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Double-counting deference? The discretionary nature of declarations of incompatibility under the Human Rights Act†

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ABSTRACT

This article argues that utilising the discretionary nature of declarations of incompatibility under section 4 of the Human Rights Act 1998 (HRA) as a form of 'remedial deference' is irreconcilable with the judgment's reasoning in the first instance. Moreover, this manifestation of judicial deference does not align with any existing theory or justification of judicial deference; rather, it is to double-count the deference that has previously been factored into the judicial assessment regarding the compatibility of the provision with the United Kingdom's human rights obligations in the first instance. Instead, the emphasis on the discretionary nature of declarations of incompatibility confuses the court's proper function under the HRA to protect and vindicate human rights while simultaneously respecting parliamentary sovereignty. Judicial references to the concept of 'dialogue' as a means of assuaging concerns of undue deference fail to convince and, on the contrary, add weight to the contention that dialogue obfuscates rather than clarifies the correct role of the judicial function. The case law as to the discretionary nature of section 4 should therefore be treated as anomalous and an unfortunate judicial experiment.

Keywords: declaration of incompatibility; Human Rights Act 1998; deference; dialogue.

INTRODUCTION

In an era of enhanced political hostility towards the judicial protection of human rights by the then incumbent Conservative Party, a line of case law emerged in which judges refused to issue a declaration of incompatibility using section 4 of the Human Rights Act 1998 (HRA), notwithstanding the judgments identifying a breach of the European

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Convention on Human Rights (ECHR).[1] This article argues that utilising the discretionary nature of declarations of incompatibility in this manner as a form of 'remedial deference' is irreconcilable with a judgment's reasoning in the first instance and, moreover, does not align with any principal theory of judicial deference. Instead, the emphasis on the discretionary nature of declarations of incompatibility confuses the court's proper function under the HRA to protect and vindicate human rights while simultaneously respecting parliamentary sovereignty. Judicial references to the concept of 'dialogue' as a means of assuaging concerns of undue deference fail to convince and, on the contrary, add weight to the contention that dialogue obfuscates rather than clarifies the correct role of the judicial function. This risk is particularly pronounced when dialogue is developed as a juridical concept deployed by the courts rather than merely as an analytical concept utilised by constitutional scholars.

The first part of this article introduces the concepts of deference and dialogue. Dialogue – the idea that a judicial determination as to the extent of rights obligations does not create a strict legal compulsion and so does not constitute the 'final say' on the issue – has been hard-wired into aspects of the HRA such as in the declaration of incompatibility under section 4. Likewise, deference – the degree to which courts accord respect to the determination as to the extent of rights by a primary decision-maker such as Parliament – has also been programmed into the HRA and exercised at several points in the judicial reasoning process. While both deference and dialogue raise questions as to the separation of powers and the relation between the courts and the political branches, the concept of dialogue is less clear with regards to the *correct* role of these powers. The second part then explores the case law concerning the discretionary nature of section 4, demonstrating that this discretionary element comes into play in cases where a declaration of incompatibility is conceptualised by the court almost exclusively as demonstrative of judicial power, notwithstanding its lack of impact on the validity of the legislative provision in question. Owing to this view of a declaration of incompatibility as a forceful exercise of judicial power, the refusal to issue one thus constitutes an exercise of remedial deference. Far from being an example of a court having both its cake and eating it, however, part three argues that utilising the discretionary space surrounding section 4 HRA as a form of remedial deference results in inconsistent judgments irreconcilable with the previous reasoning deployed. It is to double-count the deference that has previously been factored into the judicial assessment regarding the

1 For a discussion of the impact of political hostility towards the judiciary in public law cases, see Lewis Graham, 'Has the UK Supreme Court become more restrained in public law cases?' (2024) 87(5) Modern Law Review 1073–1110.

compatibility of the provision with the human rights obligations of the United Kingdom (UK) in the first instance. Consequently, this remedial deference cannot be justified by the principal theories of deference. Moreover, couching such refusals in the language of 'dialogue' has, in essence, enabled this undue judicial deference and lends weight to critiques of dialogue as obscuring the correct function of the separation of powers. The article concludes by contending that the discretionary space around section 4 should be interpreted as empowering rather than constricting the courts. Such empowerment would still respect the separation of powers, and parliamentary sovereignty in particular, owing to the aforementioned hard-wiring of deference into the HRA. Only in highly exceptional cases should a declaration of incompatibility be refused where the court has identified a breach; however, such 'face-saving exercises' may raise as many challenges for judicial legitimacy as they are designed to address. The case law as to the discretionary nature of section 4 should therefore be treated as anomalous and an unfortunate judicial experiment.

DIALOGUE AND DEFERENCE UNDER THE HRA

Dialogue was initially coined by Hogg and Bushell in their seminal article on the Canadian Charter of Rights and Freedoms where they argued that Canadian courts did not have the 'last word' on human rights; rather they were engaged in a 'dialogue' with the legislature as to what rights under the Charter require:

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.[2]

Hogg and Bushell's initial claims as to dialogue therefore were limited exclusively to 'those cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body'.[3] Notwithstanding the narrow scope of this contention, the popularity of the metaphor was swift, with dialogue being transplanted to various different jurisdictions and judicial approaches, and attracting support from across the spectrum of constitutionalist

2 Peter Hogg and Allison Bushell, 'The charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35 Osgoode Hall Law Journal 75–124, 79. While Hogg and Bushell are pivotal in the literature on the Canadian Charter and, later, on the HRA, dialogue as a concept was utilised in the earlier work of Barry Friedman to describe the United States (US) Supreme Court's relation to the political branches. See Barry Friedman, 'Dialogue and judicial review' (1993) 91 Michigan Law Review 577–682.

3 Hogg and Bushell (n 2 above) 82.

thought.[4] On the one hand, political constitutionalists found that conduits for dialogue such as section 4 HRA ensured that the legislature had the final say over the judiciary in human rights cases, while also giving the judiciary the opportunity to signal to Parliament or the Government to 'think again'.[5] Contrastingly, legal constitutionalists who prefer robust judicial protection of human rights and the rule of law found in dialogue an almost irresistible solution to the counter-majoritarian difficulty ostensibly plaguing judicial review.[6] An unelected judiciary could thus express a view as to the compatibility of a legislative provision with human rights obligations while leaving the final say on what – if anything – to do to rectify a breach to the democratic branches.

R (Nicklinson) v Ministry of Justice marked the first moment in which a judge of the UK Supreme Court acknowledged the concept of a dialogue between the courts and Parliament.[7] In *Nicklinson*, the claimants, who suffered from debilitating and terminal illnesses, challenged the absolute criminalisation of assisted suicide under section 2 of the Suicide Act 1961. They sought declarations that those who assisted them to die would not be subject to criminal proceedings; or, alternatively, that the absolute prohibition of assisted suicide was incompatible with the right to privacy under Article 8 ECHR. The judgment contains an array of different perspectives on whether to issue a declaration of incompatibility, which will be discussed further in part two. At this point, it is worth mentioning that Lord Neuberger invokes the concept of dialogue when *refusing* to issue a declaration of incompatibility:

> Dialogue or collaboration, whether formal or informal, can be carried on with varying degrees of emphasis or firmness, and there are times when an indication, rather than firm words are more appropriate and

4 See Aileen Kavanagh, 'The lure and the limits of dialogue' (2016) 66(1) University of Toronto Law Journal 83–120; Eoin Carolan, 'Dialogue isn't working: the case for collaboration as a model of legislative–judicial relations' (2016) 36(2) Legal Studies 209–299.

5 Richard Bellamy, 'Political constitutionalism and the Human Rights Act' (2011) 9(1) International Journal of Constitutional Law 86–111, 111.

6 Hogg and Bushell (n 2 above) 76–79. The idea of the counter-majoritarian difficulty in the US is articulated in Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd edn (Yale University Press 1962). Indeed, Hogg and Bushell's article commences with a discussion of the particularly acute counter-majoritarian difficulty in the US, expressly distinguishing the Canadian Charter from the US form of judicial review that flowed from *Marbury v Madison* (1803) 5 US 137. See also, Jeff King, 'Dialogue, finality and legality' in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue* (Cambridge University Press 2019) 186, 188.

7 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

> can reasonably be expected to carry more credibility. For the reasons just given, I would have concluded that this was such a case.[8]

Lord Neuberger thus contends that dialogue can exist through other means, implying that the formal judicial silence that constitutes his approach in *Nicklinson* in the form of refusing to issue a declaration of incompatibility is one such example. This refusal is justified on the basis of the inherent dialogic nature of the judicial function generally, even outside of formalised mechanisms of 'judicial disapproval'.[9] As such, Hogg and Bushell's original understanding of dialogue is not simply transplanted into UK jurisprudence; it is modified and extended to encompass a scenario where a formalised mechanism of judicial disapproval is not actually utilised.

