

# Process and Substance in Judicial Review in the United Kingdom and at Strasbourg: Proportionality, Subsidiarity, Complementarity?

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## I: Introduction

Recent decisions of the European Court of Human Rights concerning the United Kingdom – and indeed other member states – suggest an approach to the assessment of proportionality that takes into account the adequacy of administrative and legislative (and adjudicative<sup>1</sup>) process at the domestic level. On the basis of this approach, legislation and policy decisions which can demonstrate a firm evidential, as well as democratic, underpinning may be more likely to fall within a state's margin of appreciation, and therefore would be more likely to be regarded by the Strasbourg court as being compliant with the Convention. National decisions adopted following 'extensive debate by the democratically elected representatives of the state',<sup>2</sup> which can be shown to be 'the culmination of ...detailed examination of the social, ethical and legal implications of developments'<sup>3</sup> or which have proceeded following 'exacting and pertinent reviews, by both parliamentary and judicial bodies'<sup>4</sup> – for instance – have been taken by the European Court of Human Rights to contribute to its assessment of compliance with the Convention standards.<sup>5</sup> As a result, consideration of the depth and quality of the decision-making process at the national level will be weighed in the Court's assessment of the proportionality of a challenged

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<sup>1</sup> Though this piece focuses on administrative and legislative process at the national level, it is clear that domestic judicial process may also be examined in the reasoning of the Strasbourg Court (see: *Von Hannover (No.2) v Germany* (2012) 55 EHRR 15).

<sup>2</sup> *Friend v United Kingdom* (2010) 50 EHRR 51, at [50].

<sup>3</sup> *Evans v United Kingdom* (2008) 46 EHRR 34, at [60].

<sup>4</sup> *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [116].

<sup>5</sup> On which see: J. Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"' in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and the judgments of the ECtHR in national case-law* (Cambridge: Intersentia, 2014), pp.52-62.

measure. Such an approach emphasises the importance of domestic decision making processes to Strasbourg adjudication – and in so doing illustrates but one of the mechanisms by which the European Court gives life to the notion of subsidiarity<sup>6</sup> – but it also runs the risk of dilution of the Convention’s potency; procedural propriety cannot be a proxy for proportionality, nor for ultimately ensuring the maintenance of the Convention’s minimum standards.<sup>7</sup>

Since the enactment of the Human Rights Act 1998 (hereafter HRA), the United Kingdom’s jurisprudence on rights protection has been umbilically linked to the case-law of the European Court of Human Rights. In spite of this, process review is at once orthodox and alien to United Kingdom constitutional law. Fair process lies at the heart of the common law of judicial review of administrative action; alongside illegality and irrationality, procedural impropriety provides one of the established grounds by which public authority decision making might be challenged. Traditionally, by contrast, legislative review has not been a feature of United Kingdom constitutional law and the courts have long regarded the propriety of legislative processes as lying within the exclusive domain of Parliament. Though the enactment of the HRA facilitates, and renders constitutionally permissible, a species of legislative review in the United Kingdom – additionally creating a statutory requirement that public authorities act compatibly with the Convention rights to which it gives further effect – the extent to which an effective translation of the Strasbourg jurisprudence engaging with process review has taken place is unclear.

In the first instance, it is clear that there is uncertainty amongst the domestic judiciary as regards the place of process-based review in the case-law of the Strasbourg court. The sense that the European Court of Human Rights is largely focused on matters of substance – to the virtual exclusion of procedural review – has served to minimise the relevance of procedural review in HRA adjudication concerning executive (public authority) decision-making.<sup>8</sup> Taking their lead from the supposed

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<sup>6</sup> See also: *Nicklinson and Lamb v United Kingdom* (2015) 61 EHRR SE7, at [84].

<sup>7</sup> On the heightened scrutiny required by a proportionality – as opposed to reasonableness or rationality – inquiry, see: *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; 2 AC 532, at [27]-[28].

<sup>8</sup> See: *R (on the application of Nasser) v Secretary of State for the Home Department* [2010] 1 AC 1, at [12]-[14].

‘outcome orientated approach’<sup>9</sup> of the European Court of Human Rights, the House of Lords and United Kingdom Supreme Court have in recent years placed the focus of domestic proportionality analysis on ‘the practical outcome, not the quality of the decision-making process that led to it.’<sup>10</sup> In doing so, the United Kingdom’s apex court reveals a potential disconnect between the adjudicative approach to the Convention rights taken at the national and supra-national levels and simultaneously appears to eschew one of the standard tenets of domestic judicial review.

The picture is complicated by the adjudicative differences between judicial (administrative) and legislative review at the domestic level; the former being traditionally driven by concerns relating to procedural legitimacy, the latter not only historically regarded as being incompatible with the doctrine of parliamentary sovereignty but more broadly obstructed by the fact that parliamentary process has been long considered to be non-justiciable. While in its examinations of the Convention-compliance of primary legislation under the HRA the United Kingdom’s apex court has stopped short of questioning the legitimacy of domestic legislative procedure, a closer engagement with legislative deliberative process than has traditionally been permitted has become evident, with courts taking the ‘quality of the legislative decision-making process into account when assessing whether legislation is compatible with Convention rights’;<sup>11</sup> prior to the implementation of the HRA such an approach would have been regarded as being constitutionally illegitimate.

The extent to which techniques of procedural review have been adopted in domestic adjudication concerning the Convention rights therefore provides a lens through which the interplay between domestic and supra-national judicial processes and reasoning can usefully be examined, raising questions relating to the purpose of the HRA, subsidiarity and complementarity within the Convention system and the intensity of proportionality review as carried out by the Strasbourg and domestic courts.

## **II: Process and Substance in the European Court of Human Rights**

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<sup>9</sup> T. Hickman, *Public Law After the Human Rights Act* (Oxford: Hart Publishing, 2010), p.243.

<sup>10</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [31].

<sup>11</sup> A. Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring some Forbidden Territory’ (2014) 34 OJLS 443, 478-479.

In adjudication under the HRA, the European Court of Human Rights has frequently been portrayed as concerned only with the substance of a decision taken by national authorities. As Lord Bingham outlined in *R (on the application of Begum) v Governors of Denbigh High School*:

the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated.<sup>12</sup>

As such, proportionality is viewed as 'a test ... which the Court applies in order to structure its own decision-making rather than a decision-making structure that it seeks to impose on primary decision-makers.'<sup>13</sup> On the basis of this, so long as the outcome of a decision-making process achieves a proportionate balancing of rights and interests, compliance with the Convention might be anticipated. To say that the content of, or procedures adopted during, the decision-making processes of national authorities are irrelevant to the adjudicative processes of the European Court of Human Rights is, however, incorrect. For instance, the European Court clearly delineated two lines of inquiry in its decision in *Hatton v United Kingdom*: (i) an assessment of the substantive merits of the decision, to ensure compatibility with the relevant right and (ii) scrutiny of relevant decision-making processes 'to ensure that due weight has been accorded to the interests of the individual.'<sup>14</sup>

While the primary focus of the European Court is to ensure that the substance of the Convention rights has been protected in practice – to use the language of the Court, in order to ensure that the protected rights are 'practical and effective' rather than 'theoretical and illusory'<sup>15</sup> – decision-making processes followed at the domestic level are often taken by the court to demonstrate the sufficiency (or otherwise) of the

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<sup>12</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [29].

