

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹

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The UK and European Human Rights: A Strained Relationship?

Katja S Ziegler, Elizabeth Wicks and Loveday Hodson

The relationship between the UK and the European systems for the protection of human rights has become ever more contentious over the past years. The debates about prisoner voting, detention and deportation of suspected terrorists (and the absolute nature of Article 3 ECHR in this context), immigration decisions and courts passing judgments in the context of British military action abroad are paradigmatic.

Historically, the UK's engagement with the legal protection of human rights at a European level has been, at varying stages, pioneering, sceptical and antagonistic. British politicians and judges have played important roles in drafting, implementing and interpreting the European Convention on Human Rights (ECHR). However, the UK government, media and public opinion have all at times expressed some concerns

¹ Eleanor Roosevelt, 'In Our Hands' (speech delivered on the occasion of the 10th anniversary of the Universal Declaration of Human Rights 1958), E Roosevelt, *The Great Question* (New York, United Nations, 1958).

about the growing influence of European human rights law, not only but particularly in controversial contexts. It is one aim of the book to inquire into the reasons for such concerns.

I. The Complexity of the ‘Strained’ Relationship

When inquiring into the reasons, one thing that is immediately striking is the complexity of the ‘strained’ relationship – or even relationships – involved. The incorporation of the ECHR into domestic law by the Human Rights Act 1998 (HRA) intensified the on-going debates about the UK’s international and regional human rights commitments. The HRA may have been designed to ‘bring rights home’, but it also highlights the complex relationship(s) between the UK government, the Westminster Parliament, and judges in the UK both amongst themselves and with Strasbourg.

Furthermore, the different layers of European human rights (and the respective, potentially different substantive standards they lay down) and their relationship with domestic rights make the relationship more complex. The increasing importance of the European Union in the human rights sphere has added another dimension to the topic. European human rights can no longer be considered solely by reference to the ECHR for several reasons. The very substance and content of European human rights is shaped by cross-referencing and cross-fertilisation of the two European courts; and the Member States/states parties provide a formal link between the systems in the ‘two Europes’ which influences the relationship between the states and the respective courts. Furthermore, the ECHR (in particular in its domestic incorporation through the HRA) and EU human rights, may be applicable concurrently in the same case. This may not only lead to forum shopping at European level where the same rights are interpreted differently,² but may also give rise to different remedies available at national law.³ Therefore, the relationship between the UK and EU human rights (in particular the EU Charter of Fundamental Rights

² Cf Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

³ The Court of Appeal’s judgment in *Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya* [2015] EWCA Civ 33 is a case in point: the Court of Appeal issues a declaration of incompatibility of a provision of the relevant statute (the State Immunity Act 1978) with Article 6 ECHR under the HRA, but is able to disapply the same statutory provision as violating Art 47 EUCFR, EU law providing a more far-reaching remedy.

(EUCFR) and a possible accession of the EU to the ECHR) is considered alongside the issue of its relationship with Strasbourg, and it will be explored whether it is a separate issue or a connected one.

Beyond the legal dimension, the relationship is also influenced by the wider society in which European human rights operate. The book also explores the relationship from the perspective of the debates and perceptions in the general public and media.

II. Why the ‘Strain’?

‘Strains’ in the relationship between a state and an international monitoring body can be expected occasionally as being in the very nature of their relationship. However, such strains seem to have become an on-going theme in the UK-Strasbourg relationship with often heated language being used. At least that is the impression one gets from political and public discourse in the UK which culminated – so far – in the announcement of Conservative plans to dramatically change the human rights landscape in the UK by proposing to replace the HRA with a British Bill of Rights and Responsibilities.⁴ While it is not the aim of the book to analyse the proposal *per se*, it usefully highlights some of the themes and debates taken up by this book, some of which were on the table long before the latest proposal was put on the agenda, in particular, amongst others:

- Misconceptions about the function of international human rights instruments, including the ECHR, as *external control and safeguard*: the expressed intention in the Conservative Party’s proposals to make the ECHR only advisory, i.e. non-binding, would run against the object and purpose of the ECHR (and hence also would preclude any renegotiation with the other Council of Europe Member States);
- Failure to appreciate international human rights as *minimum standards*;
- Confusions about the relationship between *domestic human rights* (in particular the ECHR in conjunction with the HRA) and the *ECHR at international level*;

⁴ The Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (3 October 2014) p 5, at www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf.

- Misrepresentations about the nature and strength of the formal link between the UK courts and the European Court of Human Rights (ECtHR) under the HRA (i.e. the Section 2 HRA obligation to take into account);
- Populist misconceptions about *who human rights are for*, perhaps leading to the proposal to limit them to the ‘most serious cases’,⁵ which itself raises the question of who is to judge this standard.
- Misrepresentations of the dynamic *interpretation of human rights*: the undifferentiated criticism that a dynamic interpretation (the ‘living instrument’ doctrine) is *per se* reproachable; such misrepresentations also frequently concern the linked question of the relationship of the courts and Parliament.

