

Their Lordships' Timorous Souls

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This paper evaluates the 'mirror principle' which has recently been embraced by the senior appellate court. According to the House of Lords, the domestic courts must not deviate from the case law of the European Court of Human Rights when interpreting the meaning and application of rights under the Human Rights Act 1998.

Focusing solely on the 'scope' stage of rights interpretation,¹ it is first argued that there is no legal source which mandates such a principle. More importantly, there is no compelling reason why the national courts should be unable to extend the peripheries of these municipal rights beyond the scope of convention rights currently envisaged by the European Court (Part I). There are in fact a number of very good reasons why the courts should remain unrestrained in adopting a more generous interpretative role (Part II). Finally, in order to quell any concerns of judicial activism, several restraints are outlined which should colour this new dynamic approach (Part III).

One of the greatest triumphs of modern civilisation has been the prominence afforded to the protection of human rights. As every English law student will know, the spirit of liberty has existed in the United Kingdom for many centuries; the domestic courts have long acted as the guardians of our individual rights and freedoms by developing and upholding a number of 'Common Law rights.' The ratification of the European Convention on Human Rights 1950 (ECHR) and its incorporation under the Human Rights Act 1998 (HRA) represented two further bulwarks – one statutory and one under international law – to complement and add to these judicial constructs. Generally speaking, the national courts have employed these new instruments to great effect and decisions such as *A v Secretary of State for the Home Department (No 1)*² and *(No 2)*³ illustrate what some academics have labelled the 'new liberal voice' of the House of Lords.⁴ At the same time, the British judiciary have been rightly cautious in matters which have demanded a degree of sensitivity and restraint. It is contended, however, that there is presently one particular area in which the courts have been unduly deferential. In *R (Ullah) v*

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¹ This is the initial stage where the court must determine whether a right has been 'engaged' and is thus applicable.

² *A v Secretary of State for the Home Department* [2004] UKHL 56.

³ *A v Secretary of State for the Home Department* [2005] UKHL 71.

⁴ Gearty, '11 September 2001, Counter-terrorism, and the HRA' (2005) *Journal of Law and Society* 18, 31.

Special Adjudicator,⁵ the Law Lords emphasised that when interpreting the application of rights under the HRA, British courts should 'keep pace' with the jurisprudence of the European Court of Human Rights in Strasbourg (ECtHR). This paper argues that there is nothing prohibiting the courts from deviating from the case law of their European counterpart in order to provide a *more generous* interpretation of rights under the HRA. Moreover, in the context of interpreting the *scope* of these rights, there are a number of instances where it would be undesirable not to do so.

The 'Humpty Dumpty' Dictum

Lord Bingham, with the full endorsement of the House of Lords, outlined the following principle in *Ullab*:

'It is of course open to member states to provide for rights more generously than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. *The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*'⁶

In essence, this elevates the ECtHR's decisions to the level of *binding* - and not persuasive - precedent. When interpreting the new municipal rights under the HRA, the domestic courts must not outpace or fall behind any analogous interpretation which the European Court has given to the convention rights.⁷ Their Lordships, therefore, seem to see the ECtHR as being personified by a demanding Humpty Dumpty; that the meaning of rights and freedoms within member states must be 'just what I chose it to mean, *neither more nor less.*'⁸ Unfortunately, there has been no attempt by the courts to distinguish between clear, unclear and non-existent Strasbourg precedents. As such, it must be presumed that the principle applies to all three; if there is a clear but negative European precedent, it should be followed but if not, the domestic court would presumably be outpacing Strasbourg if it were to provide a more generous interpretation. Some academics have hence identified the *Ullab* dictum as embodying a mirror principle.⁹ Although the reflective metaphor is very useful, this author proposes to use the term 'comity' to

⁵ R (*Ullab*) v *Special Adjudicator* [2004] UKHL 26.

⁶ *Ullab* (n 5) (Lord Bingham) emphasis added.

⁷ Although the latter are directly alluded to in the HRA itself, it is important to appreciate that the two sets of rights are distinct.

⁸ Carroll, *Alice in Wonderland*. Note that Lord Bingham accepted that the European case law may be overlooked in 'special circumstances.' See Lewis, 'The European Ceiling on Human Rights' [2007] *PL* 720, 731. I agree with Lewis that these circumstances have been interpreted so narrowly that the exception's existence is extremely 'doubtful.'

⁹ *Lewis* (n 8).

emphasise the friendly acquiescence that is presently being shown to the jurisdiction of a foreign court.¹⁰

Is There a Legal Source which Substantiates this Approach?

Section 6 HRA requires the courts to act ‘in a way which is compatible with a convention right.’ This ensures that the United Kingdom’s obligations under international law are observed and rightly precludes British judges from interpreting the scope of an incorporated right *less* generously than the ECtHR’s analysis of its respective convention counterpart. However, there is no such provision or decision which unequivocally prohibits a *more* generous interpretation.

