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LECTURE III: THE COMMON LAW AND EUROPE

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1. “But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.” This was Lord Denning’s metaphor for the arrival in our books of Community Law. The citation is from *Bulmer v Bollinger*¹, a celebrated case at the time. It was about the protection of the designation “champagne” under what is of course now EU law. Judgment was delivered only 16 months after the United Kingdom acceded to what was then known as the Common Market in January 1973.
 2. In Lecture I I described the constitutional balance between law and government, between judicial and political power. The constitutional balance has evolved through the benign force of our constitution’s unifying principle, the common law. The common law’s distinctive method has yielded a process of continuous self-correction, allowing for the refinement of principle over time; it is the crucible of the moderate and orderly development of State power. This benign *continuum* of developing law has been the means by which legislature and government are allowed efficacy but forbidden oppression. But I also said that there were two contemporary threats to the constitutional balance. The first is produced by present-day fears, both real and imagined, of the malice of extremism. That was the subject of Lecture II. The second threat is the subject of this lecture. It is that the actual or perceived effects of law made in Europe upon our domestic system may undermine virtues of the common law: its catholicity, and its restraint. Lord Denning’s metaphor about the estuaries and the rivers, whether or not he meant it thus, has a whiff of apprehension about it. It may serve as a very superficial shorthand for the concerns I will expose and confront.
 3. I referred to two of the common law’s virtues: its catholicity and its restraint. The latter, the common law’s quality of restraint, is threatened by the phenomenon of human rights law, and I will come to that. The former, the common law’s quality of catholicity, is threatened by perceived effects both of EU law and of the human rights law coming out of the European Court of Human Rights at Strasbourg. Let me turn first to the threat to the law’s catholicity.

THE CATHOLICITY OF THE COMMON LAW

¹ [1974] Ch 401.

4. "Catholicity" may seem a strange description of a legal virtue. By it I mean the common law's capacity to draw inspiration from many different sources. Let me give an example from another case decided by Lord Denning, well before this country acceded to the European Union or the Human Rights Act was passed. In *Schmidt v Secretary of State*², in December 1968, two American students who had been admitted to the United Kingdom to study scientology at a college at East Grinstead were refused an extension of their leave because new government policy disapproved of the subject-matter of their studies. They challenged the refusal. Lord Denning said:

"The speeches in *Ridge v Baldwin* [1964] AC 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say... If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right - and, I would add, no legitimate expectation - of being allowed to stay."

The germane reference in this passage is to the phrase "legitimate expectation". Lord Denning's judgment in *Schmidt* is generally thought to be the first instance of the expression's use in our jurisprudence. Since *Schmidt* was decided the doctrine of legitimate expectation has of course been much deployed in the administrative law cases. There has been substantial debate upon the question whether it creates or discloses substantive rights or only procedural rights³. It has become a major instrument in the common law's insistence on fair dealing by public bodies, and the protection against abuse of power which the common law provides. But it has its origins in German administrative law from which it was borrowed and thereafter developed by the European Court of Justice⁴. That said, *Schmidt* is perhaps not quite so telling an example of the common law's catholicity. Lord Denning himself has stated that he felt sure that the concept of legitimate expectation "came out of my own head and not from any continental or other source"⁵. But it has a distinctly European pedigree.

5. However that may be, the overall point is clear enough: the common law draws inspiration from many sources. Thus our courts had embarked upon the recognition of fundamental constitutional rights well before the Human Rights Act of 1998; and were to no little extent inspired to do so by the yet unincorporated European Convention⁶. Then Lord Diplock in 1984 in the *CCSU* case⁷ expressed himself as having in mind "the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community"; since then proportionality has become common currency; and there has been an increasingly lively debate as to whether, or the extent to which, this essentially European concept should be

² [1968] 2 Ch 149.

³ Among many cases see *Ex p. Hargreaves* [1997] 1 WLR 906 and *Ex p. Coughlan* [1999] COD 340.