These misconceptions and confusions crystallise around a number of concerns as reasons for the ‘strain’: first, there are concerns about ‘sovereignty’ with two rather distinct manifestations. The concern about (*state*) ‘sovereignty’ in the UK is a concern about decisions being made elsewhere and imposed on the UK (i.e. a concern about ‘loss of control’ as a nation). The concern about the constitutional principle of *parliamentary sovereignty* is a concern about a transfer of control from Parliament to courts – at various levels). Secondly, there is a wider *scepticism about rights* and the courts which is partially fuelled by, thirdly, a misconception, that rights are foreign (European). The perception that rights are ‘foreign’ allows for the ‘externalisation’ and ‘instrumentalisation’ of rights with a variety of consequential problems. Finally, it may be asked whether the very nature of the debate itself in the UK adds further strain.⁶

The concerns expressed in the public debate are predominantly external ones or directed ‘outward’ in the sense that they focus on a criticism of the Convention and its application by the ECtHR. However, there is a further set of underlying reasons for rights-scepticism which are in reality internal to the UK, in particular the principle of parliamentary sovereignty and the constitutional relationship between the branches of government (in particular in relation to the power of the courts *vis-à-vis* parliament and the executive). Internal concerns are often not so clearly recognisable as such because they are either linked or conflated/confused with external concerns: the

⁵ Ibid, p 7.

⁶ See in further detail the Conclusions to the book, Chapter 25, section II.

principle of Parliamentary sovereignty frequently is conflated with state sovereignty (although there is a link in the sense that state sovereignty comprises the option to adopt a constitutional principle of Parliamentary sovereignty); rights are frequently considered to be European even where they are of domestic origin. As such there appears to be a mismatch between the perceived external nature and the actual internal nature of the concerns. To make things worse: there is a further, intersecting dimension, that of the instrumentalisation of human rights – with rights frequently being incorrectly described as external: that is human rights may be, in a first step, ‘disowned’ by externalising them as foreign (European); and in a second step, their name may be (ab)used in various ways, for example, by blaming human rights, for example for politically inopportune results and out of motives and reasons entirely unrelated to the actual rights issues at play (e.g. ‘scapegoating’) – a phenomenon which is to the detriment of a human rights culture and which may erode the actual protection of human rights. The proverbial ‘case of the cat’⁷ may be extreme (or at least so one hopes), but drives home the point dramatically.

III. Relieving the Strain? Untangle – or *Divide et Impera*?

Against the backdrop of such criticisms and concerns (and their instrumentalisation) which inject strain into the relationship between the UK and European human rights and the ECtHR in particular, the book seeks to untangle and examine the relationship from various perspectives in order to ascertain whether, and to what extent, and in which aspects, there is strain within a complex relationship with multiple protagonists and legal standards. In other words, the book will try to untangle and assess actual and perceived strain in the UK’s relationship with European human rights. It will try to untangle complexities in the relationship which result from a number of factors which may be located either at the international (here: European) level itself or at the domestic level or lie in the interaction of the levels.

The obvious complexity is the multi-layered dimension of European human rights itself – national – ECHR – EU (and the different sources of human rights within the EU: the EUCFR, the ECHR and general principles of EU law); and the fact that

⁷ See for further detail and discussion M Ockelton, ‘Article 8 ECHR, the UK and Strasbourg: Compliance, Co-operation or Clash? A Judicial Perspective,’ Chapter 11, and D Mead, ‘You Couldn’t Make It Up’: Some Narratives of the Media’s Coverage of Human Rights’, Chapter 23, both in this volume.

each of the different levels and sources may interact. The complexity of the picture is part of the concern and heightens more general fears of ‘encroachment’ of European human rights. It also contributes to the question of the appropriate role for the European systems of human rights protection in relation to the national level – and the rules and principles delimiting the role. One dimension of the book is therefore to shed light on some of the principles at European level which are challenged (e.g. international minimum standard, subsidiarity, margin of appreciation, interpretive methods, in particular dynamic interpretation).

The book will also consider and highlight further concerns and their underlying reasons which are currently not so much at the foreground of the debate. Firstly, the fact that the ‘dual function’ of the ECHR rights as both international and domestic rights (through the HRA) in the UK, which was intended to keep things simple, in fact adds further complexity. Secondly, there are different players at state level which indeed may require a differentiated analysis as to the level of strain in the relationship. One may indeed look beyond ‘the UK’ to its individual component institutions of government and society, and as part of the latter: the media. Thirdly, the fact that the UK constitution is in an on-going process of change is also a relevant factor. The UK constitution has already evolved considerably over the past 60 years, precisely, but not only, because of its relationship with the ‘two Europes’ (EU and ECHR). The search for the right balance between the principles of democracy, as represented by parliamentary sovereignty, and the rule of law and the role of the courts is not yet completed and, therefore, is another factor to consider in the relationship between ‘the UK’ and European human rights.

The book explores both the evolution of legal principles which define the relationship in its doctrinal and contextual dimensions, inquiring into factors which shape the relationship. The book thus considers the instruments and tools under the ECHR which shape the relationship (e.g. subsidiarity, the margin of appreciation and reform initiatives in this regard), as well as approaches UK courts have explored (e.g. the mirror principle).

