

The UK and Strasbourg: A Strained Relationship — The Long View

The UK and Strasbourg: A Strained Relationship

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I. Introduction

This chapter examines relations between the UK and the European Court of Human Rights (ECtHR), given the latter's capacity to set boundaries to what the former may do in the field of 'Convention rights'. It adopts a broad, long-term view. The introduction will undertake a brief examination of the current situation, acknowledging the risks of selectivity and generalisation.¹ Three illustrations of the strained relationship post-2009–10 will be provided, before some general reflections are offered.

The first example is the prisoner voting saga.² As is well known, British MPs (including some senior members of the government) have expressed deep-seated frustration at the fact that Strasbourg judges do not accept the politicians' collective view that all convicted prisoners in the UK should be disenfranchised while serving their sentence. This has led to some excited and confrontational reactions, magnified when Strasbourg refused to back down in 2012,³ as some senior politicians and MPs see it. The offending law has not been amended,⁴ and there has been talk of the need for a democratic override in respect of a Court that has abused its authority and aggrandised

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¹ For example, in this chapter it is convenient to refer to 'the UK', but this is not to suggest that there exists one single, national perspective on the matters addressed. A similar point may be made with respect to the references that follow to 'politicians', 'MPs' and 'senior members of the judiciary' etc.

² See E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 503; R Ziegler, 'Voting Eligibility: Strasbourg's Timidity' (ch 9), this volume.

³ See *Scoppola v Italy No 3* (2013) 56 EHRR 19 (GC). *cf* earlier rulings, including *Hirst v UK (No 2)* (2006) 42 EHRR 41 (GC).

⁴ The Committee of Ministers has been strongly critical of the UK; it has stated that it will return to the matter in September 2015. In December 2014 the British government announced that it 'will not be able to legislate for prisoner voting in this Parliament', ie before the May 2015 general election: Ministry of Justice, *Responding to Human Rights Judgments*, Report to the Joint Committee on Human Rights on the Government's Response to Human Rights judgment 2013–14 (December 2014) Cm 8962, 29.

its jurisdiction, not only in respect of the relevant Convention provision (Article 3 of Protocol 1) but overall. MPs are adamant that the Court should show greater respect for what they say are reasonable policy choices made at the national level, by affording Member States a greater margin of (national) appreciation — a view that has been echoed by some senior members of the judiciary speaking extra-judicially.⁵

A second example concerns restrictions on executive power in the field of deportation, and, in particular, regarding non-nationals suspected of terrorism.⁶ The relevant Article 3 jurisprudence has been a sore point for the UK for over a decade,⁷ but the matter flared up in 2012, Article 6(1) of the European Convention on Human Rights (ECHR) causing the main controversy. Senior politicians reacted strongly to a Strasbourg judgment⁸ which held that that provision would potentially be violated were the UK to deport a suspected terrorist, Abu Qatada, to Jordan (at least on the facts as they then existed), given the risk that evidence obtained by torture would be used in his retrial. This was, in effect, Strasbourg's first detailed consideration of the relevant Article 6(1) point; it followed the approach taken by the Court of Appeal when it had considered the *Abu Qatada* case, not the House of Lords (as it then was), which had found no potential violation. The British Home Secretary accused the Court of 'mov[ing] the goalposts by establishing new, unprecedented legal grounds upon which [deportation was] blocked'.⁹ More generally, the narrative, in fact going back some years, has been about Strasbourg failing to properly balance the needs of national security and human rights.¹⁰ In 2013, the Home Secretary warned that if withdrawal from the Convention was necessary to 'fix' the UK's human rights laws, then this should be considered.¹¹ The Conservative Party has said that it will replace the Human Rights

⁵ See text accompanying n 142 and n 177 below.

⁶ The popular press and British politicians have also expressed great frustration at the barriers that Art 8 ECHR may present regarding the deportation of non-nationals who have committed serious criminal offences. This was the background to a reform of the relevant immigration legislation in 2014: see M Elliott, 'The Immigration Act 2014: A Sequel to the Prisoner-Voting Saga?' (*Public Law for Everyone*, 23 May 2014), publiclawforeveryone.com/2014/05/23/the-immigration-act-2014-a-sequel-to-the-prisoner-voting-saga/.

⁷ See D Moeckli, '*Saadi v Italy*: The Rules of the Game Have Not Changed' (2008) 8 *Human Rights Law Review* 534.

⁸ *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1.

⁹ HC Deb 8 July 2013, vol 566, col 23 (Theresa May MP).

¹⁰ For a recent perspective see David Cameron, 'Speech on the European Court of Human Rights' (25 January 2012), www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights.

¹¹ See A Travis, 'Conservatives Promise to Scrap HRA After Next Election' *The Guardian* (London, 30 September 2013), www.theguardian.com/law/2013/sep/30/conservitives-scrap-human-rights-act.

Act 1998 (HRA) with a British Bill of Rights;¹² here they foresee modified protection for Articles 3 and 8 in the context of immigration.

The UK judiciary's approach to section 2(1) HRA provides another aspect to this broad overview of the recent strained relationship. Section 2(1) requires British judges to 'take into account' Strasbourg case law in cases raising questions concerning 'Convention rights'. Nonetheless, in the post-2009 period suggestions were made that UK judges had become subservient to Strasbourg, and there emerged a type of supremacy question:¹³ if necessary, would the UK courts be prepared *not* to apply Strasbourg's clear and settled position on the meaning of a particular 'Convention right'? How this was resolved is discussed below in section V. For now it suffices to note that certain politicians insist that the HRA places the UK Supreme Court under Strasbourg's tutelage, and that supremacy now has to be wrestled back from Strasbourg. Those claims may be exaggerated; however, certain senior judges have indicated their considerable unease with Strasbourg's influence over UK law via the HRA, whilst an element of disdain for it, or so it seems, has been evident in certain extra-judicial speeches.¹⁴

With these three illustrations in mind, it is submitted that at the core of the strained relationship are concerns over national sovereignty, supremacy in the context of domestic law and, related to both, the legitimacy of Strasbourg's influence. The fear is that the UK's national authorities have become subservient to the ECtHR, supremacy on Convention rights issues resting with it, even if the UK national authorities adopt a different approach, taking the Convention into account. The legitimacy aspect questions why and how Strasbourg has the power that it has to (in effect) override what are generally seen to be reasonable British positions. It is often suggested that Strasbourg has pursued 'mission creep' in order to do so.

Adopting a 'long view', one aim of this chapter is to demonstrate that, if one looks at the history of UK–Strasbourg relations, British concerns over sovereignty go back to the very start of the Convention's life. Questions as to the legitimacy of the Court's influence over UK law have also been a recurring theme. Section II of this chapter seeks to demonstrate this via a brief analysis of British concerns during the Convention's drafting, and how the 'British' judge on the Court in the 1970s expressed strong legitimacy-related concerns (which certain modern-day critics of the Court echo). We shall also see, in section III, that national sovereignty concerns — and related questions concerning the legitimacy of Strasbourg's growing influence — were

¹² See text following n 113 below.

¹³ See text following n 125 below.

¹⁴ See text accompanying nn 18 and 142 below. However, there have been a succession of speeches delivered by members of the judiciary which have been more positive about the Convention and the Court: see E. Bates, 'The Senior Judiciary on 'Strasbourg' – More Supportive Than Some Would Have You Believe', (UK Const. L. Blog, 28th May 2015), <http://ukconstitutionallaw.org/2015/05/28/ed-bates-the-senior-judiciary-on-strasbourg-more-supportive-than-some-would-have-you-believe/>.

prevalent throughout the 1980s and up to the late 1990s, shaping the then Conservative administrations' policy toward the Convention, and so right up to the passage of the HRA under the Labour government of 1997.

Section IV jumps ahead to 2009–10, setting out how the growing dissatisfaction with the UK's human rights arrangements culminated in proposals that the HRA should be replaced by a British bill of rights. For some that opens up the 'unfinished business' question of (what they see as) Strasbourg's domination of UK law, and, potentially, the UK's continuing membership of the Convention. Against that backdrop, section V suggests that, far from placating or resolving the concerns about the ECtHR that existed prior to the HRA, the UK's experience of that Act may have intensified them — for some at least. As already suggested, strains in the relationship have reached unprecedented levels since 2009–10 as questions over, firstly, supremacy in national law, and, secondly, the legitimacy of the ECtHR's international role have come under a bright spotlight. However, it is also suggested (in section V) that these issues, and the criticism of Strasbourg that they have entailed, have been very largely overtaken by important developments in *both* UK and ECtHR case law since 2010. It is argued that that case law indicates that the legal relationship between the UK and the ECtHR is reaching a new equilibrium — one which questions whether there really is a genuine need to radically reshape UK–Strasbourg relations as some politicians advocate.

II. 1950–79: The Drafting and Subsequent Evolution of the ECHR

The British contribution to the Convention's drafting¹⁵ is emphasised today by those who plead that the UK should not turn its back on a system it helped to establish, pointing to the input of figures such as Winston Churchill and Sir David Maxwell-Fyfe. Indeed, these individuals (especially the latter) did make a significant contribution to the Convention's genesis; however, right at the outset the real concern of the British (Labour, Atlee) government was with the potential loss of national sovereignty entailed by participation in an international system for the protection of human rights. This was one reason why, in 1950, there was a less-than-enthusiastic approach toward the Convention from the British government, which, amongst other things, opposed the establishment of a European Court of Human Rights.

This author has argued elsewhere¹⁶ that, when it was opened for signature on 4 November 1950, the Convention amounted to a compromise between those who mainly saw it as an interstate pact to serve as an alarm bell for Europe to prevent a re-emergence of totalitarianism, and others who saw it as a potential European bill of

¹⁵ There is a considerable literature on this, the most comprehensive being B Simpson, *Human Rights and the End of Empire* (Oxford, Oxford University Press, 2004).

¹⁶ E Bates, *The Evolution of the European Convention on Human Rights* (Oxford, Oxford University Press, 2010) chs 3–5.

rights for a 'new', post-war Europe. The British strongly opposed the latter, but ratified the Convention in 1951, reassured that both the right of individual petition (in fact, to the European Commission of Human Rights) and acceptance of the jurisdiction of the ECtHR were subject to optional clauses (which they did not intend to accept). Indeed, although the Convention contained articles on a Court, in the early 1950s it was not at all clear that such an institution would actually come into existence.¹⁷

So, concerns over sovereignty were sufficiently allayed in the course of 1950–51 for the UK to ratify the Convention, and it is fair to say, as Lord Hoffmann¹⁸ has, that the UK undertook that step primarily to set an example for others, and not with the expectation that it would be found in violation itself, at least not regularly. And it is also valid to suggest, as Jack Straw (then MP) did in 2012, that a reason why the States formulated the Court's powers in the broad terms expressed under what is today Article 46(1) ECHR — that is, without a 'democratic override' or something similar — may have been that the States 'never anticipated the vastly expanded role of the Court'.¹⁹ However, two further, general observations are now required.

First, it was understood in 1950 that the Convention established international legal obligations which could achieve ascendancy over any aspect of domestic law, including legislation (to the extent that a feature of the legislation could be impugned in a case reaching the Court and found incompatible with the Convention) in cases where the UK was a respondent State. It was also understood in 1950 that the Convention system could develop into a type of European bill of rights.²⁰

Secondly, 1950 was just the beginning of the story. What was originally more of a collective pact against totalitarianism evolved into more of a European bill of rights.²¹ In 1960 the ECtHR came into being and, over the years, the States chose to accept its jurisdiction and the right of individuals to access the Strasbourg system, just as the UK did in 1966,²² when it was aware of the Convention's potential to evolve. From the late 1970s onwards, the Court's jurisprudence started to flourish. Amending protocols to the Convention were drafted by the States, which necessarily require their input and their consent for their ratification. In this connection, acceptance of the Convention and

¹⁷ Eight States had to accept the Court's optional jurisdiction for it to be instituted; in 1950 only a minority of States supported its creation: see *ibid*, 90 and 124.