<sup>13</sup> T. Poole, 'Of Headscarves and Heresies: The Denbigh High School Case and public authority decision making under the Human Rights Act' [2005] PL 685, 690.

<sup>14</sup> *Hatton v United Kingdom* (2003) 37 EHRR 28, at [99].

<sup>15</sup> *Artico v Italy* (1981) 3 EHRR 1, at [33].

justifications proposed for the member state's actions in relation to the right in question. As the Strasbourg Court noted in *Martinez v Spain*:

the court cannot satisfactorily assess whether the reasons adduced by national authorities to justify their decisions were 'sufficient' for the purposes of Art 8(2) without at the same time determining whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests.<sup>16</sup>

Procedural review can therefore be seen to play a supplementary role within the European Court's overall assessment of compliance, contributing to the Court's examination of proportionality rather than seeing it displaced.<sup>17</sup>

In addressing the domestic decision-making process, the European Court has placed emphasis on the adequacy of the evidence that the interests of the claimant(s) have been considered in sufficient depth.<sup>18</sup> This analysis may be used to affirm the domestic decision, or to demonstrate its deficiencies. The European Court – in its decision in *Hirst (No.2)* – made clear that 'negative inferences'<sup>19</sup> could be drawn from the failure of the United Kingdom Parliament to engage with the rights-implications of the denial of voting rights to convicted prisoners:

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<sup>16</sup> *Martinez v Spain* (2015) 60 EHRR 3, at [147].

<sup>17</sup> On which see: J. Gerards, 'Procedural Review by the European Court of Human Rights: A Typology' in this volume.

<sup>18</sup> See eg: *Brežec v Croatia* [2014] HLR 3, at [50]. Such an approach is – in one of the leading English texts on the Convention – outlined as one of the general principles by which the Court approaches qualification of the Convention rights: 'A limitation upon a rights, or steps taken positively to protect or fulfil it, will not be proportionate, even allowing for a margin of appreciation, where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitations or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process (D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (2<sup>nd</sup> ed) (Oxford: Oxford University Press, 2009), p.11).

<sup>19</sup> A. Kavanagh, 'Proportionality and Parliamentary Debates: Exploring some Forbidden Territory' (2014) 34 OJLS 443, 476.

[T]here [was] no evidence that Parliament had ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote ... it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.<sup>20</sup>

Judicial review by the European Court of Human Rights is not therefore so outcome-centric as to be completely disassociated from the circumstances of the individual complaint giving rise to the application *and* the processes by which that decision was taken by national authorities.<sup>21</sup>

Nor does the Strasbourg engagement with domestic decision-making processes necessarily demonstrate the Court making further inroads into the policy and legislative autonomy of domestic authorities. Process review is also in evidence in those cases in which the court has deferred to the judgments, and decision-making processes, of national authorities.<sup>22</sup> As such, where a wide margin of appreciation is likely to be afforded to the national authorities, ‘the Court has recognised the “special weight” to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely.’<sup>23</sup> In such instances, process review plays an affirmative role and can be regarded as an effective demonstration of the ‘shared responsibility’ of the European Court and national authorities for upholding the Convention’s standards.<sup>24</sup> In those

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<sup>20</sup> *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41, at [79].

<sup>21</sup> *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, at [98].

<sup>22</sup> P. Popelier and C. Van De Heyning, ‘Procedural rationality: giving teeth to the proportionality analysis’ (2013) *European Constitutional Law Review* 230, 252.

<sup>23</sup> *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, at [99].

<sup>24</sup> *Nicklinson and Lamb v United Kingdom* (2015) 61 EHRR SE7, at [84]: ‘The contracting states are generally free to determine which of the three branches of government should be responsible for taking policy and legislative decisions which fall within their margin of appreciation and it is not for this Court to involve itself in their internal constitutional arrangements. However, when this Court concludes in any given case that an impugned legislative provision falls within the margin of

areas in which a wide margin may be affordable, process-based review also serves to (partially) counter the suggestion that the courts' indications that intervention will only occur where a domestic decision is 'manifestly unreasonable' or 'without legal foundation'<sup>25</sup> equates to a downgrading of the standard of review.<sup>26</sup>

Equally, however, process review is by no means confined to those fields in which a wide margin of appreciation might be thought to apply. Thus, for example, in *Animal Defenders International* – a case concerned with political expression, and therefore typically an area in which any margin of appreciation would be relatively narrowly drawn<sup>27</sup> – the European Court of Human Rights found that national authorities were 'best placed' to determine what should be regarded as a 'country specific and complex assessment' of the balance to be struck.<sup>28</sup> The court went on to thoroughly outline the process by which the challenged ban on political advertising had been enacted (and subsequently found to be compatible with the requirements of Article 10 in domestic adjudication). The court noted that:

The prohibition was ... the culmination of an exceptional examination by Parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom, and all bodies found the prohibition to have been a necessary interference with art.10 rights. [...]

The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords ... both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary

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appreciation, it will often be the case that the Court is, essentially, referring to Parliament's discretion to legislate as it sees fit in that particular area.'

<sup>25</sup> *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, at [99]. See also: *James v United Kingdom* (1986) 8 EHRR 123, at [43].

<sup>26</sup> P. Popelier and C. Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 *European Constitutional Law Review* 230, 243.

<sup>27</sup> See eg: *Worm v Austria* (1998) 25 EHRR 454.

<sup>28</sup> *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [111].

and proportionate interference with the applicant's rights under art.10 of the Convention.

The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom, and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.<sup>29</sup>

Affording weight to the considered judgment of a national legislature (and/or courts) could be said to illustrate in practice that '[s]ubsidiarity is at the very heart of the Convention' and is demonstrative that the European Court is 'intended to be subsidiary to the national systems'.<sup>30</sup> Critics of such an approach however argue that – rather than off-setting a rather more modest rationality-style review – endorsement of a domestic process in review is used by the court in order to 'appease'<sup>31</sup> those member states in which the reach and influence of the Strasbourg court is the source of political controversy and scepticism.<sup>32</sup> But, just as an overly abstract approach to judicial review may see European Court decisions excessively divorced from the 'vital forces'<sup>33</sup> at play across the member states, a purely 'country specific'<sup>34</sup> approach to adjudication would undermine the court's ability to shape common, minimum, standards between signatories to the Convention. While the term 'appeasement' connotes submission in the face of opposition, recourse to review

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<sup>29</sup> *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [114]-[116].

<sup>30</sup> *Austin v United Kingdom* (2012) 55 EHRR 14, at [61]. And see: M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) HRLR 1.

<sup>31</sup> See: H. Fenwick, 'Enhanced Subsidiarity and a Dialogic Approach – or Appeasement in recent cases on Criminal Justice, Public Order, Counter-Terrorism at Strasbourg against the UK?' in K. Ziegler, E. Wicks and L. Hodson, *The UK and European Human Rights: A Strained Relationship?* (Oxford: Hart Publishing, 2015).

