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The UK and European Human Rights: A Strained Relationship?

KATJA S ZIEGLER, ELIZABETH WICKS AND LOVEDAY HODSON

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

THE RELATIONSHIP BETWEEN the UK and the European systems regarding the protection of human rights has become ever more contentious. The debates about prisoner voting, detention and deportation of suspected terrorists (and the absolute nature of Article 3 of the European Convention on Human Rights (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 ECHR. However, the UK government, media and public opinion have all at times expressed concern at the growing influence of European human rights law, not only but particularly in controversial contexts. It is one aim of this book to enquire into the reasons behind such concerns.

I. THE COMPLEXITY OF THE 'STRAINED' RELATIONSHIP

When enquiring into those reasons, one thing that is immediately striking is the complexity of the 'strained' relationship—or even relationships—involved. The

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).

incorporation of the ECHR into domestic law by the Human Rights Act 1998 (HRA) intensified the ongoing 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 (EU) 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 through its domestic incorporation by the HRA) and EU human rights may be applicable concurrently in the same case. This may not only lead to forum shopping at the European level, where the same rights are interpreted differently,² but might 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 (EUCFR) and the 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. This book furthermore explores the relationship from the perspective of debates and perceptions among the general public and media.

II. WHY THE 'STRAIN'?

'Strains' in the relationship between a State and an international monitoring body can occasionally be expected as being in the very nature of that relationship. However, such strains seem to have become an ongoing theme in the UK–Strasbourg relationship, with heated language often being used. At least that is the impression one gets from political and public discourse in the UK, which has culminated so far in the announcement in October 2014 of Conservative plans to dramatically change the human rights landscape in the UK by proposing to replace the HRA with a

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 Art 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.

British bill of rights and responsibilities.⁴ This proposal is perceived to be a priority for the new Conservative majority government elected in May 2015.⁵ While it is not the aim of this book to analyse the proposal per se, it usefully highlights some of the wider themes and debates taken up by this work, some of which were on the table long before the latest proposal was put on the agenda. In particular, these include the following:

- A. Misconceptions about the function of international human rights instruments, including the ECHR, as an external control and safeguard: the expressed intention in the Conservative Party's proposals to make the role of the European Court of Human Rights (ECtHR) advisory only, that is, non-binding, would run against the object and purpose of the ECHR (and thus would also preclude any renegotiation with the other Council of Europe Member States).
- B. Failure to appreciate international human rights as minimum standards.
- C. Confusion about the relationship between domestic human rights (in particular the ECHR in conjunction with the HRA) and the ECHR at the international level.
- D. Misrepresentations about the nature and strength of the formal link between the UK courts and the ECtHR under the HRA (that is, the section 2 HRA obligation to take Strasbourg judgments into account).
- E. Populist misconceptions about who human rights are for, perhaps leading to the proposal to limit them to the 'most serious cases',⁶ which itself raises the question of who is to judge this standard.
- F. 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 between 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 (that is, 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 the 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.

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

⁵ Nicholas Watt, 'Michael Gove to Proceed with Tories' Plans to Scrap Human Rights Act' *The Guardian* (London, 10 May 2015) www.theguardian.com/politics/2015/may/10/michael-gove-to-proceed-with-tories-plans-to-scrap-human-rights-act.

⁶ *ibid.*, 7.

Finally, it may be asked whether the very nature of the debate itself in the UK adds further strain.⁷

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 (especially in relation to the power of the courts vis-a-vis Parliament and the executive). Internal concerns are often not so clearly recognisable as such because they are either linked to or conflated/confused with external concerns: the principle of parliamentary sovereignty is frequently 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, namely the instrumentalisation of human rights. Human rights may be, in a first step, ‘disowned’ as foreign (European); and in a second step, their name may be (ab)used and ‘scapegoated’ in various ways, for example by blaming them for politically inopportune results—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’⁸ may be extreme (or at least so one hopes), but it 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, this book seeks to untangle and examine that relationship from various perspectives in order to ascertain whether, and to what extent, and in which respects, there is strain within a complex relationship with multiple protagonists and legal standards. In other words, the book’s contributors will unpick and assess the actual and perceived strain in the UK’s relationship with European human rights. They will untangle the complexities in the relationship that result from a number of factors which may be located at the international (here: European) level itself or at the domestic level, or indeed in the interaction between 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 For further detail, see below, ch 25, section II.