As part of the inquiry into the reasons for the strain experienced in the UK-ECtHR relationship, the book considers the reasons lying in the legal regime and then takes two contextual perspectives: firstly, the comparison and contrast with other European states which are parties to the ECHR which may shed light on the reasons for peculiarly British (or not) debates. Many states party to the ECHR will at one

point or another have experienced severe friction with the ECtHR, not unlike the *Hirst*⁸ or *Chahal-to-Othman*⁹ sagas in the UK, on issues which affect the institutional structure or internal organisation of the state or ‘national sensitivities’ (e.g. *Poitrinol v France*, *Kress v France*, *Lautsi v Italy*, *SH and others v Austria*)¹⁰, which run against well established principles of the legal order (*Von Hannover v Germany*¹¹) or populist sentiments (e.g. *Gäfgen v Germany*¹²) or are just plain critical in the light of the circumstances of the case (e.g. *Konstantin Markin v Russia*, *Ananyev v Russia*¹³). What are the reactions to such conflicts on issues in law? What elevates them to a strain in the ‘relationship’? Is the level of strain in the UK unique and do reactions elsewhere appear to be similar or different to those in the UK?

Secondly, a further contextual perspective is added by the final part of the book which discusses representations of human rights in the UK media.

IV. Overview

The book is divided into five parts:

Part I: Compliance, Cooperation or Clash? – The Relationship between the UK and the ECHR/Strasbourg Court

Part I explores the relationship between the UK and the ECHR and ECtHR as one of compliance, cooperation or clash in relation to general and wider issues of the relationship, including its historic, theoretical, constitutional and legal determinants. Part I is spearheaded by perspectives from the two judicial protagonists of the relationship from the European Court of Human Rights (ECtHR) and the UK Supreme Court, *Judge Paul Mahoney* and *Lord Kerr*. Both judges stress the two-way cooperative nature of the relationship which is described as one of dialogue (both in the judicial interaction and extra-judicially), and structured along the lines of the

⁸ *Hirst v UK (no 2)* [GC], App no 74025/01, ECHR 2005-IX, (2005) 42 EHRR 41.

⁹ *Chahal v UK*, App no 22414/93, [1996] ECHR 54, (1996) 23 EHRR 413; *Saadi v Italy*, App no 37201/06, [2008] ECHR 179, (2009) 49 EHRR 30; *Othman v UK*, App no 8139/09, [2012] ECHR 56, (2012) 55 EHRR 1.

¹⁰ *Poitrinol v France*, App no 14032/88, Series A no 243, (1994) 18 EHRR 130; *Kress v France* [GC], App no 39594/98, ECHR 2001-VI; *Lautsi and Others v Italy* [GC], App no 30814/06, ECHR 2011; *SH and Others v Austria* [GC], App no 57813/00 ECHR 2011.

¹¹ *Von Hannover v Germany*, App no 59320/00, ECHR 2004-VI, (2005) 40 EHRR 1.

¹² *Gäfgen v Germany* [GC], App no 22978/05, ECHR 2010

¹³ *Konstantin Markin v Russia* [GC], App no 30078/06, ECHR 2012 –III (extracts) 77, (2013) 56 EHRR 8; *Ananyev and Others v Russia*, nos. 42525/07 and 60800/08, 10 January 2012, (2012) 55 EHRR 18.

Convention principles of subsidiarity, margin of appreciation and European consensus.

Ed Bates then in Chapter 4 provides an overview of the narrative of the UK's position towards the Convention system over the past sixty-five years in order to bring a historical perspective and constitutional context to the current friction between the UK and Strasbourg. His chapter reminds us that although the UK significantly shaped the ECHR in the drafting process, it was anxious about the compromise in State sovereignty that membership of the Convention entailed at the outset and that questions regarding the legitimacy of the Court's influence over domestic law have been a recurring theme, even before the current strains, in which an exit scenario is seriously discussed. He places the existing strain into the constitutional context of the UK, suggesting that the debate about strains resulting from Strasbourg's influence as an international court may be based on false premises.

Chapter 5 then turns to the discussion of recent reforms of the Convention system. *Noreen O'Meara* highlights the reforms as a result of the Brighton High-Level Conference (2012) which intended to reduce the Court's backlog, enhance the quality of the Court's work and make its case law more consistent. She assesses the impact of the reforms through Protocols 15 and 16 ECHR. The chapter argues that the ECtHR has been willing to engage in the reform process, and receptive to political signals for reform: case law even prior to the entry into force of Protocol 15 reflects a greater mindfulness in the application of the principles. The chapter is more sceptical about the effectiveness of the prospective advisory jurisdiction of Protocol 16.

The book moves on from history and reform to focus on the approach of one of the protagonists in the relationship in more detail, namely the approach of the English courts to Strasbourg case law. *Richard Clayton* discusses the floor-ceiling problem or mirror principle that has for a while occupied English judges. His chapter (6) provides an overview of the searching and meandering approach of the English judges since the entry into force of the HRA until recently (*Nicklinson*¹⁴). Using the Supreme Court's judgment in *Kennedy v Charity*

¹⁴ *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.

*Commission*¹⁵ as a recent example, he asks: ‘Should the English courts under the Human Rights Act mirror the Strasbourg case law?’ While the UK is bound by the Convention as a floor under international law, he answers the second aspect (ceiling) of the question in the negative because otherwise the distinction between Convention rights as UK statutory rights under the HRA and as international rights under the ECHR would not be maintained.