<sup>32</sup> For a perspective from the United Kingdom see: R. Masterman, 'The United Kingdom' in P. Popelier and S. Lambrecht (eds), *Shifting the Convention System: Counter-Dynamics at the National Level* (Intersentia, 2015 (forthcoming)).

<sup>33</sup> *Handyside v United Kingdom* (1979-80) 1 EHRR 737, at [48].

<sup>34</sup> *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [111].



which is critical of domestic decision-making process demonstrates that procedural review cannot be uniformly seen as such. Rather, procedural review is best encapsulated as one of a number of mechanisms at the disposal of the court which *may* be utilised in order to emphasise the subsidiarity in the Convention system.

That process review is essentially a discretionary tool in the hands of the Court is, however, problematic. A lack of specificity as regards the circumstances in which the Court might invoke procedural techniques of review has prompted a degree of concern relating to the consistency of the Court's adjudicatory approach.<sup>35</sup> It is further acknowledged – and evidenced by the fine margin by which the *Animal Defenders International* case was decided<sup>36</sup> – that the Court itself is divided on the extent to which domestic processes should influence the standard of Strasbourg review.<sup>37</sup> Both factors can be seen to underpin – in part at least – the uncertain domestic response to procedural human rights review pursuant to the HRA.

### **III: Procedural Judicial Review in the United Kingdom**

Judicial Review in the United Kingdom is bifurcated, with review of administrative action and of legislation regarded as being conceptually distinct. As regards the former, judicial review of administrative action remains a largely procedural guarantee; the common law of judicial review provides for a supervisory, rather than an appellate, jurisdiction which is focused on the legality of a decision (rather than its merits, or substance).<sup>38</sup> Judicial review of legislation meanwhile is a relatively recent

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<sup>35</sup> See: C. Barrow, '*RMT v United Kingdom*: The European Court of Human Rights intimidated into timidity or merely consistent in its inconsistency?' [2015] EHRLR 277 and generally M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) HRLR 1.

<sup>36</sup> The case was determined by a split in the Grand Chamber of the European Court of 9:8.

<sup>37</sup> Judge Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 HRLR 487, 497.

<sup>38</sup> The canonical articulation of the substantive grounds of judicial review at common law can be found in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 410-411 (Lord Diplock): 'one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." [...] By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question

addition to a constitutional system in which legislative process lay – and which substantially lies still – beyond the realms of justiciability. Legislative review is limited to scenarios in which domestic statute is alleged to be in contravention of European laws;<sup>39</sup> there exists no freestanding or common law power to review the constitutionality or legality of primary legislation. Enactment of the HRA has therefore legitimated judicial scrutiny of the compatibility of primary legislation with the Convention rights,<sup>40</sup> and introduced a statutory species of illegality to the existing common law grounds of judicial review (introducing a further sub-division into the domestic law of judicial review in so doing<sup>41</sup>). The foundation of the latter can be found in Section 6 of the HRA which renders it ‘*unlawful* for a public authority to act in a way which is incompatible with a Convention right.’ As will be seen, this provision has also been interpreted as directing courts’ analysis towards the substance of public body decision making and away from the traditional procedural focus of judicial review at common law.

#### *(a) Judicial Review of Administrative/Executive Action*

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to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. [...] I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.’

<sup>39</sup> Pursuant to the provisions of the European Communities Act 1972 and Human Rights Act 1998.

<sup>40</sup> Section 3(1) HRA provides: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’ (s.4 permits that legislation which cannot be rendered compatible with the Convention rights via interpretative means may be subject to a judicial declaration of incompatibility).

<sup>41</sup> With proportionality review (in HRA adjudication) co-existing alongside *Wednesbury* (reasonableness) review within administrative and common law. For a recent assessment of this division see: J.N.E. Varuhas, ‘Against Unification’ in H. Wilberg and M. Elliott, *The Scope and Intensity of Substantive Review* (Oxford: Hart Publishing, 2015).

Fair process lies at the very heart of English administrative law:

The teeth of public law are in process review. Most successful judicial review claims succeed on the basis that the decision-maker has done something in the wrong way, rather than the decision-maker has done something that is, all things considered, unjustifiable.<sup>42</sup>

Many of the central principles of the common law of judicial review of administrative action can therefore be seen to highlight procedural flaws or defects in executive decision-making. As such, decisions might be challenged – and might be demonstrated to fail to meet the standards required under the head of natural justice – on the ground that the relevant decision-maker was biased,<sup>43</sup> that the claimant was denied a fair hearing<sup>44</sup> or that the claimant enjoyed a reasonable expectation which had been frustrated by the decision.<sup>45</sup> Similarly, procedural defects in decision-making may also give rise to a challenge on the basis of a decision's illegality; taking decisions on the basis of irrelevant considerations<sup>46</sup> and the use of an allocated power for an improper purpose<sup>47</sup> both amount to essentially procedural grounds of illegality.

The common law jurisdiction of judicial review has therefore traditionally eschewed review of the substance, or merits, of executive or administrative decisions; judicial review permits intervention in defective public body decision-making, it does not permit the court to substitute its own decision for that which has been challenged. As Mead has argued, 'only if the challenge is based on irrationality has there been any level of substantive review.'<sup>48</sup> The law relating to judicial review of *administrative* action developed in this way in order to ensure that powers delegated by Parliament to

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<sup>42</sup> T. Hickman, *Public Law After the Human Rights Act* (Oxford: Hart Publishing, 2010), p.225.

<sup>43</sup> See eg: *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HLC 759; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2) [2000] 1 AC 199.

<sup>44</sup> See eg: *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; *Ridge v Baldwin* [1964] AC 40.

<sup>45</sup> See eg: *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

<sup>46</sup> See eg: *Roberts v Hopwood* [1925] AC 578.

<sup>47</sup> See eg: *Wheeler v Leicester City Council* [1985] AC 1054.

<sup>48</sup> D. Mead, 'Outcomes aren't all: defending process-based judicial review of public authority decisions under the Human Rights Act' [2012] PL 61, 63.

officials were validly exercised in accordance with the terms of the delegation.<sup>49</sup> The corollary of this ultra vires approach is recognition of the necessary (and intra vires) policy autonomy of public bodies and elected officials. Judicial review in English law has traditionally reflected a ‘conception of limited judicial authority, recognising that in most cases a public authority may exercise a genuine choice between competing public policy objectives and contrasting methods of implementation.’<sup>50</sup>

*(b) Legislative and/or Constitutional Review*

The principle of parliamentary sovereignty and Article 9 of the Bill of Rights 1688 provide the pillars on which the traditional non-justiciability of both legislative content and legislative process are based. Parliamentary sovereignty – and the consequent (and concurrent) supremacy of primary legislation – has served to focus judicial attempts to interpret the law around the specific statutory language adopted: ‘what the Queen in Parliament enacts *is* law.’<sup>51</sup> This constitutional presumption of statutory legality has conditioned (self-)perceptions of the judicial function, as well as the legitimate targets of judicial review.<sup>52</sup> As a result, in *British Railways Board v Pickin* – having been asked to set aside a statutory provision on the basis that Parliament had been fraudulently misled into enacting it – the Appellate Committee of the House of Lords emphatically found that the court enjoyed no competence to examine the propriety of parliamentary procedure. Lord Morris of Borth-y-Gest said the following:

It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide

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<sup>49</sup> For analysis see: P. Craig, ‘Competing Models of Judicial Review’ [1999] PL 428.

