



**SUPREME, SUBMISSIVE OR
SYMBIOTIC?
UNITED KINGDOM COURTS AND
THE EUROPEAN COURT OF HUMAN
RIGHTS**

ROGER MASTERMAN

Supreme, submissive or symbiotic?

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Table of Contents

Executive Summary	1
1.0 Introduction.....	3
2.0 National Law and the ECHR: The pre-HRA landscape	4
3.0 From the HRA towards a British Bill of Rights	6
4.0 National law and the ECHR: the HRA	9
4.1 The International and Domestic Dimensions of the HRA.....	9
4.2 The HRA Framework	9
4.3 The Strasbourg Enforcement Mechanisms	11
5.0 The Domestic Aspect in Practice: Interpretation and Application of s.2(1) HRA	12
5.1 Section 2(1) HRA.....	12
5.1 ‘Clear and Constant Jurisprudence’	13
5.3 A domestically-focused alternative?.....	15
5.4 No less/No more	16
5.5 A more flexible understanding of the requirements of s.2(1)?.....	17
5.6 The resurgence of the common law?	20
6.0 The International Aspect	21
6.1 The role of national authorities within the Convention system.....	21
6.2 The Margin of Appreciation.....	21
6.3 The ‘Living Instrument’ Doctrine.....	22
6.4 Dialogue with the European Court of Human Rights	24
6.5 Political Dialogue: The Brighton Declaration.....	25
7.0 The UK and Strasbourg: The Practical Dimension.....	27
8.0 The false premise of the Bill of Rights debate?	28
9.0 Breaking the formal link with the European Court of Human Rights.....	29
Select Bibliography and Further Reading.....	32

Executive Summary

- The debate surrounding the creation of a UK Bill of Rights is in part premised on the belief that the decisions of the European Court of Human Rights (given effect pursuant to s.2(1) of the Human Rights Act 1998) exert too great an influence over domestic courts and domestic law. Critics of the Act argue that the courts' application of s.2(1) has rendered decisions of the Strasbourg court effectively binding in domestic proceedings, while critics of the Strasbourg court argue that its expansionary tendencies have seen the Convention rights reach far deeper into domestic affairs than was intended by its authors.
- Following the election of a Conservative majority administration in 2015 the Queen's Speech contained the promise that the new Government would 'bring forward proposals for a British Bill of Rights.' This promise is underpinned by a manifesto commitment to 'break the formal link between British courts and the European Court of Human Rights.'
- Section 2(1) of the Human Rights Act however directs only that domestic courts 'take into account' relevant decisions of the European Court. Following implementation of the Act, initial judicial approaches to the Strasbourg case law erred towards its application in the absence of 'special circumstances.' More recent decisions have however emphasised the non-binding influence of the Strasbourg jurisprudence. Domestic courts have also stressed the ongoing ability of the common law to protect rights and the willingness of UK judges to engage in 'dialogue' with the European court.
- The idea that domestic courts and law are subservient to the whims of the European Court of Human Rights as a result of the Human Rights Act is therefore an oversimplification which ignores the far richer, and more sophisticated, interaction between domestic and European law revealed by closer analysis of the developing case law around the Act.
- The UK remains obligated under international law – as a result of Article 46 of the ECHR – to abide by decisions of the European Court to which it is a party. But the suggestion made by critics of the Court, that the Strasbourg court is, as a result, able to dictate legal change in the UK, also requires further elaboration. The principle of subsidiarity, the margin of appreciation afforded by the European Court and the fact that decisions of the Strasbourg court require implementation by national authorities in order to be translated into domestic law all temper the influence of the Court.
- The 2012 Brighton Declaration reasserted the shared responsibility of the states parties to the Convention and the Court for 'realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity'. The text of the declaration explicitly sought to undercut suggestions that the European Court had usurped the position of national-level protections by proposing amendments to the text of the ECHR to reflect the primary role of national institutions.
- Recent years have therefore seen a weakening of the domestic courts' presumption in favour of applying relevant Strasbourg case-law, alongside reforms at the supra-national level designed to emphasise the primary importance of national decision-

making processes to the Convention system. These developments have taken place alongside a gradual improvement in the UK's record before the European Court of Human Rights. Conservative zeal to replace the Human Rights Act with a British Bill of Rights – breaking the linkage between domestic law and decisions of the European Court – is nonetheless undiminished.

- 'Breaking the link' between domestic law and the European Court of Human Rights through the adoption of a British Bill of Rights alone is, however, not possible. The enactment of a British Bill of Rights, regardless of its terms, would not displace the UK's obligations in international law under Article 46 of the Convention.
- But in the light of the domestic courts' steady dilution of the mirror principle – and the flexibility now recognised in the language of s.2(1) – it is also unclear how a revised equivalent of section 2 in a British Bill of Rights would substantially alter the domestic judiciary's approach to the Convention case-law. Assuming the UK's continued membership of the Council of Europe, a re-worded section 2 – making the consideration of Strasbourg case law optional rather than mandatory – would still be likely to be interpreted in the light of the assumption that Parliament legislates in compliance with the UK's Treaty obligations. It is equally reasonable to suspect that a section 2 equivalent which permitted judicial recourse to a wider range of authority – including the decisions of other common law apex courts, for example – would also see a continued prominence afforded to the (extensive) Convention jurisprudence given the length of time that the UK has been within the jurisdiction of the court, and the extent to which that jurisprudence is now embedded in the UK.
- Complete removal of an equivalent to section 2, leaving the definition of the Bill of Rights' protections to the discretion of domestic judges, or permitting recourse to an extensive range of comparative law sources would, meanwhile, open up the possibility of increased unpredictability and instability in the UK's rights regime. This would leave the domestic judiciary (as argued by the Conservative Lord Kingsland during the debates on the Human Rights Bill) 'cast adrift' and 'able to go in whatever direction they wish.' It is unlikely that – in the longer term – exchanging the perceived activism of the Strasbourg court for that of a 'supreme' domestic apex court would result in a stable settlement.
- While a new equivalent to section 2(1) might deliver symbolic change (amending or altering the link with the Convention case-law), it is unclear that it would lead to significant practical change in the approach of domestic courts to the Strasbourg jurisprudence. Attempts to significantly weaken the linkage may well prompt unintended, unpredictable and constitutionally undesirable consequences.

1.0 Introduction

- 1.1 Since it fully came into effect in October 2000 the Human Rights Act 1998 (hereafter HRA) has effectively functioned as a Bill of Rights for the United Kingdom. The HRA gave ‘further effect’ to certain of the rights contained in the European Convention on Human Rights (hereafter ECHR), making them enforceable standards of legality to which public authorities should adhere,¹ and interpretative tools which might be used to influence the judicial reading and application of primary legislation.² In applying the protected rights, courts are directed – by s.2(1) HRA – to ‘take into account’ the relevant jurisprudence of the European Court of Human Rights.
- 1.2 In the intervening period, the relationship between national authorities – especially domestic courts – and the European Court of Human Rights has become perhaps *the* focal point of controversy surrounding the legal protection of human rights in the UK. While the UK has been bound by decisions of the European Court of Human Rights since becoming one of the first signatories of the ECHR in 1951, the enactment of the Human Rights Act – and concurrent ability of UK courts to utilise Strasbourg jurisprudence in giving effect to the Convention rights³ – has undoubtedly given decisions of the European Court a greater purchase in domestic law than they could be previously said to enjoy.
- 1.3 Over the last decade, the case for a domestic Bill of Rights has, in part at least, been developed in order to see ‘British’ rights⁴ better protected by ‘supreme’ *national* institutions.⁵ The Coalition Government-appointed Commission on a UK Bill of Rights (which reported in December 2012) found that a reassertion of the national dimensions of human rights law through the adoption of a UK Bill of Rights would ‘result in greater domestic “ownership” of rights’ and a reduction in the commonly-held perception that rights – as currently protected under the HRA scheme – are ‘foreign’⁶ or a ‘European imposition.’⁷
- 1.4 The Conservative party under David Cameron has long argued for the amendment or repeal of the Human Rights Act 1998 and its replacement with a British Bill of Rights (and Responsibilities). The years of Coalition Government between 2010 and 2015 saw those plans side-lined in the face of opposition from the Liberal Democrats. Following the election of a Conservative majority administration in May 2015 – with a manifesto commitment to ‘break the formal link between British courts and the European Court of Human Rights’⁸ – the Queen’s Speech contained the promise that the new Government would ‘bring forward proposals for a British Bill of Rights’⁹ in order to achieve that objective.¹⁰ The incoming Secretary of State

¹ Section 6 HRA.

² Section 3 HRA (and see paras.4.2.1-4.2.6 below).

³ The term is used – in s.1(1) of the HRA 1998 – to identify the rights given effect in national law as a result of the Act. The list of rights given such effect is contained in Schedule 1 to the 1998 Act.

⁴ Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012), at [7.12]-[7.16].

⁵ For instance: Chris Grayling, ‘I want to see our Supreme Court supreme again’, *The Spectator*, 28 September 2013.

⁶ Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012), at [7.27].

⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, HL165-I/HC150-I (August 2008), at [94].

⁸ The Conservative Party Manifesto 2015, p.62.