Dialogue's potential to adapt, change, and encroach beyond the parameters established by Hogg and Bushell can also be seen in HRA jurisprudence concerning the relation between UK courts and the European Court of Human Rights (ECtHR) as distinct from the relation between UK courts and Parliament. In *Horncastle*, decided before *Nicklinson*, dialogue was invoked to justify the Supreme Court departing from the ECtHR judgment in *Al-Kawaja* which found that a conviction secured solely on the basis of hearsay evidence was incompatible with the right to a fair trial under Article 6 ECHR.[10] In suggesting that the Chamber of the ECtHR had failed to consider the overall safeguards in a trial under common law in England and Wales, Lord Phillips hoped that the Supreme Court's judgment would:

> ... give the Strasbourg Court the opportunity to consider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.[11]

When the case was subsequently heard by the Grand Chamber of the ECtHR, it departed from the reasoning of the earlier Chamber, acknowledging the UK Supreme Court's concern about the inflexibility of the rule against hearsay and the need to assess the overall fairness of criminal proceedings.[12] This inter-court dialogue thus has strong echoes of the concept of judicial comity – the idea that courts from different jurisdictions should accord mutual respect for each other's

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8 Ibid para 117.

9 See Neil Duxbury, 'Judicial disapproval as a constitutional technique' (2017) 15(3) International Journal of Constitutional Law 649–670.

10 *R v Horncastle* [2009] UKSC 14.

11 Ibid para 11.

12 *Al-Khawaja and Tahery v United Kingdom* App Nos 26766/05 and 22228/06 (ECHR, 15 December 2011).

opinions and decisions.[13] Respect is key to comity and, it is submitted, dialogue also evokes connotations of respect and of a conversation between equals. Nevertheless, this idea of dialogue as explaining the relation between UK courts and Strasbourg also marks a significant departure from Hogg and Bushell's original and narrow definition of dialogue.

Dialogue's evolutive potential suggests that the concept now suffers from several difficulties. Kavanagh, for example, critiques dialogue as a metaphor in search of a theory but has instead been erroneously deployed by many commentators as a theory in and of itself.[14] The metaphor has been reified, obfuscating the machinery and theory that actually underpins the constitutional functions of the respective branches. For Kavanagh, dialogue gives no clear guidance as to whether a question is appropriate for a court to decide or whether courts should show deference to the legislature. Relatedly, dialogue has also been criticised as misrepresenting the relation between courts and the legislature, positioning them in a relation of hierarchical parity, despite each branch exercising qualitatively different powers. This propensity to flatten relations is underlined by the aforementioned example of dialogue being deployed in *Horncastle* as a means of describing the horizontal relation of comity between the Supreme Court and Strasbourg.[15] Consequently, Carolan takes issue with dialogue as ignoring conflicts between the legislative and judicial branches. Echoes of comity and respect can be seen here again with Carolan arguing that dialogue conceptualises the relationship between the courts and political branches as one of harmonious, co-equal interchange.[16]

Dialogue versus deference under the HRA

This propensity to downplay disagreement and the failure to distinguish the respective constitutional functions of the legislative and judicial branches is illustrated by the overlap between deference and dialogue. In *Nicklinson*, Lord Reed stated that:

> [T]he Human Rights Act 1998 introduces a new element into our constitutional law, and entails some adjustment of the respective

13 For further analysis of the concept of comity between UK courts and Strasbourg, see Merris Amos, 'The principle of comity and the relationship between British courts and the European Court of Human Rights' (2009) 28(1) Yearbook of European Law 503–530.

14 Kavanagh (n 4 above).

15 For further discussion of the relation between UK courts and Strasbourg as it operates under section 2 HRA, see Roger Masterman, 'Supreme, Submissive or Symbiotic? The United Kingdom Courts and the European Court of Human Rights' (UCL Constitution Unit 1 October 2015).

16 Carolan (n 4 above) 221.

> constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy. Accordingly, it does not alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as issues of that character are relevant to an assessment of the compatibility of executive action or legislation with Convention rights, that is something which the courts can and do properly take into account. They do so by giving weight to the determination of those issues by the primary decision-maker. There is nothing new about this point. It has often been articulated in the past by referring to a discretionary area of judgment.[17]

Here, Lord Reed echoes Phillipson's definition of deference as the idea that 'domestic decision-makers, particularly those with democratic pedigree, have a discretionary area of judgment that the courts should respect when reviewing their decisions under the HRA'.[18] Relatedly, Lord Reed's acknowledgment of factors such as expertise, accountability, and legitimacy that underlie the differences between the judiciary and the primary decision-maker reflects Kavanagh's alternative definition of judicial deference as occurring when 'judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy'.[19] Deference thus occurs 'when judges assign a variable degree of weight' to the judgment of the legislature or executive on the basis of these aforementioned factors.[20] Daly terms these two understandings of deference 'doctrinal deference' – the sphere of discretion created by the allocation of authority to make decisions – and 'epistemic deference' – the accordance of weight to these decisions by the judiciary – respectively. Daly's preferred conception of 'curial deference' synthesises these two understandings as a means to ensure that deference amounts to a doctrine of 'respect rather than submission'.[21] As such, Lord Reed's comments reflect many elements of Daly's curial deference.

Phillipson identifies several different ways in which deference may be exercised under the HRA. For example, broad areas of discretion

17 *Nicklinson* (n 7 above) para (Reed L).

18 Gavin Phillipson, 'Deference, discretion, and democracy in the Human Rights Act era' (2007) 60(1) Current Legal Problems 40–78, 68.

19 Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) 126 (April) Law Quarterly Review 222–250, 223.

20 Ibid; see also Aileen Kavanagh, 'Constitutionalism, counterterrorism, and the courts: changes in the British constitutional landscape' (2011) 9(1) International Journal of Constitutional Law 172–199, 175.

21 Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge University Press 2012) 10.

are built into the Convention rights themselves. Furthermore, the application of the margin of appreciation – a key doctrine which the ECtHR utilises to accord deference to national authorities – has been 'smuggled in' to domestic reasoning enabling a further opportunity for deference to open up.[22] Deference also occurs through the HRA's preservation of parliamentary sovereignty owing to the continued validity of the legislative provision subject to a declaration of incompatibility. Deference may also be exercised through the interplay between the interpretive obligation under section 3 and the power to issue a declaration of incompatibility under section 4. Judicial navigation of this interplay demonstrates an acknowledgment of the judiciary's institutional limitations and, as noted, use of section 4 over section 3 can express this limitation. For this reason, Clayton has argued that deference is programmed into the HRA and, should section 3 and section 4 be used appropriately, the need for the judiciary to develop a doctrine of deference is 'less compelling'.[23] Finally, Phillipson argues that the application of a domestic level of a discretionary area of judgment once Strasbourg jurisprudence is applied by the domestic courts provides a further opportunity for deference to be exercised.[24] This latter manifestation of deference may emerge in the context of the application of a proportionality test; however, it is potentially also relevant for the prior question of whether a right has even been interfered with.[25]

Similar instances in which deference can be exercised by courts when adjudicating upon human rights questions have also been identified by Chan who outlines the 'four strategies' of exercising deference as consisting of: rights definition, standard of justification, burden of justification, and cogency of arguments.[26] Chan also breaks down the various formulations of the proportionality test to identify points at

22 This is now happening to such an extent that domestic courts expressly refer to the margin of appreciation when in actuality they are referring to deference. See Alan Greene, 'Closing places of worship and Covid-19: towards a culture of justification?' (2021) 25(3) Edinburgh Law Review 393–400, 396–397.

23 Francesca Klug, 'The long road to human rights compliance' (2006) 57(1) Northern Ireland Legal Quarterly 186–204, 199.

24 Phillipson (n 18 above) 69–71.

25 This form of judicial deference is particularly relevant for limited rights such as the protection of liberty under Art 5 where there is no applicable proportionality test; instead, the central question is whether a particular measure constitutes a restriction or deprivation of liberty. Only if the constraint crosses the degree threshold into deprivation is Art 5 triggered, and the court then moves on to consider whether the deprivation falls within one of the express limitations contained in Art 5.2.

26 See Cora Chan, 'A preliminary framework for measuring deference in rights reasoning' (2016) 14(4) International Journal of Constitutional Law 851–882.

which deference can be exercised through these tests.[27] What is absent from both Chan's and Phillipson's accounts of deference is the concept of remedial deference, although Chan may imply that this is hard-wired into section 4 owing to it aligning with her acknowledgment of deference 'in the formulation of remedies (by handing down a remedy that affords the government room to refashion policies)'.[28] Instead, both Chan's and Phillipson's accounts of deference are focused on the court's reasoning process and, as will be argued below, using the discretionary nature of section 4 as a conduit for deference is inconsistent with this reasoning process.

