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TAKING THE STRASBOURG JURISPRUDENCE INTO ACCOUNT: DEVELOPING A 'MUNICIPAL LAW OF HUMAN RIGHTS' UNDER THE HUMAN RIGHTS ACT

ROGER MASTERMAN*

Questions surrounding the legitimate extent of the judicial role have long been the source of controversy. Concerns that unelected and unrepresentative judges are 'legislating' rather than interpreting the law or are interfering in matters of 'democratically-endorsed' government policy, have often been, and will continue to be, raised by academics and politicians alike.¹ The question is one of separation of power – of the appropriate constitutional role and division of functions between the executive, judicial and legislative branches of the United Kingdom government. This debate has been given a new dimension by the Human Rights Act 1998 (hereafter HRA), most obviously through the courts' exercise of their power under section 3(1) of that Act – the duty to interpret primary and secondary legislation to be, as far as possible, compatible with 'the Convention rights.'² And indeed much has been made of the unique method by which

* Human Rights Centre, Department of Law, University Of Durham. The research on which this piece was based was undertaken as part of the AHRB-funded project, 'Judicial Reasoning and the Human Rights Act 1998.' I am grateful to Helen Fenwick and Gavin Phillipson for their extensive comments on earlier drafts. The phrase 'municipal law of human rights' is taken from the judgment of Laws LJ in *Runa Begum v Tower Hamlets London* [2002] 2 All ER 668, para 17: '... the court's task under the HRA ... is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as HRA s.2 enjoins us to do.'

¹ JAG Griffith *The Politics of the Judiciary* (Fontana Press London 1991) chapters 8 and 9; R Stevens *The English Judges* (Hart Publishing Oxford 2002) chapter 5; A Bradley 'Judicial Independence Under Attack' [2003] PL 397.

² 'The Convention Rights' are defined in s 1(1) HRA and include Arts 2-12 and 14 of the Convention, Arts 1-3 of the First Protocol and Arts 1 and 2 of the Sixth Protocol; the 'Convention Rights' are to be read with Arts 16-18 of the Convention. The discussion which follows should be taken as referring to the interpretation in the domestic context of those rights included in s 1(1) HRA; as regards those parts of the Convention which are not given 'further effect' through the HRA – for example Art 1 – it is entirely

the HRA reconciles the interpretative obligation under section 3(1) with the sovereignty of Parliament by way of the ‘declaration of incompatibility’ under section 4.³ The doctrine of parliamentary sovereignty imposes limits the scope of section 3(1); in spite of its ‘broad and malleable’⁴ language, which *might* permit ‘an interpretation which linguistically may appear strained,’⁵ does *not* sanction courts to act as legislators.⁶ As Lord Nicholls of Birkenhead noted in *Re S; Re W*, attributing to a statutory provision, ‘a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.’⁷ That case has been seen by some as a retreat from what has been termed the ‘farfetched’ interpretation of section 3(1) adopted by the House of Lords in the earlier decision of *R v A*.⁸ Nicol, for one, has argued that *Re S; Re W* and *Anderson*⁹ taken together, clearly reject ‘the notion that “interpretations” could conflict with clear statutory words’ – as *R v A* had arguably suggested – thereby endorsing parliamentary sovereignty, above the Convention, ‘as the country’s supreme constitutional doctrine.’¹⁰ For it to retain its legitimacy therefore, the judicial act under section 3(1) therefore needs to remain an

arguable that a closer adherence to the Strasbourg case-law than advocated in the following might be appropriate: on which see *R (on the application of Al-Skeini) v Secretary of State for Defence* [2005] HRLR 3.

³ On which see: C Gearty ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 LQR 248. The ability to grant such a declaration is however, only vested in the ‘higher’ courts: s 4(5) HRA.

⁴ R Clayton ‘Judicial Deference and “Democratic Dialogue”: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] PL 33, 34.

⁵ *R v A (No 2)* [2002] 1 AC 45, 68, per Lord Steyn.

⁶ For commentary on the developing case-law on s 3(1) HRA see: Gearty (n 3); G Phillipson ‘(Mis)-Reading Section 3 of the Human Rights Act’ (2003) 119 LQR 183; C Gearty ‘Revisiting Section 3 of the Human Rights Act’ (2003) 119 LQR 551; A Kavanagh ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ 24(2) OJLS (2004) 259.

⁷ *Re S (Children) (Care Order: Implementation of Care Plan); Re W (Children) (Care Order: Adequacy of Care Plan)* [2002] 2 AC 291, para 40, per Lord Nicholls.

⁸ *R v A (No 2)* (n 5).

⁹ *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

¹⁰ D Nicol ‘Statutory Interpretation and Human Rights after *Anderson*’ [2004] PL 274, 280. Cf A Kavanagh ‘Statutory interpretation and human rights after *Anderson*: A more contextual approach’ [2004] PL 537.

exercise of ‘interpretation’: to attribute a meaning to a legislative provision ‘quite different from that which Parliament intended ... would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act’.¹¹ It would ‘not be judicial interpretation but judicial vandalism.’¹²

It would however, be a mistake to confine discussion of the legitimacy of the judicial role under the HRA to the reaches of sections 3(1) and 4 alone, since section 2(1) also allows the court a significant margin of discretion. Although the overt purpose of the Act is to ‘give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights’, domestic courts are neither bound to strictly ‘follow’ or ‘apply’ the jurisprudence of the European Court of Human Rights.¹³ Under section 2(1) of the Act, courts and tribunals have a duty to ‘take into account’ the jurisprudence of the Strasbourg institutions in adjudication under the Act: a duty which, *prima facie*, does not appear to guarantee adherence to that case-law in practice, ‘since it is open to the judiciary to consider, but disapply a particular decision.’¹⁴ The courts’ duty, under section 6(1) and 6(3)(a), to act compatibly, ensures that a *direct* conflict with the principles of the Convention rights themselves is unlikely to result from a decision under the Act; to provide a protection below the minimum standard afforded by Strasbourg would be an apparent contravention of those provisions. But it is this duty, to only ‘take into account’ the Convention case-law, coupled with the nature of that jurisprudence, that brings a new perspective to the idea of maintaining legitimacy in judicial decision-making.

Section 2(1) gives the Convention jurisprudence the effect of persuasive authority in domestic law. The court’s discretion therefore lies in the degree of consideration to afford to the Strasbourg authority. Certain characteristics of the ‘relevant’ authority, or circumstances of the case in hand, may lead the court to place differing degrees of reliance on decisions of the Strasbourg organs – in deciding whether or not to take into

¹¹ *Anderson* (n 9) para 30, per Lord Bingham.

¹² *ibid.*

¹³ Although questions of ‘compatibility’ under s 3(1) and s 6(1) are determined by reference to ‘the Convention rights.’

¹⁴ H Fenwick *Civil Liberties and Human Rights* (3rd Ed) (Cavendish London 2002) 146-147.

account seeming conflicting decisions of the Commission and the European Court of Human Rights a domestic court might legitimately decide to give more weight to the decision of the European Court as the superior and final court of review. Equally, considerations of time are apt – the effect of the Convention may alter over time; it is a ‘living instrument’ to be given a ‘dynamic interpretation in the light of conditions prevailing at the time a matter falls to be considered.’¹⁵ Domestic courts might therefore also afford increased weight to a recent decision of the Grand Chamber of the European Court than to, say, a decision of the Court handed down 20 years ago. Although this hierarchy has been acknowledged in the domestic jurisprudence under the HRA, courts have tended to focus on the issue of whether or not to follow the relevant decision or decisions in question.¹⁶

In terms of the construction of s.2(1) the courts’ obligation would appear to be satisfied by simply considering the Strasbourg authority put before it; having taken the decision into account it would not be obliged to follow or apply its reasoning. But the challenge laid down to the domestic judiciary lies in those areas in which the Strasbourg authorities cannot simply be ‘followed’: whether because a wide margin of appreciation has been afforded, that the relevant decisions of the Strasbourg court do not define the content of the right in question, or simply because of the fact that ‘decisions of the European Court are not infrequently Delphic in character.’¹⁷ It is in these areas that the question of maintaining legitimacy in judicial decisions arises; if sufficient direction cannot be gleaned from the Convention case-law, to where is the domestic judge to look for guidance?