⁴ The German concept was *Vertrauensschutz*. As for the Luxembourg court, see J. Usher, *The Influence of National Concepts on Decisions of the European Court* (1976) 1 *European Law Review* 359 at 364 and *EC Commission v EC Council* [1973] ECR. 575. I owe these references to Professor B N Pandey's article, *Doctrine of Legitimate Expectation*, 31 *Ban. LJ* (2002) 57. See also, among other materials, Professor C F Forsyth [1988] CLJ 238.

⁵ In a letter to Professor Forsyth, quoted at [1988] CLJ 238, 241.

⁶ See for example Murray Hunt, *Using Human Rights Law in English Courts*, Ch. 5 (*The Emergence of a Common Law Human Rights Jurisdiction*), (Oxford 1997).

⁷ [1985] AC 374, 410.

deployed in purely domestic public law cases. So also the idea of legal certainty, articulated as such, has a European parentage and a common law application.

6. Legitimate expectation, proportionality, legal certainty: our domestic public law, and thus the common law, has been greatly enriched by these European implants. Other examples may no doubt readily be found in other fields, such as the law merchant. We owe our modern understanding of the concept of privacy, which straddles the realms of private and public law alike, very largely to ECHR Article 8; but it has taken root here as an autonomous construct⁸ through the medium of the law of confidence. All this, moreover, may be said to march with the common law's take on customary international law. In *Trendtex v Central Bank of Nigeria*⁹ in 1976 Lord Denning stated that "the rules of international law are incorporated into English law automatically".
7. This, then, is the catholicity of the common law. It was Rudyard Kipling who coined the phrase, "[w]hat should they know of England, who only England know?"¹⁰ Our law has embraced these legal importations from foreign sources as its own. They have become part of the means of the common law's power of continuous self-correction. They go in the scales of the constitutional balance; they have refined it, and lent it nuance. In making them our own we have re-fashioned them, or some of them, to bear the colour and stamp of common law principle. Thus in *SS (Nigeria)*¹¹ in May this year I said:

"There is no doubt that proportionality imposes a more demanding standard of public decision-making than conventional *Wednesbury* review, whose essence is simply an appeal to the rule of reason. But the true innovation effected by proportionality is not... to be defined in terms of judicial intrusion or activism. Rather it consists in the introduction into judicial review and like forms of process of a principle which might be a child of the common law itself: it may be (and often has been) called the principle of minimal interference. It is that every intrusion by the State upon the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the State's proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision-makers."¹²

8. What is the threat to this catholicity of the common law? It starts from the fact that these principles with a foreign ancestry, like any other principle of the common law, can only truly take their place and play their part if the law's users, its practitioners and its commentators, believe in their benign effects. In the end the law's authority rests upon public belief. In Lecture II I cited Sir Gerard Brennan, Chief Justice of Australia from 1995 to 1998, who said in a lecture at University College Dublin in 1997¹³ that the common law courts have "no power but the power of judgment, [and] no power base but public confidence".
9. Now, I have come to think that the political controversies and resentments concerning Europe, in which of course I have no voice and claim none, may undermine the confidence which thinking people ought to have in the common law's catholicity: in its use of principles which were born or have flourished in Luxembourg and in Strasbourg. The threat takes different forms as between the two. As for Luxembourg, it is intertwined with fears of the loss, or at least the erosion, of State sovereignty. As for Strasbourg, it is intertwined with a resentment felt among many shades of opinion that under the pressure of the Strasbourg

⁸ See in particular the judgment of Sedley LJ in *Douglas & Anor v Hello! Ltd* [2001] QB 967.

⁹ [1977] 1 QB 529.

¹⁰ *The English Flag*, 1891.

¹¹ [2013] EWCA Civ 550.

¹² Paragraph 38.

