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The Future of Human Rights Law

Justiciable charters of rights give courts a dynamic and controversial role in governance, which is in tension with the roles of the executive and the legislature. In this essay I comment, from the British point of view, on the way in which these tensions work out in the law of the European Convention on Human Rights. I argue that politicians need to accept that the tension between the role of the courts and the roles of the executive and the legislature will be permanent, and is not a reason for withdrawing from the Convention, or for ignoring the decisions of the European Court of Human Rights.

Key words: Human rights, human rights adjudication, proportionality, European Convention on Human Rights, United Kingdom Human Rights Act 1998

Justiciable charters of rights have become deeply rooted in the law of most common-law countries. They take various forms in various jurisdictions, from Canada and the United States, to South Africa and India, from Britain to New Zealand. These diverse schemes have one thing in common: in each country, courts have responsibility for elaborating and for enforcing abstract rights. That gives the courts a dynamic and controversial role in governance, which is in tension with the roles of the executive and the legislature. These tensions have special, complex features in the United Kingdom, because of the international structure of the European Convention on Human Rights.

In this essay, I will comment on those tensions from the British point of view. I will discuss the ways in which the European Convention on Human Rights leads to judicial decision making that is politically controversial in the United Kingdom. My conclusion is that politicians need to accept that the tension between the role of the courts and the roles of the executive and the legislature will be permanent, and is not a reason for withdrawing from the Convention, or for ignoring the decisions of the European Court of Human Rights. This conclusion, of course, has implications for law and politics in Russia, as well as in Britain.

In Britain today, some very important aspects of the life of the community are governed by judges. Consider the right under the European Convention on Human Rights, to respect for private and family life[1]. The judges have interpreted the Convention to prohibit deportation of an illegal immigrant who has committed a crime in the United Kingdom, if a judge decides that the impact on the offender's family life- or on the family life of his partner or his child- outweighs the public purpose in deportation. Similarly, a local council

[1] European Convention of Human Rights, Article 8; see R (Huang) v Home Secretary [2007] UKHL 11.

cannot evict a council tenant from housing for misconduct, if doing so would affect their family life in a way that is disproportionate to the council's purpose[2].

Consider the duty under the European Convention to hold free elections. The European Court of Human rights (the Strasbourg Court) has decided that it prohibits a blanket ban on voting by prisoners[3].

In July 2011, the Strasbourg Court decided that the scope of the Convention extends to protect the rights of Iraqis allegedly abused or murdered by British troops on operations during the Iraq war[4].

British lawyers and politicians did not foresee these developments, when they took a leading role in the development of the European Convention on Human Rights in the 1950s. The Convention is the creature of the Council of Europe, an international organisation that was inspired by Winston Churchill, and was set up in 1949 as a shared European project to take a stand against tyranny. The project was designed not only to prevent recurrence of the atrocities of the Nazis, but also to guard against new threats from communism, and against nationalistic and authoritarian abuses that the continent had generated over centuries, and in particular throughout the nineteenth and twentieth centuries.

The British thought that the Convention would have little impact on their law and practice, because Britain had been respecting those rights, in its own ways, for centuries. They thought they would be largely unaffected even though the Convention system included a Court –the European Court of Human Rights in Strasbourg– with jurisdiction to decide what the very abstract rights require. And indeed, Britain was largely unaffected for some decades. At first the Court only heard complaints brought by states that had signed the Convention, and even after the Convention was amended in 1966 to allow individuals to bring complaints, it took a long time for the Court to develop the sort of judicial creativity that has become really interesting in this century. The development in creativity has matched the development in the volume of complaints to Strasbourg: the Court delivered only about 800 judgments in nearly forty years from its beginning in 1959 until structural reforms in 1998; since 1999, the number of decisions has risen from 177 to 1500, and the number of applications from 8,400 to 61,000[5].

Something else happened in 1998: the British Parliament passed a Human Rights Act, requiring British judges to interpret statutes compatibly with the European Convention so far as possible, and making government action unlawful if it violates Convention rights, unless legislation requires it. And although judges cannot strike down legislation, the Human Rights Act authorised them to declare that a statute is incompatible with the Convention. A declaration of incompatibility triggers a fast-track process by which the government can amend the legislation if Parliament approves. Now English judges, too, are training their creativity on the interests protected by the Convention.

The very abstract rights in the European Convention, like the abstract rights in the United States Bill of Rights or the Canadian Charter of Rights and Freedoms, encourage litigants to ask the judges to find new and controversial applications of the Convention.

[2] Manchester City Council v Pinnock [2010] UKSC 45.

[3] Hirst v United Kingdom (No 2) (Application N 74025/01), Grand Chamber [2005] ECHR 681.

[4] Al Skeaini v United Kingdom (Application N 55721/07), 7 July 2011.

