CRIMINAL JUSTICE UNDER THE UNITED KINGDOM HUMAN RIGHTS ACT

Dynamic Interaction between Domestic and International Law

The UK criminal justice system has been subject to the protections of the European Convention on Human Rights since the right to individual petition to the European Court of Human Rights was granted to UK citizens in 1966. The Convention rights became the subject of domestic UK litigation with the Human Rights Act 1998. This essay demonstrates how, both before and after the Human Rights Act, UK courts and legislators have sought to reconcile common law approaches to protecting rights and liberties with the approaches of the Strasbourg Court. It uses the development of the case law as an insight into a dynamic institutional dialogue: how interaction with the European Court of Human Rights has shaped the way that UK courts, governments and Parliament have acted on criminal justice issues and *vice versa*.

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I. Introduction

1 The UK criminal justice system has been subject to the protections of the European Convention on Human Rights ("ECHR"/"Convention") since the right to individual petition to the European Court of Human Rights ("ECtHR"/"Strasbourg") was granted to UK citizens in 1966. By the time the Convention was incorporated into UK domestic law in 2000, many key battles in the criminal justice system had been won. The key "criminal justice" rights in the Convention are: Art 5 (deprivation of liberty), Art 6 (fair trial rights) and Art 7 (retroactive crimes and punishments). Other rights are very commonly engaged in the criminal justice context. Article 2 protects the right to life, creating positive obligations requiring the criminal law to do the same, and the police to prevent such breaches. Article 2 also

regulates the right to self-defence and has commonly been invoked against police action in the course of dangerous arrests. Article 3 prevents torture, inhuman and degrading treatment. It is most commonly invoked in the context of prison treatment and in assessing the nature of criminal punishments. Article 3 has also been invoked to create positive obligations to criminalise rape and associated sexual offences. Article 4 prohibits slavery and enforced labour, and has been recently invoked in the context of human trafficking. Article 8 protects privacy and is particularly important in the regulation of police surveillance; it also has implications for prosecutorial discretion. Other rights such as the right to family life, and the right to freedom of expression, and the right to freedom of religion, are commonly invoked in the prisoners' rights context, and with respect to the shape of the criminal law. Finally, and recently, the right to vote under the Convention has become a flashpoint in human rights politics.

2 Having already shaped much of the criminal justice system as a supra-national Convention, the instrument became the subject of domestic litigation when the Human Rights Act 1998[1] ("HRA") became law in the UK. For our purposes, there are three major elements to the HRA.[2] First, s 3 provides an interpretative obligation: "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Second, s 4 creates a declaration of incompatibility, available where a s 3 interpretation was impossible, and primary or secondary legislation was incompatible with Convention rights. Such a declaration does not "strike down" legislation, but encourages the Legislature to consider amendment. Third, s 6 provides that public authorities must not act incompatibly with Convention rights, affording a new ground of judicial review of administrative action. Taken together, it was hoped that these elements would allow for greater protection of human rights within the UK without detracting from the UK's constitutional tradition of parliamentary sovereignty.[3]

3 Given the UK experience of the Convention at the time of the HRA's enactment, there should have been little doubt in legislators' minds as to the range of implications the Act would have on English criminal justice. However, it has been evident ever since that politicians may have failed to anticipate, or at least downplayed, some of the more far-reaching effects of the HRA. The legislation was designed to "give people in the UK opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to" Strasbourg, to "enhance the awareness

1 Human Rights Act 1998 (c 42) (UK).
2 See <http://www.legislation.gov.uk/ukpga/1998/42> (accessed 1 October 2013).
3 UK White Paper, *Rights Brought Home: The Human Rights Bill* (CM 3782) ch 2.

of human rights", and to reinforce the Blair government's positioning "the promotion of human rights at the forefront of our foreign policy".[4]

4 For 13 years now, therefore, British courts have sought to interpret and implement the Convention's human rights protections, and to do so while taking into account the judgments of the ECtHR.[5] It has been an eventful 13 years, particularly in the criminal justice sphere. In the eyes of many, the HRA has taken on a quasi-constitutional status within the UK's unwritten constitutional framework.[6] This essay does not seek to summarise the impact of the Convention or HRA exhaustively, but rather identifies a number of key themes evident in UK human rights jurisprudence. It will do this by reference to some key exemplary cases, while also placing these cases in the broader historical perspective of the Convention's longer influence on UK law.

5 This essay demonstrates how, both before and after the HRA, UK courts and legislators have sought to reconcile common law approaches to protecting rights and liberties with the approaches of the Strasbourg court. It uses the development of the case law as an insight into a dynamic institutional dialogue:[7] how interaction with the ECtHR has shaped the way that UK courts, governments and Parliament have acted on criminal justice issues and *vice versa*. The essay is divided between the various stages of the criminal justice system, within which particular recent developments to exemplify these themes are highlighted.

II. Policing

6 Policing in the UK has been the site of a range of crises which have given as much impetus to institutional reform as any vindication of Convention rights.[8] Nonetheless, key Strasbourg decisions have operated as serious prompts in the reshaping of police practices. Many of these prompts have come from the victims or potential victims of crime who have relied on Convention rights to raise the standard of

4 Preface to UK White Paper, *Rights Brought Home: The Human Rights Bill* (CM 3782).

5 The European Court of Human Rights is a judicial body of the Council of Europe, an organisation of 47 Member States, that is distinct from the European Union and from the European Court of Justice.

6 See, *eg*, *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at [62].

7 L Lazarus *et al*, The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union Systems (European Parliament Directorate-General for Internal Policies, 2011) at p 121.

8 T Newburn & R Reiner, "Policing and the Police" in *The Oxford Handbook of Criminology* (M Maguire, R Morgan & R Reiner eds) (Oxford: Oxford University Press, 5th Ed, 2012) at p 806.

police prevention and investigation strategies.[9] Despite what the UK media would have us believe, therefore, Convention rights do not only serve as a "criminal's charter" constraining police action.[10] Victims are protected in many respects by the protective obligations to which the Convention gives rise.[11] Nevertheless, in several instances the Strasbourg court has made crucial interventions where police powers were seen as too wide or invasive. Two such areas, surveillance and public order policing, have given rise to interesting recent case law which exemplify the complexity of the relationship between domestic courts overseeing a regional human rights instrument, and their relationship to Strasbourg.

