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THE HUMAN RIGHTS ACT

IN THE SHADOW OF THE EUROPEAN CONVENTION:

ARE COPYIST’S ERRORS ALLOWED?

Carmen Draghici*

Abstract: This article challenges the dichotomy often proposed by the scholarship and jurisprudence between the rights guaranteed in the European Convention on Human Rights [ECHR] and those claimants can rely on under the Human Rights Act 1998 [HRA]. It discusses the two contentions informing this approach, namely the autonomy of meaning of HRA “Convention Rights” and the authority of domestic courts to interpret ECHR provisions. The author relies on the effects of incorporation of treaty norms into municipal law, in the light of the statutory language, preparatory works, and the presumption of Parliament’s intent to comply with international obligations, as well as on treaty law principles, with particular regard to the interpretive competence of treaty-based monitoring organs. The experience of the domestic approach to the jurisprudence of the Court of Justice of the European Union serves as a comparator to support a reading of the HRA consistent with constitutional and international law.

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The endeavour of distinguished magistrates and public lawyers to assert a dichotomy between the rights guaranteed in the European Convention on Human Rights [ECHR] and those enforceable under the Human Rights Act 1998 [HRA] will appear startling to international lawyers. In fact, the two contentions informing this approach – the autonomy of meaning of what the HRA terms “Convention Rights” and the authority of domestic courts to interpret the ECHR provisions reproduced in Schedule 1 – are difficult to reconcile with basic principles governing the relationship between treaty norms and municipal law. Without purporting to offer a definitive view on the relationship HRA/ ECHR, this article seeks to respond to the scepticism towards the Convention regime manifested in many UK circles,¹ and propose a view of the Act more consistent with the effects of domestic incorporation of international norms, the presumption of Parliament’s intent to comply with international obligations, and the interpretive competence of treaty-based monitoring organs.

‘HRA rights’ versus ‘ECHR rights’: the parallel catalogues hypothesis

The contention that the catalogue of rights in Schedule 1 does not coincide in scope with the ECHR catalogue is phrased by Jonathan Lewis in strikingly radical terms: “The fact that [the two] are worded identically is happenstance, the

¹ The President of the ECtHR lamented “the scale and tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Government”. See N. Bratza, “The relationship between the UK Court and Strasbourg” (2011) *European Human Rights Law Review* 505, 506.

result of a political decision”.² Ian Loveland more moderately suggests overlapping is possible, but not necessary: “a Convention Right *need not have* the same substantive meaning as a textually identical Convention article”, “[it] could afford *more, less or the same degree* of legal protection”.³ Similarly, but privileging more generous protection, Baroness Hale writes extra-judicially that “although the Human Rights Act defines the Convention rights in the language used by the Convention, [...] it has created new rights [...] and not simply given the people within the jurisdiction of the United Kingdom the rights which Strasbourg would give them”.⁴

Is the ECHR/ HRA relationship based on a mere linguistic coincidence? This conjecture is rooted in a strongly dualist theory. In *Re McKerr*, Lord Nicholls emphasized the distinction between the normative source of ECHR and HRA rights, respectively: “These two sets of rights now exist side by side. [...] The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country’s law because the Convention does not form part of this country’s law. [...] These rights [...] are to be contrasted with

² J. Lewis, “The European ceiling on human rights” (2007) *Public Law* (Win) 720, 725.

³ I. Loveland, *Constitutional Law, Administrative Law and Human Rights* 6th edn (Oxford: OUP, 2012), p. 640 (emphasis added). The author further writes: “The Act itself gives no indication of the degree of divergence which is permissible between the meaning of a Convention rights and that of the textually equivalent Convention article. Nor did the Act offer any guidance as to the circumstances in which such divergence would be appropriate or inappropriate”. Is this truly a lacuna, or is it perhaps because the Act assumed correspondence between the two to be the rule?

⁴ B. Hale, “Argentorum Locutum: is Strasbourg or the Supreme Court Supreme?” (2012) 12 (1) *Human Rights Law Review*, 65, 69.

rights created by the 1998 Act. [...] They are part of this country's law".⁵ *Formally* speaking, this position is uncontroversial: the ECHR is an international instrument with no immediate applicability domestically, while the HRA is a domestic statute; however, it fails to explain the alleged *substantive* distinction between the two sets of rights. The latter incorporates the former precisely – as specified in the HRA preamble,⁶ – to make ECHR rights part of domestic law, justiciable before UK courts. The intended equivalence is furthermore expressed in the preparatory documents surrounding the Act's adoption, the government's 1997 White Paper purporting, with a much celebrated expression, to "bring those rights home".⁷

The dualist nature of UK's relationship with international law also inspires Loveland's argument that "there is no statutory requirement that the two art.8s bear the same meaning".⁸ Whereas the domestic legal force of "Convention rights" is based on the HRA, not the ECHR,⁹ the suggestion that an express statutory requirement is needed before the internalized rights are presumed semantically

⁵ *McKerr* [2004] UKHL 12; [2004] 1 WLR 807 at [25].

⁶ The introductory note to the HRA describes it as "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights".

⁷ White Paper *Rights Brought Home: the Human Rights Bill*, 1997, October, Cm 3782, para. 1.19.

⁸ I. Loveland, "The shifting sands of article 8 jurisprudence in English housing law" (2011) 2 *European Human Rights Law Review*, 151, 154-155.

⁹ Section 18 of the new European Union Act 2011 (the so-called 'sovereignty clause') is a symbolic reminder of this rule of legitimacy with reference to EU norms, but does not remove the compulsory nature of said norms: "Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act [...]".

identical is problematic. The HRA declaredly sets out to give effect to the international norm, *render it operative* in municipal law. Section 1(1) unequivocally defines protected “Convention Rights” as “Articles 2 to 12 and 14 of the Convention” (all its substantive provisions, as opposed to procedural provisions concerning the enforcement machinery) and of the protocols ratified by the UK.¹⁰ It would be surprising if, every time it incorporated a treaty, the legislator explicitly required that the same meaning be given to the provisions as under international law. The very purpose of verbatim reproduction of treaty provisions in a statute, as opposed to enacting a new text compliant with the treaty’s spirit and objectives,¹¹ is

¹⁰ Some commentators seem to attach weight to the fact that not all of the ECHR has been incorporated (see Loveland, *Constitutional Law, Administrative Law and Human Rights*, p. 640 (note 19)). In actuality, not all articles are apt to be incorporated. Thus, Art.1 contains the commitment towards the other parties to the treaty to secure fundamental rights; the articles establishing the supranational court and expressing States’ consent to be bound by its decisions do not have domestic, but international, projection. Art. 13 is also understandably left out, as the international obligation to provide a national remedy for ECHR violations is satisfied through the very adoption of a statute allowing individuals to enforce ECHR rights in domestic courts (s.7 HRA) and obtain compensation (s.8 HRA).

¹¹ The distinction, in the Italian practice of implementation of international agreements, between *procedimento ordinario* (also known as ‘parallel legislation’) and *procedimento speciale* via ‘order of execution’ (restricted to self-executing treaties) may provide a useful parallel. See R. Monaco – C. Curti Gialdino, *Manuale di diritto internazionale pubblico* (Torino: UTET, 2009), pp. 351-354. Another example is the Swedish dualist model, where in order to become applicable to domestic legal disputes an international norm must be either *inkorporerad* (i.e. an act is passed stating that the treaty is part of Swedish law) or *transformerad* (the treaty is translated and reformulated in a domestic act). See I. Cameron, *An Introduction to the European Convention on Human Rights* (Uppsala: Iustus Förlag, 2011), p. 32.

to avoid inadvertent distortions of the meaning ensuing from ‘paraphrasing’.¹² Any good-faith incorporation presupposes a convergence between the scope of international obligations and domestic implementing measures.