[5] European Court of Human Rights, Annual Report 2010, pp. 13–14: http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAC7E934A1D6/0/AnnualReport2010.pdf

The judges do not only stand up against atrocities that anyone would recognise as a violation of a human right. They also pass judgment on issues that used to be issues for ordinary politics, issues on which the people of the community disagree radically. And judges do so in a forum that privileges the techniques of the advocate, and the advocacy of particular interests, putting the advocate for the complainant on a par with the advocate for a public authority. And that public authority itself may or may not represent the various public interests (and the other private interests) that are at stake. And this forum then leaves the decision to judges who are impartial. Their commitment is to apply the abstract rights, after giving a fair hearing to the arguments for each side in the litigation.

Let's focus on one case, concerning the first of the controversial issues I mentioned — whether respect for private and family life should prevent deportation of an offender who is living illegally in the United Kingdom.

The Convention does not provide any right to immigrate. But the right to respect for family life has become a very common recourse for would-be immigrants. Whether seeking asylum or applying for ordinary immigration, or entering the country illegally, or illegally staying after the expiry of a visa, candidates spend long enough in the country that they tend to develop family ties. And then, refusal of leave to remain in the country is bound to be detrimental to their family life. The courts have held that respect for family life requires the state not to do something detrimental to your family life, if the detriment is disproportionate to the value of the public goal that is being pursued. The House of Lords decided in 2007 that the question is:

> 'whether the refusal of leave to enter or remain [in the United Kingdom]..., taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8'[6].

It is up to judges to decide whether the impact on a claimant's family life is *too serious*, in light of legitimate public purposes. The question is not just whether the burden on the complainant is necessary to achieve a legitimate purpose; even if it is, the government may not pursue that purpose, if the detriment to an interest protected by the Convention is, in the view of the judges, too much to be justified.

If a claimant shows that refusal would cause some detriment to her family life, what state purpose could make the refusal legitimate in spite of the detriment? The Convention recognizes that an interference with family life may be justifiable 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'[7]. We can imagine ways in which immigration controls may possibly protect or promote the economic well-being of the country, or protect the freedoms of others. But the British state has never actually said whether its purpose in prohibiting free entry to the United Kingdom is to pursue any of these good purposes. The Courts have no techniques for deciding whether deporting offenders does actually achieve any of them. The immigration rules are the product of controversial politics in which populism vies with political correctness, and both populism and political correctness are adverse to

[6] R (Huang) v Home Secretary [2007] UKHL 11 [20].

[7] Article 8(2).

reasoned deliberation about the goods at stake. The British government's principles for limiting immigration have never been expressed. Limiting immigration is not necessarily unprincipled. But the British law and practice will not tell you what the principles are.

The result is that the judges really are in charge of the immigration decision, for any person with family in the United Kingdom. By an interpretation of the abstract right to respect for family life, they have taken the role of weighing the immeasurable (that is, the gravity of the impact of deportation on an offender's family life –or his child's family life) against something that has always been merely unspecified (that is, whatever legitimate state purposes there may be in having immigration rules).

This new judicial role is revolutionary, because it requires judges to assess for themselves the value of pursuing public purposes in the way that the legislature or the government has done or proposes to do. There is no legal test for the complainant's right under the European Convention, except that the effect of deportation on a person's family life must not be too serious in light of the public interest –whatever that may be– in deportation.

The result has been a series of controversial and difficult decisions in which the Court of Appeal and the Supreme Court of the United Kingdom have had to decide whether family ties in the United Kingdom make it unlawful to deport illegal immigrants,[8] or to extradite a person suspected of a crime.[9] The court simply asks the open-ended question whether, in light of the public interests at stake, the impact of the proposed action would have *too serious an impact* on the claimant's family life. In these cases, judges have interpreted the European Convention as handing to them the job of deciding state action. A governmental decision to deport is only provisional; the conclusive decision is for courts.

One drawback of judicialization is a substantial increase in litigation, at public expense, to support the right to a judicial hearing on the question of proportionality. No one is extradited from the United Kingdom these days without first getting a hearing in court on their claim that extradition would show disrespect for their family life; they generally lose, but they get a lengthy delay in the extradition.[10] The deportation claimants do not always lose. In fact, they generally win, if they have a domestic partnership, or if they have children in the United Kingdom. And then another drawback is the potential for the state's decision-making process to be deformed by a sort of pretence- that judges can weigh the unmeasurable personal interests against the unspecified public interests.

Should the United Kingdom adhere to the Convention?

Many decisions of the Strasbourg Court have been controversial. But in the sixty years since the Convention was inaugurated, there has never been any serious political opposition to Britain's membership of the Council of Europe until the past year. A new political controversy has arisen, not from the cases on immigration, but from the case on voting rights for prisoners. The Strasbourg Court decided in 2005 that the blanket ban on voting by prisoners violates the guarantee of free elections in Article 3 of the First Protocol[11].