⁸ For further detail and discussion see M Ockelton, ‘Article 8 ECHR, the UK and Strasbourg: Compliance, Cooperation or Clash? A Judicial Perspective’ (ch 11) and D Mead, “‘You Couldn’t Make It Up’: Some Narratives of the Media’s Coverage of Human Rights’ (ch 23), this volume.

all 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 system of human rights protection at the national level—and the rules and principles delimiting that role. One aim of the book is therefore to shed light on some of the principles at the European level which have proved to be controversial (such as the international minimum standard, subsidiarity, margin of appreciation, and interpretive methods, in particular dynamic interpretation).

The contributors will also consider and highlight further concerns and the underlying reasons for those concerns which are currently not found at the forefront of the debate. The first is the fact that the ‘dual function’ of 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 the State level that indeed may require a differentiated analysis as to the level of strain in the relationship. One may 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 ongoing process of change is also a relevant factor. The UK constitution has already evolved considerably in the past 60-odd 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 complete and, therefore, is another factor to consider when examining the relationship between ‘the UK’ and European human rights.

The contributors explore the evolution of legal principles which define the relationship in both its doctrinal and contextual dimensions, enquiring into the factors that shape that relationship. They thus consider instruments and tools under the ECHR (such as subsidiarity, the margin of appreciation and reform initiatives in this regard) as well as approaches explored by UK courts (including the mirror principle).

As part of the enquiry into the reasons for the strain experienced in the UK–ECtHR relationship, the book considers the underlying reasons in the legal regime and then explores two contextual perspectives: first, it compares and contrasts other European States Parties with the ECHR, which may shed light on the reasons for peculiarly British (or not) debates. Many States Parties to the ECHR will at one point or another have experienced severe friction with the ECtHR, similar to the *Hirst*⁹ and *Chahal-to-Othman*¹⁰ sagas in the UK, on issues which affect the institutional structure or internal organisation of the State or ‘national sensitivities’ (*Poitrimol v France*, *Kress v France*, *Lautsi v Italy*, *SH v Austria*),¹¹ which run against well-established principles of the legal order (*Von Hannover v Germany*)¹²

⁹ *Hirst v UK (No 2)* (2005) 42 EHRR 41 (GC)

¹⁰ *Chahal v UK* (1996) 23 EHRR 413; *Saadi v Italy* (2009) 49 EHRR 30; *Othman v UK* (2012) 55 EHRR 1.

¹¹ *Poitrimol v France* (1994) 18 EHRR 130; *Kress v France* App no 39594/98, ECHR 2001-VI (GC); *Lautsi v Italy* App no 30814/06, ECHR 2011 (GC); *SH v Austria* App no 57813/00, ECHR 2011 (GC).

¹² *von Hannover v Germany* (2005) 40 EHRR 1.

or populist sentiments (*Gäfgen v Germany*),¹³ or which are just plain critical in the light of the circumstances of the case (*Konstantin Markin v Russia, Ananyev v Russia*).¹⁴ What are the reactions to such conflicts 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 to or different from those in the UK? Secondly, a further contextual perspective is added in 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.

A. 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 two judicial protagonists from the ECtHR and the UK Supreme Court respectively, **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 judicial interaction and extra-judicially) and structured along the lines of the Convention principles of subsidiarity, margin of appreciation and European consensus.

In chapter four, **Ed Bates** provides an overview of the narrative of the UK’s position regarding the Convention system over the past 60-odd years in order to bring historical perspective and constitutional context to the friction that currently exists between the UK and Strasbourg. He reminds us that although the UK significantly shaped the ECHR during 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 in 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.

We turn in chapter five to a discussion of recent reforms of the Convention system. **Noreen O’Meara** highlights the reforms that took place following the Brighton High Level Conference (2012) which were 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 to the ECHR.

¹³ *Gäfgen v Germany* App no 22978/05, ECHR 2010 (GC).

¹⁴ *Konstantin Markin v Russia* (2013) 56 EHRR 8 (GC); *Ananyev v Russia* (2012) 55 EHRR 18.

O'Meara 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. She is more sceptical about the effectiveness of the prospective advisory jurisdiction of Protocol 16.