Deference is acutely concerned with the separation of powers, demanding introspection from the courts as to whether it is constitutionally proper for them to either enquire into a specific question in the first instance, or review how the initial decision-maker acted. Deference thus constitutes a way through which constitutional competence factors, such as democratic legitimacy or expertise, can be accommodated beyond the simple bifurcation suggested by the concept of justiciability or 'political questions'.[29] This dimension of weight results in an understanding of deference as a spectrum with the intensity of judicial scrutiny waxing or waning depending upon the specific question. While dialogue incorporates many of these elements, its flattening of the relationship between courts and Parliament downplays the distinct constitutional roles of these respective branches of government. For Carolan therefore, dialogue is an inaccurate metaphor that does not accurately represent the interactions between the legislature and the judiciary over rights. Carolan instead proffers 'collaboration' as an alternative to dialogue with a view to maintaining the creative potential of disagreement that is, in his view, integral to this relationship.[30] As we will see, using the discretionary nature of declarations of incompatibility as an additional conduit for judicial deference not only does not align with accounts of deference in the literature, it also adds weight to these critiques of dialogue.[31]

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27 Ibid 857.

28 Ibid 854.

29 Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 113–115. The extreme end of this deference spectrum aligns with what B V Harris terms 'secondary justiciability' – decisions that are *prima facie* amenable to judicial review but that the decision taken may only be overturned if the body taking the decision acts in clear disregard of the constitution. See B V Harris, 'Judicial review, justiciability, and the prerogative of mercy' (2003) 62(3) Cambridge Law Journal 631–660.

30 Carolan (n 4 above).

31 See Conall Mallory and Helene Tyrrell, 'Discretionary space and declarations of incompatibility' (2021) 32(3) King's Law Journal 466–496.

THE DISCRETIONARY NATURE OF SECTION 4

The discretionary nature of section 4 is indicated by the statutory language of the HRA. Unlike section 3 HRA which states that the court must interpret legislation compatibly with the ECHR, section 4 shirks this language of obligation. Instead, if the court is satisfied that the provision is incompatible with a Convention right, 'it may make a declaration of that incompatibility'.[32] Such a declaration, however, does not affect the validity of the legislation in question, ensuring that parliamentary sovereignty endures.[33] This non-binding effect underpins the HRA's status as a 'third way' or 'third wave' document for the judicial protection of human rights. It situates the HRA between, on the one hand, political constitutionalism that eschews judicial review of rights-based concerns and legal constitutionalism in which judges are empowered to strike down legislation as unconstitutional, on the other.[34] Instead, section 4 enables the judiciary to issue an authoritative pronouncement as to the nature and application of human rights in a given case but democratic space is still preserved 'for any of us to join in the debate about where the line should be drawn when rights collide'.[35]

The interplay between section 3 and section 4 is fundamental to the operation of the HRA as it delineates the limits of the interpretive obligation under section 3. In *R v A (Complainant's Sexual History)*, Lord Steyn stated that 'a declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so.'[36] Accordingly, and to the chagrin of many, section 41 of the Youth Justice and Criminal Evidence Act 1999 was controversially interpreted in such a way as to permit what *prima facie* appeared to be inadmissible evidence concerning the previous sexual history between the accused and the complainant.[37] In a robust dissent, Lord Hope argued that the majority interpretation went too far, stating that he

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32 HRA, s 4(2).

33 HRA, s 4(6).

34 See Francesca Klug, 'The Human Rights Act – a "third way" or "third wave" Bill of Rights' (2001) (4) European Human Rights Law Review 1361–1526.

35 Ibid 370.

36 *R v A (Complainant's Sexual History)* [2001] UKHL 25, para 44 (per Slynn L).

37 For criticism of *R v A*, see Richard Ekins, 'A critique of radical approaches to rights consistent statutory interpretation' (2003) European Human Rights Law Review 641–650, 646–648; Danny Nicol, 'Are Convention rights a no-go zone for Parliament?' (2002) 3(Autumn) Public Law 438–448, 441–444; Clare McGlynn, '*R v A (No 2)*' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) ch 12; Judicial Power Project, '50 Problematic Cases' (Policy Exchange nd).

> ... would find it very difficult to accept that it was permissible under section 3 of the Human Rights Act 1998 to read in to section 41(3)(c) a provision to the effect that evidence or questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible.

He further contended that:

> ... the rule is only a rule of interpretation. It does not entitle the judges to act as legislators ... The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible.[38]

Similar views were echoed by Lord Bingham in *R (Anderson) v SSHD* where he declared that to use section 3 HRA to interpret section 29 of the Crime (Sentences) Act 1997 to preclude the statutory role of the Home Secretary in parole decisions would amount to 'judicial vandalism' rather than judicial interpretation.[39] Much of the subsequent case law and academic commentary on sections 3 and 4 focused on analysing this distinction between legislating and interpreting to stress-test the limits of section 3 and identifying when section 4 should be deployed instead. In the first decade of the HRA, debate abounded as to whether *R v A* was the high-water mark of the courts' willingness to utilise section 3 and whether subsequent judgments indicated a shift in preference towards section 4.[40] From this, section 4's status as a 'measure of last resort' could be understood as closely connected to the limits of the interpretive obligation contained in section 3. Relatedly, arguments in favour of increased use of section 4 were often framed in terms of the limits of section 3, with those favouring the political sphere as the more legitimate forum for the resolution of disputes over rights advocating for greater use of section 4.[41] Through the course of this debate, a declaration of incompatibility could be understood as an express acknowledgment of the limitations of the judicial function with section 3 arguably constituting the greater interference with parliamentary sovereignty.

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38 *R v A* (n 36 above) 86–87.

39 *R (Anderson) v SSHD* [2003] 1 AC 837, para 30 (Bingham L).

40 For competing perspectives on this debate, see Danny Nicol, 'Statutory interpretation and human rights after *Anderson*' (2004) 2(Summer) Public Law 274–282; and Aileen Kavanagh, 'Statutory interpretation and human rights after *Anderson*: a more contextual approach' (2004) 3(Autumn) Public Law 537–545.

41 Nicol (n 40 above) 279.

A breach of the Convention but no declaration of incompatibility

While the relation between sections 3 and 4 reveals the limits of the interpretive obligation under section 3, it does not follow that this relation also demarcates the limits of section 4; that is, it does not necessarily explain when a court should refuse to issue a declaration of incompatibility, even if a breach of the Convention has been identified and the use of section 3 is deemed inappropriate. Indeed, this question can only arise after section 3 is rejected as a viable option. Nevertheless, the discretionary nature of section 4 does appear to become a live issue for the judiciary in instances where section 4 is conceptualised as an expression of judicial power rather than an acknowledgment of the limitations of the judicial function. Cases where there is minimal possibility of using section 3 in the first instance thus result in a conceptualisation of section 4 as an exercise of judicial power rather than restraint. Other factors such as the declaration applying to a lacuna in the law rather than a statutory provision *per se*, or the probability of Parliament not responding to the declaration and undermining the court, may also be conceptualised in this manner by the courts as a forceful exercise of judicial power when refusing to issue a declaration of incompatibility.

Chester v Secretary of State for Justice; McGeoch v The Lord President of the Council and Another (Chester and McGeoch)[42]

In *Chester*, the claimants sought a declaration of incompatibility regarding section 3 of the Representation of the People Act 1983 and the blanket ban on prisoner enfranchisement. There was no possibility of a Convention-compatible interpretation as the Grand Chamber of the ECtHR in *Hirst (No 2) v UK* had already made it clear that the blanket ban was incompatible with the obligation on states to protect free elections under Article 3 of Protocol 1 of the Convention.[43] This was then followed by the Scottish Registration Appeal Court in *Smith v Scott* issuing a declaration of incompatibility.[44] In *Chester*, however, the Supreme Court refused to use section 4, with Lady Hale finding that to do so would be to issue it *in abstracto*. The ECtHR's ruling in *Hirst* pertained to a blanket ban on prisoner-voting; it thus envisaged a scenario where certain categories of prisoners could be disenfranchised in compliance with the ECHR. Prisoners convicted of life sentences could be one such example and the claimants in this case were such prisoners.

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42 *Chester and McGeoch* [2013] UKSC 63.

43 *Hirst v United Kingdom (No 2)* App No 74025/01 (ECHR, 10 October 2005).

44 *Smith v Scott* [2007] SC 345.

While this *in abstracto* dimension of a declaration of incompatibility is undoubtedly relevant to the discretionary nature of section 4 and will be discussed below, Lord Mance, elaborated further, arguing that the declaration of incompatibility issued in *Smith v Scott*:

> ... entitled the Government to use the remedial order provisions contained in section 10 of the Human Rights Act. The Government decided not to do this ... The issue is now however before the United Kingdom Parliament and under active consideration ... A declaration is a discretionary remedy, both generally and under the Human Rights Act 1998, section 4(4). There is in these circumstances no point in making any further declaration of incompatibility.[45]

Lord Mance thus emphasises the futility of a declaration of incompatibility in this instance as a key reason why the Supreme Court refused to make such a declaration. The courts had already spoken; Parliament heard them and, nevertheless, decided to do nothing. In essence, the limited effect of a declaration of incompatibility issued by a lower court was adduced as an additional reason to not use section 4. The Supreme Court was able to save face in an area of high political contentiousness by avoiding a similar fate befalling it. At the same time, however, the Supreme Court's refusal may have left the lower court isolated, potentially weakening any politically persuasive effect of its declaration of incompatibility.

