1. Introduction

The Bill of Rights Bill ("the Bill") seeks to re-balance two important relationships: that of the UK courts and the European Court of Human Rights ("Strasbourg"), and that of the UK courts and Parliament.[1] This is a direct response to two long held (but contestable) grievances against the Human Rights Act: that it gives supremacy both to Strasbourg over the UK courts and the UK courts over Parliament.[2] These perceived imbalances are addressed by making clear that the UK Supreme Court (UKSC) is the ultimate arbiter on Convention rights within domestic law,[3] removing the strong interpretive powers that are conferred by s3(1) HRA and obliging the courts to defer more heavily to the balances struck by Parliament between policy aims and/or Convention rights.[4] This essay will consider how these provisions are likely to take effect, concluding that: the Bill in its current form will entirely fail to re-balance the relationship between Strasbourg and the UK Courts and that it risks tilting the balance between the UK courts and Parliament too far in favour of the latter. In light of those conclusions, appropriate amendments are proposed to achieve the right balance in each case.

2. The relationship between the UK courts and Strasbourg

The Bill makes clear that the UKSC is the "ultimate judicial authority"[5] on the interpretation of the rights in Schedule 1 and is free to diverge from Strasbourg.[6] This is subject to the caveat that it may not extend a right unless it has "no reasonable doubt" that Strasbourg would.[7] The Bill *requires* regard to the text of the Convention right, rather than Strasbourg jurisprudence,[8] and *permits* regard to the preparatory work and the development of any analogous common law right.[9] As explained below, none of the Bill's provisions will achieve any re-balancing – in totality they merely reassert the existing relationship.

Departures from Strasbourg are already permitted by the HRA. The rights in Schedule 1 HRA are technically distinct from those in the ECHR. As such, they must be defined in a domestic context, which may diverge from their international counterpart.[10] s2(1) obliges courts to "take into

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[1] Bill of Rights HC Bill (2022–23) [117] cl 1(2)(a)–(c).
[2] C Gearty, *On Fantasy Island* (OUP 2016) chs 6–7.
[3] Bill of Rights Bill (n 1) cl 1(2)(a).
[4] ibid cl (2)(b)–(c).
[5] ibid cl 3(1).
[6] ibid cl 3(3)(b) and cl 1(1).
[7] ibid cl 3(3)(a).
[8] Cf Human Rights Act 1998 s 2(1).
[9] Bill of Rights Bill (n 1) cl 3(2)(a)–(b).
[10] Lord Kerr, 'The UKSC - The Modest Underworker of Strasbourg?' (Clifford Chance Lecture, London, 25 January 2012) <https://www.supremecourt.uk/docs/speech_120125.pdf> accessed 1 September 2022 19–20. See also Baroness Hale, 'Law Lords at the Margin' (JUSTICE Tom Sargant memorial annual lecture, London, 15 October 2008) <https://justice.org.uk/law-lords-at-the-margin/> accessed 1 September 2022 8.

account", not "follow" or "give effect to", any Strasbourg jurisprudence.[11] This indicates that jurisprudence is not binding[12] and implicitly anticipates that it may be departed from in some circumstances.[13]

The explanatory notes to the Bill portray an outdated view of s2(1) – that the UK courts closely follow Strasbourg jurisprudence.[14] This description *was* once apt. Lord Slynn's dicta in *Alconbury*, that any "clear and constant" Strasbourg jurisprudence should be followed,[15] coupled with Lord Bingham's dicta in *Ullah* that Strasbourg should be kept pace with, "no more, but certainly no less",[16] led to an attitude of subordination to Strasbourg, epitomised by Lord Rodger's famous comment – "*Argentoratum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed."[17] This period was a "false start".[18] The courts have now departed from Strasbourg several times and their reasons for doing so do not appear limited.[19] This is judicial recognition that the two sets of rights (domestic and ECHR) are distinct.[20] Examples include *Hallam*, where Strasbourg jurisprudence was decried as "hopelessly and irretrievably confused",[21] *Poshteh*, where *Ali v UK* was scathingly critiqued, particularly for the judgment's failure to consider its practical implications,[22] and *Horncastle*,[23] where Strasbourg was criticised for the lack consideration it gave to the application of its principle on the right to examine a witness in a common law system and to the procedural safeguards available to defendants in the UK.[24]