We then move 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 occupied English judges for some time. He provides an overview of the searching and meandering approach of the English judges since the entry into force of the HRA until recently (*Nicklinson*).¹⁵ Using the Supreme Court's judgment in *Kennedy v Charity Commission*¹⁶ as a recent example, Clayton 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.

Remaining with the theme of the relationship between the Convention and the protection of rights in English law, in chapter seven **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. He 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 large number of judgments in Strasbourg holding the UK in violation of the ECHR prior to the entry into force of the HRA in 2000. Dickson 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 HRA leaves a lasting legacy.

In chapter eight, the final chapter of Part I, two further protagonists in the relationship enter 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. She focuses particularly on the institutional dimension of implementation through the Joint Committee on Human Rights (JCHR), and 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, Donald points to statistics which reveal a low level of 'defeat' in Strasbourg (2 per cent 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 for the strain,

¹⁵ *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.

¹⁶ *Kennedy v Charity Commission* [2014] 2 WLR 808.

lying in specifics of the case rather than the fact of defeat in Strasbourg. Donald also discusses the political dimensions of the implementation process and the difficulties faced by the JCHR (and Parliament as a whole) within the context of the controversies surrounding the UK's relationship with the Convention system. She contrasts in an illuminating way the non-implementation of *Hirst*¹⁷ (prisoner voting) with the implementation of *Marper*¹⁸ (biometric data). Donald concludes that the JCHR's monitoring and scrutiny are of a high standard in a European comparison, yet it is severely limited in terms of its influence over the executive with regard to its response to adverse ECtHR judgments.

B. Part II: Specific Issues of Conflict

Part II illustrates the use of some of the principles of the Convention discussed in Part I, such as subsidiarity, the margin of appreciation and interpretation, 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 to the perception of strain in the relationship. By taking an issue-oriented perspective (rather than one that starts from legal principle), the hope is that light will be shed on 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 on some of the reasons for the strained relationship. In chapter nine, **Ruvi Ziegler** provides an overview of the ongoing saga of prisoner voting in the UK since *Hirst v UK*¹⁹ 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. Ziegler also reveals some of the tensions at the national level, in particular parliamentary sovereignty, a dimension also discussed in Part I.

Helen Fenwick uses the discussion of prisoner voting as a starting point for 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 refer to appeasement in response to pressures from the UK. She focuses on cases where the clash is mainly between the executive in the contentious areas of anti-terrorism and public order measures (*A v UK*, *Gillan v UK*, *Austin v UK* with regard to Article 5 ECHR,²⁰ *Saadi v Italy*, *Othman v UK*, *Ahmad v UK* with regard to Article 3 ECHR),²¹ 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*²² with regard to Article 6

¹⁷ *Hirst v UK (No 2)* (n 9).

¹⁸ *S and Marper v UK* (2009) 48 EHRR 50 (GC).

¹⁹ *Hirst v UK (No 2)* (n 9).

²⁰ *A v UK* (2009) 49 EHRR 29; *Gillan v UK* (2010) 50 EHRR 45; *Austin v UK* (2012) 55 EHRR 14.

²¹ *Saadi v Italy* (n 9); *Othman v UK* (n 9); *Ahmad v UK* (2013) 56 EHRR 1.

²² *Horncastle v UK* App no 4184/10 (16 December 2014).

ECHR). Fenwick 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 ...

In chapter eleven, **Mark Ockelton** adds a number of issues to the debate from the perspective of a judge in the special jurisdiction of immigration tribunals in the UK, namely problems related to the application of Article 8 ECHR (assessment of proportionality) and the nature of the judiciary’s task and role. Ockelton 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 twelve, 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 (such as *Al-Skeini v UK*)²³ and has also triggered domestic controversy directed against UK courts when they implemented the principle, for example in *Smith v MOD*.²⁴ Ovey traces and analyses the meandering search for a solution by the ECtHR in its post-*Banković*²⁵ case law and places this in the context of current debates in the UK.

C. 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 of Fundamental Rights and the relationship between EU and ECHR human rights in the context of the potential accession of the EU to the ECHR (including its impact on the UK), and by providing an example of a largely harmonious *ménage à trois* of the Convention, Charter and national human rights in Austria.