A. Surveillance

7 The UK Regulation of Investigatory Powers Act 2000[12] ("RIPA") came into force alongside the HRA. It was testimony to the fact that Strasbourg had already done significant work in forcing the UK government to place the surveillance powers of the police and other investigatory agencies on a statutory footing. Article 8 of the Convention, which protects private and family life, privacy of the home and correspondence in Art 8(1), also requires that any limitations be "in accordance with law". RIPA was designed to address shortfalls in legislation that had developed piecemeal in response to a series of decisions starting with *Malone v United Kingdom*[13] in 1984 and culminating in *Khan v United Kingdom*[14] in 2001.[15] There can be little doubt that actions brought under Art 8 were instrumental in bringing surveillance within a legal framework, although the scope of the legislative powers afforded to agencies with surveillance powers remain a matter of controversy.[16]

8 One area of controversy recently confronted by the ECtHR in *Liberty v United Kingdom*[17] concerned powers under the earlier Interception of Communications Act 1985 that RIPA had incorporated. The Act had permitted "virtually unfettered" powers to the authorities

9 *Osman v United Kingdom* (2000) 29 EHRR 245.

10 "Human Rights is a Charter for Criminals and Parasites Our Anger is No Longer Enough" *Mail on Sunday* (15 July 2012).

11 See L Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce" in *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (L Zedner & J Roberts eds) (Oxford University Press, 2012).

12 Regulation of Investigatory Powers Act 2000 (c 23) (UK).

13 (1985) 7 EHRR 14.

14 (2001) 31 EHRR 45.

15 See also *Hewitt and Harman v United K* (1992) 14 EHRR 657 and *Halford v United Kingdom* (1997) 24 EHRR 523.

16 B Goold, "*Liberty and Others v The United Kingdom*: A New Chance for Another Missed Opportunity" (2009) Public Law 5.

17 (2009) 48 EHRR 1.

to intercept communications between the UK and receivers in other jurisdictions. The ECtHR held that the Act was insufficiently clear to provide protection against abuse of power in this respect, or any guidance on how this material might be used or destroyed. Consequently, in the case of discretionary powers, "the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference".[18] The extent to which current RIPA powers have answered Strasbourg's requirements, remains a live issue and may well be tested in the near future with regard to the UK's involvement in the Tempora and PRISM digital surveillance programmes.[19]

9 Another controversial gap in the surveillance legal framework was exposed in the *Marper* cases.[20] These displayed a sharp contrast between the domestic UK courts and Strasbourg's interpretation of Art 8. *Marper* dealt with the legality of infringements on Art 8, as well as the proportionality of permissible limitations under Art 8(2), such as those in pursuit of "national security", "public safety" or "the prevention of disorder or crime". The question was whether storage of fingerprint, photograph and DNA information on national databases was both legally authorised and proportionate to their aims.

10 Both the UK Court of Appeal ("CA") and House of Lords ("HL") found the limitations on Art 8 justified. The UK courts emphasised the limited purposes for which the information was kept (the detection, investigation and prosecution of crime), and the advantage of having such a database for the fight against serious crime. Strasbourg took a different view. Heavily influenced by European and Canadian norms on data protection,[21] the court viewed the "blanket and indiscriminate" storage powers of data from persons suspected of criminal offences to be disproportionate, and as failing to strike a fair

18 *Liberty v United Kingdom* (2009) 48 EHRR 1 at [62].

19 PRISM is the code name for a clandestine mass electronic surveillance data mining programme which has been operated by the US National Security Agency since 2007; and TEMPORA refers to a similar programme operated by the British Government Communications Headquarters. Both programmes were exposed by Edward Snowden, a former US intelligence contractor. See, for discussion of these programmes, Nick Hopkins, "NSA and GCHQ Spy Programmes Face Legal Challenge" *The Guardian* (8 July 2013) <http://www.theguardian.com/uk-news/2013/jul/08/nsa-gchq-spy-programmes-legal-challenge> (accessed August 2013) and David Mayer, "Privacy Activists Sue UK Government over PRISM and Tempora" *Gigaoam* (8 July 2013) <http://gigaom.com/2013/07/08/privacy-activists-sue-uk-government-over-prism-and-tempora/> (accessed August 2013).

20 *R (Marper) v Chief Constable of the South Yorkshire Police* [2002] 1 WLR 3223 (CA), [2004] 1 WLR 2196 (HL); *S and Marper v United Kingdom* (2009) 49 EHRR 50.

21 *S and Marper v United Kingdom* (2009) 49 EHRR 50 at [45]–[54].

balance between the prevention of serious crime and individual rights.[22] This line of cases highlighted the difference of substantive approach between the UK and Strasbourg courts to the opposing values of privacy and crime prevention.

11 There was an even more striking difference in principle, however, between the CA and HL decisions in *Marper*. Section 2(1) of the HRA states that the domestic courts should take the decisions of the Strasbourg court into account when interpreting the Convention rights. In construing s 2(1), the question of whether Strasbourg's interpretation of Convention rights should be viewed as a "floor" or a "ceiling" has featured in a number of domestic decisions.[23] The most decisive guidance on this question was provided by Lord Bingham in *R (Ullah) v Special Adjudicator*[24] ("*Ullah*"):

> [I]t is of course 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 through the states party to it.

The *Ullah* principle was explicated by Lord Bingham in subsequent case law,[25] and endorsed by Lord Hope in *N v Secretary of State for the Home Department*.[26]

12 When *Marper* was before the CA, however, there was no conclusive guidance from the ECtHR on whether Art 8 was even engaged by the facts of this case. In the absence of conclusive guidance, Lord Woolf in the CA took the opportunity to test the *Ullah* principle. He argued, firstly, that the question of whether a right is engaged could be answered in part by reference to the "local cultural traditions" of a particular country. Moreover, he argued that "there is nothing in the Convention setting a ceiling on the level of respect, which a jurisdiction is entitled to extend to personal rights".[27]

13 While agreeing with the CA on the question of whether the restrictions of Art 8 were *justified*, the HL took a very different view

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22 *S and Marper v United Kingdom* (2009) 49 EHRR 50 at [105]–[126].

23 *Alconbury v Environment Secretary* [2003] 1 AC 837 at [18]; *Anderson v Secretary of State for the Home Department* [2003] 1 AC 837 at [65]–[66] and [88]–[93].