¹⁸ L Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *Modern Law Review* 159, 166; see also L Hoffmann, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416.

¹⁹ J Straw, *Aspects of Law Reform: An Insider's Perspective* (Cambridge, Cambridge University Press, 2013) 26.

²⁰ See E Bates, 'British Sovereignty and the European Court of Human Rights' (2012) 128 *Law Quarterly Review* 382, 384–89.

²¹ Bates (n 16).

²² A Lester, 'UK Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whitehall in 1965' [1998] *Public Law* 237.

continued participation in an evolving scheme of human rights supervision required the active consent of the relevant UK governments at key moments. The UK consistently renewed the optional clauses, and ratified relevant reforming protocols, most notably Protocol 11²³ in the 1990s, aware of the developments that had already occurred.

A. The Fledgling European Bill of Rights of the 1970s

The points made above may have some relevance to a recurring debate in the UK as to whether the ECtHR has illegitimately aggrandised its jurisdiction. Many of those who insist that it has done so draw comparisons between the origins of the Convention in 1950 and the modern role of the Court, as if the Convention's development into a form of European bill of rights is a recent phenomenon — but it is not. It was in the 1970s, a generation ago, that the aforementioned identity of the Convention really started to become apparent, and it was not uncontroversial then, as we now observe.

Space does not permit a detailed examination of the 1970s and early 1980s jurisprudence here; however, the approach adopted toward the Convention by the 'British' judge on the Court in the 1970s, Sir Gerald Fitzmaurice, will be discussed given its relevance to contemporary debates about aggrandisement. His Separate and Dissenting Opinions during his time on the bench at Strasbourg (1974–80) have a resonance with comments often made in the UK today by those who insist that the Court should go back to basics, adopt a more restrictive approach to the Convention's interpretation, and so, it is said, operate more as its drafters intended.²⁴

Sir Gerald's dissent in *Marckx v Belgium*²⁵ exemplifies his approach. The case concerned Belgian laws which, amongst other things, permitted differences in treatment between so-called 'legitimate' and 'illegitimate' children with respect to family affiliation, civil status and inheritance rights. The Court examined the case under Articles 8(1) (respect for family life), 14 (non-discrimination) and Article 1 Protocol 1 (right to possessions), finding various violations in a complex case. A flavour of Fitzmaurice's views, and how he saw the Strasbourg institutions as acting inappropriately, is provided by his insistence that, as conceived in 1950, Article 8(1)

²³ See text following n 52 below.

²⁴ See eg Chris Grayling MP (then Minister of Justice), 'Bill of Rights: Let us Concentrate on Real Human Rights' *Daily Telegraph* (London, 17 December 2012), www.telegraph.co.uk/news/uknews/law-and-order/9750518/Bill-of-Rights-Let-us-concentrate-on-real-human-rights.html; and as quoted in the *Daily Telegraph*, 'Chris Grayling: Senior Judges Back Me over Human Rights Reforms' (26 March 2014), www.telegraph.co.uk/news/politics/conservative/10724404/Chris-Grayling-Senior-judges-back-me-over-human-rights-reforms.html. See also the text accompanying nn 99 and 113 below.

²⁵ *Marckx v Belgium* (1979–80) 2 EHRR 330.

was concerned only with very severe intrusions into family life²⁶ — a world away from *Marckx*.

Sir Gerald's approach was guided by his view of the Convention, in particular its post-war origins and status as an international treaty, and his view that 'Convention rights' should not be equated with domestic, constitutional rights. That misconstrued the ECtHR's role, for it had 'never [been] instituted to act as a sort of general law-reformer'; rather its purpose was to protect 'genuine human rights'.²⁷ The latter were those associated with 'a deep seated and persistent feeling that [they were] so fundamental, so founded in nature and la condition humaine, as to constitute a different order of right' from those 'ordinary everyday ... rights deriving from man-made laws'.²⁸ In Sir Gerald's eyes, then, in cases like *Marckx* his fellow judges had viewed the substantive text of the Convention as a 'good opportunity for plausibly imparting to the Convention a scope which it is virtually certain its originators never even thought of, much less intended'.²⁹ It was also verging on 'an abuse of the powers given to the Court' for it to in effect condemn the Belgian national law impugned in *Marckx*, which was not in itself 'unreasonable or manifestly unjust'.³⁰ Breaches of the Convention should only be found, the 'British' judge insisted, when they were clear-cut: 'No Government or authority [could] be expected to operate from within a strait-jacket of [the] sort [fashioned in *Marckx*] and without the benefit of a faculty of discretion functioning within defensible limits.'³¹

Strasbourg's contemporary critics may find Fitzmaurice's views appealing, and they might argue that the ECtHR has devalued the currency of 'human rights'. But, looking back, can that criticism really be made of cases such as *Marckx*, or for that matter those of *Tyrer v UK*,³² *Golder v UK*,³³ *Airey v Ireland*³⁴ and other important cases of Fitzmaurice's era? The issues at stake in those cases may have been far removed from those that had inspired the Convention's drafters. But did the Court's handling of them

²⁶ '... the "domiciliary protection" of the individual', to prevent domestic intrusions such as 'the four o'clock in the morning rat-a-tat on the door': dissenting judgment of Sir Gerald Fitzmaurice in *Marckx v Belgium*, *ibid*, para 7.

²⁷ G Fitzmaurice, 'Some Reflections on the ECHR — and on Human Rights' in R Bernhardt (ed), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift für Herman Molser* (Berlin, Springer Verlag, 1983) 202, 213.

²⁸ *ibid*, 209.

²⁹ *ibid*, 214.

³⁰ *Marckx v Belgium* (n 25) para 31.

³¹ *ibid*.

³² *Tyrer v UK* (1979–80) 2 EHRR 1.

³³ *Golder v UK* (1979–80) 1 EHRR 524.

³⁴ *Airey v Ireland* (1979–80) 2 EHRR 305.

not demonstrate the value of its role as a mechanism which could gently keep the laws of the Member States within reasonable bounds, the boundaries or parameters being set to reflect a minimum, common European standard, one which Belgium had not adhered to in *Marckx* (the Court identifying fault in a domestic legal regime which permitted discrimination against illegitimate children in issues such as family affiliation and inheritance rights)?

B. The UK and Europe

Obviously, Fitzmaurice's views did not amount to an official 'British' perspective on the Convention, although it is conceivable that they may have reflected a view at Whitehall in the 1970s that the Court had aggrandised its jurisdiction.³⁵ However, the argument that Convention rights could not be equated with constitutional rights never gained any traction in the Court's case law (or in international human rights jurisprudence generally). Moreover, even after the Convention's identity as a type of European bill of rights became apparent, there was a conscious political decision on the UK's part to remain committed to it, and to a point, of course, when the constitutional rights status of 'Convention rights' was acknowledged via the passage of the HRA.

This is not to deny that, rather than actively promoting the Convention's evolution, the UK may have been carried along (via political pressure at the European level) with it somewhat reluctantly.³⁶ What might account for such reluctance, and did Fitzmaurice's arguments reflect a rather British perspective on, firstly, the appropriate role of 'Europe' in this field, and secondly, a rather British understanding of what 'human rights' were, or ought to be?

As to the first point, the current President of the UK Supreme Court, Lord Neuberger, has pondered whether the very cautious and sometimes reluctant approach that characterises the UK in 'Europe' (including the European Union) reflects a national resistance to being told what to do by European bodies. This may be less prevalent on the continent,³⁷ where history, attitudes to pooling sovereignty in the context of European integration, and approaches to constitutional law, particularly regarding the judicial enforcement of human rights, can differ significantly.

As to the second point, could it be that Fitzmaurice's perspective on 'human rights' was also rather British given the absence of a bill of rights, or an equivalent, in UK law prior to HRA? ³⁸ That reflected the UK's attachment to the 'Westminster model', two

³⁵ See Bates (n 20) 394–95, 398–99.

³⁶ See text following n 52 below.

³⁷ Lord Neuberger, 'The British and Europe', 12 February 2014, para 10 and *passim*, www.supremecourt.uk/docs/speech-140212.pdf.

³⁸ This may also be of relevance to aggrandisement arguments: see Grayling (n 24); as to the enduring suggestion that there is a difference in order or class of rights to be protected at the international level, as opposed to domestically, see eg Hoffmann, 'The Universality of Human

aspects of which are particularly relevant to us: (i) parliamentary sovereignty is the bedrock principle, democratically elected politicians being seen as the primary, legitimate decision-makers, at least in relation to matters of policy; (ii) liberty was 'residual' to this, with common law rights³⁹ subservient to express legislation, rather than being positively protected as higher, constitutional rights. Adherence to that model has meant that in the UK it is seen as 'little short of offensive to notions of constitutional propriety'⁴⁰ that a court, let alone an international one, could overrule a decision of Parliament, or, in effect, require it to legislate, as may be the substantial effect of an ECtHR ruling. To the extent that this is not how matters are seen on the continent,⁴¹ we may have a further explanation as to why there have been (and remain) greater anxieties about Convention membership in London compared to other European capitals.

C. 1985: 'Political Pressures Will Demand a Fundamental Reassessment'

It is precisely because the model just described failed to sufficiently guarantee constitutional rights of the order the Convention protected that the campaign for incorporation of the ECHR goes at least as far back as the 1970s,⁴² and that British lawyers increasingly resorted to the ECtHR from then onwards, it becoming 'in effect a supreme constitutional court of the UK'.⁴³ The disturbing effect that had on the Westminster model is summarised by comments made in 1985 by Terence Shaw, the *Daily Telegraph's* legal correspondent. He reported that

whereas initially [Strasbourg's] decisions ... tended to be regarded as minor irritants or useful checks on governmental power or failings, there appears now to be *growing resentment that groups of mainly foreign judges or jurists are increasingly replacing parliament and the domestic court as defenders of rights and liberties in the UK*. Despite the margin of appreciation allowed to governments under many of the more sensitive of the Convention's provisions, one fears that the Court and the Commission, while carefully restricting their decisions to the facts and circumstances

Rights' (n 18); J Laws, *The Common Law Constitution* (Cambridge, Cambridge University Press, 2013) 83.

³⁹ On which (including their recent revival) see R Clayton, 'The Empire Strikes Back' [2015] *Public Law* 2; B Dickson, 'Repeal the HRA and Rely on the Common Law?' (ch 7), this volume and M Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 *Current Legal Problems* (forthcoming). See also text accompanying n 175 below.

⁴⁰ Neuberger (n 37) para 28.

⁴¹ *ibid*; cf comments made by Laws LJ (n 38) 82–83.

⁴² A Lester in A Lester, D Pannick and J Herberg (eds), *Human Rights Law and Practice* (LexisNexis, 2009) 12–13.

