaser v UK*,[127] had made the view of Buxton LJ 'no longer sustain-

[120] Per Ward LJ, op cit, at 226–7.

[121] Per Ward LJ, op cit, at 227.

[122] Conway, 'The Human Rights Act 1998 and Family Law—Part One' Dec [1999] *Fam Law* 811, at 813.

[123] See, eg *X and Y v the Netherlands* (1985) App No 8978/80, 8 EHRR 235 at [23]; *Hoffmann v Austria* (1993) App No 12875/87, 17 EHRR 293 at [29]; and *Hokkanen v Finland* (1995) App No 19823/92, 19 EHRR 139 at [55]. See generally, DJ Harris, M O'Boyle, and C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), at 320–4 and Fortin, above n 115, at 240.

[124] H Fenwick, *Civil Liberties and Human Rights*, 3rd edn (London: Cavendish Press, 2002), at 161.

[125] Per Buxton LJ, *Re A*, above n 119, at 229.

[126] [2001] 1 FLR 1052.

[127] [2001] 1 FLR 153. *Glaser* concerned a complaint by the child's father that the English and Scottish authorities had not done enough to enforce a contact order against his former wife. The European Court held: '[t]here may however be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to ensure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation where appropriate, of specific steps. . . . the Court's case-law has consistently held that Art 8 includes a right for a parent to have measures taken with

able'.[128] Confirmation from the Court of Appeal just a few months after the HRA came into force that the Convention would apply to both public and private family law cases, did not, however, mean that the Courts would thereafter embrace it with enthusiasm.

B. Post-Implementation Private Law Cases

There would seem to be a great deal of sympathy for the views of Wall J and Buxton LJ among the members of the judiciary. The suspicion with which the HRA has been greeted, particularly in the context of private family law disputes, appears to stem from a strong concern that the traditional approach to resolving these disputes under English law will be fundamentally undermined by the rights-based approach of the Convention. Under English law all disputes concerning the upbringing of a child must be determined in accordance with section 1 of the Children Act 1989, which provides:

> When a court determines any question with respect to–
> (a) the upbringing of a child; or
> (b) the administration of a child's property or the application of any income arising from it,
> the child's welfare shall be the court's paramount consideration.

The interpretation afforded to the word 'paramount' by the House of Lords in *J v C*[129] remains definitive. According to the House of Lords, 'paramount' means that in matters relating to the upbringing of the child, the child's welfare must be the Court's only consideration.[130] The rights and interests of others, including the child's parents, are deemed irrelevant unless they can be shown to have some direct bearing upon the child's best interests.[131] This approach to private family disputes does not sit easily with the Convention, particularly in light of the requirement under Article 8 (1) to give separate and independent consideration to the rights of the child's parents. It could certainly be argued following the implementation of the HRA that the welfare principle, as traditionally understood under English law, would have to be reinterpreted under section 3 to give greater recognition to the parent's interests,[132] failing

a view to his or her being reunited with the child, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures, but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family.' Ibid at [63] and [65].

[128] Per Thorpe LJ, *Payne v Payne*, above n 126 at [34]. See also the judgment of Butler-Sloss P, at [81].

[129] [1970] AC 668.

[130] Ibid at 697 (per Lord Guest), 710–11 and 715 (per Lord MacDermott) and 727 (per Lord Donovan).

[131] Ibid.

[132] This could be achieved by departing from the approach as set down in *J v C* and 'downgrading' the child's interests from the sole consideration to the primary consideration—the test which is in fact set down in Art 3 of the United Nations Convention on the Rights of the Child.

which, it would probably fall victim to a declaration of incompatibility under section 4.[133] In the period immediately preceding implementation, however, clear signs of judicial opposition to any such 'watering down' of the welfare principle began to emerge.[134] That opposition now marks the post-implementation jurisprudence, rendering it, in the view of the authors, disappointingly cautious and weak.[135]