24 [2004] 2 AC 323 at [20]; see also Lord Hope in *N v Secretary of State for the Home Department* [2005] 2 AC 296 at [24] and R Clayton & H Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2009) at p 137.

25 *Kay v Lambeth London Borough Council* [2006] 2 AC 465 at [28]; *R (SB) v Denbigh High School* [2007] 1 AC 100 at [29].

26 [2005] 2 AC 296 at [24].

27 *R (Marper) v Chief Constable of the South Yorkshire Police* [2002] 1 WLR 3223 at [34].

on whether the right was *engaged*. It also entirely disagreed with Lord Woolf's proposal that domestic courts were in a position to interpret the Convention rights in ways more generous than Strasbourg. Lord Steyn made it clear that:[28]

> I do accept that when one … consider[s] the question of objective justification under Art 8(2) the cultural traditions in the UK are material. With great respect to Lord Woolf CJ the same is not true under Art 8(1). Expressing the unanimous view of the House in … *Ullah* … Lord Bingham … observed that the ECHR is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court.

14 The *Marper* cases demonstrate the dilemma facing domestic courts and a key ambiguity in the HRA regarding how to approach the interpretation of a regional instrument that is simultaneously incorporated into domestic law. Do domestic judges bring rights home by developing a local jurisprudence rooted in cultural traditions and encourage a diversity between Member States, or do they follow the guidance of Strasbourg even if that limits potential rights protections? Without a home-grown Bill of Rights, UK courts have to look both ways, at the development of a domestic jurisprudence of rights, and at the consistency of a regime which applies to 800 million citizens across 48 Member States.

B. Deprivation of liberty

15 Prior to the HRA, Strasbourg had issued a number of decisions affecting UK law related to policing and deprivations of liberty. For instance, the ECtHR issued important decisions on defining what constituted a deprivation of liberty,[29] and on the meaning of the requirement that, among other things, arrests be effected "on reasonable suspicion of having committed an offence".[30] The *Austin* litigation, which builds on this case law, illustrates the complex contemporary impact of the Convention and the HRA. *Austin* concerned the use by the London police of a crowd-control technique known as "kettling" during a May 2001 protest. Kettling involves the police imposing a cordon on the area of a protest, and preventing those within the cordon from leaving it without permission.[31] In *Austin v Metropolitan Police*

28 *R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 at [27].

29 *Engel v Netherlands* (1979-80) 1 EHRR 647; *Guzzardi v Italy* (1981) 3 EHRR 333.

30 *Brogan v United Kingdom* (1989) 11 EHRR 117; *Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157; *Murray v United Kingdom* (1995) 19 EHRR 193; *Steel v United Kingdom* (1999) 28 EHRR 603.

31 *Austin v Metropolitan Police Commissioner* [2009] UKHL 5.

Commissioner[32] and *Austin v United Kingdom*,[33] the HL and the ECtHR considered whether the kettle constituted a deprivation of liberty for those "kettled" for "many hours" in "cold and wet" weather without access to food, water, toilet facilities or shelter.[34] In assessing whether there was a deprivation of liberty, the HL judges reverted to common law instincts.

16 Article 5 of the ECHR provides that no-one may be deprived of their liberty *except* where that deprivation is in accordance with a procedure prescribed by law and for one of a number of identified purposes (*eg*, "the lawful detention of a person after conviction by a competent court").[35] Strasbourg's traditional approach has thus been to quarantine the factual question of whether there was a deprivation of liberty from the question of whether any deprivation was justified.[36]

17 In the HL, however, their Lordships elected not to analyse the kettle through the interpretive framework set forth in Art 5 and in the Strasbourg case law. Instead, they approached the matter through the traditional common law lens of reasonableness: the question of whether there *was* a deprivation was merged with the question of whether any such deprivation was *justified*. Thus, their Lordships' reasoning emphasised that the police cordon was "reasonable" and "proportionate".[37] As Lord Walker put it:[38]

> I conclude that it is essential, in the present case, to pose the simple question: what were the police doing at Oxford Circus on 1 May 2001? What were they about? The answer is … that they were engaged in an unusually difficult exercise in crowd control, in order to avoid personal injuries and damage to property …

18 On this basis, there was said to be no deprivation of liberty, and thus no need to consider whether the deprivation was justified under the Art 5 framework. Reading the judgments, one can see their Lordships grappling with a concern shaped by traditional common law approaches to administrative law and civil liberties questions: surely *reasonable* police measures could not possibly be contrary to the Convention? The judgment reads as if it was incumbent on the protesters to establish police unreasonableness, rather than for the police to justify the deprivation of Art 5: any sense of an "onus of

32 [2009] UKHL 5.
33 App 39692/09.
34 *Austin v Metropolitan Police Commissioner* [2009] UKHL 5 at [2] and [9].
35 Article 5(1) of the European Convention on Human Rights.
36 *Guzzardi v Italy* (1981) 3 EHRR 333; *Austin v Metropolitan Police Commissioner* [2009] UKHL 5 at [18]–[21].
37 *Austin v Metropolitan Police Commissioner* [2009] UKHL 5 at [58] and [61].
38 *Austin v Metropolitan Police Commissioner* [2009] UKHL 5 at [47].

justification" is missing.[39] The result: a torturously complex analysis that was contrary to past case law, and that risked neutering Art 5 by allowing governments to justify deprivations of liberty on the basis of reasons external to those contained in the Convention's text.

19 Strasbourg handed down its *Austin* judgment in March 2012, at a time of considerable political debate about the future of the UK's human rights arrangements.[40] Perhaps not coincidentally, the judgment was remarkably deferential to the reasoning of the UK courts. Indeed, the ECtHR's judgment at times reads as a paean to subsidiarity,[41] not a doctrine that has characterised its previous deprivation of liberty case law.[42] The judgment has thus been described as "appeasement" jurisprudence: a suspicion that the court relied on subsidiarity rather than a faithful application of past case law for fear that it might be further implicated in British political controversies.[43]

20 Kettling, of course, is just one example of how the HRA has assessed policing practice. Yet it provides a useful reminder that common law approaches to controlling executive power continue to exist underneath the layer of constitutionalised human rights, and that transnational courts like Strasbourg are not immune to the political implications of their judgments. More generally, cases like *Austin* also provide an example of how the content of an expressly protected right – here, the right not to be deprived of one's liberty – can be hollowed out by the creative reasoning of a common law judiciary.