First, and perhaps most importantly, the rights created by the HRA are *statutory rights* which are now ‘part of this country’s law.’¹¹ They are different creatures from the Articles protected under the European Convention and it should therefore be open for UK judges to interpret them accordingly. Furthermore, Section 2(1) HRA only requires domestic courts to ‘take into account’ European precedents. As Wicks explains, a “decision not to ‘stick like glue’ to the Strasbourg approach is perfectly legitimate.”¹² Turning to the ECHR, Lord Lester has indicated that the ‘only obligation under the Convention is in Article 46(1).’¹³ It therefore remains silent on the specific issue of domestic courts providing a more generous protection of convention rights which have been incorporated into the national law of member states. However, it is important to note that Article 53 ECHR expressly allows member states to recognise and protect rights *beyond* those listed in the ECHR.¹⁴ Finally, Strasbourg has been similarly reticent in declining to address the appropriate role for national courts. Given that the European Court ‘confines its reasoning strictly to the case before it,’¹⁵ this is not surprising. However, it should be noted that the existence of a ‘margin of appreciation’ doctrine is difficult to reconcile with an argument that convention standards must be uniformly applied.¹⁶

Revealed in this light, one will appreciate that the comity principle has not been mandated by the ECHR, ECtHR or the HRA; Lady Justice Arden has thus labelled it the ‘self-denying ordinance in *Ullab*.’¹⁷ However, to acknowledge this reality is not to say that the new interpretative method is *prima facie* wrong. The central

¹⁰ The *Ullab* approach entails *double deference* to both Strasbourg and, indirectly, the domestic decision-maker.

¹¹ *Re McKerr* [2004] 1 WLR 807 para [25] (Lord Nicholls).

¹² Wicks, ‘Taking Account of Strasbourg?’ [2005] *European Public Law* 405, 422.

¹³ Hansard HL vol 583 col 512, the UK must abide by the ECtHR’s final judgment in cases to which it is party.

¹⁴ ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.’

¹⁵ Martens, ‘Incorporating the European Convention’ [1998] *EHRLR* 6, 13.

¹⁶ *R (Kebeline) v DPP* [2000] 2 AC 326, 380 (Lord Hope).

¹⁷ Arden, ‘*The Changing Judicial Role*’ (CALBRA Annual Lecture, 26 November 2007) para [49].

question that must be addressed is not *can*, but *should* such a deferential stance be adopted?

Part I: Justifying Ullah

The *Ullah* approach prevents the courts from *outpacing* the ECtHR in its interpretation of the rights and freedoms under the Convention. This section identifies and evaluates the possible reasons for denying a more generous domestic interpretation when determining the *scope* of the new rights enshrined under the HRA.

Two 'Myths'

i) Strasbourg is 'better placed'

In *Anderson*, Lord Justice Buxton expressed that an international court interpreting an international instrument 'brings to that task a range of knowledge and principle that a national court cannot aspire to.'¹⁸ This adopts an essentially Platonic view that the European justices are a 'discerning minority' of individuals gifted with the 'blessed possession' of knowledge which is necessary to order society. It implies that a more generous interpretation should not be undertaken by the national judiciary since it does not possess sufficient expertise to come to the correct conclusion.

With the utmost respect, this assertion is unsound. The precise content of human rights has eluded the grasp of some of history's greatest minds and it is therefore misguided to bow down to the European Court's judgement on the ground that it is more likely to identify their 'correct' meaning. One could go further and argue that, in the words of Jeremy Bentham, this concession gives Strasbourg 'the satisfaction...of teaching grandmothers to suck eggs,'¹⁹ since the British judiciary has interpreted common law rights with great ingenuity for many centuries (and long before the fledgling European Court).

ii) Democratic Qualms

Amidst the euphoria surrounding the rise of human rights, a common concern has been the guardian role of the judiciary. It is frequently argued that it is *undemocratic* for these unelected and unrepresentative individuals to decide the meaning of such contestable values. I believe that this ever-present democratic concern is the underlying reason for the judicial restraint shown in *Ullah*. An initial response could be to look at the panoply of arguments which contend that the general judicial role under the HRA is *not incompatible with democracy*.²⁰ Many of these are

¹⁸ R (*Anderson*) v Home Secretary [2002] WLR 1143 para [91].

¹⁹ Bentham, *Works* (ed Bowring 1843) vol 2, 497 'while you poor simple souls know nothing about the matter.'

²⁰ Perhaps the strongest is Lord Bingham's recognition that the HRA 'gives the courts a very specific, wholly democratic mandate' see *Secretary of State for the Home Department* (n 2) para [42]. Others have stressed that the Act promotes a 'democratic dialogue' and embodies an acceptable compromise where judicial decisions are not binding *stricto sensu* on elected officials. Dworkin forcefully argues that an

very compelling but will not be pursued here since such ground is already well trodden. Alternatively, it is argued that, *even if these general arguments are not accepted*, this democratic anxiety should not arise when considering the adoption of a more generous interpretation, particularly at the *scope stage* of rights adjudication.

