OLITICAL SCIENCE

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UN TS AND THE EU COURT HUMAN RIGHTS

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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 -0.3 (e) 0.5 ( ) -268.7 (n) -0.3 (e) 0.5 (w -0.

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. This

1.0 Introduction

1.1 Since it fully came into effect in October 2000 the Human Rights Act 1998 (hereafter

> 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]

2.41 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

Council of Europe[24] 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

majority of the Commission finding that this provided Ôthe most powerful argument for a new constitutional instrument.Õ[35]

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

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

result, the legal values which widely 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).

Giving effect to the ÔConvention rightsÕ 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.

earliest days of the HRAÕs operation, a school of thought Ð quite clearly evidenced in the case law Ð has existed which sees the Convention rights given effect by the HRA as standards which are as much the product of domestic

> ... 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 precedent[78] 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]

5.4.13 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:

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

> É ascertain Ôwhere the jurisprudence of the Strasbourg court clearly shows that it currently standsÕ [but also] to resolve the question of whether a claim to a Convention right is viable or not, even where the

> 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 Ð in a series of recent decisions Ð the potential utility of the common law as a tool of rights protection.[97] Observing the tendency Ð prompted by the HRA Ð 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 Ôsupersede 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.Õ[98] The domestic law is therefore in the process of being re-emphasised as Ôthe natural starting pointÕ 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[100] of rights and its standard of judicial review of administrative discretion Ð even at the Ôanxious scrutinyÕ end of the Wednesbury scale Ð 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

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 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:

> É the machinery of protection established by the Convention is subsidiary to the national systems regarding human rights É 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 s

6.3 The ÔLiving InstrumentÕ Doctrine

6.3.1 It is also well-established in the jurisprudence of the European Court of Human Rights that Ôthe Convention is a living instrument which É must be interpreted in the light of present day conditions.Õ[107] Thus the Strasbourg Court is not formally bound to follow its own judgments[108] Ð allowing the Court to Ôhave regard to the changing conditions in contracting states and respond É to any emerging consensus as to the standards to be achieved.Õ[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 CourtÕs jurisprudence Ð and the ConventionÕs meaning has been articulated in response to contemporary challenges Ð to rights

complaint made. No violation of the applicantsÕ 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 t

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 D

the European Court of Human Rights found (by a slender majority[127]) that the UKÕs national authorities were Õbest placedÕ to determine what should be

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.

6.5.16 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 Ôsignifies a gnie era Ôs.(n) -0.10.5 (h) -0.3 (e) 0.5 (

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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

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