

Federal Dynamics of the UK/Strasbourg Relationship

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Abstract:

The quasi-federal tension between the centralising and decentralising aspects of the ECHR regime underpins current UK debates engaging the legitimacy of the Strasbourg Court's interventions in 'national' affairs *and* the domestic means by which the Convention rights are realised. Perceptions of an activist court unilaterally (and therefore illegitimately) expanding the reach of the Convention have provoked claims of interference with (legitimate) national autonomy and sovereignty. This tension has arguably been amplified by the application of the Human Rights Act 1998, which has increased the prominence of the Convention jurisprudence – and therefore the influence of the Court – within the domestic legal order. A UK Bill of Rights is mooted as the solution to these problems. Through examination of this centralising narrative of the Convention system, and the counter-balancing evidence of decentralisation (or subsidiarity) seen at the UK and Strasbourg levels, this piece argues that movements towards a UK Bill of Rights – and towards the articulation of exclusive competences held by national authorities – undermine the Convention's animating sense of co-operation.

1: INTRODUCTION

In his 1989 essay “Federal” aspects of the European Convention on Human Rights’, Colin Warbrick examined the ‘extent to which or the manner in which federal concerns make a difference to the interpretation of bills of rights.’¹ Specifically, Warbrick asked:

How is State autonomy to be maintained against a centralising tendency of the federal judiciary ... which extends the reach of protected rights into areas previously regulated by States? How is the contest between demands of

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¹ Colin Warbrick, “Federal” Aspects of the European Convention on Human Rights’ (1989) 10 *Michigan Journal of International Law* 698.

national uniformity and the ability of the States to respond to local needs to be resolved?²

Taking as his starting point the nationalising tendencies of the United States Supreme Court in the sphere of individual rights in the post-New Deal era, Warbrick queried the extent to which the European Court of Human Rights could be said to be pursuing a similarly centralising approach, ‘Europeanising’ standards of individual rights at the expense of variation and policy autonomy across the member states. Observing the expansion by the United States Supreme Court of the protections afforded by the Bill of Rights during that period,³ Warbrick suggested that a state-level counter-reaction had become evident, with the ‘perception now being that the national intervention has extended into matters “properly” falling within the power of the States.’⁴ At the time of writing, Warbrick was able to conclude that, while the reach of the European Convention into domestic affairs was extensive, the interventions of the Strasbourg Court had not (yet) provoked comparable counter-dynamics; the reach of the Convention had not ‘threatened the “States as States”’.⁵

But given contemporary debates in the UK – and elsewhere – surrounding the relative influence of domestic authorities and the European Court of Human Rights within the Convention scheme,⁶ Warbrick’s unease was prescient. As the jurisprudence of the Strasbourg court added depth and greater specificity to the Convention’s requirements, Warbrick was concerned that the Court would transgress the divide, ‘however difficult it may be to define exactly, between international and constitutional interpretation’ and in doing so ‘transform the Convention into a constitutional bill of rights rather than an international convention.’⁷ The consequences of this, Warbrick wrote, would be significant:

² Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’, at 699.

³ For an overview see: W. H. Rehnquist, *The Supreme Court* (New York: Vintage Books, 2002), ch.10.

⁴ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’, at 703.

⁵ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’, at 723.

⁶ On which see: S. Lambrecht, K. Lemmens, P. Popelier (eds), *Shifting the Convention System: Counter-Dynamics at the National and EU Levels* (Antwerp: Intersentia, 2016).

⁷ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’, at 714.

The delicate and subtle relationship between the Convention system and the national legal system for the assurance of individual rights is a developing one. [...] There are indications ... that a majority on the Court might want to abandon the constraints of this international relationship and aspire to a supra-national or constitutional role. The greater good of protecting individual rights would swamp the limitations imposed by considering contrary State interest, whether general or particular. The costs of this process, if pursued too enthusiastically, are not only likely to be a weakening of the legitimacy of the Convention system but, in the short term, an undermining of the national systems for protecting individual rights.⁸

For Warbrick, the tension between the centralising and decentralising characteristics of the Convention system provided insight into its ‘federal’ qualities, and its ability to effectively accommodate national interests and initiatives into an overarching multi-jurisdictional scheme for the protection of individual rights. In the context of the relationships between the European Court of Human Rights and national authorities within the UK, the growing perception of a power imbalance – of an *inability* of the Court and Convention to accommodate such difference – animates deliberations over a UK Bill of Rights. The consequences of the perceived trend towards centralisation have been to unsettle the balance between state and centralised authority that is inherent in the Convention system to the extent that – in the context of current UK political discourse at least – it is questionable whether the narrative of the Convention’s architecture as ‘subsidiary to the national systems’⁹ retains widespread credibility. These debates have prompted calls for revision of both the internal and external dimensions of the UK/Strasbourg relationship. As to the external, it has become commonplace for the European Court of Human Rights to be accused of over-reach, of utilising the ‘living instrument’ doctrine to develop the Convention’s

⁸ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights”, at 723. Concern that the legitimacy of the European Court – and of the Convention system – would be threatened as a result of the Strasbourg Court’s adjudicative approach was also a theme of Warbrick’s later work (see: C. Warbrick, ‘The European Convention on Human Rights and the Human Rights Act: the view from the outside’ in H. Fenwick, G. Phillipson and R. Masterman (eds.), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

⁹ *Handyside v United Kingdom* (1979-1980) 1 EHRR 737, at [48].

protections illegitimately and, as a consequence, of increasingly interfering with national sovereignty.¹⁰ The European Court's expansion of the reach and influence of the Convention is amplified internally through the provisions and application of the Human Rights Act 1998 which collectively afford a prominent role to the (European) 'Convention rights'¹¹ to the – it is argued – detriment of genuinely municipal solutions to the questions posed by rights adjudication.¹²

A desire to reassert national sovereignty in the face of perceived Strasbourg encroachment lies behind Conservative proposals to repeal the Human Rights Act 1998 and enact as its replacement a UK Bill of Rights. This debate – which it is impossible to fully distinguish from Euro-sceptic concerns regarding the influence of the European Union – is premised primarily on the sense that the European Court of Human Rights is increasingly intervening in matters of policy argued to 'properly' sit within the remit of national decision-makers.¹³ Through the application of the Convention rights to situations unforeseen at the time of their drafting and the progressive interpretation of the Convention as a 'living instrument', the policy autonomy of the States parties has – it is argued – been jeopardised by the perceived inability of the European Court to 'resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States.'¹⁴ The promise of a UK Bill of Rights

¹⁰ As the former UK judge on the European Court of Human Rights, Sir Nicholas Bratza, has summarised: 'It is said that the "living instrument" doctrine has increasingly been used as a fig-leaf to cover the Court's enthusiasm for judicial activism, at the expense of the Convention's scope which its drafters had intended, and that the Court has overreached itself in its methods of interpretation of the Convention and transgressed into the realm of policy-making.' (N. Bratza, 'Living Instrument or Dead Letter – the Future of the European Convention on Human Rights' [2014] EHRR 116, 118). For a more hyperbolic assessment see: D. Raab, *The Assault on Liberty: What went wrong with rights* (London: Fourth Estate, 2009), pp.137-143.