First, the official statements made at the time of the Human Rights Bill are ‘unusually explicit evidence of parliamentary intention’ that the courts should be free to outpace European jurisprudence.²¹ In this sense, *Ullab* is ironically undemocratic. Second, there is another reason why it might be seen as significantly undemocratic. The comity principle forthrightly defers to the opinion of the Strasbourg Court, *not the considered decisions of elected representatives*. It means that the rights of the domestic populace are determined by a democratically unaccountable panel of foreign judges, ‘some of them drawn from societies markedly unlike our own.’²² Finally, if a court claims that it is ‘deferring’ to the views of an elected representative when determining the *scope* of a right, it is deferring to what the decision-maker *believes the right should mean* and not whether he or she believes its violation is *necessary in a democratic society*. Although it is correct that deference on institutional and constitutional grounds should sometimes be applied in relation to the latter,²³ it must not be applied to the former judgement; to do so would be to permit elected officials to set their own rules and break them, rendering our fundamental rights merely imaginary.

Why Uniformity?

The reason that Lord Bingham gave for the approach in *Ullab* was that ‘the meaning of the Convention should be uniform throughout the states party to it.’²⁴ An initial point to make is that his Lordship must be asserting that the Convention should be uniform at *both* the national and European level, rather than just the latter level. This is because a different national interpretation will not jeopardise the uniformity of Strasbourg jurisprudence since the ECtHR is not required to follow it.²⁵

In his Lordship’s learned opinion, the Convention contains *autonomous* concepts which should not fluctuate and vary depending on which instrument or legal code they arise from. Without further explanation, however, this justification appears a little meaningless; having opted for an approach which promotes uniformity, it is justified by explaining that the Convention must be uniform. It is not explained

inherent feature of democracy itself is respect for fundamental values. See, Dworkin, ‘Does Britain Need a Bill of Rights?’ in *Human Rights in the UK* (OUP 1996). Sir John Laws makes a similarly compelling case in Laws, ‘Law and Democracy’ [1995] *PL* 72.

²¹ *Lewis* (n 8) 726. See Part II.

²² Bingham, ‘The ECHR: Time to Incorporate’ in *Human Rights in the UK* (OUP 1996) 8.

²³ See Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] *PL* 592.

²⁴ *Ullab* (n 5).

²⁵ Wintemute, ‘The HRA’s First Five Years’ [2006] *KCLJ* 209, 211.

why uniformity at both levels is necessary.²⁶ One possible argument could be to maintain that 'human' rights are objective values common to all men and women, and, if correctly interpreted, cannot therefore differ across member states. However, modern consensus seems to acknowledge that it is not as straightforward as this.²⁷ Instead, the author can identify three potential justifications for why uniformity might be desirable (although all are ultimately untenable).

No Governmental Right to Appeal

In *Al-Skeini*, Lord Brown explained that the 'danger' of a more generous interpretation is that 'the member state cannot itself go to Strasbourg to have it corrected.'²⁸ State parties have no right of petition under Article 34 ECHR. This rather technical argument initially appears to rest on the mistaken assumption that the ECtHR is more likely to make a 'correct' human rights interpretation (and its seal of approval is therefore required to cast legitimacy over a domestic court's decision). Such logic has already been argued to be untrue. However, proponents of uniformity might reply that the objection is not so much about which court will get the right answer but about a concern for *fairness*; it is *unfair* that the government cannot challenge an adverse domestic interpretation at Strasbourg yet the displeased individual can. Although this inequality already exists under the current structure, they would argue that it is fairer to proceed cautiously and require aggrieved individuals to pursue their cases at the ECtHR. This is unsustainable for a number of reasons.

First, it is not unfair that governments do not have a right of petition in order to challenge adverse rulings. This is because such a right would be meaningless in practice since it is difficult to imagine that the ECtHR would ever overturn a generous domestic interpretation. Indeed, it would almost certainly accord a 'margin of appreciation' in these instances and thereby serve a vestigial role. Second, it is unfair to require individuals to go to such additional length in order to protect their fundamental rights. This attitude effectively concedes that rights are, ultimately, only given to those who can afford them (an attitude that the HRA was specifically intended to counter). Finally, it is difficult to accept that *nominal* unfairness (if any) suffered by the government should stand in the way of a more effective protection of human rights. The unfairness caused will only ever be minimal since Article 26 ECHR stipulates that all domestic remedies must be exhausted before a case may be admissible before Strasbourg. Therefore, the government will still have equal and ample opportunity to challenge an adverse ruling at the domestic level.

²⁶ *Lewis* (n 8) 732. Such judicial statements have often been made 'as assumptions or simply stated as self-evident truths.'

²⁷ This will be examined in further depth in Part II.

²⁸ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 para [106].