R (Nicklinson) v Ministry of Justice[46]

No question as to the *in abstracto* status of a declaration of incompatibility arose in *Nicklinson* – the aforementioned case concerning the absolute prohibition on assisted dying. As noted, this case constituted the first acknowledgment of dialogue between the legislature and the judiciary. While the claimants did adduce arguments based on the interpretive obligation under section 3 HRA, these were perfunctorily rejected by all judges and so there was no realistic possibility of section 3 HRA being utilised.[47] The resulting judgments of the nine-judge Supreme Court are a menagerie of varying perspectives on the question of assisted dying. These judgments can be grouped into three separate categories: the four members of the majority who found no breach of the Convention and refused to second-guess Parliament's decision to prohibit assisted dying absolutely; the

45 *Chester and McGeoch* (n 42 above) para 39 (Lord Mance).

46 *Nicklinson* (n 7 above).

47 Ibid para 130. This argument entailed that a person charged with assisting the applicant to die could rely on the doctrine of necessity to avoid criminal liability. The Supreme Court rejected this as being a 'revolutionary step which would be wholly inconsistent with both recent judicial dicta of high authority, and the legislature's intentions'.

remaining three members of the majority who did find a breach of the Convention but, nevertheless, refused to issue a declaration of incompatibility; and, finally, the two dissenting judges who found a breach and would have issued a declaration of incompatibility.

The incongruous result of *Nicklinson* is that a bare majority of five found that section 2 of the Suicide Act 1961 was incompatible with the Convention but, simultaneously, a larger majority of seven refused to issue a declaration of incompatibility. The second category of judgments – those which identified a breach of the Convention but nevertheless refused to issue a declaration of incompatibility – were pivotal as to the case's ultimate outcome. Lord Neuberger's refusal to issue a declaration of incompatibility in *Nicklinson* places a heavy emphasis on the discretionary nature of section 4, downplaying the novelty of such a refusal by drawing on judicial remarks in *Bellinger v Bellinger*.[48] *Bellinger* concerned the validity of a marriage between a man and a transgender woman and consideration was given as to the practicalities of government and the pragmatic justification of leaving an offending law in operation for a reasonable period pending enactment of corrective legislation.[49] Lord Neuberger in *Nicklinson* also underlined 'considerations of proportionality in the context of institutional competence and legitimacy',[50] and on the fact that the court is dealing with 'a difficult, controversial and sensitive issue, with moral and religious dimensions, which undoubtedly justifies a relatively cautious approach from the courts'.[51]

There are several difficulties with Lord Neuberger's approach to section 4. Firstly, his invocation of *Bellinger* as an authority for not issuing a declaration of incompatibility is confusing, as in *Bellinger*, section 4 was in fact used. Additionally, the emphasis he places on the 'difficult, complex and sensitive issue' before the court and 'considerations of proportionality in the context of institutional competence and legitimacy' are arguments that he has already considered under the first-order question of whether section 2 of the Suicide Act 1961 is compatible with the Convention. Evaluating these considerations under the second-order question of whether a declaration of incompatibility should be issued after already finding a violation of the Convention is contradictory. Essentially, Lord Neuberger uses the discretionary nature of section 4 HRA as a conduit for judicial deference. Deference has, however, already been exercised when considering the first-order question of whether the absolute

48 *Bellinger v Bellinger* [2003] UKHL 21.
49 *Nicklinson* (n 7 above) para 114 (Lord Neuberger).
50 Ibid para 115.
51 Ibid para 116.

prohibition on assisted dying was in breach of the Convention.[52] Indeed, deference was exercised on this point to such an extent by other judges in the majority such as Lord Sumption that they reached the conclusion that the question at hand was to all intents and purposes non-justiciable and 'a classic example of the kind of issue which should be decided by Parliament'.[53]

Lord Neuberger further cautions against issuing a declaration of incompatibility on the basis of the impact that it would have. He distinguishes *Nicholson* from *Re G* – a case concerning the prohibition on opposite sex, unmarried couples from adopting in Northern Ireland – as, in that case, 'the incompatibility is simple to identify and simple to cure'.[54] Remedying the offending statutory provision in *Nicklinson*, however, is not so clear-cut:

> [W]hether, and if so how, to amend section 2 would require much anxious consideration from the legislature; this also suggests that the courts should, as it were, take matters relatively slowly.[55]

In essence, it is difficult to see how this is not a restatement of the first justification; namely that it is a question that the judiciary should be deferential towards the legislature.

By his own admission, however, this is simply a restatement of the first reason to not issue a declaration of incompatibility. He continues to give a more distinct reason as to the inappropriateness of section 4:

> section 2 has ... been considered on a number of occasions in Parliament, and it is currently due to be debated in the House of Lords in the near future; so this is a case where the legislature is and has been actively considering the issue.[56]

Again, like in *Chester*, this may be an example of face-saving by the court, forestalling any possibility of Parliament disagreeing with it. Nevertheless, it is unclear why the fact that Parliament is due to debate the issue in the near future should count against a declaration of incompatibility. On the contrary, the fact that 'Parliament was actively considering the issue' was given as a reason *for* issuing a declaration of incompatibility in *Bellinger*. In *Bellinger*, Lord Hope argued that

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52 While I refer to 'deference', Gearty does make a distinction between 'deference' and 'restraint' with judicial restraint referring to the competence of the judicial branch to adjudicate on a matter. Nevertheless, both 'deference' and 'restraint' do overlap as both concepts refer to the proper constitutional role of the judiciary and its relation to the political branches. Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) 119–120, 141–145.

53 *Nicklinson* (n 7 above) para 230 (Sumption L).

54 Ibid para 116 (Neuberger L); *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38.

55 *Nicklinson* (n 7 above) para 116.

56 Ibid.

'problems of great complexity would be involved if recognition were to be given to same sex marriages' through the use of section 3.[57] Using section 4 in *Bellinger* allowed for what Lord Neuberger in *Nicklinson* referred to as 'anxious consideration from the legislature' rather than detracting from it.[58] Despite these problems with Lord Neuberger's judgment, however, his utilisation of the discretionary nature of section 4 to refuse a declaration of incompatibility was taken up by Court of Appeal judges in subsequent cases.

Steinfeld v Secretary of State for International Development[59]

In *Steinfeld v Secretary of State for International Development*, the claimants challenged the Civil Partnership Act 2004 on the grounds that denying civil partnerships to opposite sex couples constituted a discriminatory breach of the right to privacy and family life under Article 8 ECHR when read in conjunction with prohibition on discrimination under Article 14 ECHR. Like *Chester* and *Nicklinson*, there was no real possibility of using section 3 HRA due to the unambiguous wording of the Civil Partnership Act 2004 as applying to same-sex couples only. The central issue therefore was whether there was a breach of the claimants' rights and, if so, whether a declaration of incompatibility should be issued. While the majority of the Court of Appeal found that there was a potential breach, this was justified by the Secretary of State's 'wait and see policy' – that there was as yet insufficient evidence available to evaluate the proportionality of the prohibition on the rights of opposite-sex couples.[60] Consequently, the breach was not yet disproportionate, although this position could change in the future. The majority thus exercised judicial deference, with respect for Parliament's assessment of the justification of the legitimate aim for the interference being factored into the proportionality assessment.

In contrast, Arden LJ disagreed and found that the breach was not justified by this 'wait and see' policy. Nevertheless, she refused to issue a declaration of incompatibility:

> The Civil Partnership Act (Amendment) Bill 2015 is currently before Parliament. It is clear that Parliament will be informed of this Court's judgments. It is entirely a matter for Parliament to decide whether any change to the bar should be made. In addition, as the Secretary of State is likely to wish to consider the appropriate policy for the future, taking

57 *Bellinger* (n 48 above) para 69.

58 *Nicklinson* (n 7 above) para 116 (Neuberger L).

59 *Steinfeld v Secretary of State for International Development* [2017] EWCA Civ 81.

60 Ibid para 102 (CA).

> account of the points in this Court's judgments. In those circumstances, I would not make a declaration of incompatibility.[61]

Consequently, Arden LJ rejects the majority's deferential appraisal of the proportionality of the interference but then utilises the discretionary nature of section 4 as a conduit for deference nonetheless. Like *Nicklinson* and *Chester*, Arden LJ's reliance on the fact that the issue was before Parliament as a reason for not issuing a declaration of incompatibility is highly unpersuasive as in *Bellinger* this was adduced as a reason in favour of the use of section 4. The second point – that the Secretary of State would have regard to court judgments regardless – echoes Lord Neuberger's claims in *Nicklinson* that dialogue can be 'formal or informal' and 'can be carried on with varying degrees of emphasis or firmness'.[62] The difficulty with this conception of dialogue, however, is that it negates the very *raison d'être* of section 4 as any exercise of the judicial function could be understood as dialogue.