¹³ *The Third Branch and the Fourth Estate*, second lecture in a series on Broadcasting, Society and the Law.

court the law of human rights has got too big. These are the incoming tides, to use Lord Denning's metaphor, which it is feared cannot be held back. The threat to the common law is that these fears may undermine the confidence which ought to be reposed in the common law's enrichment by our legal importations from Europe. It is therefore of the first importance that interested parties – lawyers and others – should have the imagination and discernment to see that the common law's catholicity, its ingenious deployment of sources from outside itself, has a value of its own, entirely unconnected with the politics of Europe or the tide of human rights. And upon this a further perception follows. When they cross the Channel these principles and ideas are absorbed into the common law's autonomy: that is, their development in this jurisdiction is in the hands of our judges, as surely as the duty of care in negligence or the doctrine of consideration in the law of contract.

10. These are the general truths I would emphasise. But there are more specific antidotes for the fears and resentments which seem to be fuelled by Luxembourg (or Brussels) and Strasbourg. My prescription for the first – Luxembourg – is a correct understanding of the European Union's position in the constitution of the United Kingdom. My remedy for the second – Strasbourg – is to revisit our domestic case-law concerning the interpretation and application of the Human Rights Act. Let me turn to State sovereignty and the European Union.

STATE SOVEREIGNTY AND THE EUROPEAN UNION

11. State sovereignty is the legal autonomy of the nation State, given and guaranteed by the State's own law. I leave aside questions of the diplomatic recognition by others of the State's sovereignty. At the present time the British State enjoys this legal autonomy. It has not been ceded to any other entity; it has not been ceded to the European Union. Neither the European Communities Act 1972, which of course took us into the Community, nor any other statute touching our membership of the Union, has done so or purported to do so. Indeed as a matter of constitutional theory, no Act of Parliament is capable of ceding altogether the sovereignty of the State. An Act of Parliament can be repealed; so long as there is a power to repeal any Act which purports to cede sovereignty, of necessity sovereignty remains, so to speak, at home; it inheres in the very power of repeal, which contradicts sovereignty's transfer elsewhere. The cession of State sovereignty would therefore require a shift in what is recognised as law; a change in what Professor H L A Hart called the rule of recognition¹⁴. The new rule would have to confirm the efficacy of a law that could not be repealed. Since the cession of State sovereignty, were such a thing ever to be contemplated, would no doubt be fraught with acute and bitter controversy, the conditions of general acceptance which a new rule of recognition requires would not readily be met.
12. But this is theoretical, far distant from the real world. These matters are however worth noting, because they represent a fundamental legal truth concerning State sovereignty in the United Kingdom: strictly speaking it cannot be ceded by law without the recognition of a new kind of statute. Of course a *de facto* cession of sovereignty might come to be treated as *de jure* with the passage of time; and there are instances of statutes which could not in practice be repealed, such as the Statute of Westminster 1931. There are also cases where the validity of a statute seems indeed to be based upon a new rule of recognition, such as the Parliament Act 1911. But all these are even further distant from my subject in this lecture. The fears and resentments relating to the European Union which threaten the

¹⁴ *The Concept of Law*, Oxford, 1961, second edition 1994 (editors Penelope Bulloch and Joseph Raz), published after Hart's death.

common law's catholicity are not of anything so outlandish as a cession of State sovereignty, despite the language in which they are sometimes expressed. Rather they concern the extent of the limited powers that have in fact been transferred to the Union and may be so transferred in the future.

13. However this rather more practical concern also raises constitutional questions. There is one case in which the Divisional Court was asked to confront the legal relationship between the powers of Westminster and the powers of Brussels, *Thoburn v Sunderland City Council*¹⁵ in 2002. I must therefore try your patience with citations from my judgment in that case, with which Crane J agreed. I hope you will not think it too reminiscent of that caustic line in the movie *Two for the Road*¹⁶, about taking the salute at an endless march past of oneself.