Fairness to Foreign Citizens

In *Anderson*, Lord Justice Buxton stated that ‘fairness between the citizens of those different countries requires that [the ECHR’s] terms have a uniform and accessible meaning.’²⁹ This is a somewhat novel suggestion that interests of justice should transcend British borders into a European sphere; that like cases should be treated alike all over Europe. However, this argument is again flawed. Professor McCrudden has cogently argued that, for the principle of justice to operate, ‘the decision-maker has to have some duty to treat the similarly situated parties alike.’³⁰ For him, this duty derives from being *responsible* for the decision in both cases. Given that the UK courts are in no way responsible for decisions beyond British shores, the claim that a more generous domestic interpretation would be unfair is a *non sequitur*. In the alternative, one might question why a concern for being fair to foreign citizens in Andorra must *trump* a desired improvement in the protection of human rights in the United Kingdom. Lord Justice Buxton might point to the ancient maxim ‘let justice be done though the Heavens fall.’ However, it is debatable whether this must still hold true if the falling heavens are a sub-optimal protection of fundamental rights, and the injustice done is comparatively minute.

Legal Certainty

It might be argued that a less precedential approach will generate legal uncertainty. According to the late Professor Wade, this is undesirable because it becomes difficult to know which acts will attract legal implications.³¹ This may have adverse consequences such as discouraging beneficial activities and encouraging litigation. Although, it is conceded that a more generous approach may create a small degree of uncertainty, this is unobjectionable in the context under consideration.

First, the additional uncertainty generated by a more flexible interpretative approach will be very small. The law will still possess ‘a solid core of certainty’³² where there are positive Strasbourg and domestic precedents. Second, a degree of uncertainty in the human rights context is in fact *beneficial*. The air of unpredictability will deter invasive official behaviour at the very fringes of human rights legitimacy; instead, it will encourage officials to make less interfering but equally effective decisions. There will be a ‘double-check’ ethos which goes hand-in-hand with the HRA’s aim of facilitating a ‘human rights culture.’ Third, one must accept that uncertainty is an *inevitable part of any legal system* (this is particularly true for the common law which develops incrementally). Professor Wade therefore stressed that the law ‘represents a kind of equilibrium between certainty and justice.’³³ More importantly, the Chief Justice of Canada has identified that uncertainty is particularly inevitable when dealing with the broad principles in

²⁹ *R (Anderson) v Secretary of State for the Home Department* [2001] EWCA Civ 1698 para [89].

³⁰ McCrudden, ‘Transnational Judicial Conversations on Constitutional Rights’ [2000] *OJLS* 499.

³¹ Wade, ‘The Concept of Legal Certainty’ [1940] *MLR* 183, 187.

³² McLachlin, *Judging in a Democratic State* (Templeton Lecture 3 June 2004).

³³ *Wade* (n 31) 197.

human rights instruments.³⁴ Fourth, the ECtHR itself is not bound by its own precedents and it has explicitly acknowledged that the 'interests of legal certainty' may sometimes be ignored 'since the Convention is first and foremost a system for the protection of human rights.'³⁵ Finally, legal uncertainty could be mitigated through the adoption of prospective overrulings.³⁶

Part II: Justifying a More Generous Approach

The reason why the approach in *Ullab* is so objectionable is because it leads to a sub-optimal domestic protection of the rights conveyed under the HRA.³⁷ An effective protection of human rights demands a dynamic *principled approach* rather than a stultified precedential and legalistic one. As Sir Andrew Morritt V-C emphasised in *Aston Cantlow*, the judge's task is not to 'cast around in the European Human Rights Reports like black-letter lawyers seeking clues...it is to draw out the broad principles which animate the Convention.'³⁸ Indeed, the Privy Council has long upheld the view that constitutional instruments must be interpreted flexibly, avoiding the 'austerity of tabulated legalism.'³⁹ As Lord Wilberforce put it, a constitutional charter is '*sui generis*, calling for principles of interpretation of its own.'⁴⁰ In this light, David Pannick has argued that the HRA must be seen as a constitutional document which demands its own 'special principles of interpretation.'⁴¹ Outlined below are four interpretative principles which, it is argued, the UK courts should be free to apply at the 'scope' stage of adjudication in order to achieve a more effective protection of municipal rights.⁴²

The Dialogue Principle

In his Hamlyn Lecture, Professor Gearty identified that a major problem which plagues human rights scholarship is the 'crisis of authority,' the gargantuan task of providing an authoritative foundation for human rights.⁴³ Traditionally, natural law theorists argued that human rights were objective truths (defined by God or by Reason) and that their validity was 'as much a matter of definite knowledge...as the colour of a ripe apple.'⁴⁴ Jeremy Bentham famously replied that this was 'nonsense upon stilts.' Indeed, twentieth century scholarship has seen a move away from *meta*-ethics to *discourse* ethics where it is conceded that the precise meaning of

³⁴ *McLachlin* (n 32).

³⁵ *Goodwin v UK* (2002) 35 EHRR 18 para [74].

³⁶ The House of Lords has recently indicated that it has the power to make such rulings in the interests of justice; *Re Spectrum Plus* [2005] 3 WLR 58.

³⁷ The third recital of the ECHR's Preamble requires state parties to ensure the 'maintenance and *further realization* of Human Rights and Fundamental Freedoms.'

³⁸ *Aston Cantlow* [2001] EWCA Civ 713 para [65].

³⁹ *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (Lord Wilberforce).

⁴⁰ *Spectrum* (n 39) 329.

⁴¹ Pannick, 'Principles of Interpretation of convention rights under the HRA' (1998) *PL* 545, 545.