The Supreme Court, however, unanimously issued a declaration of incompatibility.[63] On the question of the suitability of section 4, Lord Kerr stated that:

> The amendment to Mr Loughton's Bill [the Civil Partnership Act (Amendment) Bill 2015] which the government has agreed does no more than formalise the consultation process to which it was already committed. It does not herald any imminent change in the law to remove the admitted inequality of treatment. Even if it did, this would not constitute an inevitable contraindication to a declaration of incompatibility …[64]

Emphasising that a declaration of incompatibility does not oblige the Government or Parliament to do anything, he concluded that:

> In my view, there is no reason that this court should feel in any way reticent about the making of a declaration of incompatibility. To the contrary, I consider that we have been given the power under section 4 of HRA to do so and that, in the circumstances of this case, it would be wrong not to have recourse to that power.[65]

Secretary of State for Business and Trade v Mercer[66]

This Supreme Court attempt to contain the discretionary nature of section 4 seen in *Steinfeld* continued in *Secretary of State for Business and Trade v Mercer*. Here, the Court of Appeal refused to

61 Ibid para 131 (Arden L).
62 *Nicklinson* (n 7 above).
63 *Steinfeld v Secretary of State for International Development* [2018] UKSC 32.
64 Ibid para 58.
65 Ibid para 61.
66 *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.

issue a declaration of incompatibility concerning the lack of protection afforded to employees taking action short of a strike under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The Court of Appeal held that it would not be appropriate to grant a declaration of incompatibility because the case involved a lacuna in the law rather than section 146 TULRCA *per se*, and the Court of Appeal concluded that a declaration of incompatibility must be made against a specific legislative provision. Moreover, the Court of Appeal stressed that the extent of the incompatibility was unclear, echoing Lord Neuberger's concerns in *Nicklinson* as to the array of options open to Parliament to cure the defect amounting to a reason *not* to issue a declaration of incompatibility.[67]

While expressing 'some sympathy' for the Court of Appeal, the Supreme Court, however, rejected this argument.[68] Instead, it found that 'section 146 is the only provision which limits the common law in this context and has the implicit effect of legitimising sanctions short of dismissal imposed for participation in a lawful strike, thus putting the UK in breach of Article 11'.[69] Moreover, even if there had been a lacuna, section 4 could still be used, as was the case in *Bellinger*. The Supreme Court further rejected the conclusion reached by the Court of Appeal that the options available to Parliament to cure the incompatibility 'are far from being binary questions'.[70] Instead, the Supreme Court concluded that:

> Questions of policy will have to be addressed and evaluated, their practical ramifications considered, and a fair balance struck between all the competing interests at stake. But the existence of policy choices in the means of giving effect to lawful strike rights protected by Article 11 is a reason in favour of making a declaration of incompatibility, not refusing one. It is for Parliament to decide whether to legislate and, if so, the scope and nature of such protection.[71]

A common thread?

This line of case law concerning the discretionary nature of section 4 has been described by Adams as applying in 'controversial cases'.[72] It is suggested here that this 'controversial' element manifests in the case law through: the limited possibility of using section 3; that the declaration

67 Ibid para 6.
68 Ibid para 116.
69 Ibid.
70 Ibid paras 111 and 88 (CA).
71 Ibid para 120.
72 See Elizabeth Adams, 'Judicial discretion and the declaration of incompatibility: constitutional considerations in controversial cases' (2021) 2(Spring) Public Law 311–333.

may apply to a lacuna in the law as distinct from a specific legislative provision; or the array of options open to Parliament to cure the defect should a declaration be issued. All three of these factors point to the discretionary nature of section 4 coming into play when a declaration of incompatibility is conceptualised as an expression of rather than as a constraint on judicial power. In cases where section 3 is in play, the principal issue before the court is one of drawing a distinction between legislating and interpretation. Here, section 4 becomes a means of constitutional acknowledgment that the responsibility to resolve this breach lies with Parliament. In cases where the possibility of utilising section 3 is minimal, however, this deferential dimension of section 4 falls away; instead section 4 is conceptualised exclusively as vesting a significant power in the judiciary and, in turn, raising questions as to the legitimacy of this power should the judiciary choose to exercise it. In such cases, judges refusing to issue a declaration of incompatibility appear to consider the use of section 4 to be a constitutionally inappropriate expression of judicial activism. This activist conception of section 4 is further underlined when Parliament has recently considered the provision in question or is actively considering it at the time the judgment is issued.[73] Even in cases where section 3 was in play, such as in *Mercer*, the Court of Appeal's concern for how Parliament would fix this incompatibility and the issue of whether it applied to a lacuna, rather than a statutory provision, further underlines this understanding of section 4 as an expression of strong judicial power demanding a response from Parliament. By refusing to use section 4, therefore, the court is, in essence, exercising a form of 'remedial deference' and avoids placing what the court considers to be undue pressure on Parliament to rectify a complex situation. As we shall see, however, this understanding of section 4 confuses the proper role of the courts in protecting human rights under the HRA and constitutes a 'double-counting' of deference. Moreover, loosely couching this refusal in terms of 'dialogue' fails to assuage these concerns.

73 See text to n 98 below for a discussion of the *obiter* remarks in *Kelly v Secretary of State for Work and Pensions* [2024] EWCA Civ 613 concerning the possibility of refusing to issue a declaration of incompatibility when Parliament had previously considered a similar or identical declaration and refused to act upon it.

DOUBLE-COUNTING DEFERENCE AND THE DISCRETIONARY NATURE OF SECTION 4

As Adams notes, Parliament's possible responses to a declaration of incompatibility feeds into the judicial discretionary space surrounding section 4.[74] Adams thus contends that the possibility of Parliament failing to respond positively to a declaration of incompatibility may be a factor considered by the courts when refusing to issue one. Such a refusal may be a defensive posture, allowing the courts to protect their institutional reputation and ensuring the continued persuasive strength of the declaration of incompatibility. It may therefore be the case that failure to issue a declaration of incompatibility is a means through which the strength of the remedy can be protected. This persuasive fortitude of declarations of incompatibility is stressed by sceptics of judicial review such as Tushnet who argues that, as legislatures are highly unlikely not to implement a finding of formal judicial approval, soft-form judicial review mechanisms such as declarations of incompatibility may essentially evolve into *de facto* strong-form judicial review.[75] Writing in 2008, Leigh and Masterman made similar observations about the *de facto* binding status of declarations of incompatibility under the HRA, suggesting that: 'If there is a dialogue at all, it is one in which the judicial voice is beginning to be heard the loudest.'[76] The *de facto* binding nature of a declaration of incompatibility raises the question of whether a constitutional convention exists that the political branches will take steps to remedy.[77] Writing in 2015, King suggests that there is evidence of an emerging constitutional convention of a response by the Government and Parliament to declarations of incompatibility.[78]

74 Ibid 314.

75 See Mark Tushnet, 'Policy distortion and democratic debilitation: comparative illumination of the counter-majoritarian difficulty' (1995) 94 Michigan Law Review 245–301.

76 Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act 1998 in its First Decade* (Hart Publishing 2008) 118. The similarities between strong and weak form judicial review are not exhausted by the *de facto* effects of a declaration of incompatibility; Kavanagh contends that the interpretive power under s 3 essentially means that statutory Bills of Rights like the HRA 'seem to give Parliament the last word, whilst nonetheless giving the courts powers of constitutional review, not hugely dissimilar from those possessed by the US Supreme Court'. See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 418; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013) 181.

77 *Kavanagh* (n 76 above) 289.

78 Jeff King, 'Parliament's role following declarations of incompatibility under the Human Rights Act' in Murray Hunt, Hayley J Hooper and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 165, 167.

King's conclusions are tentatively expressed, however, owing to the brief period examined dating from the entry into force of the HRA, and the few declarations that had been actually issued.[79] Therefore, far from an admission of a servile or deferential court, utilising the discretionary nature of declarations of incompatibility could be an expression of judicial power; it is the court keeping its powder dry for a more opportune moment in the future, aware of the profound political implications that a declaration of incompatibility may have.