¹¹ Section 1, Human Rights Act 1998.

¹² See generally: *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.5 (available at: https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf). Cf. R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 ICLQ 907.

¹³ As will be discussed below, a distinctly domestic dimension of the debate over a UK Bill of Rights focuses on the division of powers between the national-level institutions of government as currently governed by the Human Rights Act 1998.

¹⁴ Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416, 424.

responds to this tension through calls for rights adjudication to be repatriated and for supremacy over questions of rights to be restored to UK national institutions.¹⁵ Discord between the UK Government and the European Court of Human Rights is therefore reflective of what Dicey identified as one of the potential costs of federalism, namely, ‘the denial of national independence to every state’ within the overarching federal structure.¹⁶

This piece examines the federal pressures of the ECHR regime as manifested in the debate over the adoption of a UK Bill of Rights. The core centralising difficulties of the growing reach of the ECHR and domestic amplification of the Convention jurisprudence as a result of the Human Rights Act will be contrasted with the upward influence of national decision-making and moves – at the European level – to reiterate the subsidiarity integral to the Convention regime. In the light of the continued scope within the Convention system for subsidiarity to be realised in practice, it will be argued that the adoption of a UK Bill of Rights – and its promise of a clear demarcation of autonomous national decision-making – contains the potential to destabilise the co-operative constitutionalism which underpins the Convention system.

2: THE ‘FEDERAL’ CHARACTER OF THE ECHR

While the Convention system cannot be regarded as being fully federalised, it nonetheless displays significant federal – or pseudo-federal – characteristics. Roots of the federal notion can be found in international law and relations; Locke’s conception of the federative power was concerned with governmental powers beyond the state, and with the relations between otherwise autonomous state units on the international plane.¹⁷ Though federal structures have subsequently evolved to regulate the internal dynamics of national and regional governance, parallels can clearly be drawn between

¹⁵ *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (October 2014), p.5 (available at: https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf).

¹⁶ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed. reprint) (Indianapolis: Liberty Fund, 1982), p. xcvi.

¹⁷ J. Locke, *Two Treatises of Government*, Ch. XII. For a survey of the interrelationship between federalism, international and national laws see: R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009), pp.16-22.

the characteristics of internal federal structures and those inter-state arrangements which seek to distribute or share powers between centralised governance structures and otherwise autonomous state units.¹⁸ If the legal relationship between state/national units and overarching multi-state/national institution(s) can be accepted as providing the bare minimum of a federal structure, it is certainly arguable that that in structuring cross-jurisdictional rights protections around an international (federal/centralised) court exercising a supervisory jurisdiction over national (states) authorities, linkages between the Convention system and explicitly federal systems can be drawn and that quasi-federal parallels can be identified.

The federal account of the Strasbourg Court and Convention is however subject to a number of qualifications. The fact that the Convention system rests upon an international structure that is not, by design, avowedly federal, raises particular issues for those seeking to compare it to a federal configuration within a single state. It should be acknowledged for instance (as Warbrick did) that, in contradistinction to a system of divided powers within a sole state, the ‘functional demand for uniformity in a system of international States is less than that within a national federal system.’¹⁹ As much is reflected in the competence of the Court, whose decisions – rather than formally acting as cross-jurisdictional precedents – demand a response only from the respondent state and may be tempered by any margin of appreciation exercised at the domestic level.

This limitation is integral to the status of the Convention as an agreement between states; a ‘co-operative’²⁰ endeavour that was (and is) politically and legally reliant on the continuing acquiescence of its sovereign State membership. The success of the Convention system was therefore contingent on a division of power

¹⁸ Of which the European Union provides a salient example. On which see: R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009).

¹⁹ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’, at 705. Indeed, as Warbrick later observed: ‘[i]t was not the object of the Convention to establish a uniform set of rights for all the party states, still less to set an optimum standard’ (C. Warbrick, ‘The European Convention on Human Rights and the Human Rights Act: the view from the outside’ in H. Fenwick, G. Phillipson and R. Masterman (eds.), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007), at 29).

²⁰ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’, at 700.

that would entrust significant and continuing powers to national authorities.²¹ As such, the Convention's division of powers is rudimentary but undoubtedly premised on a sense of collective responsibility.²² Thus, primary responsibility for the realisation of the Convention's standards rests with the member states and is accompanied by the supervisory jurisdiction of the Court (the latter only coming into play once domestically-available avenues towards redress have been exhausted²³). Authority for upholding the Convention's standards was therefore to be a joint enterprise shared between national authorities and the Strasbourg institutions, and was to be reliant on the positive engagement of both. Such an approach is entirely consistent with the view – recently reiterated in Protocol 15²⁴ – that it is the national authorities of the member states that provide the foundations on which the Convention and the jurisdiction of the Court rests.

While the emphasis of subsidiarity is generally on the delivery of objectives at the local level where that is most appropriate, its implications for central governance structures cannot be ignored. The empowerment of the central authority is a necessary consequence of subsidiarity for the reason that the principle implicitly justifies 'central involvement in affairs that *cannot be adequately handled* at the local level.'²⁵ But while subsidiarity implies that the deployment of centralised power will occasionally be necessary, further structural characteristics of the Convention place limitations on the nature of this central authority. In spite of the hierarchical positioning of the European Court of Human Rights 'above' the structures of national legal systems, Warbrick wrote that in the Convention context:

... it has to be conceded that the division of power is vastly asymmetrical in favour of the States and is not uniform across the range of governmental

²¹ N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 MLR 183, 206-208.

²² http://www.echr.coe.int/Documents/Dialogue_2010_ENG.pdf

²³ Article 35(1) ECHR.

²⁴ Article 1 of Protocol 15 ECHR reads: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in so doing, they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'

²⁵ D. Halberstam, 'Federal Powers and the Principle of Subsidiarity' in V. D. Amar and M. Tushnet, *Global Perspectives on Constitutional Law* (Oxford: OUP, 2009), p.35 (emphasis added).

powers. There is nothing equivalent to the Supremacy Clause in the European Convention. What degree of direct/domestic effect is given to the Convention or to the decisions of its institutions is a matter of national constitutional law. Although there is the obligation in Article 53 that the States ‘will abide by the decision of the Court in any case in which they are parties,’ the Court has made it clear that it is for the State to choose the means it adopts to secure compliance.²⁶

Though sovereignty may formally reside in the legal and constitutional structures of the various member states that make up the jurisdiction of the court, the authority of the court itself rests on the acquiescence of those states. While in a federal constitution a supreme court ‘must be able to strike down *state* legislation’²⁷ that is inconsistent with the constitution, the Strasbourg court’s enforcement mechanisms are comparably weak, with the execution of judgments subject only to the supervision of the Committee of Ministers.²⁸ The Strasbourg court does not therefore enjoy the ability to invalidate national legislation which is inconsistent with the requirements of the Convention and, as such, ‘does not exercise *direct* authority within national legal orders.’²⁹ Instead judgments of the European Court of Human Rights are in form ‘essentially declaratory’³⁰ in nature, stating whether a given decision, action or omission of the national authorities in question is either compatible with, or in breach of, the Convention standards (or falls within the State’s margin of appreciation). Further, that the Strasbourg authorities recognise that a certain amount of adaptation may be necessary to give effect to judgments at the national level is evident from the

²⁶ Warbrick, ‘“Federal” Aspects of the European Convention on Human Rights’, at 699-700. See also: S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), p.56.