More critically, Loveland’s contention that a ‘Convention right’ could be read to afford less protection than the ECHR counterpart defeats the purpose of incorporation. Malcolm Shaw observes: “There is in English law a presumption that legislation is to be so construed as to avoid a conflict with international law. [...] [W]here the provisions of a statute implementing a treaty are capable of more than one meaning, and one interpretation is compatible with the terms of the treaty while others are not, it is the former approach that will be adopted”.¹³ This presumption of conformity, *a fortiori* applicable to statutes implementing treaties, suggests that the adoption of HRA aimed to ensure compatibility of municipal law with ECHR obligations,¹⁴ not to introduce a home-grown inferior catalogue of rights.¹⁵ To

¹² The preference for ‘cut and paste’ implementation of EU directives instead of by means of rewording them (despite the stated intention of directives to allow flexibility) obeys the same rationale. See the comment of Sir Robin Jacob on the point in *Nova Productions v Mazooma Games* [2007] EWCA Civ 219 at [28], discussed in L. Woods and P. Watson, *Steiner & Woods’s EU Law* 11th edn (Oxford: OUP, 2012), p. 359. See further the authors’ reference to the ‘gold-plating’ concern expressed in the Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market [OJ L 98/47], at pp. 358-359.

¹³ M. Shaw, *International Law* (Cambridge: CUP, 2008), p. 153. The author relies on the consistent jurisprudence of the House of Lords from *Salomon* [1967] 2 QB116 to *Garland* [1983] 2 AC 751 and *Al-Skeini* [2007] UKHL 26 to that effect.

¹⁴ The international obligation subscribed by virtue of Art. 1 ECHR is to “secure to everyone within [the] jurisdiction the rights and freedoms defined in ... this Convention”.

¹⁵ The obligation in s.3(1) HRA to interpret all domestic legislation consistently with Convention rights lends further support to this proposition: “[s]o far as it is possible to do so, primary and

claim that Parliament intended HRA rights to have independent meaning rather than accurately reflect ECHR rights is to ignore both teleological considerations and the plain wording of s.1(1).¹⁶

Another justification for the autonomy of HRA rights invokes the limited competences of the European Court of Human Rights (ECtHR). Lord Hoffmann in *McKerr* maintains that the Court's judgments only bind the UK externally: "the United Kingdom is bound to accept a judgment of the Strasbourg court [...]. But a court adjudicating in litigation in the United Kingdom about a domestic "Convention right" is not bound by a decision of the Strasbourg court".¹⁷ Lewis draws a further distinction under international law: "the United Kingdom is only bound to "abide by" rulings of the Strasbourg Court in cases in which it has been involved as a party".¹⁸ Loveland adds a public law perspective: "The Act does not grant the ECtHR any kind of appellate status within the domestic legal system. That court's determinations as to the meaning of a Convention article do not have binding effect on domestic courts' construction of the meaning of a textually

subordinate legislation must be read and given effect in a way which is compatible with Convention rights".

¹⁶ Affording more protection would not violate the international obligations, but less protection would constitute a breach of Art. 1 ECHR.

¹⁷ *McKerr* at [64].

¹⁸ See Lewis, "The European ceiling on human rights", 2007 *Public Law* (Win) p. 731. See also on p. 729: "unlike under the Convention where the United Kingdom has to accept a judgment of the Strasbourg Court as binding (Art.46(1)), a court adjudicating in litigation in the United Kingdom about a municipal right is theoretically not bound by a decision of the Strasbourg Court. This is in contradistinction to the position under s.3(1) of the European Communities Act 1972 whereby domestic courts are bound by decisions of the European Court of Justice".

identical Convention Right”.¹⁹ These statements assume that lack of *contentious* jurisdiction proves *ipso facto* lack of *interpretive* jurisdiction, conflating two separate issues.

The ECtHR is, indeed, not an appellate court capable of reversing domestic judgments, although it may find them in violation of the ECHR²⁰ and require as a remedy the reopening of domestic proceedings; in a 2000 Recommendation, the Committee of Ministers of the Council of Europe urged States to provide means of reopening domestic proceedings following a finding of violation based on the merits of a decision or serious procedural shortcomings.²¹ Although it does not act as a fourth instance, the ECtHR’s interpretation is overriding, due to the s.1(1) equivalence between HRA provisions and Articles 2-14 ECHR. This interpretation is *inherent* in the content of ECHR rights; the ECHR’s open-textured language would have little meaning in the absence of hermeneutical guidance.²²

Thus, Article 2 (right to life) was found to encompass an obligation to protect individuals against known hazards,²³ but not to protect the life of the foetus,²⁴ nor to sanction assisted suicide.²⁵ Article 3 (protection against torture and

¹⁹ Loveland, *Constitutional Law, Administrative Law and Human Rights*, p. 640.

²⁰ In fact the acts of any branch of the State, including the judiciary, may amount to a violation.

²¹ Recommendation No. R (2000) 2 of 19 January 2000.

²² White and Ovey expound this principle straightforwardly: “The Convention, even with its Protocols, is a relatively short document. To be effective, it requires interpretation. The role of the Strasbourg Court is to interpret and apply the Convention”. See C. Ovey and R. White, *Jacobs & White: The European Convention of Human Rights* 5th edn (Oxford: OUP, 2010), p. 64.

²³ *Oneryildiz v Turkey* (2005) 41 EHRR 325; *Budayeva v Russia* (App. No. 15339/02).

²⁴ *Paton v United Kingdom* (1980) 3 EHRR CD 81; *Vo v France* (2005) 40 EHRR 259.

²⁵ *Pretty v United Kingdom* (2002) 35 EHRR 1.

inhuman/ degrading treatment) was interpreted to require local authorities to remove children from abusive situations²⁶ and conduct effective investigations into credible ill-treatment allegations.²⁷ The Court clarified that Article 6 (fair trial) includes a right of access to a court,²⁸ prohibits criminal trial *in absentia*,²⁹ and requires States to provide impecunious litigants legal aid where indispensable for effective access to court.³⁰ Further, it is now well-established that the protection of Article 8 (respect for private/ family life and the home) extends to office premises³¹ and office phone calls³² and disallows criminalizing private homosexual activity.³³

These unsystematic illustrations suffice to show that most positive and negative ECHR obligations are the product of judicial interpretation rather than enshrined in the text itself. Without it Convention provisions would have little concrete meaning, and different meanings across the 47 parties. Consequently Lewis' proposition that "it is the Convention itself, not the jurisprudence of the court, that is the ultimate source of the relevant law"³⁴ is unconvincing. The 'package deal' of text *and* interpretation that ECHR States accepted upon ratification may occasionally entail unforeseen surprises, such as the prohibition of

²⁶ *Z and others v United Kingdom* (2002) 34 EHRR 97.

²⁷ *Sevtap Veznedaroglu v Turkey* (2001) 33 EHRR 1412.

²⁸ *Golder v UK* (1975) 1 EHRR 524.

²⁹ *Kremzow v Austria* (1994) 17 EHRR 322.

³⁰ *Airey v Ireland* (1979-80) 2 EHRR 305.

³¹ *Niemietz v Germany* (1993) 16 EHRR 97.

³² *Halford v United Kingdom* (1997) 24 EHRR 523.

³³ *Dudgeon v United Kingdom* (1982) 4 EHRR 149.