Mallory and Tyrrell, however, reject this contention, arguing instead that the discretionary space around declarations of incompatibility has led to a shrinking of the power afforded to the judiciary.[80] This shrinkage is largely due to the fact that the failure to issue a declaration of incompatibility despite a breach being identified is due to a perceived 'legitimacy deficit' and judges tending to 'tie themselves in knots attempting to fulfil the purpose of the regime in a manner which is not overly upsetting to Parliament'.[81] Rather than an expression of judicial power, refusal to issue a declaration of incompatibility therefore constitutes an act of judicial deference. Using the discretionary dimension of section 4 as a conduit for deference, however, cannot be reconciled with the principal theories of deference. If one utilises Kavanagh's understanding of deference as the manner in which the judiciary accords respect to the primary decision-maker by giving weight to their initial conclusions, exercising deference on the discretionary aspect of section 4 double-counts the deference that has already been exercised in assessing whether there was a disproportionate breach of rights in the first instance. Relatedly, if one approaches deference from Phillipson's perspective as of a discretionary area of judgment, then finding a breach of the Convention in the first instance essentially means that the decision-maker – in this instance Parliament – strayed beyond this discretionary area. This remains the case even if a declaration of incompatibility is not issued; the fact that the decision-maker is a sovereign parliament should also be irrelevant as this has already been hard-wired into the non-binding effect of a declaration of incompatibility. The resulting judgment therefore is logically unstable, regardless of the pragmatic factors taken into account. This inconsistency of such remedial deference has distinct

79 As acknowledged by King, while it is certainly possible to conduct an empirical examination to assess the degree to which Parliament has implemented legislative responses to give effect to declarations of incompatibility or inconsistency, the sample size is invariably small. This is also the case in relation to trying to identify trends in the use of declarations of incompatibility over time, something Kavanagh cautions against, owing to the importance of contextual variables in specific cases concerning the use of ss 3 and 4. See Kavanagh (n 40 above).

80 Mallory and Tyrrell (n 31 above).

81 Ibid 495.

'overtones of servility' as distinct from constituting an acknowledgment of a declaration of incompatibility's strength.[82]

Undue deference, dialogue and the discretionary nature of section 4

Adams argues that there exist two zones of decisional space around section 4: a judicial decisional space and a political one.[83] The judicial decisional space concerns the discretion afforded to the judiciary under section 4 regarding whether to issue a declaration in the first place and the political decisional space refers to the political response to this declaration. In this judicial decisional space, judges often anticipate how a declaration of incompatibility would be received in the political space. Here, what Adams terms 'constitutional considerations' come into play, such as deference to Parliament, institutional defensiveness, uncertainty regarding the proper focus of review, and the significance of Strasbourg's impact on the domestic courts.[84]

Again, however, these constitutional considerations have also been considered at the earlier stages of judicial reasoning when the court is assessing whether there is, in fact, a breach of the Convention. If there is an understanding of remedial deference under section 4, then considerations regarding how the political decisional space would respond to a declaration seeping into the judicial decisional space may result in such a doctrine of remedial deference constituting 'hollow vessels, guided and filled by all the circumstances of the individual case to which they are ostensibly applied'.[85] Remedial deference under section 4 thus runs the risk of what Cohn describes as judges 'finding shelter' from accusations of politicisation by deploying legalistic language.[86] Writing about decision-making in the administrative state, Cohn contends that:

> ... the more detailed and elaborate the [legal] formula, the greater its distancing potential: a complex, highly structured formula requires judges to jump through several hoops, which serve as a signal of judicial commitment to the application of complex, professional, even clinical processes that have nothing much to do with the political.[87]

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82 Daly (n 21 above) 9; *R (ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 AC 185, 240 (Hoffmann L).

83 Adams (n 72 above).

84 Ibid 317.

85 Ernest Gellhorn and Glen Robinson, 'Perspectives on administrative law' (1975) 75(4) Columbia Law Review 771–799,780; Daly (n 21 above) 32.

86 Margrit Cohn, 'Form, formula and constitutional ethos: the political question/justiciability doctrine in three common law systems' (2011) 59(3) American Journal of Comparative Law 675–713, 683; Daly (n 21 above) 33.

87 Cohn (n 86 above).

The discretionary space around section 4 is ill-suited for technocratic depoliticisation, however. The aforementioned factors that Adams outlines are deeply political and the inconsistency evident in the case law on the discretionary nature of section 4, discussed above and also flagged by Adams, is a testament to this. This is further underlined by the highly contextual specificity of section 4 and its relation to section 3 which, according to Kavanagh, should cause us to pause for thought before trying to identify broad trends favouring section 4 over section 3 and *vice versa*.[88] Therefore, far from depoliticising the judiciary, utilising the discretionary space surrounding section 4 runs the risk of encouraging pre-emptive political criticism; it damages political respect for the judiciary rather than amounting to an expression of judicial respect towards the political branches.

The idea of remedial deference through section 4 HRA therefore should be rejected. However, as we have seen, the discretionary use of section 4 has also been justified through the judicial invocation of dialogue. Like deference, respect is also fundamental to the idea of dialogue, with the judicial branch 'listening' to the respective branches and *vice versa*. Unlike dialogue, however, deference tends to be contextualised as a one-way street. It refers to the judiciary's approach to the legislative or executive branches and the degree of respect the judiciary must afford the primary decision-maker before making its judgment, having regard to both the institutional factors affecting the legitimacy of the primary decision-maker and the judiciary itself. Deference is thus more self-reflective than the concept of dialogue and requires consideration of the distinct constitutional functions of the respective institutions. These distinct constitutional functions may be downplayed by a dialogic conception of the relation between legislature and judiciary. For instance, Arden LJ contends in *Steinfeld* that the Secretary of State would have regard to the court's reasoning, regardless of whether a declaration of incompatibility was issued. This dialogic line of reasoning, however, would be salient for any case in which a court is asked to make a declaration of incompatibility, so it is difficult to see what is unique about the issue in *Steinfeld* as distinct from cases where the courts did use section 4. Indeed, it would be relevant for *any* exercise of the judicial function, for example, where a court issues an *obiter dicta* remark inviting Parliament to address a

88 Kavanagh (n 40 above).

certain issue.[89] Here, a dialogic understanding only confuses rather than clarifies the relation between the legislature and the judiciary.

In contrast, were one to approach this issue through the lens of judicial deference, the correct role of the judiciary has already been factored into the various stages of assessment as to whether the legislation is compatible or not. Therefore, to avoid double-counting this deference, a declaration of incompatibility should be issued. While dialogue may thus be a useful (albeit highly questioned) tool for constitutional theorists in terms of describing the relation between the legislature and judiciary, it is submitted that its development as a juridical concept and the prescriptive implications that this would entail should be resisted, not least because its prescriptive implications are so unclear. It facilitates the use of the discretionary nature of section 4 as a conduit for deference, resulting in a highly unstable approach that vacillates between assuming and abdicating a role for the court in scrutinising a legislative decision. It double-counts the deference afforded to the legislative branch at the expense of the human rights of the individual claimants, meaning that even if the claimant manages to cross the dauntingly high hurdles of demonstrating that a law interferes with a Convention right, that there is no possibility of a Convention-compatible interpretation of the legislative provision, and that such an interference is disproportionate, they can still be denied a remedy – a remedy that does not actually affect the validity of the provision in question.[90] It also risks kicking the can further down the road, increasing the chances of a case being taken to Strasbourg and undermining the very *raison d'être* of the HRA as bringing rights home. Further, any judgment of the ECtHR finding a breach would be binding in international law. The UK would be legally required to respond to this breach which would defeat the entire purpose of the remedial deference exercised by the domestic court to refuse to issue a declaration of incompatibility in the first place.

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89 In *R v Gul*, for example, the Supreme Court issued a powerful condemnation of the breadth of the definition of terrorism contained in s 1 of the Terrorism Act 2000. This definition involves 'Parliament abdicating a significant part of its legislative function to an unelected DPP', and further that 'such a device leaves citizens unclear as to whether or not their actions … are liable to be treated by the prosecution authorities as effectively innocent or criminal'. Despite this rebuke, however, Parliament took no action whatsoever. To suggest therefore that this constitutes dialogue on a par with a declaration of incompatibility is to stretch the notion of dialogue too far. See *R v Gul* [2013] UKSC 64, para 36; Alan Greene, 'The quest for a satisfactory definition of terrorism: *R v Gul*' (2014) 77(5) Modern Law Review 780–793, 787–790.

90 Indeed, the ECtHR does not consider a declaration of incompatibility to be an effective remedy under Art 13 ECHR. It is for precisely this reason that Art 13 was not incorporated into UK domestic law by the HRA.

WHAT DISCRETIONARY SPACE IS LEFT?

This article has argued that the discretionary nature of section 4 is an inappropriate conduit for judicial deference and, further, that a juridical development of the concept of dialogue should be resisted. Subsequent Supreme Court cases such as *Steinfeld* and *Mercer* perhaps suggest that an expansive approach to the discretionary nature of section 4 to justify refusing declarations may be on the wane. Nevertheless, the discretionary nature of section 4 is clearly articulated in the statutory language. It is submitted therefore that, when the judiciary identifies a violation of the Convention, it should only consider the refusal to issue a declaration of incompatibility when to issue one would be *in abstracto*. That stated, the discretionary nature of section 4 could also point to an expansive rather than restrictive approach to section 4.