This piece argues that the HRA need not simply be an instrument for achieving mere compatibility with the Strasbourg standard of those rights given effect through that Act. The view taken is that the HRA should be used as a mechanism not only for the

¹⁵ S Grosz, J Beatson and P Duffy *Human Rights: The 1998 Act and the European Convention* (Sweet and Maxwell London 2000) 18.

¹⁶ R Masterman ‘Section 2(1) of the Human Rights Act 1998: Binding domestic courts to Strasbourg?’ [2004] PL 725, 731-735.

¹⁷ ATH Smith ‘The Human Rights Act: the Constitutional Context’ in Cambridge Centre for Public Law *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing Oxford 1999) 6.

‘maintenance’ of the Convention rights in domestic law, but also for the ‘further realisation of human rights and fundamental freedoms’, a view which, it is argued, finds support in both the Parliamentary debates on the Human Rights Bill and in the Convention itself.¹⁸ If the HRA is a tool designed to facilitate the development of a domestic law of human rights grounded in – and sensitive to – Convention law and principles then the courts will increasingly need to have regard to alternate sources of authority, sources that compensate for the limitations of the Strasbourg case-law. But an increasing reliance on wider authority might also lead to accusations of exceeding the power conferred on the judiciary by the HRA. The Act explicitly states that questions of compatibility in relation to legislation, and of lawfulness, in relation to executive acts¹⁹ are to be gauged by reference to ‘the Convention rights’; an increased regard to alternate sources of authority – to the exclusion of the Convention and its jurisprudence – would result in significant difficulties for the application of sections 3(1), 4 and 6(1) for example.

The first part of this piece suggests that taking a progressive stance to the Convention rights under the HRA is legitimised by the fact that the Convention is a ‘living instrument’, by the position of the HRA itself as a ‘Constitutional statute’ in domestic law, and by the unsuitability of the Strasbourg jurisprudence to simply be transposed into domestic law. Secondly, this piece attempts to illustrate a number of areas in which the domestic courts are adopting a ‘generous and purposive’ approach to the interpretation of the HRA – by looking to sources of authority beyond the Strasbourg jurisprudence – and in doing so are simultaneously addressing some of the limitations of the ECHR as a template for a domestic human rights jurisprudence. It is in these areas that we may be seeing the emergence of what might be called a ‘municipal law of human rights.’

¹⁸ The preamble to the ECHR contains the following: ‘Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms.’

¹⁹ Section 6(1) HRA.

I. A 'PROGRESSIVE' OR 'COMPATIBILITY' APPROACH TO THE CONVENTION RIGHTS?

A. A 'living instrument'

The degree of protection offered to the Convention rights under the Strasbourg system is by no means static. The European Court of Human Rights has consistently stated that the Convention is a 'living instrument which ... must be interpreted in the light of present day conditions.'²⁰ Thus the Strasbourg Court is not formally bound to follow its own judgments²¹ – 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.'²² The precise content of or, perhaps more accurately, the minimum level of protection afforded by a Convention right may therefore develop over time.²³ That the Convention itself assumes that domestic courts will *also* take a progressive approach to the rights and fundamental freedoms it contains is evident from the wording of the preamble to the ECHR, particularly in its reference to the 'further realisation' of the rights and freedoms it provides. The laying down of minimum standards demonstrates not only that, in the view of the Strasbourg institutions, there is no requirement of a pan-European standard across the range of rights afforded, but also that States parties should be free to develop an enhanced protection within their national legal systems (without falling below an 'irreducible minimum which will be monitored by the Strasbourg institutions').²⁴ In the Convention system, the domestic authorities of the States parties are primarily responsible for upholding the Convention rights – with the Convention institutions themselves providing a secondary, or supervisory, layer of protection – as the European Court noted in its judgment in the *Handyside* case:

²⁰ *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, para 30.

²¹ See eg *Cossey v United Kingdom* (1991) 13 EHRR 622, para 35.

²² *Stafford v United Kingdom* (2002) 35 EHRR 32, para 68.

²³ 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, per Lord Clyde.

²⁴ Grosz, Beatson and Duffy (n 15) 20. See also *Handyside v United Kingdom* (1979-1980) 1 EHRR 737, para 49.

... the machinery of protection established by the Convention is subsidiary to the national systems regarding human rights ... by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.²⁵

And it is not only on the executive or legislative branches that this burden of progressive development falls; as Judge Martens, formerly of the European Court of Human Rights has observed, the role of the domestic judiciary under the Convention system: ‘ ... goes further than seeing to it that the minimum standards in the ECHR are maintained. That is because the ECHR’s injunction to further realise human rights and fundamental freedoms contained in the preamble is also addressed to domestic courts.’²⁶ This view may go so far as to suggest that the obligation on national authorities to further the Convention’s ‘minimum’ standards – to take more than a minimalist, or mere compatibility approach – exists independently of the provisions of the HRA itself. But nevertheless, that the Labour Government intended the domestic courts to take a purposive approach to the Convention rights under the HRA is apparent from the Parliamentary debates on the Human Rights Bill.

In rejecting a Conservative amendment which would have replaced the words ‘must take into account’ with ‘shall be bound by’ in Clause 2 of the Bill, the then Lord Chancellor, Lord Irvine of Lairg, identified three reasons why the domestic judiciary should not be bound to follow the decisions of the Strasbourg institutions. The first was that the Convention itself, rather than the decisions of the Strasbourg bodies, was the ‘ultimate source of the relevant law.’²⁷ Secondly, under the terms of the Convention, the United Kingdom is only strictly bound to ‘abide by’ decisions of the Strasbourg court in

²⁵ *Handyside v United Kingdom* (n 24) para 48.

²⁶ Judge Sibrand Karel Martens ‘Incorporating the European Convention: the role of the judiciary’ (1998) EHRLR 5, 14.

²⁷ HL Deb vol 583 col 514 18 November 1997.

cases in which it has been involved as a party to the proceedings.²⁸ Finally, and most importantly when considering whether domestic courts should adopt a progressive or compatibility-only approach to the Convention standards, Lord Irvine proposed that ‘our courts must be free to give a lead to Europe as well as to be led.’²⁹ When the Bill reached Report Stage he elaborated on this, saying:

The courts will often be faced with cases that involve factors perhaps specific to the United Kingdom which distinguish them from cases considered by the European Court ... it is important that our courts have the scope to apply that discretion so as to aid the development of human rights law.³⁰

The Parliamentary debates give few hints as to the specific circumstances in which a domestic court might legitimately depart from Strasbourg jurisprudence; but for determining the question of whether a purposive approach to the Convention rights under the Act was envisaged, the very fact that domestic courts are not bound to follow or apply the Strasbourg jurisprudence seems to point towards a positive answer.³¹

That the HRA might be used as a tool for the development of domestic common law standards is not in doubt; Lord Irvine, for example, saw the HRA as a tool which might, over time, enable the common law to fashion a right of privacy based on Article 8

²⁸ *ibid.* Art 46(1) ECHR provides: ‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are the parties.’ Art 46(2) provides the task of supervising the execution of such a judgment is exercised by the Committee of Ministers.

²⁹ *ibid.*

³⁰ HL Deb vol 584 cols 1270-1271 19 January 1998.