Staying on the theme of the relationship between the Convention and the protection of rights in English law, *Brice Dickson* turns to a potential protagonist (but currently only given the role of an extra) when he examines whether the Common Law would be able to fill the gap, should the HRA be repealed. His chapter (7) argues that the common law as it currently stands would not be able to meet the task. He suggests that human rights currently are not, and never have been, central to the English common law, as was demonstrated by the high number of judgments in Strasbourg holding the UK in violation of the ECHR prior to the entry into force of the HRA in 2000. He concludes that although UK Supreme Court Justices recognise the deficiencies in the Common Law – and also its potential – the common law needs to be developed more systematically in order to ensure that the Human Rights Act leaves a lasting legacy.

The last chapter (8) in Part I brings two further protagonists in the relationship onto the stage – the UK Parliament (and the role of parliaments more widely, from a comparative perspective) and the executive. *Alice Donald* discusses the need to involve national parliaments in order to implement judgments of the ECtHR effectively. The chapter focuses particularly on the institutional dimension of implementation through the Joint Committee on Human Rights (JCHR), its approach, impact, effectiveness and limitations in monitoring the response of the executive to Strasbourg judgments. In the light of the heightened debates within the UK in recent years, the chapter points to statistics which reveal a low level of ‘defeat’ in Strasbourg (2% in the years 1999 and 2010), coupled with a relatively strong implementation record regarding Strasbourg judgments, *prima facie* suggesting the absence of conflict – yet the UK took an extremely antagonistic stance on the prisoner voting issue. This in itself points to totally different reasons of the strain lying in specifics of the case rather than the fact of defeat in Strasbourg. The chapter also discusses the political

¹⁵ *Kennedy v Charity Commission* [2014] 2 WLR 808.

dimensions of the implementation process and the difficulties involved for the task of the JCHR (and of Parliament as a whole) within the context of the controversies surrounding the UK's relationship with the Convention system. Donald contrasts in an illuminating way the non-implementation of *Hirst*¹⁶ (prisoner voting) and the implementation of *Marper*¹⁷ (biometric data). The chapter concludes that the JCHR's monitoring and scrutiny is of a high standard in a European comparison, yet it is severely limited in terms of its influence over the executive in regard to its response to adverse ECtHR judgments.

Part II: Specific Issues of Conflict

Part II illustrates the use of some of the principles of the Convention, such as subsidiarity, margin of appreciation and interpretation discussed in Part I by focusing on specific, particularly contentious, issues in the relationship (prisoner voting, immigration, anti-terrorism and public order measures as well as extraterritorial action of the UK). These issues are inextricably linked with the perception of strain in the relationship. By taking an issue oriented perspective (rather than one that starts from the legal principle), it is hoped to bring out more clearly possible reasons for the strain. It may be noted that as with most human rights cases, and visible from the sample, the violation tends to result from executive action – the statutory regime of prisoner voting is the outlier here, providing a window to some of the reasons of the strained relationship. Chapter 9, the first chapter of Part II, by *Ruvi Ziegler* provides an overview of the on-going saga of prisoner voting in the UK since *Hirst v UK*¹⁸ and a critique of what must be considered a light-touch approach by Strasbourg – contrary to public perceptions, given the fundamental nature of the right to vote in a democracy. The chapter also reveals some of the tensions resulting from the national level, in particular parliamentary sovereignty, a dimension also discussed in Part I both by *Ed Bates* and *Alice Donald*.

Chapter 10 by *Helen Fenwick* continues the discussion of prisoner voting as a starting point of her analysis which focuses on the existence (and successes, from a UK perspective) of dialogue and what may be called the implementation of an 'enhanced' subsidiarity by the ECtHR post-Brighton. A less benign description would

¹⁶ *Hirst v UK (no 2)* (n 8).

¹⁷ *S and Marper v UK* [GC], App nos 30562/04 and 30566/04, ECHR 2008, (2009) 48 EHRR 50.

¹⁸ *Hirst v UK (no 2)* (n 8).

refer to appeasement in response to pressures from the UK. She focuses on cases where the clash is mainly with the executive in the contentious areas of anti-terrorism and public order measures (*A v UK*, *Gillan v UK*, *Austin v UK* in regard to Article 5 ECHR¹⁹, *Saadi v Italy*, *Othman v UK*, *Ahmad and others v UK* in regard to Article 3 ECHR²⁰), but also deals with a clash between Strasbourg and the common law/UK courts in the area of the criminal justice system (*Horncastle v UK*²¹ in regard to Article 6 ECHR). She points to the tension between the pressures on the ECtHR to avoid head-on-clashes (which may lead to ‘enhanced subsidiarity’/appeasement of the states parties) for the sake of ‘rescuing’ the European Convention system as an institution *per se* and the appropriate maintenance of a minimum standard applicable to all states. The two issues are of course linked...

Mark Ockelton’s chapter (11) adds a number of issues to the debate from the perspective of a judge in the special jurisdiction of the immigration tribunals in the UK: problems related to the application of Article 8 ECHR (assessment of proportionality) and the nature of their task and role. The chapter makes a strong case that the real clash is not one of the rules, but an institutional clash between the executive and UK judges.

Chapter 12 by *Clare Ovey* concludes Part II’s focus on specific issues of conflict by turning to another ‘saga’ and contentious issue, that of the extra-territorial application of the Convention in situations of armed conflict, which has to a large extent been fuelled by cases against the UK (e.g. *Al-Skeini v UK*²²) and also has triggered domestic controversy directed against UK courts when they implemented the principle, for example in *Smith v MOD*.²³ She traces and analyses the meandering search for a solution by the ECtHR in its post-*Bankovic*²⁴ case law and places this into the context of current debates in the UK.