⁴³ *ibid*.

before them, are of necessity being *drawn into making political judgments seen by many as the province of democratically elected parliament*.⁴⁴

Shaw added: 'Events in Britain appear to be moving fast to the point where political pressures will demand a fundamental reassessment of the relationship between the UK law and that of the Strasbourg institutions'.⁴⁵ Shaw's reference to 'political pressures' for a 'fundamental reassessment' provides a snapshot of how things were seen 30 years ago; however, the broader point he made offers a perspective upon what has followed, including the current era, as successive British governments worked out what to do about 'Strasbourg'. In the remaining parts of this chapter we examine how this matter was largely avoided from the 1970s onwards until tensions surfaced in the mid-1990s, which were followed by the passage of the HRA (Part III below). But it is argued in Parts IV and V that the UK's experiences of the domestic application of 'Convention rights' have led to a renewed focus on the points Shaw made three decades ago.

III. 1980–98: Keeping the European Bill of Rights in Strasbourg and then Bringing it 'Home'

The Thatcher (1979–90) and Major (1990–97) administrations remained steadfast to the British Westminster model, stressing the pedigree of the common law and Parliament at protecting the rights of the individual. These governments opposed the adoption of a domestic bill of rights, which 'risk[ed] transferring power away from parliament to legal courts [thereby] undermining the democratic supremacy of parliament as representatives of the people'.⁴⁶ Opposition to incorporation of the Convention naturally followed.

A. The Conservatives Live With, and Then Attempt to Tame, the Court

Thus, over the 1980s and 1990s, the UK was in a curious position. Despite the 'growing resentment' identified by Shaw, manifested by reactions to certain Strasbourg judgments,⁴⁷ the UK was found in violation of its Convention obligations on more and

⁴⁴ T Shaw, 'The Impact of the Case-Law of the Organs of the ECHR on Public Opinion' in Council of Europe, *Proceedings of the Sixth International Colloquy about the ECHR* (Martinus Nijhoff, 1988) 758, 770–72 (emphasis added), noting that it had become 'firmly entrenched in the public's mind ... that decisions of the British courts, Acts of Parliament, subordinate legislation and administrative decisions may be open to challenge and review in Strasbourg' (at 760).

⁴⁵ *ibid* (emphasis added).

⁴⁶ Conservative Party Manifesto 1997. See also N Lyell, 'Whither Strasbourg?' (1997) 2 *European Human Rights Law Review* 18 (Sir Nicholas Lyell was the Conservative government's Attorney-General in 1996).

⁴⁷ In 1995 the Court delivered its judgment in *McCann v UK* (1996) 21 EHRR 97, the so-called 'IRA-Gibraltar shootings' case, which was met with a strong euro-phobic reaction in the tabloid

more occasions. Yet there was no concerted response to the effect that the ECtHR's judgments should not be implemented, and no cases where the UK failed to act in response to a Strasbourg ruling. Withdrawal from the ECHR seemed out of the question.⁴⁸ So, in spite of the growing number of adverse judgments through the 1980s and 1990s, the Convention's role as a type of external bill of rights was tolerated. Why?

Perhaps the 'external' nature of Strasbourg review was important. It meant that the ECtHR and its influence could be kept at arm's length: sometimes the minimum necessary was done to secure compliance with its judgments, and after considerable delay. The absence of a domestic bill of rights or an equivalent must have been important too, for it meant that any suggestion of withdrawal from the ECHR would have been hotly opposed by campaigners who could point to the constitutional vacuum filled by the ECtHR. Related to this, and despite popular antipathy toward Strasbourg as noted by Shaw, the Court's legitimacy 'stock', so to speak, was high,⁴⁹ and was confirmed, it seems, by various extra-judicial speeches backing incorporation of the Convention into domestic law.⁵⁰

Perhaps it was significant too that before 1998 the right of individual petition and acceptance of the jurisdiction of the ECtHR remained subject to optional clauses. Even though their non-renewal may have been a remote prospect, given the negative political reaction associated with non-renewal,⁵¹ the possibility of such a step may not have been without influence. The stance adopted by the UK government during the negotiation of Protocol 11 to the Convention in 1994 suggested as much. The UK strongly opposed the proposal that the right of individual petition should become mandatory, as was being proposed.⁵² The argument that it should remain subject to the individual State's periodic decision to continue to permit this was based on the view that this feature of the Convention was vital to maintaining 'the balance between the

press and a venting of anti-Strasbourg sentiment from senior politicians; see S Kentridge, 'Parliamentary Supremacy: Some Lessons from the Commonwealth' [1997] *Public Law* 96, 101.

⁴⁸ As far as the author is aware, no senior politician advocated this publicly in the 1980s and 1990s.

⁴⁹ The preface to D Harris, M O'Boyle and C Warbrick, *Law of the ECHR*, 1st edn (London, Butterworths, 1995) pondered whether it was 'an exaggeration to suggest that the system has developed to the point that no European State could seriously contemplate resiling from the Convention' (vii). The Strasbourg institutions had 'rightfully earned the confidence of contracting parties by carrying out their tasks with the objectivity of judicial bodies and have earned a world-wide reputation for fairness, balance and intellectual rigour' (ibid).

⁵⁰ See T Bingham, 'The ECHR: Time to Incorporate' (1993) 109 *Law Quarterly Review* 390; H Woolf, 'Droit Public — English Style' [1995] *Public Law* 57.

⁵¹ No Convention State which accepted the optional clauses ever failed to renew them.

⁵² See A Drzemczewski, 'A Major Overhaul of the ECHR Control Mechanism: Protocol No 11' in Academy of European Law (ed), *Collected Courses of the Academy of European Law*, vol VI bk 2 (Leiden, Martinus Nijhoff, 1997) 121, 174 at fn 81.

authority of the Court, and that of the elected government of Member States'.⁵³ It was necessary as, unlike the governments of the Convention States, the Court was 'accountable to no one', even though it could 'make binding decisions on domestic matters, which may oblige Parliaments to legislate'.⁵⁴ It was submitted that this was an 'enormous responsibility' for the ECtHR to have, such that it was appropriate that the Member States should be able to continue to 'review [its] performance periodically, and make a conscious decision to renew the right of individual petition'.⁵⁵

The UK government therefore fought to retain what it saw as a 'democratic safeguard', one that it argued was 'absolutely essential'⁵⁶ to avoid the Court becoming an institution that, the government contended, was insufficiently accountable to the Member States. However, the initiative was unsuccessful. It lacked support across the negotiating table, and Protocol 11 made the right of individual petition mandatory. When it entered into force in 1998 it also established a new, permanent Court (whose jurisdiction was also mandatory).

The UK ratified the Protocol in late 1994, but anxieties over the Convention at Whitehall appeared to be growing. The very next year saw a British initiative to bring political pressure to bear on the Court to curb its influence, in the form of a 1995 Foreign Office initiative which involved the circulation of a memorandum to other Convention States. It had a number of features,⁵⁷ the most important for us being that it called for the ECtHR to afford the States more margin of appreciation, 'to allow for diversity, particularly on those moral and social issues where the view of what is right may legitimately vary'.⁵⁸ It was proposed that the Committee of Ministers pass a resolution drawing the Court's attention to certain principles:

- (a) account should be taken of the fact that democratic institutions and tribunals in Member States are the best placed to determine moral and social issues in accordance with regional and national perceptions;
- (b) full regard should be paid to decisions by democratic legislatures and to differing legal traditions;
- (c) long-standing laws and practices should be respected, except where these are manifestly contrary to the Convention.⁵⁹

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ For full details see 'Reform of the Court: The Foreign Office Position Paper' (editorial) (1996) 3 *European Human Rights Law Review* 229, 229–32.

⁵⁸ para 7 of the British document, as quoted *ibid.*, 230.

⁵⁹ *ibid.*, 231.

As far as the author is aware, this 1995 Foreign Office memorandum did not result in any specific response from the Committee of Ministers. We can only speculate as to whether that meant that the other States rejected the British government's implied criticism of the ECtHR, which frequently stressed the subsidiary nature of the Convention, and the margin of appreciation doctrine in its jurisprudence.⁶⁰

The mid-1990s was not a propitious time for these UK initiatives,⁶¹ and one wonders if matters would have culminated in a 'fundamental reassessment' (Shaw) in defence of the Westminster model had the Conservatives retained power in 1997. As we know, they did not, the reassessment coming in a different form. The new Labour government of 1997 recognised that the UK was virtually alone in Europe, having neither incorporated the Convention nor adopted equivalent protection under a bill of rights or written constitution.⁶² Rather than attempt to directly control Strasbourg as an external force on UK law, the new approach was for the UK to modify its own domestic arrangements for protecting human rights. And if so, would that not entail that the actual problem Shaw identified — 'growing resentment that groups of mainly foreign judges' are replacing UK national authorities — would be alleviated?

B. The HRA 1998

The Labour Party committed itself to incorporation in 1993,⁶³ a step that was foreseen as 'cut[ting] costs, sav[ing] time and *giv[ing] power back to British courts*'.⁶⁴ According to Tony Blair, repatriating 'British rights to British courts' would also help transform attitudes *toward the Convention*; it would make it clear that 'protection afforded by [it]

⁶⁰ In a 1995 lecture the Court's President stated: 'The Convention is not intended to destroy the richness of the cultural and other variety found in Europe by imposing rigid, uniform solutions in the vast field it covers', for the Court recognised 'the right of free societies, within limits, to choose for themselves the human rights policies that best suit them': R Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1997) 2 *European Human Rights Law Review* 18, 25.

⁶¹ *cf* Ryssdal's lecture, *ibid*.

⁶² Although Lyell (n 46) 139 observed that, like the UK, States such as Italy, France and Austria, which had incorporated, had been found in violation of the Convention many times. *cf* J Straw and P Boateng, 'Bringing Rights Home: Labour's Plans to Incorporate the ECHR' (1997) 1 *European Human Rights Law Review* 71, 74, arguing that the UK was 'mark[ed] out' given the 'serious nature of the cases' and the absence of effective domestic remedies. At the time of writing Straw was Shadow Home Secretary and Boateng Shadow Minister for the Lord Chancellor's Department.

⁶³ This was originally part of a two-stage plan, part two being the adoption of a domestic bill of rights. By 1996 the commitment was reduced to that of incorporating the ECHR into UK law: see F Klug, 'The HRA: Origins and Intentions' in N Kang-Riou et al (eds), *Confronting the Human Rights Act* (Oxford, Routledge, 2012) 31, 35.

⁶⁴ Straw and Boateng (n 62) 71 (emphasis added).

was *not some foreign import* but that it had been accepted by successive British governments and that it should apply throughout the UK'.⁶⁵ What then of arguments that incorporation would unsettle the UK constitutional model? Blair argued, 'we are already signatories to the Convention' — so, incorporation would simply mean 'allowing *British judges rather than European judges* to pass judgment'.⁶⁶

The HRA sought to establish a human rights culture, with 'Convention rights'⁶⁷ as its focal point.⁶⁸ The 1997 White Paper, *Rights Brought Home: The Human Rights Bill*,⁶⁹ displayed a sense of superiority about the seriousness with which the new government approached human rights protection compared to the old.⁷⁰ The line adopted was that the Convention was highly regarded,⁷¹ that Strasbourg had proven itself as a trusted external auditor of human rights protection, and that it was high time that British courts should be allowed to apply 'Convention rights', and the Strasbourg jurisprudence, albeit under a scheme that, on its face, would not fundamentally disturb parliamentary sovereignty.⁷²

Placing 'Convention rights' centre-stage in this way amounted to a remarkable vote of confidence in the Strasbourg system, and recognition of the constitutional-like nature of the rights protection it afforded. Incorporation would overcome the 'inordinate delay and cost'⁷³ of having to take a case to Strasbourg to vindicate 'Convention rights'.⁷⁴ It would also enable an interchange of views on 'Convention rights' between the UK and Strasbourg judiciaries, with each gently influencing the other.⁷⁵ But what was the real aim of the HRA? Was it narrow, to ensure that the ECHR would be

⁶⁵ T Blair, 'John Smith Memorial Lecture' (February 1996), cited in F Klug, *Values for a Godless Age* (Harmondsworth, Penguin, 2000) 62 (emphasis added).