²⁷ E. Barendt, *An Introduction to Constitutional Law* (Oxford: Clarendon Press, 1998), p.55.

²⁸ The UK has, for instance, resisted addressing the breach of Article 3 of Protocol No.1 of the Convention highlighted in *Hirst v United Kingdom (No.2)* ((2006) 42 EHRR 41) for over a decade.

²⁹ A. Stone Sweet, ‘The European Convention on Human Rights and National Constitutional Reordering’ (2011-2012) 33 *Cardozo Law Review* 1859, 1860 (emphasis added).

³⁰ *Marckx v Belgium* (1979) 2 EHRR 330, at [58].

allowance that a State is free to implement such decisions ‘in accordance with the rules of its national legal system’.³¹

In the absence of a clear articulation that decisions of the Strasbourg court are both binding and of general applicability, the vision of federalism that emphasises *separation* of governmental competences and the division of sovereignty between component units and central authority does not accurately capture the spirit of the Convention system. Wheare’s famous account of the federal principle – ‘the method of dividing powers so that the general and the regional governments are each, within a sphere, coordinate and independent’³² – emphasises autonomy, arguably at the expense of co-operation.³³ Yet it is the latter which better reflects the animating concerns of the Convention system. In consequence, the notion of the ‘shared responsibility’³⁴ of the member states and the European Court for the maintenance of the Convention’s protections enjoys a firm grounding in the text of the Convention,³⁵ the jurisprudence of the Court³⁶ and has provided a recurring theme in ongoing political deliberations regarding its modernisation, case-management, and jurisprudential technique. The self-perception of the Court in this regard is that of a body whose role and function is supplementary – secondary – to that of the member states: ‘[the] task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the contracting states rather than with the

³¹ *ibid* where the example given is of *Vermeire v Belgium* (1993) 15 EHRR 488.

³² K.C. Wheare, *Federal Government* (1946), p.11

³³ D. Halberstam, ‘Federalism: Theory, Policy, Law’ in M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012), p.579

³⁴ On which see: J. Gerards, ‘The European Court of Human Rights and the National Courts: Giving shape to the notion of “shared responsibility”’ in J. Gerards and J.Fleuren (eds), *Implementation of the European Convention on Human Rights and the judgments of the ECtHR in national case law: A Comparative Analysis* (Cambridge: Intersentia, 2014).

³⁵ Article 1 ECHR (‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention’); Article 35 ECHR (the European Court of Human Rights will only enjoy jurisdiction in relation to cases in which, *inter alia*, ‘all domestic remedies have been exhausted’).

³⁶ See eg: *SAS v France* (2015) 60 EHRR 11, at [129].

Court. The Court can and should intervene only where the domestic authorities fail in that task.³⁷

Though the fact that the Convention mechanisms lack the capacity to enforce uniformity provides one ground on which recognised federal systems might be distinguished, the fact that subsidiarity is built into the fabric of the Convention system underlines a structural similarity to formalised federal systems:

Federal systems across the world are generally designed according to the principle of subsidiarity, which in one form or another holds that the central government should play only a supporting role in governance, acting only if the constituent units of government are incapable of acting on their own.³⁸

Accordingly, while the primary responsibility for upholding the requirements of the Convention lies with the member states, the system demands recourse to centralised authority where those requirements have not been satisfied.

In sum, as Nicol has argued, the European Court of Human Rights has traditionally occupied a space on the ‘spectrum of federalism’ between that held by a ‘classical international tribunal’ and that of a ‘quasi-federal sui generis entity’ such as the Court of Justice of the European Union; the interventions of the Court are ‘perceived as going to the core of national sovereignty’ but lack the ‘hierarchical pre-eminence’ of those of the Luxembourg Court.³⁹ The gradual expansion of the reach of the Convention, and the ‘general acceptance of [the Strasbourg Court’s] authority as the ultimate arbiter of human rights disputes in Europe’,⁴⁰ has however resulted in the weakening of the narrative of co-operation and an increased sense of centralisation within the Convention system. Though one of the animating concerns of a federal structure is that the central authority should not be competent to arrogate powers to

³⁷ Jurisconsult of the European Court of Human Rights, *Interlaken Follow-up: Principle of Subsidiarity* (8th July 2010), available at: http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf

³⁸ D. Halberstam, ‘Federal Powers and the Principle of Subsidiarity’ in V. D. Amar and M. Tushnet, *Global Perspectives on Constitutional Law* (Oxford: OUP, 2009), p.34

³⁹ D. Nicol, ‘Lessons from Luxembourg: Federalisation and the Court of Human Rights’ (2001) 26 EL Rev HR3, HR3. And see: R. Masterman, ‘A Tale of Competing Supremacies’ UK Const L Blog, 30 September 2013.

⁴⁰ N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71 MLR 183, 184.

itself at the expense of the federation's component parts,⁴¹ in spite of the apparent limitations on the Court's competence, this is precisely the accusation levelled at the Strasbourg court.⁴²

4: THE 'CENTRALISING' INFLUENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Assessing the jurisprudence of the Strasbourg Court, Warbrick highlighted the following as 'federal' techniques of reasoning, indicative of the centralising tendencies of the Convention system:

1. The suggestion that there should be no national authority to limit or reduce rights as defined by the Strasbourg court (ie in those cases where the right in question might be said to enjoy a clearly-defined and irreducible minimum);
2. In determining the content of the right in question, the Strasbourg court finds a 'strong majority practice' across its jurisdiction;
3. A concern that the 'localization' of rights will result in unjustifiable differences in treatment as between the states.⁴³

Warbrick was careful to observe that – aside from the first argument – the European Court had developed no theory that made the application of any of the 'federal' contentions mandatory.⁴⁴ But each of these characteristics remains of relevance, and speaks to the (centralised) interpretative function of the Court in articulating the meaning of the Convention rights.

It is a core element of the Court's role to articulate the minimum standards required by the Convention, the level of protection that should be common across each of the member states. In performance of this function, the Court may look to

⁴¹ E. Barendt, *An Introduction to Constitutional Law* (Oxford: Clarendon Press, 1998), p.64.

⁴² For a robust defence of the Court in the face of these criticisms see: R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in an Age of Subsidiarity' (2014) 14(3) HRLR 487.

⁴³ Warbrick, "'Federal' Aspects of the European Convention on Human Rights', at 707.

