

Judicial Discretion and the Declaration of Incompatibility: Constitutional Considerations in Controversial Cases

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This piece explores the judicial discretion to make a declaration of incompatibility under s.4 of the Human Rights Act 1998 in controversial cases. It contends that in controversial cases, constitutional considerations may lead to judicial reticence regarding courts' exercise of their discretion to make a declaration, resulting in an inconsistent approach to s.4. The case law on prisoner voting rights is evaluated in order to demonstrate problems with the judicial approach to s.4. It is argued that s.4 can be understood as establishing a double filter mechanism: the first filter is the judicial "decisional space" and the second filter is the political "decisional space". The application of the double filter mechanism is explored in relation to other controversial cases where it is suggested that where the impugned legislation is held wanting, constitutional considerations should not preclude courts from granting a declaration. An alternative approach to the double filter mechanism is proposed, arguing that courts should recognise different constitutional considerations which support making a declaration, maximising the political decisional space.