⁹ <https://www.gov.uk/government/speeches/queens-speech-2015>

¹⁰ See also: HC Debs, Vol.598, Cols.301-311, 8 July 2015.

for Justice and Lord Chancellor, Michael Gove MP, has indicated that a consultation on the Government's proposals for a British Bill of Rights will take place during the Autumn of 2015.¹¹

- 1.5 The HRA's adoption was premised on the sense that – in rights adjudication – ‘for British citizens, justice has been exported’¹²; the 1997 Labour Party consultation paper – *Bringing Rights Home* – declared that it was ‘time to repatriate British rights to British courts.’¹³ Some 15 years after the implementation of the Act, the sense that the European Court of Human Rights wields excessive influence over the content and shape of domestic rights protections – despite the HRA's attempted ‘repatriation’ of rights – remains a driver of both domestic reforms and of continued efforts to limit the external influence of the European Court of Human Rights.

2.0 National Law and the ECHR: The pre-HRA landscape

- 2.1 The UK has been a member state of the Council of Europe since 1951, and has permitted the right of individual petition before the European Court of Human Rights since 1966. Despite this, the Convention rights have only been enforceable in domestic courts since October 2000, when the HRA came into full effect across the UK.¹⁴ Prior to the implementation of the HRA, the ECHR rights could not be directly relied upon in domestic adjudication.¹⁵
- 2.2 For much of the latter part of the twentieth century, the common law was widely held to provide protection for individual rights equivalent to that provided by the ECHR. As a result, the 1997 White Paper, *Rights Brought Home*, outlined that it had not been ‘considered necessary to write the Convention itself into British law, or to introduce any new laws in the United Kingdom in order to be sure of being able to comply with the Convention.’¹⁶ By the close of the century this view appeared to demonstrate a complacent belief in the abilities of the common law to protect individual rights.¹⁷
- 2.3 The judicially-administered common law was – in the face of the relative constitutional power of the ‘sovereign’ Parliament – a weak tool via which rights could be protected:

There are two obvious limits to what the common law can achieve by way of protecting human rights. The first is a matter of law – the principle of parliamentary sovereignty. Any legislation can override rights recognised and

¹¹ House of Commons Justice Committee, Oral Evidence, The Work of the Secretary of State for Justice (HC 335), 15 July 2015, Q54-Q55.

¹² 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, 73.

¹³ 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, 71.

¹⁴ The rights given effect by the HRA 1998 were enforceable as against the devolved bodies in Scotland, Wales and Northern Ireland since those institutions had come into being in mid-1999. The HRA came in to full effect in England and Wales on 2 October 2000.

¹⁵ *Malone v Metropolitan Police Commissioner (No.2)* [1979] Ch 344; *Kaye v Robertson* [1991] FSR 62.

¹⁶ *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), at [1.11].

¹⁷ Commission on a UK Bill of Rights report, *A UK Bill of Rights: The Choice Before Us* (December 2012), para 6.32.

protected by the common law. The second is a matter of technique and attitude. By and large the common law courts have not reasoned from the premise of specific rights. Our boast, that we are free to do anything not prohibited by law, and that official action against our will must have the support of law, reflects the fact that our rights are residual – what is left after the law (and in particular, legislation) is exhausted. Our thinking does not proceed from rights to results – rather, our rights are the result.¹⁸

2.4 In the absence of implementing legislation the dualist nature of the constitution largely precluded direct reliance on the Convention rights in domestic law; As Lord Donaldson starkly noted in the then leading decision of *Brind*:

...the duty of the English Courts is to decide disputes in accordance with English domestic law as it is, and not as it would be if full effect were given to this country's obligations under the Treaty ... It follows from this that in most cases the English courts will be *wholly unconcerned* with the terms of the Convention.¹⁹

While, in the event of a statutory uncertainty or ambiguity, the courts were able to presume parliamentary intent to legislate compatibly with the UK's international obligations under the Convention, further recourse to the Convention rights was resisted on the basis that it would amount to incorporation of the Convention via the back door.²⁰

2.5 Nor could the routine protection by Parliament of individual rights be taken for granted. As the late Lord Bingham observed (extra-judicially) in terms which retain relevance: 'The elective dictatorship of the majority means that, by and large, the government of the day can get its way, even if its majority is small. If its programme or its practice involves some derogation from human rights Parliament cannot be relied on to correct this.'²¹

2.6 The UK's record before the European Court of Human Rights appeared to demonstrate that the joint record of Parliament and the common law in upholding individual liberties was severely open to question²² and evidence of the failure of domestic law to meet the minimum standards of the ECHR was not difficult to locate.²³ Ewing and Gearty commented in 1990 that 'Britain has an unenviable reputation as one of the most consistent transgressors against human rights in the

¹⁸ J Doyle and B Wells, 'How far can the common law go towards protecting human rights?' in P. Alston (ed), *Promoting Human Rights through Bills of Rights* (Oxford, Oxford University Press, 1999), 17. For a timely reminder of the common law's deficiencies as a mechanism of rights protection see: C. A. Gearty, 'On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights' [2015] EHRLR 1.

¹⁹ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 718 (emphasis added).

²⁰ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. And see also: *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

²¹ T. H. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390.

²² See: K.D. Ewing and C.A. Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990), ch.1.

²³ See eg: *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283-284 (Lord Goff of Chieveley); *Derbyshire v Times Newspapers* [1993] AC 534, 551 (Lord Keith of Kinkel). Cf *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245; *Sunday Times v United Kingdom* (1992) 14 EHRR 229.

Council of Europe²⁴ while Lord Irvine outlined at Second Reading of the Human Rights Bill:

Our legal system has been unable to protect people in the 50 cases in which the European Court of Human Rights has found a violation of the Convention by the United Kingdom. That is more than any country other than Italy. The trend has been upwards. Over half the violations have been since 1990.²⁵

3.0 From the HRA towards a British Bill of Rights

3.1 Adoption of the HRA served the perceived need to see rights cases adjudicated in domestic courts, saving applicants the long and costly process of taking a case to the European Court of Human Rights (a court then perceived to be ‘neither sufficiently familiar with, nor sensitive to, British legal and constitutional traditions’²⁶). The HRA was intended to domesticate decisions relating to the protection of the Convention rights – to ‘bring rights home’ – and in so doing to both reduce the occasions on which the UK would be found to be in contravention of the Convention and to allow domestic decision-making processes to be fully considered in adjudication reaching the European Court of Human Rights. In the words of the White Paper which preceded enactment of the HRA:

The [Convention] rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much. [...] Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts – without this inordinate delay and cost. It will also mean that the rights will be brought more fully into the jurisprudence of the court throughout the United Kingdom, and their interpretation will thus be more subtly and more powerfully woven into our law. And there is another distinct benefit. British judges will be enabled to make a distinctly British contribution to the development of the jurisprudence of human rights in Europe.²⁷

3.2 Since enactment of the HRA the Convention’s influence has certainly been more keenly felt in domestic law.²⁸ The ability of courts to enforce the Convention rights has given the Convention jurisprudence an immediacy that it could not previously have been said to enjoy. Human rights litigation can account for almost 30 per cent of the case load of the apex court²⁹ and the effects of the Convention on certain

²⁴ K.D. Ewing and C.A. Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990), p.2.

²⁵ HL Debs, Vol.582, Col.1227, 3 November 1993.

²⁶ 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, 71.

²⁷ Rights Brought Home: The Human Rights Bill, Cm.3782 (October 1997), at [1.14].

²⁸ In an early assessment of the HRA, Kier Starmer found that: ‘Between October 2000 and April 2002, the ECHR was substantively considered in 431 cases in the High Court or above. In 318 of those cases, it affected the outcome, reasoning or procedure.’ This stands in sharp contrast to analysis of the pre-HRA position which revealed that ‘in the 21 years from July 1975 to July 1996, the ECHR was substantively considered in 316 cases in the High Court or above and affected the outcome, reasoning or procedure in just 16.’ (K. Starmer, ‘Two years of the Human Rights Act’ EHRLR [2003] 14, 15).

²⁹ See generally: S. Shah and T. Poole, ‘The Impact of the Human Rights Act on the House of Lords’ [2009] PL 347.

areas of national law have been transformative.³⁰ And yet – as a governmental review of the Act published in 2006 recorded – the ‘impact of the HRA on the development of UK Law had been significantly less, and significantly less negative’ than many sceptics had predicted.³¹

3.3 While the Act – and the Convention rights – may have been perceived as obstacles to the achievement of policy objectives by Ministers during the Act’s early years of operation, the review conceded that it had ‘not seriously impeded the government’s objectives on crime, terrorism or immigration and has not led to the public being exposed to additional or unnecessary risk.’³²

3.4 As to the UK’s relationship with the European Court of Human Rights, the review noted the following:

There is no doubt that the Human Rights Act has also established a ‘dialogue’ between English judges and the European Court of Human Rights. The close analytical attention paid by the English courts to the European Convention on Human Rights case law is respected in Strasbourg, and has become influential on the way it approaches English cases. This in part accounts for the *significant reduction* in a number of adverse decisions against the UK Government by the European Court of Human Rights since the Human Rights Act came into effect.³³

It continued:

... the evidence is that, if anything, the UK Government tends to get better outcomes than previously in Strasbourg through having the Act, because these issues are adjudicated by UK judges here in a manner which has gained the approval and respect of the European Court of Human Rights.³⁴

3.5 The 2006 review was, however, conducted on behalf of a Labour Government attempting to counter growing criticism of one of its flagship constitutional reforms. The election of the Conservative-dominated Coalition Government in 2010 saw the end of any attachment between governing party and its legislative offspring and saw debate steadily refocus around the domestic credentials of the UK’s human rights laws.