⁴⁴ Warbrick, "'Federal' Aspects of the European Convention on Human Rights', at 708-709.

whether a ‘European consensus’ can be seen to exist, or can be seen to be emergent.⁴⁵ The ‘centralising’ consequences of this exercise, for those states that can be said to be a part of the emerging consensus, are rather less pronounced than for those whose protections fall below the level set by the majority. The visible function of the Court is therefore to adjudicate the complaints of individuals alleging interference with their rights at the hands of the state or its agents, but in doing so it must also seek to articulate the minimum level of protection that should be afforded to those rights across the Convention system. The individual complaint mechanism is the means by which the concurrent purpose of the Convention – the administration of ‘constitutional justice’ through the articulation of minimum standards of compliance in response to serious defects at the national level – is realised.⁴⁶ There is considerable tension between these two core elements of the Court’s function,⁴⁷ but it is in discharging this (constitutional) interpretative function that the Court can be most clearly seen to wield a clear centralising influence; indeed as Gerards has suggested:

*Only a central institution such as the ECtHR can uniformly establish the meaning of fundamental rights and define a minimum level of fundamental rights protection that must be guaranteed in all the States of the Council of Europe.*⁴⁸

In adjudication under the UK’s Human Rights Act, this centralised interpretative role has also been recognised. As acknowledged by Lord Bingham in the influential decision of the House of Lords in *Ullah*, ‘... the Convention is an international

⁴⁵ On which see: K. Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the case law of the European Court of Human Rights’ [2011] PL 534.

⁴⁶ S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), p.59.

⁴⁷ On which see: K. Dzehtsiarou and A. Greene, ‘Restructuring the European Court of Human Rights: Preserving the right of individual petition and promoting constitutionalism’ [2013] PL 710; F. de Londras, ‘Dual functionality and the persistent frailty of the European Court of Human Rights’ [2013] EHRLR 38.

⁴⁸ J. Gerards, ‘The European Court of Human Rights and the National Courts: Giving Shape to the Notion of “Shared Responsibility”’ in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law: A Comparative Analysis* (Antwerp: Intersentia, 2014), p.16 (emphasis added).

instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court.⁴⁹ Considered as a question distinct from whether the Human Rights Act permits – as a matter of domestic law – domestic courts to consider ‘the Convention rights’ as subtly different to their international law counterparts,⁵⁰ this assessment must be correct. But the interpretative function of the Court is not administered in splendid isolation of the concerns arising within and across the member states. The capacity of the Court as a constitutional actor in this regard is limited to those cases that come before it. Though the living instrument doctrine permits the incremental development of the Convention jurisprudence, it does so only – if operating consistently with the subsidiary role of the Court – where an emerging consensus can be said to identify a direction of travel. The interpretative role of the Court is, as a result, doubly parasitic upon trends and developments within the member states.

And yet, since publication of Warbrick’s essay the Court has, in the eyes of many commentators, adopted characteristics of an overtly constitutional court.⁵¹ That the Convention, and the European Court of Human Rights, undertake constitutional functions is not open to question; the Court ‘is ... a constitutional, or “quasi-constitutional” court, in the sense of being the final authoritative judicial tribunal for a specific constitutional system designed to ensure that the exercise of public power throughout Europe is constitution-compliant.’⁵² The Court is however not the creature of a national constitution, but of a concordat between states, and its mandate is both provided for and limited by that agreement. While its decisions lack the supremacy or finality typically enjoyed by those of domestic constitutional courts – falling to be addressed in accordance with the internal constitutional laws of the

⁴⁹ *R (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323, at [20].

⁵⁰ *Re McKerr* [2004] UKHL 12 at [65] (Lord Hoffmann).

⁵¹ See for instance: S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), pp.165-189; D. Nicol, ‘Lessons from Luxembourg: Federalisation and the Court of Human Rights’ (2001) 26 EL Rev HR3. Cf. N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71 MLR 183.

⁵² S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), p.190.

relevant member state – they otherwise enjoy significant gravitational pull, providing authoritative determinations of the requirements of the Convention.

The tendency toward viewing the Convention system as being highly centralised, to the detriment of national self-government or sovereignty, is clearly apparent in discourse surrounding the role of the Convention jurisprudence in domestic law and in the projected replacement of the Human Rights Act with a UK Bill of Rights. It would be wrong however to assume that this centralisation narrative is solely a product of the Convention system itself. In addition to those centralising characteristics of the Convention system highlighted above, current debate in the UK emphasises further difficulties at both the international level and in the interpretation of the existing mechanism for vindicating the Convention rights in domestic law, the Human Rights Act 1998. Current debate is in particular animated by two core concerns: the adoption by the European Court of an expansionist approach to the Convention and the increased prominence – or amplification – of the Convention jurisprudence in domestic law following the adoption of the Human Rights Act.

An ‘expansionist’ approach to the Convention

It is now well-established in the jurisprudence of the European Court of Human Rights that ‘the Convention is a living instrument which ... must be interpreted in the light of present day conditions.’⁵³ Thus, the Strasbourg Court is not formally bound to follow its own judgments⁵⁴ – allowing the Court to ‘have regard to the changing conditions in contracting states and respond ... to any emerging consensus as to the standards to be achieved.’⁵⁵ The precise content of or, perhaps more accurately, the minimum level of protection afforded by a Convention right, may therefore develop over time.⁵⁶ While the adoption of the living instrument doctrine pre-dated Warbrick’s assessment of the federal aspects of the Convention,⁵⁷ he voiced a concern

⁵³ *Tyrer v United Kingdom* (1979-1980) 2 EHRR 1, at [31].

⁵⁴ See eg *Cossey v United Kingdom* (1991) 13 EHRR 622, at [35].

⁵⁵ *Stafford v United Kingdom* (2002) 35 EHRR 32, at [68].

⁵⁶ That the Convention is a ‘living instrument’ has been acknowledged by domestic courts in litigation under the HRA: see eg *Brown v Stott* [2003] 1 AC 681, 727 (Lord Clyde).

⁵⁷ *Tyrer v United Kingdom* (1978) 2 EHRR 1. See also: *Marckx v Belgium* (1979-80) 2 EHRR 330; *Dudgeon v United Kingdom* (1982) 4 EHRR 149. Warbrick’s piece also pre-dates the abolition of the

regarding the stretching of this interpretative method. Looking to the decision of the minority of the European Court in *Feldbrugge v Netherlands*, Warbrick highlighted the suggestion that ‘evolutive interpretation ... does not allow entirely new concepts of spheres of application to be introduced into the Convention: that is a legislative function that belongs to the member States of the Council of Europe.’⁵⁸ Warbrick observed that such an approach:

... seems to me to stay clearly within the international (and even federalist) tradition. It recognizes the peculiar characteristics of the treaty under consideration without letting them overwhelm the legal basis of the Convention, the agreement of sovereign States.⁵⁹

The development of the European Court’s jurisprudence – as the Convention’s meaning has been articulated in response to contemporary challenges to rights – has resulted in its application to new spheres of governmental activity (and indeed inactivity).⁶⁰ The judgment of Judge Costa in *Hatton v United Kingdom* – concerning whether permitted night flights out of Heathrow airport constituted an interference with local residents’ rights under Article 8 ECHR – attempts to explain and contextualise the need for the Court’s adoption of the living instrument approach:

... as the Court has often underlined: ‘The Convention is a living instrument, to be interpreted in the light of present-day conditions’ ... This ‘evolutive’ interpretation by the Commission and the Court of various Convention requirements has generally been ‘progressive’, in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the ‘European public order’. In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 [the right to privacy] embraces the right to a healthy

Commission and establishment of the European Court as a permanent institution following the implementation of Protocol No.11.