In abstracto declarations

In *Re Northern Ireland Human Rights Commission*, the Supreme Court rejected an application by the Northern Ireland Human Rights Commission (NIHRC) to issue a declaration of incompatibility concerning Northern Ireland's abortion regime.[91] The claim centred on the prohibition of abortion even in circumstances of serious malformation of the foetus and pregnancies as a result of rape or incest as being in breach of Article 8 – the right to private and family life – in conjunction with Article 14 – prohibition on discrimination – and Article 3 – the prohibition on torture or inhuman and degrading treatment or punishment. A majority of the Supreme Court found that the NIHRC lacked standing to take the case and so the Court had no jurisdiction to issue a declaration of incompatibility when the claimant lacks standing.[92] Despite this, however, a majority of the Court also issued an *obiter dictum* that the current law was in breach of Article 8, aligning with Lord Neuberger's contention that 'dialogue or collaboration whether formal or informal, can be carried on with varying degrees of emphasis or firmness'. This can be contrasted with the conclusions of Lady Hale in *Chester*, where she expressly stated that the HRA does 'leave open the possibility of a declaration *in abstracto*' but that a court should be 'extremely slow' to do so.[93] In *Re NIHRC*, however, Lady Hale found that the NIHRC did have standing and her

91 *In the matter of an application by the Northern Ireland Human rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland)* [2018] UKSC 27.

92 For a discussion of this case, see Jane Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82(3) Modern Law Review 525–548.

93 *Chester* (n 42 above) para 102.

dissenting judgment offers a compelling case as to why a declaration of incompatibility should be issued:

> Parliament has expressly given the higher courts the power to rule upon the compatibility or incompatibility of legislation with the Convention rights. Parliament did not say, when enacting section 4 of the HRA, 'but there are some cases where, even though you are satisfied that the law is incompatible with the Convention rights, you must leave the decision to us'. Parliamentary sovereignty is respected, not by our declining to make a declaration, but by what happens if and when we do.[94]

As such, all that a declaration on incompatibility should do is to 'place the ball in Parliament's court'.[95] Respect for the supremacy of Parliament was meant to be built into the nature and effect of section 4. Similar views were echoed by Lord Kerr who stressed that: 'It is to be remembered that a declaration of incompatibility does no more than indicate to the appropriate legislative body that a statutory provision has been deemed to be inconsistent with citizens' Convention Rights.'[96]

To reiterate, Lady Hale and Lord Kerr (with whom Lord Wilson agreed) were in the minority, and the majority in *Re NIHRC* appear to suggest that a declaration of incompatibility cannot be issued if the claimant does not have standing. This would mean that a declaration of incompatibility could never be issued *in abstracto*, and, if this is correct, the discretionary nature of section 4 would only come into play once a clear breach of the Convention in a matter relevant to the 'forensic dispute' between the parties in question was identified. In essence, this would entail the approaches of Lord Neuberger in *Nicklinson* or Arden LJ in *Steinfield*; approaches which, for the reasons outlined above, are misguided. It would be to corroborate Mallory and Tyrrell's assertion that acknowledgment of the discretionary space around section 4 is symptomatic of the shrinking of the judicial power.[97] In contrast, Lady Hale's approach in the dissenting opinions of *Re NIHRC*, *Nicklinson* and then in the unanimous Supreme Court judgment in *Steinfeld* is that the discretionary nature of section 4 only comes into play in the context of *in abstracto* declarations and that such declarations, although not impossible, should be issued sparingly. Failure to issue a declaration of incompatibility also raises the further possibility of a claimant subsequently taking a case to the

94 Ibid para 39.

95 Ibid para 40.

96 Ibid para 300 (Kerr L). Lord Kerr also sought to distinguish Lord Neuberger's judgment in *Nicklinson* on the basis that Parliament was not about to consider the Northern Irish prohibition on abortion; nor would a declaration of incompatibility amount to a *volte face* in this case unlike in *Nicklinson* where the court had previously considered the absolute prohibition on assisted suicide.

97 Mallory and Tyrrell (n 31 above).

ECtHR. While a declaration of incompatibility does not prevent this, as a claimant could still bring a case to the ECtHR in the event that Parliament chooses not to remedy the breach, it has nevertheless been the case that legislative reform has followed the vast majority of declarations of incompatibility.

An expansive approach to section 4?

In addition, 'may' in section 4 can potentially be interpreted as having an expansive, rather than a restricting, effect on the use of section 4. As Stark argues, it is not *prima facie* clear from a reading of the HRA that the courts should only issue section 4 declarations on the basis of the facts of the case before them; that is, they should not issue them *in abstracto* or on the basis of an *actio popularis*.[98] Stark thus argues for an expansive use of section 4 beyond cases where a breach has been identified on the basis of the facts of the case in question and suggests that there are examples of this in practice.[99] The courts have themselves acknowledged this possibility. In *Secretary of State for the Home Department v Nasseri* the House of Lords stated that:

> The making of a declaration of incompatibility, like any declaration, is a matter for the discretion of the court: see *R (Rusbridger) v Attorney-General* [2004] 1 AC 357. I would not therefore wish to exclude the possibility that in a case in which a public authority was not, on the facts, acting incompatibly with a Convention right, the court might consider it convenient to make a declaration that if he had been so acting, a provision of primary legislation which made it lawful for him to do so would have been incompatible with Convention rights. But such cases, in which the declaration is, so to speak, an obiter dictum not necessary for the decision of the case, will in my opinion be rare.[100]

It is understandable that a court in a strong-form judicial review system with the power to invalidate legislation may take a strict approach to standing or *actio popularis* challenges. Such fundings of unconstitutionality result in laws being declared *void ab initio*,

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98 See Shona Wilson Stark, 'Facing facts: judicial approaches to section 4 of the Human Rights Act 1998' (2017) 133(Oct) Law Quarterly Review 631–655.

99 In *Miranda*, the Court of Appeal found that the exercise of the stop and search power in sch 7 of the Terrorism Act 2000 was lawful. Nevertheless, the Court of Appeal still issued a declaration of incompatibility on the grounds that the stop and search power in para 2(1) of sch 7 was not subject to adequate safeguards and therefore was incompatible with Art 10 ECHR – right to freedom of expression – so far as it pertained to journalistic materials. As s 4 can have a role in purging the statute book of non-conforming provisions as distinct from providing justice in the instant case in question. See [2016] EWCA Civ 6; Stark (n 98 above) 646–647.

100 *Secretary of State for the Home Department v Nasseri* [2009] UKHL 23.

creating a legal vacuum with potentially dramatic consequences.[101] Therefore, courts in strong-form judicial review systems will develop strict rules on standing, even in instances where a law has already been invalidated,[102] 'reach constitutional issues last',[103] and deploy a 'double-construction rule' which prefers a constitutional interpretation over an unconstitutional interpretation of a statute where this is possible.[104] Irish courts, inspired by their Canadian counterparts, have also been delaying the declaration of unconstitutionality, giving the legislature time to rectify the issue so as to avoid a legal lacuna.[105] Judges have also invoked 'dialogue' while referring to this delaying practice, suggesting that dialogue may have some juridical utility; however, the similarities between delayed declarations of unconstitutionality and a declaration of incompatibility must not be overstated.[106] Declarations of unconstitutionality are a measure of last resort, not least because of their consequences: finding a statutory provision *void ab initio* creates a legal vacuum, and thus it constitutes the nuclear option. However, it does not necessarily follow that judicial approaches to mechanisms of review such as the declaration of incompatibility under the HRA should mirror those seen in strong-form review systems. Certainly, there are some similarities largely due to the fact that they are legislatively prescribed. For example, the section 3 interpretive obligation mirrors to an extent the double-construction rule seen in Ireland; however, the nuclear option of a finding of unconstitutionality does not map on to section 4 HRA, seeing as there is no legal lacuna created. Consequently, the risks to legal certainty of an expansive approach to section 4 vis-à-vis an expansive approach to findings of unconstitutionality in strong-form review systems are considerably lower.

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101 For example, in *CC v Ireland* [2006] IESC 33, the Irish Supreme Court found that s 1(1) of the Criminal Law (Amendment) Act 1935 which criminalised statutory rape was unconstitutional because it precluded the offence of honest mistake. This raised the possibility of every person convicted under this offence being released on the grounds that they were convicted of an offence that never existed. A subsequent Supreme Court judgment in *A v Governor of Arbour Hill Prison* [2006] IESC 45 limited the effects of the finding of unconstitutionality to those who had standing to make the argument pertaining to honest mistake.

102 *A v Governor of Arbour Hill Prison* (n 101 above).

103 *M v An Bord Uchtála* [1977] IR 287, 293.

104 *McDonald v Bord na gCon* [1965] IR 217, 239.

105 See *NHV v Minister for Justice and Equality* [2017] IESC 35. The issue of delayed/suspended declarations of unconstitutionality in Ireland are given substantial judicial examination by O'Donnell CJ in *Henegan v Minister for Housing, Planning and Local Government* [2023] IESC 18.

106 *A v Governor of Arbour Hill Prison* (n 101 above) para 34 (Denham J); Oran Doyle and Tom Hickey, 'The use of foreign law in Irish constitutional adjudication' in Giuseppe Franco Ferrari (ed), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (Brill 2019) 69, 86.

What space is there for remedial deference?