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[11] Lord Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237, 239.
[12] ibid.
[13] Lord Kerr (n 10) 20–21. *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [44] (Lord Scott).
[14] Bill of Rights HC Bill (2022–23) [117–EN], para 5.
[15] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26].
[16] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20].
[17] *Secretary of State for the Home Department v AF (FC)* [2009] UKHL 28, [2010] 2 AC 269 [98]. R Masterman, 'Roger Masterman: The Mirror Crack'd' (UK Constitutional Law Blog, 13 February 2013) <https://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/> accessed 1 September 2022.
[18] C Gearty, 'The Human Rights Act Should Not Be Repealed' (UK Constitutional Law Blog, 17 September 2016) <https://ukconstitutionallaw.org/2016/09/17/conor-gearty-the-human-rights-act-should-not-be-repealed/> accessed 1 September 2022.
[19] Masterman (n 17); L Graham, 'Taking Strasbourg jurisprudence into account' (2022) 2 EHRLR 168–170; L Graham, 'The Modern Mirror Principle' [2021] PL 523 524–534; A Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP 2009) 150–152; A Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who Decides about Rights after Re P' (2009) 72 MLR 832–834
[20] F Klug and H Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights', (2010) 6 EHRLR 621 627–629.
[21] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279 [85] (Lord Wilson). See further Graham, 'The Modern Mirror Principle' (n 19) 530–533.
[22] *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36, [2017] AC 624 [36] (Lord Carnwath); *Ali v United Kingdom* [2015] ECHR 924. See further Graham (n 21) 529–533.
[23] *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.
[24] ibid [11], [94], [107]–[108] (Lord Phillips).

Cl3(3)(a) too will fail to re-balance the relationship between the UK courts and Strasbourg. It might have done so prior to *Elan-Cane*,[25] albeit by imposing further limitations on the powers of the UK courts. In *Re G*, the majority considered, *obiter*, that even if Strasbourg would not find the unequal treatment in question unjustified discrimination under Article 14 with Article 8, the courts could determine the UK's position within the margin of appreciation and issue a declaration of incompatibility.[26] Cl3(3)(a) would preclude that result because it "expands the protection conferred by the right" despite the court anticipating that Strasbourg would not do so.[27] The same could be said of *Re McLaughlin*.[28] In *Shackell v UK*, Strasbourg had concluded that married and unmarried widowers were not in analogous situations.[29] Lady Hale disagreed, arguing *Shackell* was not conclusively against this conclusion.[30] Lord Mance's concurring judgment went further, calling for *Shackell* to be overruled.[31] Either approach would be impermissible under cl3(3)(a) as in both there is room for "reasonable doubt"[32] that Strasbourg would not adopt that interpretation. *Elan-Cane* extinguished the prospect of any further such rulings by expressly rejecting the *dicta* in *Re G*.[33] While Lord Reed did acknowledge that the UK courts can exceed Strasbourg, he was careful to point out that they may only do so when following a trend in Strasbourg's jurisprudence.[34] *McLaughlin* is the anomaly.[35]

The Bill's drafters might envisage that, by directing the UK courts to consider the text of the Convention right and the preparatory work,[36] rather than Strasbourg's jurisprudence,[37] the UK courts will have greater freedom to depart from Strasbourg. In reality, this is unlikely for two reasons. First, because Schedule 1 replicates the ECHR, the Convention rights will continue to have a "dual status" – domestic and international.[38] While technically distinct, the domestic Convention rights cannot be divorced from their international source.[39] When interpreting these rights, UK