⁵⁸ *Feldbrugge v Netherlands* (1986) 8 EHRR 425, at [24].

⁵⁹ Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights”, at 713.

⁶⁰ For instance: *Goodwin v United Kingdom* (2002) 35 EHRR 18; *EB v France* (2008) 47 EHRR 21.

environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.⁶¹

These statements have been singled out for criticism by one critic of the Human Rights Act and of the European Court as betraying the ‘blatantly expansionist’ tendencies of the latter.⁶² It should be noted in response that the judgment of Judge Costa came in dissent and that the violation found by the European Court in *Hatton* was – as a result of the case arising prior to the implementation of the Human Rights Act – that domestic law failed to provide an effective remedy in respect of the complaint made. No violation of the applicants’ Article 8 rights was found, and no damages were awarded.

The expansionist – or centralising – narrative in relation to the extent of the Convention’s protections has, however, increasingly gained traction. The decision of the European Court in *Hirst (No.2)*⁶³ has been seized upon by critics as providing evidence of the extension of the meaning of the Convention to include rights originally ‘excluded’ from the Convention and therefore of the imperialising tendencies of the Court.⁶⁴ In the resulting February 2011 House of Commons debate on prisoner voting, the former Secretary of State for Justice and Lord Chancellor Jack Straw argued that, ‘through the decision in the *Hirst* case and some similar decisions, the Strasbourg court is setting itself up as a supreme court for Europe with an ever-widening remit.’⁶⁵

Senior judicial figures have made similar observations. Most prominently, the views of the Supreme Court Justice Lord Sumption illustrate that concerns relating to Strasbourg overreach are evident at the highest levels of the serving judiciary. Extra-

⁶¹ Application no. 36022/97 (2003) 37 EHRR 28

⁶² M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011), p.31.

⁶³ *Hirst v United Kingdom (No.2)* ((2006) 42 EHRR 41.

⁶⁴ On which see: C. R. G. Murray, ‘A Perfect Storm: Parliament and Prisoner Disenfranchisement’ (2013) 66 *Parliamentary Affairs* 511.

⁶⁵ HC Debs, Vol.523, Col.502, 10 February 2011. See also: D. Nicol, ‘Lessons from Luxembourg: Federalisation and the Court of Human Rights’ (2001) 26 *EL Rev HR3*; F. de Londras, ‘Dual functionality and the persistent frailty of the European Court of Human Rights’ [2013] *EHRLR* 38, 46.

judicially, Sumption has described the European Court of Human Rights as having become ‘the institutional flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying.’⁶⁶ The effect of the application by the Court of the living instrument approach has, Sumption continues, been ‘to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention, and transformed them into questions of law to be resolved by an international judicial tribunal.’⁶⁷ The consequence of then applying – at the domestic level – that jurisprudence, is to preclude the courts ‘from respecting the proper role of Parliament as a representative body and of Ministers as officers answerable to Parliament and the electorate.’⁶⁸

So while the living instrument doctrine is argued by many to provide one of the essential underpinnings to the Convention’s relative longevity – permitting the Court to ‘breathe life into the words of the instrument so as to make it relevant to contemporary European society’⁶⁹ – others perceive the steady encroachment of the Court upon areas of law and policy for which constitutional responsibility could previously be said to lie within the domestic domain. Though the Court has repeatedly stressed that it is not open to it to rewrite the terms of the Convention,⁷⁰ those terms have – it is said – been extended to include meaning that its framers cannot possibly have envisaged,⁷¹ or rather less charitably (and in the words of the UK Government’s former Minister for Human Rights), have been ignored as the Court has taken it upon itself to ‘invent’ new rights.⁷²

⁶⁶ Lord Sumption, ‘The Limits of Law’, The 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013.

⁶⁷ Lord Sumption, ‘The Limits of Law’, The 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013.

⁶⁸ Lord Sumption, ‘Judicial and Political Decision-Making: The Uncertain Boundary’ 2011 FA Mann Lecture.

⁶⁹ N. Bratza, ‘Living Instrument or Dead Letter – The Future of the European Convention on Human Rights’ [2014] EHRLR 116, 118.

⁷⁰ See eg: *Quark Fishing v United Kingdom* (2007) 44 EHRR SE4.

⁷¹ The Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’

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

⁷² This suggestion is made on multiple occasions in D. Raab, *The Assault on Liberty: What went wrong with rights* (London: Fourth Estate, 2009), esp. pp.123-168.

The Domestic Amplification of the Convention Jurisprudence

Any assessment of the federal character of the UK/Strasbourg relationship is complicated by the fact that one of the core centralising arguments in the case for a UK Bill of Rights is the consequence of a legislative exercise in decentralisation taken by the UK Parliament. It has become trite to recall that the purpose of enacting the Human Rights Act 1998 was to ‘bring rights home’, but the problem to which the Act was the proposed solution was that the Convention rights were seen as being both practically and jurisprudentially alien. The Act therefore sought to deliver on the promises to make rights accessible to litigants in domestic courts – saving the delays and costs associated with making an application to the Strasbourg court – and to bring the Convention rights ‘much more fully into the jurisprudence of the courts throughout the United Kingdom’ so that they might be ‘more subtly and powerfully woven into our law.’⁷³ The 1998 Act therefore was, and remains, an essentially pro-sub subsidiarity measure. This state-led exercise in decentralisation has, however, given rise to a heightened perception of central control held by the Strasbourg court.

In adjudication under the Human Rights Act, the centralising interpretative aspect of the Convention system has been amplified by domestic courts in their application of the Convention rights. In discharging their obligations under s.2(1) of the Act – the duty to ‘take into account’ decisions of the European Court of Human Rights in their resolution of disputes arising in connection with the protected rights – domestic adjudication has highlighted the potential paradox that the ‘Convention rights’ are simultaneously creatures of both statute (the Human Rights Act⁷⁴) and of the Convention itself. Those readings of the Act which emphasise its domestic credentials decentralise interpretative authority over the protected rights, understanding them as standards that are subtly distinct from those adjudicated by the European Court whose ‘meaning and application is a matter for domestic courts, not the court in Strasbourg.’⁷⁵ The prevailing approach to the interpretation of the Act however, has been to regard ‘the Convention [as] an international instrument, the correct interpretation of which can be authoritatively expounded *only* by the

⁷³ *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), at [1.14].

⁷⁴ Human Rights Act, s.1(1).

⁷⁵ *Re McKerr* [2004] UKHL 12 at [65] (Lord Hoffmann).

Strasbourg court.⁷⁶ Following this understanding of the Convention – and in parallel with a reading of the Human Rights Act which sees domestic courts effectively operating as local proxies for the Strasbourg court⁷⁷ – the prevalent, ‘internationalist’⁷⁸, approach has seen the requirements of the Strasbourg jurisprudence ‘mirrored’ in the domestic context.⁷⁹ As a consequence, domestic courts applying the Human Rights Act have deferred to (and implicitly acceded to) a rather more centralised understanding of the role of the European Court, and have treated its decisions – if deemed to be relevant and applicable to the dispute in question – as effectively setting precedential standards, regardless of the UK’s involvement in the proceedings before the Strasbourg court.⁸⁰ Treatment of any and all relevant decisions of the European Court of Human Rights as being presumptively to be followed distorts – in its translation into domestic law – the requirements of the Convention in two core ways. First, by regarding decisions taken by the Court against states other than the UK as being of greater coercive force than the Convention organs themselves would. Second, by treating what could be seen as a decentralised system of constitutional review in a rather more centralised manner.