³⁴ Lewis, "The European Ceiling on Human Rights", (2007) *Public Law* (Win) p. 731.

a blanket ban on prisoners' right to vote,³⁵ or the extra-territorial effect of Art.3 preventing terrorists' extradition towards torture-practising countries.³⁶ Nevertheless, human-rights monitoring organs have been traditionally invested with vast interpretive powers (the UN Human Rights Committee and the American Court of Human Rights are other notable examples); the fact that States tend to observe their decisions and only exceptionally denounce the treaties indicates *acquiescence* to such powers.³⁷ Further confirming the Strasbourg Court's role, in October 2013 Protocol 16 (not yet in force) introduced a mechanism of advisory opinions on the interpretation of ECHR norms, at the request of the highest domestic courts, during the course of proceedings pending before them – a system similar to the EU preliminary rulings procedure, save for the non-binding nature of opinions.

The adjustment of the domestic legal order to EU law further demonstrates that the lack of appellate status is not dispositive of which court is the final arbiter of interpretation. The Court of Justice of the EU [CJEU] cannot reverse domestic decisions any more than the ECtHR; unlike the ECtHR, it does not even have the competence to receive claims from individual litigants against States for breaches of EU law (Art.263 Treaty on the Functioning of the European Union [TFEU]). But

³⁵ *Hirst v United Kingdom* (2004) 38 EHRR 40; *Greens and M.T. v United Kingdom* (2011) 53 EHRR 21.

³⁶ *Chahal v United Kingdom* (1996) 23 EHRR 413; *Saadi v Italy* (2009) 49 EHRR 730.

³⁷ Isolated examples are those of Jamaica and Trinidad and Tobago, who denounced the Optional Protocol to the International Covenant on Civil and Political Rights [ICCPR] allowing for individual communications against them to be brought before the Human Rights Committee (not the Covenant itself though). Trinidad and Tobago also denounced the Inter-American Convention on Human Rights.

it certainly can interpret EU law provisions in the context of preliminary rulings and domestic courts are expected to apply that interpretation to proceedings before them (Art.267 TFEU). The lack of appellate status has never undermined the CJEU's interpretative authority.³⁸ As the Court of Appeal recognized in *Arsenal v Reed*, domestic judges must defer to CJEU's interpretation (then European Court of Justice [ECJ]) in matters of EU law: "the ruling of the ECJ is binding in so far as it is a ruling upon interpretation".³⁹ In expounding the *acte clair* doctrine, Lord Denning in *Bulmer v Bollinger* implicitly accepted the primacy of ECJ's interpretation when he indicated that its rulings create precedent, removing the need to refer under Art.267.⁴⁰

Other elements in the HRA have been adduced to support the dichotomy HRA/ ECHR rights. Lewis argues that "Some sections of the Act implicitly acknowledge the distinction between municipal rights and Convention rights. Section 1(4) enables the Lord Chancellor...to make such amendments...to reflect the effect of a protocol. Section 14 enables the United Kingdom to derogate from

³⁸ The Court has indeed consolidated its interpretive authority by extending the State liability doctrine to national judicial decisions clearly inconsistent with its rulings. See C-224/01 *Köbler* [2003] ECR I-1023 and C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana* [2006] 3 C.M.L.R. 19.

³⁹ *Arsenal Football Club v Reed* [2003] EWCA Civ 696 at [30]. See also the willingness of the Court of Appeal in *R v Secretary of State for Employment Ex Parte Equal Opportunities Commission* [1993] I.C.R. 251, 263 to rely on the ECJ's expansive interpretation of "pay" under Art. 119 EC (Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e.V. v. Botel* [1992] I E.C.R 3589 at [12]). On this point see D. Nicol, "Disapplying with relish? The Industrial Tribunals and Acts of Parliament" (1996) *Public Law*, 579, 586-587.

⁴⁰ *Bulmer v Bollinger* [1974] 2 WLR 202; [1974] 2 CMLR 91.

an article... Section 15 enables the United Kingdom to make certain reservations”.⁴¹ The first observation is unpersuasive: s.1(4) merely reflects the fact that additional Protocols are separate treaties, only binding ratifying States; whenever the UK becomes a party to a new Protocol, its content needs to be incorporated through this fast-track amending procedure, to keep the pace with the extent of international obligations. The latter two examples are inaccurate: ss.14-15 do not “enable” the UK to avail itself of derogations/ reservations (States cannot unilaterally grant themselves exceptions from international agreements by enacting domestic legislation); these sections are merely declaratory of the option open to States under Art.15 ECHR to suspend the exercise of a right in times of war/ public emergency, or to enter a reservation under Art.57, and they provide the relevant definitions and context (in any event, the reference to reservations can only apply to existent reservations to the ECHR or future reservations to protocols, as reservations to the ECHR can no longer be entered after ratification).⁴² Consequently, these provisions do not indicate any dichotomy, but quite on the contrary align the substance of the HRA to ECHR norms.

Are British judges interpreters of ECHR rights?

The second contention emancipating the HRA from the ECHR is that the scope of the rights falls to be determined by the British judiciary. The Home

⁴¹ Lewis, “The European ceiling on human rights”, p. 728.

⁴² See Vienna Convention on the Law of Treaties Art. 19: “A State may, *when signing, ratifying, accepting, approving or acceding to a treaty*, formulate a reservation [...]” (emphasis added).

Secretary proclaimed: “Through incorporation we are giving a profound margin of appreciation to British courts to interpret *the convention...*”⁴³ Those who believe the set of articles in Schedule 1 have loose inspirational connection with the ECHR naturally postulate that they are to be interpreted by domestic courts as this is mere statutory interpretation. Loveland thus proposes that “Art. 8 of Sch. 1 [HRA] has its own, autonomous meaning, which is to be decided by domestic courts”.⁴⁴

Any notion that national courts are competent to put a British gloss on ECHR rights is arguably a misconception. As any international treaty, the Convention can only be authoritatively interpreted by the body invested by the treaty itself with hermeneutic powers: according to Art.32(1) ECHR, “The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention”.⁴⁵ The only legitimate interpreter of ECHR provisions is thus the Strasbourg Court. The British judges’ power is to interpret *domestic law touching upon human rights* in the way they deem most consistent with ECHR requirements. In *Ullah* Lord Bingham acknowledged domestic courts’ obligation to comply with the ECtHR’s interpretation in cases raising issues under the HRA, insofar as “the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg

⁴³ Hansard, House of Commons Debates, 3 June 1998, col. 424: <http://hansard.millbanksystems.com/commons/1998/jun/03/legislation> [Accessed October 31, 2012] (emphasis added).

⁴⁴ Loveland, “The shifting sands of article 8 jurisprudence in English housing law”, 155. The interpretative competence of domestic courts is the necessary corollary of the author’s thesis that the HRA catalogue of rights is a fully autonomous one.

⁴⁵ The Court is also entrusted with monitoring State adherence to fundamental rights by virtue of Art.19, while Art.47 bestows on it the competence to give advisory opinions.

court”.⁴⁶ He seemed to accept though the *Alconbury Development* qualified approach to compliance, allowing exceptional disobedience: “While such case law is not strictly binding, it has been held that courts should, *in the absence of some special circumstances*, follow any clear and constant jurisprudence of the Strasbourg court”.⁴⁷

From a constitutional perspective, the HRA itself contains a specific provision on interpretation: s.2 directs domestic courts seized with matters pertaining to Convention rights⁴⁸ to “take into account” not only any “judgment, decision, declaration or advisory opinion” of the ECtHR, but also non-binding reports of the former Commission and decisions of the Committee of Ministers. The legislator thereby recognizes that the proper legal space for the interpretation of Convention rights is that governed by the ECHR machinery. The interpretative role of domestic courts appears residual: only where no clear indication from Strasbourg is available can they proceed to construe the meaning of a Convention right.⁴⁹

Commentators usually over-emphasize the fact that the HRA does not attribute Strasbourg judgments the force of binding precedents. In *Pinnock* Lord Neuberger underlines: “section 2 of the 1998 Act requires our courts to “take into

⁴⁶ *Ullah* at [20].