THOBURN v SUNDERLAND CITY COUNCIL

14. *Thoburn* – the so-called “Metric Martyrs” case – was directly concerned with the doctrine of implied repeal. It was contended that s.1 of the Weights and Measures Act 1985 effected an implied repeal of s.2(2) of the European Communities Act 1972 “to the extent that the latter empowered the making of any provision by way of subordinate legislation... which would be inconsistent with that section.”¹⁷
15. I need not take time with the details of the argument, or the complex web of subordinate legislation that was involved. The submission on implied repeal failed for various reasons. What matters for present purposes is the court's response to an argument advanced for the respondent (by Eleanor Sharpston QC, now the British Advocate General at the Court of Justice of the European Union) which “proceeded on the assumption that the incorporation of EU law effected by the [European Communities Act]... must have included not only the whole corpus of European law upon substantive matters such as... the free movement of goods... but also any jurisprudence of the Court of Justice, or other rule of Community law, which purports to touch the constitutional preconditions upon which the sovereign legislative power belonging to a member State may be exercised”¹⁸. Anticipating, as it were, what I have said in this lecture about the rule of recognition, I responded thus:

“Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation... Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty... This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the

¹⁵ [2003] QB 151.

¹⁶ With Albert Finney and Audrey Hepburn.

¹⁷ *Thoburn*, paragraph 39.

¹⁸ Paragraph 58.

traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.”¹⁹

16. The modification there referred to was the proposed acknowledgement of a category of statutes which may be called “constitutional” statutes²⁰, which include the European Communities Act. Other examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act, the Scotland Act 1998 and the Government of Wales Act 1998:

“Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature’s *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation?... The ordinary rule of implied repeal... has no application to constitutional statutes.”²¹

17. This acknowledgement of the European Communities Act as a constitutional statute sought to reconcile Parliament’s power of repeal with the result of the House of Lords’ decision in *Factortame (No 1)*²². In that case the House was faced with a statute, the Merchant Shipping Act 1988, which included provisions in breach of EU rights and which (it might be thought) was to that extent inconsistent with the European Communities Act 1972. On conventional doctrine, the Merchant Shipping Act would by implication have repealed the European Communities Act *pro tanto*. But such an outcome was not even argued in *Factortame*. Sir William Wade regarded the result in that case as “revolutionary”²³, for it appeared from Lord Bridge’s reasoning that Parliament by the Act of 1972 had succeeded in binding its successors. On the approach taken in *Thoburn*, however, it has done nothing of the kind; *Thoburn* shows that the Act of 1972 could only be repealed by express provision, which the Merchant Shipping Act certainly did not purport to do.
18. The point for present purposes is that the levers of constitutional power are in law untouched by our membership of the European Union. “[T]he courts have found their way through the *impasse* seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament”²⁴; and the supremacy which European law possesses in this jurisdiction is entirely given by the United Kingdom Parliament. To that extent European measures, so far as they are effective in this jurisdiction, possess a principal characteristic of secondary legislation: they only have force to the extent permitted by the enabling Act. Now, it is well established by the common law that secondary legislation cannot lawfully abrogate a fundamental or constitutional right unless the enabling statute gives authority for that to be done by express words or the clearest implication.²⁵ But s.2 of the European Communities Act is expressed in very general terms. In *Thoburn* I said:

“In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general

¹⁹ Paragraph 59.

²⁰ There is a valuable discussion of this idea, including important criticisms of my approach in *Thoburn*, by Professor David Feldman in *The Nature and Significance of “Constitutional” Legislation*, (2013) 129 LQR 343.

²¹ Paragraph 63.

²² [1990] 2 AC 85.

²³ Wade & Forsyth, *Administrative Law*, Oxford (2000).

²⁴ *Thoburn*, paragraph 60.