3.6 The 2012 report of the Commission on a UK Bill of Rights provided little criticism of the HRA’s specific mechanism of reconciling the Strasbourg case-law with domestic common and statute law. The Commission did however, point to a perceived lack of domestic ‘ownership’ of the HRA and its protected rights, with the

³⁰ Particularly, perhaps, in those areas of national law which fall within the scope of Article 8. Though, as Lord Bingham has noted, it should come as no surprise that the Convention has had a marked influence on this previously ‘piecemeal’ and ‘inadequate’ area of domestic law (T. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010), p.71).

³¹ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), p.4.

³² Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), p.3.

³³ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), p.4 (emphasis added).

³⁴ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), p.34.

majority of the Commission finding that this provided ‘the most powerful argument for a new constitutional instrument.’³⁵

- 3.7 By 2014, a Conservative party paper outlining plans for alteration of the UK’s human rights laws and the UK’s relationship with the European Court of Human Rights, spelled out concerns in the following terms:

The European Court of Human Rights has developed ‘mission creep’. Strasbourg adopts a principle of interpretation that regards the Convention as a ‘living instrument’. Even allowing for necessary changes over the decades, the ECtHR has used its ‘living instrument doctrine’ to expand Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it. There is mounting concern at Strasbourg’s attempts to overrule decisions of our democratically elected Parliament and overturn the UK courts’ careful applications of Convention rights.³⁶

- 3.8 While parliamentary sovereignty provided the conceptual framework around which the HRA was constructed, the current debate over the future of the HRA and the UK’s relationship with Strasbourg is as much animated by rather less concrete – in terms of domestic constitutional doctrine at least – concerns relating to *national* sovereignty. The well-established tabloid narrative that the HRA protects only ‘undeserving’ litigants has been accompanied by a growing perception that the ECHR and the European Court are becoming increasingly influential ‘tools of European meddling in British justice.’³⁷ The 2014 Conservative Party document accordingly openly mooted the potential for the UK to withdraw completely from the ECHR system.³⁸

- 3.9 The May 2015 election saw the return of a Conservative administration – albeit one with a relatively modest parliamentary majority – elected following a manifesto commitment to ‘scrap the Human Rights Act, and introduce a British Bill of Rights’ in order to ‘*break the formal link* between British Courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the United Kingdom.’³⁹ Despite the Prime Minister’s confidence that the Government’s proposals will be in compliance with the UK obligations under the ECHR,⁴⁰ and the Secretary of State for Justice’s ‘hope’ that the UK will remain within the Convention system⁴¹, complete withdrawal from the jurisdiction of the Strasbourg court has not been ruled out.

³⁵ Commission on a UK Bill of Rights report, *A UK Bill of Rights: The Choice Before Us* (December 2012), at [80].

³⁶ The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’

https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.3.

³⁷ ‘There may be trouble ahead’, *The Economist*, 16th May 2015.

³⁸ The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’

https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.8.

³⁹ The Conservative Party Manifesto 2015 (Emphasis added).

⁴⁰ HC Debs, Vol.598, Cols.301-311, 8 July 2015.

⁴¹ House of Commons Justice Committee, Oral Evidence, The Work of the Secretary of State for Justice (HC 335), 15 July 2015, Q54-Q55.

- 3.10 The ‘formal link’ between domestic courts and the European Court of Human Rights rests upon two elements: the obligations on courts imposed by the Human Rights Act itself and the obligations on the UK imposed by membership of the Convention system. Each will be addressed in turn.

4.0 National law and the ECHR: the HRA

4.1 *The International and Domestic Dimensions of the HRA*

- 4.1.1 Two characteristics of the HRA scheme have given rise to the perception of the HRA which sees domestic courts as merely enforcing European rights defined by the European Court. The domestic aspect of this perception focusses on the mechanism employed by the HRA in order to see the protected rights given meaning. The international aspect of this argument focuses on the European Court of Human Rights and the umbilical linkage between its decisions and the rights enforced under the HRA.
- 4.1.2 The domestic aspect concerns the mechanism by which the Court’s case law is translated into domestic law, and the nature of the transformation which occurs as national courts seek to give effect to the Convention rights. Central to this debate is s.2(1) of the HRA which, despite its open (perhaps imprecise) language is said to effectively require the direct application of Strasbourg jurisprudence, and therefore limit the ability of domestic courts to develop a human rights jurisprudence which is sensitive to, and respectful of, distinctive characteristics of domestic law.⁴²
- 4.1.3 The international aspect concerns the ability of the European Court of Human Rights to influence domestic law and policy, with the Court increasingly accused of over-reaching into matters more readily falling within both the competence and expertise of national-level decision-makers. The ‘living instrument’ doctrine, it is argued, has been utilised by the Court to include meaning in the Convention that its framers cannot possibly have envisaged,⁴³ with the text of the ECHR ignored as the Court has taken it upon itself to ‘invent’ new rights.⁴⁴

4.2 *The HRA Framework*

- 4.2.1 The governing provision of the Human Rights Act 1998 – s.2(1) – provides:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of

⁴² Contrast: R. Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 ICLQ 907.

⁴³ The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’

https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.3.

⁴⁴ This suggestion is made on multiple occasions in D. Raab, *The Assault on Liberty: What went wrong with rights* (London: Fourth Estate, 2009), esp. pp.123-168.

the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

- 4.2.2 While the obligation imposed upon courts by s.2(1) might (linguistically at least) appear to be relatively weak, it cannot be considered in isolation of the Act's primary 'enforcement' provisions. Section 3(1) requires that courts seek to interpret primary legislation in a way which is compatible with the Convention Rights, while s.6 renders it unlawful for public authorities to act in a way which would contravene the protected rights.
- 4.2.3 Section 3(1) of the HRA provides: '[s]o 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.' The foil to this far-reaching provision can be found in s.4 which – in the event that primary legislation cannot be interpreted compatibly with protected rights – provides that it may be the subject of a declaration of incompatibility. In the event that a declaration of incompatibility is issued by the higher courts, the decision over how (indeed whether) to remedy the judicially-identified deficiency in the legislation is passed back to the elected arms of government.⁴⁵
- 4.2.4 The adoption of this mechanism by which judicial and legislative (and/or executive) power over the resolution of rights disputes was designed to counter arguments relating to the counter-majoritarian – or anti-democratic – elements of rights adjudication. As Conor Gearty has observed, contrary to the 'orthodox precedents' of other Bills of Rights, the declaration of incompatibility mechanism indicates the 'genius' of the HRA through 'inviting the political back in to control the legal at just the moment when the supremacy of legal discourse seems assured.'⁴⁶
- 4.2.5 Section 6(1) renders it 'unlawful for a public authority to act in a way which is incompatible with a Convention right.' For the purposes of interpreting the reach of s.6, public authorities are defined so as to include both courts and private bodies exercising public functions, but the Act's definition does not include Parliament and persons undertaking functions in connection with proceedings in Parliament.⁴⁷
- 4.2.6 In spite of the phrasing of s.2(1), when it is considered alongside s.6(1) and s.3(1) it is clear that the jurisprudence of the European Court of Human Rights (and the legal framework within which that jurisprudence operates) is of fundamental importance to the HRA scheme. As Mark Elliott has argued:

By ascribing to the United Kingdom's international obligations under the Convention a central role on the domestic stage, the distinction between international and domestic law is (in this context) substantially eroded. In

⁴⁵ As of March 2015, 29 declarations of incompatibility had been issued since the HRA became operational in October 2000. Of that number, 20 had become final (ie had survived an appeal process or had not been appealed), with only three such declarations issued during the course of the 2010-2015 Parliament (See: Joint Committee on Human Rights, *Human Rights Judgments*, HC130/HL1088 (March 2015), p.17).

⁴⁶ C.A. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), pp.94-98.

⁴⁷ HRA, s.6(3).

result, the legal values which newly infuse the political process are invested with real normative force, their fragility viewed through the parochial lens of parliamentary sovereignty being somewhat obscured by the obligatory character which they enjoy as binding norms of international law.⁴⁸

4.3 The Strasbourg Enforcement Mechanisms

- 4.3.1 A finding by the European Court of Human Rights that a state has acted in breach of the requirements of the Convention triggers an obligation on the part of the state which sounds in international law. Article 46(1) of the ECHR provides that: '[t]he High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties'.
- 4.3.2 The strength of this obligation under international law was emphasised by Lord Sumption in the UK Supreme Court decision of *Chester and McGeoch* where it was noted that '[Article 46 imposes] an international obligation on the United Kingdom ... to abide by the decisions of the European Court of Human Rights in any case to which it is a party. This obligation is in terms absolute.'⁴⁹
- 4.3.3 However, decisions of the European Court of Human Rights in which the Strasbourg Court has found the UK to have acted in breach of the requirements of the Convention are *not* self-executing:

A finding by the European Court of Human Rights of a violation of a Convention right does not have the effect of automatically changing United Kingdom law and practice: that is a matter for the United Kingdom Government and Parliament.⁵⁰

- 4.3.4 Nor do decisions of the Strasbourg court specify how a breach might be remedied. Rather, judgments of the European Court of Human Rights are 'essentially declaratory'⁵¹ in nature, stating whether a given decision, action or omission of the national authorities in question is either compatible with, or in breach of, the Convention standards (or falls within the State's margin of appreciation). Further, that the Strasbourg authorities recognise that a certain amount of adaptation may be necessary to give effect to their decisions at the national level is evident from the allowance that a State is free to implement such decisions 'in accordance with the rules of its national legal system'.⁵² Claims that an adverse finding at Strasbourg 'compels' a specific course of action at the domestic level should be considered in the light of this; decisions of the European Court of Human Rights do not set precedents akin to those understood to be a core element of common law process.⁵³

⁴⁸ M. Elliott, 'After Brighton: Between a Rock and a Hard Place' [2012] PL 619, 621.