⁴⁷ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [26] (emphasis added).

⁴⁸ The text establishes a clear obligation rather than a recommendation (“must” rather than “shall” or “should”).

⁴⁹ See D. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Oxford: OUP, 2012), p. 25: “Where a point of interpretation has not been ruled upon in a Strasbourg case, the national courts will have no choice but to adopt their own interpretation”.

account” European court decisions, not necessarily to follow them”.⁵⁰ Nevertheless, attempts to characterize the relationship between courts belonging to different jurisdictions (municipal/ international) by way of *stare decisis* would have been misplaced. The ECtHR itself is not bound by its previous rulings, although in practice it references and consolidates past pronouncements. As the Court explained in *Cossey*, “it usually follows and applies its own precedents, such a course being in the interest of legal certainty and the orderly development of the Convention case-law”.⁵¹ The obligation for domestic courts to take into account Strasbourg judgments indicates the expectation of consistency with sufficient clarity. Significantly, the statute goes beyond judgments to include advisory opinions and the non-binding reports of the Commission.

Moreover, the House of Lords debate on Lord Kingsland’s proposed amendment replacing the expression “must take into account” with “shall be bound by” demonstrates that the objections were hardly based on an intent to diminish the

⁵⁰ *Manchester CC v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104 at [48]. The *Pinnock* re-statement of Lord Mance’s observation in *Doherty* arguably shifts the emphasis from the duty to take into account to the lack of obligation to follow, in fact the intention was hardly to minimize that duty. See *Doherty v Birmingham CC* [2008] UKHL 57; [2009] AC 367 at [126]: “While the House is not bound to give effect to McCann, under section 2 of the Human Rights Act 1998 it is its duty to “take into account” the decision in McCann”.

⁵¹ *Cossey v United Kingdom* 13 EHRR 622 at [35]. See also *Christine Goodwin v United Kingdom* 35 EHRR 447 at [74]: “it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases”. The Court further explains in *Cossey* at [35] that departure from precedent is rather exceptional, if there are “cogent reasons” such as “ensur[ing] that the interpretation of the Convention reflects societal changes”.

value of Strasbourg jurisprudence.⁵² Lord Irvine, then Lord Chancellor and architect of the HRA, invoked the risk of the Bill being intrinsically inconsistent in case of incompatible legislation (which cannot be disapplied) and the difficulty of reconciling the binding nature of the case-law with the margin of appreciation. He found it more appropriate for courts to consider judgments against other States as “source of jurisprudence” rather than “binding precedents”, which international law did not require it to do. He further argued that “it is *not considered necessary* to set out to provide that United Kingdom courts and tribunals are bound by Strasbourg jurisprudence, since where it is relevant *we would of course expect our courts to apply convention jurisprudence...*”.⁵³ He also saw the amendment as “putting the courts in some kind of straitjacket where flexibility is what is required”, a concern shared by Lord Browne-Wilkinson, who questioned the very doctrine of precedent on the basis that it is “undesirable when old cases are carved in stone”. The instances in which UK courts would be permitted to depart appear very narrowly construed in Lord Irvine’s speech: “[the Bill] would permit the United Kingdom courts to depart from Strasbourg decisions where there has been no precise ruling on the matter and a commission opinion which does so has not taken into account subsequent Strasbourg court case law”.⁵⁴ The *travaux préparatoires* thus suggest it

⁵² Hansard, House of Lords Debates, 18 November 2007, col. 511-516: <http://hansard.millbanksystems.com/lords/1997/nov/18/human-rights-bill-hl-1> [Accessed October 31, 2012].

⁵³ Emphasis added.

⁵⁴ Significantly, Lord Irvine’s example refers to disregarding a Commission opinion – which was not technically binding even under the Convention regime according to international law – inconsistent with subsequent ECtHR rulings.

is far-fetched to invoke the flexible language of s.2 to support a domestic ruling in clear contrast with an ECtHR judgment, especially if against the UK.

Downplaying the meaning of “taking into account” in s.2 would ultimately deprive the statutory direction of any *effet utile*. Besides, this much debated formulation is not far from the direction in s.3(2) European Communities Act [ECA] 1972, which does not frame the obligation *vis-à-vis* the decisions of the (then) European Court of Justice (ECJ) in terms of precedence: “*Judicial notice shall be taken... of any decision of, or expression of opinion by, the European Court on [the meaning of the Treaties]*”. The supremacy of ECJ’s interpretation of EU law is, nonetheless, undisputed.⁵⁵ Domestic courts’ obligation to follow the interpretation of the ECJ when applying EU law stems from the acceptance of the content of the EU treaties as binding on domestic authorities: “All such rights, powers, liabilities, obligations and restrictions *from time to time created or arising by or under the Treaties*, [...] shall be recognised and available in law, and be enforced, allowed and followed accordingly”.⁵⁶ A right/ liability created by the ECJ’s jurisprudence is a right/ liability “arising under the Treaties”. As the ECJ stated in *Benedetti v Munari* (1977), it follows from Article 177 (now Article 267)⁵⁷ that “the purpose of a preliminary ruling is to decide a question of law and [...] that

⁵⁵ It might be worth recalling that the supremacy of Parliament remains unaffected, as it is theoretically possible for Parliament to expressly repeal the European Communities Act 1972, as stated in *Thoburn v Sunderland CC* [2002] EWHC 195 (Admin) at [59]. The same applies to the HRA 1998.

⁵⁶ s 2 (1) ECA 1972 (emphasis added).

⁵⁷ Under Art.267 TFEU, “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) ... interpretation of acts of the institutions ... of the Union”.

ruling is binding on the national court as to the interpretation of the community provisions and acts in question”.⁵⁸

More generally, when States choose to become parties to treaties establishing monitoring bodies with binding interpretative powers, they sign up to *open-ended obligations*.⁵⁹ The content of the treaty norms can be subsequently clarified in a manner that diverges from one party’s understanding, possibly expanding the scope of obligations.⁶⁰ This is particularly true of human rights treaties, subject to evolving theories of morality and justice (hence the ECtHR’s “living instrument” doctrine).⁶¹ In the words of Iain Cameron, “the requirements of the Convention can *expand* as a result of the dynamic method of interpretation

⁵⁸ *Benedetti v Munari Fratelli SAS* (52/76) [1977] E.C.R. 163 at [26]. National courts are actually considered to be EU courts, i.e. EU law enforcers. See e.g. Nicol, “Disapplying with relish? The Industrial Tribunals and Acts of Parliament”, p. 579: “The strategy of the European Court of Justice (ECJ) has been to co-opt the national courts and tribunals onto its project of ensuring the uniformity of Community law”.

⁵⁹ The proposition stands true even where the monitoring body lacks the authority to issue binding judgments. The Human Rights Committee, for instance, concludes its examination of complaints under the Optional Protocol to the ICCPR with a non binding report expressing its ‘views’ on the case, however the interpretation of the provisions of the Covenant as it transpires from those reports is the only authentic interpretation. The General Comments of ICCPR provisions also contribute to that interpretation even though they are not technically speaking acts binding on the contracting States. The binding value of the interpretation is predicated upon the role ascribed by the treaty to that body.

⁶⁰ For example, the European Court bases its interpretation on the “European consensus” doctrine, i.e. on the practice of the great majority, not all, Member States. See e.g. Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 8.