²⁵ See for example *Ex p. Witham* [1998] 2 WLR 849, *Ex p. Pierson* [1998] AC 539, 575C-D, *Ex p. Simms* [2000] 2 AC 115.

words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law.”²⁶

19. And so, because the supremacy which European law possesses in this jurisdiction is given by the United Kingdom Parliament, the reach of European law is ultimately a function of Parliament’s will; and it is of course not to be assumed that Parliament has given the European legislature *carte blanche*.
20. I hope it goes without saying that this conspectus of the edge of power between Brussels and Westminster implies no hostility to anything European. I would have no business peddling such an opinion, even if I harboured it. I have been concerned only to describe what in law is the constitutional position as I see it. And the constitutional position thus described is in truth ring-fenced from the storms of controversy over the content of EU law. The development of our public law, enriched as I have said by ideas that come from Europe, should be no less secure. The common law’s catholicity – its absorption of principles such as proportionality – has nothing at all to do with the politics of Europe. That is how they should be seen and understood. Indeed there is every reason to suppose, and for my part I hope, that even if the United Kingdom were to secede from the Union, these principles would continue to mature within the fabric of the common law, and enrich the constitutional balance.

STRASBOURG

21. Now I will move from Brussels and Luxembourg to Strasbourg. As I said at the start, the common law’s catholicity is threatened not only by the perceived effects of EU law, but also those of the law of human rights. However the perceived effects of human rights law also threatens another virtue of the common law: its restraint. The charge is that the law of human rights has got too big. It has pushed the judges into the field of political decisions. Here the threat to the law’s catholicity and to its restraint march together. To the extent that the law is or seems to be driven by decisions of the Strasbourg court, we are looking again at Lord Denning’s unstoppable tide, flowing up the estuaries and the rivers; or at least, the perception of it. Just as with the European Union, the resulting fears and resentments may undermine the confidence which thinking people ought to have in the common law’s catholicity, for our common law principles with a European source, most notably proportionality, have their parentage in Strasbourg as well as Luxembourg. But if we can make the law of human rights truly our own, perceived and rightly perceived as a construct of English law, we shall quell these fears of the incoming tide and so protect the common law’s catholicity, and at the same time keep control of the proper place of human rights, and so protect the common law’s restraint.
22. Are our courts more subservient than they need be to the jurisprudence of the European Court of Human Rights? Have they fettered their historic autonomy and undercut their own power of judgment – the very power that enables them to keep the constitutional balance? This is not, I must confess, by any means a new debate. There have been eloquent calls for looser ties between our courts and Strasbourg for some time. Lord Irvine of Lairg and Jack Straw MP, who sponsored the Human Rights Bill in the Lords and Commons respectively, have been muscular advocates for such an outcome: Jack Straw in the second of his Hamlyn Lectures delivered last year²⁷. So has Baroness Hale, speaking extra-judicially²⁸. And Lord

²⁶ Paragraph 69.

²⁷ *Aspects of Law Reform: an Insider’s Perspective*, Hamlyn Lectures 2012 (Ch. 2: *The Human Rights Act and Europe*). Lord Irvine gave a lecture entitled *A British Interpretation of Convention Rights* at the UCL Judicial

Reed, in a lecture here at the Inner Temple earlier this month²⁹, has expounded and emphasised the primacy of the common law's protection of human rights. I travel this ground again because I think there remain important questions as to the relationship between the Human Rights Act 1998 and the Convention jurisprudence which touch the catholicity and the restraint of the common law, and because there have been some very recent important developments in the Supreme Court including one case (*Osborn*) referred to by Lord Reed in his lecture and in which he gave the first judgment.

23. If statute required such subservience of our courts to Strasbourg as to fetter their historic autonomy and undercut their power of judgment, then the legislature would itself have assaulted the constitutional balance. We must start with s.2(1) of the Human Rights Act 1998:

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission...,

(c) decision of the Commission..., or

(d) decision of the Committee of Ministers...

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.”

Ullah [2004] 2 AC 323

24. How have the courts discharged their duty under s.2? The case of *Ullah* in June 2004³⁰ concerned the right to freedom of thought, conscience and religion guaranteed by Article 9 of the Convention. Lord Bingham said this:

“[T]he House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course

Institute on 14 December 2011. Sir Philip Sales published a reply: *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine* [2012] PL 253.

²⁸ *Argentoratum Locutum: Is the Supreme Court Supreme?* Nottingham Human Rights Lecture 2011, 1 December 2011.