³¹ The House of Lords seems to have in general adopted quite a strict approach to the issue of ‘following’ Strasbourg decisions. The following quote from Lord Bingham is a typical example: ‘In my opinion, even if the United Kingdom courts are only to take account of the Strasbourg decisions and are not strictly bound by them (s.2 of the Human Rights Act 1998), where the Court has laid down principles and, as here a minimum threshold requirement, United Kingdom courts should follow what the court has said. If they do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.’ (*R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653, para 44).

and its jurisprudence.³² That the rights conferred by domestic courts under the Act could be more limited than those afforded by the European Court of Human Rights is seemingly prohibited by section 2(1) and 6(1) HRA taken together – since the domestic court would be acting incompatibly with the European Court’s conception of the Convention right at stake.³³ But refusing to oblige domestic courts to follow the relevant Strasbourg decisions not only allows courts under the HRA to assert Convention rights in domestic law, but opens up the possibility of ‘developing a domestic jurisprudence under the Convention which may be more generous to applicants than that dispensed at Strasbourg, while remaining broadly consistent with it.’³⁴ In consequence, some commentators have argued that the courts’ duty under section 2(1) was the legislative provision which had the potential to turn the HRA into a ‘Bill of Rights’ for the United Kingdom.³⁵

B. A ‘Constitutional Statute’

Furthermore, as Richard Clayton QC has observed,³⁶ the HRA is a ‘constitutional statute’ – a legislative measure which, as defined by Laws LJ in *Thoburn*, either ‘(a) conditions the legal relationship between the citizen and the state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we now regard as fundamental constitutional rights’³⁷ – a view which has received support from the House of Lords in

³² HL Deb vol 595 col 784-786 24 November 1997.

³³ *R (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26, para 20, per Lord Bingham.

³⁴ Grosz, Beatson and Duffy (n 15) 20. A possibility which has been recognised in domestic litigation: ‘... so there can be situations where the standards of respect for the rights of the individual in this jurisdiction are higher than those required by the Convention. There is nothing in the Convention setting a ceiling on the level of respect which a jurisdiction is entitled to extend to personal rights’ (*R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire* [2003] 1 All ER 148, 157-158, per Lord Woolf).

³⁵ F Klug ‘The Human Rights Act—A “Third Way” or “Third Wave” Bill of Rights’ (2001) EHRLR 361, 370; D Bonner, H Fenwick and S Harris-Short ‘Judicial Approaches to the Human Rights Act’ (2003) 52 ICLQ 549, 553.

³⁶ Clayton (n 4) 33-34.

³⁷ *Thoburn v Sunderland City Council* [2003] QB 151, para 62.

HRA cases.³⁸ Thus, ‘relatively strict methods of interpretation’ may not be suitable, as ‘constitutional adjudication needs to be approached generously in order to afford citizens the full measure of the protections of a Bill of Rights.’³⁹ And, as Clayton suggests, ‘constitutional’ instruments have, in the jurisprudence of the Judicial Committee of the Privy Council, consequently been afforded a ‘generous and purposive’ interpretation.⁴⁰ In his commentary on the movement away from the ‘austerity of tabulated legalism’ in the jurisprudence of the Judicial Committee, Ewing has written of the decision in *Minister of Home Affairs v Fisher*:

Lord Wilberforce thought it was appropriate to point out that the Privy Council was ‘concerned with a Constitution’ which had ‘certain special characteristics’ which included the fact that it was ‘drafted in a broad and ample style’ and was ‘greatly influenced by’ the European Convention on Human Rights. These considerations called for a generous interpretation ...⁴¹

The parallels are clear: the HRA is a ‘constitutional instrument’ in the terms of the English common law; it is ‘expressed in the open-textured language appropriate to a

³⁸ See eg *Brown v Stott* (n 23) 703, per Lord Bingham.

³⁹ Lord Steyn, ‘The New Legal Landscape’ [2000] EHRLR 549, 550.

⁴⁰ On which see KD Ewing, ‘A Bill of Rights: Lessons from the Privy Council’ in W Finnie, CMG Himsworth and N Walker (eds) *Edinburgh Essays in Public Law* (Edinburgh University Press Edinburgh 1991) 236-241.

⁴¹ *ibid.*, 238-239. In that case Lord Wilberforce outlined the ‘generous and purposive’ approach to be taken suggesting that it would, ‘treat a constitutional instrument such as this *sui generis*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law.’ He continued, ‘[r]espect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point for departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences’ (*Minister of Home Affairs v Fisher* [1980] AC 319, 329).

constitutional charter'⁴²; and to suggest that an Act, the manifest purpose of which was to 'give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights' was not 'greatly influenced by' that document could hardly be countenanced. In a number of decisions under the HRA this 'generous and purposive'⁴³ approach to its interpretation has been recognised as correct – *Kebilene*⁴⁴ and *Brown v Stott*⁴⁵ are two examples – and yet as Clayton has observed:

[t]he English courts have not so far laid any particular emphasis on the importance of interpreting the [Human Rights] Act generously. In fact, there is an obvious tension between the courts giving effect to the HRA as a constitutional instrument and avoiding the charge of excessive judicial activism.⁴⁶

C. Using Strasbourg as a template for a domestic human rights jurisprudence

This tension is exacerbated by the fact that the Convention and its jurisprudence demand of the domestic judiciary a more creative intervention than that required by the application of a statutory provision to a given set of circumstances. The deficiencies of the Convention and its case-law as a basis of a domestic human rights jurisprudence are threefold: firstly there is the relative weakness of the Convention itself as a statement of positive rights; secondly there is a tendency towards paucity in the Convention jurisprudence in respect of actually defining the content of the rights it protects; finally, there is the application of the margin of appreciation.

As to the first of these limitations, it is the structure of the Convention itself, and the exceptions to the rights provided, which provides a hindrance to its direct application in domestic law. As Ewing and Gearty have written:

⁴² A Lester 'The Human Rights Act 1998 – Five Years On' [2004] EHRLR 258, 259-260.

⁴³ It should be noted that there has been some disagreement over the appropriateness of giving the Convention rights themselves a 'generous' interpretation: see D Pannick 'Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment' [1998] PL 545; RA Edwards, 'Generosity and the Human Rights Act: the right interpretation?' [1999] PL 400.

⁴⁴ *R v DPP, ex parte Kebilene* [2000] 2 AC 326, 375, per Lord Hope.

⁴⁵ *Brown v Stott* (n 23) 703, per Lord Bingham.

⁴⁶ Clayton (n 4) 34.

It is well known that the terms of the Convention are extremely vague, with most freedoms enjoying only qualified protection and with much depending on such vague phrases as ‘necessary in a democratic society’, ‘pressing social need’ and proportionality.⁴⁷

As to the condition that a restriction be ‘necessary in a democratic society,’ the European Court of Human Rights has offered some assistance in defining the meaning of this nebulous phrase, ruling out the ‘flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”’ and noting that it implied the existence – rather circuitously – of a ‘pressing social need.’⁴⁸ But even with such guidance, as Lord Irvine has written of the nature of human rights instruments more generally, ‘their linguistic texture and their evolutive nature necessarily leave the judges with a significant margin of interpretative autonomy.’⁴⁹

This ‘interpretative autonomy’ will be constrained to an extent by the courts’ duty to ‘have regard’ to the jurisprudence of the Strasbourg bodies, but, as suggested above, the nature of the Strasbourg case-law itself ensures that there will remain scope for a certain degree of judicial creativity on the part of the domestic judge. In part this may be attributable to the fact that many such decisions of the Strasbourg organs are not suitable to be applied or followed in strict terms. Judgments of the European Court of Human Rights are ‘essentially declaratory’⁵⁰ 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). That the

⁴⁷ KD Ewing and CA Gearty, ‘Rocky Foundations for Labour’s New Rights’ (1997) EHRLR 146, 147. See also S Fredman ‘Scepticism under Scrutiny: Labour Law and Human Rights’ in T Campbell, KD Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press Oxford 2001) 210.

⁴⁸ *Handyside v United Kingdom* (n 24), para 48.

⁴⁹ Lord Irvine of Lairg ‘Activism and Restrain: Human Rights and the Interpretive Process’ in Cambridge Centre for Public Law *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing Oxford 1999) 14.

⁵⁰ DJ Harris, M O’Boyle and C Warbrick *Law of the European Convention of Human Rights* (Butterworths London 1995) 26.