⁶¹ *Tyrer v UK* (1979-80) 2 EHRR 1 at [31]; *Marckx v Belgium* (1979) 2 EHRR 330 at [41].

applied by the Court”.⁶² However, unless a State denounces the treaty, its initial ratification or accession implies an acceptance of the obligations spelled out by the monitoring body. By virtue of s.2(1) HRA, Parliament delegated to UK courts the responsibility for ensuring that domestic law is continuously updated to comply with the ECHR evolving requirements. Where this process of judicial adjustment is impracticable insofar as clearly *contra legem*, courts must alert Parliament to the need for legislative intervention, by means of a declaration of incompatibility under s.4.⁶³

Undoubtedly, national judges ought not to revisit the meaning of a provision when its wording is clear or there is well-established Strasbourg jurisprudence on how it should be construed. Domestic courts are not expected nor entitled to redesign the Convention to suit their particular traditions and practices, except where the ECHR itself affords a margin of appreciation.⁶⁴ When they do not find sufficient Strasbourg indication as to the precise extent of a right or scope of a legitimate interference, domestic judges are, pursuant to treaty law rules as codified

⁶² Cameron, *An Introduction to the European Convention on Human Rights*, p. 182 (emphasis in original).

⁶³ See s.4(2) HRA: “If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility”.

⁶⁴ Nor can they invoke a more limited scope of a right under the ECHR to restrict the protection afforded under common law, as Art.53 ECHR (‘Safeguard for existing human rights’) makes it clear that no such construction is warranted: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”. For the same reason the interpretation of the Strasbourg Court could not compel domestic judges to restrict the scope of a human right guaranteed by domestic law.

by the 1969 Vienna Convention, called upon to interpret the ECHR in good faith, according to the usual meaning of the terms, examined in their context.⁶⁵

Lord Bingham notes in *Ullah* that States can be more generous than the ECHR requires,⁶⁶ including through their courts. They can indeed, but *not as a matter of interpretation of the Convention*. The ECHR was conceived as a minimum standard in safeguarding human rights within the Council of Europe, a starting point. Whenever a British court construes a human right to encompass privileges not guaranteed under the ECHR, it does not interpret the ECHR,⁶⁷ but the corresponding common law right.

The analogy with the competence of domestic courts under ECA 1972 might prove helpful in demystifying the idea that UK judges have the authority to interpret the ECHR. Although the binding legal force of the provisions of the EC/EU treaties depends on the ECA (even where they meet the *Van Gend en Loos* criteria for direct effect),⁶⁸ when they apply EU law provisions, domestic courts do not purport to give an indigenous interpretation, but to ascertain the ‘objective’ interpretation, uniform across the EU, in light of CJEU’s case law. Where no such guidance is available, rather than being creative domestic courts have the option (or obligation, for final courts) pursuant to Article 267 TFEU to refer the legal issue to

⁶⁵ Vienna Convention on the Law of Treaties Arts.31-33.

⁶⁶ *Regina (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323 at [20].

⁶⁷ Indeed that interpretation would not bind other ECHR States (UK decisions have no value in other jurisdictions), precisely because it would not constitute interpretation of the ECHR.

⁶⁸ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

the CJEU in order to obtain the authentic interpretation.⁶⁹ UK courts are not competent to interpret the ECHR more than they are to interpret the EU treaties. They need to “take into account” Strasbourg case law in order to apply the Convention in a manner as close as possible to the expected approach of the ECtHR to the case. In fact incorporation aims at avoiding the need for individuals to seek an international remedy in Strasbourg, which presupposes the intent to align the domestic judgment with the likely outcome before the ECtHR.⁷⁰

The problem potentially raised by the different interpretations given to the same text by different ECHR enforcers⁷¹ is not new. Since *Nold*⁷² and *Hauer*,⁷³ the ECJ has recognized that ECHR rights were part of the fundamental principles of EU law, an approach codified by the Maastricht Treaty (Art.F(2)). In interpreting ECHR provisions within the sphere of application of EU law, the ECJ acknowledged the need for consistency. Cameron highlighted the ECJ’s deference in relation to protection of the home in Art.8. Initially, in *Hoechst v Commission*, the ECJ found that the notion of ‘home’ did not extend to business premises.⁷⁴

⁶⁹ When the meaning is clear from the wording or settled case-law of the ECJ, they are expected to apply accordingly. See Case 283/81 *CILFIT* [1982] ECR 3415 at [14] and [16].

⁷⁰ Hale, “Argentorum Locutum: is Strasbourg or the Supreme Court Supreme?”, p. 69.

⁷¹ I use the term in a non-technical sense. Domestic courts in dualist countries enforce the domestic text giving effect to the ECHR. The EU is not as yet a party to the ECHR, and the CJEU enforces the ECHR merely as an indirect source of EU law categorized as general principles of law. However, in substance all these judicatures are called upon to apply the same instrument, regardless of how it is legitimized in their respective legal orders.

⁷² Case 4/73 *Nold v Commission* [1974] ECR 491.

⁷³ Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

⁷⁴ Case 46/87 *Hoechst v Commission* [1989] ECR 2859.

After ECtHR's contrary finding in *Niemietz v Germany*,⁷⁵ in *Roquette Frères*⁷⁶ the ECJ "corrected its case law to come into line with *Niemietz*".⁷⁷ Another example of *rapprochement* concerns transsexuals' right to marry. *KB v NHS Pensions Agency* (2004)⁷⁸ regarded the refusal to grant a widower's pension to a female-to-male transsexual who had cohabited with a woman without entering marriage, as a result of his impossibility to alter his birth certificate. The ECJ found that it amounted to indirect discrimination, indicating that the principle of equal treatment in respect of remuneration prohibited legislation running contrary to the ECHR, and that the ECtHR had found in *Christine Goodwin v UK* (2002)⁷⁹ that the impossibility for transsexuals to marry a person of the sex to which they belonged prior to the gender reassignment surgery breached Article 12. Javier García Roca appositely noted that in doing so the ECJ "in fact acts as a *guarantor for ECtHR case law*, thereby preventing contradictions between the legal orders of the European Union and the Council of Europe".⁸⁰

In the same spirit, the drafters of the Charter of Fundamental Rights provided for a mechanism to ensure consistency between ECHR and Charter

⁷⁵ *Niemietz v Germany* (1993) 16 E.H.R.R. 97.

⁷⁶ Case 44/79 *Roquette Frères v Commission* [2002] ECR I-9015.

⁷⁷ Cameron, *An Introduction to the European Convention*, pp. 176-177.

⁷⁸ C-117/01 *KB v NHS Pensions Agency* [2004] E.C.R. I-541.

⁷⁹ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18.

⁸⁰ J. García Roca, "The Preamble, The Convention's Hermeneutic Context: A Constitutional Instrument of European Public Order", in J. García Roca and P. Santolaya (eds.), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff, 2012), 1, 9-10 (emphasis in the original).

obligations:⁸¹ Art.52(3) establishes that, “[i]n so far as th[e] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention”. This suggests that the CJEU will follow the ECtHR’s interpretation. It would be an unfortunate anomaly if, in applying the same ECHR norms, the Supreme Court, the Luxembourg Court and the Strasbourg Court each provided a different interpretation.

Are UK Rulings Inconsistent with Strasbourg Case Law Legitimate?