[8] See e.g. ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4.

[9] Norris v USA [2010] UKSC 9.

[10] See: e.g. Susz v Poland [2011] EWHC 1862.

[11] Article 3: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

The British government did not make any changes in time for the 2010 general election. The new government (a coalition of the Conservative Party and the Liberal Democrat Party) started planning legislation that might meet the Court's requirements (although those requirements are very unclear). But anger was growing against the idea that the judges of the Strasbourg Court were overriding the view of Parliament that prisoners should not have the vote. A backbench debate in February 2011 supported the existing ban by a vote of 234 to 22, with Members of Parliament from all parties taking turns expressing their anger at the idea that the human rights of prisoners entitled them to vote, and also at the idea that this question should be decided by the Strasbourg Court, rather than by the British Parliament.

There is, for the first time, serious political discussion about doing something, and the Prime Minister set up a 'Commission on a United Kingdom Bill of Rights'; its purpose was meant to be to find ways of redressing the balance between the British Parliament and the Strasbourg Court.[12] But its terms of reference merely say that 'The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights'.

The dilemma for the government is that there is not much to be done. Some politicians have talked about ignoring the Court's decision, or even of withdrawing from the European Convention on Human Rights altogether. But withdrawing from the Convention would be a violent and destructive act in European and international politics, and it is clear that the main British political parties are not going to do that. If there was any doubt, the doubt was removed by a remarkable speech in October 2011, by Mr Dominic Grieve, the Conservative Attorney General (the government's chief legal officer, who is a member of Cabinet). Mr Grieve said,

> 'There is no question of the United Kingdom withdrawing from the Convention. The United Kingdom signed the Convention on the first day it was open for signature on 4 November 1950. The United Kingdom was the first country to ratify the Convention the following year. The United Kingdom will not be the first country to leave the Convention....The benefits of remaining within the Convention and retaining our position as a leader of the international community are seen by the government to be fundamental to our national interest.' [13]

That is an unequivocal commitment, and the political furor over the role of the Strasbourg Court leaves the British government looking for something to do, without withdrawing. And in November 2011, the United Kingdom took over the rotating Chairmanship of the Committee of Ministers, the governing body of the Council of Europe. In his speech, the Attorney General called the Chairmanship 'a once in a generation opportunity to drive forward reform of the European Court of Human Rights.' He proposed to strengthen the principle of subsidiarity, which is the doctrine that the primary responsibility for respecting the Convention belongs to the institutions of each member state, that the role of the Strasbourg Court is a supporting role, and that the Strasbourg Court should apply a 'margin of appreciation' — that is, some flexibility for member states to act on their own views as to the requirements of the rights in the Convention. But even in chairing the Committee of

[12] See: *Elliott M.* 'The UK Bill of Rights Commission': ukconstitutionallaw.org/2011/04/18/the-uk-bill-of-rights-commission.

[13] http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx

Ministers, the British government has no tools available for strengthening that principle, because the requirements of the principle itself are decided by the Strasbourg Court. For example, in the prisoners' voting rights case, the Court held that the ban on voting by prisoners 'must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be'[14].

Can the British government redress the balance between Parliament and Strasbourg through reforms of domestic law? The Attorney General aims to do so in the field of deportation of illegal immigrants, through changes to the immigration rules:

> 'We take the view that Parliament, before whom these changes to the Immigration Rules will be laid, is best placed to decide on difficult policy questions such as where the balance should be struck in relation to the deportation of foreign criminals. But it is important to note that in changing the rules we will respect the jurisprudence of the Strasbourg court and reflect the margin of appreciation that the Court has afforded to Member States in coming to such decisions.'

This statement by the Attorney General simply points out the government's dilemma: if the United Kingdom is going to respect the jurisprudence of the Strasbourg Court, and the Strasbourg Court holds that illegal immigrants cannot be deported if judges consider that the deportation would disproportionately affect their family life (or the family life of their partners or children), then there is nothing that the government can do. Reform of the immigration rules will not redress the balance between the Strasbourg Court and the British Parliament, because the Strasbourg Court decides what the balance will be. If we accept that the United Kingdom is not going to withdraw from the Convention, then even if British politicians do not like the decisions of the Strasbourg Court, they will have to put up with them. The tension between law and politics will be a permanent tension.