One way in which the Courts have managed to avoid tackling the difficult question of whether section 1 of the Children Act needs to, and indeed can be, reinterpreted in order to give effect to Convention rights, is to ignore sections 3 and 4 of the HRA altogether. In fact, when addressing the Convention, the Courts have generally been silent as to the exact statutory provision of the HRA under which they are acting, preferring instead to restrict themselves to vague statements as to the need to give effect to the Convention rights of the parties.[136] As was suggested with respect to the approach taken in *Percy*, by conducting a 'free-standing' enquiry into the impact, if any, of Article 8 on the particular dispute in question and omitting any reference to sections 3 and 4, the Court can avoid embarking upon a comprehensive reinterpretation of the welfare principle and making generally applicable, binding rulings as to its compatibility or otherwise with the Convention. Whilst this approach neatly avoids tackling an extremely sensitive and difficult issue and has the advantage of preserving the greatest possible flexibility for the Court to deal with the demands of each particular case on its own merits—something which is valued particularly highly by the family bench—it is, nevertheless, jurisprudentially flawed to simply ignore the carefully constructed scheme under the HRA for dealing with the interpretation of statutory provisions such as section 1 of the Children Act 1989.

As was pointed out above, a further possible advantage of avoiding section 3 and any detailed reference to the statutory provision in question, is the greater leeway it provides for judicial activism. Any potential for activism will, however, depend on the view which is taken of the demands of the Convention and the substantive content of Convention rights as revealed

[133] See, in particular, J Herring, 'The Human Rights Act and the welfare principle in family law' (1999) *Child and Family Law Quarterly* vol 11 (3) and Fortin, above n 115, esp at 250–2.

[134] See, eg, *Re C (HIV Test)* [1999] 2 *FLR* 1004 at 1016G (Wilson J at first instance) and at 1021 (Butler-Sloss LJ on appeal); *Re P (Section 91(14) Guidelines (Residence and Religious Heritage)* [1999] 2 *FLR* 573, at 598–9; *Re A (Conjoined Twins: Medical Treatment)* [2001] 1 *FLR* 1 at 97–8; *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 *FLR* 678 at 701 (not challenged on appeal, see [2000] 1 *FLR* 571 at 575); *Dawson and Wearmouth* [1999] 1 *FLR* 1167, at 1174 and 1181; and *Re A (Permission to Remove Child from Jurisdiction)* above n 119, at 226–7 and 229–30.

[135] See A Bainham, 'Taking Children Abroad: Human Rights, Welfare and the Courts' [2001] *CLJ* 489, at 492 and A Bainham, 'Can we Protect Children and Protect their Rights', April [2002] *Fam Law* 279.

[136] See *Payne v Payne*, above n 126, at [35]–[39] and [81]–[82] and *Re H (Contact Order) (No 2)* [2002] 1 FLR 22 at [59]. Outside the context of the Children Act 1989 see *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190 at 1197–8. Cf *Re B (Adoption: Natural Parent)* [2002] 1 FLR 196 at [30].

through the Strasbourg jurisprudence. By ignoring particularly important factors influencing the outcome of Article 8 cases at Strasbourg, most notably the large margin of appreciation afforded to States in this particular sphere, it is possible for the judiciary to rationalise a 'minimalist' approach.[137] However, what is particularly striking about the reasoning in the family law cases is that a weak and conservative outcome is achieved, not by giving a 'minimalist' reading to Article 8 and the Strasbourg case law, but by failing to engage with it at all. The judgment of Wall J in *Re H (Contact Order) (No. 2)*[138] provides a particularly striking example of how the reasoning in these cases has typically progressed. The case concerned an application by the child's father for direct contact with the child against the wishes of the mother. The mother was opposed to contact because the father was suffering from Huntingdon's disease and posed a potential risk to the children's safety. In the last paragraph of his judgment, Wall J holds:

> Finally, it will be apparent that I have made no mention of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in this judgment. Inevitably, however, every order made under s. 8 of the Children Act 1989 represents in some measure an interference by a public authority (the court) in the right to respect for family life contained in Article 8. The court's interference must, of course, be in accordance with the powers given to the court under the Children Act 1989, and proportionate. Every application involves the court balancing the rights of the participants to the application (including the children who are the subjects of it) and arriving at a result which is in the interests of those children (or least detrimental to those interests) and proportionate to the legitimate aims being pursued. However, it seems to me that a proper application of the checklist in s 1(3) of the Children Act 1989 is equivalent to the balancing exercise required in the application of Article 8, which is then a useful cross-check to ensure that the order proposed is in accordance with the law, necessary for the protection of the rights and freedoms of others and proportionate. In my judgment, and for all the reasons I have given, the order I am making in this case fulfils those criteria.[139]

There is no citation or consideration of Strasbourg jurisprudence in support of this contention.