²⁹ *The Common Law and the ECHR*.

³⁰ [2004] 2 AC 323.

open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”³¹

25. This statement of high authority has been repeatedly followed since. The last sentence – “[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence” – has been taken to indicate that the Strasbourg cases should generally, even if not rigidly, be treated as authoritative: as having the effect of legal precedent, or something very close to it. With deference to the House of Lords, and with great respect for Lord Bingham, I have in common with others come to think that this approach represents an important wrong turning in our law. I will come to the reasons more fully. Essentially (1) s.2 of the 1998 Act enjoins no subservience to the Strasbourg jurisprudence: it is to be “[taken] into account”. (2) Lord Bingham’s reference to “the correct interpretation” of the Convention, and his statement that it is in the hands of the Strasbourg court implies that there is such a thing: a single correct interpretation, a universal jurisprudence, across the boundaries of the signatory States. I think that is a mistake. (3) So close an adherence to Strasbourg gravely undermines the autonomous development of human rights law by the common law courts. As I have said: unless we make the law of human rights truly our own, we shall not quell the fears of Lord Denning’s tide, and we shall put at risk the catholicity and the restraint of the common law.
26. There has, it is true, been some slippage from the unqualified *Ullah* position. Lord Phillips in a 2010 case³² referred to “rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision”³³. Lord Neuberger has stated that “[t]his court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law.”³⁴ But the *Ullah* doctrine has not been overturned.

Osborn [2013] UKSC 61

27. The latest word is to be found in two very recent decisions of the Supreme Court, *Osborn*³⁵ and *Chester*³⁶, in each of which judgment was delivered in October 2013. In *Osborn* Lord Reed emphasised that

“[t]he values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law. The Convention taken by itself is too inspecific to provide the guidance which is necessary in a state governed by the rule of law... The importance of the [Human Rights] Act is unquestionable. It does not however supersede the protection of

³¹ Paragraph 20. Cf Lord Brown in *Al-Skeini* [2007] UKHL 26.

³² *R v Horncastle* [2010] 2 AC 373.

³³ Paragraph 11.

³⁴ *Manchester City Council v Pinnock* [2011] 2 AC 104, paragraph 48.

³⁵ [2013] UKSC 61.

³⁶ [2013] UKSC 63.

human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.”³⁷

This emphasis on the primary protections offered by the common law is with respect very important and surely to be welcomed. This reasoning shows that it should often be unnecessary to have recourse to the Convention. But it does not tell us how to interpret the Convention where the case in hand requires that to be done; and there may be a question (as Lord Reed acknowledged³⁸) – indeed there very often is – whether compliance with the common law will satisfy the Convention. More radically, there are some cases where the common law has no or virtually no free-standing voice because the human rights issue arises out of a statutory provision or provisions which are wholly unambiguous. That is so in relation to prisoners’ voting rights, with which the other Supreme Court case from last month, *Chester*, was concerned.

Chester [2013] UKSC 63

28. In *Chester* the Attorney General invited the Supreme Court not to apply the principles in the two Strasbourg decisions, *Hirst v UK (No 2)*³⁹ and *Scoppola v Italy (No 3)*⁴⁰, which dealt with prisoners’ voting rights. The court declined the invitation. Lord Mance refers to the views of Lord Phillips and Lord Neuberger which I have cited. Then he states⁴¹

“It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.”

29. Lord Sumption refers⁴² to the “international obligation of the United Kingdom under Article 46.1 of the Convention to abide by the decisions of the European Court of Human Rights in any case to which it is a party”, and notes⁴³ that this obligation “goes further than section 2(1) of the Act, but it is not one of the provisions to which the [Human Rights] Act gives effect”. Then this:

“In the ordinary use of language, to ‘take into account’ a decision of the European Court of Human Rights means no more than to consider it, which is consistent with rejecting it as wrong. However, this is not an approach that a United Kingdom court can adopt, save in altogether exceptional cases. The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do so. In enacting the Human Rights Act 1998, Parliament must be taken to have been aware that effect would be given to the Act in accordance with this long-standing principle. A decision of the European Court of Human Rights is more than an opinion about the meaning of the Convention. It is an

³⁷ Paragraphs 56-57.