⁴⁹ *Chester and McGeoch v Secretary of State for Justice* [2013] UKSC 63, at [119].

⁵⁰ *Rights Brought Home*, at [1.10].

⁵¹ D.J. Harris, M. O'Boyle, and C. Warbrick *Law of the European Convention of Human Rights* (Butterworths London 1995), p. 26.

⁵² D.J. Harris, M. O'Boyle, and C. Warbrick *Law of the European Convention of Human Rights* (Butterworths London 1995), p. 26 (where the example given is of *Vermeire v Belgium* (1993) 15 EHRR 488).

⁵³ For a more detailed examination of this point see: R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 ICLQ 907, 915-921.

- 4.3.5 A straightforward example will illustrate the point. The decision in *Hirst v United Kingdom (No.2)* is frequently portrayed as having *required* the UK government to afford convicted prisoners the right to vote in elections.⁵⁴ Rather, the finding of the court was that a blanket ban on prisoner voting was a disproportionate interference with rights under Article 3 of Protocol No.1 of the Convention. The decision of the European Court was silent on the remedial steps required, reiterating the point that a ‘wide’ margin of appreciation resulted from the fact that ‘[t]here are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each contracting state to mould into its own democratic vision.’⁵⁵
- 4.3.6 In *Greens and MT v United Kingdom*, the European Court was emphatic in this regard, noting that while the UK remained under an obligation to remedy the breach in relation to prisoner voting, it would be inappropriate for it to dictate ‘the content of future legislative proposals.’⁵⁶

5.0 The Domestic Aspect in Practice: Interpretation and Application of s.2(1) HRA

5.1 Section 2(1) HRA

- 5.1.1 The wording of s.2(1) appears to impose only a weak obligation on domestic courts determining issues relating to the Convention rights; as Lord Irvine of Lairg QC has observed, the statutory wording ‘take into account’ suggests that a court should “‘have regard to”, “consider”, “treat as relevant” or “bear in mind” the Convention case law.⁵⁷
- 5.1.2 There is evidence in the parliamentary debates on the Human Rights Bill that imposing a stronger obligation on domestic courts was not intended. In the face of Conservative calls to replace the words ‘take into account’ in clause 2 of the Bill with the words ‘shall be bound by’,⁵⁸ the then Lord Chancellor responded by suggesting that use of the word ‘binding’ would impose precedential obligations which would go ‘further ... than the Convention itself requires.’⁵⁹
- 5.1.3 Lord Irvine appeared to envisage that the HRA would prompt a dynamic relationship between national courts and the European Court of Human Rights, giving rise to a so-called ‘dialogue’ between the two:

The courts will often be faced with cases which involve factors perhaps specific to the United Kingdom which distinguish them from cases considered by the European Court... [I]t is important that our courts

⁵⁴ See, eg: W. Steavenson, ‘Jonathan Sumption: The Brain of Britain’, *The Guardian*, 6 August 2015.

⁵⁵ *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41, at [61].

⁵⁶ *Greens and MT v United Kingdom (2011)* 53 EHRR 21, at [115].

⁵⁷ Lord Irvine of Lairg QC, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 238.

⁵⁸ See: HL Debs, Vol.583, Col.514, 18 November 1997 (Lord Kingsland); HC Debs, Vol.313, Cols.397-398, 3 June 1998 (Edward Leigh MP).

⁵⁹ HL Debs, Vol.583, Col.514, 18 November 1997.

have the scope to apply that discretion so as to aid the development of human rights law.⁶⁰

The Labour Government did not, it would seem, envisage domestic courts being the passive recipients of an externally-imposed jurisprudence; national judges, Irvine noted, ‘must be free to try to give a lead to Europe as well as to be led.’⁶¹

- 5.1.4 In the House of Lords decision *In Re G*, Lord Hoffmann noted that the ‘language [of s.2(1)] makes it clear that the United Kingdom courts are not bound by ... decisions [of the European Court of Human Rights]; their first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg.’⁶² As a result, it should be stressed that the primary role of the Courts under the HRA is to give effect to the provisions of the Act itself; deployment of the Strasbourg case-law is a secondary function.

5.1 ‘Clear and Constant Jurisprudence’

- 5.2.1 In practice however, domestic courts initially accorded s.2(1) a rather more specific meaning that the language of the provision might naturally suggest. Rather than using the Strasbourg jurisprudence to inform the development of the law under the HRA, the approach of the courts tended towards treating the Convention case law as the law to be applied in the application of the Act. As such, the argument has been made that – contrary to the apparent wording of the Act and of governmental intent⁶³ – the Convention jurisprudence was taken as being tantamount to binding on domestic courts.⁶⁴

- 5.2.2 As the domestic courts gradually reconciled themselves with their obligations under the HRA it is perhaps understandable that a presumption in favour of the application of relevant Strasbourg case law emerged. As Lord Slynn outlined in *Alconbury*:

Although the Human Rights Act 1998 does not provide that a national court is bound by ... decisions [of the Strasbourg organs] it is obliged to take account of them so far as they are relevant. In the absence of special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.⁶⁵

⁶⁰ HL Debs, Vol.584, Cols.1270-1271, 19 January 1998.

⁶¹ HL Debs, Vol.583, Col.514, 18 November 1997.

⁶² *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, at [34].

⁶³ The White Paper stated that, ‘our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights (although these will not be binding)’ (*Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), at [2.4]).

⁶⁴ R. Masterman, ‘Section 2(1) of the Human Rights Act: Binding Domestic Courts to Strasbourg?’ [2004] PL 725.

⁶⁵ *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, at [26].

- 5.2.3 The ‘clear and constant’ jurisprudence approach was subsequently endorsed in the case of *Anderson* – concerning the compatibility of the Home Secretary’s discretionary power to determine the minimum tariff to be served by adult prisoners convicted of murder with Article 6(1) of the ECHR⁶⁶ – by the Senior Law Lord. In that case, Lord Bingham outlined:

While the duty of the House under s.2(1) of the Human Rights Act 1998 is to take account of any judgment of the European Court, whose judgments are not strictly binding, the House will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber.⁶⁷

- 5.2.4 The presumption in favour of following the Strasbourg line was reiterated – in the context of a decision regarding the obligations on the state to investigate deaths in custody – in *Amin*:

... even if the United Kingdom courts are only to take account of the Strasbourg Court decisions and are not strictly bound by them (section 2 of the Human Rights Act 1998), where the Court has laid down principles and, as here a minimum threshold requirement, United Kingdom courts should follow what the Court has said.⁶⁸

- 5.2.5 Even if it could not be said that these early interpretations of the s.2(1) requirement did not *require* that domestic courts apply relevant Strasbourg case law, they quickly established a presumption that national courts would do so, and that courts seeking to depart from an otherwise applicable Strasbourg authority would have to identify the ‘special circumstances’ on which the departure would be justified.⁶⁹

- 5.2.6 The interpretation of the requirements of s.2(1) evidenced in *Alconbury*, *Amin* and *Anderson* provides evidence of an understanding of the HRA which sees domestic courts positioned as local proxies for the European Court of Human Rights. As Lord Nicholls summarised in *Quark*:

The [Human Rights] Act was intended to provide a 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.⁷⁰

⁶⁶ The provision allocating the power – s.29 of the Crime (Sentences) Act 1997 – was declared incompatible with the right to a fair trial under Article 6(1) ECHR (for the reason that the Home Secretary, as a member of the executive, could not be considered to be an ‘independent and impartial’ adjudicator).

⁶⁷ R (*on the application of Anderson*) v Secretary of State for the Home Department [2002] UKHL 46, at [18].

⁶⁸ R (*on the application of Amin*) v Secretary of State for the Home Department [2003] UKHL 51, at [44].

⁶⁹ Lord Hoffmann provided an early example of ‘special circumstances’ under which a relevant Strasbourg decision might not be followed in *Alconbury*: ‘The House [of Lords] is not bound by decisions of the European Court and, if I thought that ... they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed’ (R (*on the application of Alconbury Developments Ltd*) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, at [76]).

⁷⁰ R v Secretary of State for Foreign and Commonwealth Affairs, *ex parte Quark Fishing Ltd* [2005] UKHL 57, [34].

Giving effect to the ‘Convention rights’ in domestic law therefore led the courts to give effect to the *Convention case law* as the authoritative line on the interpretation of the protected rights. The sense given was less of a dynamic relationship between courts, but of a responsive domestic judiciary seeking to give faithful effect to the largely pre-determined Convention jurisprudence.

5.3 A domestically-focused alternative?

5.3.1 Though the default approach of the House of Lords appeared to assume application of relevant Convention jurisprudence – in the absence of some ‘special circumstance’ – an alternative reading of the role of courts pursuant to s.2(1) was also evident during the Act’s infancy. This view saw the HRA less as a vehicle through which the Strasbourg case-law could be given effect to domestically, more as an instrument through which – having regard to the Convention’s guarantees – a distinctly domestic law of human rights might be developed.