⁶⁶ *ibid* (emphasis added).

⁶⁷ See especially ss 1, 2(1), 3(1), 4, 6(1) and (2)(b), 7(1)(b), 10(1)(a) and 19 HRA.

⁶⁸ See especially s 6(1).

⁶⁹ 'Rights Brought Home: The Human Rights Bill', October 1997, CM 3782.

⁷⁰ *ibid*, para 1.17.

⁷¹ The Convention was 'one of the premier agreements defining standards of behaviour across Europe': *ibid*, para 1.3. Strasbourg was 'well tried and tested'; the rights and freedoms in issue were 'ones with which the people of this country were plainly comfortable', so 'Convention rights' afforded 'an excellent basis' for the protections to be provided by the HRA. Moreover the Strasbourg system was in good standing elsewhere in Europe as evidenced by the fact that 'almost all' States Parties had incorporated it into their domestic law.

⁷² *ibid*, and see s 4 HRA.

⁷³ *Rights Brought Home* (n 69) para 1.14.

⁷⁴ *ibid*, para 1.16 and 1.19.

⁷⁵ *ibid* para 1.16.

complied with domestically, it making little sense for Strasbourg to keep correcting faults in UK law when British judges could do that? Or was it more ambitious, the idea being that the HRA should become a type of British bill of rights? The Labour government was very ambivalent on these points when the Act was passed.⁷⁶

The White Paper and the relevant parliamentary debates do, however, leave the impression that the path ahead for UK–Strasbourg relations was assumed to be a positive one and, although we have the advantage of hindsight, we might ask whether such optimism was misplaced. After all, before 1998 Strasbourg was popularly regarded as a foreign court, ‘simply not respected’ in the public’s eyes, and viewed with ‘resentment and suspicion’.⁷⁷ This was why Sir Sidney Kentridge, reflecting on his experiences of South Africa, argued that the best way to secure public confidence in a new constitutional system of human rights protection was to have a home-grown bill of rights,⁷⁸ *not* an instrument whose focus was primarily on an international treaty.

Perhaps in 1997–98 there was optimism and an expectation that the application of ‘Convention rights’ by British judges would be sufficient to infuse human rights protection in the UK with a newfound respect as far as the public were concerned.⁷⁹ After all, foreign judges would no longer be, in effect, the first instance court for the positive enforcement of UK human (Convention) rights issues. Under the ‘bringing rights home’ agenda, the government emphasised the ‘Britishness’ of the Convention, given the important role played by the UK in its drafting. The rationale was that most breaches of ‘Convention rights’ would be resolved domestically, by ‘home-grown’ judges. Moreover, for cases that went to the ECtHR, European judges would now benefit from British judges’ detailed views on the application of the Convention to the British context,⁸⁰ which would surely help to influence outcomes.

In summary, then, we may tentatively suggest that the view in 1998 may have been that the increased role that UK judges would have under the HRA would entail a commensurately decreased role — and, presumably, profile — for Strasbourg as a ‘foreign’ court.⁸¹ Explaining how, in practice, matters seem to have culminated in

⁷⁶ Klug (n 63) 35–36.

⁷⁷ Kentridge (n 47) 101, commenting on British hostility toward Strasbourg.

⁷⁸ S Kentridge, ‘Bill of Rights: The South African Experiment’ (1996) 112 *Law Quarterly Review* 237, 258.

⁷⁹ *cf* Kentridge’s optimism that ‘[the] enforcement of the Convention by a [British] judiciary which commands widespread even if not invariable respect will do more to entrench a culture of rights than any number of [Strasbourg] decisions’: Kentridge (n 47) 102.

⁸⁰ This point was made by eminent figures such as Anthony Lester (as he then was) and Lord Bingham: A Lester, ‘Fundamental Rights: The UK Isolated?’ [1984] *Public Law* 46, 66; Bingham (n 50).

⁸¹ *cf* Moses LJ, ‘Hitting the Balls Out of Court: Are Judges Stepping Over the Line?’ (26 February 2014), 10, www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/moses-lj-speech-creaney-lecture-2014.pdf.

unprecedented strains in UK–Strasbourg relations is the concern of the remaining parts of this chapter.

In Part V it is argued that the post 2009–10 period has seen a paradox unfold: the scheme and operation of the Act foreseen as heralding in a new, positive era in UK–Strasbourg relations may have had a part in elevating the UK’s longstanding concerns about membership of the ECHR. Before that, in Part IV, we examine the debate that has developed recently about the HRA’s future.

IV. 2009–15 (Overview): ‘Unfinished Business’?

We now depart from our chronological approach and jump to 2009–10. It is argued that those years marked the beginning of the current era of strained relationship, one that has culminated in serious talk of repeal of the HRA, a Commission calling for a British/UK bill of rights — and talk of possible withdrawal from the ECHR. Let us now map out what has happened by reference to the 2012 recommendation of the Commission on a UK bill of rights (‘the Commission’)⁸² that a ‘fresh beginning’ is required for the UK’s domestic human rights arrangements.

A. Why a ‘Fresh Beginning’?

In some respects the Commission’s existence reflected the desire of the 2010 coalition government to avoid difficult questions about sovereignty and Strasbourg’s influence that had arisen since the HRA entered into force. Crucially, its terms of reference,⁸³ formulated in May 2010, in the first weeks of the new coalition government, assumed the UK’s continued membership of the ECHR, and that any bill of rights would build on the obligations it established. This favoured the pro-ECHR/pro-HRA Liberal Democrats, but was acceptable, at the time at least, to the Conservatives, whose 2010 manifesto spoke of replacing the HRA with a British bill of rights (a policy dating back to 2006). At the risk of oversimplifying matters, the latter reflected the unpopularity of the HRA over its first decade. Amongst the general public the view appeared to be that the Act protected the rights of the ‘undeserving’ at the expense of the majority, making the fight against terrorism and crime harder.⁸⁴ The highly influential tabloid press encouraged

⁸² Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012); 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.

⁸³ Which were, amongst other things, to ‘investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the [ECHR], ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties’; see *A UK Bill of Rights* (n 82) para 12.7.

⁸⁴ See comments made by Lord Dyson, ‘What is Wrong with Human Rights?’ (3 November 2011), 5, www.supremecourt.uk/docs/speech_111103.pdf.

such views, campaigning against the Act⁸⁵ in what at times appeared to reflect hostility towards any European influence on UK law. Exaggeration, misinformation, myths and misreporting became associated with the Act, as well as Strasbourg's enduring role as an international court.⁸⁶ Lord Lester, a member of the Commission, had in mind the influence of an anti-Strasbourg tabloid press⁸⁷ and politicians, fuelling public resentment toward an Act regarded as European, not British, when he suggested that rather than 'bringing rights home', the HRA had had 'an alienating effect especially among those for whom "Europe" is a dirty word'.⁸⁸ Here we recall the backdrop of the UK's suspicion of and uneasy relationship with 'Europe',⁸⁹ and note how the domestic courts — and, vicariously, Strasbourg — came under an intense media spotlight in the 2000s, not least in the post-9/11 context.

It seems, then, that, up to 2011, the HRA's 'difficult and embattled life'⁹⁰ owed much to factors other than the pressures placed on the Westminster model. Indeed, there was little criticism of the constitutional mechanisms and regime established by the HRA in the Commission's Report.⁹¹ Its conclusion that 'on balance, there [was] a strong argument in favour of the UK Bill of Rights',⁹² and the need for a 'fresh beginning'⁹³ was essentially based on the premise that human rights protection in the UK was seen as 'European'. It observed that, unlike the UK, virtually all other Convention States had their own written constitutions or bills of rights, setting out human rights protection in their own terms.⁹⁴ That mattered given the absence of 'widespread public acceptance of the legitimacy of our current human rights structures, including the role of the Convention and [Strasbourg]'. As the Commission understood it, there was 'a lack of

⁸⁵ See, for example, comments made by Lord Lester in the House of Commons Political and Constitutional Reform Committee, UK Bill of Rights Commission — Oral and Written Evidence, 16 June 2011, 19 July 2011, HC Paper 1049-ii of session 2010–12.

⁸⁶ For a good overview see Dyson (n 84).

⁸⁷ See D Mead, "'You Couldn't Make It Up': Some Narratives of the Media's Coverage of Human Rights' (ch 23) and L Gies, 'Human Rights, the British Press and the Deserving Claimant' (ch 24), this volume.

⁸⁸ Lord Lester, 'A Personal Explanatory Note', Individual Paper included within *A UK Bill of Rights: The Choice Before Us* (n 82) 231 at 233.

⁸⁹ See text accompanying n 37.

⁹⁰ Lord Dyson (n 84) 1.

⁹¹ H Kennedy QC and P Sands QC, 'In Defence of Rights', Individual Paper included within *A UK Bill of Rights: The Choice Before Us* (n 82) 221 at 222, noting that the Commission had failed to 'identify or declare any shortcomings' of the HRA itself.

⁹² *A UK Bill of Rights: The Choice Before Us* (n 82) para 78.

⁹³ *ibid*, para 84.

⁹⁴ *ibid*, para 79 and para 12.7.

public understanding and “ownership” of the HRA, and especially so as regards the Convention and Strasbourg, such that ‘many people feel alienated from a system that they regard as more “European” rather than British’.⁹⁵

B. ... ‘Unfinished Business’?

Essentially, then, the Commission’s main point (by majority) appeared to be that the HRA needed changing to enhance the feeling of national ‘ownership’ over human rights issues. Restricted by its terms of reference,⁹⁶ however, it abstained from any real comment on whether the ‘European rather than British’ criticism it had identified was merely a superficial matter, or whether, in fact, Strasbourg’s influence on UK human rights law was open to criticism.⁹⁷ This was ‘the elephant in the room’, as was evident from the Commission’s earlier work⁹⁸ and the intense public debate occurring in parallel to it, hence the issues such as prisoner voting, and the protection afforded by Articles 3 and 8 (amongst others) referred to in the introduction to this chapter.

We observe then that Separate Opinions attached to the Commission’s Report of late 2012 revealed divisions along pro- and anti-ECHR lines. One jointly authored Opinion, entitled ‘Unfinished Business’,⁹⁹ identified membership of the Convention as the central issue, attacking the ECtHR for its over-expansive interpretations. A different jointly authored Opinion¹⁰⁰ argued that the case for a British bill of rights had not been made out (suggesting that the argument as to lack of ‘ownership’ had not been established). These authors were concerned that the time was ‘not ripe’ for change, suggesting that the real agenda for some of the Commission’s members was to support a British bill of rights as a preliminary step towards achieving the real ambition of withdrawing from the ECHR.

⁹⁵ *ibid*, para 80.

⁹⁶ See n 83.

⁹⁷ For criticism of the Commission’s failure to address key issues of controversy regarding the HRA, and more generally, see Elliott (n 82).

