

**Strasbourg
Jurisprudence and the
Human Rights Act: A
Response to Lord
Irvine**

By

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Reprinted from Public Law
Issue 2, 2012

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine

Sir Philip Sales

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☞ Case law; European Court of Human Rights; Human rights; Legislative intention; Precedent; Separation of powers

In a recent controversial lecture,¹ Lord Irvine of Lairg, a principal architect of the Human Rights Act 1998 (the HRA), has suggested that the House of Lords and the Supreme Court have repeatedly erred in the weight they have attached to the jurisprudence of the European Court of Human Rights (ECtHR) when deciding cases under the HRA. According to Lord Irvine, our highest court has been improperly supine in the face of the Strasbourg case law, unduly willing to accept arguably over-extensive interpretations of Convention rights by the ECtHR even when doubtful about them² and unduly reticent about striking out on its own to venture novel and more wide-ranging interpretations of Convention rights than the ECtHR has yet been prepared to endorse. On this last point, he is critical in particular of the approach of the majority of the Supreme Court in *Ambrose v Harris (Procurator Fiscal)*.³ He thus calls in question what is sometimes called the “mirror principle” in interpreting Convention rights, according to which (subject to special cases) the domestic courts seek to mirror in their interpretation of “Convention rights” under the HRA the interpretation given by the ECtHR to the equivalent Convention rights set out in the European Convention of Human Rights (the ECHR). Lord Irvine argues that the domestic courts have misinterpreted s.2 of the HRA by treating themselves as bound by Strasbourg case law, whereas it only provides that:

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ... judgment ... of the European Court of Human Rights.”⁴

¹ “A British Interpretation of Convention Rights”, lecture delivered on December 14, 2011 for the Bingham Centre for the Rule of Law, British Institute for International and Comparative Law. See Lord Irving, “A British Interpretation of Convention Rights” [2012] P.L. April 237.

² The particular example he gives is *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 A.C. 269, in which a number of the Law Lords (see especially the speeches of Lord Hoffmann and Lord Rodger) accepted the interpretation of art.6 of the ECHR by the Grand Chamber of the ECtHR in *A v United Kingdom* (2009) 49 E.H.R.R. 625 to the effect that it was violated by court proceedings based on secret evidence but subject to the safeguard of a special advocate procedure, even though they appeared to disagree with that conclusion.

³ *Ambrose v Harris* [2011] UKSC 43; [2011] 1 W.L.R. 2435.

⁴ He points out that an amendment to s.2 proposed by Lord Kingsland during the passage of the Human Rights Bill to provide that the domestic courts should be bound to follow the judgments of the ECtHR was rejected by Parliament: *Hansard*, HL, Vol.585, col.755, February 5, 1998; Vol.582, col.1228, November 3, 1997; Vol.583, cols 511–515 November 8, 1997; Vol.584, cols 1270–1271; he also points out that the White Paper, *Rights Brought Home*:

In this article, I seek to defend the approach of the House of Lords and the Supreme Court in adopting the mirror principle against Lord Irvine's criticism. I suggest that their approach is eminently sensible as a matter of general legal policy and is fully justified by reference to the terms of the HRA itself. In doing so, I hope I will be forgiven for addressing the issues which arise as matters of general principle and detailed statutory interpretation—much as Lord Irvine does—rather than referring extensively to authority. The fact is that the case law of the House of Lords and the Supreme Court is overwhelmingly in favour of applying the mirror principle, starting with a powerful dictum of Lord Slynn in the *Alconbury* case,⁵ running through the unanimous decision of the House of Lords on the point in *Ullah*⁶ and decisions in a range of cases including the well-known ones of *Al-Skeini*⁷ and *AF (No. 3)*⁸ to the unanimous nine Justice Supreme Court judgment in *Pinnock v Manchester City Council*.⁹ The judgments in *Ambrose* (including the dissenting judgment of Lord Kerr) are in line with this jurisprudence, and do not cast doubt on it. There is certainly scope for argument in many cases about how to identify the proper interpretation of Convention rights given by the jurisprudence of the ECtHR, and it is this feature which is at the heart of the difference between the majority and Lord Kerr in his dissent in *Ambrose*, not the mirror principle itself.

The significance of Lord Irvine's views

Having regard to the eminence of Lord Irvine and his important role in getting the HRA onto the statute-book, it is appropriate to make a preliminary point which is not in doubt. The subjective views of a promoter of an Act of Parliament about its meaning are not a relevant aid to its construction.¹⁰ An Act is a public declaration of the law produced by an institution (Parliament) which has many members who act collectively. MPs vote for different reasons, which they may not declare. There is no obligation on anyone in Parliament to state reasons for adopting legislation, and no-one is empowered to do so definitively and authoritatively. The courts are involved in interpretation of legislation by the construction of a picture of unified

The Human Rights Bill, Cm. 3782, contained statements that the domestic courts would not be bound to follow a decision of the ECtHR: see paras 1.14, 2.4 and 2.5.

⁵ *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [26].

⁶ *R. (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 see esp. [20].

⁷ *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153 especially Lord Brown at [106]. The fact that the ECtHR ultimately disagreed with the House of Lords in its interpretation of the ECHR ((2011) 53 E.H.R.R. 18) is, of course, nothing to the point in relation to the present debate. A court is a human institution and can make a mistake in its interpretation of the Convention law.

⁸ *Secretary of State for the Home Department v F* [2009] UKHL 28; [2010] 2 A.C. 269.