<sup>50</sup> T.R.S. Allan, ‘Human Rights and Judicial Review: A Critique of “Due Deference”’ [2006] CLJ 671, 679.

<sup>51</sup> V. Bogdanor, *Politics and the Constitution: Essays on British Government* (Aldershot: Dartmouth, 1996), p.5 (emphasis added).

<sup>52</sup> For an overview see: R. Masterman and J.E.K. Murkens, ‘Skirting Supremacy and Subordination: The Constitutional Authority of the United Kingdom Supreme Court’ [2013] PL 800.

whether in any particular case to dispense with amply with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.<sup>53</sup>

The decision in *Pickin* drew on a series of established common law authorities, not least among which was *Edinburgh and Dalkeith Railway Co. v Wauchope*. In that decision, Lord Campbell had made the following remarks:

no court of justice can inquire into the mode in which [primary legislation] was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.<sup>54</sup>

As a result, courts have treated parliamentary process as lying beyond the legitimate realms of judicial inquiry.

That judicial interpretation of statute is a process which is in a sense disassociated from the legislative procedures which saw the legislation enacted is confirmed by the Bill of Rights 1688, Article 9 of which provides that ‘freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of Parliament.’ Article 9 is – Kavanagh argues – therefore commonly ‘understood to preclude any judicial recourse to *Hansard* for the purposes of statutory interpretation.’<sup>55</sup> In other words, the evidence from which courts derive their understanding of statutory purpose comes largely from the output of legislative deliberations – the legislation itself – rather than from arguments advanced

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<sup>53</sup> *British Railways Board v Pickin* [1974] QC 765, 790.

<sup>54</sup> *Edinburgh and Dalkeith Railway Co. v Wauchope* (1842) VIII Clark & Fennelly 710, 725.

<sup>55</sup> A. Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring some Forbidden Territory’ (2014) 34 OJLS 443, 453.

(or not advanced) during the course of the legislative process. The extent to which the courts have held themselves to respect the procedural and substantive legislative autonomy of Parliament can be seen in the relatively narrowly-drawn circumstances under which it is regarded as being legitimate for courts to utilise *Hansard* as an aid to statutory construction. It is only since the seminal decision of the House of Lords in *Pepper v Hart* – in 1992 – that judicial reference to parliamentary debates has been permitted, and even then only in order to illuminate legislative intent in those circumstances where the apparent interpretation of the statute would lead to an ambiguity or absurdity.<sup>56</sup>

#### **IV: Process Review and the influence of the Human Rights Act**

That the HRA was not intended to vest disproportionate authority in the judges – to the detriment of the elected branches of government – is well documented.<sup>57</sup> To the extent that it is a meaningful term of constitutional discourse, the HRA is a ‘dialogic’ instrument, which allocates responsibility for the realisation of the rights it protects across the branches of state. To this end, the processes of public body decision-making were almost certainly intended to be impacted upon by the enactment of the HRA.<sup>58</sup> As Lord Irvine of Lairg QC – Lord Chancellor and one of the architects of the Act – argued before the Joint Parliamentary Committee on Human Rights in 2001:

a culture of respect for human rights is to create a society in which our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every decision they take, in relation to every piece of legislation they sponsor.<sup>59</sup>

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<sup>56</sup> *Pepper v Hart* [1993] AC 593.

<sup>57</sup> See for instance: I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford: Hart Publishing, 2008), chs, 1, 2 and 5.

<sup>58</sup> See generally: P. Boateng and J. Straw, ‘Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights into UK Law’ [1997] EHRLR 71.

<sup>59</sup> Joint Committee on Human Rights, Minutes of Evidence, 19 March 2001, 38 (Lord Irvine of Lairg QC).

It was clear that the Labour government's intentions were that the HRA precipitate a step-change in governmental decision-making; as the Home Office Minister, Lord Williams, echoed in the House of Lords:

Every public authority will know that its behaviour, its structure, its conclusions and its executive actions will be subject to this culture.<sup>60</sup>

Enforcement of the HRA therefore imposes upon public bodies (including courts, but excluding Parliament) a statutory obligation to act in compliance with the Convention rights.

Though the Act excluded Parliament from its definition of public authorities to whom section 6 would apply,<sup>61</sup> it is clear that some modification of legislative process was envisaged. The Act requires that draft legislation be stated compatible with the Convention rights upon being debated in Parliament (although makes provision for proposals which cannot be so endorsed to proceed).<sup>62</sup> The HRA has also seen the establishment of a Joint Parliamentary Committee on Human Rights and – in the event of a judicial finding that primary legislation cannot be interpreted in a way which would achieve Convention-compliance<sup>63</sup> – provides that the locus of remedial action should be within the elected arms of government.<sup>64</sup> It is this characteristic of the HRA which emphasises the conceptual and practical distance between the compact between branches that it seeks to engineer and the judicio-centric precedents of many of its constitutional comparators.

Whilst the Act itself makes few prescriptions as to how public decision-makers are to go about the processes of achieving compliance with the protected rights, section 2(1) does impose a burden of process upon the courts who, in determining questions arising in connection with the Convention rights, must 'take into account' decisions of the European Court of Human Rights. The judicial

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<sup>60</sup> HL Debs, 3 November 1997, Col.1308.

<sup>61</sup> Section 6(3), Human Rights Act 1998.

<sup>62</sup> Section 19, Human Rights Act 1998.

<sup>63</sup> Section 3(1) Human Rights Act 1998.

<sup>64</sup> Sections 4 and 10, Human Rights Act 1998 (Section 4 provides for the courts to make a 'declaration of incompatibility' in the event that primary legislation cannot be interpreted compatibly with the Convention rights).

approach resulting from this obligation initially saw domestic courts positioned as domestic proxies for the European Court of Human Rights, with the consequence that the substance of the emergent HRA jurisprudence very closely replicated its Strasbourg counterpart. The development of this so-called mirror principle<sup>65</sup> therefore fed criticisms of the HRA scheme which argued that the jurisprudence of the European Court was afforded too great an influence in the domestic sphere to the exclusion of distinctly domestic approaches to human rights adjudication. Examination of the extent to which the European Court's use of methods of process review have been translated into domestic adjudication reveals an important disconnect between rights adjudication at the supra-national and national judicial levels (as well as between pre- and post-HRA approaches to judicial review).