⁴² There is an inevitable overlap between the four principles.

⁴³ Gearty, *Can Human Rights Survive?* (CUP 2006) Chapter 2.

⁴⁴ Dahl, 'Decision Making in a Democracy' in *Toward Democracy* (IGSP 1997).

human rights is not instantaneously identifiable and will invariably need to be made and remade.⁴⁵

If this is accepted, one must logically concede that, in order to render human rights *less* contestable, any interpretative process should invite debate and dialogue rather than nullify it.⁴⁶ It is therefore argued that the UK courts need to embrace and take part in a two-way ‘creative dialogue’⁴⁷ with the Strasbourg court. If there is a good reason for departing from a European precedent, the courts must not feel restrained from interpreting the municipal right’s scope more generously. This should ultimately provoke a response from the ECtHR which will be able to show its regard or disregard for the cogency of analysis in an analogous but subsequent case. Likewise, the House of Lords will be then able to posit a riposte, and so on and so forth.

The Cultural Values Principle

This interpretative principle recognises the importance of cultural values when determining the meaning of the rights created by the HRA. It is premised on a view that it is wrong to perceive these statutory rights as essentially *European* constructs which must be moulded by a *European* Court, taking into account *European* values. This is particularly since the rights created by the HRA are not international rights created by treaty but liberties that have been born and bred in the United Kingdom. It demands that the courts should expand the purview of these rights in order to incorporate important ‘constitutive values.’⁴⁸

What are these distinctive cultural values? Sir Alfred Denning opened the Hamlyn Lecture series with the impassioned eulogy that the United Kingdom has ‘succeeded to the greatest heritage of all – the heritage of freedom.’⁴⁹ One can discern a number of rights which have been particularly pronounced and protected over time: freedom from unlawful detention,⁵⁰ access to justice,⁵¹ presumption of innocence⁵² and freedom of conscience,⁵³ are some of the many which spring to mind.

⁴⁵ *Lewis* (n 8) 744 -745. The author disagrees with Morgan who argues that this view makes human rights no better than subjective judgements with no moral force. As Lord Hoffmann explains, the assertion that human rights are universally true is still a ‘half truth’ since there remains an ‘irreducible minimum’ that we can all accept, see Hoffman, ‘Human Rights and the House of Lords’ [1999] *MLR* 159,165. It is only beyond this objective core, and within the ambit of certain ‘grey areas’ that it is vitally important for a contentious dialogue to take place see *Guzzardi v Italy* (1980) 3 EHRR 333 para [3] (Judge Matscher).

⁴⁶ ‘The effective protection of human rights demands a ‘process of arguing, urging, campaigning, denouncing, encouraging and asserting’ (Sir Stephen Sedley’s Holdsworth Lecture 2005).

⁴⁷ Steyn, ‘2000-2005: Laying the Foundations of Human Rights Law’ [2006] *EHRLR* 349, 361.

⁴⁸ Poole, ‘Harnessing the Power of the Past?’ [2005] *J Law & Soc* 534, 545-546. In a similar vein, Lord Hoffmann has argued that we have ‘our own hierarchy of moral values... [and] it would be wrong to submerge this under a pan-European jurisprudence of human rights’ at (n 45). See also *Pannick* (n 41) 165.

⁴⁹ Denning, ‘*Freedom under the Law*’ (Hamlyn Lecture 1949).

⁵⁰ *A* (n 2) para [87]. Lord Hoffmann has referred to this as ‘a quintessentially British liberty.’

⁵¹ *Scott v Scott* (1913) AC 417 (Lord Hoffman).

⁵² *Woolmington v DPP* [1935] AC 462 (Viscount Sankey).

⁵³ *Entick v Carrington* (1765) 19 HST 1029.

An adoption of this principle would enable these values to 'bolster' the model of convention rights, as seen through the eyes of the Strasbourg Court, in order to provide a 'particularly British view of fundamental rights.'⁵⁴ In particular, it should be noted that the European Court itself does not see the Convention as embodying a set of homogeneous European values which must be interpreted uniformly across the forty seven member states. As the Court's former President has stressed, the 'Convention is not intended to destroy the richness of the cultural and other variety found in Europe by imposing rigid, uniform solutions.'⁵⁵ In particular, the 'margin of appreciation' doctrine acknowledges that countries may hold different cultural values and ensures that these differences are respected; Strasbourg remains 'subsidiary to the national systems safeguarding human rights.'⁵⁶

The Evolutive Principle

'Like the eagle in the sky that maintains its stability only when it is moving, so too is the law stable only when it is moving.'⁵⁷ The beliefs and philosophies of societies are always in constant flux. The furore surrounding the publication of D.H. Lawrence's *Lady Chatterley's Lover* is a good example of how the moral attitudes of society may change over time. Another example is the decriminalisation of homosexuality under the Sexual Offences Act 1967 and its subsequent protection under the Equality Act 2006. Not bound by its earlier decisions,⁵⁸ the European Court itself is free to adopt a flexible interpretative approach in order to reflect the shifting sands of moral opinion within the meaning of the Convention. It emphasises that the ECHR should be seen as a 'living instrument which...must be interpreted in the light of present-day conditions.'⁵⁹