¹⁹ *A v UK*, App no 3455/05, [2009] ECHR 301, (2009) 49 EHRR 29; *Gillan v UK*, App no 4158/05, [2010] ECHR 28, (2010) 50 EHRR 45; *Austin v UK*, App nos 39692/09, 40713/09 and 41008/09 ECHR 2012, (2012) 55 EHRR 14.

²⁰ *Saadi v Italy* (n 9); *Othman v UK* (n 9); *Ahmad and Others v UK*, App Nos 24027/07, 14909/08, 36742/08, 66911/09, 67354/09, 10 April 2012, (2013) 56 EHRR 1.

²¹ *Horncastle v UK*, App no 4184/10, 16 December 2014.

²² *Al-Skeini and Others v the United Kingdom* [GC], App no 55721/07, ECHR 2011, (2011) 53 EHRR 18.

²³ *Smith and Others v The Ministry of Defence* [2013] UKSC 41.

²⁴ *Banković and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* [GC], App no 52207/99, ECHR 2001-XII, (2007) 44 EHRR SE5.

Part III: The Interplay of Human Rights in Europe: ECHR, EU and National Human Rights

Part III widens the perspective to include the additional and also contentious layer of EU human rights by focusing on the EU Charter on Fundamental Rights, the relationship between EU and ECHR human rights in the context of a potential accession of the EU to the ECHR (including its impact on the UK); and by providing an example of a largely harmonious *menage-à-trois* of the Convention, Charter and national human rights in Austria.

Sionaidh Douglas-Scott (Chapter 13) opens the discussion by pointing to the scepticism towards the EU Charter of Fundamental Rights in the UK which has culminated in a 2014 recommendation by the House of Commons European Scrutiny Committee to pass legislation to disapply the Charter in the UK (contrary to the principle of supremacy of EU law). The chapter discusses the sources of scepticism and confusions that exist in respect of the Charter, including within Government and the domestic courts, such as confusions about the legal relevance of Protocol 30 to the Treaty of Lisbon (the UK ‘opt-out’) and its effects in UK law (in particular regarding the social rights contained in the Charter which are an important reason for the reluctance towards the Charter), and misconceptions about the scope of application of the Charter. Douglas-Scott’s chapter discusses the bases for such concerns and places them into context, stressing the primary thrust of the Charter to protect against a potentially overreaching EU and EU law. The chapter thus also highlights some of the contradictions of ‘Euroscepticism’ where it meets ‘rights scepticism’ even when looking at the EU Charter alone.

Paul Gragl, in Chapter 14, shows that such tensions and contradictions are heightened further when taking into view a possible accession of the EU to the ECHR – a process that should limit the powers of the EU by subjecting it to an external control (like each EU Member State), by filling gaps in the protection of individuals against EU measures and by unifying the European human rights architecture. Although EU accession to the ECHR would be limiting the EU and thus should be welcome to the Eurosceptic, British scepticism towards the ECHR also fuels scepticism towards EU accession to it, leading to fears of tangling ‘the UK legal

order in a multi-layered labyrinth of European human rights²⁵ and a fear of giving supremacy, in domestic law, to the ECHR over national law via the backdoor of EU law, as the chapter argues. Meanwhile, the accession process has been stalled by the Court of Justice of the EU's very own version of rights scepticism in *Opinion 2/13*²⁶, perhaps also echoing the conflict with the ECtHR in some of its Member States. The chapter, nevertheless points to the advantages of accession and argues that they significantly outweigh such concerns. It may also be highlighted that the ECHR, via the general principles doctrine, applies in the sphere of EU law, and this provides one rationale for the assimilation of the treatment of both bodies of law as also highlighted by Oreste Pollicino in his critique of the Italian Constitutional Court, discussed further below.

Andreas Th. Müller in Chapter 15 complements the discussion of the concerns about the EU Charter and the interaction of EU law with the ECHR in a post-accession scenario. Such concerns result in particular from the operation of EU law within the domestic sphere. Austria, while sharing many similarities with the UK, provides a unique example of a harmonious *ménage-à-trois* – Convention, Charter and Constitution – within domestic law, following the addition of the Charter to the national fundamental rights protection regime by the Austrian Constitutional Court. As in the UK, the ECHR is also closely linked to the domestic protection of human rights in Austria and there is no single bill of rights but three different sources of fundamental rights. While on the whole the Austrian approach both to the ECHR and the Charter may be described as particularly 'Europe-friendly', the chapter reveals that this may also be the result of a complex institutional relationship, interest and power struggle between the three types of jurisdiction and their respective highest courts (Constitutional Court, Supreme Court, Supreme Administrative Court) which may be activist and use the complex set up for their own agenda (potentially entailing problems both for the domestic constitutional order and the European legal orders which are unrelated to the issue of protection of rights). The example of Austria is not unique in this way, but highlights the significance of internal factors, such as inter-institutional

²⁵ P Gragl, 'Of Tangled and Truthful Hierarchies: EU Accession to the ECHR and its Possible Impact on the UK's Relationship with European Human Rights', Chapter 14 in this volume, text around n 20.