III. Fair trials

21 Under Art 6(1) of the ECHR, one is entitled to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The nature of the fair trial rights that are engaged in a given proceeding will depend on whether the proceedings are "civil" or "criminal", in which case additional protections in Arts 6(2) and 6(3) will be triggered. The impact of Art 6 on UK case law has been significant.

39 See L Lazarus, "Conceptions of Liberty Deprivation" (2006) 69 *Modern Law Review* 738 at 740–741.

40 UK Commission on a Bill of Rights, "A UK Bill of Rights? The Choice Before Us" (18 December 2012) <http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> (accessed 1 October 2013).

41 *Austin v United Kingdom* (App 39692/09) at [61].

42 *Guzzardi v Italy* (App 7367/76); *Home Secretary v JJ* [2007] UKHL 45 at [90].

43 H Fenwick, "An Appeasement Approach in the European Court of Human Rights?" *UK Constitutional Law Group Blog* (5 April 2012) <http://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/> (accessed 1 October 2013).

22 Prior to the HRA, Strasbourg's fair trial rights jurisprudence played an important part in shaping UK law. The UK was the subject of landmark Strasbourg decisions on, for example, when proceedings were properly regarded as criminal rather than civil,[44] on the right of an accused to participate effectively in a criminal trial,[45] the right of access to a court,[46] and the privilege against self-incrimination.[47] This influence has developed under the HRA, with Strasbourg handing down decisions on matters ranging from whether jury trials are consistent with Art 6's right to a reasoned judgment,[48] to the rules of hearsay,[49] and the right of access to a lawyer before trial.[50]

23 The contemporary impact of fair trial rights under the Convention and the HRA is well illustrated by tracking recent case law on "gisting" in closed material procedures ("CMPs"). In recent years, CMPs have been adopted in a range of UK civil proceedings. Gisting, or providing an individual with a redacted summary of any secret evidence against them, is viewed as one key safeguard, together with security-cleared special advocates, in ameliorating the potential unfairness of CMPs. The range of civil proceedings in which a CMP is available has included proceedings with quasi-criminal subject matter such as those concerning control orders, which were orders made "against individuals involved in terrorism-related activity … for purposes connected with preventing or restricting their further involvement in such activity".[51]

24 In this section we assess how the UK courts have grappled with the notion of gisting against a common law background, and how Strasbourg's influence has shaped their analysis.

25 Gisting was considered in the 2009 ECtHR judgment in *A v United Kingdom*[52] ("*A*"), which concerned the detention without trial of terror suspects. In *A*, the ECtHR noted the "dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants' fundamental rights".[53] It went on to hold that a person involved in a CMP must be "provided with sufficient information about the allegations against him to enable him to give

44 *Benham v United Kingdom* (1996) 22 EHRR 293.
45 *Stanford v United Kingdom* (App 16757/90).
46 *Golder v United Kingdom* (1975) 1 EHRR 524.
47 *Murray v United Kingdom* (1996) 22 EHRR 29; *Saunders v United Kingdom* (1997) 23 EHRR 313.
48 *Taxquet v Belgium* (App 926/05).
49 *Al-Khawaja and Tahery v United Kingdom* (App 26766/05).
50 *Salduz v Turkey* (2009) 49 EHRR 19.
51 *Home Secretary v JJ* [2007] UKHL 45 at [405]. Control orders have since been replaced by the Terrorism Prevention and Investigation Measures Act 2011 (c 23) (UK).
52 App 3455/05.
53 *A v United Kingdom* (App 3455/05) at [220].

effective instructions to the special advocate" but noted that "this question must be decided on a case-by-case basis".[54] Applied by the HL in the control orders case of *Home Secretary v AF (No 3)*[55] ("*AF (No 3)*"), the *A* ruling was said to stand for the proposition that: "The judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him."[56] And that "non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order".[57]

26 Thus, the impact of the ECtHR's judgment on the UK is clear: the Convention and the HRA acted as constraints on legislative intrusion into basic rights guarantees. But at least one of their Lordships, Lord Hoffmann, was not pleased about the extent of that influence: "I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders … Nevertheless, I think that your Lordships have no choice but to submit."[58] *AF (No 3)* thus demonstrates the practical impact that the HRA has had on the place of the HL (now Supreme Court ("SC"))[59] within the UK's judicial hierarchy.

27 Litigation over gisting and CMPs continued after the decision in *AF (No 3)*. Two 2011 judgments further illustrate the complex impact of the HRA in this area. In *Home Office v Tariq*[60] ("*Tariq*"), where a government employee challenged his dismissal from a sensitive job, the SC ruled that gisting was *not*, in fact, required in every case in which a CMP was used. The SC reached this conclusion through a reconsideration of the judgment in *A*, holding that the requirement to gist would apply differently depending on the rights at stake for the individual concerned. The SC held that, whereas the right at stake in *A* (liberty) had been particularly important, the HRA's fair trial requirements would be less stringent for a civil claim for discrimination:[61]

> Detention, control orders and freezing orders impinge directly on personal freedom and liberty … cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to

54 *A v United Kingdom* (App 3455/05) at [220].
55 [2009] UKHL 28.
56 *Home Secretary v AF (No 3)* [2009] UKHL 28 at [85].
57 *Home Secretary v AF (No 3)* [2009] UKHL 28 at [65].
58 *Home Secretary v AF (No 3)* [2009] UKHL 28 at [70].
59 The UK Supreme Court replaced the Appellate Committee of the House of Lords in October 2009.
60 [2011] UKSC 35.
61 *Home Office v Tariq* [2011] UKSC 35 at [27], *per* Lord Mance.

pursue a civil claim for discrimination against the state which is seeking to defend itself.

28 The majority's decision in *Tariq* is susceptible to criticism. Indeed, as Lord Kerr put it in dissent: "The opportunity to know and effectively test the case against him … surely captures the essence of the right. And it seems to me that the essence of the right cannot change according to the context in which it arises."[62]

29 The full ramifications of *Tariq* remain to be seen. For present purposes it should be noted that the SC judgment as to what was required in CMPs was driven by the "case by case" approach of the ECtHR in *A*. This afforded the UK courts the interpretative space that facilitated restriction of fair trial rights.