In treating the judgments of the European Court of Human Rights – generally – as setting standards to be applied under the Human Rights Act, the individual justice dispensing elements of the Court’s role have been emphasised at the expense of its

⁷⁶ *R (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323 [20] (Lord Bingham) (emphasis added).

⁷⁷ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing Ltd* [2005] UKHL 57, [34] (Lord Nicholls): ‘The [Human Rights] Act was intended to provide a remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.’

⁷⁸ B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), p.56.

⁷⁹ On which see: J. Lewis, ‘The European Ceiling on Rights’ [2007] PL 720; R. Masterman, ‘Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the ‘Convention Rights’ in Domestic Law’ in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

⁸⁰ R. Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?’ [2004] PL 725. See also: Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 240.

ability to deliver constitutional justice.⁸¹ Individual decisions of the European Court are treated as being domestically applicable, rather than contributing – collectively – to a broader understanding of the Convention’s minimum standards. Regardless of the specific language adopted in the Human Rights Act itself, the result of this is a tendency to view the decisions of the European Court of Human Rights as determinative, and to see the Court itself as an *appellate* (rather than supervisory) body, in turn encouraging the sense that the Strasbourg court *overrules* decisions taken at the national level (rather than declaring such decisions to be in contravention of the Convention’s requirements). The symbolism of this appellate (as opposed to supervisory) role is as potent in discussions regarding the role and function of the European Court of Human Rights as it is to the distinction between review and appeal as drawn in the domestic law of judicial review of administrative action and is reinforced by the hierarchical symbolism of the Court’s extra-jurisdictional position. In the context of the UK at least, the sense that the European Court of Human Rights operates effectively as a court of fourth instance will be difficult to displace.⁸² It is a view of the Court which is underlined by years of pre-Human Rights Act practice – during which time substantive judicial consideration of the Convention could *only* be achieved (following the exhaustion of domestic ‘remedies’) through an application to the European Court⁸³ – has been implicitly endorsed in judicial practice since implementation of the Act,⁸⁴ and has been conveniently assimilated in the anti-Strasbourg narrative as ‘evidence’ of an over-mighty institution.⁸⁵

⁸¹ It must be acknowledged that the Court itself, in the determination of decisions such as *Von Hannover* ((2006) 43 EHRR 7) has, perhaps inadvertently, contributed to this perception.

⁸² See: R. Masterman, ‘Deconstructing the Mirror Principle’ in R. Masterman and I. Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 *Proceedings of the British Academy*) (Oxford: Oxford University Press, 2013), pp.136-137.

⁸³ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

⁸⁴ Including, on occasion, by the Strasbourg Court itself (see for instance: *Axel Springer AG v Germany* (2012) 55 EHRR 6, esp. the dissenting opinion of Judge Lopez Gueva joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi).

⁸⁵ See for instance: *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (October 2014), p.5 (available at: https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf), p.3: ‘There is mounting concern at Strasbourg’s attempts to *overrule* decisions of our democratically elected Parliament and *overturn* the UK courts’ careful applications of Convention rights (emphasis added).’

5: ADDRESSING THE STATE/STRASBOURG IMBLANCE: TOWARDS SUBSTANTIVE SUBSIDIARITY?

Given that symbiosis between the member states and European Court is a necessary consequence of the Convention structure, it is to be expected that the centralising force of the Strasbourg court will be tempered by factors tending towards the devolution of responsibility to the component parts of the Convention's 'federal' structure. In favour of a more decentralised application of the Convention's protections, Warbrick highlighted the following considerations:

1. That the sovereignty of States as 'significant autonomous units' requires that certain matters fall to be resolved at the national level, especially where there is uncertainty regarding the reach or extent of the protected right;
2. That any system of divided powers implies a degree of diversity;
3. That there is an intrinsic interest in 'preserving the leeway for States to experiment on social and political questions'; and
4. That – especially in cases dealing with qualified rights – national authorities may be the 'best judges, both more sensitive and more effective, of such issues.'⁸⁶

Given that the Convention system regards national authorities as the primary level of rights protection, it is no surprise that the margin of appreciation – the central mechanism employed in the name of promoting the autonomy of the member states – encompasses each of the above and continues to figure prominently in the Court's jurisprudence and in attempts to reform the Convention system more broadly. In the light of domestic criticisms of the Court however, it is arguable that the idea of the margin of appreciation as a recognition of 'the latitude which signatory states are permitted in their observance of the Convention' lacks currency.⁸⁷ Warbrick's

⁸⁶ Warbrick, "Federal" Aspects of the European Convention on Human Rights', at 708.

⁸⁷ T. H. Jones, 'The Devaluation of Human Rights under the European Convention' [1995] PL 430, 430-431.

decentralising characteristics emphasise the positive role to be played by the state in upholding the Convention. A narrative which speaks of the imperialising, expansionist, tendencies of the Court contains little space for consideration of those aspects of the Convention system designed to empower the member states.

Conscious of current controversy, Judge Mahoney has reiterated that the ‘object of the Convention system, unlike that of the legal order of the European Union, is not to bring about uniformity of national law or rigorously uniform implementation of the internationally accepted engagements (that is, the guaranteed rights and freedoms) in each one of the participating states.’⁸⁸ It follows that the Court grants not only a margin of appreciation but also does not – as noted above – prescribe specific responses, allowing states the scope to determine the most appropriate mechanism by which the Convention’s minimum standards might be secured within the jurisdiction in question. The European Court itself has, in a similar vein, taken the opportunity to reject the suggestion that it is in the process of attempting to homogenise the legal and political systems of the member states:

There [are] a wealth of differences, inter alia, in the historical development, cultural diversity and political thought within Europe which it is for each contracting state to mould into its own democratic vision.⁸⁹

While the very notion of the margin of appreciation suggests that an allocation of powers as between the states and the European Court might be possible (for instance in questions engaging questions of public morals, national security or where national authorities have attempted a proportionate balancing of rights) the division would, in practice, appear to be highly porous. While a wider margin of appreciation may, for instance, be permitted to the states in decisions taken in support of upholding ‘the rights of others’,⁹⁰ this does not mean that states have a monopoly on all limitations taken on such grounds. That the dividing line between the Court’s duty to uphold the Convention rights, and the state’s duty to uphold individual and group interests as best

⁸⁸ P. Mahoney, ‘The relationship between the Strasbourg court and the national courts’ (2014) 130 LQR 568, 582.

⁸⁹ *Shindler v United Kingdom* (2014) 58 EHRR 5, at [102].