Sionaidh Douglas-Scott opens the discussion by pointing to the scepticism towards the EU Charter of Fundamental Rights in the UK, which 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). Douglas-Scott discusses the sources of scepticism and confusion that exist in respect of the Charter, including within government and the domestic courts, such as confusion 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 a significant cause of the

²³ *Al-Skeini v UK* (2011) 53 EHRR 18 (GC).

²⁴ *Smith v Ministry of Defence* [2013] UKSC 41.

²⁵ *Banković v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (2007) 44 EHRR SE5 (GC).

reluctance towards the Charter), and misconceptions about the scope of application of the Charter. Douglas-Scott discusses the bases for such concerns and puts them in context, stressing the primary thrust of the Charter to protect against a potentially overreaching EU and EU law. She thus also highlights some of the contradictions of ‘euroscepticism’ where it meets ‘rights scepticism’ even when looking at the EU Charter alone.

In chapter fourteen, **Paul Gragl** shows that such tensions and contradictions are heightened further when we take into account the possible accession of the EU to the ECHR—a process that should limit the powers of the EU by subjecting it to 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 limit the EU and thus should be welcomed by eurosceptics, 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 rights’²⁶ and a fear of giving supremacy, in domestic law, to the ECHR over national law via the back door of EU law. 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*,²⁷ perhaps also echoing the conflict with the ECtHR in some of its Member States. Gragl 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 highlighted by Oreste Pollicino in his critique of the Italian Constitutional Court, discussed further below.

Andreas Th Müller complements the discussion of the concerns about the EU Charter and the interaction of EU law with the ECHR in a post-accession scenario in chapter fifteen. 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 closely linked to the domestic protection of human rights in Austria and there is no single bill of rights; in fact there are three different sources of fundamental rights. While on the whole the Austrian approach to both the ECHR and the Charter may be described as particularly ‘Europe-friendly’, Müller 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 to further their own agendas (potentially entailing problems both for the domestic constitutional order and for the European legal orders beyond the issue of protection of rights). The example

²⁶ 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’ (ch 14), this volume, text around n 20.

²⁷ *Opinion 2/13* of 18 December 2014, (2014) ECR I-0000.

of Austria is not unique in this respect, but it highlights the significance of internal factors, such as inter-institutional 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.

D. 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 UK's legal perspective on the relationship, providing *comparative perspectives*. Do other Convention States experience similar strain to the UK with regard to controversial issues? What is the situation with regard to implementation of the Convention in general and with regard to controversial issues? What is the state of the relationship more broadly, what is the nature of such criticism, and who are the protagonists? As has already been shown in Part III, the question is in various ways linked to, and embedded in, the various ways in which States have shaped their relationship with EU law. At the extremes, the Convention either occupies a contrasting position to 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).

The chapters in Part IV explore the relationship between other States and European human rights and explore differences in human rights cultures, while making connections and drawing contrasts with the UK where possible. It is beyond the scope of a publication such as this to provide a comprehensive comparison of all Council of Europe States with regard to all possible issues. This collection presents necessarily a very selective sample of issues and jurisdictions. The jurisdictions covered are a mixture of long-established and more recent Member States, of those with a long-term 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 Convention (through domestic bills of rights) which may be contrasted with the direct application in Austria and the UK. The Austrian example is comparable to the UK in so far as the Convention (in effect) doubles up as a domestic human rights standard and as the domestic protection of human rights in Austria is fragmented, being based on 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 with regard to issues of 'national sensitivity'.

The scene for the chapters in Part IV is set in chapter sixteen by **Luis López Guerra**, who provides a general overview of compliance with rulings of the ECtHR, thus linking the debates and strain to the crucial question of compliance: the protection of Convention rights, and the credibility and ultimately the legitimacy of the

Convention system as a whole—insofar as it requires the same (minimum) standards for all Member States—depends on compliance with the Convention and ECtHR rulings. At the same time, the monitoring of compliance, and 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. Guerra highlights an evolution in the case law of the ECtHR away from providing merely declaratory remedies to being more proactive in giving specific instructions as to the implementation of judgments, both in the individual effects of judgments (*inter partes*) and in their more general dimensions (implementation 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 by the State in question as a greater interference and even raise subsidiarity concerns. On the other hand, particularly 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. In chapter seventeen, Constance Grewe 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 that contributed significantly to the caseload 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 reflects to some extent that experienced by the UK. This tension crystallised around some high-profile cases which required fundamental changes to the French legal order (*Poitrinol* (1993), *Kress* (2001)).²⁸ Not unlike the UK, France experienced constitutional and institutional difficulties in implementing the Convention, particularly 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 effect of improving conventional review by the ordinary courts.