⁹ *Pinnock v Manchester City Council* [2011] UKSC 6; [2011] 2 A.C. 104. The one significant indication that the mirror principle might not be adopted was obiter observations by some judges in *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 which suggested that the domestic courts could adopt their own particularist interpretation of Convention rights going further than the ECtHR would accept. I have made respectful criticisms of those observations elsewhere and do not repeat them here: see P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 L.Q.R. 598, 612–614; P. Sales and R. Ekins, "Rights-Consistent Interpretation and the Human Rights Act 1998" (2011) 127 L.Q.R. 217, 228 fn.49. The unanimous judgment in *Pinnock* has foreclosed this debate. In the observations in *Re G* reliance was placed on the decision in *Re McKerr's Application for Judicial Review* [2004] UKHL 12; [2004] 1 W.L.R. 807 HL, but that decision relates only to the time at which Convention rights come to apply for the purposes of the obligations created by the HRA (the HRA is not retrospective in its effect) and is fully compatible with adoption of the mirror principle at such times as they do apply.

¹⁰ See, for example, *R. (on the application of Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin); [2010] I.C.R. 1198 at [42] and [53]–[55].

intention on the part of Parliament, drawing on established traditions of interpretation.¹¹ It is the objective interpretation of an Act, produced in line with a settled tradition and generally accepted standards of construction, which governs. Lord Irvine's views should be given respectful attention, like those of any other eminent, well-informed and thoughtful commentator; but they have no part to play in controlling the meaning to be given to the HRA and the concepts which it employs.

Section 2 of the HRA: “take into account” and the mirror principle

The domestic courts are well aware that they are not directly “bound” by the HRA to follow the jurisprudence of the ECtHR in interpreting Convention rights. It is clear that the mirror principle, as stated by the House of Lords and the Supreme Court, is based on a recognition of this. The courts emphasise that there will be circumstances where judgments of the ECtHR will not be followed. Even in the early statements in *Alconbury* of what has come to be called (as useful shorthand) the mirror principle, this point was made expressly. Lord Slynn qualified his statement of the principle by saying that the domestic courts should follow the “clear and constant” jurisprudence of the ECtHR and that it should only do so “in the absence of some special circumstances.”¹² Lord Hoffmann said that he doubted that a Strasbourg decision which led to a result which was “fundamentally at odds with the distribution of powers under British constitution”¹³ should be followed. Those early statements have been authoritatively developed and followed in *Pinnock* at [48], as follows:

“This 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 constructive dialogue with the European court which is of value to the development of Convention law: see, for example, *R. v Horncastle* [2010] 2 A.C. 373. Of course, we should usually follow a clear and constant line of decisions by the European court: *R. (Ullah) v Special Adjudicator* [2004] 2 A.C. 323. But we are not actually bound to do so or (in theory at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] 1 A.C. 367, para. 126, section 2 of the 1998 Act requires our courts to ‘take into account’ European court decisions, not necessarily follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.”

¹¹ See, for example, R. Ekins, “The Intention of Parliament” [2010] P.L. 709.

¹² *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [26] per Lord Slynn.

¹³ *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [76] per Lord Hoffmann.

There has been no error by the Supreme Court in its interpretation of s.2 of the HRA. There are a number of reasons why it would not have been sensible or appropriate for Parliament in the HRA to oblige the domestic courts to treat themselves simply as “bound” to follow judgments of the ECtHR whatever they might say and whatever result doing so might produce. But this is compatible with a strong presumption that they *should* do so where such reasons do not apply—which is what the mirror principle amounts to. Section 2 is (to put it no higher) at least consistent with adoption of such an approach.

Along with questions of practicality referred to by the Supreme Court, reasons for not wishing to have a simple rule that the domestic courts always follow judgments of the ECtHR include reasons related both to the weight accorded by the ECtHR to its own jurisprudence and to domestic canons of statutory construction.

As is well-known, in line with the usual approach in continental legal systems and those created by international law, the ECtHR does not operate under a strict system of *stare decisis*. It is not bound by its own judgments. This is the underlying reason why the mirror principle is stated by reference to the formula of “a clear and constant line of decisions”, since that is a usual criterion in such systems of being satisfied that some ruling or statement of law has acquired clear authoritative status¹⁴ (individual judgments of the Grand Chamber of the ECtHR have a broadly similar status, since they are intended to contain especially carefully considered and authoritative statements of ECHR law). The issue is compounded in the case law of the ECtHR by its adoption of the “living instrument” doctrine, according to which it reserves to itself the ability to change the meaning to be given to Convention rights (even if their meaning has been clearly established at some earlier point in time) to take account of substantial changes in the circumstances or the societies in which they fall to be applied.¹⁵ Since the ECtHR is not bound by its own cases there is good reason why the domestic courts should not be, especially as there may be circumstances where it becomes clear from other developments that the statement of law in some case has been overtaken by events and would not be followed by the ECtHR itself if the dispute were before it. Treating the domestic courts as being free to depart from a previous decision of the ECtHR, just as the ECtHR itself would be, is in line with the basic objective of the HRA, as explained in the White Paper, *Rights Brought Home*, to give individuals access to remedies in the domestic courts to relieve them from the need to take the “long and hard” road to Strasbourg to vindicate their human rights.¹⁶

Even if Strasbourg case law is “clear and constant” and there is no question of it being changed under the “living instrument” doctrine, there may be powerful reasons of domestic legal principle why it should not be followed under the HRA. If application of the line of Strasbourg decisions would produce a result which is inconsistent with a fundamental feature of our law, then—particularly since

¹⁴ Although it is also important to note the considerable weight the ECtHR *does* give to its own previous decisions, to give effect to important rule of law values of predictability and certainty, as explained by it in cases such as *Chapman v United Kingdom* (27238/95) (2001) 33 E.H.R.R. 18 at [70], and *Goodwin v United Kingdom* (28957/95) (2002) 35 E.H.R.R. 18 at [74]. I return to these issues below.