⁹⁰ See for instance: *Handyside v United Kingdom* (1979-1980) 1 EHRR 737; *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34.

it sees fit, is therefore reliant on a contextual analysis of proportionality means that no clear division of responsibility can be asserted in the abstract with any precision. Though this is consistent with the spirit of co-operation between national authorities and the Strasbourg court, it is also problematic – especially for those states concerned with the cession of sovereignty over questions of national law and policy – for the perceived autonomy of the member states. As a consequence, the repeated emphasis by the Court that the Convention system permits domestic variance and considerable flexibility in the realisation of the protected rights has done little to mollify critical factions in the UK.⁹¹

Given the devaluation of the currency of the margin of appreciation, other mechanisms of acknowledging decentralisation within the Convention system are worthy of consideration. They are noteworthy because, instead of taking the form of a concession afforded by the Strasbourg court, they provide evidence of the positive influence of national decision making on the reasoning of, and outcomes determined by, the Court.

The accommodation of national variance

Though critics of the European Court dismiss its frequent invocations of the principle of subsidiarity as amounting to little more than empty rhetoric, recent UK experience provides a number of illustrations of the upward influence of national decision-making on that of the European Court. In contrast to those domestic views of the Strasbourg court that emphasised its determinative role in the articulation of international standards, recent decisions have seen a greater prominence given over to the distinctive role played by the Court as an international actor:

It must be remembered that the Strasbourg court is an international court, deciding whether a Member State, as a state, has complied with its duty in international law to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention.⁹²

⁹¹ That similar sentiments were expressed in *Hirst v United Kingdom (No.2)* ((2006) 42 EHRR 41 (at [61])) appears to indicate that the mollifying effect of such statements is, or can be, rather limited.

⁹² *Re P* [2008] UKHL 38; [2009] 1 AC 173, at [32].

In recognition of this fact (which also speaks to the role of the Court as a body which reviews domestic compliance rather than by which domestic decisions might be overturned on appeal), it has also – and perhaps belatedly – been recognised by the UK Supreme Court that the that the Convention rights ‘have to be fulfilled at national level through a substantial body of much more specific domestic law [than that emanating from the European Court].’⁹³ As a result, the willingness of domestic courts to engage in ‘creative dialogue’⁹⁴ with the European Court of Human Rights has become gradually more pronounced.⁹⁵ Such interactions have been evident both in the iterative refinement of the implications of the Convention rights in domestic law, and – illustrating the point most clearly – on those occasions on which the European Court has effectively adopted the reasoning of the domestic court as to the requirements of the Convention in the relevant national context. As to the first of these categories, domestic courts have increasingly sought to identify the flexibility in their Human Rights Act-imposed obligation to ‘take into account’ the Convention jurisprudence, and have held that in the light of various circumstances, otherwise applicable Convention case-law need not be followed. The UK Supreme Court decision in *Pinnock* provides, in summary, evidence of this more nuanced approach. In that decision, Lord Neuberger, with whom the eight other Supreme Court Justices agreed, said:

This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law... Of course, we should usually follow a clear and constant line of decisions by the European court ... but we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber ... section 2 of

⁹³ *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115, at [55].

⁹⁴ Lord Steyn, ‘2000-2005: Laying the foundations of human rights law in the United Kingdom’ [2005] EHRLR 349, 361.

⁹⁵ On which see: M. Amos, ‘From Monologue to Dialogue: The Relationship between UK Courts and the European Court of Human Rights’ in R. Masterman and I. Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 Proceedings of the British Academy) (Oxford: Oxford University Press, 2013).

the HRA requires our courts to ‘take into account’ European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.⁹⁶

Pinnock amounts to a rejection of the precedential approach to the Strasbourg jurisprudence, instead envisaging a relationship between national authorities and the European Court which permits greater space for jurisprudential collaboration.

That the European Court can also be seen to positively engage with, and take a lead from, national authorities further emphasises the co-operation that many argue to be lacking from the Convention system. The decision of the Supreme Court in *R v Horncastle* provides perhaps the most compelling authority to date for both the suggestion that domestic courts will not simply apply even relevant and clear Strasbourg case-law as a matter of course, *and* that critical engagement with the Strasbourg jurisprudence in domestic adjudication can lead to a reconsideration and refinement of European Court’s own stance.⁹⁷ Following that decision, the willingness of the Strasbourg court to reconsider its earlier position on the compatibility of hearsay evidence with Article 6(1),⁹⁸ demonstrates the principle of subsidiarity in practice and illustrates that national authorities can – and do – play a decisive role in shaping the content of the Strasbourg case law.⁹⁹

The increasing turn of the European Court towards procedural review¹⁰⁰ also provides an example of the preparedness of the Strasbourg Court to accommodate – and potentially defer to – domestic legislative decision-making. Thus, for example, in *Animal Defenders International* – a case concerned with the limitation of political

⁹⁶ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, at [48]

⁹⁷ *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

⁹⁸ *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1. A similar accommodation of national-level judicial reasoning is also in evidence in *Hutchinson v United Kingdom* (2015) 61 EHRR 13 (cf. *Vinter v United Kingdom* (2016) 63 EHRR 1).

⁹⁹ *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23.

¹⁰⁰ On which see: J. Gerards and E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge: Cambridge University Press, 2017).

expression, and therefore typically an area in which any margin of appreciation would be relatively narrowly drawn¹⁰¹ – the Court thoroughly considered the process by which the UK’s challenged ban on political advertising had been enacted (and subsequently found to be compatible with the requirements of Article 10 in domestic adjudication¹⁰²). The Strasbourg court noted that:

The prohibition was ... the culmination of an exceptional examination by Parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom, and all bodies found the prohibition to have been a necessary interference with art.10 rights. [...]

The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords ... both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant’s rights under art.10 of the Convention.

The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom, and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.¹⁰³

The European Court of Human Rights found that national authorities were ‘best placed’ to determine what should be regarded as a ‘country specific and complex assessment’ of the balance to be struck.¹⁰⁴

¹⁰¹ See eg: *Lingens v Austria* (1986) 8 EHRR 407.

¹⁰² *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312.

¹⁰³ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [114]-[116].

¹⁰⁴ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, at [111].

Affording weight to the considered judgment of a national legislature (and/or courts) could be said to illustrate in practice that '[s]ubsidiarity is at the very heart of the Convention' and is demonstrative that the European Court is 'intended to be subsidiary to the national systems'.¹⁰⁵ Instead of affording a concession to national authorities, the European Court demonstrates that the decision-making process of the domestic legislature will be material, and that decisions adopted following 'extensive debate by the democratically elected representatives',¹⁰⁶ or which can be shown to be 'the culmination of ... detailed examination of the social, ethical and legal implications of developments'¹⁰⁷ may be more likely to fall within any margin of appreciation afforded by the Court.

Embedding structural subsidiarity

The UK Government's chairing of the Committee of Ministers of the Council of Europe provided, in early 2012, a clear opportunity to see concerns relating to the perceived diminution of national authority's influence over those areas of law falling within the purview of the European Court raised at a High Level Conference on the Future of the European Court of Human Rights. The discussions and outcomes of the Brighton conference, held in April 2012, were explicitly animated by concerns relating to the perceived dilution of the importance of national authorities within the Convention system. Entering into the Brighton conference, the UK Government sought to promote revisions to the Convention system in order to emphasise the primary role of national authorities in the protection of the Convention rights, to reinforce the concept of subsidiarity, to work towards increasingly efficient case-law management on the part of the European Court and to ensure consistency in the quality of European Court decisions through improvement to the processes by which national judges were appointed.¹⁰⁸ UK Government efforts to confine the jurisdiction of the Strasbourg court to cases in which national courts could be demonstrated to

¹⁰⁵ *Austin v United Kingdom* (2012) 55 EHRR 14, at [61]. And see: M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) HRLR 1.