⁹⁸ The Commission’s interim advice on future reform of the ECHR included a minority view that the Court should be subject to some sort of democratic override: see Bates (n 2) fn 137. One member of the Commission resigned, arguing that it was refusing to address the real issue (as he saw it) of whether Parliament rather than Strasbourg should have the final say on human rights issues: see C Urquhart, ‘Bill of Rights Commissioner Resigns over Bypass of Commons’ *The Guardian* (London, 11 March 2012), www.theguardian.com/law/2012/mar/11/uk-bill-of-rights-kenneth-clarke.

⁹⁹ Lord Faulks QC and Jonathan Fisher QC, individual Paper included within *A UK Bill of Rights: The Choice Before Us* (n 82) 182.

¹⁰⁰ Kennedy and Sands (n 91) 221.

As to the broader public debate, this had been growing since 2009–10 with Strasbourg as the primary target, either directly, in the context of affairs such as prisoner voting and that concerning Abu Qatada, or indirectly, via criticism of over-reliance on Strasbourg law in the context of the judicial application of the HRA. Very importantly, however, the criticism also came from quarters hitherto regarded as favourable to the Court. This included the political ‘midwives’ to the HRA, Jack Straw (then MP) (2013)¹⁰¹ and Lord Irvine (2011).¹⁰² Straw led opposition to a change in the law on prisoner voting,¹⁰³ and spoke directly in terms of Strasbourg, rather than the HRA itself, being the real problem.¹⁰⁴ This chimed with the strident and direct attacks on the Court made by a small number of senior judges,¹⁰⁵ speaking extra-judicially in the post-2009–10 period.

C. Keeping British Rights at Home?

The bright spotlight under which the ECtHR was put by these respected figures who would be expected to be championing Strasbourg’s cause, not undermining it, lent credibility to the more vociferous opposition coming from the constituencies traditionally hostile to Strasbourg, including aspects of the media and many Conservative politicians. For the latter, frustration with Strasbourg rose to a critical point over the life of the 2010–15 Parliament, reflecting the view, it seems, that it was high time to push back what was seen as the overwhelming tide of Strasbourg’s influence and reassert the Westminster model.¹⁰⁶ There were echoes then of the Conservatives’ initiatives of the mid-1990s,¹⁰⁷ although now the perceived need was to address the ECtHR’s influence not just in the international context (that is, as a court

¹⁰¹ See Straw (n 19). However, in May 2015 Straw delivered a lecture which, in view of the Court’s recent jurisprudence, was more supportive of it, see O Bowcott, ‘Strasbourg court has backed off over rights rulings, says Jack Straw’, *The Guardian* (21 May 2015) <http://www.theguardian.com/law/2015/may/21/strasbourg-court-backed-off-human-rights-jack-straw/>.

¹⁰² Derry Irvine, ‘A British Interpretation of Convention Rights’ [2012] *Public Law* 237.

¹⁰³ HC Deb 10 Feb 2011, vol 523, col 498.

¹⁰⁴ See text accompanying n 167 below.

¹⁰⁵ See text accompanying n 18 above and n 142 below; but see also Bates (n 14) above

¹⁰⁶ The announcement of the creation of the Commission was linked to the Prime Minister’s description of a Supreme Court judgment holding that placement for life on the sex offenders register could be incompatible with Art 8 as ‘offensive’. It was ‘about time’, he said, that ‘we started making sure decisions are made in this Parliament rather than in the courts’: HC Deb 16 February 2011, vol 523, col 955. The week before that, MPs had voted overwhelmingly not to change the law on prisoner voting, anti-Strasbourg sentiment being vented in the process: see D Nicol, ‘Legitimacy of the Common Debate on Prisoner Voting’ [2011] *Public Law* 681.

¹⁰⁷ See text accompanying nn 52–59 above.

which retained jurisdiction over the UK),¹⁰⁸ but also in the domestic setting (that is, under the HRA).

The latter was associated with Conservative arguments that the HRA needed amendment to make it clear that ‘parliament is the ultimate source of legal authority, and that the Supreme Court [not Strasbourg] is indeed supreme in the interpretation of the law’.¹⁰⁹ In terms of Strasbourg’s external role, there was the confrontation with it on the prisoner voting issue, whilst the British government’s negotiating position in the lead-up to the Brighton Declaration of 2012 was also notable: it was widely reported that the government attempted to secure a Declaration that would pressurise the ECtHR to apply the margin of appreciation doctrine more generously.¹¹⁰ With that initiative perceived to be unsuccessful — although, in fact, it is suggested below that it was indeed influential¹¹¹ — over 2013–14 the Conservative Party adopted an increasingly aggressive anti-Strasbourg position.¹¹² In October 2014 proposals for changing the UK’s human rights laws¹¹³ were published, including the introduction of a British Bill of Rights and Responsibilities, should the Conservatives be elected in May 2015.

The full details of that document cannot be examined here. It received considerable criticism for its inaccuracies, amongst other things, from academics and commentators, including the by then former (Conservative) Attorney-General.¹¹⁴ The proposals on substantive human rights issues seemed to be addressed to ensuring that ‘Convention rights’ (notably those concerning Articles 3 and 8 in the context of immigration) were read in a British (in fact, Conservative) rather than Strasbourg way. The document stated that under a future Conservative government Parliament should have to approve Strasbourg judgments finding the UK in breach of the Convention, those judgments being treated as advisory only. In a vendetta-like way it asserted that the ECtHR had undermined public confidence in human rights and, with echoes of

¹⁰⁸ On the ‘democratic override’ debate see Bates (n 2) n 137.

¹⁰⁹ *Protecting Human Rights in the UK* (n 12) 5.

¹¹⁰ See N O’Meara, ‘Reforming the ECtHR: The Impact of Protocols 15 and 16 to the ECHR’ (ch 5), this volume.

¹¹¹ See section V.B.

¹¹² Domestic politics may have been relevant, given the increased popularity of the UK Independence Party.

¹¹³ Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (3 October 2014), www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf.

¹¹⁴ Dominic Grieve QC MP, ‘Why Human Rights Should Matter to Conservatives’, lecture delivered at UCL, 3 December 2014, www.ucl.ac.uk/constitution-unit/constitution-unit-news/031214a. Grieve was Attorney General under the Coalition Government, but his appointment by the Prime Minister was not renewed in July 2014, it being reported that Grieve was too favourable toward the ECHR.

Fitzmaurice, reference was made to the Court's illegitimate 'mission creep' (the aggrandisement argument). The UK, it said, stood by 'the commitments made when we signed the Convention', so the Convention would not be renounced unilaterally given that it was *not* 'our principled commitment to fundamental rights that ha[d] changed'. Thus, under a Conservative government, the UK would 'engage' with the Council of Europe to 'seek recognition that our approach [for example as regards reinterpreting Article 3 and 8] is a legitimate way of applying the Convention' — but if that recognition was not forthcoming, 'the UK would be left with no alternative but to withdraw from the Convention' when the new, proposed British Bill of Rights and Responsibilities entered into force.

It transpired, however, that the commitments set out in the Conservative Party manifesto for the May 2015 election, which it won, were more reserved than the October 2014 document. There was no mention of withdrawal, for example, although it was stated that the '[t]he next Conservative Government [would] scrap the Human Rights Act, and introduce a British Bill of Rights' (the 'Rights and Responsibilities' label being dropped). Such a Bill would '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 UK'.¹¹⁵ The Bill would 'restore common sense to the application of human rights in the UK'. It would remain 'faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights', but it would 'reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society'.¹¹⁶

No draft Bill of Rights had been produced in time for the election, or has been published by the time of writing. In fact, soon after the election questions arose as to whether the new government, with a majority of just 12 MPs, would be able to obtain the necessary support to repeal the HRA. It was also realised that the attempt to do so would be confronted by potential political obstacles and sensitivities arising in the context of the UK's devolution arrangements.¹¹⁷ Against this backdrop, in late May 2015 the government's position was that it intended to fulfil its manifesto commitment to introduce a British Bill of Right, but would embark on a consultation process to do so. In

¹¹⁵ *The Conservative Party Manifesto 2015* at 60.

¹¹⁶ *ibid* at 73. The document went on: '[a]mong other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation'.

¹¹⁷ See N Watt, 'Scotland bill may give Holyrood veto over Human Rights Act repeal' *The Guardian* (London, 28 May 2015) <http://www.theguardian.com/politics/2015/may/28/scotland-bill-human-rights-act-repeal>. See also M Elliott, 'Could the devolved nations block repeal of the Human Rights Act and the enactment of a new Bill of Rights?', (*Public Law for Everyone*, 12 May 2015), <http://publiclawforeveryone.com/2015/05/12/could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights/>.

these circumstances it would seem that, under the present government at least, the prospect of a UK withdrawal from the Convention has been significantly reduced.¹¹⁸

V. UK–Strasbourg Relations under the HRA: A New Equilibrium Already Reached?

Now that we have an overview of how the ECtHR's influence on UK law has become the focal point of intense criticism since 2009, we may stand back and reflect. In what follows it is argued that the particular experience of incorporating 'Convention rights' via the HRA may have served to aggravate, rather than placate, the sensitivities that have historically characterised UK–Strasbourg relations and which have been a theme of this chapter, namely European sovereignty concerns and feelings of 'resentment' that foreign judges¹¹⁹ control UK law. In this regard the print media have undoubtedly been most influential, fuelling popular perception that the Act significantly magnified the influence of what was seen as an 'alien jurisprudence'¹²⁰ on UK law, and, following that lead, it seems that the public's 'disconnect' from the Act, and the Convention, has been exacerbated by incautious remarks made by certain politicians.¹²¹ Then again, we have just noted that figures who might have been expected to be the Court's traditional allies — the political midwives to the HRA, as well as some senior judges — have also been critical, adding a certain respectability to the anti-Strasbourg/anti-HRA agenda. So, what is at the root of their critiques?

It is submitted that two concerns dominate the debates. First, supremacy concerns came to be associated with the operation of the HRA, for the argument was made that, under it, the UK courts were subservient to Strasbourg's interpretation of 'Convention rights' (A, below). Related to this, secondly, concerns arose about Strasbourg's legitimacy — concerns which were also associated with its capacity to continue to find the UK in violation of 'Convention rights' in terms of its international

¹¹⁸ See N Watt, 'Threat to exit human rights convention must be dropped, Tories tell Cameron', *The Guardian* (London, 27 May 2015) <http://www.theguardian.com/law/2015/may/27/threat-exit-human-rights-act-convention-dropped-tories-cameron>. However, in early June 2015 it was reported that the Prime Minister's position was that the possibility of withdrawal from the Convention should not be discounted, should this step ultimately be deemed necessary in the light of the plan identified for possible withdrawal set out in the Conservative's October 2014 document: see N Watt, 'David Cameron prepared to break with Europe on human rights', *The Guardian* (London, 2 June 2015) <http://www.theguardian.com/politics/2015/jun/02/david-cameron-prepared-to-break-with-europe-on-human-rights/>.

¹¹⁹ See text accompanying n 44 (Shaw) and n 65 (Blair).

¹²⁰ See Dyson (n 84).

¹²¹ *cf* comments noted in the context of the Wilton Park Conference on the future of the Court: '2020 Vision for the European Court of Human Rights' (17–19 November 2011), www.wiltonpark.org.uk/wp-content/uploads/wp1139-report.pdf, 5.

obligations under the ECHR (B, below). With respect to both issues, it is argued below that, whether or not the concerns raised were valid, they have been considerably mitigated given recent case law from firstly, the UK courts (under the HRA) and, secondly, the ECtHR (given its subsidiary role).