As suggested above, the question of whether Strasbourg judgments are ‘binding’ on UK courts is misformulated. The more appropriate question to ask is whether domestic rulings disregarding Strasbourg jurisprudence are legitimate. If the yardstick for legitimacy is international law, courts, as “organs of the State” under the law on responsibility,⁸² are bound to observe the treaty as interpreted by its monitoring body. This obligation is even more stringent where the principles were laid down in judgments against the UK⁸³ (see *Horncastle* for an example of

⁸¹ See D. Anderson and C. Murphy, “The Charter of Fundamental Rights”, in A. Biondi and P. Eeckhout (eds.), *EU Law after Lisbon* (Oxford: OUP, 2012), 155, 162: “Painstaking attempts [...] have been made to ensure that the Charter is interpreted consistently with the ECHR”.

⁸² See Art.2 of the International Law Commission’s Draft Articles on State Responsibility for Internationally Wrongful Acts (2001).

⁸³ As a consequence of the binding nature of judgments recognized in Art.46(1) (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”), States have an obligation to take the necessary measures to remedy the violation found,

disapplication);⁸⁴ however, on the basis of Art.32(1), when it exercises its jurisdiction under Art.19, the Court's findings on points of law have value *erga omnes*.

The international obligation to comply with Strasbourg jurisprudence was emphasized by Lord Hoffmann in *AF v Secretary of State for the Home Department*: "I agree that the judgment of the European Court of Human Rights ("ECtHR") in *A v United Kingdom* [...] requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong [...]. [T]he United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention."⁸⁵

which may involve legislative action (law amendment) or a change in administrative practice or domestic jurisprudence. See e.g. Ovey and White, *Jacobs & White: The European Convention of Human Rights*, p. 58 on legislative changes introduced in the UK following judgments of the Strasbourg Court against the UK.

⁸⁴ In *R. v Horncastle* [2009] UKSC; 14 [2010] 2 A.C. 373, the Supreme Court chose not to follow the Strasbourg's court finding in *Al-Khawaja v UK* (2009) 49 EHRR 1 that a conviction based solely, or to a decisive extent, on statements of absent witnesses, not available for cross-examination, infringed art.6(1) and art.6(3)(d) ECHR, as established earlier in *Doorson v The Netherlands* (1996) 22 EHRR 330.

⁸⁵ *Secretary of State for the Home Department v AF* (No 3) [2009] 3 WLR 74 at [70]. Lord Irvine strongly disapproved of this position: "It is not the Courts' function under the HRA to determine cases of high Constitutional importance [...] on the basis of their view of the importance of the UK's standing as a good global citizen. That is an issue far better left to the Foreign and Commonwealth Office and Parliament. The consequence of the domestic Courts not following a

If the yardstick for legitimacy is domestic law, the obligation placed by the HRA on domestic tribunals to “take into account” Strasbourg jurisprudence means at the very least that adopting an interpretation in clear contrast with the position of the ECtHR on the matter is not legitimate. However, the Supreme Court seems to believe that the ECtHR’s interpretation can be ignored if it shows insufficient grasp of common law practices. In *R v Lyons (No. 3)* and *R v Spear*, it was suggested that if the ECtHR “has misunderstood or been misinformed about some aspect of English law”,⁸⁶ the domestic courts are entitled to depart from its interpretation. Similarly, in the 2009 *Horncastle* judgment, Lord Phillips found that “The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently

judgment of the Strasbourg Court is that, if Government and Parliament consider it appropriate, then they can legislate to reverse the position.” (See Lord Irvine, *A British Interpretation of Convention Rights* (lecture hosted by UCL on 14 December 2011): http://www.biicl.org/files/5786_lord_irvine_convention_rights.pdf [Accessed: October 31, 2012].)

This observation arguably reverses the logical interaction between State branches: the role of the judiciary is to uphold civil rights guarantees as expressly directed by Parliament under the HRA, i.e. in the light of ECHR jurisprudence, and to signal any incompatibilities between domestic law and the ECHR; if the breach stems from primary legislation, it is not open to courts in any event to go against Parliament’s decision; if the breach is the consequence of an executive act, Parliament will have a choice to sanction the executive act or not. This role for the courts is consistent with the principle in *Re Simms* ([2000] 2 A.C. 115) that only express Parliamentary acts can curtail human rights.

⁸⁶ *R v Lyons (No. 3)* [2002] UKHL 44 at [46]; *R v Spear* [2002] UKHL 31 at [12].

appreciates or accommodates particular aspects of our domestic process”.⁸⁷ More specifically, “[t]he jurisprudence of the Strasbourg court in relation to article 6(3)(d) has developed largely in cases relating to civil law rather than common law jurisdictions [...] that case law appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure”.⁸⁸ Loveland interpreted Lord Phillips’ stance as an acknowledgement that “the meaning of art.6 of Sch.1 to the HRA should not be the same as that of art.6 ECHR”.⁸⁹ This may be an unnecessary extrapolation; in fact, Lord Phillips argues that changes were made to English law on the admissibility of evidence “intended to ensure that English law complies with the requirements of article 6(1)(3)(d)”.⁹⁰ Rather than attempting to sanction a variance between ECHR and HRA rights, he maintained that the ECtHR gave insufficient weight to domestic efforts to respond to ECHR requirements.

What Lord Phillips did do, however, was to posit that domestic judges can disregard the authoritative interpretation of the ECHR if *they* deem the relevant domestic law to be compliant with the ECHR. This amounts to a claim to *self-supervision* by domestic authorities, which is hardly compatible with the Strasbourg court’s function (pursuant to Art.19 ECHR) of monitoring compliance with the Convention. To accept that the domestic judge’s conviction that the ECtHR ‘got it wrong’ is a valid justification for departure may have further paradoxical ramifications. It would render Art.46 ECHR completely ineffective, as even where

⁸⁷ *Horncastle* at [11].

⁸⁸ *Horncastle* at [107].

⁸⁹ Loveland, “The shifting sands of article 8 jurisprudence in English housing law”, p. 155.

⁹⁰ *Horncastle* [2009] UKSC 14 at [107].

domestic proceedings were reopened following a Strasbourg finding of a breach, the victim could not hope for a more favourable outcome the second time around.

This problematic option of non-compliance based on national fundamental principles was, however, re-proposed with some variation in *Pinnock*, although there were no objections to following Strasbourg jurisprudence in that particular instance. The Supreme Court noted: “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. In the present case there is no question of the jurisprudence of the European court failing to take into account some principle *or cutting across our domestic substantive or procedural law in some fundamental way.*”⁹¹ This is a further qualification of the acceptance of the Strasbourg authority, an autochthonous *solange* principle reminiscent of the German Bundesverfassungsgericht’s approach. In fact, the implication here is that the decisions of the ECtHR will be followed *only to the extent that* they do not conflict with a fundamental aspect of English law.

It is not easy to reconcile this position with a core principle of international law, as codified in Art.27 of the 1969 Vienna Convention on the Law of Treaties, which establishes that municipal law can never excuse the lack of compliance with a treaty obligation: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Bearing in mind the presumption of Parliament’s intention to comply with international obligations, the contention that

⁹¹ *Pinnock* [2010] UKSC 45 at [48-49] (emphasis added).

the implementing statute seeks to achieve selective compliance with the ECHR has little credibility.

Equally difficult to defend is the thesis that departing from Strasbourg jurisprudence and providing reasons therefor contributes to a constructive dialogue between the two courts. In *Horncastle* it was held: “In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court”.⁹² This peculiar conception of dialogue between courts did not remain isolated. The *Pinnock* court opined: “[t]his Court is not bound to follow every decision of the [ECtHR]. 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 [ECtHR]”.⁹³ Similarly, in a scholarly piece Baroness Hale writes: “it is right and healthy for national courts to feel free to criticise Strasbourg where its judgments have applied principles which are unclear or inconsistent or where it has misunderstood national law or practices”.⁹⁴

Arguably, this is not the way a dialogue between courts should take place. The Strasbourg court should indeed take into account domestic jurisprudence when reaching the conclusion that pan-European consensus has evolved in a certain

⁹² *Horncastle* at [11].