¹⁰⁶ *Friend v United Kingdom* (2010) 50 EHRR 51, at [50].

¹⁰⁷ *Evans v United Kingdom* (2008) 46 EHRR 34, at [60].

¹⁰⁸ For an accessible summary see House of Commons Library, *The UK and Reform of the European Court of Human Rights*, SN/IA/6277 (27 April 2012). See also: D. Cameron, Speech to the Parliamentary Assembly of the Council of Europe (25 January 2012).

have ‘seriously erred’ in their interpretation of the Convention, or to only those which raise ‘a serious question’ relating to the interpretation of the Convention rights, were ultimately unsuccessful.¹⁰⁹ Nonetheless, the Brighton process did lead to a notable reiteration of the vital place of national decision-making within the Convention system.

The Brighton Declaration saw the shared responsibility of the States parties to the Convention and the Courts for ‘realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity’ reasserted. The text of the declaration sought to undercut suggestions that the European Court had usurped the position of national-level protections as the core of the Convention system by reaffirming the vital role of national institutions in upholding the Convention standards:¹¹⁰

The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.¹¹¹

Protocol 15’s suggested revision to the Preamble to the Convention¹¹² could, on one reading, be seen as something of a victory for the UK Government’s push towards

¹⁰⁹ M. Elliott, ‘After Brighton: Between a Rock and a Hard Place’ [2012] PL 619, 622-623.

¹¹⁰ *The Brighton Declaration*, at [7].

¹¹¹ *The Brighton Declaration*, at [11].

¹¹² Article 1 of Protocol 15 reads: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in so doing, they enjoy a margin of appreciation,

greater subsidiarity and the acknowledgement of a more generous margin of appreciation across the contracting parties. On another, it might be interpreted as little more than a formalisation of concepts of interpretation that have been commonplace in the jurisprudence of the European Court of Human Rights since at least the *Handyside* decision in 1976.¹¹³

The Joint Parliamentary Committee on Human Rights has welcomed the amendment to the Preamble to the Convention prompted by the Brighton process saying that it ‘signifies a new era in the life of the Convention, an age of subsidiarity, in which the emphasis is on States’ primary responsibility to secure the rights and freedoms set out in the Convention.’¹¹⁴ While the European Court of Human Rights’ continuing commitment to the subsidiarity principle had begun to be perceived as being increasingly in tension with the expanding scope of its jurisprudence, recent cases have hinted that the European Court’s respect for the democratic decision making processes of the member states runs deeper than critics of the Court would concede. In the *RMT* decision, the European Court reiterated that:

In the sphere of social and economic policy ... the court will generally respect the legislature’s policy choice unless it is ‘manifestly without legal foundation.’ Moreover, the Court has recognised the ‘special weight’ to be accorded to the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ.¹¹⁵

Though the UK Government was in fact successful at Brighton in securing support for a number of its initiatives concerning the primary importance of domestic mechanisms to the European structures of rights protection and the centrality of subsidiarity to the reasoning processes of the European Court, there is little evidence that the Brighton Declaration has in practice diminished dissatisfaction with the

subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.’

¹¹³ *Handyside v United Kingdom* (1979-1980) 1 EHRR 737, at [48]-[50].

¹¹⁴ Joint Committee on Human Rights, *Protocol 15 to the European Convention on Human Rights*, HL 71/HC 837 (2 December 2014), at [3.17].

¹¹⁵ *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, at [99]. See also: *James v United Kingdom* (1986) 8 EHRR 123, at [43].

Convention and European Court within the Conservative membership of the Coalition Government and the Conservative 2015 General Election manifesto duly committed to introduce a UK Bill of Rights which would ‘break the formal link between British courts and the European Court of Human Rights.’¹¹⁶

6: CONCLUSION: THE RENATIONALISATION OF HUMAN RIGHTS?

In spite of the evidence of the continuing effort on the part of the Court to accommodate, and respond to, the decentralising pull of the Convention’s states membership, there remains a powerful sense – within UK constitutional and political discourse – that the centralising influence of the European Court of Human Rights remains too great. On the one hand, domestic courts have begun to address the perceived imbalance between national and European protections for rights – in part a product of their own interpretation of the provisions of the Human Rights Act – through examination of those circumstances in which departure from the Convention jurisprudence might be possible. This subtle movement in the courts’ understanding of the role of the Act has been accompanied by more direct attempts to accentuate the continuing utility of the common law as a means by which rights can be protected. Attempts by Supreme Court Justices to re-emphasise that the enactment of the Human Rights Act did not ‘supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European Court’¹¹⁷ have sought to re-emphasise the capacity of national laws to complement the Convention’s protections.¹¹⁸ This common law ‘resurgence’ provides partial evidence of a trend towards the decentralisation of rights protections within the Convention system,¹¹⁹ but it is also arguably a self-correction on the part of the domestic judiciary

¹¹⁶ The Conservative Party Manifesto 2015, p.60. Despite (at the time of writing) the continued absence of formal legislative proposals in this regard, the Government appears committed to the replacement of the Human Rights Act with a UK Bill of Rights (House of Commons Justice Committee, Oral Evidence, The Work of the Secretary of State HC620, 7 September 2016, Q78-Q91).

¹¹⁷ *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, at [57].

¹¹⁸ *A v British Broadcasting Corporation* [2014] UKSC 25; [2015] AC 558, at [57].

¹¹⁹ R. Masterman and S. Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] EHRLR 57. See also: P. Scott, ‘On “Domestic” Law and the Law of Human Rights’ (2014) 25 KLJ 147; S. Stephenson, ‘The Supreme Court’s Renewed Interest in Autochthonous Constitutionalism’ [2015] PL 394.

of what came to be seen as an overly-limiting interpretation of the provisions of the Human Rights Act itself.

More pertinent – and as much a response to the European Court itself as to the deficiencies of the Human Rights Act – is the debate surrounding the potential adoption of a UK Bill of Rights. This debate is an exercise stimulated by a strongly-held perception that the European Court of Human Rights has adopted an overly-centralised approach to the application and interpretation of the Convention, and has upset the delicate balance between the collaborative responsibilities of court and member state in the Convention project. The adoption of a UK Bill of Rights would – its supporters hope – be a firm assertion of decentralisation and an attempt to recapture national powers ceded to (or accumulated by) the European Court of Human Rights. It is a project premised on the need to reclaim ‘sovereignty’ and cement a relationship in which the (potentially exclusive) competences of states and European Court are more carefully demarcated and policed. As such, it is a defensive step towards a dualised model of federal relationship which seeks to underscore the autonomy of the member state at the expense of the Convention’s animating sense of pan-European co-operation.