Strasbourg authorities recognise that a certain amount of adaptation may be necessary to give effect to their decisions at the national level is evident from the allowance that a State is free to implement such decisions ‘in accordance with the rules of its national legal system.’⁵¹ Furthermore, the declaratory nature of a Strasbourg decision might necessarily demand an element of resourcefulness from the domestic judiciary because of the possibility that it does not specify a standard to be applied as such as: ‘it is difficult, sometimes, to read them as giving rise to any clear *ratio decidendi* of the kind sought and applied by common lawyers.’⁵²

That the application of an Article may also vary as between the States parties to the Convention may also make the Convention jurisprudence difficult to ‘apply’ strictly in domestic law:

The court has not required that the States travel forward at the speed of the fastest. Where there remains diversity among the States’ practices, a State may well be justified in maintaining its position. While States may experiment (by conceding more to individuals than the Convention presently requires), other states will not be compelled to imitate the innovation; but if they follow suit voluntarily, there may come a time when the laggards will be held to be in breach of their Convention obligations.⁵³

The margin of appreciation afforded in a given area – taken with the status of the Convention as a ‘living instrument’ – may make it increasingly likely that the range of permissible responses or restrictions may accordingly differ from one State to the next over time. Domestic courts should therefore take care to note those cases in which a State has been afforded a margin of appreciation and on which they are asked to place

⁵¹ *ibid.*, where the example given is of *Vermeire v Belgium* (1993) 15 EHRR 488.

⁵² Smith (n 17) 6.

⁵³ C Warbrick “‘Federal’ aspects of the European Convention on Human Rights’ (1989) 10 *Michigan Journal of International Law* 698, 715-716.

reliance.⁵⁴ As the application of the doctrine inherently involves a degree of respect for the judgment of the national decision-maker – one which takes into account the prevailing circumstances in that State⁵⁵ – domestic courts would be advised not to adopt unquestioningly similar reasoning without noting the breadth of the margin afforded in such circumstances, especially where the judgment of the Strasbourg authorities is addressed to another State party. As Fenwick and Phillipson have suggested, in the context of direct action protest, the tendency of the Strasbourg institutions to afford a wide margin of appreciation to States parties has a number of consequences:

Review of the ‘necessity’ of State interferences is not intensive, at times appearing to be confined to ensuring actions were taken in good faith and were not manifestly unreasonable ... States are typically not required to demonstrate that lesser measures than those actually taken would have been inadequate to deal with the threats posed ... the effect of this ‘light touch’ review may also be seen in the tendency to deal with crucial issues – typically proportionality, but also in some cases the scope of the primary right – in such a brusque and abbreviated manner that explication of the findings is either non-existent or takes the form of mere assertion.⁵⁶

This is not to say that the domestic judiciary cannot gain any enlightenment through recourse to such decisions – simply that the margin of appreciation is a further factor to be ‘taken into account’ when determining the degree of reliance to be placed upon a judgment or opinion by a domestic court in coming to its decision.

D. Strasbourg ‘precedent’ and principle

⁵⁴ And should also note that the margin of appreciation may not only vary as between subject matter but also as between the justification relied upon for the restriction of a right: *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 59.

⁵⁵ Although – in the words of the Commission – those circumstances ‘cannot of themselves be decisive’ (*Dudgeon v United Kingdom* (1981) 3 EHRR 40, para 114).

⁵⁶ H Fenwick and G Phillipson ‘Direct Action, Convention Values and the Human Rights Act’ (2001) 21 LS 535, 553-554.

Whilst the above suggests that there are a number of factors to be taken into account in considering the relevance of a given Strasbourg decision or decisions – and hint at the potential for a more expansive domestic interpretation of the Convention rights – domestic courts, in particular the House of Lords, have approached section 2(1) in a curious manner, treating ‘relevant’ Strasbourg jurisprudence as tantamount to binding, rather than guiding or persuasive authority, as the obligation to ‘take into account’ seems to suggest.⁵⁷ As Lord Slynn suggested in *Alconbury*:

Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.⁵⁸

And while it could be suggested that the phrase ‘clear and constant’ actually gives courts considerable scope to depart from Strasbourg case-law – in particular in an area where that jurisprudence is rapidly developing⁵⁹ – in the absence of guidance as to what might amount to ‘special circumstances’⁶⁰ the possibility of lower courts unquestioningly adopting the relevant reasoning of Strasbourg is quite real. While Clapham recognises this constrained approach as one of the potential hazards of transposing an international treaty into a national ‘bill of rights,’ it also brings with it the potential both to frustrate the object of the ECHR itself – the ‘further realisation’ of the Convention rights – and of the

⁵⁷ Masterman (n 16).

⁵⁸ *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. See also *Anderson* (n 9), para 18; *Amin* (n 31), para 44.

⁵⁹ Compare, for example, *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163 with *Goodwin v United Kingdom* (2002) 35 EHRR 18.

⁶⁰ For discussion of the possible justifications for departing from ‘relevant’ Strasbourg case-law, see below n 113-116.

HRA by running the risk of confining the domestic judiciary to a compatibility-only approach to the Convention rights. This may be a particular problem where ‘no international consensus emerges regarding the standard to be applied’; as Clapham has written:

... the problem is that judges or Governments may be tempted to point to such minimum standards as evidence of the limits of the human rights at stake. The challenge is to ensure that national courts treat the international human rights as a part of the national heritage and interpret them in the national context so as to give the appropriate maximum protection at the national level ... It is important that national courts have the autonomy to interpret the relevant international human rights so as to make them appropriate to the national culture.⁶¹

This is not to suggest that the domestic courts under the HRA have ruled out the possibility of adopting a more expansive approach to the Convention rights where appropriate,⁶² but simply to suggest that an overly slavish attitude to the Convention jurisprudence, perpetuated by an adherence to the language of precedent, makes it highly unlikely. And indeed, despite an apparent acceptance that the HRA is deserving of a ‘generous and purposive’ interpretation, recent decisions in the House of Lords have indicated that this may not extend so far as to develop an enhanced protection – beyond

⁶¹ A Clapham ‘The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights’ in P Alston (ed) *Promoting Human Rights Through Bills of Rights* (Oxford University Press Oxford 1999) 134-135.

⁶² Although some judicial comment seems to indicate that although national courts might have the autonomy to give ‘maximum protection’ to the international standards at the domestic level, they would not necessarily do so if that means going beyond the ‘Strasbourg standard’: ‘... it is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’ (*Ullah* (n 33) para 20, per Lord Bingham).

that offered by the Convention – to the Convention rights in domestic law, where that does not already exist.⁶³

An approach to the courts' duty in section 2(1) HRA which is arguably less inclined to simply 'follow any clear and constant jurisprudence' of the Strasbourg institutions can be found in the dicta of Laws LJ:

... the court's task under the HRA ... is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as HRA s.2 enjoins us to do.⁶⁴

The reasoning of Laws LJ has received some support from Sir Andrew Morritt VC in the Court of Appeal: '[o]ur task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues. In the light of s.2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the Convention.'⁶⁵ This approach takes a more holistic view of the Convention jurisprudence, aiming to draw on the principles which underpin the Convention and its case-law rather than attempting to apply or follow individual decisions. In terms of the interpretation of constitutional documents this approach also receives support from the jurisprudence of the Judicial Committee of the Privy Council

⁶³ *ibid.*, see also *R v Chief Constable of South Yorkshire, ex parte LS; R v Chief Constable of South Yorkshire, ex parte Marper* [2004] UKHL 39, para 27, per Lord Steyn, para 66, per Lord Rodger, and para 78, per Baroness Hale.

⁶⁴ *Runa Begum v Tower Hamlets London* [2002] 2 All ER 668, para 17. See also *R (on the application of Prolife Alliance) v British Broadcasting Corporation* [2002] 2 All ER 756, paras 33-44: 'The English court is not a Strasbourg surrogate ... our duty is to develop, by the common law's incremental method, a coherent and principled domestic law of human rights ... treating the ECHR text as a template for our own law runs the risk of an over-rigid approach.'

⁶⁵ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2002] Ch 51, 65.