³⁸ Paragraph 101.

³⁹ (2005) 42 EHRR 41.

⁴⁰ (2013) 56 EHRR 19.

⁴¹ Paragraph 27.

⁴² Paragraph 119.

⁴³ Paragraph 120.

adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly explained, lead to the decision being reviewed by the Strasbourg Court.”

A Different Approach?

30. I cannot do justice in the course of this lecture to all the learning on the relation between our courts and Strasbourg, or even to the fullness of the *Osborn* and *Chester* decisions. But perhaps I may pick out two statements from our highest court which seem to me to be at the core of the matter. Lord Bingham in *Ullah*: “the correct interpretation of [the Convention] can be authoritatively expounded only by the Strasbourg court... the meaning of the Convention should be uniform throughout the states party to it”. Lord Sumption in *Chester*: “a decision of the European Court of Human Rights... is an adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention...”
31. So the House of Lords and the Supreme Court have accorded overriding force to the notion that only Strasbourg’s rulings on the Convention are “definitive” or “authoritative”. Why should this be so? S.2 of the Human Rights Act cannot surely bear such a weight. The expression “take into account” simply does not mean “follow” or “treat as binding” (or something close to it). But the point on the interpretation of s.2(1) is stronger than this. As Jack Straw points out⁴⁴, decisions of the Commission and Council of Ministers are to be taken into account under s.2(1) no less than judgments of the court; and decisions of the Council, at least, are “wholly political”. Parliament surely cannot have intended, by deployment of the phrase “take into account”, that our courts should treat such decisions as effectively determining the jurisprudence of the Convention for the purposes of its application in the United Kingdom. Yet the term “take into account” must mean the same across all its applications in the subsection.
32. Perhaps the reason for this deference to the Strasbourg court, apparently quite unwarranted by the statute, lies in Lord Sumption’s reference to the United Kingdom’s obligations under Article 46.1 of the Convention. That provides:

“The High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties.”

So the United Kingdom must fulfil rulings of the Strasbourg court in cases brought against it. But this is an obligation which sounds in public international law; it forms no part whatever of our domestic law. As Lord Sumption pointed out, Article 46.1 has not been incorporated by the Human Rights Act. Unlike for example France and Germany, we do not have a monist constitution by which a treaty, once entered into, automatically becomes part of the State’s own law. Under our dualist constitution, international treaties are entered into by the executive government; and the executive is not generally a source of law in England. And Article 46, moreover, of course says nothing whatever about how a signatory State is to treat Strasbourg cases to which it has not been a party.

33. There is with respect no reason that I can see to conclude that the obligation of Article 46.1 offers any aid to the true interpretation of s.2(1) of the Human Rights Act. Lord Sumption

⁴⁴ Op. cit. p.31.

refers to the long-standing practice of our courts to interpret statutes so as to achieve consistency between the domestic law of the United Kingdom and its international obligations⁴⁵. But the development of a domestic law of human rights, taking account (in the proper but limited sense of the term) of the Strasbourg cases, offers no affront whatever to Article 46.1 or any other international obligation. Article 46.1 means only that once a case involving the United Kingdom has been decided in Strasbourg, the United Kingdom must abide by the result. That is a very far distance from the notion that, for example, Strasbourg judgments on Article 8, which on the facts may have nothing whatever to do with the United Kingdom, are authoritative for the purpose of the Human Rights Act.