A. Supremacy Concerns under the HRA — Still Valid?

The first issue grew out of a controversy that evolved over how the UK courts approached the application of Convention law when applying the HRA.¹²² Over the first part of the HRA's life the judiciary adopted a narrow view of its purpose, reflecting more the notion that it was designed to facilitate the UK's domestic compliance with the Convention (and stop claimants having to go to Strasbourg to champion 'Convention rights') rather than establish a type of British bill of rights.¹²³ At the risk of oversimplifying matters, the courts attempted to anticipate how Strasbourg would resolve the case before them. The 'mirror principle' set out in the famous *Ullah* case¹²⁴ epitomised this approach and how, over the first decade or so of the HRA's life, Strasbourg's clear and consistent interpretation of the meaning of 'Convention rights' risked being treated as an authoritative exposition of the same for the purpose of assessing the human rights compatibility of domestic law under the HRA. This was the backdrop to Lord Rodger's famous statement in *AF*, '*Argentoratum locutum, iudicium finitum*' — 'Strasbourg has spoken, the case is closed',¹²⁵ which apparently reflected unease at what had occurred in that case. In it the Law Lords treated a recent authoritative Grand Chamber ruling¹²⁶ on Article 6(1) as practically closing down legal argument on the key issue before them, given that the Strasbourg case mirrored the precise fair trial issue that the House of Lords was considering. If Lord Rodger's latinised dictum was cynical, this may have been because some Law Lords regarded Strasbourg's

¹²² See further Lord Kerr, 'The Relationship between the Strasbourg Court and the National Courts — As Seen from the UK Supreme Court' (ch 3) and R Clayton, 'Should the English Courts under the HRA the Strasbourg Case Law?' (ch 6), this volume.

¹²³ The intentions in 1998 were not clear: see text accompanying n 76 above. See also Clayton's discussion on the drafting history of s 2(1), *ibid*.

¹²⁴ *R (Ullah) v Special Adjudicator* [2004] UKHL 26. See Clayton (n 122). See also R Masterman, 'Deconstructing the Mirror Principle', ch 5 in R Masterman and I Leigh, *The UK's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013), also providing a comprehensive account of the shift away from this principle. The mirror principle is also relevant to the question of whether domestic courts can go further than the level of protection afforded by the Convention, or resolve issues the ECtHR has not yet fully considered. This is not examined here; however see Clayton (n 122), and Masterman *ibid*.

¹²⁵ *Secretary of State for the Home Department (Respondent) v AF (Appellant)* [2009] UKHL 28, para 98. See Lady Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 *Human Rights Law Review* 65.

¹²⁶ *A v UK* (2009) 49 EHRR 29 (GC) (the Art 5(4) issue addressed in this case mirrored the precise Art 6(1) in issue in *AF*).

position as questionable, some saying explicitly that it was wrong,¹²⁷ and as it was feared that its application (in *AF*) would have drastic consequences for a highly sensitive and important aspect of domestic law.¹²⁸

However, *AF* (2009) seems to have marked the high-water mark of the *Ullah* approach, with subsequent case law exposing the increasing inaccuracy of the mirror metaphor.¹²⁹ It is 'now generally recognised that in the early years after the HRA the courts went too far in regarding themselves as virtually bound to follow every Strasbourg decision'.¹³⁰ It is accepted too that there may have been a tendency for UK courts initially to approach ECHR case law on the binding precedent-setting basis common lawyers are familiar with, but that they are now far more circumspect, especially regarding Chamber judgments, and ready to depart from, or question, the ECtHR when they deem it appropriate.¹³¹ The new direction was especially evident in *Horncastle*¹³² (2009) and *Pinnock*¹³³ (2010), when the Supreme Court (instituted in October 2009) undertook a reappraisal of Lord Rodger's dictum in *AF*. As a result, the UK courts now look more generally at the ECtHR's law, expecting to follow it when (i) there is 'a clear and constant line of decisions', (ii) 'whose reasoning does not appear [from the UK perspective] to overlook or misunderstand some argument or point of principle', and (iii) 'whose effect' is 'not inconsistent with some fundamental substantive or procedural aspect of *our* law' (emphasis added). These '*Pinnock* criteria'¹³⁴ envisage

¹²⁷ Lord Hoffmann in *AF* (n 125) para 70; cf his criticism of the Court generally: see n 18.

¹²⁸ *AF* concerned the (Art 6(1)) fairness of procedures employed in (what were then) anti-terrorism control order hearings. There was foreboding among the Law Lords that the modifications required by Strasbourg law might affect the very viability of the control order regime (a central feature of the government's anti-terrorism agenda). In fact, this did not prove to be the case. As the Independent Reviewer of Terrorism Legislation reflected some years later, the 'upshot' was 'an improvement in the fairness of ... proceedings, with only a very limited loss of capacity to impose control orders': D Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law' [2013] 3 *European Human Rights Law Review* 233, 246.

¹²⁹ See Masterman (n 124) 129–36, and especially the critique at 136 suggesting that aspects of the debate on a bill of rights have proceeded on a 'false premise'.

¹³⁰ Lord Toulson, 'International Influence on the Common Law' (11 November 2014), para 36 and see para 37, www.supremecourt.uk/docs/speech-141111.pdf. For comment on the evolution of the UK court's approach, see the statements made by Lord Neuberger and Baroness Hale, *House of Lords Select Committee on the Constitution (Annual Oral Evidence from the President and Deputy President of the UK Supreme Court)*, 25 June 2014, 20–22.

¹³¹ cf comments made by Lord Neuberger, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience' (8 August 2014), paras 29 and 32–38, www.supremecourt.uk/docs/speech-140808.pdf.

¹³² *R v Horncastle* [2009] UKSC 14, paras 10–11, and 108 (Lord Phillips), 116–21 (Lord Brown). See Masterman (n 124) 130.

¹³³ *Manchester City Council v Pinnock* [2010] UKSC 45, para 48 (Lord Neuberger).

¹³⁴ *ibid.*

criterion (iii) as a constitutional redline¹³⁵ when, contrary to Lord Rodger's suggestion, the Supreme Court ultimately reserves the right *not* to follow even a Strasbourg Grand Chamber.¹³⁶

In spite of this reappraisal, however, the dominant narrative has been one of the UK courts' inappropriate subservience to Strasbourg under the mirror approach.¹³⁷ Lord Irvine (2011)¹³⁸ and Jack Straw (then MP) (2013)¹³⁹ have strongly argued that under *Ullah* the UK judiciary had been far too willing to regard Strasbourg views as determinative, thereby emboldening the ECtHR as a type of Supreme Court for the UK. Both were adamant that that certainly had not been intended when the 1998 Act was passed. Supremacy anxieties were also revived in *Chester*¹⁴⁰ in late 2013, when the Supreme Court, applying the *Pinnock* criteria, followed the ECtHR's unequivocal position that blanket bans on convicted prisoners voting whilst in detention were incompatible with the Convention.¹⁴¹ This was met by comments in a small number of lectures from

¹³⁵ In *Pinnock* (n 133), Lord Neuberger stated that Strasbourg law should not '[cut] across our domestic substantive or procedural law in some fundamental way': para 49. See also *R (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63, Lord Mance, paras 27 and 35 and Lord Sumption, para 137 ('fundamental feature of the law of the UK'); *R (on the applications of Haney, Kaiyam, and Massey) v Secretary of State for Justice* [2014] UKSC 66, paras 18–21 (Lords Mance and Hughes: relevant tests developed in *Pinnock* and *Chester* offer 'general guidelines' which are context specific: para 21). A tentative comparison may also be made with respect to the limits of the reception of EU law into UK law: see *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

¹³⁶ *Pinnock* (n 133) para 48 (Lord Neuberger: UK courts are not bound by Strasbourg 'or (in theory, at least) to follow a decision of the Grand Chamber'). However, for earlier expressions of disagreement between the then Lord Chief Justice (Lord Judge) and the President of the Supreme Court (Lord Phillips) as to whether Strasbourg would prevail over the UK courts, see Hale (n 121) 67.

¹³⁷ cf the points also made by Masterman (n 124) 136.

¹³⁸ Irvine (n 102) (cf M Wolfe-Robinson and O Bowcott, 'Lord Irvine: Human Rights Law Developed on False Premise' *The Guardian* (London, 14 December 2011), www.theguardian.com/law/2011/dec/14/lord-irvine-human-rights-law; see also P Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] *Public Law* 253.

¹³⁹ Straw (n 19).

¹⁴⁰ *Chester* (n 135).

¹⁴¹ Strasbourg's position was beyond doubt, as two Grand Chamber judgments (of 2005: *Hirst* (n 3); and 2012: *Scoppola* (n 3)) had concluded so; hence the Supreme Court regarded the matter as not susceptible to further dialogue. Furthermore, the constitutional redline (*Pinnock* criterion (iii)) was not in issue. According to Lord Mance, there could be reasonable differences of opinion on the prisoner disenfranchisement issue, but it would 'exaggerate their legal and social importance to regard them as going to "some fundamental substantive or procedural aspect of our law"'. Given the diverse approaches to the prisoner voting issue in Europe it was 'difficult to see prisoner disenfranchisement as fundamental to a stable democracy and legal system such as

senior judicial figures critical of the ECtHR and its influence.¹⁴² Lord Judge, the former Lord Chief Justice, argued that the HRA should be amended to make it clear that ‘in this jurisdiction the Supreme Court is, at the very least, a court of equal standing with the Strasbourg Court’.¹⁴³ Media reporting of these and other speeches has played on British anxieties about Europe, the tone being that British judges are imploring their colleagues not to make themselves supine to Strasbourg. A measure of legal credibility was therefore given to sweeping arguments from the then Minister for Justice, Chris Grayling, that supremacy must be wrestled back from Strasbourg via repeal of the HRA.¹⁴⁴

The matter is far more subtle than this, of course, for it is inaccurate to say that the Supreme Court is no longer supreme, whilst the actual need, based on restoration of supremacy grounds, to amend the HRA is very debatable.¹⁴⁵ On the one hand, there has been no case to date in which the Supreme Court has felt it necessary to invoke the constitutional redline envisaged by *Pinnock* criterion (iii), and we may note that the criteria themselves may yet become more robust.¹⁴⁶ On the other hand, some would suggest that, as things stand, the constitutional redline is drawn inappropriately, their point being, it seems, that it potentially constrains the domestic courts into accepting the ECtHR’s final and unequivocal view (not the domestic judge’s own preferred one) on

the United Kingdom enjoys’: *Chester* (n 135) para 35. See also Lord Sumption at para 137, although he implied that Strasbourg’s absolute stance on prisoner voting bans amounted to undue activism on its part. A declaration of incompatibility (s 4 HRA) had already been made in a previous case, so the Supreme Court in *Chester* declined to make a further declaration.

¹⁴² Lord Sumption (member of the Supreme Court, who had sat in *Chester*), ‘The Limits of Law’ (20 November 2013), www.supremecourt.uk/docs/speech-131120.pdf (cf O Bowcott, ‘Senior Judge: European Court of Human Rights Undermining Democratic Process’ *The Guardian* (London, 28 November 2014), www.theguardian.com/law/2013/nov/28/european-court-of-human-rights); Laws LJ, ‘The Common Law and Europe’ (27 November 2013), www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf (cf O Bowcott, ‘Stop Deferring to Human Rights Court, Says Senior Judge’ *The Guardian* (London, 27 November 2013), www.theguardian.com/law/2013/nov/27/stop-deferring-human-rights-court); Lord Judge (former Lord Chief Justice), ‘Constitutional Change — Unfinished Business’ (3 December 2013), www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitution-unit/research/judicial-independence/lordjudgelecture041213 (cf O Bowcott, ‘European Court is Not Superior to UK Supreme Court, Says Lord Judge’ *The Guardian* (London, 4 December 2013), www.theguardian.com/law/2013/dec/04/european-court-uk-supreme-lord-judge). As to subsequent judicial lectures, more favorable to the Court, see Bates (n 14).