¹⁵ See, for example, *Tyrer v United Kingdom* (A/26) (1979–1980) 2 E.H.R.R. 1; *Goodwin v United Kingdom* (28957/95) (2002) 35 E.H.R.R. 18 at [74].

¹⁶ See in particular paras 1.14–1.19 of White Paper, *Rights Brought Home: The Human Rights Bill*, Cm. 3782; Sales and Ekins, “Rights-Consistent Interpretation” (2011) 127 L.Q.R. 217.

Parliament chose not to stipulate that the domestic courts are “bound” to follow such decisions—it cannot be assumed that the courts are authorised to do so. The HRA is a statute expressed in very general terms, and in the absence of more specific indications that fundamental features of the domestic legal system are to be treated as overridden the ordinary application of the principle of legality indicates that they are not.¹⁷ (It should be noted that the principle of legality does not supply a reason to depart from Strasbourg in relation to the true meaning to be given to Convention rights; rather, it supplies a reason for reading down the wide terms of s.3 of the HRA, the obligation to interpret legislation in a sense which is compatible with Convention rights where it is “possible” to do so, and s.6, the obligation on public authorities to act compatibly with Convention rights, so that they do not authorise departure from some fundamental feature of domestic law).

Since there are obvious reasons of this character why Parliament should have chosen to express the obligation in s.2 as an obligation to “take into account” rather than to be “bound by” the case law of the ECtHR, it cannot be inferred from the language of s.2 that Parliament intended to go further so as to exclude adoption of the mirror principle, as it has been formulated by the courts. On the contrary, there are powerful reasons to infer that Parliament intended to leave the detailed development of the law regarding the weight to be given to Strasbourg jurisprudence to the domestic courts (in particular, to the House of Lords and, now, the Supreme Court) and intended that the weight to be given to it should be great, according to cues in the White Paper and the HRA itself. There are also powerful reasons of general principle in support of the mirror approach adopted by the Supreme Court which it is plausible to suppose Parliament intended should have an impact on the way it applies the Convention rights under the HRA. I address these points in turn.

A judicial discretion for the domestic courts

The phrase, “must ... take into account,” in s.2(1) of the HRA does not itself specify the way in which the judgments and decisions of the ECtHR should be taken into account, nor the weight to be given to them. Those are matters inevitably left to the judgment of the domestic courts which have to apply the statute. The language of s.2(1) creates an obligation on the courts to treat the case law of the ECtHR as a mandatory relevant consideration in determining a question in connection with Convention rights but also provides for there to be a form of judicial or legal evaluative discretion, leaving it to the domestic courts under the guidance of the Supreme Court to work out the weight to be given to that case law in taking it “into account”. This discretion is clearly not intended to be an individual discretion for each and any court or tribunal to exercise according to its own individual judgment, subject only to *Wednesbury* irrationality style review by the superior courts. That is why I refer to it as a judicial or legal evaluative discretion. It is a discretion to be exercised judicially, i.e. in accordance with guiding principles

¹⁷ See Sales, “Comparison” (2009) 125 L.Q.R. 598, 600–607: the principle of legality is a principle of respect for domestic constitutional rights and principles. Particular examples of fundamental matters might be art.IX of the Bill of Rights, which appears to be called in question by recent judgments of the ECtHR such as *Hirst v United Kingdom* (74025/01) (2006) 42 E.H.R.R. 41 GC (see P. Sales, “The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights”, Ch.12 in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (2009), pp.178–180), jury trial in serious criminal cases and domestic rules of precedent (see *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465).

determined ultimately by the Supreme Court. The HRA is not intended to allow for or to produce random and arbitrary differences between courts and tribunals in their interpretation of Convention rights (it is worth bearing this point in mind when one considers the appropriate relationship between the domestic courts and interpretations given by the ECtHR: see the discussion below). Therefore, Parliament left it open to the House of Lords and the Supreme Court to develop their own approach to the Strasbourg case law along the lines of the mirror principle—that is, an approach which gives strong, but not binding, weight to the judgments of the ECtHR.

Guidance from the HRA and the White Paper

I suggest that the position can be stated still more strongly in favour of adoption of the mirror principle. Parliament gave guidance in the HRA and in the White Paper which provides a powerful indicator (even if not establishing a binding obligation¹⁸) that when acting in accordance with their obligation under s.2(1) the domestic courts should adopt a strong (but not irrebuttable) presumption that the established case law of the ECtHR should be followed when interpreting Convention rights under the HRA—i.e. that they should indeed adopt the mirror principle.

I begin with the White Paper, *Rights Brought Home*. Reference to a White Paper is a legitimate aid to construction of legislation, particularly as a guide to the general purpose that an Act is intended to promote and the “mischief” it is intended to rectify.¹⁹

The title of the White Paper is itself highly indicative of the purpose of the Act, namely to allow domestic enforcement of and remedies for the Convention rights contained in the ECHR. That purpose is confirmed by reference to the body of the White Paper. There the case was made for incorporation of rights under the ECHR into domestic law to bring the United Kingdom into line with other European states which gave direct effect to the ECHR in their domestic law (para.1.13), to reduce the scope for findings of violation by the ECtHR in Strasbourg (paras 1.14–1.16) and to allow individuals access to machinery for enforcement of their rights under the ECHR at the domestic level without having to take the “long and hard” road to Strasbourg to achieve that end (paras 1.14 and 1.17–1.19). Each of these objectives focused on bringing domestic law into line with the law under the ECHR. This was the objective which Lord Bingham understood the HRA had.²⁰ The White Paper also referred to the desirability of British judges being “enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe” (para.1.14), which is also on proper analysis a pointer in the

¹⁸ Arguably a binding obligation was created, but in light of the position arrived at by the Supreme Court in *Pincock* it is unnecessary to debate this further.