A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the *traditions and usages* which have given meaning to that language.⁶⁶

By not treating relevant Strasbourg authority as equivalent to binding precedent, this interpretation of the court's duty under section 2(1) may open up the possibility of adopting a less deferential attitude to the 'clear and constant' jurisprudence of the Convention organs, and might require the court to assert why a decision is suitable to be 'followed' or 'applied' in the domestic context.

In other words, in constitutional interpretation and adjudication it may not be sufficient to look to individual decisions in the abstract. Equal attention must be paid to the aims of the document in question – in the case of the Convention the maintenance and further realisation of human rights and fundamental freedoms and the preservation of effective political democracy⁶⁷ – and to the values enshrined in that document – pluralism, tolerance and broadmindedness, the rule of law with access to the courts, and freedom of expression, which is 'one of the essential foundations of a democratic society and one of the basic conditions for its progress.'⁶⁸ In giving meaning to the language of the Convention the Strasbourg organs have established a number of guiding principles which permeate the Convention jurisprudence: the protection afforded to the Convention rights must be 'practical and effective' not 'theoretical and illusory.'⁶⁹ A fair balance should be struck, 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'⁷⁰ The exceptions to the qualified rights must be 'narrowly interpreted,'⁷¹ and any restriction imposed on a

⁶⁶ *Minister of Home Affairs v Fisher* (n 41) 329, per Lord Wilberforce.

⁶⁷ *Brown v Stott* (n 23) 707, per Lord Steyn. For the viewpoint of the Strasbourg Court on the objectives of the Convention see: *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121, paras 43-45.

⁶⁸ D Pannick and A Lester *Human Rights Law and Practice* (Butterworths London 1999) 68-69.

⁶⁹ *Artico v Italy* (1981) 3 EHRR 1, para 33.

⁷⁰ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69.

⁷¹ *Sunday Times v United Kingdom* (n 54) para 65.

protected right must be proportionate to the legitimate aim pursued. Admittedly, it is highly unlikely that such principles will be determinative of individual cases in the abstract, or be of help in defining the precise content of a right or rights, in domestic law, but ensuring a firm grounding in Convention principle will safeguard against the overturning of a domestic decision at Strasbourg. Equally, adopting the Convention principles as aids to the interpretation of the Strasbourg case-law might well lead to the domestic court giving a more generous protection to the right in question by interpreting an exception to the right narrowly where the European Court of Human Rights has arguably not done so.⁷²

In those areas where the Strasbourg organs have traditionally afforded a wide margin of appreciation, recourse to the principles underlying the Convention becomes of increased importance. In the areas where the Strasbourg case law affords little or no direct guidance – either where the primary source of authority exists only in admissibility decisions,⁷³ or where the Court has deferred to the judgment of the national authorities⁷⁴ – ‘indirect guidance may be obtained from it, but only by a process of inference; therefore the principles deriving from the Strasbourg jurisprudence should generally be called upon to underpin and guide this inferential process.’⁷⁵

II. ALTERNATIVE SOURCES OF AUTHORITY

Discussions of judicial attempts to reconcile the ‘constitutional’ status of the HRA with the limitations on the judicial role have largely focussed on the boundary between legitimate interpretation and illegitimate legislation under section 3(1) HRA. And in treating ‘clear and constant’ Strasbourg authority as precedent the domestic courts are – on the whole – safeguarding against accusations of the judge ‘govern[ing] society on the

⁷² As in, for example, *Otto-Preminger Institute v Austria* (1985) 19 EHRR 34.

⁷³ As in, for example, the case-law on public protest, on which see: H Fenwick and G Phillipson ‘Public Protest, the Human Rights Act and Judicial Responses to Political Expression’ [2000] PL 627, 640-641.

⁷⁴ Strasbourg decisions on restrictions on freedom of expression on grounds of morality provide useful examples: *Handyside v United Kingdom* (n 24); *Müller v Switzerland* (1991) 13 EHRR 212.

⁷⁵ Fenwick and Phillipson (n 56) 564.

basis of his own philosophy, his own biases, or his own worldview.’⁷⁶ But in placing reliance on sources of authority and legal principle beyond the Strasbourg jurisprudence, domestic courts are beginning to address some of the limitations of the Convention case-law, and are giving a ‘generous and purposive’ interpretation to the section 2(1) of the HRA itself.

A. Sources of comparative law

The text of section 2(1) allows scope for – or at least does not expressly prohibit – the consideration of jurisprudence from other jurisdictions. This may, as Klug has noted, be particularly appropriate where there is ‘little or no steer from the Strasbourg organs.’⁷⁷ That domestic courts have been willing to examine comparative jurisprudence has been evident from some of the earliest decisions taken under the HRA. In *Brown v Stott*⁷⁸ – a challenge to the admissibility of evidence obtained under section 172 of the Road Traffic Act 1988 on the basis that it compelled disclosure of certain information under threat of criminal sanctions in breach of Article 6 – Lords Bingham and Hope examined jurisprudence under the Canadian Charter on the right against self-incrimination. In that case Lord Hope, however, urged caution in the use of comparative standards and in so doing drew attention to the need to maintain a common approach noting that ‘care needs to be taken in the context of the European Convention to ensure that the analysis by the Canadian courts proceeds upon the same principles as those which have been developed by the European Commission and the European Court’⁷⁹ – hinting at the potential illegitimacy of a judicial decision which departed from those principles. Lord Hope’s concerns were echoed by Lord Bingham in *Attorney-General’s Reference, No 4 of 2002*,

⁷⁶ Justice Antonin Scalia ‘The Bill of Rights: Confirmation of Extent Freedoms or Invitation to Judicial Creation?’ in G Huscroft and P Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing Oxford 2002) 23.

⁷⁷ F Klug ‘The Human Rights Act 1998, *Pepper v Hart* and All That’ [1999] PL 246, 251. For a particularly useful examination of the use of comparative jurisprudence in human rights adjudication see C McCrudden ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20(4) OJLS 499.

⁷⁸ *Brown v Stott* (n 23).

⁷⁹ *ibid.*, 724.

with the requirement that domestic courts retain a firm grounding in the Convention jurisprudence made explicit: ‘the United Kingdom Courts must take their lead from Strasbourg.’⁸⁰

But what is interesting about the domestic courts’ reference to comparative jurisprudence is that it has *not* been restricted to those circumstances in which there is little or no ‘steer’ from the Strasbourg organs. In *Brown v Stott* for example, reference to the Canadian jurisprudence was not made as a consequence of the paucity of Strasbourg jurisprudence on self-incrimination,⁸¹ but to offer a perspective from a comparable court in the national setting, as opposed to that of an international court of review. In one sense therefore, the English courts can be seen to be taking an activist approach: in placing increased reliance on comparative jurisprudence in human rights adjudication, even where their primary source, the Convention case-law, has a wealth of ‘relevant’ jurisprudence available.⁸² In one sphere in particular, that of the protection of personal privacy under the common law doctrine of breach of confidence, the importation of a legal test from Australian law appeared – at least until the House of Lords decision in *Campbell*⁸³ – ‘to have had far more influence on the development of confidence as a privacy remedy than any principles derived from Article 8.’⁸⁴

More specifically, the possibility of reliance on comparative jurisprudence has been recognised as a legitimate way of compensating for the inadequacies of the Strasbourg authorities:

⁸⁰ *Attorney-General’s Reference, No 4 of 2002* [2004] UKHL 43, para 33. See also *Douglas v Hello! Ltd* [2001] QB 967, 989, per Brooke LJ.

⁸¹ *Funke v France* (1993) 16 EHRR 297, para 44; *Murray v United Kingdom* (1996) 22 EHRR 29, paras 44-45; *Saunders v United Kingdom* (1997) 23 EHRR 313, paras 67-76.

⁸² Although in those circumstances it should not simply be assumed that the domestic judge will ‘take account’ of decisions from other jurisdictions: *R (on the application of the National Union of Journalists v Central Arbitration Committee)* [2004] EWHC 2612, para 49, per Hodge J: ‘... it seems to me that ... the Canadian jurisprudence adds little to the interpretation in this case.’