30 The SC delivered its decision in *Tariq* on the same day as *Al-Rawi v Security Service*[63] ("*Al-Rawi*"). *Al-Rawi* considered "whether the court has the power to order" a CMP "for the whole or part of the trial of a civil claim for damages and, if so, in what circumstances it is appropriate to exercise the power".[64] The question was whether the courts had this power *at common law*. There was no question about whether Parliament could confer such powers on the courts by statute.[65] Lord Dyson discussed in depth the common law's protection of the "open justice principle" and the "principle of natural justice".[66] Ultimately, the SC concluded that these "extremely important" principles "should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved".[67]

31 In an interesting counterpoint to *Marper* considered above, Lord Dyson noted here that it was "open to our courts to provide greater protection through the common law than that which is guaranteed by the Convention".[68] *Tariq* and *Al Rawi* thus provide a Diceyan reminder that quasi-constitutional protection of fundamental rights does not always provide a greater level of protection than the common law. Since *Al-Rawi*, however, the UK Parliament passed the Justice and Security Act 2013,[69] to confer power on the court to order CMPs in the full range of civil proceedings. In future, therefore, those seeking to challenge or

62 *Home Office v Tariq* [2011] UKSC 35 at [119], *per* Lord Kerr.
63 [2011] UKSC 34.
64 *Al-Rawi v Security Service* [2011] UKSC 34 at [1].
65 *Al-Rawi v Security Service* [2011] UKSC 34 at [137].
66 *Al-Rawi v Security Service* [2011] UKSC 34 at [10]–[14].
67 *Al-Rawi v Security Service* [2011] UKSC 34 at [48].
68 *Al-Rawi v Security Service* [2011] UKSC 34 at [68].
69 Justice and Security Act 2013 (c 18) (UK).

ameliorate CMPs will need to do so through the HRA framework rather than through any common law challenge.

32 In sum, developments in the law of gisting and CMPs have demonstrated the extent of Strasbourg's influence on the level of human rights protection in the UK courts, and the extent to which pre-existing common law protections continue to exert influence alongside the HRA framework. More generally, these developments fit into the broader story of Strasbourg's influence on fair trial rights in the UK before and after the enactment of the HRA, and highlight how UK human rights jurisprudence is shaped by complex interactions between Parliament, the UK courts and the ECtHR.

IV. Prisoners' rights

33 UK prisoners' rights were transformed in 1976 when Strasbourg insisted in *Golder v United Kingdom*[70] that prisoners were equal bearers of Convention rights.[71] The ECtHR argued that rights restrictions were to be assessed "having regard to the ordinary and reasonable requirements of imprisonment"; and that these restrictions had to be "stipulated by law" and in accordance with the proportionality test.[72] In a series of domestic cases, beginning with *R (St Germain) v Board of Visitors of Hull Prison*[73] and culminating in *R (Hague and Weldon) v Deputy Governor of Parkhurst Prison*,[74] the UK courts went on to assert supervisory jurisdiction over prison administration.[75]

34 By the early 1990s, the UK's test for the limitation of prisoners' rights expressed in *R (Leech) v Home Secretary (No 2)*[76] was already very close to Strasbourg's, and after the HRA entered into force this test was rearticulated in *R (Daly) v Secretary of State for the Home Department*.[77] Lord Bingham made clear that:[78]

> Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens … But the order does not wholly deprive the person confined of all rights enjoyed by other citizens … Such rights may be curtailed only by clear and express

70 *Golder v United Kingdom* [1975] 1 EHRR 524.
71 See generally L Lazarus, *Contrasting Prisoners' Rights* (Oxford: Oxford University Press, 2004).
72 *Golder v United Kingdom* [1975] 1 EHRR 524 at [45].
73 (1978) 1 QB 425 (CA).
74 [1992] 1 AC 58.
75 *R (St Germain) v Board of Visitors of Hull Prison* (1978) 1 QB 425 (CA); *Raymond v Honey* [1983] AC 1; *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533; *R (Hague and Weldon) v Deputy Governor of Parkhurst Prison* [1992] 1 AC 58.
76 [1994] QB 198.
77 [2001] 2 AC 532.
78 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [5].

words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

35 This remains the test under domestic law and the HRA, and evolving Strasbourg jurisprudence has also served to strengthen the range of potential claims that prisoners can make in domestic courts. These range from suicides and murders in prison,[79] the quality of prison accommodation,[80] the right to a fair trial where disciplinary offences involved the extension of sentence,[81] the right to confidentiality of legal correspondence,[82] the right to have a child by artificial insemination,[83] to the right to correspond with a journalist where a miscarriage of justice may be involved.[84] Two of the most compelling areas of litigation, for our purposes, have been in the area of life sentences, and in the development of the prisoners' right to vote. The remaining sections will examine these in turn.

A. Life sentences

36 The current law on life sentences is the product of a dynamic interplay between the UK courts' assertion of common law doctrine and key Strasbourg decisions prior to the HRA, and subsequent decisions under the HRA regime. In the 1990s, Strasbourg asserted key procedural protections over discretionary life sentence prisoners where the retributive element of their tariffs had been concluded. Article 5(4) of the ECHR requires that everyone have access to a court of law to establish the lawfulness of their detention, unless the individual in question falls under the exceptions in Art 5(1), which include, under Art 5(1)(a), "the lawful detention of a person after conviction by a competent court". Strasbourg took the view that Art 5(4) applied to discretionary lifers where their detention could no longer be justified by reference to the retributive element of their sentence, and continued to rely on the element of "dangerousness". These principles were well established in *Thynne, Wilson & Gunnell v United Kingdom*,[85] *Wynne v United Kingdom*[86] and *V and T v United Kingdom*[87] (which dealt with the detention of minors at Her Majesty's Pleasure).

79 *Keenan v United Kingdom* (2001) EHRR 38; *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; *Edwards v United Kingdom* (2002) 35 EHRR 19.
80 *Napier v Scottish Ministers* [2004] UKHRR 881.
81 *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 28.
82 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; [2001] 3 All ER 433.
83 *Dickson v United Kingdom* (2008) 46 EHRR 41.
84 *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115.
85 (1991) 13 EHRR 666.
86 (1995) 19 EHRR 353.
87 (1999) 30 EHRR 121.