5.3.2 In the Court of Appeal decision in *Runa Begum v Tower Hamlets LBC*, Laws LJ made the following remarks:

... the court’s task under the HRA ... is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as HRA s.2 enjoins us to do.⁷¹

5.3.3 Returning to this theme in *R (on the application of ProLife Alliance) v British Broadcasting Corporation*, Laws LJ continued:

The English court is not a Strasbourg surrogate ... [O]ur duty is to develop, by the common law’s incremental method, a coherent and principled domestic law of human rights ... [T]reating the ECHR text as a template for our own law runs the risk of an over-rigid approach.⁷²

5.3.4 Other senior judges were also keen to demarcate a conceptual difference between the Convention rights as applied domestically and the Convention as interpreted by the European Court of Human Rights. In the House of Lords decision in *McKerr*, Lord Hoffmann argued that domestic courts should enjoy interpretative authority over rights questions for the reason that – while the language of the HRA mimics that of the Convention – the rights available to litigants in domestic courts are ‘... domestic rights, not international rights. Their source is the statute, not the Convention ... their meaning and application is a matter for domestic courts, not the court in Strasbourg.’⁷³

5.3.5 The importance of this line of cases is to counter the suggestion that the HRA *necessarily* subordinates domestic courts – and thereby domestic law – to the (allegedly excessive) influence of the European Court of Human Rights. Since the

⁷¹ *Runa Begum v Tower Hamlets LBC* [2002] 2 All ER 668, at [17].

⁷² *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] 2 All ER 756, at [33]-[34].

⁷³ *Re McKerr* [2004] UKHL 12, at [65] (Lord Hoffmann).

earliest days of the HRA's operation, a school of thought – quite clearly evidenced in the case-law – has existed which sees the Convention rights given effect by the HRA as standards which are as much the product of domestic processes and reasoning as they are the product of a 'foreign' court.

5.4 No less/No more

5.4.1 The prevailing approach to the governing provision of the HRA – s.2(1) – demonstrated a strong collective presumption on the part of the judiciary that relevant Strasbourg authority should be applied. The development and application of this so-called 'mirror principle'⁷⁴ gave life to the suggestion that the Strasbourg authority was tantamount to binding precedent and is best illustrated in the House of Lords decision in the deportation case of *Ullab*. In that case, Lord Bingham, then Senior Law Lord, said the following:

... a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention Right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.⁷⁵

This hugely influential passage not only conditioned the courts' approach to the specific construction and application of s.2(1) of the HRA, but came to be seen as a rather more pervasive indicator of the purpose and function of the Act as a whole.⁷⁶

5.4.2 The extent to which the *Ullab* presumption influenced judicial decision-making under the HRA – even in the apex court – was considerable and led to a number of senior judges denying the ability of domestic courts to pre-empt, clarify or query decisions taken by the European Court. In the House of Lords decision in *N v Secretary of State for the Home Department*, Lord Hope outlined that the consequence of the relationship between domestic courts and the European Court as established by the HRA was for the judges to:

⁷⁴ The phrase 'mirror principle' is Jonathan Lewis': J. Lewis, 'The European Ceiling on Rights' [2007] PL 720. See also: 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 under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

⁷⁵ *R (on the application of Ullab) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323, at [20] (Lord Bingham). Lord Bingham was supportive of incorporation (see: T. Bingham, 'The European Court of Human Rights: Time to incorporate' (1993) 109 LQR 390) and a defender of the idea that English law had been 'enriched by the injection of international jurisprudence, emanating from Strasbourg, and binding on the UK in international law' (T. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010), p.82.

⁷⁶ T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), pp.31-40.

... analyse the jurisprudence of the Strasbourg court and, having done so and identified its limits, to apply it to the facts of [the] case ... It is not for us to search for a solution ... which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be.⁷⁷

While Lord Hope was careful to note that extension of the protections attaching to the Convention rights was not a matter for national *courts*, the broader sense was conveyed of national judges operating within the strictures of Strasbourg precedent⁷⁸ and having little capacity to engage critically with the Strasbourg case law, even where it was felt to be unclear, inadequately reasoned, or otherwise unsatisfactory.⁷⁹

- 5.4.3 The occasional sense that the judiciary viewed the Strasbourg jurisprudence as a ‘straightjacket from which there is no escape’⁸⁰ is perhaps best conveyed in the speech of the late Lord Rodger in *AF (No.3)*:

Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentorum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.⁸¹

5.5 A more flexible understanding of the requirements of s.2(1)?

- 5.5.1 Lord Kerr was among the first of the senior judiciary to lament the inhibiting effects of the presumption that domestic human rights law should simply track and mimic its Strasbourg counterpart. In *Ambrose v Harris*, Lord Kerr observed that:

... some judges in this country have evinced what might be described as an *Ullab*-type reticence. On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone.⁸²

- 5.5.2 In the light of the fact that, under the Convention system, not all questions relating to the Convention rights could – as a matter of ‘practical reality’ – possibly be addressed in the Strasbourg jurisprudence, Lord Kerr recognised that ‘many claims to Convention rights will have to be determined by courts at every

⁷⁷ *N v Secretary of State for the Home Department* [2005] UKHL 31, at [25].

⁷⁸ R. Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?’ [2004] PL 725. See also: Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 240.

⁷⁹ *N v Secretary of State for the Home Department* [2005] UKHL 31, at [11], [14] and [91].

⁸⁰ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, at [50].

⁸¹ *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269, at [98].

⁸² *Ambrose v Harris* [2011] UKSC 3; [2011] 1 WLR 2435, at [126]. See also: Lord Kerr, ‘The UK Supreme Court – The Modest Underworker of Strasbourg?’, Clifford Chance Lecture, 25 January 2012; R (*on the application of Children’s Rights Alliance for England*) v *Secretary of State for Justice* [2013] EWCA Civ 34, at [62]-[64] (Laws LJ).

level in the UK without the benefit of unequivocal jurisprudence from the European court.’ Though the ‘no less, no more’ encapsulation of the courts’ role suggested a deferential approach to the Strasbourg jurisprudence, Lord Kerr argued in favour of a more positive duty to:

... ascertain ‘where the jurisprudence of the Strasbourg court clearly shows that it currently stands’ but [also] to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view.⁸³

In the absence of a rather more critical stance towards the Strasbourg case law, the ‘much vaunted’ dialogue between national courts and the European Court of Human Rights would – Lord Kerr argued – amount to naught.⁸⁴

5.5.3 Though the *Ullab* approach retains credibility, it no longer can be said to imply unquestioning acceptance of the Strasbourg line. The steady dilution of the ‘mirror principle’ in recent years has seen the grounds on which domestic courts might depart from the Strasbourg line articulated with more confidence and clarity, for instance, where:

- It is ‘reasonably foreseeable’ that the European Court of Human Rights would now come to a different conclusion than in the available authorities;⁸⁵
- A margin of appreciation would be likely to be afforded, rendering the question to be resolved as one for domestic authorities to ‘decide for themselves’;⁸⁶
- The area is governed by common law and the court is minded to exercise its discretion to depart from the Strasbourg line;⁸⁷
- The court attaches ‘great weight’ to a parliamentary (legislative) decision which determines the balance to be struck between rights and interests in a way which might be interpreted as being inconsistent with Strasbourg authority;⁸⁸
- The Strasbourg case-law has passed its use-by date;⁸⁹
- The Strasbourg authority is wrong (‘inconsistent with some fundamental substantive or procedural aspect of our law’);⁹⁰

⁸³ *Ambrose v Harris* [2011] UKSC 3; [2011] 1 WLR 2435, at [129]. Cf. at [18]-[20] (Lord Hope).

⁸⁴ *Ambrose v Harris* [2011] UKSC 3; [2011] 1 WLR 2435, at [130].

⁸⁵ *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356, at [53]

⁸⁶ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, at [31]

⁸⁷ *Rabone v Pennine Care Foundation NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at [113]

⁸⁸ *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, at [33]

⁸⁹ *R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 48; [2012] 1 AC 621, at [43]

⁹⁰ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, at [48]

- The Convention case-law is badly-informed ('appear[s] to overlook or misunderstand some argument or point of principle').⁹¹

5.5.4 While Lewis was able to comment in 2007⁹² that the judicial compulsion towards following the Strasbourg case law was 'practically inescapable' – and that exceptions to the presumption that relevant Convention jurisprudence be applied were more readily found in theory than in practice – the courts' approach to s.2(1) in the intervening years has steadily been modified in order to more readily reflect the discretion apparent in the wording of s.2(1) of the Act. As the grounds on which departure from the nominally-applicable Strasbourg case law become better articulated by the courts, s.2(1) becomes more readily described as a 'filter into the channel by which the Convention rights enter municipal law'.⁹³

5.5.5 The Supreme Court decision in *Pinnock* provides, in summary, clear evidence of this more nuanced approach. In that decision, Lord Neuberger, with whom the eight other Supreme Court Justices agreed, said:

This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law... Of course, we should usually follow a clear and constant line of decisions by the European court ... but we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber ... section 2 of the HRA requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.⁹⁴

5.5.6 Lest it should be thought that the *Pinnock* approach is little more than modest refinement of the mirror principle, the Supreme Court decision in *Horncastle* confirms that Strasbourg authorities – even when taken by the Grand Chamber of the European Court and amounting to 'a clear statement of principle ... in respect of the precise issue' before the domestic court – will *not* be regarded as being binding in domestic proceedings.⁹⁵

5.5.7 The 2015 position was well-summarised in debates in the House of Lords by Lord Lester of Herne Hill QC:

The [Human Rights] Act requires our courts to have regard to Strasbourg judgments, but not to be bound by them. Our Supreme Court has been robust in recent years in subjecting Strasbourg reasoning to critical

⁹¹ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, at [48].