⁸³ *Campbell v MGN Ltd* [2004] 2 AC 457.

⁸⁴ G Phillipson ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 65 MLR 726, 731.

The elastic and elusive nature of the Strasbourg doctrine of the ‘margin of appreciation’ is applied by the European Court on the basis of ad hoc pragmatic judgments, sometimes lacking in clear and consistent principles. The developing principles contained in the constitutional case law of courts in other common law countries – such as the Constitutional Court of South Africa, the Supreme Courts of the United States, Canada and India, the High Court of Australia, and the Court of Appeal of New Zealand – are likely to be at least as persuasive as the Strasbourg case law. Indeed in *Reyes v The Queen*,⁸⁵ Lord Bingham of Cornhill observed that ‘Decided cases around the world have given valuable guidance on the proper approach to the courts to the task of constitutional interpretation.’⁸⁶

Comparative jurisprudence from those countries outside the Council of Europe is likely to offer little in terms of the strict question of judging the *compatibility* of a statutory provision with the Convention rights themselves; similarly it is unlikely to point to the direction in which the common law should be developed to ensure or maintain compatibility with the Convention rights.⁸⁷

Comparative jurisprudence is likely to come most usefully into play – as in the decision in *Brown v Stott* – in the assessment of how other jurisdictions have dealt with similar limitations on rights or clashes between the individual and public interest. Equally useful for the process of assessing the legitimacy of a restriction in Convention terms will be the issue of alternative solutions or approaches adopted in comparable jurisdictions: the usefulness of this reasoning technique was demonstrated as a part of the proportionality inquiry undertaken in *R v A*, where Lord Hope of Craighead analysed the approaches taken by rape-shield provisions in the United States (Michigan, New Jersey and California), Australia (New South Wales and Western Australia), Canada and

⁸⁵ [2002] 2 WLR 1034, 1045.

⁸⁶ A Lester and L Clapinska ‘Human Rights and the British Constitution’ in J Jowell and D Oliver (eds) *The Changing Constitution* (5th ed) (Oxford University Press Oxford 2004) 83.

⁸⁷ An exception to this general point might be if the actual content of the Convention right was unclear.

Scotland.⁸⁸ Similarly in *R v Lambert*,⁸⁹ where Lord Steyn set down the ‘eloquent’ explanation of the presumption of innocence adopted by Sachs J in the South African Constitutional Court decision of *State v Coetzee*,⁹⁰ before endorsing the reasoning of Dickson CJC in the Supreme Court of Canada judgment in *R v Whyte*⁹¹ regarding the proportionate nature of restrictions on that presumption.

B. Fundamental common law rights

Prior to the implementation of the HRA the domestic case-law on fundamental, or constitutional, common law rights was – in UK-terms – a relatively sophisticated statement of positive rights, in comparison to the largely residual state of liberty in the UK at that time.⁹² In the *International Transport Roth* case, Laws LJ stated:

... the common law has come to recognise and endorse the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the Convention for the Protection of Human Rights and Fundamental Freedoms, but their recognition in the common law is autonomous ... the Human Rights Act 1998 now provides a democratic underpinning to the

⁸⁸ *R v A (No 2)* (n 5), paras 100-102. This case is also of interest due to the reliance placed in particular on two decisions of the Supreme Court of Canada – *R v Seaboyer* [1991] 2 SCR 577 and *R v Darrach* (2000) 191 DLR (4th) 539 – due to the similarity of the restrictions on admissible evidence in rape trials in place under the Canadian Criminal Code.

⁸⁹ *R v Lambert* [2002] 2 AC 545.

⁹⁰ *ibid*, para 34 (*State v Coetzee* [1997] 2 LRC 593).

⁹¹ *ibid*, para 35 (*R v Whyte* (1998) 51 DLR 4th 481).

⁹² As Lord Steyn has noted extra-judicially, the classification of a right as constitutional ‘is a powerful indication that added value is attached to the protection of the right. It strengthens the normative force of such rights. It virtually rules out arguments that such rights can be impliedly repealed by subsequent legislation’ (Lord Steyn ‘Dynamic Interpretation amidst an orgy of statutes’ [2004] EHRLR 245, 252). For criticisms of the common law method of rights protection see J Doyle and B Wells ‘How far can the common law go towards protecting human rights?’ in Alston (n 61) 17.

common law's acceptance of constitutional rights, and important new procedural measures for their protection.⁹³

And although the HRA has brought certain of the Convention Rights into play in domestic law, as the House of Lords recognised in *Anufrijeva*, 'the Convention is not an exhaustive statement of fundamental rights under our system of law.'⁹⁴ In his Third Annual Commonwealth Lecture, Lord Cooke of Thorndon outlined the rights recognised by the English common law as 'constitutional'; they are: 'the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege.' Further he adds, there exists a 'right of participation in the democratic process, equality of treatment, freedom of expression, religious freedom, ... the right of unimpeded access to the courts ... [and] also the right to a fair trial.'⁹⁵ These rights, Lord Cooke goes on, 'exist quite apart from the Human Rights Act'; their existence predates 2 October 2000 when that statute came into force.

The relationship between the rights conferred under the HRA and fundamental common law rights is something of an ambiguity which is yet to be clarified. It seems as if constitutional rights are not to be simply subsumed into the developing domestic jurisprudence concerning the 'Convention rights' as defined in section 1(1) of the HRA. The above dicta of Laws LJ suggests that the HRA has given a sense of democratic legitimacy to the common law of fundamental rights. And as Sedley LJ has said of the development of the common law in relation to the legal protection of personal privacy, the Convention rights and the common law, 'now run in a single channel,'⁹⁶ thereby seemingly suggesting that there exists a degree of symbiosis between the two.⁹⁷ It

⁹³ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, para 71.

⁹⁴ *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, para 27.

⁹⁵ Lord Cooke of Thorndon 'The Road Ahead for the Common Law' 53 ICLQ 273, 276-277.

⁹⁶ *Douglas and others v Hello!* (n 80) 998.

⁹⁷ The symbiotic relationship between the common law and a 'bill of rights' has also been noted by the Chief Justice of Canada, Beverly McLachlin: '... bills of rights do alter the common law ... the common

follows therefore, that in circumstances in which there is no clear guidance from the Strasbourg authorities, then previously existing common law standards could legitimately be relied upon in the development of human rights standards under the HRA – provided that they too are based on the same principles which underpin the Convention and its case-law. Indeed, even with clear guidance from the Strasbourg authority, domestic case-law concerning a common law right should not be disregarded as it may already afford a greater protection than that provided by the Strasbourg case-law. In such circumstances, even in the face of ‘clear and constant’ Strasbourg jurisprudence, it is at least arguable that greater weight be given to the existing right in domestic law.

The use of the Convention rights to bolster protections afforded by the common law has been one of the most salient developments under the HRA thus far – the most obvious example perhaps being the increased protection afforded to personal information under the doctrine of breach of confidence culminating in the striking decision in *Campbell*.⁹⁸ In that case, Lord Nicholls noted that the post-HRA development of the doctrine of confidence was such that the action could now more accurately be termed ‘misuse of private information’, reflecting the fact that the law no longer required an existing confidential relationship nor was it limited to protecting information which might strictly be called ‘confidential.’⁹⁹ That is not, however, to say that existing common law rights have been subsumed into the ‘Convention rights’ afforded protection under the HRA. The two traditions can be seen to be operating in tandem. The decision of the House of Lords in *ex parte Daly*¹⁰⁰ for example owes more to the domestic jurisprudence on access to a court and legal professional privilege¹⁰¹ than to any

law modifies a bill of rights, even an entrenched bill of rights. The result is a hybrid system, incorporating aspects of the rights tradition into the common law and vice versa’ (B McLachlin ‘Bills of Rights in Common Law Countries’ (2002) ICLQ 197, 197.

⁹⁸ *Campbell v MGN Ltd* (n 83); on which see J Morgan ‘Privacy in the House of Lords, again’ (2004) 120 LQR 563.