It is argued that this interpretative principle should be adopted in the *domestic* as well as the *European* sphere. Again, the rights that the HRA establishes are part of the domestic law and are distinct entities from the Articles protected under the ECHR. The courts should therefore be free to keep them abreast with modern domestic attitudes, rather than waiting much longer for cases to reach the

⁵⁴ *Dworkin* (n 20) 64. See also *R (Marper) v Chief Constable of Yorkshire* [2002] EWCA Civ 1275 para [34] (Lord Woolf CJ): 'there can be situations where the standards of respect for the rights of the individual in this jurisdiction are higher than those required by the Convention [and there is] nothing in the Convention setting a ceiling on the level of respect which a jurisdiction is entitled to extend to personal rights.' However, this was rejected on appeal. Similarly, McLachlin CJ has argued that constitutional instruments should be seen as part of a 'hybrid system, incorporating aspects of the rights tradition into the common law and vice versa.' See also McLachlin, 'Bills of Rights in Common Law Countries' (2002) *ICLQ* 197, 197.

⁵⁵ Rysdall, 'The Coming Age of the ECHR' [1996] *EHRLR* 18, 25-26.

⁵⁶ *Handyside v UK* (1976) 1 EHRR 737 para [48].

⁵⁷ Barak, 'A Judge on Judging' [2002] *Harv L Rev* 16, 29 (Lord Steyn has commented that this is 'pre-eminently true of human rights law' in Steyn, 'Laying the Foundations of Human Rights Law' [2006] *EHRLR* 349).

⁵⁸ *Cossey v UK* (1991) 13 EHRR 622 para [35].

⁵⁹ *Tyrer v UK* (1978) 2 EHRR 1 para [31].

European Court and for a general consensus to crystallise everywhere else in Europe. Interestingly, Roger Masterman has highlighted that a refusal by a national court to interpret rights ‘evolutively’ will mean that the ECtHR is ‘starved of one of the sources of information regarding prevailing present-day conditions,’ thus rendering it more difficult to determine if there has been a change in the pan-European consensus.⁶⁰

It should be noted that Justice Scalia, a proponent of the ‘strict constructionist’ judicial philosophy, has been critical of the ‘evolutionist’ approach.⁶¹ He argues that it promotes the imposition of value-laden judgments by judges and that it must remain for the legislature and ballot-box to recognise and protect these emerging social values.⁶² The immediate response to this is to deny the assertion that a dynamic judicial role in the UK is undemocratic (see above). In particular, the HRA is a very different instrument from the American Constitution since judges are unable to invalidate legislation under its provisions. Unlike in the United States, the HRA promotes a democratic dialogue between all three branches of government *where Parliament - not the courts - has the ultimate say*. In addition, the adoption of the strict constructionist view will hinder the effective protection of fundamental rights; as the ECtHR has already recognised, a failure to keep the meaning of the Convention in line with modern attitudes risks ‘rendering it a bar to reform or improvement.’⁶³

The Comparative Principle

If it is accepted that the precise peripheries of human rights are contestable to some degree, it must surely be desirable that the broadest possible panoply of rights jurisprudence is at the disposal of a discerning judge. In determining the appropriate scope of human rights under the HRA, foreign rights analysis - and not *exclusively* Strasbourg’s analysis - should be embraced.⁶⁴ Justice La Forest has convincingly argued that the ‘greater use of foreign material affords another source, another tool for construction of better judgments’ and will ‘enhance their effectiveness and sophistication.’⁶⁵ In the struggle to identify the limits of these often amorphous entities, judges around the world should promote a ‘brisk international traffic in ideas about rights.’⁶⁶ It seems nonsensical to view supposedly *human* rights through such a restrictive European lens.

⁶⁰ Masterman, ‘Section 2(1) of the HRA 1998’ [2004] *PL* 725, 732.

⁶¹ Scalia, ‘*Ayatollahs of the West*’ (The Tercentenary Lecture in Public Law, Edinburgh University, 11 December 2007).

⁶² Judges must give constitutional texts the original meaning that they bore when they were first democratically approved.

⁶³ *Stafford v UK* (2002) 35 EHRR 32 para [68].

⁶⁴ *Arden* (n 17) para [49]. One must acknowledge Lady Justice Arden’s concern that it may not *always* be appropriate to ‘transplant’ foreign interpretations into our own jurisdiction.

⁶⁵ La Forest, ‘The Use of American Precedents in Canadian Courts’ [1994] *Maine Law Review* 211, 216.

⁶⁶ Glendon, *Rights Talk* (Free Press 1991) 158. For example, the Constitutional Court of India has interpreted the right to life as including the right to enjoy pollution-free water and air (a more expansive interpretation than Strasbourg’s).