¹⁴³ Lord Judge, *ibid*, para 46.

¹⁴⁴ See ‘Chris Grayling: Senior Judges Back Me over Human Rights Reforms’ *Daily Telegraph* (London, 26 March 2014), www.telegraph.co.uk/news/politics/conservative/10724404/Chris-Grayling-Senior-judges-back-me-over-human-rights-reforms; see also n 109 above.

¹⁴⁵ In July 2014 Lord Neuberger suggested that ‘an amendment would send a legislative message to the courts. However, I rather doubt whether it is strictly necessary’: n 130, 21.

¹⁴⁶ Lord Neuberger (n 130) para 33.

a particular human rights matter that may still be of national interest and importance (eg prisoner voting) even though it falls short of being a ‘fundamental substantive or procedural aspect’ of UK law.¹⁴⁷ Put another way, the argument is that the criteria still leave UK law too vulnerable to Strasbourg’s influence, potentially at least.

Of course, the HRA could be amended (or new legislation put in place) to make it clear that, even if there is a ‘clear and constant’ line of authoritative Strasbourg rulings, precisely on point, they may be ignored in any circumstances at all. But would this merely communicate a reassuring message about supremacy being retained? Section 2(1) HRA already makes it clear that the domestic courts are not bound by the ECtHR. Furthermore, in the context of concerns about supremacy two additional points may be made about the post-2010 adjustment in UK–Strasbourg legal relations.

First, *Pinnock* criteria (i) and (ii) will usually (albeit not in *Chester*)¹⁴⁸ offer a broad basis for the domestic courts to demonstrate their respect for Strasbourg but decline to follow it in a given case on the basis that the domestic court seeks a constructive and respectful dialogue with Strasbourg on whether one of its judgments is correct, or on the meaning of ‘Convention rights’.¹⁴⁹ The outcome of this may be that the ECtHR adjusts its position in the light of the concerns communicated to it by the domestic court. Indeed, this has happened in cases concerning both the UK and other States.¹⁵⁰ Here we note that Strasbourg positively welcomes this dialogue approach,¹⁵¹ which has been endorsed by the Brighton Declaration.¹⁵² It is one that envisages fruitful

¹⁴⁷ This would seem to be the view of Lord Judge (n 142) and Laws LJ (n 142). Lord Irvine would seem to agree: see (n 102) 242–45.

¹⁴⁸ See nn 135 and 140 above.

¹⁴⁹ *Horncastle* (n 132) para 11; *Pinnock* (n 133) para 48; *Chester* (n 135) para 27. On dialogue, see M Amos, ‘From Monologue to Dialogue’ in Masterman and Leigh (n 124) ch 6.

¹⁵⁰ Amos, *ibid*, 148. On fruitful dialogue between the ECtHR and the German Bundesverfassungsgericht see further J Rackow, ‘From Conflict to Cooperation: The Relationship between Karlsruhe and Strasbourg’ (ch 19), this volume.

¹⁵¹ *cf* Judge Bratza’s Separate Opinion in *Al-Khawaja v UK* (2012) 54 EHRR 23 (GC) (in this judgment the ECtHR adjusted its position on a specific aspect of the Art 6(1) jurisprudence, in direct response to the Supreme Court judgment in *Horncastle* (n 128)). There is now a large literature on ‘dialogue’ between the ECtHR and domestic courts including Amos (n 149); N Bratza, ‘The Relationship between the UK Courts and Strasbourg’ (2011) 5 *European Human Rights Law Review* 505; J-P Costa, ‘The Relationship between the European Court of Human Rights and National Constitutional Courts’ (2013) 3 *European Human Rights Law Review* 264 (Costa was one-time President of the Court, as was Bratza); P Mahoney, ‘The Relationship between the Strasbourg Court and the National Courts’ (2014) 130 *Law Quarterly Review* 568 and ‘The Relationship between the Strasbourg Court and the National Courts — As Seen from Strasbourg’ (ch 2), this volume (Mahoney is the current ‘British’ judge at the Court).

¹⁵² Brighton Declaration (Declaration adopted by the Committee of Ministers of the Council of Europe on 20 April 2012 at the High Level Conference on the Future of the European Court of Human Rights, in Brighton), para 12(c) and (d).

interactions between the domestic courts and Strasbourg under a model which is at odds with sweeping suggestions that the latter acts as a type of infallible Supreme Court, disrespectful of national positions and unwilling to change course.

This brings us to the second point to be addressed in this section, which concerns the new equilibrium reached between Strasbourg and the UK courts in recent years. To the extent that the supremacy concern is derived from the fear of an all-powerful and unaccountable Strasbourg judiciary ignoring matters of national interest and importance, account must be taken of what the ECtHR does in practice. The need for self-restraint on Strasbourg's part and sensitivity toward the national context is of great relevance here, and, as we shall see under the next heading, this is a matter that has been a central issue in recent years, there being a new emphasis on the subsidiarity principle. We turn then to Strasbourg's external review role.

B. Strasbourg's Role as an International Court

To explore this aspect of the strained relationship, perhaps a useful point of departure is to consider how the HRA may have shifted British expectations about the 'foreign' court that the ECtHR was seen as. For example, with 'Convention' 'rights brought home' by the HRA, it was understandable that questions would arise such as why, or upon what basis, their application by British judges should be subject to further review by Strasbourg.¹⁵³

This was central to Lord Hoffmann's attack upon the Strasbourg Court in 2009,¹⁵⁴ when he expressed fundamental doubts as to the legitimacy of its role at international law. Meanwhile, and in connection with the reform process instituted by the Swiss government at Interlaken in 2010 and followed up at Izmir and Brighton, the UK government placed great emphasis on the principle of subsidiarity. The argument that primary responsibility for protecting rights should rest at the national level, with the ECtHR occupying a residual role only, is of course a very valid one, although the debate lies in how residual Strasbourg's role should be.¹⁵⁵

It is submitted that, aside from the very occasional decision, the subsidiarity message is one that was thoroughly recognised in the Strasbourg jurisprudence before

¹⁵³ Lord Hoffmann posed this question *before* the HRA entered into force, when he was highly critical of Strasbourg, and expressed doubts over the case for the UK's continued adherence to the ECHR: see L Hoffmann, 'Human Rights and the House of Lords' (n 18).

¹⁵⁴ Hoffmann, 'The Universality of Human Rights' (n 18), and see *ibid* (the later article is the text of a lecture delivered soon after the *AF* case had been heard).

¹⁵⁵ The Brighton Declaration para 15(d) states: '[A]n application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia*, to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention.'

the reform process initiated at Interlaken got underway. Nonetheless, the respective declarations from Interlaken, Izmir and Brighton placed great emphasis on the subsidiarity principle and the margin of appreciation. As is well known, Protocol 15 to the ECHR envisages the insertion of a new paragraph into the Convention's Preamble referring to both.¹⁵⁶

Reflecting on these and other developments, the Joint (Parliamentary) Committee on Human Rights (JCHR) has suggested that Protocol 15 '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'.¹⁵⁷ The same Committee has observed that recent Strasbourg jurisprudence has verified this point, and the Court's willingness to extend a margin of appreciation in cases when the national authorities have already diligently applied the Convention.¹⁵⁸ According to the JCHR:

In recent case-law, the Court has been increasingly explicit that ... deference will be applied by the Court to Parliament's careful consideration of Convention compatibility. In a significant and growing number of recent cases against the UK, for example, the Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities (including Parliament) of their Convention obligations, resulting in legislation being upheld as being within the UK's margin of appreciation. Statutes prohibiting paid political advertising,¹⁵⁹ restricting the right of British citizens resident overseas to vote in parliamentary elections,¹⁶⁰ and prohibiting secondary strike action¹⁶¹ have all been upheld by the Strasbourg Court, in part because of the extensive and detailed examination by Parliament of the Convention compatibility of the law, in which Parliament has taken into account the principles and case-law of the Convention.¹⁶²

¹⁵⁶ See O'Meara, this volume.

¹⁵⁷ Joint Committee of Human Rights, 'Protocol 15 to the ECHR' HL Paper 71/ HC 837, para 3.17. See also R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487 (R Spano is a judge at the Court); see, by the current President of the Court, D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine — Waiver or Subsidiarity of European Review?' (13 December 2013), www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf, and 'Whither the Margin of Appreciation?' (20 March 2014), www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf.

¹⁵⁸ In which connection, see *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15 (GC).

¹⁵⁹ *Animal Defenders International v UK* (2013) 57 EHRR 21 (GC), para 107.

¹⁶⁰ *Shindler v UK* (2014) 58 EHRR 5.

¹⁶¹ *National Union of Rail, Maritime and Transport Workers v UK* (2015) 60 EHRR 10.

¹⁶² Joint Committee of Human Rights (n 157) para 3.15. See also A Donald, 'The Implementation of ECtHR Judgments against the UK: Unravelling the Paradox' (ch 8), this volume.

Yet there has been no real recognition of such points in criticisms of the Convention from high-profile figures, many continuing in the vein of Lord Hoffmann from 2009. Lord Judge has spoken of a 'democratic deficit' arising from Strasbourg's jurisdiction vis-a-vis national authorities on matters such as prisoner voting, stating that parliamentary sovereignty on such matters should not be exported to a 'foreign court'.¹⁶³ Other senior judges¹⁶⁴ have argued that Strasbourg undermines the democratic process,¹⁶⁵ and that the application of 'Convention rights' trespasses into political fields, contrary to what 'the respective roles of government and judiciary'¹⁶⁶ should be under the British constitutional set-up, with its emphasis on political constitutionalism. In his 2013 Hamlyn Lecture, Jack Straw stated, in sweeping terms, that, '[s]ince the passage of the Act, it has not been judgments of the UK courts on Convention interpretations that have caused real difficulty ... but those of Strasbourg'.¹⁶⁷ He complained that '[o]ne of the aims of the HRA was to ensure that the [UK] was able to enjoy a much greater margin of appreciation from Strasbourg than pre-incorporation because our courts would now themselves be adjudicating on issues before they went to Europe'.¹⁶⁸ In fact, there is good evidence that this *has* occurred — and Straw himself conceded as much ('To some extent, this aim has been met'¹⁶⁹) — whilst the 'age of subsidiarity' to which the JCHR refers is precisely in keeping with this.

In summary, even if there may have been doubts in the past, the Court's recent jurisprudence evidences that it is very alert to being accused of not respecting its subsidiary position,¹⁷⁰ and very anxious to be seen to respect the democratic legitimacy of national authorities. This deference point may offer no guarantees, but it is of great relevance to the validity of concerns about Strasbourg's purported illegitimate domination of UK law when issues of national interest are at stake.

This brings us to *Hirst*¹⁷¹ and the prisoner voting issue. When delivered 10 years ago, the judgment did not seem to attract much controversy. The ECtHR's case law does not require the enfranchisement of all convicted prisoners, and there is good reason to

¹⁶³ Lord Judge (n 142) para 48; see also Lord Judge, 'The View From London', *Counsel* magazine (October 2014), www.counselmagazine.co.uk/articles/view-london.

¹⁶⁴ Laws LJ (Court of Appeal judge) (n 142).