⁹⁹ *ibid.*, para 14.

¹⁰⁰ *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532.

¹⁰¹ *Raymond v Honey* [1983] 1 AC 1; *R v Secretary of State for the Home Department, ex parte Anderson* [1984] QB 778; *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198.

Convention jurisprudence on prisoner's rights.¹⁰² The reason given by Lord Cooke of Thorndon in *Daly* was that, 'some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.'¹⁰³

Further, there is the distinct possibility that existing common law rights may be relied upon to remedy deficiencies or lacunae in the Strasbourg jurisprudence¹⁰⁴ – Lord Steyn has speculated that the domestic courts' treatment of Article 14 might be supplemented by the existing common law right of equality:

The anti-discrimination provision in Article 14 of the Convention is parasitic inasmuch as it serves only to protect specific Convention rights. There is no general or free-standing prohibition on discrimination. This is a relatively weak protection. On the other hand, the constitutional principle of equality developed domestically by our courts is stronger. In our system the law and government must accord to every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Law's necessary distinctions must be justified but must never be made on grounds of race, colour, belief, gender or other irrational ground ... The organic development of constitutional rights is therefore a complementary and parallel process to the application of the Human Rights Act.¹⁰⁵

¹⁰² Of which *Campbell v United Kingdom* (1992) 15 EHRR 137 is the only example cited by the House of Lords – although reference is made to *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 and *Lustig Prean v United Kingdom* (1999) 29 EHRR 548 to 'illuminate the distinctions between "traditional" ... standards of judicial review and higher standards under the European Convention or the common law of human rights' (para 32, per Lord Cooke).

¹⁰³ *Daly* (n 100) para 30.

¹⁰⁴ For an example of the common law of Canada being used to remedy what would have been a 'lacuna created by [the] strict application of the Charter' see: *R v Seaboyer* [1991] 2 SCR 577 (described in *McLachlin* (n 97) 202).

¹⁰⁵ Steyn (n 39) 551-552.

And the application of existing common law principles to HRA adjudication is not confined to defining or applying the content of specific rights, the rule that fundamental rights cannot be legitimately restricted through ‘general or ambiguous words’ is one of general application: it applies to ‘fundamental rights beyond the four corners of the Convention.’¹⁰⁶

Assuming that this dicta points to common law, or fundamental, rights continuing to exist independently of the Convention rights under the HRA, it may also suggest a degree of upward influence – of the Convention rights themselves being influenced at the Strasbourg level by developments in domestic common law. It can be said that domestic case-law can aid the development of Convention rights at the Strasbourg level: decisions of State’s national courts form a large part of the evidence on which the Strasbourg gauges the ‘present day conditions’ in the light of which the Convention is to be interpreted.

C. Separation of powers

Invoking constitutional principle in judicial reasoning is – similarly to reliance on comparative authority – by no means a phenomena brought about by the advent of the HRA. Historically courts have relied upon the doctrine of separation of powers in cases concerning local authority spending,¹⁰⁷ the correct construction of the Trade Union and Labour Relations Act 1974,¹⁰⁸ and a ministerial decision not to publish a report by the Serious Fraud Office¹⁰⁹ among others. The rule of law has played a similarly important role in determining cases – perhaps most famously in *Entick v Carrington*¹¹⁰ – for instance in adjudication involving contempt of court and the disclosure of journalists’ sources¹¹¹ and the enforcement of judgments made outside this jurisdiction.¹¹² The HRA

¹⁰⁶ *Anufrijeva* (n 94) para 27, per Lord Steyn.

¹⁰⁷ *R v Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986] AC 240, 250, per Lord Scarman.

¹⁰⁸ *Dupont Steel v Sirs* [1980] 1 WLR 142.

¹⁰⁹ *R v Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525.

¹¹⁰ (1765) 19 St Tr 1030.

¹¹¹ *X v Morgan-Grampian Ltd* [1991] AC 1, 48, per Lord Bridge.

may however, represent an important step towards the further ‘constitutionalisation’ of public law adjudication in the UK by enhancing the substantive content of these constitutional principles as elements of a domestic human rights jurisprudence.

Hinting at a more activist stance to the Strasbourg jurisprudence under section 2(1), domestic courts have suggested that they may not follow Strasbourg decisions in cases in which the European Court of Human Rights has seriously misunderstood the relevant UK law¹¹³ or has not ‘receive[d] all the help which was needed to form a conclusion.’¹¹⁴ A further indication of a situation where a United Kingdom court might legitimately depart from the ‘clear and constant’¹¹⁵ jurisprudence of the European Court was given by Lord Hoffmann in *Alconbury*:

The House [of Lords] is not bound by the decisions of the European Court and, if I thought that ... they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed.¹¹⁶

Lord Hoffmann’s dicta hints at a certain normative force to the principles on which the UK constitution is based which might justify a departure from the Strasbourg authorities. Significantly, it can also be read as suggesting that the section 2(1) obligation might also require an evaluation of the suitability of the relevant Strasbourg authority to be applied or relied on in the domestic context. Similarly to the democratic endorsement of the

¹¹² *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638, per Lord Diplock.

¹¹³ *R v Lyons (No 3)* [2003] 1 AC 976, para 46: ‘If, for example, an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECtHR to reconsider the question’ (per Lord Hoffmann). An example of such a misunderstanding can be seen in *Osman v United Kingdom* (2000) 29 EHRR 245; see R Clayton ‘Developing Principles for Human Rights’ (2002) EHRLR 175, 178; Lord Hoffmann ‘Human Rights and the House of Lords’ (1999) 62(2) MLR 159, 162-164.

¹¹⁴ *R v Spear and Others* [2003] 1 AC 734, para 12, per Lord Bingham.

¹¹⁵ See n 58 above and eg *Anderson* (n 9) para 18, per Lord Bingham.

¹¹⁶ *Alconbury* (n 58) para 76.

common law's fundamental rights jurisprudence provided by the HRA, the Act may equally be seen as providing the impetus for a forceful restatement of the separation of powers doctrine in UK law.

In spite of the fact that the European Court of Human Rights has consistently maintained that the Convention itself does not demand adherence to any 'theoretical constitutional concepts,'¹¹⁷ the notion of the separation of powers has attained a certain prominence in the case-law of the Strasbourg Court: the 'growing importance' of the doctrine was noted in *Stafford v United Kingdom*,¹¹⁸ while in *Benjamin and Wilson v United Kingdom* the principle of separation of powers was referred to as 'fundamental.'¹¹⁹ This trend is arguably also apparent in post-HRA domestic case-law, perhaps most emphatically in *R v Secretary of State for the Home Department, ex parte Anderson*.¹²⁰

The European Court of Human Rights has also consistently stressed that the doctrine of separation of powers will not be determinative of a breach in and of itself: in each case the specific facts must be taken into consideration.¹²¹ In those cases where the separation of powers has been in play regarding fair trial rights in Article 6(1) – either through links between the judicial and legislative or judicial and executive arms – in objective terms the court or tribunal in question must be judged to be impartial and 'independent of the executive and also of the parties.'¹²² Further evidence of the growing importance of the doctrine can be found in the fact that the European Court of Human Rights has also recognised that the separation of judicial and legislative powers may be

¹¹⁷ *McGonnell v United Kingdom* (2000) 30 EHRR 289, para 51.

¹¹⁸ *Stafford v United Kingdom* (n 22) para 78.

¹¹⁹ *Benjamin and Wilson v United Kingdom* (2003) 36 EHRR 1, para 36.

¹²⁰ *Anderson* (n 9) where Lord Bingham observed that the European Court of Human Rights had been correct to 'describe the complete functional separation of the judiciary from the executive as "fundamental" since the rule of law depends on it' (882), with Lord Hutton adding that such a separation is 'an essential part of a democracy' (899).

¹²¹ *Kleyn v Netherlands* (2004) 38 EHRR 14, para 193.