⁹² J. Lewis, 'The European Ceiling on Rights' [2007] PL 720.

⁹³ D. Feldman, 'The Internationalization of Public Law and its Impact on the UK' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 2011), p.150.

⁹⁴ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, at [48]

⁹⁵ *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373 at [11] (Lord Phillips).

scrutiny, and explaining where it begs to differ. A valuable dialogue now takes place, and the judgments of our courts are influential in Strasbourg.⁹⁶

5.6 *The resurgence of the common law?*

- 5.6.1 In parallel with the judicial development of an interpretation of the requirements of s.2(1) which admits of greater flexibility in the translation of Strasbourg jurisprudence into domestic law, the UK Supreme Court has also pointed towards the further development of a distinctly national source of rights protection, reiterating – in a series of recent decisions – the potential utility of the common law as a tool of rights protection.⁹⁷ Observing the tendency – prompted by the HRA – for courts and advocates to treat the Convention case-law as both the beginning and end of an enquiry into a potential infringement of rights, the Supreme Court has sought to reaffirm the rights protecting qualities of the common law.
- 5.6.2 Appealing to the doctrine of subsidiarity, the Supreme Court has argued that the HRA did not necessarily ‘supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon judgments of the European court.’⁹⁸ The domestic law is therefore in the process of being re-emphasised as ‘the natural starting point’ for analysis of a rights question, with the Supreme Court cautioning against focusing exclusively on the Convention rights.⁹⁹
- 5.6.3 In the face of political antagonism towards the Convention and the European Court of Human Rights, the judicial turn towards the common law can be interpreted as an attempt to dissipate tensions. However, the potential of the common law as a tool of rights protection should not be overstated; it is powerless to resist a clear and unequivocal legislative encroachment of rights¹⁰⁰ and its standard of judicial review of administrative discretion – even at the ‘anxious scrutiny’ end of the *Wednesbury* scale – has been found to be lacking by the European Court.¹⁰¹ Though the potential for rights questions to be resolved by recourse to the common law should not be ignored, nor too should the potential for the Convention to require adherence to a more exacting standard:

... although the Convention and our domestic law give expression to common values, the balance between those values, when they conflict, may not always be struck in the same place under the Convention as it might once have been under our domestic law. In that event, effect must be given to the Convention rights in accordance with the Human Rights Act.¹⁰²

⁹⁶ HL Debs, Vol.762, Col.2186, 2 July 2015 (Lord Lester of Herne Hill QC).

⁹⁷ For discussion see: R. Masterman and S. Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] EHRLR 57.

⁹⁸ R (*Osborn*) v *Parole Board* [2013] UKSC 61; [2014] AC 1115, at [57]

⁹⁹ *Kennedy v Information Commissioner* [2014] UKSC 20, at [46].

¹⁰⁰ R v *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131.

¹⁰¹ *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, at [138].

¹⁰² *A v British Broadcasting Corporation* [2014] UKSC 25, at [57].

6.0 The International Aspect

6.1 *The role of national authorities within the Convention system*

6.1.1 Within the Convention system, it has long been held that the domestic authorities of the states parties are primarily responsible for upholding the Convention rights. The Convention institutions regard themselves as providing a secondary, or supervisory, layer of protection; as the European Court noted in its judgment in the *Handyside* case:

... the machinery of protection established by the Convention is subsidiary to the national systems regarding human rights ... by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.¹⁰³

As a result, the principle of subsidiarity holds that the ‘task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the contracting states rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task.’¹⁰⁴

6.2 *The Margin of Appreciation*

6.2.1 Judicial emphasis of the distinctly domestic features of adjudication over questions of rights can also be found in those areas in which the European Court would afford a margin of appreciation:

It must be remembered that the Strasbourg court is an international court, deciding whether a member state, as a state, has complied with its duty in international law to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention. Like all international tribunals, it is not concerned with the separation of powers within the member state. When it says that a question is within the margin of appreciation of a member state, it is not saying that the decision must be made by the legislature, the executive or the judiciary. That is a matter for the member state.¹⁰⁵

As Lord Hoffmann summarised in the House of Lords decision in *Re G*, where a matter would fall within a State’s margin of appreciation, it ‘means that the question is one for the national authorities to decide for themselves and it follows that different member states may well give different answers.’¹⁰⁶

¹⁰³ *Handyside v United Kingdom* (1979-1980) 1 EHRR 737, at [48].

¹⁰⁴ Jurisconsult of the European Court of Human Rights, *Interlaken Follow-up: Principle of Subsidiarity* (8th July 2010), available at: http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf

¹⁰⁵ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, at [32].

¹⁰⁶ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, at [31]. Extra-judicially, Lord Hoffmann has argued that the scope of the margin afforded by the European Court – and therefore the available area of discretion available to national authorities – is overly narrow: ‘[i]n practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the

6.3 The 'Living Instrument' Doctrine

- 6.3.1 It is also well-established in the jurisprudence of the European Court of Human Rights that 'the Convention is a living instrument which ... must be interpreted in the light of present day conditions.'¹⁰⁷ Thus the Strasbourg Court is not formally bound to follow its own judgments¹⁰⁸ – allowing the Court to 'have regard to the changing conditions in contracting states and respond ... to any emerging consensus as to the standards to be achieved.'¹⁰⁹ The precise content of or, perhaps more accurately, the minimum level of protection afforded by a Convention right, may therefore develop over time.¹¹⁰
- 6.3.2 The development of the European Court's jurisprudence – as the Convention's meaning has been articulated in response to contemporary challenges to rights – has resulted in its application to new spheres of governmental activity (and indeed inactivity). The judgment of Judge Costa in *Hatton v United Kingdom* – concerning whether permitted night flights out of Heathrow airport constituted an interference with local residents' rights under Article 8 ECHR – attempts to explain and contextualise the need for the Court's adoption of the living instrument approach:

... as the Court has often underlined: 'The Convention is a living instrument, to be interpreted in the light of present-day conditions' ... This 'evolutive' interpretation by the Commission and the Court of various Convention requirements has generally been 'progressive', in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the 'European public order'. In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 [the right to privacy] embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.¹¹¹

These statements have been singled out for criticism by one prominent critic of the HRA and of the European Court as betraying the 'blatantly expansionist' tendencies of the latter.¹¹² It should be noted in response that the judgment of Judge Costa was in dissent and that the violation found by the European Court in *Hatton* was – as a result of the case arising prior to the implementation of the HRA – that domestic law failed to provide an effective remedy in respect of the

temptation to aggrandise its jurisdiction and to impose uniform rules on member states. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe' ('The Universality of Human Rights' (2009) 125 LQR 416, 423-424).

¹⁰⁷ *Tyrer v United Kingdom* (1979-1980) 2 EHRR 1, at [31].

¹⁰⁸ See eg *Cassey v United Kingdom* (1991) 13 EHRR 622, at [35].

¹⁰⁹ *Stafford v United Kingdom* (2002) 35 EHRR 32, at [68].

¹¹⁰ That the Convention is a 'living instrument' has been acknowledged by domestic courts in litigation under the HRA: see eg *Brown v Stott* [2003] 1 AC 681, 727 (Lord Clyde).

¹¹¹ Application no. 36022/97 (2003) 37 EHRR 28

¹¹² M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011), p.31.

complaint made. No violation of the applicants' Article 8 rights was found, and no damages awarded.

- 6.3.3 The decision of the European Court in *Hirst (No.2)* has however been seized upon by critics as providing evidence of the extension of the meaning of the Convention to include rights 'excluded' from the Convention and of the imperialising tendencies of the Court.¹¹³ In the resulting February 2011 House of Commons debate on prisoner voting, the former Secretary of State for Justice and Lord Chancellor Jack Straw argued that, 'through the decision in the *Hirst* case and some similar decisions, the Strasbourg court is setting itself up as a supreme court for Europe with an ever-widening remit.'¹¹⁴
- 6.3.4 So while the living instrument doctrine is argued by many to provide one of the essential underpinnings to the Convention's relative longevity – permitting the Court to 'breathe life into the words of the instrument so as to make it relevant to contemporary European society'¹¹⁵ – others perceive the steady encroachment of the Court upon areas of law and policy for which constitutional responsibility could previously be said to lie exclusively within the domestic domain. The Convention has – it is said – been stretched by the Court to include meaning that its framers cannot possibly have envisaged,¹¹⁶ or rather less charitably, has been ignored as the Court has taken it upon itself to 'invent' new rights.¹¹⁷
- 6.3.5 Conscious of current controversy, the UK's judge on the European Court, Paul Mahoney, has argued that the 'object of the Convention system, unlike that of the legal order of the European Union, is not to bring about uniformity of national law or rigorously uniform implementation of the internationally accepted engagements (that is, the guaranteed rights and freedoms) in each one of the participating states.'¹¹⁸ It follows that the Court grants not only a margin of appreciation but also does not prescribe specific responses, allowing states the scope to determine the most appropriate mechanism by which the Convention's minimum standards might be secured.
- 6.3.6 The European Court itself has, in a similar vein, taken the opportunity to reject the suggestion that it is in the process of attempting to homogenise the legal and political systems of the member states:

There [are] a wealth of differences, inter alia, in the historical development, cultural diversity and political thought within Europe which it is for each contracting state to mould into its own democratic vision.¹¹⁹

¹¹³ On which see: C. R. G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 *Parliamentary Affairs* 511.