*(a) Away from process-based review of administrative decisions?*

Section 6 of the HRA renders it unlawful for public authorities – or private bodies exercising public functions – to 'act' in a way which is incompatible with the Convention rights.<sup>66</sup> The primary focus of section 6 is on the substance of a public body's decision:

The first question that section 6 asks is result-orientated – were the claimant's Convention rights violated by the public authority? If the answer is affirmative the process by which the public authority came to violate his or her Convention rights is irrelevant.<sup>67</sup>

While it is certainly arguable that 'acts' of public authorities encompass the processes by which decisions were taken, adjudication under the HRA has seen a judicial reluctance to impose specific procedural requirements on public body decisions

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<sup>65</sup> On which see: J. Lewis, 'The European Ceiling on Rights' [2007] PL 720; R. Masterman, 'Deconstructing the Mirror Principle' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 Proceedings of the British Academy) (Oxford: Oxford University Press, 2013).

<sup>66</sup> Section 6(1) provides: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

<sup>67</sup> I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] PL 265, 283.



impacting on the Convention rights. The compliance with and/or proportionality of public body decisions with the Convention rights is a matter of an ex post facto assessment by the courts which is primarily directed towards the result or outcome of public body decision-making.

Two cases in particular have served to cement an approach to Convention-compliance which is primarily based on the outcomes of public body decision-making. The first of these decisions – *R (SB) v Governors of Denbigh High School*<sup>68</sup> – concerned a challenge made to the imposition of a School’s uniform policy on the ground that it prohibited the wearing of certain forms of religious dress and was therefore an infringement of the claimant’s Article 9 rights.<sup>69</sup> The second – *Belfast City Council v Miss Behavin’ Ltd*<sup>70</sup> – concerned the denial, by a local authority, of a licence to use premises as a sex shop. In both decisions, the apex court found against a process of review which would have imposed overly-onerous procedural obligations on the relevant public body.<sup>71</sup>

To contextualise this debate, the Court of Appeal in *Denbigh* – per Brooke LJ – would have seen the public body decision-maker respond to the following series of questions:

- (1) Has the claimant established that she has a relevant Convention right which qualifies for protection under article 9(1)?
- (2) Subject to any justification that is established under article 9(2), has that Convention right been violated?
- (3) Was the interference with her Convention right prescribed by law in the Convention sense of the expression?
- (4) Did the interference have a legitimate aim?
- (5) What as the considerations that need to be balanced against each other when determining whether the interference was necessary

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<sup>68</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

<sup>69</sup> Specifically, the policy did not permit female Muslim students to wear the jilbab, instead permitting them to wear the shalwar kameeze.

<sup>70</sup> *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19; [2007] 1 WLR 1420.

<sup>71</sup> A third case reiterated the findings in *Begum* and *Miss Behavin’*: *R (on the application of Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2010] 1 AC 1.

in a democratic society for the purposes of achieving that aim? (6) Was the interference justified under article 9(2)?<sup>72</sup>

On appeal to the House of Lords, the Senior Law Lord, Lord Bingham, found that judicial enquiry should focus on ‘the practical outcome, not the quality of the decision-making process that led to it.’<sup>73</sup> Echoing the approach to the interpretation of section 6(1) noted above, Lord Bingham found that ‘[t]he unlawfulness proscribed by s.6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning.’<sup>74</sup> As the House of Lords subsequently confirmed in the decision in *Belfast City Council v Miss Behavin’ Ltd*, the central question for the courts must always be to adjudge whether the relevant decision infringed the applicant’s Convention rights. Even in adjudication over those Convention rights with ‘procedural content’:

... the question is still whether there has been an actual violation of the applicant’s Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not.<sup>75</sup>

The House of Lords advanced three primary reasons for the avoidance of requiring public bodies to adhere to specific structural requirements in the making of decisions which might impact on an individual’s Convention rights. The first of these reasons might be labelled ‘constitutional’, the second ‘practical’, the third ‘institutional’.

First, the Law Lords noted that such an approach would be inconsistent with their understanding of the requirements of the Convention. The Convention rights require that the substance of the right (eg family life, freedom of religion) is guaranteed. When speaking to substantive rights, the Convention is not prescriptive

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<sup>72</sup> At [75]. On which see: T. Poole, ‘Of Headscarves and Heresies: The Denbigh High School Case and public authority decision making under the Human Rights Act’ [2005] PL 685.

<sup>73</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [31].

<sup>74</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [29].

<sup>75</sup> *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19, at [15].

about the process to be followed by the public authority; what is mandated is the protection of the right in substance. As explained by Lord Hoffmann in *Begum*:

[A]rticle 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?<sup>76</sup>

The approach of the House of Lords on this point was informed by an approach to the interpretation of the HRA which viewed the purpose of the Act being to give better effect to rights (and remedies) which would otherwise only be available to claimants at Strasbourg.<sup>77</sup> The approach is neatly summarised by Lord Nicholls in the decision in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing*:

The [Human Rights] Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.<sup>78</sup>

The House of Lords' decisions are therefore grounded in an approach to the interpretation of the HRA which sees domestic courts positioned as local proxies for the Strasbourg court, their task being to 'assess how a claim by [an] appellant ... would fare before the European Court of Human Rights.'<sup>79</sup> (Given the failure of the House of Lords to acknowledge the procedural turn of the Strasbourg court, it should

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<sup>76</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [68].

<sup>77</sup> Compare: R. Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the Convention Rights in Domestic Law' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning after the Human Rights Act* (Cambridge: Cambridge University Press, 2007).

<sup>78</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing* [2005] UKHL 57; [2006] 1 AC 529, at [34].

<sup>79</sup> *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332, at [55].

be noted that the apex court's approach extends to replicating the adjudicative outcome that could be expected at Strasbourg, rather than the adjudicative methodology of the European Court.)

Secondly, it would be impractical and/or inefficient to expect public authorities to engage in detailed, legalistic analysis measuring the requirements of the relevant Convention right against the measure under consideration.<sup>80</sup> Lord Hoffmann in *Miss Behavin'* argued that, as a result, the Human Rights Act could not impose such obligations on public bodies: '[a] construction of the 1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous.'<sup>81</sup> The third ground for the avoidance of the process-focused approach relates to misunderstanding of institutional competence and expertise and an acknowledgment that public authorities will often not possess the competence or expertise to conduct a precise proportionality analysis. As Lord Hoffmann put it in *Begum*, 'teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows.'<sup>82</sup>

As to the departure from the traditional process focused approach of judicial review, in *R (on the application of Begum) v Governors of Denbigh High School*, Lord Hoffmann made explicit the divergence between review on the basis of the Convention rights and the orthodox approach to judicial review:

In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But Article 9 is concerned with substance, not procedure.<sup>83</sup>

As Lord Hoffmann continued, 'no display of human rights learning' by public bodies could render compatible a decision which, in the view of the court, violated the

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<sup>80</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [13].

<sup>81</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [13].

<sup>82</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [68]

<sup>83</sup> *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, at [68].

applicant's rights.<sup>84</sup> It was clear from the speech of the Baroness Hale that HRA review should be regarded as being conceptually and procedurally distinct from judicial review as ordinarily conceived:

The role of the court in human rights adjudication is quite different from the role of the court in ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.<sup>85</sup>

It follows from this that, while the requirements of proportionality could prompt public authority decision makers to analyse the potential impact of (less intrusive) alternatives to the proposed policy decision, this analysis need not impose an undue burden on public authorities and need not be explicitly Convention based. While it may be open to public bodies to consider the potential impact of a particular policy or decision in substantive human rights terms – and while there may be good reasons for doing so – it is not a requirement of the decision-making process which will be imposed by the court. Section 6(1) of the HRA does not therefore seem to require public bodies to engage with the substance of the Convention rights themselves during the decision-making process; it is the outcome of that process which the courts will assess for Convention compliance.

