The UK and European Human Rights: A Strained Relationship?

Edited by Katja S Ziegler, Elizabeth Wicks and
Loveday Hodson. Oxford, Hart Publishing, 2015.
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Against the backdrop of growing concerns in the UK about the influence of European human rights law and current Conservative proposals to repeal and replace the Human Rights Act 1998 (HRA) with an independent bill of rights, this book brings together a collection of papers exploring the reasons behind these antagonistic developments. The approach is wide-ranging and multi-faceted, drawing on some impressive contributors to treat: the nature of the emergent relationship between UK institutions and the Strasbourg Court and whether it is characterised by compliance, cooperation and/or conflict; the specific issues of conflict between the UK and Strasbourg; the relevance of EU institutions and law to the evolving relationship; the comparative relationship of other jurisdictions to Strasbourg; and the formative role of the media in public debate about human rights. This thematic breadth means the volume cannot examine any specific issue in great detail, and fails to develop an effective dialogue between different viewpoints. However, notwithstanding this, a number of insightful essays are on offer, and the editors make a valiant attempt to integrate the different issues and identify and disentangle the actual and perceived sources of strain in the relationship.

The relationship between the UK and the Strasbourg Court is considered from different angles. There is an interesting exchange of views from two judicial protagonists on relations between the domestic courts and Strasbourg. Judge Mahoney examines the extent and development of judicial dialogue, advocating a more cooperative relationship. Lord Kerr provides a perspective from the UK Supreme Court, with an emphasis on the separate judicial competences, and a critical examination of developments in domestic case law on the effect of Strasbourg

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decisions. The effect of the *Ullah* or mirror principle—which binds national courts to a clear and consistent line of Strasbourg jurisprudence—on the relationship with Strasbourg is subject to extended scrutiny, not only by Lord Kerr, but also by Clayton; both of whom identify the emergence of a more flexible approach in recent UK jurisprudence. From a ‘long view’ perspective, Bates provides historical and constitutional context to the current tensions by charting the UK’s position on the European Convention on Human Rights (ECHR) over the past 60 years. O’Meara takes a closer look at prospects for reform to the Strasbourg Court to enhance subsidiarity and judicial dialogue, particularly through Protocols 15 and 16. Dickson considers the potential for common law rights to cover the gap should the HRA 1998 be repealed and Donald compares the level of hostility levelled at Strasbourg, with the empirical data on implementation of Strasbourg decisions.

A number of contributors point to the formative role of specific areas of political sensitivity in the strained relations with Strasbourg. The volume attempts to identify and consider each of these conflicts. Ziegler takes on the issue of prisoners’ voting rights head on, arguing for a more stringent approach by the Strasbourg Court, allowing a wide margin of appreciation for choices in electoral system, but not in voting eligibility. Fenwick looks at the increased flexibility, dialogue and subsidiarity in recent Strasbourg jurisprudence, applying human rights law to public order and counter-terrorism measures. Ockelton provides a judicial perspective on the application of the right to family life in immigration law and Ovey traces the development of a more principled approach from Strasbourg to the application of the ECHR to international armed conflicts.

Another major issue concerns the interaction between EU law, the ECHR, and domestic human rights law, and the association in public discourse of scepticism about human rights law with Euroscepticism. Douglas-Scott considers the misconceptions and realities concerning the role of the EU Charter of Fundamental Rights in UK law. Gragl looks at the effect of EU accession to the ECHR and Müller considers the relative success of the Austrian system in its constitutional integration of rights under the EU Charter, the ECHR and domestic law.

To shed light on what is particular to the UK experience, the volume delves into the approaches to compliance with the ECHR taken by other state parties. Guerra provides a general empirical overview of compliance amongst state parties. This is followed by a series of articles on perspectives from France, Germany, Italy and Russia. The main point the editors draw from these comparisons is that political hostility to European human rights within the UK is quite distinctive due to the traditional importance of parliamentary sovereignty and lacunae in constitutional protection for fundamental rights.

The shortcomings in the public culture of human rights in the UK are then traced through the role of the media in forming public debates about human rights. Uerpmann-Wittzack provides a useful summary of the judicially recognised role of the media as a public watchdog within democratic societies, and the extent and limits of protection afforded to this role by the right to freedom of expression, especially in relation to unfounded criticisms of judicial institutions. A typology of misreporting on human rights is developed by Mead. This is complemented by Gies' article on how public perceptions of deserving claimants, worthy of the community's compassion, are formed—perhaps contrary to the principle of universal human dignity upon which human rights are purportedly grounded.

The multi-faceted approach is particularly successful for introducing the reader to the range of interconnected issues explaining UK/Strasbourg relations. Although there is some overlap between the contributions, each has its specific strand to add to the tapestry. The tapestry itself is also integrated through the skilful weaving by the editors of a narrative that attempts to disentangle the separate issues at stake and distinguish misconceptions from legitimate concerns in the public debate. Four general elements to the apparent strain are identified.