¹⁹ See, for example, *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Spath Holme Ltd* [2001] 2 A.C. 349 at 396E–399E per Lord Nicholls.

²⁰ See his review of Bogdanor, *The New British Constitution*, at (2010) 126 L.Q.R. 131, 132 (“[The HRA] conferred no rights on the British people which the United Kingdom was not already obliged in international law to secure to them, and provided for nothing to be decided by judges which was not already susceptible to judicial decision [i.e. by the ECtHR]”). His view echoes what was said at para.1.19 of the White Paper: “Our aim is a straightforward one. It is to make more directly accessible the rights which the British people *already* enjoy under the Convention ...” (emphasis added).

same direction.²¹ Since the purpose of the HRA is to give effect on the domestic plane to Convention rights set out in the ECHR on the international plane, and in relation to those rights it is the ECtHR which is the body empowered to give authoritative rulings as to their meaning and effect, it is to be expected that the approach to be adopted by the domestic courts to interpretation of the Convention rights set out in the HRA ought properly to be guided in a powerful way by what the ECtHR has ruled in relation to the content of those rights.

The general impression given by the White Paper is strongly reinforced by the detailed provisions of the HRA itself. Section 1(1) defines the concept of “Convention rights” in the HRA to be the rights set out in relevant Articles “of the Convention”, “the First Protocol” and “the Sixth Protocol”. The “Convention” is defined in s.21(1) as the ECHR “as it has effect for the time being in relation to the United Kingdom”, and “the First Protocol” and “the Sixth Protocol” are defined as those Protocols to the ECHR. The point is reinforced by s.1(3), which states “The Articles are set out in Schedule 1”, which duly sets out the relevant Articles of the ECHR and those Protocols. It is, of course, the ECtHR which, under the ECHR itself, is authorised ultimately to determine how the ECHR “has effect for the time being in relation to the United Kingdom”. Section 1(2) provides that the specified articles “are to have effect for the purposes of this Act subject to any designated derogation or revocation”, and ss.14 and 15 define such derogations and revocations by reference to derogations and revocations in respect of the ECHR. The obligation in s.2(1) that the jurisprudence of the ECtHR regarding the Convention rights in the ECHR has to be taken into account is itself a strong indication that the “Convention rights” in the HRA are to be given the same meaning as they have in the ECHR, and therefore that very substantial weight should be given to the jurisprudence of the ECtHR when interpreting them in domestic litigation. Section 7(7) defines standing to make a claim for violation of a Convention right against a public authority by reference to the test whether a person would be a “victim” under art.34 of the ECHR if proceedings were brought in the ECtHR. In determining whether to award damages against a public authority for violation of a Convention right, s.8(4) provides that

“the court must take into account the principles applied by the [ECtHR] in relation to the award of compensation under Article 41 of the Convention.”²²

In relation to judicial acts, s.9(3) provides that “damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.” Section 10(1) treats two cases as equivalent for the purposes of creating a power for a remedial order to amend legislation to be made, namely (a) where a declaration of incompatibility has been made by a domestic court under s.4 or (b) where it appears, “having regard to a finding of the [ECtHR] made ... in proceedings against the United Kingdom”, that “a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.” Thus, the HRA is replete with strong indications that the (HRA)

²¹ See the discussion of dialogue between the domestic courts and the ECtHR, below.

²² See *R. (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 W.L.R. 673 HL.

Convention rights are to have the same meaning and effect as the (ECHR) Convention rights, which are what the ECtHR is authorised to determine.

Consideration of what is perhaps the most important provision of the HRA, s.3, against the background of the constitutional principles of democracy and the rule of law, supports the same conclusion. Section 3(1) provides for a powerful interpretive obligation to operate in relation to all legislation to produce, if “possible”, new or altered meanings which are compatible with the Convention rights. Where s.3(1) operates, it destabilises the meaning of legislative provisions and makes it less perspicuous (and so, to a degree, tends to undermine rule of law values) and involves the transfer of practical legislative power from Parliament to the judiciary (and so, to that degree, tends to undermine democratic principle). It is plausible to infer that Parliament intended to produce these effects only where justified by very cogent reasons, namely the desirability of producing a domestic remedial regime in respect of the rights to which the United Kingdom is subject in international law under the ECHR.²³ It cannot be assumed that Parliament intended to create a wider and unconstrained power in the domestic courts to change the ordinary meaning of legislation in this way by reference to their own idiosyncratic interpretations of Convention rights.

General principle: rule of law values and the legitimacy and logic of human rights adjudication

The arguments stemming from rule of law values in favour of adoption of the mirror principle under s.2 of the HRA when working out the meaning, application and effect of Convention rights do not end with the points made in the last section. Four further arguments—reflecting both formal and substantive aspects of rule of law thinking²⁴—lead to the same conclusion. I would respectfully submit that the approach worked out by the House of Lords and Supreme Court in this context is more deeply in tune with powerful values underlying any legal system which operates with human rights concepts than the alternative proposed by their detractors, and can be described as wise as a matter of general legal policy.

First, if the domestic courts were to depart from the meanings of Convention rights given by the Strasbourg case law without a clear reason for doing so as allowed by the mirror principle, that would tend to undermine basic rule of law values, judged by reference to formal versions of rule of law thinking.²⁵ It would severely reduce predictability in application of the law, both under the HRA itself (such as by reference to the obligation on public authorities created by s.6 to act compatibly with Convention rights) and more widely under the totality of the statute book (all of which is, by virtue of s.3(1), potentially affected by interpretations to be informed in a powerful way by reference to Convention rights). Citizens and public authorities would be less able to obtain clear advice or to inform themselves regarding their rights and obligations where the stream of Strasbourg jurisprudence has to be taken into account alongside a different stream of domestic jurisprudence, giving different meanings to the same Convention rights, and the relationship between the two is not structured and determinate.