37 At the same time, however, Strasbourg had always maintained a strict line, since its decision in *X v United Kingdom*[88] in 1975, that the mandatory life sentence entailed no such procedural protections. This was because the mandatory life sentence, long viewed as the replacement for the death penalty abolished in 1965, is imposed as a punishment for murder irrespective of the dangerousness of the offender. It has taken a series of decisions to unpick the view that mandatory lifers were devoid of rights to liberty, or that "life means life". At first, the protections were found in the common law itself, and domestic courts went further than Strasbourg in affording mandatory lifers rights to natural justice in the 1990s.[89]

38 The distinction between the two types of sentence began to collapse, however, just as the HRA entered into force. The first sign of change came in *V and T v United Kingdom*[90] in 1999 when the ECtHR extended Art 5(4) protections to minors detained at Her Majesty's Pleasure, a sentence which had always been seen as synonymous in structure to the mandatory life sentence. But the real breakthrough came in *Stafford v United Kingdom*[91] ("*Stafford*"). The ECtHR accepted that UK practice no longer supported the distinction between mandatory and discretionary lifers.[92] Moreover, that the role of the Home Secretary in fixing the minimum tariff for mandatory lifers had "become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case law of the [ECtHR]".[93]

39 Application of this approach domestically led, in *R (Anderson) v Secretary of State for the Home Department*[94] ("*Anderson*"), to one of the first "declarations of incompatibility" under s 4 of the HRA. In this ground-breaking case in the UK constitutional landscape, the HL held that the power that the Home Secretary had in the fixing of a tariff for mandatory lifers was incompatible with both Art 6 of the ECHR and basic concepts of the separation of powers in the UK constitution. The HL entirely endorsed the view of the ECtHR in *Stafford* "that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing.

88 (1975) 3 DR 10. This decision dealt with Myra Hindley (the infamous moors murderer).
89 *R v Secretary of State, ex parte Doody* [1993] 3 WLR 154; [1993] 3 All ER 92.
90 (1999) 30 EHRR 121.
91 *Stafford v United Kingdom* (2002) 35 EHRR 32.
92 *Stafford v United Kingdom* (2002) 35 EHRR 32 at [79].
93 *Stafford v United Kingdom* (2002) 35 EHRR 32 at [78].
94 [2003] 1 AC 837; [2002] 4 All ER 1089.

It is a sentencing exercise".[95] It went on to hold that the sentence was incorporated into Art 6 as part of the trial, and that the Home Secretary was not an "independent and impartial" tribunal for the purposes of Art 6.[96] Moreover, Lord Bingham made clear that "[t]he European Court was right to describe the complete functional separation of the judiciary from the executive as 'fundamental', since the rule of law depends on it".[97]

40 There can be little doubt that *Anderson* had broad constitutional implications in the UK. Not only was it one of the first declarations of incompatibility, but it also resolved one of the core battles between the Judiciary and the Home Secretary over control of sentencing and the personal liberty of the individual. There was, as a consequence, a remarkable level of agreement between the HL and the ECtHR in this otherwise politically controversial area. There was one small loophole left by *Anderson* however. The decision had been handed down ten days after the most renowned criminal in the UK, Myra Hindley, had died in prison. Her presence loomed large over a criminal justice system still not able to let go of the idea that life could, in some cases, mean life. Lord Steyn made it clear that:[98]

> If the role of the executive in setting the tariff should cease it does not follow that life imprisonment for murder may never, even in the worst cases imaginable, literally mean detention for life … 'there is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence.'

41 This position, repeatedly voiced by the UK senior judiciary, has recently been radically altered by the *Vinter v United Kingdom*[99] ("*Vinter*") decision in Strasbourg. *Vinter* is the culmination of a series of cases: an interaction between Strasbourg and domestic case law since 2003 aimed at abolishing irreducible life sentences. The process started soon after *Anderson* with the *R v Lychniak*[100] application. Here, the HL rejected the argument that the mandatory life sentence was incompatible with Arts 3 or 5 of the Convention. Given the possibility of release, the sentences of the applicants in question were partly

95 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; [2002] 4 All ER 1089 at [17].

96 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; [2002] 4 All ER 1089 at [20].

97 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; [2002] 4 All ER 1089 at [27].

98 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; [2002] 4 All ER 1089 at [47].

99 Applications Nos 66069/09, 130/10 and 3896/10 (9 July 2013).

100 [2003] 1 AC 903.

punitive and partly preventive. However, Lord Bingham did signal a shift from Lord Steyn's position in *Anderson*:[101]

> If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate Articles 3 and 5 … as being arbitrary and disproportionate.

42 Lord Bingham's suggestion was picked up by Strasbourg in *Kafkaris v Cyprus*[102] ("*Kafkaris*"), which held that a whole life tariff "may raise an issue under Article 3". This was interpreted domestically in *R v Bieber*[103] to allow for the imposition of a "whole life tariff" at the point of sentence where exceptionally grave offences justified such a retributive response. In *Bieber*, the possibility of release or mitigation under the sentencing scheme counted in favour of the CA's view that a "whole life tariff" did not necessarily constitute an irreducible sentence. Thus the CA took the view that, while it was not open to the prisoner to challenge the imposition of the "whole life tariff" at the point of judicial sentence, it was possible to challenge such a sentence at a later point where continued imprisonment of a rehabilitated offender may be said to constitute "inhuman or degrading treatment".

43 The irreducible life sentence then arose in three extradition cases. Two of these cases, *Ahmad v United Kingdom*[104] and *Harkins and Edwards v United Kingdom*,[105] were decided by Strasbourg; the other decision, *Wellington v Secretary of State for the Home Department*[106] ("*Wellington*"), by the HL. In all cases, the applicants were facing extradition to the US. The scheme of the life sentences was severe, but most of these judgements set the threshold of Art 3 violations higher in the extraterritorial context. In *Ahmad* and *Harkin and Edwards*, the ECtHR argued that an irreducible sentence would only violate Art 3 for the purposes of blocking extradition where grossly disproportionate to the original offence. In *Wellington*, however, despite recognising that Strasbourg and domestic authority was yet to support his position, Laws LJ made a powerful *obiter* statement in the Divisional Court:[107]

> [D]oes the risk of a whole-life sentence [constitute] … a breach *per se* – a case which intrinsically violates the Convention? There are powerful

101 *R v Lychniak* [2003] 1 AC 903 at [8].
102 (2009) 49 EHRR 35.
103 [2009] 1 WLR 223.
104 (2013) 56 EHRR 1.
105 (2012) 55 EHRR 19.
106 [2009] 1 AC 335; [2009] 2 All ER 436.
107 *Wellington v Secretary of State for the Home Department* [2008] 3 All ER 248 at [39].