¹¹⁴ HC Debs, Vol.523, Col.502, 10 February 2011.

¹¹⁵ N. Bratza, 'Living Instrument or Dead Letter – The Future of the European Convention on Human Rights' [2014] EHRLR 116, 118.

¹¹⁶ The Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.3.

¹¹⁷ This suggestion is made on multiple occasions in D. Raab, *The Assault on Liberty: What went wrong with rights* (London: Fourth Estate, 2009), esp. pp.123-168.

¹¹⁸ P. Mahoney, 'The relationship between the Strasbourg court and the national courts' (2014) 130 LQR 568, 582.

¹¹⁹ *Shindler v United Kingdom* (2014) 58 EHRR 5, at [102].

6.4 Dialogue with the European Court of Human Rights

6.4.1 For this co-operative approach to the protection of rights within Europe to be effective, evidence is required of interplay between domestic authorities and the European Court, and – more importantly – of the upward influence of national decision-making on the Strasbourg judges. While the European Court of Human Rights’ continuing commitment to the subsidiarity principle had begun to be perceived as being increasingly in tension with the expanding scope of its jurisprudence, recent cases have hinted that the European Court’s respect for the democratic decision making processes of the member states runs deeper than critics of the Court would concede. In the *RMT* decision, the European Court reiterated the following:

In the sphere of social and economic policy ... the court will generally respect the legislature’s policy choice unless it is ‘manifestly without legal foundation.’ Moreover, the Court has recognised the ‘special weight’ to be accorded to the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ.¹²⁰

6.4.2 The decision of the UK Supreme Court in *R v Horncastle* provides perhaps the most compelling authority to date for the suggestion that domestic courts will not simply apply even relevant and clear Strasbourg case-law as a matter of course, *and* that critical engagement with the Strasbourg jurisprudence in domestic adjudication *can* lead to a reconsideration and refinement of the European Court’s position.¹²¹ In *Horncastle*, the Supreme Court declined to follow Strasbourg authority which suggested that hearsay evidence which played a decisive role in the case against a defendant would in certain circumstances be incompatible with Article 6(3)(d) of the ECHR.¹²² A unanimous Supreme Court found that the existing domestic law provided sufficient safeguards to ensure a fair process, with the President of the Court commenting that the case raised ‘concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process’¹²³ which were sufficient to justify departing from the Strasbourg authority. In the light of *Horncastle*, the willingness of the Strasbourg court to reconsider its earlier position on the compatibility of hearsay evidence with Article 6(1) demonstrates the principle of subsidiarity operating in practice and illustrates that national authorities can – and do – play a decisive role in shaping the content of the Convention case law.¹²⁴

6.4.3 A further example can be found in the decision of the European Court in *Animal Defenders International v United Kingdom*.¹²⁵ In the *Animal Defenders* decision – a case concerned with the regulation of political expression, and therefore typically an area in which any margin of appreciation would be relatively narrowly drawn¹²⁶ –

¹²⁰ *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].

¹²¹ *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

¹²² The relevant authority was: *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1.

¹²³ *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373, at [11].

¹²⁴ *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23.

¹²⁵ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.

¹²⁶ See eg: *Worm v Austria* (1998) 25 EHRR 454.

the European Court of Human Rights found (by a slender majority¹²⁷) that the UK's national authorities were 'best placed' to determine what should be regarded as a 'country specific and complex assessment' of the balance to be struck.¹²⁸ The European Court went on to thoroughly examine 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), noting 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 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.¹²⁹

Affording weight to the considered judgment of a national legislature (and/or courts) – and effectively endorsing it – could again be said to demonstrate in practice that '[s]ubsidiarity is at the very heart of the Convention' and that the European Court is 'intended to be subsidiary to national systems'.¹³⁰

6.5 Political Dialogue: The Brighton Declaration

6.5.1 The UK's chairing of the Committee of Ministers of the Council of Europe provided, in early 2012, a clear opportunity to see concerns relating to the perceived diminution of national authorities' influence over those areas of law falling within the purview of the European Court raised at a High Level Conference on the Future of the European Court of Human Rights. The discussions and outcomes of the Brighton conference, held in April 2012, were explicitly animated by concerns relating to the perceived dilution of the importance of national authorities within the Convention system.

¹²⁷ The Grand Chamber decided by nine votes to eight that s.321 of the Communications Act 2003 did not violate Article 10 ECHR.

¹²⁸ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [111].

¹²⁹ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [114]-[116].

¹³⁰ *Austin v United Kingdom* (2012) 55 EHRR 14, at [61].

- 6.5.2 Entering into the Brighton conference, the UK Government sought to promote revisions to the Convention system in order to emphasise the primary role of national authorities in the protection of the Convention rights, to reinforce the concept of subsidiarity, to work towards increasingly efficient case-law management on the part of the European Court and to ensure consistency in the quality of European Court decisions through improvement to the processes by which national judges were appointed.¹³¹
- 6.5.3 UK Government efforts to confine the jurisdiction of the Strasbourg court to cases in which national courts could be demonstrated to have ‘seriously erred’ in their interpretation of the Convention, or to only those which raise ‘a serious question’ relating to the interpretation of the Convention rights, were ultimately unsuccessful.¹³² Nonetheless, the Brighton process did lead to a notable reiteration of the vital place of national decision-making within the Convention system.
- 6.5.4 The Brighton Declaration saw the shared responsibility of the states parties to the Convention and the Court for ‘realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity’ reasserted. The text of the declaration explicitly sought to undercut suggestions that the European Court had usurped the position of national-level protections as the core of the Convention system by reaffirming the vital role of national institutions in upholding the Convention standards.¹³³

The jurisprudence of the Court makes clear that the states parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.¹³⁴

- 6.5.5 The Brighton Conference saw the formalisation of the principle of subsidiarity – a principle clearly traceable through over 30 years’ worth of Strasbourg jurisprudence¹³⁵ – articulated in a proposed amendment to the preamble to the Convention. Article 1 of Protocol 15 reads:

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,

¹³¹ For an accessible summary see House of Commons Library, *The UK and Reform of the European Court of Human Rights*, SN/IA/6277 (27 April 2012). See also: D. Cameron, Speech to the Parliamentary Assembly of the Council of Europe (25 January 2012).

¹³² M. Elliott, ‘After Brighton: Between a Rock and a Hard Place’ [2012] PL 619, 622-623.

¹³³ *The Brighton Declaration*, at [7].

¹³⁴ *The Brighton Declaration*, at [11].

¹³⁵ *Handyside v United Kingdom* (1979-1980) 1 EHRR 737, at [48]-[50].

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.

6.5.6 The Joint Parliamentary Committee on Human Rights has welcomed the amendment to the Preamble to the Convention prompted by the Brighton process saying that it ‘signifies a new era in the life of the Convention, an age of subsidiarity, in which the emphasis is on states’ primary responsibility to secure the rights and freedoms set out in the Convention.’¹³⁶ Conservative zeal to replace the Human Rights Act with a British Bill of Rights – which would ‘break’ the linkage between domestic law and decisions of the European Court – would nevertheless appear to be undiminished.

7.0 The UK and Strasbourg: The Practical Dimension

7.1 Given that a stated aim of enactment of the HRA was the reduction of instances in which the UK is found by the European Court to have acted in breach of the Convention, the anti-Court invective might be easier to appreciate if this aspiration had not been realised. Research published in 2007 indicated that the HRA can be seen to have had a positive effect in addressing concerns over the frequency with which the UK was found to have breached the ECHR, highlighting a ‘definite reduction in the number of applications declared admissible and the number of judgments where at least one violation of the ECHR has been found.’¹³⁷

7.2 Figures published by the European Court relating to decisions handed down by the Court during 2014 are also illuminating.¹³⁸ Of the 14 judgments issued in 2014 to which the UK was a party, a violation was found in 4 cases (28.5%). Many states’ records during the same period reveal a far higher number of violations:

- of 129 cases involving the Russian Federation a violation was found in 122 (94.5%);
- of the 87 decisions to which Romania was a party, breaches of the Convention were found in 74 (85.0%).

More long-standing members of the Convention system were also seen to evidence high rates of violation during 2014:

- of 19 cases involving Belgium, a violation was found in 16 (84.2%);
- of 22 cases involving France, violations were found in 17 (77.2%);

7.3 While only providing a snapshot of the UK’s fortunes before the European Court, these figures do not suggest extensive ‘interference’ with domestic decisions by the Strasbourg court and provide additional support for the suggestion that since implementation of the HRA the record of the UK at Strasbourg has improved.

¹³⁶ Joint Committee on Human Rights, *Protocol 15 to the European Convention on Human Rights*, HL 71/HC 837 (2 December 2014), at [3.17].

¹³⁷ M. Amos, ‘The impact of the Human Rights Act on the United Kingdom’s performance before the European Court of Human Rights’ PL [2007] 655, 675.