¹⁶⁵ Lord Sumption (n 142) (and, before this, 'Judicial and Political Decision Making: The Uncertain Boundary' (9 November 2011), www.legalweek.com/digital_assets/3704/MANNLECTURE_final.pdf).

¹⁶⁶ Laws (n 38) 82.

¹⁶⁷ Straw (n 19) 30.

¹⁶⁸ *ibid*, 44.

¹⁶⁹ *Ibid*. See also the report of the lecture delivered by Straw in May 2015 Straw n 101 above

¹⁷⁰ *cf* n 157 above (Spano).

¹⁷¹ See n 3.

suggest that the ECtHR has become more lenient on this issue in response to UK pressure. Moreover, the parliamentary committee tasked with examining the case for reform, in the light of the ECtHR's rulings, supports an amendment to the existing law.¹⁷² However, since the enforcement of *Hirst* became an issue from late 2010 onwards, for many MPs the case has become emblematic of the current strained relationship. Many regard it as exemplifying how, even after the passage of the HRA, the ECtHR continues to aggrandise its jurisdiction (by inappropriately reading a right to vote into Article 3 Protocol 1, they argue), and defies Parliament's express view on a matter that MPs do not see as raising a fundamental human rights issue. The saga has demonstrated that MPs can express Parliament's undoubted sovereign right *not* to amend British law in the light of a relevant ECtHR judgment, but that doing so could come at a significant political price — the reputational cost suffered by the UK if it is seen to defy the Court.¹⁷³ *Hirst* therefore cuts very deep, for it demonstrates the enduring relevance of the issues identified 30 years ago by Shaw, namely the pressure that Convention membership can place on the 'Westminster model' and parliamentary sovereignty, and the potential for the Convention to act like a European bill of rights, occasionally overriding the will of British MPs. It would seem that it is this 'constitutional' question that generates much of the controversy associated with *Hirst*. If so, then it is important that that question is viewed in the broader context noted above, and as pointed out by the JCHR, which suggests that the loss of sovereignty — parliamentary and national — occurring via Convention membership is far more apparent than real.

VI. Conclusions

The depth and extent of the anti-Strasbourg agenda as it has evolved recently in the UK does seem peculiar to that country.¹⁷⁴ Why? Perhaps some insight into the answer emerges from our long view of UK-Strasbourg relations, and what it reveals about how the Convention has been viewed in the UK compared to other countries.

Lord Neuberger,¹⁷⁵ for example, has pointed to Germany, noting that its written Constitution (dating back to the immediate post-war period) 'generally grants parallel or even greater rights to citizens that they are accorded by the Convention'. Therefore, he suggests, unlike in the UK:

¹⁷² On these points, see Bates (n 2).

¹⁷³ *ibid*, 24.

¹⁷⁴ See, generally, J Gerrards and J Fleuren (eds), *Implementation of the ECHR and of the Judgments of the ECtHR in National Case-Law* (Antwerp, Intersentia, 2013) ch 9.

¹⁷⁵ See Neuberger (n 37) para 17. See also Lord Reed referring to the 'striking contrast between the approach taken to human rights law in France and Germany and the approach often taken in this country': Lord Reed, 'The Common Law and the ECHR' (11 November 2013), www.innertemple.org.uk/downloads/members/lectures_2013/lecture_reed_2013.pdf.

(i) Germans are used to their courts challenging statutes and (ii) judgments of German courts, involving issues on which UK courts' decisions would be based on the Convention, are based on constitutional rights and either involve no consideration of the Convention or include a throw away paragraph,¹⁷⁶ sometimes a cross-check, on the Convention.

Lord Neuberger opines that 'the Convention [therefore] seems far more revolutionary in the UK than in other European countries', where there is also far less likelihood of the 'public suspicion of judicial aggrandisement ... [and] particularly in the light of their history which gives rise to rather less confidence in the democratic process than that of the UK'.¹⁷⁷

By contrast, and as we have seen (parts II and III), unease with the Convention in the UK dates at least as far back as the 1970s, when its 'revolutionary' (Lord Neuberger) influence started to be felt, with Terence Shaw suggesting in 1985 that the pressure Strasbourg was placing on the Westminster model would soon require a 'fundamental reassessment' of UK-Strasbourg relations. But this did not occur in the 1980s or 1990s (part III); rather at the end of the 1990s *the Convention* itself was taken as the inspiration for the UK's new human rights regime, under the banner of rights being 'brought home'. Then, over the first decade or so of the HRA's life, the Convention (and the Court's jurisprudence, in particular) tended to be treated as the focal point for domestic human rights protection, the perception of its 'revolutionary' influence being magnified accordingly. It seems that this helped fuel the old supremacy and sovereignty anxieties Shaw had identified, to a point when, from 2010 onwards, the pressure for the predicted 'fundamental reassessment' reached a head.

To sum up, for a country already highly suspicious of European influences on domestic law, and jealous of its national and parliamentary sovereignty, a European treaty, rather than domestic law, increasingly came to be seen as *the* primary reference point for judicial, 'constitutional' protection of human rights. As Lord Lester has put it: the 'weakness' of the HRA is that it depends upon the Convention 'to define our rights and freedoms', rather than 'asking whether our constitutional rights have been infringed'. That is 'not the way it works in the rest of Europe and the common law world where written constitutions protect the universal civil and political rights anchored in international treaties'.¹⁷⁸

¹⁷⁶ *cf* observations that UK cases have been dominated by citation of, and reliance upon, Strasbourg jurisprudence: Lord Reed, *ibid*.

¹⁷⁷ In this connection see the concluding comments of Rackow, this volume, also commenting on the generally harmonious relationship between the ECtHR and the German Bundesverfassungsgericht. See also comments made in *A UK Bill of Rights: The Choice Before Us* (n 82) para 36 (suggesting that populations are 'less antagonistic' towards the Convention in countries where human rights cases are usually decided by reference to domestic law human rights guarantees).

¹⁷⁸ Lord Lester, 'A Personal Explanatory Note' (n 88) 233.

Lord Lester's point and those made by Lord Neuberger may go to the suggestion that reliance on Convention rights and Convention jurisprudence in the context of the HRA may have increased the desire (for some) for a backlash against Strasbourg, even though, had a British Bill of Rights been established in 1998, it would probably have led to very similar jurisprudence to that under the HRA in the vast majority of instances. And at the time of writing change, and a backlash, certainly seems a real possibility, although no details have been provided by the new Conservative government of the form that a new, proposed British Bill of Rights might take. It is clear, however, that one of the key drivers for the introduction of such a Bill is to reduce Strasbourg's influence on UK law. As noted, the Conservative manifesto says that the Bill will '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 UK'.¹⁷⁹

It remains to be seen what this means. But is the radical change that is suggested by this statement really required? And what dangers may lie ahead on the path to a British Bill of Rights?

On the first question, looking back some might have criticised the HRA over its first ten years on the basis that not just Convention rights but *the ECHR jurisprudence* itself became too much part of domestic law. But we have noted (part V) that over the last five years in particular there has been the start of what may be viewed as a new phase in the HRA's life. There has been a reappraisal whereby the domestic judiciary have become more circumspect about the ECtHR, and far more willing to question its case law in the context of the domestic protection of human rights. Also, that (domestic) case law¹⁸⁰ has started to place a renewed emphasis on and confidence in a home-grown dimension of rights protection, with the role of the common law at its forefront, not 'Convention rights', the narrative being that the latter supports 'the continuing development' of the former, without 'supplanting' it.¹⁸¹ This may amount to some recognition of Lord Lester's comments, viz the weakness of the HRA, and an attempt to learn lessons from the continent, as implied by Lord Neuberger's comments above, regarding Germany. It could signal the transition to a new approach under the HRA, a British model whereby human rights protection is seen as a more autonomous issue for the UK, but one which still respects Strasbourg's position, which is residual, based on subsidiarity. If so, should this emerging model not be allowed to flourish?

For the reasons just stated, it would seem that, as regards the role of the domestic courts, a fundamental reassessment of UK-Strasbourg relations hardly seems necessary. And as for Strasbourg, it is submitted that concerns over its external review

¹⁷⁹ *The Conservative Party Manifesto 2015* at 60.

¹⁸⁰ See, inter alia, *Osborn v Parole Board* [2013] UKSC 61 and *Kennedy v Information Commissioner* [2014] UKSC 20; for commentary see Clayton (n 39); Lord Toulson (n 130); Lord Reed (n 172); Lady Hale, 'UK Constitutionalism on the March?' (12 July 2014), www.supremecourt.uk/docs/speech-140712.pdf; Dickson, this volume.

¹⁸¹ Lord Reed (n 175) 16.

role should also be allayed in the light of the approaches noted in part V, as it progresses into what has been termed a 'new age of subsidiarity'.

Yet the fear must be that the subtleties of the situation as it has evolved over the last five years will be totally ignored by politicians intent on showing that they are putting Strasbourg in its place (as they see it) via a British Bill of Rights that is *seen* to deliver on an unnecessary manifesto promise of breaking the link with Strasbourg and restoring supremacy to UK courts. The concern is that there will be a damaging anti-Strasbourg response which is out of all proportion to the sovereignty and supremacy issues that are said to be in issue. This is especially so if the Conservative party agenda remains, in the final analysis, to withdraw from the Convention if the Council of Europe does not accept that the ECtHR's judgments become merely advisory for the UK. It is almost certain that the Council of Europe would find such a proposal to be totally unacceptable.

We shall have to wait to see what unfolds. However, reflecting on the long view of UK-Strasbourg relations, as this chapter has sought to, and looking ahead, there may be an enduring issue underlying the future of the regime for human rights protection in the UK, whether that is under the HRA or a future British Bill of Rights. Could it prove to be the case that the strains that have existed in UK-Strasbourg relations reflect not only British attitudes toward Europe and the role of a Court regarded as 'foreign', but also a traditional British view as to what the constitutionally appropriate role for the courts should be when it comes to resolving certain human rights issues? Some senior UK judges, for example, have argued that Strasbourg law risks challenging the democratic process, arguing for an approach that is more reliant on the common law, and so more suited, they say, to the 'British' way.¹⁸² This view may not be widely shared, and the points made above about the ECtHR in a new 'age of subsidiarity' offer a response to it. Then again, and looking ahead, for steadfast adherents to political constitutionalism and a Westminster model that envisages Parliament as always having the 'last word', it seems inevitable that there will be more occasions when membership of the Convention proves controversial for the UK, even if Strasbourg's influence is diminished in the context of the domestic regime of human rights protection. It is submitted that the responsible approach to any reform of the UK's domestic human rights arrangements must be to reduce the potential for such conflict. In this regard the new equilibrium existing between the UK courts and Strasbourg in recent years (part V) is something that any future British Bill of Rights must facilitate. It must continue to allow UK judges

¹⁸² Lord Hoffmann (n 18); Lord Reed (n 172) 9; Lord Sumption (n 138) and (n 161) (also his judgment in *Chester* (n 131) para 137); Lord Judge (n 138) para 48; and see especially Laws LJ (n 38) 82–83 ('By our Constitution, there is an important difference between the protection of fundamental values and the formulation of State policy: broadly the former is the business of the courts and the latter the business of elected government. The greatest challenge of our human rights law [as influenced by Strasbourg] is that it appears to merge these two ideas'). It is important to note that these were the opinions of the speakers, some of whom appeared to be opposed to the influence of the Convention. For other judicial lectures delivered on this, see Bates n 14 above.

to take Strasbourg case law into account, for only then can Strasbourg continue to fulfil its essentially subsidiary role.