Despite subsequent judicial attempts at reigning in experiments with the discretionary nature of section 4, the possibility of it operating as a conduit for remedial deference still remains; specifically, with regards to whether a further declaration of incompatibility is appropriate if Parliament has already responded to address the incompatibility previously identified. The manner in which Parliament responded to *Steinfeld* came before the courts in *Kelly v Secretary of State for Work and Pensions*.[107] The applicant was refused a claim for bereavement benefits under sections 36 and 39B of the Social Security Benefits and Contributions Act 1992 on the basis that she was not married or in a civil partnership. She had been in a long-term opposite-sex relationship with her late partner but they had never married for 'personal reasons'.[108] The Upper Tribunal found that there was sufficient evidence to demonstrate that there was a real risk that the appellant and her partner would have entered into a civil partnership had that been an option for them.[109]

The Court of Appeal found that there was no breach as the objection was not the inability to be in a civil partnership; rather, it centred on not being treated as in one.[110] However, even if there had been a breach, Elisabeth Laing LJ contended that it would not be appropriate to issue a declaration of incompatibility. *Steinfeld* had already been addressed by Parliament, and the offending provisions relating to benefits had been 'largely repealed' and only in force, 'pursuant to transitional provisions, for very limited purposes'.[111] To make a further declaration of incompatibility therefore:

> ... in relation to two statutory provisions which are clinging onto the statute book, if at all, by the slenderest of threads, would not be an appropriate use of the power, when, in substance, Parliament and the Secretary of State are aware of the real past incompatibility which underlies this complaint, and have remedied it.[112]

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107 *Kelly v Secretary of State for Work and Pensions* [2024] EWCA Civ 613

108 Ibid para 7.

109 Ibid.

110 Ibid paras 79–81; see also Charlotte O'Brien and Tom Royston, 'No incompatibility in effects of historic treatment of unmarried heterosexual couples' (2024) 31(3) Journal of Social Security Law D67.

111 *Kelly* (n 107 above) para 2.

112 Ibid para 83 (Elisabeth Lang LJ). Underhill LJ at para 95 clarifies Elisabeth Laing LJ's remarks by stating that it would not be appropriate for the court to make a declaration the only purpose of which would be to encourage the Government and Parliament to reconsider that decision as distinct from predicting whether Parliament is likely to respond positively to such a declaration. Elisabeth Laing LJ confirms that this is the correct reading of her judgment at para 84.

Ultimately, the offending provisions were almost historical and only in effect in extremely narrow circumstances, and for this reason it would not be appropriate to issue a declaration as it would make no meaningful difference in practice.[113]

There appear therefore to be two circumstances given in *Kelly* for when it would not be appropriate to issue a declaration of incompatibility following the identification of a breach. The first reason is in circumstances where Parliament is aware of a breach but has nevertheless decided not to act. Here, the discretionary nature of section 4 operates as a conduit for deference and an attempt at legitimacy-saving, with the court not wishing to raise the issue again before Parliament. Nevertheless, the aforementioned difficulty with this approach still remains; namely, the fact that a claimant may still bring a case before Strasbourg, and the incoherence of this outcome with the reasoning on the merits of the case. There is also the possibility that the failure to issue a declaration of incompatibility could actually cause confusion and frustrate Parliament's will as other decision-makers step into the breach to clarify this confusion.[114] While this may not be the case where Parliament has expressly refused to address the declaration of incompatibility, it may be relevant where the refusal is *implied* from the extent of the response Parliament took to the previous declaration.

The second circumstance raised by *Kelly* is when the declaration would apply only to extremely narrow circumstances. This appears to be an attempt to temper the significance of leaving a breach unrectified; however, it would still remain the case that the Court would have identified a breach of the Convention but issued no formal declaration of incompatibility, and it is arguably unclear as to why the extent of the incompatibility matters. On the contrary, a narrower incompatibility is likely to be easier to rectify by Parliament or by a remedial order from Government.[115] A narrower incompatibility is also less likely to be politically controversial, and so the legitimacy risks to the court are likely to be less.

A third circumstance for refusing a declaration may also be identified in *Kelly*, with Elisabeth Laing LJ declaring that 'if the reasons why I would have held that any discrimination is justified somehow do not

113 Lewis Graham, 'Discretion and declarations of incompatibility' (2025) Public Law 24, 27.

114 For example, Shona Wilson Stark argues that judicial refusal to issue a declaration of incompatibility in *Beghal v DPP* [2015] UKSC 49 could create confusion over the maximum length of permissible detention under sch 7 of the Terrorism Act 2000. The judiciary or other relevant public authorities therefore may try to step in to clarify this question rather than passing the issue back to Parliament for consideration. See Shona Wilson Stark, 'Section 4 of the Human Rights Act 1998: still standing, or standing still?' (*UKCLA Blog* 16 November 2022).

115 HRA, s 10(2).

amount to justification they are, nevertheless, relevant to the exercise of the s 4(1) power'.[116] For Graham, this 'curious passage' suggests that 'the strength of a human rights case, or the extent to which an infringement can be justified, might influence the judges' decision as to whether a declaration of incompatibility is issued following a finding of a breach'.[117] A declaration of incompatibility is already more a systemic remedy rather than providing just satisfaction to an individual claimant, so it is unclear as to why the trivial impact this would have on a claimant should matter. An analogy could potentially be drawn with the concept of 'significant disadvantage' in the admissibility criteria of the ECtHR.[118] But the appropriateness of importing an analogous concept into domestic law is deeply suspect. The 'significant disadvantage' criterion is itself contentious at the ECHR level but was implemented to tackle the ECtHR's extreme docket crisis, and defended on the basis of the subsidiary nature of the Court.[119] Such factors are not relevant to a domestic court and, indeed, the subsidiary nature of the ECtHR operates on the basis that domestic authorities are the primary defenders of human rights. As an admissibility criterion, it also operates to deny an applicant a full decision on the merits of their case; to apply a similar concept at the end of a case after the applicant is found to have standing and *after* a breach has been identified would be incoherent. Moreover, this scenario hinted at by Elisabeth Laing LJ is almost the polar opposite to that before the Court of Appeal in *Kelly*. There, had her case been proven, the applicant would have suffered a significant individual loss – namely benefit entitlements – but the systemic impact of a declaration of incompatibility would have been limited owing to the 'extremely narrow circumstances' in which it would have applied.

Of the three circumstances outlined by *Kelly*, it is submitted that Parliament's refusal to address the incompatibility is the strongest reason for refusing to issue a further section 4 declaration. At best, this may be understood as an exceptional, legitimacy-saving tool at a court's disposal and, like all exceptions, the extent of its contours are axiomatically difficult to map.[120] However, the core issues with this still remain; namely, the dangers of double-counting deference again at the remedial stage, the incoherence with the reasoning on the merits of the claim, and the fact that a case may still be brought before

116 *Kelly* (n 107) para 84.

117 Graham (n 113) 30–31.

118 Art 35.3(b) ECHR.

119 See Nikos Vogiatzis, 'The admissibility criterion under Article 25(3)(b) ECHR: a "significant disadvantage" to human rights protection?' (2016) 65(1) International and Comparative Law Quarterly 185–211.

120 Greene (n 29 above) 31.

Strasbourg. Moreover, this reasoning suggests that dialogue does not continue indefinitely. Once a court has spoken, *Kelly* suggests that it would be inappropriate for the court to speak again. In turn, this raises questions as to whether such refusals would be legitimacy-saving exercises, or perhaps encouraging Parliament and the Government to continue pushing back.

CONCLUSIONS

Judicial acknowledgment of concepts such as the 'dialogic' nature of the HRA has coincided with a notable reluctance of some members of the judiciary to issue a declaration of incompatibility, despite finding a violation of the Convention.[121] This juridical acknowledgment of dialogue has become entangled with the concept of judicial deference through the discretionary nature of section 4, confusing both the concepts of dialogue and deference alike. Ultimately, while dialogue may be a useful concept for constitutional scholars in explaining and examining the relation between the legislature and judiciary, its broad contours and potential applicability to an array of various manifestations of judicial power and its relation to other political branches or even international courts makes it ill suited for its development as a juridical concept.

In contrast, deference is a more coherent concept, requiring reflection on the separation of powers and the correct role of the courts. However, a doctrine of deference cannot coherently explain the approach taken to the discretionary nature of section 4. This remedial deference in the form of refusing to issue a declaration of incompatibility is irreconcilable with the reasoning of the judgment in the first instance; it is to double-count deference and compounds judicial genuflection towards the political branches of government. As such, judicial experimentation with the discretionary nature of section 4 as a means of refusing a declaration should end. At most, such refusals in the face of an identifiable breach should only come into play in exceptional circumstances, as a means of saving legitimacy in the face of a Parliament that refuses to act on a previous declaration. However, such face-saving exercises bring with them their own legitimacy challenges and are likely to raise just as many questions as they purport to answer.

121 *Nicklinson* (n 7 above).