The appropriateness of this outcome-focused approach has, however, been widely contested. One view suggests that the potency of the HRA as a tool of rights protection can be evidenced in the ability of the courts to 'make authoritative determinations as to what the Convention rights require.'<sup>86</sup> Poole's criticisms of the process-focused approach of the Court of Appeal in *Begum* therefore accuse the court of making a 'fetish of procedure' and warn against the 'excessive judicialisation of the public sphere.'<sup>87</sup> By contrast, the apparent absurdity of the outcomes approach is effectively captured by Hickman:

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<sup>84</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [13].

<sup>85</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [31].

<sup>86</sup> T. Poole, 'The Reformation of English Administrative Law' (2009) 68 CLJ 142, 160.

<sup>87</sup> T. Poole, 'Of Headscarves and Heresies: The Denbigh High School Case and public authority decision making under the Human Rights Act' [2005] PL 685, 691 and 694.

The effect of the House of Lords' judgments ... is that even where a decision-maker decides a case by an irrational process of reasoning, or even without any consideration at all, it will be compatible with the Convention rights and it will be consistent with the decision-maker's responsibilities under the Human Rights Act, as long as the outcome is compatible with the Convention rights.<sup>88</sup>

Given that one of the stated objectives of the HRA was to fully integrate human rights considerations in the processes of public authority decision making – an alternative view categorises the outcomes approach as being based on 'judicial exclusivity'<sup>89</sup> and therefore unable to fully account for, or give credit to, public body decisions which consider human rights considerations, and an inadequate characterisation of the HRA's rather more 'diffuse' scheme.<sup>90</sup> As a result Dickson has argued that the failure of the courts to encourage rights-respecting processes in public body decision-making 'strikes at the heart of the mission of the Human Rights Act, which is to inculcate an appreciation of human rights in all public authorities.'<sup>91</sup>

*(b) Towards judicial examination of legislative process?*

The HRA was also intended to embed rights concerns into the pre-legislative, and legislative, processes of the United Kingdom Parliament.<sup>92</sup> Given that a stated aim of the HRA's authors was that the doctrine of parliamentary sovereignty remain undisturbed,<sup>93</sup> and the traditional reluctance of courts in the United Kingdom to

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<sup>88</sup> T. Hickman, *Public Law After the Human Rights Act* (Oxford: Hart Publishing, 2010), p.228. See also: D. Mead, 'Outcomes aren't all: defending process-based judicial review of public authority decisions under the Human Rights Act' [2012] PL 61, 81.

<sup>89</sup> D. Mead, 'Outcomes aren't all: defending process-based judicial review of public authority decisions under the Human Rights Act' [2012] PL 61, 63.

<sup>90</sup> D. Mead, 'Outcomes aren't all: defending process-based judicial review of public authority decisions under the Human Rights Act' [2012] PL 61, 63.

<sup>91</sup> B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University press, 2013), p.46. See *Doherty v Birmingham City Council* [2008] UKHL 57: 'public authorities are bound to take account of human rights ... this should be seen as a normal part of their function, not an exotic introduction.'

<sup>92</sup> See eg: Section 19, Human Rights Act 1998.

<sup>93</sup> HC Debates, Vol.306, Col.772 (16 February 1998).

explicitly engage with issues of legislative process, it might readily be assumed that questions relating to the Convention compatibility of primary legislation would also be primarily oriented towards an outcomes-focused assessment.

The increased willingness of courts to (prior to enactment of the Human Rights Act) utilise purposive methods of interpretation had already prompted a movement away from the highly positivist approaches that had dominated judicial reasoning during much of the twentieth century.<sup>94</sup> But the obligation imposed upon courts by section 3(1) of the Human Rights Act required further refinement of the judicial approach, with judges required to assess the compatibility of primary legislation with the requirements of the Convention rights. Inherent in this task – and assuming engagement and a *prima facie* interference with one of the protected rights – is the requirement that courts ask whether the measure is proportionate to the aim pursued. It was clear from the outset that the approach of the courts to the application of section 3(1) was not to be so focused as to require only linguistic assessment of statutory purpose:

In enacting section 3(1), it cannot have been the intention of Parliament to place those asserting their rights at the mercy of the linguistic choices of the individual who happened to draft the provision in question. What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament had enacted in those words.<sup>95</sup>

As the House of Lords noted in *Ghaidan v Godin Mendoza*, the task of the court in applying section 3(1) is to ‘concentrat[e] on matters of substance, rather than on matters of mere language.’<sup>96</sup> In the sphere of statutory interpretation, as with questions of public body decision making, the courts have taken outcomes to be their focus of their enquiry into the Convention-compatibility of an Act. The point was reiterated in *R (Williamson) v Secretary of State for Education and Employment*; ‘the proportionality of a statutory measure is to be judged objectively and not by the

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<sup>94</sup> See: J. Steyn, ‘Does Legal Formalism Hold Sway In England?’ (1996) *Current Legal Problems* 43.

<sup>95</sup> *Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 2 AC 557, at [123].

<sup>96</sup> *Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 2 AC 557, at [123].

quality of reasons advanced in support of the measure in the course of parliamentary debate.<sup>97</sup>

The European Court's reliance on process review has emphasised that the content of legislative deliberation can support a finding of proportionality. Direct and routine engagement with *Hansard* for the purpose of assessing the quality of legislative process is, however, impermissible. In the Court of Appeal's decision in *Wilson v First County Trust*, the suggestion that the justificatory questions posed by proportionality analysis required a more interventionist approach was discernible:

It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced.<sup>98</sup>

By analogy, the court appears to acknowledge the artificiality of a proportionality assessment which is premised on the orthodox approach to statutory interpretation by the courts, that is, a sovereignty-driven acceptance of the legality of the measure under which the assessment of arguments advanced, or not advanced, during legislative debates is non-justiciable.

In spite of this, indications that the courts indirectly acknowledge parliamentary deliberation of legislation affecting the Convention rights are not difficult to find, and it is relatively commonplace to see reference to the 'great weight'<sup>99</sup> which the courts acknowledge should attach to legislative decisions, and the presumption of parliamentary competence to determine how competing societal interests be balanced during the legislative process; 'line[s] must be drawn, and it is for Parliament to decide where.'<sup>100</sup> In those cases involving social and economic policy and the allocation of governmental resources the highest courts have similarly indicated that

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<sup>97</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246, at [51].

<sup>98</sup> [2002] QB 74, at [33].

<sup>99</sup> *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, at [33].

<sup>100</sup> *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, at [33].