²⁶ *Opinion 2/13* of 18 December 2014, (2014) ECR I-(nyr).

relationships as one amongst many determinants of the relationship between European human rights and a particular legal order. The examples of Italy and, to an extent, France discussed later in the book, provide further illustration.

Part IV: Perspectives from other Jurisdictions: Contrasts and Comparisons with the UK Experience

Part IV aims to explore further the determinants of the relationship between the UK and European human rights by looking beyond the legal perspective of the UK on the relationship, providing *comparative perspectives*. Do other Convention states experience similar strain as the UK in regard to controversial issues? What is the situation in regard to implementation of the Convention in general and in regard to controversial issues? What is the state of the relationship more broadly, the nature of criticism and who are the protagonists? As has already been shown in Part III, the question is in different ways linked with, and tangled with, the various way states have shaped their relationship with EU law. At the extremes, the Convention is either a case of contrast with EU law, or benefits from, the generally more powerful status of EU law in the national sphere (via the EU doctrines of supremacy, direct effect and state liability). There are also various intermediate and even conflicting scenarios relating, for example to the specific standards applied by national Constitutional Courts (as in the example of Austria).

Part IV explores the relationship of other states and European human rights and explores differences in human rights cultures, while making connections and drawing out contrasts with the UK where possible. It is beyond the scope of a publication like the present one to provide a comprehensive comparison of all Council of Europe states in regard to all possible issues. The collection presents necessarily a very selective sample of issues and jurisdictions. Jurisdictions covered are a mixture of old and more recent member states, of those with a long-established relationship with the ECHR (the ‘usual suspects’: France, Italy, Germany) and relatively recent accessions (in the case of Russia with only a relatively short experience with the Western tradition of human rights as epitomised by the ECHR) and of states with a more indirect or mediated domestic application of the Conventions (through domestic bills of rights) which may be contrasted with the direct application in Austria and the UK. The Austrian example provides a close comparison with the UK in that the Convention (in effect) doubles up as a domestic human rights standard as well in a

situation of fragmented (or: a multiplicity of) human rights standards. It can be said, however, that at one time or another each of the states has come into conflict with the Convention in regard to issues of ‘national sensitivity’.

The scene for the chapters on specific jurisdictions in Part IV is set by *Judge López Guerra* who provides a general overview of the compliance with rulings of the ECtHR (Chapter 16), thus linking the debates and strain to the crucial question of compliance: the protection of Convention rights, but also the credibility and ultimately legitimacy of the Convention system as a whole – in as far as requiring the same (minimum) standards for all member states – depends on compliance with the Convention and ECtHR rulings. At the same time, compliance monitoring, or the execution of judgments, is a process of potentially intense interaction between the national level, the ECtHR and the Council of Europe’s Committee of Ministers. The chapter highlights an evolution in the case law of the ECtHR away from providing a merely declaratory remedy to being more proactive in giving specific instructions as to the implementation of judgments, both in their individual (*inter partes*) and more general dimension of enforcement of judgments beyond the parties to the case. It may be said, on the one hand, that in the present context, more specific remedies are more likely to conflict with traditional institutional structures and national sensitivities and thus may be perceived as greater interference by the state in question and even raise subsidiarity concerns. On the other hand, in particular in the case of systemic, widespread and large-scale violations, such specific remedies are crucial to making the Convention effective.

The following five chapters turn to the consideration of specific jurisdictions. *Constance Grewe*, in Chapter 17, provides an overview of the judicial implementation of the ECHR in France, pointing to the fact that until 2009 France was one of the states significantly contributing to the case load of the ECtHR. This, together with a traditional hostility to judicial review of statutes, fearing a ‘*gouvernement de juges*’, led to an inherent tension between the French courts and the ECtHR which shares some similarities with the UK. This tension crystallised around some high profile cases which required fundamental changes to the French legal order (*Poitrinol*, *Kress* of 1993 and 2001, respectively ²⁷). Not unlike the UK, France experienced constitutional and institutional difficulties in implementing the Convention, in

²⁷ *Poitrinol v France* (n 10); *Kress v France* (n 10).

particular in relation to the division of jurisdiction for constitutional review and conventional review between the Constitutional Council and the ordinary courts. Implementation was helped by the introduction of the priority preliminary ruling procedure on the issue of constitutionality by constitutional amendment in 2008 (*question prioritaire de constitutionnalité, QPC*) which had the reflex of improving conventional review by the ordinary courts.

Not unlike the situation in Austria and in Italy, the chapter thus also highlights problems with implementing the ECHR and dynamics (and perhaps also separate agendas) that relate to the division of competences (and competition) between different jurisdictions of the courts. Interestingly, being able to adopt a more long-term perspective on these conflicts, Grewe highlights that, although highly controversial at the time, today's perception in France of cases of conflict at the time is that they contributed to the improvement of human rights protection and led to an acknowledged improved state of the law in France. Thus, what started out as a relationship of conflict may be described as more harmonious today (although the chapter also identifies some human rights issues that may well lead to further confrontation in the future). The chapter stresses that conflicts and debates in France were predominantly borne out in a technical or technocratic way rather than entering high-level political or public debate, while pointing out that weak Parliamentary involvement may mean that 'optimal subsidiarity' has not been reached.