So should the British be considering withdrawing from the Convention, after all? I do not think so. The drawbacks are, in my view, genuine: the controls imposed on the deportation of an offender who is an illegal immigrant are an example, and the excessive and pointless litigation over extradition cases is another example. And yet, it is possible to imagine circumstances in which it might be abusive to expel from Britain an offender who does not have British citizenship. Imagine a populist government that uses a heavy majority to rush legislation through Parliament making a parking ticket into grounds for deportation of a non-citizen who has lived for decades in the country, since infancy. And here is the potential in the judicial role: it gives the judges the opportunity to stand against a genuine abuse, which we can imagine being facilitated by a Parliament that wants to act willy-nilly against immigrants, and which we can imagine being carried out by immigration authorities that are under political pressure, whipped up by irresponsible media corporations, to be mindlessly anti-immigrant. That is the potential, and there is actually no way to secure legal protection against such abuses, without giving judges a responsibility that is bound to lead to creative and controversial decisions, such as the decisions on deportation of illegal immigrants, or the case on voting by prisoners.

And the judicial process has actually secured justice in some cases. Here is a real-life instance, in my view. A murderer in England receives a life sentence, and Parliament gave the Home Secretary — a politician — the power to decide how long he would actually be

[14] *Hirst,* above, note 3, para. 82.

imprisoned before he could be considered for parole (the 'tariff' of imprisonment). Under the right to a trial by an independent and impartial tribunal in Article 6 of the Convention, it was held that these offenders had a right to have a tariff fixed by a judge, rather than by the Home Secretary.[15] There are some in Britain who think that sentencing clearly, definitely, ought to reflect the view of the public, in a way that makes it perfectly appropriate to commit the decision in a particular case to a politician. But that seems to me to be a mistake, because of the Home Secretary's political agenda, and because of the media pressures under which the Home Secretary operates. Those pressures had led the Home Secretary to impose harsh terms of imprisonment precisely on the ground that a particular defendant's case had become notorious in the media.[16] Detaching a community's decision making from politicians can improve the justice of a country's government.

The extension of legal protections to human rights ought to depend on whether the potential benefits (the possibility of judicial interference with distorted legislative and executive judgments as to the interests at stake) are worth pursuing, at the cost of the distorted judgments that judicial decision making may yield. The case of the sentencing of murderers shows –in my view–what can be done in the interests of justice. The case of the deportation of offenders shows –in my view– what can go wrong. It is impossible to come up with an exact balance sheet; the advantages of the European Convention system are, themselves, incommensurable with the drawbacks of the arrangement.

But in the opinion of many of the British politicians who are angry about the decision no voting by prisoners, there is one special and very serious drawback: the international nature of the Strasbourg Court. And it really is an extraordinary court. There is a judge for each of the 47 countries. Monaco and San Marino each have one judge. The United Kingdom has 2,000 times as many people as Monaco and San Marino, and Russia has 4,000 times as many people, and the UK and Russia have one judge each, just like the tiny countries of Europe. Each country's judge is elected by the parliamentary assembly of the Council of Europe, from a list of three people nominated by the country. The diverse processes by which judges are nominated by their home countries are not transparent, and the process for choosing among the nominees is under review. The system needs reform.

If the appointment of judges is reformed, though, the basic problem will remain: the judges who are trying to balance the unmeasurable against the unspecified –the interests of the litigant against the purposes of the public– will do so without even sharing whatever consensus there may be in Britain, as to the legitimacy of the public interests at stake. A human rights court removes the state's decision-making process from political influences within the state; an international human rights court removes the state's decision-making process from the state itself.

The people of other common law countries, such as Canada and the United States, are used to the judicial role in applying fundamental rights, but I am sure that they would not agree to a general international human rights court. It has particularly angered some British politicians, that the international court is interfering with British policy on issues that particularly affect the national interest: such as immigration, and the question of who can vote in national elections.

[15] R (Anderson) v Home Secretary [2002] UKHL 46.

[16] See: *Endicott T.A.O.* Administrative Law, 2nd ed. (Oxford University Press, 2011), chapter 3.

In my view, the international nature of the court is extraordinary, and it needs an extraordinary justification. And I think that there is such a justification, in the nature of Europe and its history. The European Convention gives Britain and Russia a unique opportunity: a way in which they can cooperate in the project of establishing certain protections against abuses, across a continent that needs such protections.[17] It is good for Britain and for Russia, and for the whole world, if the British and the Russians can participate in the project.

The interesting thing about justiciable bills of rights is the range of radically controversial decisions that they take out of ordinary politics, and assign to judges. There will never be any consensus as to the benefits of doing so, and the benefits cannot be secured without also incurring the drawbacks of judicialization (although it is even controversial whether there are, as I have argued, drawbacks). Reasonable and intelligent people are going to go on disagreeing deeply about the difference between standing up for human rights, and extending them irresponsibly. So the tension between the courts and the politicians will continue. This tension is not in itself a reason to abolish the judicial role.

[17] And the project now extends beyond Europe, to Turkey.