‘the choices that are to be made can easily be seen as falling within the discretionary area of judgment best left to the *considered opinion* of the legislature.’<sup>101</sup>

Examining the extent to which the courts are engaging with the ‘forbidden territory’ of parliamentary process and debate, Kavanagh has asked whether such statements are ‘rhetorical flourishes to emphasize the superior status of legislation’ or whether ‘they have a greater practical significance for judicial assessments about whether legislation complies with Convention rights?’<sup>102</sup> Kavanagh concludes that the Law Lords and Supreme Court have drawn both positive and negative inferences from the extent of parliamentary engagement with the implications for the protected Convention rights in the process of proportionality analysis. Some caution is needed here, however, as – even though the Supreme Court has explicitly acknowledged that parliamentary process can affect the intensity of review<sup>103</sup> – the depth in which legislative process is susceptible to judicial examination is subject to ongoing limitations.

The leading case remains the House of Lords decision in *Wilson v First County Trust*.<sup>104</sup> As Lord Nicholls outlined in that decision the court must ask ‘whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate to its adverse effect.’<sup>105</sup> While, as a result, it may be necessary for a court to consider *Hansard* in order to be in a ‘better position to understand the legislation’, the House of Lords was careful to note that the modesty of the change in approach the HRA would require. Lord Nicholls made the following observations:

Beyond [the] use of *Hansard* as a source of background information, the content of parliamentary debates has *no direct relevance* to the issues the court is called upon to decide in compatibility cases and, hence, *these debates are not a proper matter for investigation or consideration by the courts*. In

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<sup>101</sup> *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465, at [77] (emphasis added).

<sup>102</sup> A. Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring some Forbidden Territory’ (2014) 34 OJLS 443, 445.

<sup>103</sup> *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, at [92]-[96].

<sup>104</sup> *Wilson v First County Trust (No.2)* [2003] UKHL 40; [2004] 1 AC 816.

<sup>105</sup> *Wilson v First County Trust (No.2)* [2003] UKHL 40; [2004] 1 AC 816, at [62].

particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure *is not to be judged by the quality of reasons advanced in support of it* in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members ... *Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality.* The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene Article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute.<sup>106</sup>

While the court is ultimately concerned with the proportionality of the statutory measure under debate, the extent to which government has – or has not – considered alternative, less intrusive, measures would not appear to be a legitimate line of judicial inquiry. Whether a statute is considered to be Convention compliant is largely an objective judicial assessment which 'must be judged primarily by what the legislation] provides.'<sup>107</sup> Judicial examination of legislative process within such a proportionality analysis is very much confined to a quantitative, rather than qualitative, assessment.

### **V: A Moderated Approach?**

In the context of review of public authority decision-making, considerations regarding the process by which the public authority arrived at the decision are not, and should not be, dismissed as irrelevant. Considerations of substance and process are not mutually exclusive;<sup>108</sup> the courts are grappling with the the extent of the relevance and weight that ought to be attributed to process when deciding whether a measure or

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<sup>106</sup> *Wilson v First County Trust (No.2)* [2003] UKHL 40; [2004] 1 AC 816, at [67] (emphasis added).

<sup>107</sup> *Salvesen v Riddell* [2013] UKSC 21, at [38].

<sup>108</sup> On which see: A. Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: Outcomes, Substance and Process' (2014) 130 LQR 235, 247-249.

decision has unjustifiably interfered with a Convention right. Decision-making process will not impact upon a court's assessment of whether a Convention right is engaged, or whether there has been a *prima facie* interference with the right in question. Rather, as with questions relating to the expertise or constitutional competence of the primary decision-maker should carry weight, considerations of process may factor in judicial analysis: a thorough, consultative process can positively influence the court's assessment of proportionality, while a deficient process – can weigh against such a finding. In the sphere of public body decision-making at least, while a structured proportionality analysis will not be judicially-required of primary decision-makers, evidence that a 'Convention-like' analysis had taken place might weigh in favour of the decision-maker in the court's assessment. As Lord Neuberger suggested in *Belfast City Council v Miss Behavin' Ltd*:

... it seems to me ... that where a council has properly considered the issue in relation to a particular application, the court is inherently less likely to conclude that the decision ultimately infringes the applicant's rights.<sup>109</sup>

On this reading, process – it would seem – is not entirely irrelevant to the court's assessment of proportionality. Developing Lord Neuberger's approach to the weighing of process considerations, Baroness Hale went some way towards outlining what 'proper' process might entail. The primary question for the court to resolve, Baroness Hale observed, was whether or not the claimant's Convention rights had been infringed.<sup>110</sup> The court's response to that question was not – however – to be completely disassociated from the decision-making process undertaken by the primary decision-maker:

... the court has to decide whether the authority has violated the Convention rights. In doing so, it is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted-for the prevention of disorder or crime, for the protection of health or morals, or for the

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<sup>109</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [91]. See also [37].

<sup>110</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [31].

protection of the rights of others. But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.<sup>111</sup>

Both Neuberger and Hale point towards an approach which maintains the HRA's focus on substance, without jettisoning the established procedural focus of domestic judicial review. Both also indicate that the integration of Convention rights reasoning into public authority decision-making can weigh affirmatively in favour of a finding of compatibility. Decisions taken in the aftermath of *Denbigh* and *Miss Behavin'* illustrate that a failure to consider the rights implications of a decision might also permit adverse inferences to be drawn from the failure of decision-making processes to engage with the Convention implications of a decision.<sup>112</sup> Given the apparent primacy of outcome-focused judicial analysis highlighted by the above discussion, it

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<sup>111</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, at [37]. While TRS Allan challenges Lady Hale's suggestion that judicial review and Human Rights Act review are conceptually different, he shares her sensitivity to the contextual dynamics and differences between public body and judicial decision-making processes: 'The greater the dependence of legal analysis on a sensitive judgment of complex and contested matters of empirical fact, especially where competing imperatives of constitutional right and public interest are finely balanced, the closer the court's intervention must move to a species of procedural review. The court's role must be to examine the quality of the administrative process, in which the public authority will enjoy a limited power to make its own appraisal of all the relevant circumstances, subject to the normal demands of rationality or reasonableness. The court has the final say on the appropriate reconciliation of public and personal, or general and particular, interests; but the judicial process should not be the only means of preserving the requisite balance between citizen and state' (T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013), p.264).

<sup>112</sup> See: *R (on the application of Bashir) v Independent Adjudicator* [2011] EWHC 1108 (Admin); *London Borough of Hillingdon v Neary* [2011] EWHC 1377 (COP).

is important to note that the language of section 6 does not foreclose a broader interpretation which would view ‘acts’ of public bodies as including decisions taken and the broader processes through which those decisions were generated. As a result, the ability of courts to scrutinise administrative processes is not definitively precluded by the HRA itself, even though the primary focus of the judicial enquiry has tended to be taken – on the basis of both section 6 and the perceived approach of the European Court – to be primarily directed towards decision-making outcomes.