> arguments of penal philosophy which would suggest that it does … [A] prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is *lex talionis*. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the *lex talionis*) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate – the very vice which is condemned on Article 3 grounds – unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But, in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival … That is to pay lip-service to the value of life; not to vouchsafe it … But I have concluded, not without misgivings, that these considerations cannot prevail against authority.

44 Despite receiving approval from Lord Bingham in the Privy Council decision of *de Boucherville v Mauritius*,[108] the sentiment or content of Laws LJ's *obiter* appeal did not find much support in the HL in *Wellington*. Applying *Kafkaris*, the HL found that the Governor's pardoning process available to Wellington rendered his sentence reducible for the purposes of compliance with Art 3 of the ECHR. Lord Hoffmann,[109] Lord Scott,[110] Baroness Hale[111] and Lord Brown[112] took great pains to dispute Laws LJ's view that whole-life sentences were incompatible with Art 3 *per se*. It was clear that the *Kafkaris* conclusion that whole-life sentences "*may*" give rise to Art 3 issues left a space for the HL to conclude as it did. In the main, the Law Lords took the view that whole-life tariffs would only violate Art 3 of the ECHR where the penalty was grossly disproportionate to the crime.

45 *R v Oakes*[113] is the most recent domestic decision to address the question of "whole life tariffs" in the UK. The case was striking for the way in which it analysed both Strasbourg and domestic opinions along the lines of principle, rather than any institutional divide between the two jurisdictions. Lord Chief Justice Judge examined on one side of the debate the views of Laws LJ in *Wellington*, Lord Bingham in

108 [2008] UKPC 37.

109 *Wellington v Secretary of State for the Home Department* [2009] 1 AC 335; [2009] 2 All ER 436 at [6]–[7].

110 *Wellington v Secretary of State for the Home Department* [2009] 1 AC 335; [2009] 2 All ER 436 at [46]–[47].

111 *Wellington v Secretary of State for the Home Department* [2009] 1 AC 335; [2009] 2 All ER 436 at [53].

112 *Wellington v Secretary of State for the Home Department* [2009] 1 AC 335; [2009] 2 All ER 436 at [81].

113 [2013] 3 WLR 137.

de Boucherville v Mauritius, and the dissenting three opinions of Judges Garlicki, David Thorbe Jorgivsson and Nicolaou in the ECtHR Fourth Section decision in *Vinter*.[114] All of these judgments took the view that "whole life tariffs" were irreducible life sentences and incompatible with Art 3 *per se*. Equally, however, the Lord Chief Justice was able to draw on opposing opinions in *R v Secretary of State for the Home Department, ex parte Hindley*,[115] *Wellington*, *R v Bieber*, *Kafkaris*, *Harkin and Edwards v United Kingdom* and *Ahmad v United Kingdom* as well as the majority of the Fourth Section decision in *Vinter*. Ultimately, the Lord Chief Justice was able to conclude that Strasbourg authority permitted a range of approaches to the mandatory life sentence: "In short, it is open to the individual state to make statutory provision for the imposition of a whole life minimum term, and in an appropriate case, as a matter of judicial discretion, for the court to make such an order."[116]

46 *R v Oakes* has very recently been followed in Strasbourg by the ECtHR Grand Chamber decision in *Vinter*.[117] The decision made it clear that the UK's system of "whole life tariffs" violates Art 3 of the Convention, because the powers of compassionate release by the Home Secretary are insufficient to ensure that the sentence was indeed reducible. Given the step that had to be taken in *Vinter* it is not surprising that the judgment cited a wide range of legal materials. The Grand Chamber drew not only on relevant UK domestic opinions, but also on a range of Council of Europe instruments, international criminal law, European Union Law, United Nations Minimum Standards, the International Covenant on Civil and Political Rights, the domestic law of Council of Europe Member States and relevant non-member states. Key in the analysis was the German 1976 decision that declared the irreducible life sentence incompatible with human dignity.[118] Having reviewed this range of materials, as well as ECtHR jurisprudence, the Grand Chamber concluded that:[119]

> [I]n the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds … the Court would also observe that the

114 Applications Nos 66069/09 and 130/10 and 3896/10 (9 July 2013).
115 [2001] 1 AC 410.
116 *R v Oakes* [2013] 3 WLR 137 at [22].
117 *Vinter v United Kingdom* Applications Nos 66069/09, 130/10 and 3896/10 (9 July 2013).
118 *Life Imprisonment* case of 21 June 1977, 45 BVerfGE 187.
119 *Vinter v United Kingdom* Applications Nos 66069/09, 130/10 and 3896/10 (9 July 2013) at [119]–[122].

> comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter … It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention … Where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

47 *Vinter* now ensures that prisoners subject to whole life tariffs are able to look forward to a realistic prospect of release where certain preconditions are met. The legal journey to this point starkly displays the dynamic interaction between UK judgments and those of Strasbourg. It cannot simply be concluded that Strasbourg led the UK courts by the nose in this regard. The momentum came from both jurisdictions, in a shifting landscape of sensibilities and legal reform in a range of Council of Europe Member States. Some of these states, like Germany, had arrived at the *Vinter* position decades ago. Strasbourg and the UK, however, worked together to come to the same conclusion nearly 40 years later.

B. Prisoner voting

48 Among the criminal justice and constitutionalism issues that have attracted recent popular attention in the UK, the debate about prisoners' voting rights is one of the most prominent. The debate revolves around a specific policy issue, but that specific issue conceals a multitude of broader constitutional concerns. Since at least 1870, UK prisoners have been denied the franchise while incarcerated.[120] The provision applicable today is s 3 of the Representation of the People Act 1983.[121] In October 2005, Strasbourg in *Hirst v United Kingdom (No 2)*[122] ("*Hirst (No 2)*") found that the ban was contrary to Art 3 of Protocol 1 of the European Convention:

> [T]he 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate … Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation.

120 See *Hirst v United Kingdom (No 2) (Grand Chamber)* (6 October 2005) (App 74025/01) at [21]–[24].

121 Representation of the People Act 1983 (c 2) (UK). See *Hirst v United Kingdom (No 2) (Grand Chamber)* (6 October 2005) (App 74025/01) at [21].

122 (6 October 2005) (App 74025/01) at [82].