Grewe thus also highlights problems similar to those facing Austria and Italy with implementing the ECHR, namely the dynamics, conflicts (and perhaps also separate agendas) relating to the division of competences between courts of different jurisdiction in France. Adopting a historical perspective on these conflicts, Grewe highlights that, although highly controversial at the time the conflicts first arose, today's perception in France of these cases is that they contributed to an improvement of the law and of human rights protection in France. Thus, what started out as a relationship of conflict may be described as a more harmonious one today (although Grewe also identifies some human rights issues that may well lead to further confrontation in the future). Grewe stresses that conflicts and debates in France were predominantly borne out in a technical or technocratic way rather than entering high-level

²⁸ *Poitrinol v France* (n 11); *Kress v France* (n 11).

political or public debate, while pointing out that weak parliamentary involvement may mean that ‘optimal subsidiarity’ has not been reached.

In chapter eighteen, **Oreste Pollicino** takes us through the labyrinth of the interaction of Italian law with the Convention and EU law. He outlines a radical change in the Italian Constitutional Court’s approach to the ECHR: with two decisions of 2007²⁹ it established that review for conformity with the ECHR as a substantive standard as interpreted by the ECtHR is part of domestic constitutional review. The Constitutional Court thus goes beyond ‘taking into account’ Strasbourg jurisprudence, as the UK does under section 2 HRA. However, Pollicino also reveals that, although ECHR-friendly on the face of it, the Constitutional Court has subsequently, in effect, monopolised the application of the Convention, 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 apply conflicting national law in individual cases, in other words truly assimilating the reception of EU law and the ECHR. A parallel may be drawn here with the UK, where the limited remedy of a declaration of incompatibility under the HRA has come under fire, but still holds strong.³⁰ It may be asked whether this new strictness in the approach of the Italian Constitutional Court can be seen against the backdrop of the case of *Lautsi v Italy*,³¹ considered to be the ‘Italian *Hirst*’ by some. Pollicino critically analyses the implications of the Italian Constitutional Court’s approach 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.

In chapter nineteen, **Julia Rackow** traces the evolution of the relationship between the German Federal Constitutional Court (FCC) and Strasbourg as one moving from conflict to cooperation. She discusses the approach of the German Federal Constitutional Court (FCC) towards the ECHR and ECtHR from *Von Hannover and Görgülü*³² to the 2011 *Preventive Detention* case³³ (following *M v Germany* in Strasbourg).³⁴ 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 the substantive standard of its constitutional review). However, the FCC appears to have become more cooperative than this might suggest. In the *Preventive Detention* case it imposed a 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 is a party. The underlying rationale is to minimise the risk of conflicts with (and breaches of) international law. Rackow considers the ongoing headscarf debate in Germany as an area of both potential future clash and public debate, whilst also concluding that, generally,

²⁹ Decision nos 348/2007 and 349/2007.

³⁰ *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Libya* (n 3) para 67.

³¹ *Lautsi v Italy* (n 11).

³² *Görgülü v Germany* App no 74969/01 (26 February 2004).

³³ Entscheidungen des Bundesverfassungsgerichts (BVerfGE), 128, 326.

³⁴ *M v Germany* (2009) 51 EHRR 976.

criticism of the Strasbourg Court in legal and political circles and amongst the public has tended to be issue oriented rather than fundamentally posing a challenge to the legitimacy of the ECHR or ECtHR. Finally, Rackow reflects on various conclusions regarding 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 mere existence of a bill of rights may not in itself avoid conflict: the wider constitutional culture plays a vital part in the harmonious protection of rights.

The last two chapters of Part IV turn further east to discuss a more recent party to the Convention: Russia. Olga Chernishova and Bill Bowring provide insights into the problems concerning 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.

In chapter twenty, **Olga Chernishova** discusses specific mechanisms (including Supreme Court plenary resolutions) and problems concerning the implementation of ECtHR judgments in Russia, in particular pilot judgments relating to 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, Chernishova points to remaining concerns about the effective implementation of Article 3 ECHR ‘on the ground’: 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 the 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 operations.