Synopsis: A New Approach

It is clear that the recent comity principle has suppressed the adoption of these important interpretative principles. For example, Lord Bingham declined to review Commonwealth jurisprudence in *Sheldrake* (the *comparative* principle), explaining that the courts 'must take their lead from Strasbourg.'⁶⁷ Similarly, Lord Hope in *N v Home Secretary* expressed that '[i]t is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions (the *evolutive* principle).'⁶⁸ Again, Lord Steyn in *Marper* stated that the Convention Articles 'should receive a uniform interpretation throughout member states, unaffected by different cultural traditions (the *cultural values* principle).'⁶⁹

It is proposed that these essential adjudicative tools should be adopted by the UK courts. It is time to move forward from the current myopia which reduces the domestic judiciary to little more than a 'sullen defendant' of our individual freedom.⁷⁰ It is only through a dynamic and creative 'symbiosis' of ideas that these fundamental rights will become less contestable, more acceptable and more effective.⁷¹

However, a call for generosity is not a call for unfettered judicial freedom; the courts must steer clear from the 'Scylla of excessive activism.'⁷² The proposed approach does not advocate a re-conceptualisation of the HRA as a domestic bill of rights. It still acknowledges Lord Kingsland's concerns that such a reading might cast judges 'adrift from their international moorings...with no accurate charts by which to sail... [and going] in whatever direction they wish.'⁷³ Rather than advocating the absolute *independence* of the UK courts from Strasbourg, it is merely asserted that they should not be absolutely *dependent*; the adjudicative process must be seen as a *two-way* relationship where Strasbourg precedents, although remaining extremely persuasive, should be seen as 'stepping stones' rather than 'halting-places.'⁷⁴

Alternative Submission: Parliamentary Intention

Even if one does not accept that the above principles have freestanding veracity and value, it is now argued that a dynamic interpretative approach has been mandated by Parliament itself. *Prima facie*, the HRA does not explicitly stipulate its objectives or intentions. However, if one turns to the Parliamentary materials and

⁶⁷ *Sheldrake v DPP* [2004] UKHL 43 para [33].

⁶⁸ *N v Home Secretary* [2005] UKHL 31 para [36].

⁶⁹ *R(Marper) v Chief Constable of Yorkshire* [2004] UKHL 39 para [27].

⁷⁰ *Dworkin* (n 20) 65.

⁷¹ Sir Stephen Sedley has argued that 'the vigour of a constitution has far less to do with its formal provisions than with the energy and imagination deployed by the courts in interpreting and applying them.' See Sedley, 'The Sound of Silence' [1994] *LQR* 270, 275.

⁷² Laws, 'The Limitations of Human Rights' [1998] *PL* 256, 261.

⁷³ Hansard HL vol 583 col 514 (18 November 1997).

⁷⁴ *Birch v Brown* [1931] AC 605, 631 (Lord Macmillan). See also Part III.

White Papers which were released during the passage of the Human Rights Bill (HRB),⁷⁵ it can be seen that there are several aims which underlie the 1998 Act. For the purposes of the present discussion, there is one which is of particular importance: the intention that the HRA would enable the national courts to make a direct ‘contribution to the development of the jurisprudence of human rights in Europe.’⁷⁶ Thus, the Lord Chancellor promoting the Bill emphasised that:

‘The Bill would *of course* permit UK courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might make a *successful lead to Strasbourg*.’⁷⁷

One merely needs to remember Lord Bingham’s remark in *Sheldrake* to perceive the evident disparity between judicial and parliamentary will; ‘the United Kingdom courts *must take their lead from Strasbourg*.’⁷⁸

Moreover, it is possible to go *even* further and identify Parliamentary endorsement for the specific interpretative principles which have been proposed. For example, the White Paper expressed that ‘our courts’ decisions will provide the European Court with a useful source of information and reasoning⁷⁹ (the *dialogic* principle).’ Lord Irvine expressed that the UK courts might depart from a Strasbourg decision ‘given decades ago’ in light of ‘the circumstances of today’⁸⁰ (the *evolutive* principle).’ The White Paper referred to the desirability of the domestic courts influencing the European court ‘on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the UK’⁸¹ (the *cultural values* principle).’ Considering this remarkably clear evidence, it is unfortunate that the comity principle has sometimes been justified on the purported basis that it is in accordance with parliamentary will.⁸²

Part III: Potential Limitations to a More Generous Approach

‘Beware the slippery slope’ is a familiar, yet very potent, caveat. An immediate riposte to a more generous interpretative role is that it has the potential to be abused. One must appreciate that the slippery slope concern is not a justification against a generous interpretative approach (as in Part I). Instead, the argument ‘contains the implicit concession that the proposed resolution is not itself

⁷⁵ See *Pepper v Hart* [1993] AC 593, 634 (Lord Brown-Wilkinson) on the admissibility of parliamentary material as evidence.

⁷⁶ White Paper – ‘*Bringing Rights Home*’ see para [1.14].

⁷⁷ *Marper* (n 69); *Hansard* (n 73) (Lord Irvine).

⁷⁸ *Sheldrake* (n 67).

⁷⁹ *White Paper* (n 76) Para [1.18].

⁸⁰ *Hansard* HL vol 583 col 1271 (19 January 1998). See also *Marper* (n 69).