[25] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133.
[26] *Re G (A Child) (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [32]–[38] (Lord Hoffmann), [50] (Lord Hope), [118]–[120] (Lady Hale), [126]–[130] (Lord Mance).
[27] Bill of Rights Bill (n 1) cl 3(3)(a).
[28] *Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250.
[29] *Shackell v United Kingdom* App no 45851/99 (ECtHR, 27 April 2000).
[30] *McLaughlin* (n 28) [28].
[31] ibid [49].
[32] Bill of Rights Bill (n 1) cl 3(3)(a).
[33] *Elan-Cane* (n 25) [108].
[34] ibid [101], [103]–[104].
[35] A Deb, 'Re McLaughlin: Normalising the Departure from Strasbourg?' (UK Constitutional Law Blog, 3 September 2018) <https://ukconstitutionallaw.org/2018/09/03/anurag-deb-re-mclaughlin-normalising-the-departure-from-strasbourg/> accessed 1 September 2022.
[36] Bill of Rights Bill (n 1) cl 3(2)(a).
[37] Cf Human Rights Act (n 8) s 2(1).
[38] Kavanagh 'Strasbourg, the House of Lords or Elected Politicians: Who Decides about Rights after Re P' (n 19) 835; Kavanagh *Constitutional Review Under the UK Human Rights Act* (n 19) 156.
[39] ibid.

courts will therefore also be interpreting the Convention and be minded to achieve consistency.[40] The courts may also be motivated by judicial comity.[41] Though free to depart from Strasbourg under the HRA, this led the courts not to do so absent strong reasons.[42]

The second reason is that the courts will be minded not to set the UK up for failure before Strasbourg. While the UKSC has declined to follow Strasbourg, the primary rationale for this has been to generate dialogue with Strasbourg.[43] On several occasions, UK courts have successfully changed Strasbourg's mind.[44] Where this is unlikely, because Strasbourg's position is "clear and constant",[45] the UK courts are more reluctant to diverge.[46] The relevance of the UK's international obligations is clear from *AF*, in which Lord Hoffmann considered *A v UK* wrong, but nevertheless acceded to it to avoid placing the UK in breach of its Convention obligations.[47] This factor has particular relevance for cases won against the UK, to which the UK is bound to abide.[48]

Fourth and finally, cl3(2)(b) permitting regard to the development of any analogous common law right will incur no change, as the courts already do so before considering any Convention-based claim.[49]

2.1. Recommended amendments

A genuine re-balance could be achieved by removing cl3(3)(a). By reversing *Elan-Cane*, this would fully deliver on the promise of making the UKSC the ultimate authority on the domestic Convention rights and allow the UKSC to progress them, as well as reign them in.

3. The relationship between the UK courts and Parliament

Three features of the Bill are relevant to this relationship. First, it explicitly removes the s3(1) obligation of the Human Rights Act for courts to read legislation compatibly with Convention rights

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[40] ibid; *Animal Defenders International* (n 13) [46] (Lord Scott).

[41] M Amos, 'The Principle of Comity and the Relationship between British Courts and the European Court of Human Rights' (2009) 28(1) YEL 503 505.

[42] ibid.

[43] *Horncastle* (n 23) [11] (Lord Phillips); *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [48] (Lord Neuberger); *Hallam* (n 21) [172]–[174] (Lord Reed); *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [34] (Lord Mance), [137] (Lord Sumption).

[44] *Horncastle* (n 23) and *Al-Khawaja v United Kingdom* ECHR 2011–VI 191; *R v McLoughlin* [2014] EWCA Crim 188, [2014] 1 WLR 3964 and *Hutchinson v United Kingdom* App no 57592/08 (ECtHR, 17 January 2017).

[45] *Alconbury* (n 15) [26] (Lord Slynn).