²³ See Sales and Ekins, “Rights-Consistent Interpretation” (2011) 127 L.Q.R. 217, 222–225.

²⁴ See P. Craig, “Formal and substantive conceptions of the rule of law: an analytical framework” [1997] P.L. 467.

²⁵ See, for example, J. Raz, “The Rule of Law and its Virtue” (1977) 93 L.Q.R. 195.

Confusion would result. The costs of litigation would increase, since in very many cases there would be much greater scope for argument than is possible under the mirror principle about both sets of case law and how they bear upon the dispute in question. The basic rule of law values inherent in the ECHR and the Convention rights²⁶ would not be promoted as they should be.

There are therefore strong rule of law reasons why the domestic courts should adopt a similar approach to the judgments of the ECtHR as it does itself. As the ECtHR observed in *Chapman v United Kingdom*²⁷:

“The Court considers that, while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.”

Secondly, if the domestic courts are perceived to be giving different meanings to Convention rights than the ECtHR gives them, there is a serious risk that public confidence in the courts and respect for human rights would be adversely affected, so undermining more substantive interpretations of rule of law values.²⁸ It is likely that disappointed litigants and political actors hostile to recognition of legally enforceable human rights would seize upon differences between the two divergent streams of authority in order to use each to criticise the other, and so discredit both. The Supreme Court would particularly be at risk of being diminished in the eyes of European States and institutions²⁹; and the general authority of the ECHR system and Convention rights would be at greater risk of being diminished in the eyes of the British public. It therefore seems in accordance with the human rights values given effect by the HRA, drawn from the ECHR,³⁰ that the mirror principle should be adopted.

This is linked to the third point, which relates to the logic of resolving disputes about human rights. Human rights are “contestable concepts”—people can reasonably disagree about what they might require in a given situation. There is no a priori or necessary conclusion about their meaning and effect which everyone is simply bound, as a matter of rationality, to accept. Therefore, what is required in order for a legal system which gives effect to human rights to operate in a satisfactorily coherent and determinate way is a system of authority in adjudication on human rights issues.³¹ Within the legal system created by the ECHR, it is the

²⁶ See Sales, “The General and the Particular”, Ch.12 in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (2009).

²⁷ *Chapman v United Kingdom* (27238/95) (2001) 33 E.H.R.R. 18 at [70]; see also *Goodwin v United Kingdom* (28957/95) (2002) 35 E.H.R.R. 18 at [74].

²⁸ For an example of a substantive conception of the rule of law, see Tom Bingham, *The Rule of Law* (2010) Ch.7.

²⁹ A matter of increasing, not diminishing, concern, since the role of Convention rights or their equivalent is becoming more important, with their inclusion in the EU’s Charter of Fundamental Rights and the accession of the EU to the ECHR.

³⁰ There are, of course, serious arguments of a political or philosophical nature which may be made against legal recognition and judicial enforcement of human rights (see, for example, T. Campbell, K. D. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (2001); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007)). But what is in issue in our discussion is the operation of a statute which reflects the countervailing political and philosophical arguments in favour of legal recognition of human rights, so it is legitimate to make the point here by reference to what the HRA is intended to achieve, without one necessarily being committed to one side or the other in the more general debate.

³¹ See A. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), pp.106–107; J. Waldron, *Law and Disagreement* (1999) pp.224–231; M. Perry, “Protecting Human Rights in a Democracy: What Role for the Courts?” (2003) 38 Wake Forest L. Rev. 635, 645–651; 227–230; and Sales and Ekins, “Rights-Consistent Interpretation” (2011) 127 L.Q.R. 217, 225 and 227–230.

ECtHR which is the authoritative body to determine the meaning and effect of Convention rights. Since the HRA is a statute which seeks to give effect in domestic law to Convention rights drawn from the ECHR, there is a powerful logic in saying that authoritative interpretations of Convention rights by the ECtHR should generally be treated as authoritative in the domestic legal system as well. The ECtHR makes its pronouncement last, after the domestic courts, and speaks with the full weight of the Council of Europe behind it. In relation to the interpretation of Convention rights, it is the ECtHR (particularly the Grand Chamber) to which Justice Robert Jackson's pithy comment about the US Supreme Court now applies: "We are not final because we are infallible, but we are infallible only because we are final."³²

The fourth point is related to the others. If the domestic courts do not give the same interpretation and effect to Convention rights as the ECtHR, but interpret them more restrictively, the inevitable consequence will be that individuals aggrieved at decisions of the domestic courts will exercise their right of petition to the ECtHR to vindicate their Convention rights. The ECtHR will then give rulings in their favour and grant them remedies. The proper protection of their Convention rights at domestic level will have been found to have been inadequate. A primary objective of the HRA, to spare individuals having to embark down the long and hard road to Strasbourg to vindicate their rights, will have been defeated.

In relation to this last point Lord Irvine suggests that one should simply be content that the remedies in such cases can be worked through at the international level, mediated in some way by discussion between states. He says that "the resolution of the resultant conflict must take effect at State, not judicial, level." It is true, as a matter of form, that this is how the ECHR system operates: see art.46. But it is now many decades since the introduction of the ECHR system, and there is no serious doubt that the Council of Europe (the parent body of the ECHR) will stand behind judgments of the ECtHR and require them to be implemented and the remedies pronounced by the ECtHR honoured by states found to be liable of violations of Convention rights. It is unreal to propose that the resolution of the conflict in such cases should not be judicial.³³ Also, it would severely damage the moral standing and international prestige of any state in the Council of Europe—and would tend to undermine the Council of Europe and the ECHR system itself—if it failed to respect a judgment given against it by the ECtHR. So, with respect, Lord Irvine's plea that resolution of violation of Convention rights be left to the sphere of international relations is impractical and unattractive.