First, there are concerns relating to state sovereignty, which interact with, but are often confused with, issues pertaining to parliamentary sovereignty, and the proper role of the judiciary. There is, secondly, a general scepticism about rights, which may relate to their legitimacy in moral discourse, or reflect a cynicism about bureaucratic or judicial overreach, or the worthiness of those afforded protection. Thirdly, human rights are often portrayed in the UK as a foreign imposition and connected to a general Euroscepticism that can conflate the EU with the ECHR. This characterisation of rights as foreign leads to their externalisation from public culture. Fourthly, the public debate in the UK has a distinct all or nothing character, which may arise from the central importance attributed to questions about the proper role of courts and legislature, the absence of a constitutional tradition of fundamental rights and the distinct influence of the media in forming and misinforming the debate.

What are the editors' solutions for relieving the strain? There is the emergent and potential role for dialogue between courts, legislature and public. They also argue for greater sensitivity to the vital role of independent institutional mechanisms for protecting human rights, whether through courts or parliamentary processes. They welcome the opportunities for nurturing a home-grown culture of human rights through a domestic bill of rights, to operate in tandem and dialogue with international standards. Overall, they hope such developments might cultivate a

public culture of human rights in the UK, which can be fruitfully combined with external mechanisms for accountability to international standards.

The editors wish to contribute to the public debate by reframing and reorienting it towards ‘an informed approach to human rights, both by those in power and by ordinary citizens, an “owning” of human rights as a valuable achievement of the polity and citizens, and good quality human rights reasoning in the legal sphere, derived from principle.’¹ However, there is a critical problem with this integrated narrative. There is little dialogue between competing viewpoints on the main themes, which would be helpful to uncover suppressed presuppositions and potential problems with the views of the contributors and narrative of the editors. Let me consider some theoretical issues which, on the whole, are not adequately considered but are critical to some of the opinions.

There is a propensity to conflate moral human rights with legal human rights, as if the latter were necessarily determinative of the former. The editors rightly place the moral legitimacy of the ECHR system in a more general and constructive light by noting that good case law goes largely unreported by the UK press. However, evaluation of whether that institutional framework is efficacious at embodying moral human rights standards in general can remain open to political discourse, lest we unquestioningly accept the moral authority of the institution and crowd out moral discourse with regulation. The editors caution that ‘constructive engagement with the interpretation of a particular right is far removed from a sweeping rejection of the very concept of rights under the ECHR.’² Indeed, they ostensibly foreclose the possibility that the political importance of particular judicial decisions can be a catalyst for reasonable dialogue about the efficacy of the system as a whole. Perhaps this ultimately rests on the claim that ‘the significance of human rights and their persuasiveness must speak for themselves—that is, under the proverbial Rawlsian veil of ignorance, abstracting from specific situations.’³ This suggests a commitment to a ‘political conception’ of human rights which eschews any necessary connection between the emergent human rights practice and specific moral foundations; instead emphasising the importance of the role or function of human rights as a whole, within international political and legal practice. Suffice it to say, while this view is becoming increasingly influential, it is not uncontroversial. To sustain that

1 Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 513.

2 *ibid* 505.

3 *ibid* 512.

view, the editors would need to delve deeper into the distinctly political conception of justice it draws upon, and the debates it implicates with rival understandings of human rights. Another problem is that human rights tend to be spoken of as entitlements we possess by virtue of our humanity, which should not be taken away from us, as if we possess them in the abstract. Indeed, concerns about the desert of human rights claimants are dismissed as clearly contrary to the universal scope of human rights based on human dignity. This may entail an implicit detachment of human rights from broader considerations of substantive justice and the common good. It can lead us to think about rights in a way that commits what Joseph Raz calls the individualist fallacy. Essentially, we can focus too narrowly on the abstract articulation of rights in manifesto form ('right to X'), and over-emphasise the potential value of the right to the claimant as a conclusive consideration. As a consequence, the potential value of the right to the claimant is presumed to ground an adequate reason to impose duties, without due consideration of the constitutive social commitments necessary to make that value a matter for common concern and action, including institutional enforcement. Ultimately, this confuses the universal attribution of human dignity with questions about the proper value response of other agents, and especially state institutions, to that dignity.

Jacques Maritain once said, '[f]or the peoples to agree on the means of securing effective respect for Human Rights, they would need to have in common, however implicitly, not necessarily the same speculative concept, but at least the same practical concept, of man and life, the same "philosophy of life"'.⁴ Human rights decisions can be controversial because they implicate divergent practical understandings of the common good, which may be hotly disputed within a community and not just by the government of the day. This connects up with concerns about subsidiarity. Although attention is given to the potential for subsidiarity through the margin of appreciation doctrine and enhanced dialogue, very little is devoted to the value of subsidiarity within a human rights context. Yet, this is central. The editors believe 'an effective guarantee of individual rights necessitates external oversight' and this must come 'from somewhere outside the UK'.⁵ But this begs the question for anyone who thinks, like Maritain, that quality human rights reasoning rests on an implicit understanding of the common good,

4 UNESCO 'Human Rights: Comments and Interpretations' (25 July 1948) UNESCO/PRS/3, IX (emphasis removed).

5 Ziegler, Wicks and Hodson (n 1) 514.

nurtured by common practical commitments within communal life. Whatever one's views, much more needs to be said on why subsidiarity is to be valued or not.

Without consideration of these foundational issues, the editors' narrative is unable to attain an adequate critical perspective on the public debates to reframe them for anyone who does not already accept their underlying assumptions. Nevertheless, the volume does contain a valuable collection for readers wanting to become more acquainted with current debates on human rights in the UK.