[46] *Ullah* (n 16) [20] (Lord Hoffmann); *Pinnock* (n 43) [48] (Lord Neuberger); *Chester* (n 43) [26] (Lord Mance).

[47] *AF* (n 17); *A v United Kingdom* ECHR 2009-II 137.

[48] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 46.

[49] R Masterman and S Wheatle, 'A common law resurgence in rights protection?' (2015) 1 EHRLR 57 58, 60–64. See *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [46] (Lord Mance), [133] (Lord Toulson) and *A v BBC* [2014] UKSC 25, [2015] AC 588, [57] (Lord Reed).

so far as possible.[50] Second, the Bill stipulates that, when a Convention right is balanced against a legitimate aim, the courts must "give the greatest possible weight to the principle that, in a Parliamentary democracy", this balance should be struck by Parliament.[51] Third, the Bill continues to provide immunity to legislation, and any action expressly authorised by it, from any legally effective challenge.[52]

3.1 Section 3(1) HRA

The Bill seeks to restores the "habitual manner of statutory interpretation" so that, where a statute is not Convention compliant on orthodox principles of statutory interpretation, the issue is remitted to Parliament.[53] s3(1) arguably never undermined Parliamentary sovereignty, because its very use gave effect to Parliamentary intent as of 1998.[54] Nevertheless, s3(1) certainly did allow the courts to give a different meaning to a statute from that which it would have had under orthodox principles of statutory interpretation,[55] even contrary to the express wording of statute,[56] albeit within the confines of interpretation (not legislation)[57] and consistency with the fundamental features of the legislative scheme.[58] In this sense, it undermined the intention of the enacting Parliament, and handed power to the courts.

Removing s3(1) will lead two common law principles of interpretation to resurface: the principle of legality and the presumption that Parliament does not intend to legislate contrary to its treaty obligations.[59] However, these will likely provide weaker powers of interpretation than s3(1). The first principle holds that, "In the absence of express language or necessary implication to the contrary" Parliament is presumed not to have authorised the infringement of basic rights,[60] including the Convention rights.[61] The latter holds that legislation will be construed compatibly

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[50] Bill of Rights Bill (n 1) cl 1(2)(b).
[51] ibid cls 1(2)(c) and 7(1)(b)-(2)(b).
[52] ibid cls 10 and 12(2); cf Human Rights Act (n 8) ss4 and 6(2).
[53] Bill of Rights HC Bill (2022–23) [117–EN] para 7.
[54] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [26] (Lord Nicholls), [40] (Lord Steyn); Ministry of Justice, *Independent Human Rights Act Review* (2021) para 66.
[55] Kavanagh, *Constitutional Review Under the UK Human Rights Act* (n 19) 335; Independent Human Rights Act Review (n 54) para 63.
[56] ibid 54–59.
[57] ibid 60–67; Independent Human Rights Act Review (n 54) para 51.
[58] ibid 59–62; Lord Irvine, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] PL 308 320.
[59] B Coxon, 'Human Rights at Common Law: Two Interpretive Principles' (2014) Statute Law Review 35(1) 35 43.
[60] *R v Secretary of State for the Home Dept, Ex p Simms* [2000] 2 AC 115, [1999] 3 WLR 328 131 (Lord Hoffmann); *R v Secretary of State for the Home Dept, Ex p Pierson* [1998] AC 539, [1997] 3 WLR 492 575 (Lord Browne-Wilkinson).
[61] *R (Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36, [2004] 1 AC 604 [27] (Lord Steyn).

with the UK's treaty obligations,[62] but only where it is ambiguous.[63] The principle of legality is feistier, requiring that any rights-infringing intent be evident as a matter not just of reasonable but *necessary* implication.[64] This ensures that Parliament "must squarely confront what it is doing and accept the political cost".[65] Unlike s3(1), though, it is trumped by clear statutory language.[66] Using s3(1), the courts have been able to look beyond statutory terms, provided the construction goes with the grain of the legislative scheme.[67] While there has been some *dicta* envisaging a bolder principle of legality,[68] developing the common law in this way would conflict with Parliament's intention in repealing the HRA.[69] Removing s3(1) will therefore see more issues remitted to Parliament than resolved in the courts but the principle of legality will ensure that rights-infringing legislation continues to receives full political scrutiny. To this extent, the balance is satisfactory.