¹³⁸ http://www.echr.coe.int/Documents/Stats_violation_2014_ENG.pdf

During 2014, the UK's record before the European Court of Human Rights was in fact broadly comparable with that of Germany (13 decisions, 3 violations found (23.0%)), a country enjoying a record before the European Court which Conservative politicians have previously remarked upon favourably.¹³⁹

8.0 The false premise of the Bill of Rights debate?

8.1 Given the development of the case law under the HRA since the *Ullab* decision in 2004, the increased evidence in favour of a meaningful dialogue between domestic courts and the European Court of Human Rights and the movement – post-Brighton – towards a more fully realised notion of subsidiarity within the Convention system, it can be forcefully argued that reform of s.2(1) HRA is in fact unnecessary. The Strasbourg jurisprudence has been demonstrated, as a matter of domestic law, not to bind national courts, the upward influence of domestic decisions has been successfully illustrated following *Horncastle*, and signs are emerging that the commitments agreed to at Brighton are likely to be – to use the phraseology of the European Court – ‘practical and effective.’

8.2 In the light of these factors it is reasonable to conclude that a significant part of the anti-HRA and anti-Strasbourg narrative which has prompted calls for a British Bill of Rights is based on a jurisprudence – and an interpretation of s.2(1) HRA – which at best appears dated, and at worst appears obsolete. The Conservative Party continues (as of October 2014) to make the claim that the HRA goes further than the Convention would ordinarily demand by ‘requiring the jurisprudence of the Strasbourg Court to be directly binding on domestic courts.’¹⁴⁰ The evidence above illustrates that this presents a seriously misleading vision of both the text of the Act and, now, of its interpretation and application by the Courts. It is regrettable that developments in the jurisprudence of the UK Supreme Court dating back at least 5 years have failed to permeate what is in danger of becoming mainstream political opinion.

8.3 In the light of the achievements of the UK Government at the Brighton conference and the subsequent reiteration by the European Court of the centrality of national authorities to the Convention system, it is equally regrettable that a number of senior politicians continue to raise the suggestion of the UK leaving the Convention system as a serious possibility. That many continue to do so – even in the light of the substantial achievements of the UK Government at Brighton – suggests that the threat of abandonment of the Convention system remains either a continuing sop to potential UKIP voters or the Euro-sceptic wing of the Conservative party, or suggests that some senior members of the Government are so ideologically opposed to the Convention system (or to certain individual decisions of the European Court) that a UK Bill of Rights which maintained *any* link to Strasbourg would be unacceptable.

¹³⁹ See: P. Oltermann, ‘Tory bid to liken human rights plans to German legal system backfires’ *The Guardian*, 3 October 2014.

¹⁴⁰ The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’
https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.5.

8.4 It is all the more unlikely, then, that one reasonable conclusion to be drawn from the above evidence – that the relationship between domestic courts and the European Court of Human Rights as it has developed is not defective and that reform of the HRA is in fact unnecessary – will be treated with any degree of credence by the current administration.

9.0 Breaking the formal link with the European Court of Human Rights

9.1 ‘Breaking the link’ between domestic law and the European Court of Human Rights through the adoption of a British Bill of Rights alone is, however, not possible. The enactment of a British Bill of Rights, regardless of its terms, would not displace the UK’s obligations in international law under Article 46 of the Convention. While the October 2014 Conservative Party document, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’, pointed towards further efforts to reform the Court and Convention system – including the (implausible) suggestion that findings of the Strasbourg court be rendered ‘advisory’ – it remains to be seen how much more ground will be conceded to the UK by an already conciliatory Council of Europe.

9.2 The 2014 Conservative Party document suggested that ‘[i]n future Britain’s courts will no longer be required to take into account rulings from the Court in Strasbourg’¹⁴¹ and that the ‘formal requirement for our Courts to treat the Strasbourg Court as creating legal precedent for the UK’¹⁴² (sic) would be undone under a British Bill of Rights. But in the light of the domestic courts’ steady dilution of the mirror principle – and the flexibility now recognised in the language of s.2(1) – it is also unclear how a revised section 2 equivalent in a British Bill of Rights would be intended to substantially alter the domestic judiciary’s approach to the Convention case-law. Assuming the UK’s continued membership of the Council of Europe, a reworded section 2 equivalent – making the consideration of Strasbourg case law optional rather than mandatory, for instance – would still be likely to be interpreted in the light of the well-settled judicial assumption that Parliament legislates in compliance with the UK’s Treaty obligations.¹⁴³

9.3 The most light touch approach would simply rephrase s.2(1) to include the specific disclaimer that Strasbourg jurisprudence is not binding upon domestic courts in order to more accurately reflect the law as it has developed under the HRA. A lightly revised s.2(1) HRA might include one of the following clarifications:

- ‘... must take into account, *but is not bound to follow*, any ...’
- ‘... must take into account, *and may choose to follow*, any...’

¹⁴¹ The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’

https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.6.

¹⁴² The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’

https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf, p.5.

¹⁴³ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 747-748.

The first formulation would be the least significant, simply serving to clarify that the provision does not require adherence to the Strasbourg case law while maintaining the presumption of a meaningful link between the international and domestic understandings of the rights. The second might hold the potential to diminish this linkage somewhat by presenting the use of Strasbourg authority as a choice rather than a natural consequence of the provision. The adoption of either alternative formulation would be unlikely to lead to much practical change in the judicial approach to the Convention rights.

9.4 A more significantly amended s.2(1) variant – which would remove the *obligation* to consider the Strasbourg jurisprudence – could read:

- ‘... *may* take into account, *and is not bound to follow*, any...’

Such an arrangement would, however, result in the structural incoherence of the UK Bill of Rights by asking the courts to give effect to the Convention rights potentially without any regard to the meaning of the Convention as articulated by the Strasbourg court. Again assuming the UK’s continued membership of the Convention system, this alternative must also be accompanied by provisos relating to legal certainty and to the potential for increased adverse findings against the UK following the adoption of sub-Strasbourg levels of protection where (or if) domestic courts chose not to consider the available Convention case-law.

9.5 Just as it is reasonable to assume that a cosmetically altered section 2 would result in little practical difference to the domestic courts’ treatment of Strasbourg authority, it is equally reasonable to suspect that a section 2 equivalent which permitted judicial recourse to a wider range of authority – including the decisions of other common law apex courts, for example – would also see a continued prominence afforded to the (extensive) Convention jurisprudence given the length of time that the UK has been within the jurisdiction of the court, and the extent to which that jurisprudence is now embedded in the UK’s legal system.

9.6 Complete removal of a section 2 equivalent, leaving the definition of the Bill of Rights’ protections to the discretion of domestic judges, or permitting recourse to an extensive range of comparative law sources would, meanwhile open up the possibility of increased unpredictability and instability in the UK’s rights regime. It would leave the domestic judiciary (as argued by the Conservative Lord Kingsland during the debates on the Human Rights Bill) ‘cast adrift’ and ‘able to go in whatever direction they wish.’¹⁴⁴

9.7 International comparators can be seen to permit judicial recourse to a wide range of authorities on the meanings of rights. Under the Victorian Charter of Human Rights and Responsibilities 2006, the meaning of the rights to be enforced may be determined by reference to, ‘[i]nternational law and the judgments of domestic, foreign and international tribunals’ in so far as they are ‘relevant’ to the human right under consideration.¹⁴⁵ The Australian Capital Territory Human Rights Act 2004 similarly permits that in the interpretation of the protected rights ‘[i]nternational law, and the judgments of international and foreign and international courts and tribunals,

¹⁴⁴ HL Debs, Vol. 583, Col. 512, 18 November 1997.

¹⁴⁵ Victorian Charter of Human Rights and Responsibilities, s.32(2).

relevant to a human right may be considered.¹⁴⁶ It should be noted, however, that in distinction to the HRA neither the Victorian nor ACT instruments sought to reconcile the protections afforded with the developing jurisprudence of a specific supervisory court with equivalent enforcement mechanisms to the European Court of Human Rights.

9.8 Permitting courts to range more widely in their searches for the meanings of the rights protected by a BoR should also be accompanied by a note of caution. One benefit of the HRA scheme can be found in its relative predictability; the link between the HRA rights and the Convention means that applicants – and of course the Government of the day – can identify the likely relevant authorities which courts will ‘take into account’ in a given set of circumstances. Should courts be encouraged to range more widely (perhaps globally) in their search for authority, those decisions which the court determined should be taken under consideration could not be so reasonably foreseen. While Lord Chancellor under the Coalition Government, Chris Grayling argued in favour of restoring ‘supremacy’ over rights questions to the UK Supreme Court. It is unlikely that his intention was to permit the Supreme Court Justices completely unbridled discretion as to the sources of legal authority which may determine the meanings of those rights, nor is it likely that he wished to see the supposed supremacy of the Strasbourg court merely exchanged for a domestic apex court with genuine supremacy over rights questions.

9.9 While a section 2(1) equivalent might deliver symbolic change (amending or altering the link with the Convention case-law), it is unclear that it would lead to significant practical change in the approach of domestic courts to the Strasbourg jurisprudence. Attempts to significantly weaken the linkage between domestic law and the Strasbourg case-law – including complete removal of a s.2(1) equivalent from any British Bill of Rights – may well prompt unintended and unpredictable consequences. These could be as constitutionally undesirable as the problem to which the Conservative party is currently searching for a solution.

¹⁴⁶ ACT Human Rights Act 2004, s.31.

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