¹²² *Ringeisen v Austria* (1979-80) 1 EHRR 455, para 95.

regarded as a ‘legitimate aim’ to be pursued by national authorities.¹²³ A recent indication of the increased stature attained by the separation of powers doctrine in the jurisprudence of the Strasbourg authorities can be found in the (dissenting) judgment of Judge Borrego Borrego in *Pabla KY v Finland* where – without explicit regard to the particular factual circumstances of the case – he asserted that the doctrine is an ‘essential component of a state based on the rule of law.’¹²⁴ Similarly, in the case of *Kleyn v Netherlands*, the dissenting judgment of Judge Tsatsa-Nikolovska reads as follows:

... the exercise of both advisory and judicial functions by the same persons is, as a matter of principle, incompatible with the requirements of Art.6 *regardless of the question how remote or close the connection is between these functions*. A strict and visible separation between the legislative and executive authorities on the one hand and the judicial authorities of the state on the other is indispensable for securing the independence and impartiality of judges and thus the confidence of the general public in its judicial system. Compromise in this area cannot but undermine this confidence.¹²⁵

Whether these dissenting voices can be taken as a precursor of future Strasbourg jurisprudence remains to be seen; although perhaps ironically their most ringing endorsement, in domestic terms, can be found in the Government’s proposals of June 2003 to establish a Supreme Court independent of the House of Lords and to abolish, latterly reform, the office of Lord Chancellor. What can be said with some certainty is that the domestic judiciary have taken heed of the emphasis increasingly being placed on the separation of powers doctrine by the European Court of Human Rights. In *R v*

¹²³ *A v United Kingdom* (2003) 36 EHRR 51, para 77, where, in a case concerning parliamentary immunity, the court noted that: ‘the Parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary’.

¹²⁴ Dissenting opinion of Judge Borrego Borrego in *Pabla KY v Finland*, 22 June 2004 (available at: www.echr.coe.int)

¹²⁵ *Kleyn v Netherlands* (n 121) (Judge Tsatsa-Nikolovska’s dissenting opinion was joined by Judges Strážnická and Ugrekhelidze) (emphasis added).

Secretary of State for the Home Department, ex parte Anderson, Lord Bingham observed that the Strasbourg court had been correct to ‘describe the complete functional separation of the judiciary from the executive as “fundamental” since the rule of law depends on it,’¹²⁶ Lord Hutton adding that such a separation is an ‘essential part of a democracy.’¹²⁷ One commentator has speculated that the *Anderson* judgment might ‘be a starting point for building a separation of powers jurisprudence which, although rooted in Article 6, extends beyond the existing objective and subjective tests for independence and impartiality.’¹²⁸

And so in spite of the fact that the European Court of Human Rights has held that the principle of separation of powers will not be ‘decisive in the abstract’, there is a growing body of opinion which suggests that in determining a human rights issue, more weight can be attached to the principle by the domestic judiciary than has hitherto been possible – at least in terms of the functional separation of judicial power from those held by the executive and legislature, something which a number of senior judges in the United Kingdom regard as a ‘cardinal feature of a modern, liberal democratic state governed by the rule of law.’¹²⁹ In this sphere at least we may be seeing the beginnings of the movement away from the separation of powers as a benign principle of the UK constitutional arrangements into a principle of domestic human rights law.

III. CONCLUSION

While it may be accepted that ‘law-making – within certain limits – is an inevitable and legitimate element of the judge’s role,’¹³⁰ the extent of those limits vis-à-vis the HRA are still being probed by the courts, most obviously in the jurisprudence on the meaning of ‘possible’ in section 3(1). And while the result achieved by a judgment may be seen as

¹²⁶ *Anderson* (n 9) 882.

¹²⁷ *ibid.*, 899.

¹²⁸ M Amos ‘*R v Secretary of State for the Home Department, ex p Anderson – Ending the Home Secretary’s Sentencing Role*’ (2004) 67(1) MLR 108, 123.

¹²⁹ Response of the Law Lords to the Government’s consultation paper, *A Supreme Court for the United Kingdom*, available at: www.parliament.uk/judicial_work/

¹³⁰ Irvine (n 49) 12.

correct, without the support of relevant authority, a decision will be open to accusations of unwarranted activism. An example of a decision which has been praised for its purposive application of the HRA – in remedying an iniquity in the law by extending the protection afforded to heterosexual couples under the Rent Act 1977 to those in same-sex relationships – can be found in the judgment of the Court of Appeal in *Ghaidan v Godin-Mendoza*.¹³¹ Yet this decision has been simultaneously criticised for lacking any principled grounding in the Strasbourg case-law.¹³²

While the Court of Appeal’s decision in *Mendoza* was upheld by a majority of the House of Lords,¹³³ the episode illustrates that there remains a fine line between a constitutionally legitimate development in human rights law, and one which may arguably exceed the boundaries of the judicial role under the HRA. Some explanation for this may be found in the fact that doubts remain over the actual constitutional function of the HRA itself. Is the Act simply a mechanism which governs the interpretation of statute law and development of the common law by reference to the (fluid) standards of an international treaty? Or does it provide the courts with a mandate to develop and expand on those standards found in the European Convention in the domestic context? The argument here has favoured the latter, but there appears to be no clear judicial consensus on the issue at this point. The judgment of Lord Hoffmann in *Re McKerr* – a case concerning the procedural rights adjunctive to Article 2 ECHR and the question of their existence at common law prior to the advent of the HRA – is revealing in terms of his assessment of the position of the Convention rights in domestic law. In his speech, Lord Hoffmann said of the rights under the HRA:

... [a]lthough people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has

¹³¹ *Ghaidan v Godin-Mendoza* [2003] Ch 380.

¹³² I Loveland ‘Making it up as they go along?: The Court of Appeal on same sex spouses and succession rights to tenancies’ [2003] PL 222; S. Harris-Short, ‘Family Law and the Human Rights Act 1998: Protecting “The Family”?’ (Paper delivered at the University Of Durham Human Rights Centre seminar, Allen and Overy LLP, London, 22 April 2004, as a part of the AHRB-funded project, ‘Judicial Reasoning and the Human Rights Act 1998’)

¹³³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention ... their meaning and application is a matter for domestic courts, not the court in Strasbourg.¹³⁴

This statement is remarkable in that it seems to mark a backward step from the House of Lords' concerns that any decision on a Convention right which departed from 'clear and constant' Strasbourg jurisprudence ran the risk of being overturned by the European Court of Human Rights.¹³⁵ It is also arguably inconsistent with, or at least strongly in tension with, the requirement to 'take into account' the jurisprudence of the Strasbourg organs under section 2(1). Moreover, it could be suggested that this approach to the HRA comes close to treating the Act as a UK Bill of Rights as it has the potential to separate the content of domestic human rights law almost completely from the Convention and its jurisprudence. In asserting that the 'meaning and application' of the rights under the HRA is a 'matter for domestic courts' – and explicitly denying this function to Strasbourg – Lord Hoffman could be seen as laying claim to a more creativistic role for domestic courts in rights litigation. Diverging the meaning of the rights under the HRA *completely* from the Convention and its jurisprudence would, under the auspices of an Act designed to 'give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights,' undoubtedly come into conflict with the scheme of the HRA.¹³⁶ But in his recognition that the rights conferred by the HRA are 'domestic rights, not international rights', Lord Hoffmann may tacitly acknowledge that the interpretation of those rights in the domestic context is a different exercise from that performed by the European Court of Human Rights, and one for which it is not sufficient to simply 'have regard' to the Strasbourg jurisprudence. While the Convention and its jurisprudence may provide the basis by which questions of compatibility relating to the

¹³⁴ *In Re McKerr* [2004] UKHL 12, para 65.

¹³⁵ *Alconbury* (n 58) para 26, per Lord Slynn.

¹³⁶ Most obviously in terms of judging the 'compatibility' of an act or omission with the Convention rights under s 3(1) or s 6(1) HRA and in the potential making a 'declaration of incompatibility' under s 4(2).

Convention rights may be judged, if those rights are to be 'further realised' in domestic law, the judiciary may also have to look elsewhere for guidance.