Dialogue between the domestic courts and the ECtHR

It is clear from the statement in *Pinnock* quoted above that the domestic courts recognise the desirability of being able to engage in a dialogue with the ECtHR about the meaning and effect of Convention rights. What might such a dialogue consist of?

Obviously, it is a dialogue which will have to take place within the highly formal procedural limits of litigation in the domestic courts and before the ECtHR. There

³² *Brown v Allen* (1953) 344 US 443 at 540.

³³ For discussion, see *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), pp.862–863 and Ch.24.

is no scope for a direct *exchange* of views between the Supreme Court and the ECtHR before resolution of a particular case. There is no equivalent to the reference procedure available in relation to disputes involving questions of EU law, whereby the domestic court may refer a question of EU law to the Court of Justice of the European Union in Luxembourg and receive back an authoritative ruling on that question framed by reference to the case in hand.

This is a feature of the system created by the juxtaposition of the ECHR and the HRA which deserves emphasis, because it tends to support the relatively cautious approach of the House of Lords and the Supreme Court to resolving issues regarding the meaning and effect of Convention rights where there is no clear lead given by the ECtHR. This is because there is a certain imbalance in access to the ECtHR for a judicial dialogue to take place in a particular case, as between a situation where the Supreme Court is too cautious in its application of a Convention right and a situation where it is too generous.³⁴ In the first situation, there is scope for the ECtHR to correct the error because the aggrieved individual can apply directly to it having exhausted domestic remedies. In the second situation, the public authority which has lost before the domestic courts has no right of application to the ECtHR and so the ECtHR cannot readily correct the error.³⁵ This structural feature of the HRA and ECHR system, and the imbalance following from it in the availability of access to the ECtHR to correct any error made domestically, provides a reasonable justification for the Supreme Court to adopt a relatively conservative approach to trying to develop the interpretation of the Convention rights itself. This is in substance the approach preferred by the majority in *Ambrose*,³⁶ against the dissent of Lord Kerr who would have preferred a more adventurous approach.

Although Lord Kerr felt that his approach, adopting a more expansive interpretation of a Convention right than the ECtHR had as yet clearly endorsed, would have provided a better prospect for creating a dialogue with the ECtHR, it is strongly arguable that the reverse is the case. If his preferred interpretation had been adopted, it would not have been possible to test its accuracy by argument in Strasbourg, because the public authority would have lost and neither it nor the Government would have been able to take the case to Strasbourg. By contrast, on the result arrived at by the majority, the individual concerned will be able to apply

³⁴ Noted, in particular, by Lord Brown in *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153 at [106].

³⁵ An opportunity might arise in a future case for it to take notice of the domestic decision, but that would be purely fortuitous and cannot be guaranteed: the ECtHR decides actual cases and does not go out of its way to comment on domestic decisions in other cases. It would in theory be possible for the Government to engineer a situation in which, if it lost a case domestically, it could try in effect to appeal to the ECtHR by obtaining primary legislation from Parliament to reverse the effect of the domestic decision, leaving any individual affected by that legislation with a declaration of incompatibility granted under s.4 of the HRA and the opportunity to apply himself to the ECtHR, on which application the correctness of the domestic decision on Convention rights could be debated before the ECtHR. This would be extraordinarily convoluted and would provide a very unattractive basis for the Government to argue its case before the ECtHR. I am not aware of this manoeuvre ever having been attempted. In more ordinary cases there may be an occasional situation in which a declaration of incompatibility is granted but where remedial action taken in respect of it is not sufficiently far-reaching to cure the violation of Convention rights, leaving the individual to apply to the ECtHR, where the arguments before the domestic courts can be rehearsed again. These are few and far between. *A v United Kingdom* (3455/05) (2009) 49 E.H.R.R. 25, the Strasbourg manifestation of the *Belmarsh* case (*A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68), is an example: the control order regime which replaced the regime of administrative detention for terrorist suspects did not undo all the effects of that regime, so the individuals made applications to the ECtHR.

³⁶ And in other cases: see in particular *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 A.C. 430 at [6] per Lord Bingham, at [60]–[70] per Lord Hoffmann, at [82]–[94] per Lord Millett and at [109]–[115] per Lord Walker, and *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153.

to Strasbourg and the matter can be tested, with the ECtHR having the benefit of the debate in the Supreme Court to inform its decision.³⁷ Generally, in cases where the Supreme Court is doubtful whether the ECtHR would adopt a more extensive interpretation of a Convention right than it has done to date, there would be nothing to stop Supreme Court Justices explaining how they see the arguments on both sides of the debate (including as appropriate indicating a provisional preference for a wider interpretation), while at the same time erring on the side of caution in their actual ruling by adopting the more restrictive interpretation already endorsed by that stage by the ECtHR.³⁸

Though it is significant, the difference between Lord Kerr and the majority in *Ambrose* seems more one of emphasis rather than of fundamental principle.³⁹ On the more cautious approach of the majority, there still remains plenty of scope for the domestic courts to engage in a general process of fruitful dialogue with the ECtHR as contemplated by paras 1.14 and 1.18 of the White Paper.