34. If neither s.2 of the Act, nor Article 46 of the Convention, justifies the judicial deference under which we have laboured since the *Ullah* case, what remains? A distinctive human rights jurisprudence of our own must of course acknowledge that Strasbourg may take a different view of the same case; and Article 46 would then bite and the United Kingdom would be obliged to give effect to the Strasbourg decision. But I cannot see that our courts should be discouraged by that possibility. As I have said, Lord Neuberger referred to “the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law”. That ability, and that value, may be increased, not diminished, by our own initiatives in the field. We should have the confidence to act on that premise.
35. The constructive dialogue of which Lord Neuberger spoke, if we pursue it vigorously, may enrich not only the development of Convention law, but will also allow our own constitutional law to flourish. By our constitution, there is an important difference between the protection of fundamental values and the formulation of State policy: broadly the former is the business of the courts and the latter the business of elected government. The greatest challenge of our human rights law is that it appears to merge these two ideas. Not least in the litigation of claims for the protection of private or family life under ECHR Article 8 we encounter muscular disputes as to whether the government measure in question, perhaps a deportation decision, is properly within the sphere of policy or is an unwarranted intrusion upon the individual’s rights. In such a case, the debate is not only about the weight to be accorded to the Convention right on the merits. It is about the respective roles of government and judiciary. In this jurisdiction, despite the brickbats daily thrown at politicians, there remains a deep sense that matters of State policy are in essence the responsibility of the elected arms of government. But in other States, no less democratic than our own, a different view may be taken of the respective roles of the judicial and the elected arms of State power. Constitutional conditions – including the actual and perceived authority of legislature, executive and judiciary – differ from State to State, and cultural and historic factors may feed the differences.
36. The historic role of the law of human rights is the protection of what are properly regarded as fundamental values. It is not to make marginal choices about issues upon which reasonable, humane and informed people may readily disagree. I acknowledge that the boundary between proper policy and the vindication of rights is difficult. What is a policy issue to one man’s mind is a human rights issue to another. Certainly there will come a point – and it is a very important point – where the law of human rights must be allowed to say, Thus far but no further. Fundamental values possess at the very least an irreducible minimum. Torture, the suppression of free speech, or disregard of due process are not matters of legitimate disagreement, but of shame. However in a debate on Convention issues where there may be more than one civilised view, the balance to be struck between policy and rights, between the judiciary and government, is surely a matter for national constitutions. This is why with very great respect I would venture to question Lord

⁴⁵ See for example *Garland v British Rail Engineering* [1983] 2 AC 751.

Bingham's statement in *Ullah* that "the correct interpretation of [the Convention] can be authoritatively expounded only by the Strasbourg court... the meaning of the Convention should be uniform throughout the states party to it". There may perfectly properly be different answers to some human rights issues in different States on similar facts. I think the Strasbourg court should recognise this. The means of doing so is readily at hand: the doctrine of the margin of appreciation. As Lord Reed said in his lecture at the Inner Temple, "in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation".

CONCLUSION

37. The Strasbourg case law is not part of the law of England; the Human Rights Convention is. The Convention can be and should be a great force for good in this jurisdiction; as I said in Lecture II, it puts more teeth in the common law's mouth. If we develop it according to the methods and principles of the common law, it will enrich us. Any threat to the common law's catholicity will be dissipated. As for the common law's restraint, we are entitled to think that human rights are like the human heart: the bigger they get, the weaker they get.
38. In these lectures I have been concerned with the constitutional balance between law and government. It is harboured and matured by the common law's process of continuous self-correction, which allows the refinement of principle over time, and therefore the orderly development of State power. As I said in Lecture I, the challenge in the end is simply expressed: it is to keep the constitutional balance, and thus to give the principles of the common law – reason, fairness and the presumption of liberty – as big a space as possible. It is no easy challenge. Because our law is constantly renewed by the force of fresh examples, because it reflects and moderates the temper of the people as age succeeds age, because it builds on the experience of ordinary struggles, its principles will always be buffeted by events. In their different ways the confrontation of extremism, and the absorption of law from Europe (the subject of these last two lectures), press upon the constitutional balance. But if we keep faith with it, we shall enjoy a noble inheritance, and may anticipate a tranquil future.

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