In Chapter 18, *Oreste Pollicino* takes us through the labyrinth of the interaction of Italian law with the Convention and EU law, as the interaction or at least the debates about such interaction are shaped by the approach towards EU law. The chapter outlines a radical change of the Italian Constitutional Court's (ICC) approach to the ECHR: by two decisions of 2007²⁸ it established that review for conformity with the ECHR as a substantive standard as interpreted by the ECtHR is part of the domestic constitutional review. The ICC thus goes beyond 'taking into account' Strasbourg jurisprudence in the UK under Section 2 HRA. However, the chapter also reveals how, although on the face of it ECHR-friendly, subsequently the ICC has, in effect, monopolised the application of the Convention, in particular thus protecting the authority of national statutes: it stopped a budding practice, emerging since the end of the 1990s of ordinary courts using the Convention in order to not

²⁸ Decisions no 348/2007 and no 349/2007.

apply conflicting national law in individual cases, i.e. truly assimilating the reception of EU law and ECHR. A parallel to the UK may be drawn here where the limited remedy of a declaration of incompatibility under the HRA has come under fire, but still holds strong.²⁹ It may be asked whether this new strictness in approach of the ICC can be seen against the backdrop of the case of *Lautsi v Italy*,³⁰ considered to be the ‘Italian *Hirst*’ by some. The chapter critically analyses the implications of the approach of the Italian Constitutional Court and argues for a similar treatment of the ECHR and EU law on the basis of the special status of the ECHR amongst international treaties.

Chapter 19 by *Julia Rackow* traces the evolution of the relationship between the German Federal Constitutional Court (FCC) and Strasbourg as one moving from conflict to cooperation. It discusses the parameters and approach of the German Federal Constitutional Court (FCC) towards the ECHR and ECtHR from *Von Hannover* and *Görgülü*³¹ to the 2011 *Preventive Detention* case³² (following *M v Germany* in Strasbourg³³). Formally the FCC continues to adhere to a dualist approach under which the Convention is not directly applicable in Germany and hence not the standard of assessment of the FCC, as confirmed by the FCC’s *Görgülü* decision (formally, it therefore does not go as far as its Italian counterpart which does use the Convention as substantive standard of its constitutional review). However, the FCC appears to have become more cooperative than this *prima facie* suggests. In the *Preventive Detention* case, it imposes a strong duty on courts, making decisions of the ECtHR a ‘factual precedent’ (*faktische Präzedenzwirkung*). This applies to all ECtHR decisions, not only those in which Germany was a party. The underlying rationale is to minimise the risk of conflicts with (and breaches of) international law. The chapter considers the ongoing headscarf debate in Germany as an area both of potential future clash and public debate, while it also concludes that generally criticism of the Strasbourg Court in legal and political circles and amongst the public has tended to be issue oriented rather than fundamentally challenging the legitimacy of the ECHR or

²⁹ *Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya* (n 3), para 67.

³⁰ *Lautsi v Italy* (n 10).

³¹ *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 101, 361; *Von Hannover v Germany*, no 59320/00, 24 June 2004, ECHR 2004-VI, 1, (2005) 40 EHRR 1; *BVerfGE* 111, 307; *Görgülü v Germany*, App no 74969/01, 26 February 2004.

³² *BVerfGE* 128, 326.

³³ *M v Germany*, App no 19359/04, ECHR 2009, (2009) 51 EHRR 976.

ECtHR. The chapter reflects on some conclusions for the UK-Strasbourg relationship, stressing the conflict-reducing potential of a domestic bill of rights very similar to the ECHR, drafted in the same era, while also pointing to the fact that the existence alone of a bill of rights may not in itself avoid conflict but only as part of a wider constitutional culture.

The last two chapters of Part IV turn further east and take into view a more recent party to the Convention: Russia. *Olga Chernishova* and *Bill Bowring* provide insights into the problems with the implementation of the ECHR in Russia, national mechanisms to address, in particular, systemic violations of the Convention and wider debates about the sovereignty of Russia.

Olga Chernishova in Chapter 20 discusses in more detail specific mechanisms (including Supreme Court Plenary Resolutions) and problems with the implementation of judgments of the ECtHR in Russia, in particular pilot judgments concerning systemic violations. While the Supreme Court and Constitutional Court provide a general framework for the implementation of the Convention, and in spite of improvements in this general framework, the chapter points to remaining concerns about the effective implementation ‘on the ground’ of Article 3 ECHR: in cases concerning pre-trial detention where insufficient safeguards against breaches of Article 3 (resulting from over-crowded conditions and the length of pre-trial detention) exist; in cases concerning extradition and expulsion of foreign nationals and illegal renditions in breach of interim orders of the ECtHR; and in cases concerning the authorisation of and safeguards around covert police operation.

Bill Bowring, in chapter 21, provides us with the wider context of historic and recent developments in the legal protection and enforcement of international human rights in Russia, revealing not only historic parallels between the UK and Russia but also similarities in regard to public and media discourse both countries have experienced about state sovereignty (including exit scare scenarios). He also discusses complexities resulting from ECHR accession, and why Russia nevertheless wished to join the Council of Europe. Against this backdrop, the chapter considers the case *Konstantin Markin v Russia*³⁴, which could have become as antagonising as *Hirst v UK*³⁵, and shows how a ‘judicial conversation’ between the Russian Constitutional

³⁴ *Markin v Russia* (n 13).

³⁵ *Hirst v UK (no 2)* (n 8).