The approach of Wall J to the Convention in *Re H (Contact Order) (No 2)* is unfortunately not an isolated example of poor judicial reasoning in private family law cases. Having reached a decision on the child's best interests, there will often be a final paragraph in which the judge addresses the Convention in a cursory manner before it is concluded that Article 8 has no affect on the decision which has previously been reached on the basis of

[137] This possibility was predicted by Fortin, above n 115, at 252. As to the extent of the margin of appreciation afforded to States under Art 8 see *Hokkanen v Finland*, above n 123, at [55] and [58]; *Johansen v Norway* (1997) App No 17383/90, 23 EHRR 33 at [64]; *Glaser v United Kingdom* (2000) App No 32346/96 [2001] 1 FLR 153 at [63]–[64]; and *Sahin v Germany* [2002] 1 FLR 119 at [40]–[41].

[138] [2002] 1 FLR 23.

[139] Ibid at [59].

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welfare.[140] As in *Re H*, the usual reason given for this conclusion is that the balancing of interests required under section 1 and section 1(3) of the Children Act 1989 is exactly the same as the balancing of interests required under Article 8 ECHR. Taking a more structured approach, it is simply argued that whilst the order may constitute a prima facie interference with the Article 8(1) rights of one of the parties, the child's welfare will constitute an automatic justification for the interference in accordance with the requirements of Article 8(2). Consequently, if the Court reaches a decision in accordance with the best interests of the child, it will automatically be deemed to comply with Article 8 ECHR.[141] Welfare remains conclusive.

There is one important example of this tendency to dismiss the Convention without making any serious attempt at a substantive analysis of its requirements which merits more detailed consideration. The decision of Lord Nicholls in the House of Lords in *Re B (Adoption: Natural Parent)*[142] is particularly important because it sends a very strong message to the family bench that the HRA and the ECHR do not necessitate any change to the traditional welfare-centred approach to questions concerning the upbringing of a child. It is therefore likely to inhibit any future activism by more enthusiastic judges who could see the value of trying to re-conceptualise these issues in terms of the rights of the parties, including the rights of the child, in accordance with the approach enshrined in Article 8. *Re B* was an unusual case concerning an attempt by the natural father of a young child to adopt her so that he could irrevocably exclude the child's mother from playing any future role in her life.[143] His application was successful at first instance,[144] overturned by the CA,[145] but reaffirmed by the House of Lords. The question which arose under the HRA was whether, in accordance with section 3 of the HRA, section 15(3) of the Adoption Act 1976 needed to be given a restrictive interpretation in order to protect the child's right to family life, in particular, the right to know and develop a relationship with both natural parents.[146]

[140] See, *Payne v Payne*, above n 126 at [82] (judgment of Butler-Sloss P), *Re B (Adoption: Natural Parent)* above n 136, discussed below, and *Re S (Contact: Children's Views)* [2002] 1 FLR 1156, at 1170. This reflects the approach which was generally taken towards the Convention prior to the implementation of the HRA. See *Re A (Conjoined Twins: Medical Treatment)* at 978; *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)*, at 701 (not challenged on appeal); *Dawson and Wearmouth* [1999] 1 FLR 1167, at 1174 and 1181; and *Re A (Permission to Remove Child from Jurisdiction)*, at 226–7 and 229–30. All cited above, n 134.

[141] The origins of this approach to the Convention can be found in the judgment of Lord Oliver in the House of Lords in *Re KD (A Minor) (Ward: Termination of Access)* [1988] 1 All ER 577, at 587–9. For analysis of this approach, see Fortin, above n 115, at 251–2.

[142] Above, n 136.

[143] For a detailed analysis of this case including Lord Nicholl's approach to the HRA, see S Harris-Short, 'Re B (Adoption: Natural Parent) Putting the child at the heart of adoption?' *Child and Family Law Quarterly*, Vol 14 (3) (2002) 325.

[144] *B v P (Adoption by Unmarried Father)* [2000] 2 FLR 717.