In chapter twenty-one, **Bill Bowring** 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 with regard to the public and media discourse concerning 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, Bowring considers the case of *Konstantin Markin v Russia*,³⁵ which could have become as antagonising as *Hirst v UK*,³⁶ and shows how a ‘judicial conversation’ between the Russian Constitutional Court and the ECtHR was able to defuse the situation. He also provides a useful illustration of how case law from other jurisdictions is used (or rather misused)—namely 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.³⁷ Bowring highlights one of the complexities in Russia’s relationship with the ECHR, namely the lack of independence of, and public confidence in, the judiciary, which results in particular from the interaction of the executive with the judiciary.

³⁵ *Konstantin Markin v Russia* (n 14).

³⁶ *Hirst v UK (No 2)* (n 9).

³⁷ A similar attempt is made in the Conservative Party’s *Protecting Human Rights in the UK* (n 4), which ‘decontextualises’ and misrepresents the approach of Germany to the ECHR and ECtHR decisions.

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

Following on from Part IV's rather broad-brush comparative approach, which is intended to tease out the determinants of the relationship between the UK and European human rights, Part V considers one of the possible societal and cultural determinants: the role of the media in shaping debates and human rights culture in the UK. This part stands against the backdrop of ferocious attacks by the media of judgments and judges; deliberate, careless or misleading misreporting; *ad hominem* attacks on judges; and general scapegoating of human rights. The chapters in Part V discuss legal aspects relating to the regulation of the media in light of the tension created by its dual position: it is vulnerable to violations of its rights at the same time as being itself a potential 'perpetrator' of rights violations. We then proceed to an outline of various 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 reported material to the media.

The first chapter of Part V, by **Robert Uerpmann-Witzack**, reflects on legal dimensions, focusing on the protection of the media under the principle of freedom of expression. The rights enjoyed by the media as a 'public watchdog' sometimes create tension with the protection of other rights; this chapter explores media regulation and its supervision 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 on legal developments and criticise the judiciary, and so contribute to public debate 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 example under Article 8 ECHR. Striking the balance is in principle a matter to be determined at the domestic level. Because state supervision of the media, including that by the courts, is a sensitive issue, the ECtHR has expressed a preference for self-regulation. Uerpmann-Witzack argues that as long as domestic authorities take a carefully balanced and effective approach (even if control is in the form of self-regulation), Strasbourg should not intervene. He 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.

The next two chapters turn to the discussion of media representation of human rights in the UK. In chapter twenty-three, **David Mead** looks at empirical evidence concerning 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). He reflects on narratives that readers might be exposed to (such as the 'conflated Europes', 'the English idyll' (or 'Englishness is best'),³⁸ 'human rights scapegoating', 'the non-universality of human rights'

³⁸ Mead (ch 23), this volume, text near n 76.

and the ‘self-preservation of the media’ (for example in the context of privacy), and their wider implications, especially in light of the Conservative governments’ plans to repeal the Human Rights Act. Mead concludes that the understanding of human rights protection among large parts of the population in the UK will be greatly at odds with reality and that this will have wide ramifications, in particular since one of the aims of the HRA was to embed a culture of human rights.

Against the backdrop of attacks by British media on the HRA, depicting it as a ‘villains’ charter’, Lieve Gies looks at how the British press determine and create perceptions of who is a ‘deserving’ claimant worthy of compassion. She identifies several factors which influence the approach of the media: the kind of rights abuse—whether classic ‘home-grown’ civil liberties or contemporary European human rights are engaged; and the presence of a ‘politics of pity’ which facilitates compassion for victims of human rights violations. She points to the arbitrary and unpredictable nature of such determinations, as well as the power of the media to dramatically shape perceptions and outcomes, for example by choosing to bring a ‘distant sufferer’ close enough to engender pity.

Part V is also presented as a call for further research. The representation of human rights by the media is an area that merits further empirical and comparative work in the future, in 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), and as a ‘fourth power’ that may affect the exercise of human rights by others and may be acting in conjunction with (as well as against) those in formal positions of power. 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 protective functions, the horizontal application of rights, the notion of responsibility, and even the direct obligations 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 link between technocratic circles and the wider public, play a crucial role in developing a human rights culture, which is of course one of the aims of the HRA.

In the final chapter of the book we offer our own reflections on the themes discussed in the book and on options for the future in the ongoing 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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