Will weakening the courts' interpretive powers truly re-balance their relationship with Parliament if this only increase the number of declarations of incompatibility? Through not strictly binding, these have almost always been met with a legislative response.[70] Further, a declaration indicates that the UK is in breach of its ECHR obligations and is a judicial statement of legal principle.[71] Arguably, the Bill only makes the court's power less direct. Whilst it is arguably right that Parliament bears primary responsibility for resolving issues of legislative incompatibility, it has always been able to legislate to reverse a s3(1) interpretation.[72] Furthermore, it is also open to the executive to respond to a declaration,[73] risking that power lands with the executive, not Parliament. The answer is arguably found in cl7, which will strongly influence the frequency of these declarations.

3.2. Clause 7 BRB

Cl7 applies to any determination of the incompatibility of legislation and whether it strikes an appropriate balance between policy aims and/or Convention rights.[74] It will have greatest relevance

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[62] *R v Secretary of State for the Home Dept, Ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588 747–78 (Lord Bridge).
[63] Coxon (n 59) 45–46.
[64] *R (Morgan Grenfell & Co Ltd) v Special Comrs of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [45] (Lord Hobhouse).
[65] *Ex p Simms* (n 60) 131 (Lord Hoffmann).
[66] *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 [112] (Lord Phillips).
[67] E.g. *Ghaidan* (n 54).
[68] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102] (Lord Steyn); *Ex p Simms* (n 60) 131 (Lord Steyn).
[69] B Dickson, 'Repeal the HRA and Rely on the Common Law?' in K Ziegler, E Wicks and L Hodson (eds), *The UK and European Human Rights Law: A Strained Relationship?* (Hart 2015) 119.
[70] Independent Human Rights Act Review (n 54) para 114.
[71] Kavanagh (n 55) 321.
[72] Kavanagh (n 55) 129; Independent Human Rights Act Review (n 54) para 64.
[73] Bill of Rights Bill (n 1) cl 26.
[74] ibid cl 7(1).

to qualified rights, with their in-built balancing clause.[75] It requires the court to assume that Parliament has determined an appropriate balance in passing an Act, and "give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament.".[76]

Under the HRA, the courts already deploy some form of democratic deference to Parliament,[77] but only "where the context justifies it".[78] The extent depends on the nature of the decision.[79] Cl7, however, seems to require deference in all circumstances. This aims to shift greater power to Parliament by reducing the intensity of statutory review where cl7 applies. The extent to which this re-balances the relationship between the courts and Parliament is tempered by *Elan-Cane*, which held that where Strasbourg finds a measure falls within the margin of appreciation, it determines that the measure is ECHR-compatible.[80] Because the UK courts cannot interpret Convention rights more generously than can be anticipated of Strasbourg,[81] the ruling means that decisions within the margin of appreciation are automatically left to the elected branches of the state. This will often be the case where proportionality is assessed.[82] In such cases, cl7 will not alter the relationship between the courts and Parliament.

Whether cl7 has any impact at all will depend upon the precise interpretation of its ambit. Whilst It could arguably be considered a mere re-assertion of the low-level deference from which all legislative decisions benefit,[83] that would seems to defeat its purpose. More likely is the view that it requires heightened deference in all circumstances. This could lead courts to decline to declare incompatibility where they would otherwise find it, as a result of enhanced deference given to the legislature in a context where it would not previously have been thought appropriate. This *would* re-balance the relationship between the courts and Parliament, but its implications are disconcerting.