⁹³ *Pinnock* at [48].

⁹⁴ Hale, “Argenteratum Locutum: is Strasbourg or the Supreme Court Supreme?”, p. 78.

direction;⁹⁵ once it reaches a determination on the present-day interpretation of a right, however, that interpretation should be applied uniformly by domestic courts. The input of domestic courts and the constructive dialogue mentioned in *Pinnock* should take place at the stage of scrutiny, by the Strasbourg judges, of domestic jurisprudence clarifying the *opinio juris* of the Member States on a particular aspect of a right; certainly not by frustrating the purpose of the creation of a binding supra-national court, which is to enforce a consistent implementation of the ECHR across Europe. Moreover, the governments, through their legal advisors, have an opportunity, whether as respondents or intervening parties, to submit arguments to the attention of the court in the course of proceedings.⁹⁶ Where an important political matter is at stake, the respondent State further has an option to request the referral to the Grand Chamber, and engage with the reasoning of the Chamber if it finds it inconsistent or otherwise flawed.⁹⁷ These are the mechanisms the

⁹⁵ Any such determination would have to be based on generalized State practice in Europe, including the practice of the courts dealing with human rights claims. This is the consequence of the aforementioned European consensus doctrine.

⁹⁶ Art. 36 (2) ECHR allows for third party intervention: “The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings”.

⁹⁷ See Art. 43 (1): “Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber”. The Grand Chamber [GC] has often proven willing to take a more conservative stance than the Chambers in order to address the concerns raised by the respondent States. See e.g. *Lautsi v Italy* (2012) 54 E.H.R.R. 3 where the GC found that the display of crucifixes in classrooms, insofar as passive, cultural rather than religious symbols, did not breach Art. 9 (freedom of belief) taken together with Art. 14 (non-discrimination), thereby reversing the Chamber’s decision in *Lautsi v*

Convention itself places at States' disposal to facilitate dialogue. The refusal of domestic courts to apply Strasbourg case law – however gracious and substantiated with reasons – is not contemplated. The UK will, in fact, incur international responsibility for non-compliance with the ECHR if its judiciary applies it in a manner clearly inconsistent with the ECtHR rulings, especially where the UK is the respondent State. The saga of the repeated condemnations for the blanket prohibition of prisoners' right to vote is emblematic, even if it also reveals that the consequences of breaching international law may not be particularly severe.⁹⁸ From a systemic perspective, if each domestic judicature asserted its competence to challenge the interpretation of the ECtHR on the basis of alleged inconsistency or of national practices, the authority of the Strasbourg Court would be undermined.

The domestic scepticism towards the Strasbourg Court is also a consequence of a culturally relativistic position depicting that Court as alien to UK realities. In a 2011 lecture, Lord Irvine thus proposed: "It is our own Judges who are embedded in our culture and society and so are best placed to strike the types of balance between the often competing rights and interests which adjudication under the HRA requires. Put shortly, more often than not we should trust our own judges to reach a 'better' answer."⁹⁹ These concerns, however, have already been

Italy (2010) 50 E.H.R.R. 42. For another recent example see *S.H. and others v Austria* (app. no. 57813/00) where, unlike the Chamber, the GC found that the prohibition on the use of donated gametes for the purposes of artificial procreation was legitimate and fell within the State's margin or appreciation, given the complex ethical issues involved.

⁹⁸ *Hirst v United Kingdom* (2006) 42 EHRR 41; *Greens and M.T. v United Kingdom* (2011) 53 EHRR 21 .

⁹⁹ Lord Irvine, *A British Interpretation of Convention Rights*. In his article "Strasbourg Jurisprudence and the Human Rights Act: a Response to Lord Irvine" (2012) *Public Law*, 1, Philip

addressed by the margin of appreciation doctrine elaborated by the Strasbourg Court, which reserves to itself a subsidiary control of human rights compliance, limited to cases where national authorities exceed the latitude left to them by the Convention. As recognized in *Handyside v United Kingdom* (1976), “[b]y 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 [of morals] as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them”.¹⁰⁰ The Court has indeed proved deferential to national authorities in numerous matters, such as national security concerns and the determination of a state of emergency for the purposes of entering a derogation under Article 15 ECHR. In *A v United Kingdom* (2009),¹⁰¹ a case regarding the indefinite detention of suspected terrorists not susceptible to deportation, the Court reiterated that national authorities are best placed to assess an emergency, and whereas the UK was the only ECHR State to have lodged a derogation after 9/11, each government was entitled to make its own assessment of the threat.¹⁰² Therefore it considered that the findings of the House of Lords on the validity of the derogation needed to be endorsed unless manifestly

Sales argues that “the subjective views of a promoter of an Act of Parliament about its meaning are not a relevant aid to its construction”. It should be added that views expressed in an academic context after the adoption of the Act carry less weight than comments advanced during legislative debates in an institutional capacity (see above).

¹⁰⁰ *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 at [48].

¹⁰¹ *A. and Others v United Kingdom* (2009) 49 EHRR 29.

¹⁰² The ECtHR had already recognized in *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539 that national authorities are better placed to assess the existence of an emergency for the purposes of Art. 15.

unreasonable. The Court further considered it appropriate to follow the thorough assessment of the proportionality of the measures with the exigencies of the situation carried out by the House of Lords. Similarly, in controversial and sensitive areas the Court is highly obsequious of national policies, and recognizes that, for instance, matters such as bioethics (*Evans v United Kingdom*),¹⁰³ blasphemy (*Wingrove v United Kingdom*),¹⁰⁴ euthanasia (*Pretty v United Kingdom*),¹⁰⁵ same-sex marriage (*Parry v United Kingdom*),¹⁰⁶ fall within States' discretion. Under the fourth instance doctrine, the Court will also be reluctant to question the findings of fact and decisions of national courts in a particular case, unless blatantly unreasonable.¹⁰⁷

¹⁰³ *Evans v United Kingdom* (2008) 46 EHRR 34 at [59]. See further at [60]: “the Chamber did not find, therefore, that the absence of a power to override a genetic parent’s withdrawal of consent, even in the exceptional circumstances of the applicant’s case, was such as to upset the fair balance required by Article 8 or to exceed the wide margin of appreciation afforded to the State”.

¹⁰⁴ See *Wingrove v United Kingdom* (1997) 24 EHRR 1 at [57]: “there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention”.

¹⁰⁵ *Pretty v UK* (2002) 35 EHRR 1.

¹⁰⁶ *Parry v United Kingdom* (App. No. 42971/05).

¹⁰⁷ See *Kemmache v France (no. 3)* (1995) 19 EHRR 349 at [44]: “In principle, and without prejudice to its power to examine the compatibility of national decisions with the Convention, it is not the Court’s role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action”.

Strasbourg authority and inconsistent earlier domestic precedents

Pinnock clarified that “House of Lords decisions have to be seen against the backdrop of the evolving Strasbourg jurisprudence”,¹⁰⁸ i.e. the highest judicature can depart from its precedent to adjust to the ECHR. The question is whether the doctrine of precedent should automatically qualify lower courts’ interpretative obligation under s.2 HRA, requiring them to ignore the ECtHR’s divergent interpretation intervened after the highest courts’ pronouncements.