Court and the ECtHR was able to defuse the situation. The chapter also provides a useful illustration of how case law from other jurisdictions is used – or rather misused – in this case the Russian Constitutional Court’s attempt to justify a hard line against the ECHR on the basis of one (contentious) reading of the German Constitution Court’s *Görgülü* decision.³⁶ It also shows, as one of the Russian complexities in its relationship with the ECHR and institutional dimension, the lack of independence of, and public confidence in, the judiciary, which results in particular from interaction of the executive with the judiciary.

Part V: The Role of the Media in Shaping the Relationship

Part V, following the more broad-brush comparative approach intended to tease out determinants of the relationship, considers one of the possible societal and cultural determinants: the role of the media in shaping debates and human rights culture in the UK. The part stands against the backdrop of some ferocious attacks by the media of judgments and judges, deliberate or careless or misleading misreporting and *ad hominem* attacks on judges as well as general scapegoating of human rights. Part V discusses legal aspects relating to the regulation of the media in the light of the tension of its dual position as being both vulnerable to violations of its rights and as potential ‘perpetrator’ of rights violations. The part then proceeds, in two chapters, to outlining some examples and mechanisms of media reporting in the context of human rights. These illustrations are not just confined to the media per se but also relate to the ‘instrumentalisation’ or ‘externalisation’ of rights by those who feed the reported material to the media, discussed in some of the preceding chapters.

The first chapter of Part V by *Robert Uerpmann-Witzack* reflects on the legal dimensions, focusing on the protection of the media by the freedom of expression, as a ‘public watchdog’, the tension it sometimes creates with the protection of other rights, media regulation and its supervision both by national courts and their supervision by the ECtHR. In order for the media to exercise its ‘watchdog’ function, it must be able to report and criticise the judiciary, and so contribute to public debates about judgments and the judiciary, including the Strasbourg Court itself. But media freedom is limited where it disproportionately interferes with the rights of others, for

³⁶ A similar attempt is made by *The Conservatives’ Proposals* (n 4), which ‘decontextualises’ and misrepresents the approach of Germany to the ECHR and ECtHR decisions.

example under Article 8 ECHR. Striking the balance is in principle a matter to be determined at the domestic level. Because of the sensitivity of state supervision, including that by the courts, the ECtHR has expressed a preference towards self-regulation. The chapter argues that as long as self-regulation and domestic authorities exercise a carefully balanced and effective approach, Strasbourg should not intervene. The chapter also reflects on media attacks on the ECtHR, which in line with the general approach need to be addressed at national level, not by the ECtHR itself.

Chapters 23 and 24 turn to the discussion of media representation of human rights in the UK. Chapter 23 by *David Mead* looks at some of the empirical evidence of newspaper reporting and identifies types of misreporting and its techniques, including selective skew in coverage (omission) as well as four 'sins of commission': giving false or misleading prominence to human rights issues, phrasing (language chosen to report), pre-emption (selective, incomplete and therefore misleading reporting that is not false in itself) and partiality (selectivity in relation to sources, data or evidence). The chapter reflects on wider narratives that readers might be exposed to (such as the 'conflated Europes', 'the English idyll' (or 'Englishness is best'³⁷), 'human rights scapegoating', 'the non-universality of human rights' and the 'self-preservation of the media' (e.g. in the context of privacy), and their wider implications, especially in light of the Conservative Party's plans to repeal the Human Rights Act after the 2015 election. It concludes that the understanding of human rights protection by large parts of the population in the UK will be greatly at odds with reality and that this will have wider ramifications, in particular since one of the aims of the HRA was to embed a culture of human rights.

Lieve Gies in Chapter 24, against the backdrop of attacks by British media on the HRA depicting it as a 'villains' charter', examines one aspect of the media representations of human rights. She analyses how the British Press determines and creates perceptions of who is a 'deserving' claimant who deserves compassion. She identifies several factors which influence the approach of the media: the kind of rights abuse, such as whether classic 'home-grown' civil liberties or contemporary European human rights are engaged or the presence of a 'politics of pity' which facilitates compassion with victims of human rights violations. She points to the arbitrary and unpredictable nature of such determinations, but also to the power of the media to

³⁷ Mead (n 7), text near n 76.

dramatically shape perceptions and outcomes, for example by choosing to bring a ‘distant sufferer’ close enough to engender pity.

Part V is presented also as a call for further research. The representation of human rights by the media is an area, we find, that would merit further empirical and comparative work in the future, firstly, in the light of the factual complexities of the role of the media: as a subject of human rights (freedom of expression and information) and vulnerable to violations (debate about regulation); as a ‘fourth power’ that may affect the exercise of human rights of others and may be acting in conjunction (as well as against) those in formal positions of power. Secondly, however, the legal issues resulting from this remain challenging, even if some of the relevant doctrinal concepts are not new, such as the balancing of rights in their liberal and their protective function, the horizontal application of rights, the notions of responsibility or even direct obligation of private entities under human rights law which may be broadly linked to the evolving discussion of the role of business and human rights. Finally, the media as the frequent link between technocratic circles and the wider public plays a crucial role in developing a human rights culture, one of the aims of the HRA.

In the final chapter (25) of the book we offer our own reflections on the themes discussed in the book and on options for the future in the on-going debate (which is likely to intensify following the 2015 general election) about the relationship between the UK and European human rights.

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