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[75] *R v DPP Ex p Kebeline* [2000] 2 AC 326, [1999] 3 WLR 972 381 (Lord Hope).
[76] Bill of Rights Bill (n 1) cl 7(2).
[77] P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117(4) LQR, 589 590–592; *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 [69]; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 [2008] 1 AC 719 [45] (Lord Bingham); *Kebeline* (n 75) 381 (Lord Hope); *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903 [14] (Lord Bingham); *R v Lambert* [2002] QB 1112, [2001] 2 WLR 211 [16] (Lord Woolf); *Brown v Stott* [2003] 1 AC 681, [2001] 2 WLR 817 703 (Lord Bingham); *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 [77] (Lord Hoffmann).
[78] *Brown* (n 77) 711 (Lord Steyn).
[79] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [39] (Lord Bingham).
[80] *Elan-Cane* (n 25) [80], [83], [85].
[81] ibid [86]–[106].
[82] G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) OJLS 705 709–711.
[83] Kavanagh (n 55) 192–193.

First, deference ought to be context specific, not ubiquitous.[84] Less deference is warranted where, for example, rights of high constitutional importance are engaged,[85] or the issue is one on which the courts have particular competence,[86] such as the requirements of a fair trial.[87] More concerningly, Allan suggests that a demand for deference detached from context is a plea for immunity from constitutional standards.[88] By demanding maximum deference in all contexts, cl7 compels courts to accept the legislature's conclusion without properly interrogating its rationale. The problem with such an approach is well illustrated by *Belmarsh*, where the legislature had reached a position that was patently discriminatory.[89] Cl7 could require a court to accept this position, without interrogating how it could be necessary to indefinitely detain non-nationals if this was not necessary for nationals or, worse still, to ignore their judicial instinct that this showed the measure's lack of necessity. This lack of scrutiny risks meeting the same fate as *Wednesbury* reasonableness which, even at its highest, failed to meet the requirements of Article 13 ECHR by effectively precluding consideration of the measure's proportionality.[90]

The second problem with the balance struck by cl7 is that, taken with cl10 and the removal of s3(1), it leads to double deference. Deference and dialogue (of the kind generated by the remittance of an issue back to the legislature through a declaration of incompatibility) are "alternative mechanisms with which to distribute decision-making power between the legislature and the judiciary."[91] Unlike deference, though, dialogue ensures legislative transparency by exposing the reason for subordinating a right.[92] The need for deference under the HRA was substantially weakened by s4, which remits issues back to Parliament.[93] This is even more so for the Bill, which ensures that all incompatible legislation is remitted to Parliament by cl10. Cl7 will only serve to undermine the dialogue between Parliament and the courts that a declaration of incompatibility is designed to generate.[94]

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[84] R Clayton, 'Judicial Deference and "Democratic Dialogue": the Legitimacy of Judicial Intervention Under the Human Rights Act 1998' [2004] PL 33 36; T Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127(1) LQR 96.
[85] *Kebeline* (n 75) 381 (Lord Hope); D Pannick, "Principles of Interpretation of Convention Rights Under the Human Rights Act and Discretionary Areas of Judgment" [1998] PL 545 550–551.
[86] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [87] (Laws LJ); Pannick (n 85) 550.
[87] *A v Secretary of State for the Home Department* (n 79) [39] (Lord Bingham); M Hunt, R Singh and M Demetriou, 'Is There a Role for the "Margin of Appreciation" in National Law After the Human Rights Act?' (1999) 1 EHRLR 15 22.
[88] Allan (n 84) 97.
[89] *A v Secretary of State for the Home Department* (n 79).
[90] *Smith and Grady v United Kingdom* ECHR 2000–IX 193 paras 129–139.
[91] A Young, 'Is Dialogue Working Under the Human Rights Act 1998?' [2001] PL 773 793.
[92] ibid 796.
[93] Kavanagh (n 55) 330–331.
[94] F Klug, 'Judicial Deference Under the Human Rights Act 1998' (2003) 2 EHRLR 125 128–131.