[145] *Re B (Adoption by One Natural Parent to Exclusion of Other)* [2001] 1 FLR 589.

[146] Section 15(3) of the Adoption Act 1976 provides: 'An adoption order shall not be made on the application of the mother or father of the child alone unless the Court is satisfied that—(a) the

Having concluded that adoption would be in the child's best interests, Lord Nicholls held that to adopt a restrictive interpretation of section 15(3) and require the applicant to demonstrate the existence of exceptional circumstances akin to the 'death or disappearance' of the other natural parent before allowing adoption by a sole natural parent to go ahead, was unnecessary in order to comply with Article 8 of the Convention.[147] Adopting virtually identical reasoning to that found in *Re H*, Lord Nicholls concluded that a simple welfare test was sufficient to guarantee compatibility with the Convention and 'recourse' to section 3 HRA was thus unnecessary:

> This balancing exercise required by Art 8, does not differ in substance from the like balancing exercise undertaken by a court when deciding whether in the conventional phraseology of English law, adoption would be in the best interests of the child. The like considerations fall to be taken into account. Although the phraseology is different, the criteria to be applied in deciding whether an adoption order is justified under Art 8(2) lead to the same result as the conventional tests applied by English law. Thus, unless the court misdirected itself in some material respect when balancing the competing factors, its conclusion that an adoption order is in the best interests of the child, even though this would exclude the mother from the child's life, identifies the pressing social need for adoption and represents the court's considered view on proportionality.[148]

As has been argued in detail elsewhere, this approach to the relationship between the welfare test and Art 8 of the Convention is fundamentally flawed.[149] The notion that identical factors will fall for consideration whether one adopts the traditional welfare approach enshrined in English law or the rights-based approach of Article 8, is, with respect, simply misconceived.[150] Under the ECHR individuals have certain legal entitlements: they have a rights-based claim to which the State must give effect unless it can establish sufficient justification to set the claim aside. One of the entitlements recognised under the Convention is the right of both parents to respect for their family life, in essence, the right to a meaningful parent–child relationship. This may require the Court to take into consideration certain rights and interests of the parents which, having no direct bearing upon the child's welfare, would have been deemed irrelevant following the traditional *J v C* approach. Moreover, the rights and interests which the Court must take into account

other natural parent is dead or cannot be found, or by virtue of section 28 of the Human Fertilisation and Embryology Act 1990, there is no other parent, or (b) there is some other reason justifying the exclusion of the other natural parent . . .'.

147 *Re B* above, n 136, at [30].

148 Ibid, at [31]. This reasoning would seem to be equally applicable to the question of the compatibility of s 1 of the Children Act with the Convention, thus strongly suggesting that no reconceptualisation of the welfare principle will be required.

149 Harris-Short, above n 143, at 336–7.

150 For a particularly good analysis of the difference between the approach taken under the Children Act 1989 and the approach taken under the Convention, see Herring, above n 133, esp at 228–30.

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under Article 8 ECHR are qualitatively different from the range of factors which will bear upon the best interests of the child. The Convention rights of the parties will prescribe a particular outcome to the case unless that prescribed outcome can be overridden by other considerations in accordance with Article 8(2). In contrast, if one takes the utilitarian welfare approach of section 1 of the Children Act 1989, nobody can claim to have any prima facie entitlement to any particular outcome to the dispute. The Court, using wide discretionary powers, will simply balance all the available evidence pertaining to the welfare of the child to reach its decision on the facts of the particular case in question.[151] The exercise demanded of the judge under Article 8 ECHR, when compared with that under section 1 of the Children Act 1989, is thus, at a fundamental level, quite different and may result in a very different substantive conclusion.

The position taken by Lord Nicholls would be more convincing if the Strasbourg jurisprudence supported an approach whereby, having taken into account the rights and interests of the child's parents, or even the child herself, the child's welfare were to constitute an automatic justification under Article 8(2) for setting aside those rights.[152] If this were to be the case, welfare would, in effect, remain the determining factor and the rights-based approach of the Convention would be rendered superfluous.[153] However, such a position is simply not sustainable when the demands of Article 8(2) and the relevant Convention case law are properly considered.[154] Of central importance to the

[151] Herring, ibid, at 224 and 231. See also, R Bailey-Harris, J Barron, and J Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' *IJLF* 13 (1999), 111, at 111–31.

