

The impact of the Human Rights Act 1998

1. Sections 2, 3 and 4

1.1 Interpretation and declarations of incompatibility

s.3 interpretive obligation . . .as far as possible. . . .would use of s.3 to reject literalist interpretation mean de facto a redefinition of parliamentary sovereignty ?

s.4 declaration of incompatibility (DoI) if s.3 cannot be used; no effect on validity of law or outcome of case

R v A (2001) (rape evidence) **Lord Steyn** wide view of s.3; s.4 a 'last resort'

Lord Hope narrow view of s.3; court must not 'legislate'

Re S (Care Order) (2001) S.3 must not be used to alter fundamental features of a statutory scheme

Bellinger v Bellinger (2003) Gender reassignment; S.3 should not be used in respect of issues which have wide-ranging implications

Nicol (2004) Public Law Steyn's approach goes beyond interpretation

Kavannagh (2004) Public Law Legitimacy of expansive use of s.3 dependent on particular context

Ghaidan v Mendoza (2004) Same-sex partners: Acceptable to use s.3 to read words in (and out); not a fundamental feature? no wide-ranging implications ?

Lord Steyn Wrong turning? Too many DoIs; use s.3 more assertively

Chandrachud (2014) Public Law Parliament (almost) always responds to s.4 orders with amending legislation

Burden v UK (2008 ECtHR) S.4 is not (yet) an adequate remedy

1.2 Convention articles or convention rights ?

Lord Irvine at second reading Act is not intended to make Convention directly effective

s.2 Domestic courts must take into account (NOT follow) ECHR authority

Horncastle (2009) Ends recurrent practice of equating Convention rights with Convention articles; UK courts will not follow ECtHR if think ECtHR misunderstands domestic law

2. Section 6

2.1 The meaning of 'public authority'

<i>Poplar Housing</i> (2001)	assimilation test; privatised government body
<i>Aston Cantlow</i> (2001 CA) (2003 HL)	Parish council payment; CoA concludes is public authority; established church; tax; HoL reverses; not established church; contract not tax 'Core' and hybrid' distinction
<i>YL</i> (2007)	Contracted out care provider not a public authority or public function; 3-2 judgment; reversed by legislation
<i>Weaver</i> (2009)	Social landlord performs public function when seeking to evict occupant; very significant judgment quantitatively

2.2 'Horizontal effect' - in cases where both parties are private individuals

<i>Ghaidan v Mendoza</i> (2004)	HRA applies if outcome turns on statutory provision
<i>Douglas/ Zeta-Jones</i> (2001)	HRA is not directly effective if outcome turns on common law; but may (indirect effect) shape content of common law
<i>Campbell v MGN</i> (2004)	HRA requires alteration to breach of confidence as common law tort
<i>Venables</i> (2001)	Does not require creation of wholly new common law remedy
<i>Young</i> (2002) <i>Public Law</i>	'Remedial' and 'substantive' horizontality

3. Proportionality

More intensive than *Wednesbury*? If so, how much?

<i>Alconbury</i> (2001)	Intensity of substantive review will vary with context; general economic/social policy = <i>Wednesbury</i> ; individual rights may require more rigorous review
{ <i>Denbeigh High School</i> { <i>Miss Behavin</i> (2007)	HoL reverses CoA holdings that proportionality required structured, legalistic decisionmaking process. This is unrealistic. Proportionality is only concerned with substantive outcomes

Huang (2007)

But approves structured approach in immigration cases

Powell (2011)

And then rejects it in housing cases

Quila (2011)

Very rigorous/intrusive notion of proportionality; '10 questions'

Keyu (2015)

Supreme Court recognises inconsistency in proportionality case law, but declines to resolve it

Knight and Cross (2017)
Judicial Review

'endless proportionality debate trudges on'

4. 'Deference' ?

An initial question ? Should courts assume Parliament/government would not breach Convention Rights
This is conceptually distinct from the proportionality intensity of review issue

Alconbury (2001)

Court will more likely defer (so assume no breach) in general economic or social policy matters than cases involving 'rights of high constitutional importance'

Wilson v First... (2003)

The more the legislation concerns matters of broad social policy, the less ready will a court be to intervene"

Loveland (2015)
Constitutional law...

Improperly conflates hierarchy and function

Allan (2006) *Cambridge LJ*

No role for deference; abdication of judicial duty

5. Future prospects?

Moral entrenchment ?

Conservative party manifestos 2010;2015;2017 propose repeal