The third problem with the balance struck by cl7 is that it undermines an essential check on democratic politics. There are a number of risks inherent in democratic politics, namely its responsiveness to popular views (to the potential exclusion of unpopular groups), majoritarian concerns (to the potential exclusion of minorities) and short-term interests.[95] Judicial review allows the marginalised and disenfranchised to challenge legislation which prejudices their rights.[96] A general principle of deference would distort the impartiality of judicial review in favour of the legislature, leaving individuals with no independent avenue for redress.[97] This argument does not necessarily assume negligence or malice by the legislature, only that legislators might not be able to predict the full implications of an Act in advance.[98] Assessing the plausibility of the balance struck by a statute in a particular context requires knowledge of that context.[99] The fallacy that cl7 creates is to pretend that Parliament has predicted the full implications of an Act and consciously struck a balance. This is particularly fictitious for pre-HRA Acts, passed with no obligation on the government to assess its rights implications.[100] Even post-HRA, s19 has not always provoked in-depth consideration.[101]

Finally, the assumption by cl7 of a principle that, in a Parliamentary democracy, decisions as to how to strike these balances are always properly made by Parliament is flawed. Many of the Convention rights, such as freedom of thought, speech and assembly, ensure the continued preservation of democracy.[102] Giving Parliament near unfettered power to sacrifice rights in favour of the public interest,[103] by eliminating independent judicial protection of those rights,[104] would undermine rather than uphold our democratic system.

3.3. Recommendation for amendment

On the second interpretation of cl7, the Bill's combined effect is to remove the strong interpretive powers of the judiciary and make declarations of incompatibility less likely. For the reasons above, this re-balances the relationship too far in favour of Parliament. Cl7(2)(b) should be amended so that it clearly has effect in accordance with the first interpretation suggested. This will leave the removal of s3(1) playing the key redistributive role. To ensure that this does benefit Parliament, rather than the executive, the use of remedial orders should be constrained only to where it is strictly

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[95] Kavanagh (n 55) 345–350.
[96] ibid 340–344.
[97] T Allan, 'Human Rights and Judicial Review: a Critique of "Due Deference" (2006) 65(3) CLJ 671 675–676.
[98] Kavanagh (n 55) 352–353 and 361–363.
[99] Allan (n 97) 673–674.
[100] Human Rights Act (n 8) s 19.
[101] Kavanagh (n 55) 358.
[102] C Gearty, *Principles of Human Rights Adjudication* (OUP 2004) 33–35 and 41–42.
[103] Allan (n 97) 692.
[104] ibid 677.

necessary for reasons of expedience, as opposed to what the Minister considers necessary for compelling reasons.[105]

4. Conclusion

The Bill is highly unlikely to succeed in re-balancing the relationship between the UK courts and Strasbourg. Contrary to the pretence of its drafters, the UKSC is already supreme under the HRA save for being subject to a Strasbourg ceiling. Despite removing s2(1) HRA, by retaining Schedule 1 the Bill will only sustain this balance. The UKSC should be given true primacy by removing cl3(2)(a), so that it may depart from Strasbourg in both directions – to progress as well as reign in the Convention rights.

As currently drafted, the Bill will succeed in re-balancing the relationship between the UK courts and Parliament in favour of the latter. The removal of s3(1) HRA coupled with the strong deference to Parliament that cl7 is likely to generate would substantially weaken the courts' ability both to interpret legislation in a Convention right-compatible way and to issue a declaration where it cannot. This risks the inadvertent rights consequences of legislation going unnoticed by the legislature and the public, and unchecked by the courts. The removal of s3(1), coupled with an amended cl7 (limiting deference to that already provided by the HRA), would strike a far better balance, according due respect to Parliament whilst ensuring that issues of rights incompatibility are properly exposed and remitted.

[105] Bill of Rights Bill (n 1) cl 26.