[152] This argument has again been discussed in greater detail in Harris-Short, above n 143, at 337–8.

[153] Fortin, above n 115, at 252.

[154] In fact the only support in the Convention case law for such an approach is the very recent case of *Yousef v The Netherlands* (Application No 33711/96) [2003] 1 FLR 210, in which the European Court held: 'where the rights under Art 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail . . .' (at [73]). However, the contention that the interests of the child are "paramount" and "must prevail" runs contrary to the clear and undisputed line of authority derived from *Johansen v Norway* (to be discussed below). Significantly, *Johansen* was not discussed by the Court in *Yousef*; the Court relying instead on *Elsholz v Germany* [2000] 2 FLR 486 and *TP and KM v United Kingdom* [2001] 2 FLR 549, neither of which, it is submitted, provides support for the Court's conclusion. Both of the cases cited assert that in carrying out the required balancing of interests under Article 8(2), the best interests of the child will be of 'crucial importance'. However, the Convention case law, whilst recognising this fact, does not suggest 'crucial' equates to rendering the interests of the child 'paramount' as understood in English law. Indeed, *Elsholz* goes on to confirm the approach taken in *Johansen* (the implications of which are discussed below) that: 'a fair balance must be struck between the interests of the child and those of the parent . . . and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent' (at [50]). The *Johansen* approach has also been reaffirmed in the subsequent case of *Hoppe v Germany* (Application No 28444/95) [2003] 1 FLR 384 which, interestingly, relies on *Elsholz v Germany* and *TP and KM v the UK* as authority, not for the paramountcy of the child's welfare, but for the familiar proposition from *Johansen* as cited in full above (at [49]). *Yousef* thus stands as an isolated and weak decision which is very unlikely to signal a major shift in the approach of the European Court to this important issue.

balancing exercise to be carried out under Article 8(2) is the concept of proportionality. The Strasbourg jurisprudence on the meaning of 'proportionality' has made it clear that there must exist a 'fair balance' or 'reasonable relationship' between the 'legitimate aim' pursued by the State and the means which are used to achieve it.[155] This would seem to suggest that whilst action taken to protect the legitimate rights and interests of the child will have the *potential* to justify interfering with the Article 8(1) rights and interests of the child's parent(s), it will not *automatically* do so.[156] In other words, there will be some circumstances in which the interference with the Article 8(1) rights of the parent(s) will be so far-reaching that only particularly strong and weighty welfare considerations will be sufficient to satisfy the 'fair balance' or 'reasonable relationship' requirement of Article 8(2). It is worth stressing again that although, in conformity with the subsidiary role of the Court as expressed in the doctrine of the margin of appreciation, Strasbourg has taken a deferential approach to the domestic Court's determination of how best to balance the child's best interests against the competing rights of the parent(s),[157] that does not affect the domestic Court's duty under the HRA to carry out this balancing exercise in accordance with the Convention's general principles and the minimum standards set down by Strasbourg.

Unfortunately, there is no consideration given to any of this in the judgment of Lord Nicholls. He refers, in passing, to only one Convention case: *Silver v UK*,[158] which, if anything, supports the more rigorous approach to Article 8(2) contended for above. With reference to the meaning of the phrase 'necessary in a democratic society', the European Court in *Silver* simply confirm:

> (a) that the adjective 'necessary' is not synonymous with 'indispensable' neither has it the flexibility of such expression as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' (see the Handyside judgment of 7 December 1976, Series A No 24, p 22, §48);
> (b) the Contracting States enjoy a certain margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (ibid, p 23, §49);
> (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued' (ibid, 22–23, §§48–49).
> (d) *those paragraphs of Articles on the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted. . .* [159] (emphasis added)

Had Lord Nicholls complied with greater diligence to the requirements of

[155] See *James v UK* 8 EHRR 123, at [50]. See also Swindells *et al*., above n 118, at 53.
[156] See Herring, above n 133, at 230.
[157] See the Convention cases cited above, above n 137. See also Herring, op cit, and Fortin, above n 115, at 252.
[158] App No 5947/72 (1983) 5 EHRR 347.
[159] Ibid, at [97].