In *Leeds/ Kay*, Lord Bingham maintained that lower courts should adhere to the traditional rule of precedent to achieve the greatest degree of legal certainty.¹⁰⁹ One objection to that view is that it is highly uncommon for statutes to give instructions to courts concerning the method to be used for their interpretation;¹¹⁰ therefore, the statutory instruction in s.2 HRA should be seen as *lex specialis*, thus *prevailing over the general rules on interpretation, including precedence*. Also, the HRA requires *all* courts and tribunals to take into account the Strasbourg interpretation, and lists no exception; this suggests a priority in favour of applying Strasbourg judgments subsequent to the higher courts’ decisions where in contrast. Furthermore, since the HRA only places obligations on public authorities, not private parties, the legal certainty argument is less cogent (although courts’

¹⁰⁸ *Pinnock* at [47].

¹⁰⁹ *Kay and others v Lambeth LBC; Leeds City Council v Price* [2006] UKHL 10; [2006] 2 A.C. 465 at [43].

¹¹⁰ See Loveland, *Constitutional Law, Administrative Law and Human Rights*, p. 640: “Legislation rarely instructs the courts as to the principles of statutory interpretation which they should deploy. An exception is provided by ss 2-3 of the European Communities Act 1972 [...]”.

decisions in proceedings between private parties may engage HRA rights and trigger an incidental horizontal effect).¹¹¹

The comparison with the interplay between EU law and constitutional principles is again useful. The CJEU established that domestic rules on judicial hierarchy cannot deprive lower courts from their prerogative under the Treaty to refer a case to Luxembourg.¹¹² Also, *Thoburn v Sunderland* indicated that the HRA pertains to the same category of ‘constitutional statutes’ as the ECA, of particular importance and immune from implied repeal.¹¹³ Like the ECA 1972, the HRA 1998 therefore occupies a privileged position in domestic law.

Does the ‘mirror principle’ require self-restraint?

Lewis maintains that equating HRA rights with ECHR rights (“the mirror principle”) prevents domestic authorities from affording individuals greater protection than under the ECHR. It is difficult to see why that must be the case. The ECHR establishes minimum requirements; it does not impose uniform regulation of human rights within the Council of Europe, but rather ensures that national standards do not fall below shared values. Thus, the Strasbourg authorities’ failure

¹¹¹ This was the rationale, *mutatis mutandis*, for recognizing vertical, but not horizontal, direct effect to unimplemented EU directives. See L. Woods and P. Watson, *Steiner & Woods’s EU Law*, p 108.

¹¹² See C-210/06 *Cartesio Oktató* [2009] 3 WLR 777. The court underlined that, if an appellate court prevented a lower court from referring by varying or setting aside the order for reference, this would call into question the autonomous jurisdiction conferred upon the referring court by Art.267.

¹¹³ *Thoburn* at [62].

to recognize same-sex couples as ‘family life’ under the ECHR until 2010¹¹⁴ did not bar the UK’s introduction of civil partnerships; it only meant that other States were not bound to provide same-sex couples legal recognition. In matters where there is little commonality of legislative choices across Europe, States enjoy a wide margin of appreciation in deciding aspects unregulated at Strasbourg level. Similarly, the fact that only Strasbourg can pronounce on Convention rights does not mean that domestic judges cannot go beyond the protection required by that court.

Lord Brown’s finding in *Al-Skeini* that HRA requests “no less, but certainly no more” than what Strasbourg ascertains to be the law¹¹⁵ should not be read as inhibiting domestic judges from taking a more protective approach. The HRA *does not require*, but surely *does not preclude* more than the ECHR prescribes. In fact, ECHR obligations incorporated with the HRA do not affect the residual decision-making power legislatures and courts have in the field of human rights. The depiction of the ECHR as a ceiling consequently lacks a valid basis, as there is no normative conflict between the enactment of limited obligations internationally assumed under a treaty and the more wide-ranging domestic legislation. As the ECtHR suggested in *Wemhoff v Germany*, where two interpretations are possible, preference should be given to the one furthering individual rights, not limiting State obligations.¹¹⁶

¹¹⁴ *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

¹¹⁵ *Al-Skeini v United Kingdom* [2008] 1 A.C. 153 at [106].

¹¹⁶ *Wemhoff v Germany* (1979-80) 1 E.H.R.R. 55 at [8]: “Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and

Consequently, if a litigant brings a claim under the HRA, the domestic court cannot afford less protection than required under the ECHR, but can interpret the right more generously based on all domestic law. For example, in *Re EM* the House of Lords was willing to recognize extra-territorial effect to the right to family life,¹¹⁷ whereas the ECtHR has so far recognized such effect to Articles 3 and 6 ECHR, but not 8.¹¹⁸

The idea that the level of protection guaranteed under ECHR obligations does not prevent ECHR-compliant jurisdictions from going further seemed patent to the drafters of the EU Charter of Fundamental Rights. Even though the rights in the Charter reproducing ECHR rights have the scope determined under the latter, Article 52(3) emphasizes *in fine* that “This provision shall not prevent Union law providing more extensive protection”. As commentators have noted, “[t]his suggests that the ECHR is intended to function as a floor but not necessarily as a ceiling”,¹¹⁹ and “Article 52... provides for *at least* equivalent protection of Convention rights under the Charter system”.¹²⁰ Municipal courts applying domestic legislation corresponding to ECHR obligations should take a similar approach.

achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”.

¹¹⁷ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2009] 1 AC 1198.

¹¹⁸ *Soering v UK* (1989) 11 EHRR 439; *Chahal v UK* (1996) 23 EHRR 413; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494.

¹¹⁹ Anderson and Murphy, “The Charter of Fundamental Rights”, p. 163.

¹²⁰ Anderson and Murphy, “The Charter of Fundamental Rights”, p. 178 (emphasis added).

Concluding remarks

Schedule 1 HRA is not a domestic bill of rights, autonomous in its meaning and subject to municipal courts' interpretation. The HRA is a statute expressly aimed at rendering operative a set of treaty norms within the UK jurisdiction. The requirement that the statutory provisions should be identical to the corresponding international provisions is clearly established in the incorporating statute in the sections on definitions and interpretative principles. This is consistent with the presumption that Parliament did not intend to legislate in contrast with UK's international obligations.

In 2012 the Commission on a Bill of Rights reported on the adequacy of a separate, indigenous UK charter.¹²¹ Such an instrument would permit a more creative interpretation of human rights, as well as the codification of existing domestic case law going beyond Strasbourg requirements.¹²² Convention rights are, in fact, only one facet of the UK's protection of fundamental rights.

Precisely because in the HRA Parliament required courts to adjust the meaning of all statutory provisions to that of the international norms incorporated, blatant departure from the evolving Strasbourg interpretation is unwarranted. There

¹²¹ On the work of the Commission see M. Elliott, "A damp squib in the long grass: the report of the Commission on a Bill of Rights", (2013) 2 *European Human Rights Law Review*, 137.

¹²² A new charter could not afford less protection than the HRA, as this would entail a declaration of incompatibility under the HRA, unless the HRA is repealed and completely replaced by the new charter.

is no basis to suggest that a *bona fide* application of the ECtHR's authoritative interpretation of Convention rights should give way to domestic judges' perception of that court's consistency or grasp of English law. Conversely, the HRA may well provide the impulse for further development of rights under common law.

The Strasbourg Court's judicial activism means that the UK found itself bound by more than it had bargained for, but unless and until the UK denounces the ECHR, the proper extent of ECHR obligations, domestically enforceable by virtue of the HRA, remains prescribed by the ECtHR. By the same token, unless and until Parliament repeals or amends the HRA, domestic courts are expected not to fall below the standards of protection of fundamental rights expounded in Strasbourg jurisprudence.