First, and most importantly, the domestic courts will always be very well placed to inform the ECtHR about features of the domestic legal system which it may have overlooked or misunderstood when seeking to apply the Convention rights, so as to offer potential corrections to the reasoning of the ECtHR.⁴⁰ This is a very important facility in the context of rights expressed at a high level of abstraction, as the Convention rights are.⁴¹ In many, if not most, cases, the difference between defeat and victory on a specific point depends critically on the process of application of the right in the particular context of the case, so the domestic courts' ability to understand the context more fully than the ECtHR and so to steer it in its application of a Convention right gives them a considerable advantage in guiding the development of the Convention jurisprudence case by case.

Secondly, there will be cases where domestic judges may feel a sufficient degree of confidence in identifying existing trends in the ECtHR's jurisprudence as to justify them in inferring how the ECtHR would develop its case law in future. In fact, this is the rule rather than the exception. The normal case before the domestic courts is not one dealing with a context in which the ECtHR has already delivered a ruling specifically by reference to that precise situation,⁴² but rather with a situation in which inferences have to be drawn from Strasbourg rulings on very varied fact situations arising under very disparate legal systems across Europe. So it is *usual* for the judgments of the domestic courts to be based on an inference

³⁷ See the comment on *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465 below.

³⁸ This was in fact what happened in *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 A.C. 430.

³⁹ After the statement by Lord Hope at [15]–[20] in *Ambrose v Harris* [2011] UKSC 43; [2011] 1 W.L.R. 2435 about the cautious approach required, he carefully analyses the Strasbourg case law to see what inferences can be drawn from it: see in particular [25], [35], [46], [54], [58], [59] and [64]–[65]; also see per Lord Brown at [80], [82] and [85] and per Lord Dyson at [90]–[95] and [99]–[105], contrasting with Lord Kerr at, in particular, [130].

⁴⁰ The ECtHR is sensitive to the possibility that it may err in its application of Convention rights in the particular legal and factual context in a Contracting State, and is ready to correct its previous judgments where the error is brought home to it, as it did, for example, in correcting its application of art.6 in relation to the English law regarding creation of a duty of care in tort (the judgment in *Osman v United Kingdom* (23452/94) (2000) 29 E.H.R.R. 245 being corrected in *Z v United Kingdom* (29392/95) (2002) 34 E.H.R.R. 3), its application of art.6 in relation to the operation of the UK's court martial system (in light of *R v Spear (John)* [2002] UKHL 31; [2003] 1 A.C. 734) and most recently its application of art.6 in relation to use of hearsay evidence in criminal trials (the Chamber judgment in *Al Khawaja v United Kingdom* (26766/05) (2009) 49 E.H.R.R. 1 being corrected, in the light of *R v Horncastle (Michael Christopher)* [2009] UKSC 14; [2010] 2 A.C. 373, by the Grand Chamber judgment of December 15, 2011).

⁴¹ See Sales, "Comparison" (2009) 125 L.Q.R. 598, 599.

⁴² When that has occurred, people will tend not to litigate because (at least, if the mirror principle is applied) they will often know what the outcome will be in the domestic proceedings.

about how the ECtHR would be likely to respond to the particular case at hand. This is an area where there will inevitably be shades of grey regarding the confidence with which inferences can be drawn about how the ECtHR would interpret and apply Convention rights in a particular case, and judges will vary in their assessment of the position in some, more marginal cases.⁴³ The ECtHR can benefit from the discussion of the matter in the domestic courts. No precise rule can be laid down to govern when and how far the domestic courts should draw inferences from the Strasbourg case law in particular cases. All that is realistically possible are statements of general guidance from the higher courts as to the proper approach to adopt (as in *Pinnock*, in favour of a generally mirroring approach, and in *Ambrose*, urging an attitude of relative caution in the freedom with which such inferences should be drawn).

Thirdly, even in adopting a restrictive approach on a debateable point of Convention law, the detailed reasoning of the domestic courts can help the ECtHR in identifying and articulating underlying principles when it has to address other cases. A good example of this was the discussion by the House of Lords of the operation of art.6 (right to a fair trial) in relation to administrative decision-making procedures in *Alconbury* and *Runa Begum*,⁴⁴ which was fuller and arguably gave more detailed attention to underlying principles than anything in the jurisprudence of the ECtHR up to that time, the thrust of which was later endorsed by the ECtHR in another case, *Tsfayo v United Kingdom*.⁴⁵

In addition, as explained above, there is no reason why, when adopting a cautious approach to drawing inferences about the future development and application of Convention rights by the ECtHR along the lines preferred by the majority in *Ambrose*, domestic judges may not set out on a provisional basis reasons pointing in favour of a wider interpretation of Convention rights than has so far been endorsed by the ECtHR.

Finally under this heading, contrary to the view of Lord Irvine, I suggest that the desirability of fostering the ability of the domestic courts to engage in dialogue with the ECtHR about the interpretation and application of Convention rights (emphasised in the White Paper and by the Supreme Court in *Pinnock*) is yet another reason in favour of adoption of the mirror principle. The domestic courts are only likely to be persuasive in such a dialogue if the ECtHR understands that when applying the (domestic) Convention rights under the HRA the domestic

⁴³ As they clearly did in *Ambrose v Harris* [2011] UKSC 43; [2011] 1 W.L.R. 2435. Another example is the division between the majority (Lord Hope, Lord Scott, Baroness Hale and Lord Brown) and the minority (Lord Bingham, Lord Nicholls and Lord Walker) in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465 regarding the application of art.8 to bringing possession by a trespasser of residential property to an end. Ultimately, after a run of decisions at the highest level domestically in which relevant ECtHR judgments were interposed (all reviewed in *Pinnock v Manchester City Council* [2011] UKSC 6; [2011] 2 A.C. 104), in a process which could in some phases be described as a dialogue between the courts in which the ECtHR paid close attention to the reasoning in the domestic cases, the ECtHR endorsed the more expansive view of art.8 as stated by the minority in *Kay*. It is important to note that this review by the ECtHR of the reasoning of the domestic courts was only made possible because the majority in *Kay* had adopted a more restrictive interpretation, so the individuals concerned applied to Strasbourg. Other examples given by Lord Irvine—*R. (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 A.C. 396 and *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2009] 1 A.C. 1198—were simply cases where the House of Lords did feel sufficiently confident about the meaning of Convention rights in light of the existing case law of the ECtHR. It may be noted that they did not readily give rise to a dialogue with the ECtHR, since the applicants won in the domestic proceedings.