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section 2 of the HRA, he would have found more helpful guidance, in particular from *Johansen v Norway*,[160] as to how the correct balance should be struck between the individual rights of the parent(s) and the welfare of the child. The paucity of Convention case law referred to in his Lordship's judgment is, however, typical of the private family law cases. It is rare for the judge to refer to the Strasbourg jurisprudence in any great detail before reaching the inevitable conclusion that Article 8 adds nothing to the previous welfare analysis.[161] Where the Convention case law has been referred to, the analysis is incomplete and even inaccurate.

A classic example of the rather haphazard fashion in which the Convention case law is being dealt with in the family law context occurs in the judgment of Thorpe LJ in *Payne v Payne*.[162] His Lordship begins from the position that 'the advent of the Convention does not necessitate a revision of the fundamental approach to relocation applications formulated by this court and consistently applied over so many years'; that approach being to 'apply child welfare as the paramount consideration'.[163] Having carefully articulated the competing rights of 'each member of the fractured family', he thus goes on to assert that 'in balancing them the court must adhere to the paramountcy of the welfare principle'.[164] In seeking to defend this contention, Thorpe LJ first appeals to the rights of the child as recognised under general international law, asserting, incorrectly, that the paramountcy of the child's welfare is enshrined in 'Art 3 (1) of the UN Declaration of the Rights of the Child 1959'. It is assumed by this that Thorpe LJ meant to refer to Article 3(1) of the UN Convention on the Rights of the Child 1989, but, in any event, the Convention only makes the welfare of the child *a primary consideration* and not *the paramount consideration* as he suggests.[165] He then turns to the European Court of Human Rights which he argues 'inevitably recognises the paramountcy principle, albeit not expressed in the language of our domestic statute'.[166] It is certainly clear from the Strasbourg jurisprudence that when carrying out the required balancing exercise under Article 8(2), the welfare of the child will be an important and weighty consideration, even of 'crucial importance'.[167] However, for his assertion that welfare is recognised in the Convention case law as paramount, in the sense of an automatic trump card, Lord Justice Thorpe relies on the following extract from the judgment of the European Court in *Johansen v Norway*:

[160] Above n 137, at [78].
[161] See generally the cases cited above, n 140.
[162] Above n 126.
[163] Ibid, at [35].
[164] Ibid, at [37].
[165] Art 3(1) of the UNCRC provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
[166] Above n 126, at [38].
[167] See, eg *Johansen v Norway* above n 137, at [64]; *Buchberger v Austria* App No 32899/96 (not yet reported) at [38] and *Sahin and Others v Germany*, above n 137, at [40].

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> [P]articular weight should be attached to the best interests of the child . . . which may override those of the parent . . .[168]

Although no pinpoint reference is provided, this extract would appear to have been taken from paragraph 78 of the Court's judgment in which the Court is discussing the need to strike 'a fair balance' between the interests of the child in remaining in public care and those of the parent in being reunited with the child. Assuming this to be correct, it is interesting to note the words which have been omitted from the extract. In full, it actually provides:

> In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent.[169]

The omitted words are of crucial importance. They make clear that, far from making welfare the paramount consideration in the sense of the *automatic* trump card contended for by both Thorpe LJ and Butler-Sloss P, welfare *may* override the interests of the parents *depending on their nature and seriousness.* *Johansen* is thus a clear authority against the paramountcy of the child's welfare as it is traditionally understood in English law. It confirms that under the principle of proportionality there will be certain situations, such as adoption, in which the interference with the rights of the individual are so far-reaching and grave, that only very weighty and substantial welfare considerations will be sufficient to justify that interference.[170] That this is the view of the Court in *Johansen* is absolutely clear given: (i) its implicit rejection of the Norwegian Government's submission that 'in cases such as the present one . . . rather than attempting to strike a 'fair balance' between the interests of the natural parent and those of the child, [the Court] should attach paramount importance to the best interests of the child . . . ';[171] and (ii) its eventual conclusion that Norway had violated Article 8 of the Convention having failed to show that its decision to terminate the mother's parental rights and access to the child corresponded to any 'overrriding requirement in the child's best interests.'[172] Although this use of the *Johansen* judgment may well be due to the way in which the case was argued before the Court,[173] it is nevertheless disappointing that two highly experienced judges of the Court of Appeal should have been led to adopt, what is submitted to be, a fundamentally flawed understanding of the Strasbourg jurisprudence on this crucial issue.