By contrast with section 6, the target of section 3(1) HRA is, linguistically, rather more precise: ‘primary ... *legislation*.’ In spite of this, the implementation of the HRA has also prompted a subtle revision of the orthodox understanding of the courts’ approach to examination of legislative process. Courts will afford weight to the judgment of the legislature over the legislative resolution of ‘controversial and complex questions of fact arising out of moral and social dilemmas’<sup>113</sup> on the basis of Parliament’s expert judgment and capacity to accommodate diverse perspectives *and* have been prepared to draw inferences from the apparent depth and diligence of legislative scrutiny. But the extent of this change should not be overstated: the degree to which courts might – to use the wording of Article 9 of the Bill of Rights – question the quality of the parliamentary process remains an area around which the courts are cautious. As much has been observed most recently in the UK Supreme Court’s decision in *HS2* (albeit in the context a dispute concerned primarily with the influence of EU law):

Scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (i.e. condemning) Parliament’s internal proceedings.<sup>114</sup>

The abiding judicial view that an assessment of ‘the quality of ministerial consideration of the policy options available in the context of the evolution of a

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<sup>113</sup> *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38’ [2015] AC 657, at [232].

<sup>114</sup> *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, at [86].

particular legislative measure’ would ‘contravene article 9 of the Bill of Rights 1689’<sup>115</sup> makes detailed scrutiny of legislative process constitutionally impermissible. Given this significant limitation on the use of parliamentary debates during the adjudicative process, it is unsurprising to find that ‘British courts are much more content to elicit the legislative mischief or purpose from other “external aids” to construction’, including Select Committee documents, White Papers, Law Commission reports and so on.<sup>116</sup> While such sources may well illuminate a courts’ assessment of legislative intent, the inability of courts to carefully examine the adequacy of the primary reasons advanced for legislative change ensures first that judicial focus remains on the outcome of parliamentary deliberations – the legislation – and second that attempts to ‘give weight’ to parliamentary consideration of competing interests will continue to be blighted by suggestions of institutional ‘servility, or perhaps gracious concession’<sup>117</sup> to the superior constitutional position of Parliament. For so long as assessment of the adequacy of legislative process remains beyond the constitutional Rubicon, domestic courts will be ill-positioned to fully appraise the proportionality of a legislative measure; a court’s assessment of the quality of the legislative process will necessarily remain impressionistic, rather than forensic. As such, the domestic proportionality exercise will continue to display the artificiality highlighted above, given its potential disconnection from the content of relevant parliamentary debates, and the informed judicial accordance of weight will be compromised through the inability of the court to fully examine the available evidence advanced (publicly) in support of a chosen legislative course. While courts are rightly concerned to avoid the subversion of the democratic process, it is also recognised that the extent to which a decision might be legitimately referred to as the ‘the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances.’<sup>118</sup> Judicial recourse to proxies for the quality of legislative consideration may be appropriate, but cannot always provide the justificatory evidence which would underpin effective proportionality analysis. It may

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<sup>115</sup> *International Transport Roth GmbH* [2002] EWCA Civ 158; [2003] QB 728, at [114].

<sup>116</sup> A. Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring some Forbidden Territory’ (2014) 34 OJLS 443, 455.

<sup>117</sup> *R v British Broadcasting Corporation, ex parte ProLife Alliance* [2003] UKHL 23; [2004] 1 AC 185, at [75].

<sup>118</sup> *R (Countrywide Alliance) v Attorney General* [2008] AC 719, at [45].

be more obviously acceptable to, for instance, afford positive weight to a legislative decision taken following a manifesto commitment, consultation process and lengthy parliamentary process than it would be to afford weight to emergency legislation drafted and debated in the absence of broader deliberation. But to deny, in the latter circumstance, the courts the ability to evaluate what primary evidence in favour of the proposals may be gleaned from the parliamentary debates is to constitutionally impose an obstacle to informed proportionality analysis which denies the court the ability to fully assess whether the claimant's (or any other) interests have been considered in sufficient depth. It might be suggested that a quantitative assessment of legislative process might well be appropriate for a supra-national court seeking to give effect to principles of subsidiarity. Whether it is appropriate for a domestic court to conduct a similar exercise – and comprehensively examine the proportionality of a legislative measure – is open to question.

## **VI: The Interplay with Strasbourg: Subsidiarity, Complementarity or Confusion?**

The above analysis suggests a lack of continuity between the approaches to review adopted at the Strasbourg and domestic levels, and as between the standards of – and approaches to – judicial review of administrative action at common law, and the legislative and public body judicial review sanctioned by the HRA. The procedural focus of judicial review at common law has not been fully replicated either in the species of legislative or judicial review prompted by enactment of the HRA. Nor has the European Court's willingness to inform its proportionality analysis through examination of the adequacy of domestic decision-making processes been consistently acknowledged in HRA review. That domestic courts operate under the misapprehension that the European Court is largely unconcerned with matters of process speaks to both the lack of certainty as to circumstances in which process review is appropriate and provides evidence of a disconnect from the Strasbourg case law (contrary to common perceptions regarding the linkages between the domestic and supra-national levels) which might be seen to limit the potential of the HRA to instil a broad-based culture of rights.

Regardless of the administrative or legislative target of judicial review, a focus on outcomes – to the exclusion of process – 'flies in the face of collaborative –

dialogic – approaches to resolving rights disputes<sup>119</sup> and can increasingly be seen to be in tension with the reasoning processes of the European Court, and with broader attempts to fully integrate subsidiarity into the fabric of the Convention system.<sup>120</sup> The tendency towards an outcomes-focused approach ‘reinforces the idea of the HRA as a juricentric constitutional document’<sup>121</sup> at a time when the European Court of Human Rights is consciously seeking to demonstrate that respect for the considered decisions of national legislatures and governments is an embedded feature of its reasoning processes.<sup>122</sup> While the signs are emerging that a moderated approach is emergent at the local level, it has yet to be fully and/or consistently realised. The judicial self-denying ordinance which appeared to oppose the accommodation of procedural concerns into proportionality analysis under section 6 HRA has shown itself to be more flexible than initially presumed. This is to be contrasted with the rather more immovable constitutional obstacle which, in the context of statutory review, precludes full judicial engagement with the content of legislative process. In the light of these parallel developments, it should be recognised that the examination of administrative and legislative decision-making processes by the domestic judiciary can be facilitative of subsidiarity and can serve to support a finding by the Strasbourg Court that a potential infringement of the Convention rights falls within the discretionary area of judgment afforded to national authorities. For so long as domestic courts lack the willingness or competence to fully consider the adequacy of administrative or legislative decision-making processes in their assessments of

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<sup>119</sup> D. Mead, ‘Outcomes aren’t all: defending process-based judicial review of public authority decisions under the Human Rights Act’ [2012] PL 61, 84.

<sup>120</sup> See the text of Article 1 of Protocol 15 to the ECHR: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in so doing, they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.’

<sup>121</sup> D. Mead, ‘Outcomes aren’t all: defending process-based judicial review of public authority decisions under the Human Rights Act’ [2012] PL 61, 63.

<sup>122</sup> See eg: *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, at [99]; *SAS v France* (2015) 60 EHRR 11, at [129].



proportionality, an opportunity to fully benefit from the Convention's new 'age of subsidiarity'<sup>123</sup> will remain tantalisingly out of reach.

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<sup>123</sup> Joint Committee on Human Rights, *Protocol 15 to the European Convention on Human Rights*, HL 71/HC 837 (2 December 2014), at [3.17].