49 In reaching its conclusion of disproportionality, Strasbourg emphasised that:[123]

> [T]here is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote … it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

50 Clearly eager to encourage Parliament to debate and legislate in a manner consistent with human rights, the ECtHR indicated that it would leave "it to the [UK] legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol 1".[124]

51 Since that time, Strasbourg has delivered several judgments on prisoner voting rights which have demonstrably softened their position on prisoner voting in light of vocal UK resistance.[125] While maintaining the line that a blanket ban on prisoner voting is incompatible with the Convention, Strasbourg's latest decision in *Scopolla v Italy (No 3)*[126] allows the UK to make the smallest possible change to the regime and remain Convention compliant. Nevertheless, the UK was required at least to legislate before 22 November 2012.[127] Although legislation is yet to be enacted, a draft bill was introduced into Parliament by the UK government, earning a reprieve from Strasbourg's enforcement mechanism (the Council of Europe's Committee of Ministers).[128]

52 While the introduction of the Voting Eligibility (Prisoners) Draft Bill has postponed the need for final legislation, Convention-compliant legislation is far from the most likely outcome of the legislative process. The UK debate over Strasbourg's approach to

123 *Hirst v United Kingdom (No 2) (Grand Chamber)* (6 October 2005) (App 74025/01) at [79]. *Cf Pickin v British Railways Board* [1974] AC 765.

124 *Hirst v United Kingdom (No 2)(Grand Chamber)* (6 October 2005) (App 74025/01) at [84].

125 See, *eg*, *Frodl v Austria* (8 April 2010) (App 20201/04); *Greens and MT v United Kingdom* (23 November 2010) (App 60041/08); and *Scoppola v Italy (No 3)* (22 May 2012) (App 126/05).

126 (22 May 2012) (App 126/05).

127 This deadline was the combined effect of the judgments in *Hirst v United Kingdom (No 2) (Grand Chamber)* (6 October 2005) (App 74025/01), *Greens and MT v United Kingdom* (23 November 2010) (App 60041/08) and *Scoppola v Italy (No 3)* (22 May 2012) (App 126/05).

128 See Antonine Buyse, "UK Prisoner Voting Rights Update" *ECHR Blog* (28 March 2013) <http://echrblog.blogspot.co.uk/2013/03/uk-prisoner-voting-rights-update.html> (accessed 1 October 2013). The Voting Eligibility (Prisoners) Draft Bill is accessible at <http://www.official-documents.gov.uk/document/cm84/8499/8499.pdf> (accessed 1 October 2013).

prisoner voting has been reasonably one-sided. A backbench debate was held in the House of Commons on 10 February 2011 and the motion to support the continuation of the current ban was agreed on a division by 234 to 22.[129] It brought together politicians who are usually political rivals, around the mantra "if you break the law, you can't make the law".[130] The politics, which has raised the prospect of withdrawal from Strasbourg altogether, has been nothing short of incendiary since then. Prime Minister David Cameron, for example, told Parliament in 2011 that it made him "physically ill to even contemplate having to give the vote to anyone in prison".[131] The Opposition Labour Party Justice spokesperson was similarly minded.[132] With rhetoric representative of much of the parliamentary debate, Philip Hollobone, a Conservative MP, said that he was:[133]

> … appalled by the lack of legal training for so many of the so-called judges of the European Court of Human Rights, incensed by the Court's repeated attempts to traduce the sovereignty of the British Parliament, and cognisant of the fact that there would be no Court and no human rights in Europe if this country had not stood alone against Hitler in 1940.

53 Despite the generous leeway afforded to the UK government by Strasbourg's judgments on prisoner voting since *Hirst (No 2)*, they have generated considerable constitutional criticism of the ECtHR and its relationship with the UK. Much of the debate reflects a discomfort about the extent to which the court's judgments are seen as undermining parliamentary sovereignty, an indication of the extent to which parliamentarians, as well as judges, are still grappling with the constitutional consequences of the HRA. But the ECtHR's judgments have also had the effect of forcing Parliament to debate the appropriate role of human rights in the UK constitutional settlement and the best way to ensure both parliamentary supremacy and the protection of human rights.[134] While the prospect of a "British Bill of Rights" replacing the HRA currently appears unlikely,[135] withdrawal from the Strasbourg scheme altogether remains the goal of the right wing of the Conservative Party.[136] What remains to be seen is whether the Draft

129 House of Commons Hansard (10 February 2011) at col 493 onwards.

130 See "Straw and Davis Unite Against Prisoners' Voting Rights" *The Guardian* (19 January 2011) <http://tinyurl.com/strawdavis> (accessed 1 October 2013).

131 Chris Morris, "Prisoner Votes: Are European Courts Going Too Far?" *BBC News* (12 April 2011) <http://bbc.in/hk876Z> (accessed 1 October 2013).

132 "ECHR's Prisoner Voting Decision – Khan" (22 May 2012) <http://www.labour.org.uk/echrs-prisoner-voting-decision> (accessed 1 October 2013).

133 House of Commons Hansard (22 November 2012) at col 758.

134 House of Commons Hansard (22 November 2012) at col 745 onwards.

135 Andrew Grice, "Tories' Bid for UK Bill of Rights Declared 'Dead' After Review Ends in Stalemate" *The Independent* (19 December 2012).

136 A Travis, "Theresa May Criticizes Human Rights Convention After Abu Qatada Affair" *The Guardian* (8 July 2013).

Bill will also encourage Parliament to debate the *substance* of prisoners' rights.

V. Conclusion

54 This essay has conveyed the complexity of developing a fledgling domestic jurisprudence under the UK HRA, while interacting with a maturing Strasbourg jurisprudence. This dynamic interplay has had implications for the trajectory both of domestic and European human rights. At times Strasbourg and the UK courts move in a mutually reinforcing pattern, while at others the relationship is more fractious. The interplay is complicated further by politics at the domestic level that is deeply ambivalent about the role of human rights within the English constitutional setting. It is also characterised by tension between the UK courts themselves, as well as between the Judiciary and the Executive. This said, the corpus of human rights jurisprudence that has developed in the last 13 years is deep and wide ranging. While rights in the UK may always sit at odds with a common law culture honed in the acceptance of political sovereignty, they have certainly changed the legal landscape more fundamentally than politicians may have anticipated in 1998. This uncertain and contradictory picture cannot be confidently branded as a thriving "human rights culture", but equally it cannot be said that rights have left the tacit expectations of citizens and state unchanged.