[168] Above n 126, at [39]. Butler-Sloss P also takes the view that *Johansen* is authority for the child's welfare being the 'overriding' consideration. Ibid, at [82].

[169] This has since been reiterated in *Buchberger v Austria*, App No 32899/96, above n 167, at [40] and *Sahin and Others v Germany* above n 137, at [42].

[170] See Harris-Short, above n 143, at 338.

[171] *Johansen*, above n 137, at [76].

[172] Ibid, at [84].

[173] Thorpe LJ refers to the fact that he has taken his review of the authorities from the skeleton argument of counsel. *Payne*, above n 126, at [39].

B. Reflections on the Private Family Law Cases

Since the implementation of the HRA, there have been only a handful of important private family law cases in which the Article 8 rights of the parties have been engaged. It is, however, significant that in two key cases: *Payne v Payne* in the Court of Appeal and *Re B (Adoption: Sole Natural Parent)* in the House of Lords, a very clear message has been sent to the lower courts that the HRA necessitates no change to the traditional welfare-centred approach of domestic family law. This defence of the welfare principle may well be welcomed by many family lawyers who consider its founding role in private family law disputes to be wholly justified. However, now the HRA is in force, the rights of other family members, and indeed the child, cannot simply be ignored. If the paramountcy principle is to survive, it must be defended on its own terms in accordance with the requirements of the HRA and the Convention, not in spite of them.[174] Unfortunately, that has not happened. The reasoning on which the defence of the welfare principle has been based is extremely disappointing. The specific duties placed upon the Court by sections 3, 4, and 6 of the HRA have largely been glossed over or ignored and the demands of the Convention and its case law have not been subjected to careful, rigorous examination. It may well be that the judiciary fear or dislike what such a rigorous examination may reveal. There clearly remains a strong body of opinion that 'rights-based' discourse has no place within private family disputes. However, that battle was lost back in 1998. The Courts now have a duty to reinterpret these issues in terms of the Convention rights of the parties. Unfortunately, to date, they have shown very little willingness to do so.

V. A DEGREE OF APPRAISAL FROM THIS STOCKTAKING

This examination of the key case law demonstrates that there is considerable judicial uncertainty as to the use of this novel constitutional instrument. This is unsurprising and replicates Canadian experience with its statutory Bill of Rights in the 1960s and 1970s.[175] As anticipated, there have been few declarations of incompatibility, and only two have so far resulted in remedial action. There is some disagreement about activism in interpretation using the powerful section 3 rule of construction, or, at least, disagreement on whether to express or disguise such activism. There is some uncertainty over how to

[174] Indeed, the recent decision of the European Court in *Yousef v The Netherlands* may have created some scope for launching a successful defence of the welfare principle within the terms of the Strasbourg jurisprudence—although it should also be said that for the reasons discussed above at n 154, it is view of the authors that *Yousef* would not justify a departure from the established approach as set down in *Johansen* and which has been followed consistently by the European Court thereafter.

[175] See W Tarnopolsky, *The Canadian Bill of Rights*, 2nd edn (Toronto: McLelland and Stewart Ltd., 1973), esp at 14–15, 132–63.

approach statutory provisions which would violate Convention rights only if used in certain ways in certain contexts. One can perceive some desire to fit the HRA within the traditionally British incremental approach as building on developments and trends in common law, rather than as something wholly new. Indeed, the clear indication from the family law cases surveyed in Part Four is a willingness to (mis)read ECHR rights, as explained in ECHR jurisprudence, to preserve traditional approaches. As section 2 demands, the Strasbourg jurisprudence has been grappled with, albeit not always convincingly, and recourse has quite properly been had to case law from Canada and New Zealand, common law countries with rather different Bills of Rights, from South Africa and to the jurisprudence of the JCPC dealing with other Commonwealth Bills of Rights. However, in general the approach has been cautious and tentative rather than radical. But were there many commentators who had expected more?

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