⁴⁴ *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 A.C. 430.

⁴⁵ *Tsfayo v United Kingdom* (60860/00) (2009) 48 E.H.R.R. 18. See also *Brown v Stott* [2003] 1 A.C. 681 PC, endorsed by the ECtHR in *O'Halloran v United Kingdom* (15809/02) (2008) 46 E.H.R.R. 21.

courts are doing their best to interpret and apply those rights in the same way as the (international) Convention rights are interpreted and applied by the ECtHR. If, on the other hand, the ECtHR thought the domestic courts applied their own distinct interpretation of the domestic Convention rights, it would be only too easy for it to avoid confronting the domestic case law when making its own rulings under the ECHR.⁴⁶

Conclusion: an integrated European conception of human rights

The ECtHR and the Supreme Court acting under the HRA are inevitably political courts, in the small “p” sense that in applying Convention rights they enter more fully into ruling on issues of policy than was the case for the domestic courts before the HRA. The legitimacy and coherence of their activities will always be subject to democratic or populist pressures. Sceptics about the human rights enterprise may object that resolution of such issues by the courts distorts political processes.⁴⁷ But a commitment to effective protection of human rights has formed a vital part of the self-definition of western democracies since the Second World War, by contrast with fascism and communism which in the twentieth century posed existential threats to them.⁴⁸ It is part of the legitimating identity of those states and their rulers in the eyes of themselves and their populations.⁴⁹

The European human rights project has involved an attempt to identify and promote common (western European) standards to deal with situations where popular politics fail to meet human needs or to respect the human rights which arise from the recognition of those needs, and to foster a broad congruence in the constitutional arrangements to be shared by a range of neighbouring states based on democracy, rule of law and respect for human rights.⁵⁰ Part of the motivation to develop this post-Second World War consensus among western European states has been to remove international tensions between those states arising from ideological incompatibility of very different constitutional forms, so as to safeguard

⁴⁶ A similar point is made at para.1.18 of the White Paper: “United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed.”

⁴⁷ Using human rights as legal concepts and judicial rulings on them as a way to make policy has aspects of the rationalist approach to politics which Michael Oakeshott criticised in *Rationalism in Politics and other essays* (1991); also see Benjamin Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (1988). cf. A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000). For an historical perspective on the dangers of such an approach in the lead up to the English Civil War see Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England 1450–1642*, (2006), especially the summary at p.274, “When politics is absorbed within a positive law system, the methods and priorities of that system inevitably condition the substance as well as the language of political debate ... Not every existing political aim could be accommodated in this fashion ...”, and T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, J. Cropsey (ed.) (1971), in the section “On Sovereign Power” and at pp.13–14 in Cropsey’s introduction.

⁴⁸ cf. L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004), who notes at pp.221–224 that general scepticism about popular government came to characterise western intellectual thought after the Second World War in reaction to fascism and communism, leading American liberals to support judicial supremacy in applying the US Constitution; R. Aron, *In Defense of Decadent Europe* (1977, trans. 1979) and *Peace and War: A Theory of International Relations* (1962, trans. 1966), pp.668–678, arguing that the goals of western strategy should include “moral survival by the safeguarding of liberal civilization” in the face of the communist threat; A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001), pp.343, 605–606 and 746–750; Tony Judt, *Postwar: A History of Europe Since 1945* (2005), pp.564ff.

⁴⁹ See R. Barker, *Legitimizing Identities: The Self-Presentations of Rulers and Subjects* (2001).

⁵⁰ H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008).

liberal western values.⁵¹ This strategy has been expanded into Eastern Europe after the collapse of communism. The pressures upon these arrangements are likely now to mount in an increasingly “zero-sum” world,⁵² and they require constant support and reinforcement. The ECHR and the Council of Europe provide institutions (particularly the ECtHR), peer review and group pressure between states and governing elites to maintain them. Even for national supreme courts, if left to their own resources, it is not always easy to see problems or slippages below these standards.⁵³

The HRA is legislation binding the United Kingdom yet more closely into the European human rights project. Adoption of the mirror principle by the House of Lords and the Supreme Court is in line with what that project and the HRA are intended to achieve. It is a legitimate and lawful principle for the Supreme Court to articulate and apply.

⁵¹ cf. the collapse of liberal regimes before the Second World War, described in M. Mazower, *Dark Continent: Europe's Twentieth Century* (1998), Ch.1. See P. Bobbitt, *The Shield of Achilles* (2002), Ch.17 and pp.776–777; Sales and Ekins, “Rights-Consistent Interpretation” (2011) 127 L.Q.R. 217, 238 fn.78; A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001), pp.560–597, describing Churchill and the United Europe Movement and other initiatives, and pp.605–606.

⁵² G. Rachman, *Zero-Sum World: Politics, Power and Prosperity After the Crash* (2010).

⁵³ For a classic example, see *Sunday Times v United Kingdom* (A/30) (1979–80) 2 E.H.R.R. 245. Compare the observation that the US Supreme Court “follows the election returns” in making its rulings: M. Tushnet, *Taking the Constitution Away from the Courts* (1999), pp.133–135. As Tushnet observes, in important respects national courts are part of the national political system and do not stand wholly apart from it.