⁸¹ *White Paper* (n 76) Paragraph 1.18.

⁸² *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 para [53] (Baroness Hale).

troublesome... [and] perhaps even desirable.⁸³ It focuses our fears on the possibility that the acceptable role might be misused in the future.

The primary aim of this paper has been to challenge the validity of the comity principle. As such, the question of how far the House of Lords should go, *if the alternative approach is accepted*, is not immediately relevant to this initial objective. It might be considered *obiter dicta*. However, for the purpose of completeness, it is important to address the question of where to draw the line between an acceptable and unacceptable creative interpretation. Six *restraints* can be briefly sketched out which, it is contended, should be borne in mind if theory is to be applied to practice.

1) Continued use of 'distancing devices'⁸⁴ - The new approach does not mandate the desertion of clear and principled argument. Judges must still take heed of Judge Cardozo's guidance:

'The judge, even when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own idea of beauty or goodness. He is to draw inspiration from consecrated principles.'⁸⁵

The courts must continue to use objectively convincing analysis in order to convince others (not only other courts but also the populace) that it is an acceptable interpretation.

2) Where the Strasbourg precedent is clear but *negative* and not *unclear* or *non-existent*, the court should proceed with more caution in adopting a generous interpretation. A clear Strasbourg decision will still carry much weight and strong reasons must be given if it is to be overruled. *The European jurisprudence must still be taken into account.*⁸⁶ However, where there is no precedent, or where the case law 'lacks its customary clarity,'⁸⁷ the UK courts should be particularly willing to engage in a dialogue with the ECtHR. As Judge Martens has noted, such situations demand that domestic courts use 'daring and creativity.'⁸⁸

⁸³ Schauer, 'Slippery Slopes' [1985] *Harv L Rev* 361, 368.

⁸⁴ These are principles which can be used to come to a decision 'in a way that is independent of the personal tastes of the judges.' See Raz, 'On the Authority and Interpretation of Constitutions' in *Constitutionalism* (CUP 1998) 190.

⁸⁵ Cardozo, *The Nature of the Judicial Process* (Dover 2005) 141.

⁸⁶ *Wicks* (n 12) 147. Wicks explains that a failure to do so would be outside the realms of legality; taking into account requires a 'thorough analysis at the very least.'

⁸⁷ *Lord Nicholls* (n 67) para [14].

⁸⁸ *Martens* (n 15) 14.

3) Where an interpretation would lead to a *conflict with another right under the HRA*, the court must be particularly circumspect in broadening the meaning of that right. However, if it would merely lead to a mutual and complimentary ‘overlap’ with another right, there is no obvious reason why a generous interpretation should not be adopted. In *JJ and Others*, Lord Hoffmann argued against employing an ‘over-expansive interpretation’ where it would preserve the ‘key distinction’ with other rights.⁸⁹ It is submitted, however, that there is no immediately obvious reason which mandates this perspective. The only exception is where the peripheries of a ratified right could be interpreted so as to ‘bleed’ into the content of an unratified right (as this would subject the government to obligations which it had expressly not agreed to).⁹⁰

4) Where the proposed interpretation entails the imposition of a *positive duty* on the State, judges should again be more guarded in embracing a creative role. As the ECtHR recognised in *Chapman v UK*, such decisions are often a ‘matter for political not judicial decision.’⁹¹ However, it should still be open to courts to recognise new duties if there are strong reasons for doing so.⁹²

5) Where the right under scrutiny is an *absolute right*, courts should show a degree of restraint since, unlike qualified rights, there is no opportunity for the State to justify its actions (all utilitarian considerations are *trumped*). If one is engaged, it is violated; the ramifications of a generous interpretation are therefore more accentuated.

6) Courts must not design *new rights* - Courts may only build on *existing* rights. To borrow Viscount Sankey’s metaphor, the HRA should be seen as ‘a living tree, capable of growth and expansion’⁹³ but the courts must refrain from seeding new trees which have not been consented to.⁹⁴

To conclude, it is helpful to summarise the above with the words of Sir John Laws: ‘Judges will, if I may say so, need to be imaginative and conservative at the same time.’⁹⁵

⁸⁹ *Home Secretary v JJ and Others* [2007] UKHL 45 para [44].

⁹⁰ *Guzzardi v Italy* (1980) 3 EHRR 333 para [6].

⁹¹ *Chapman v UK* (2001) 33 EHRR 18 para [99]. See also Fredman, ‘Positive Duties and Positive Rights’ [2006] *PL* 498.

⁹² Indeed, their Lordships arguably did so in *R (Limbuella) v Home Secretary* [2005] UKHL 66.

⁹³ *Edwards v Attorney-General for Canada* [1930] AC 124, 136.

⁹⁴ *Brown v Stott* [2003] AC 681, 703 (Lord Bingham).

⁹⁵ *Laws* (n 72) 257.

Conclusion

Lord Denning once drew a distinction between two judicial extremes:

‘On the one side there were the *timorous souls* who were fearful of allowing a new cause of action, on the other side there were the *bold spirits* who were ready to allow it if justice so required.’⁹⁶

When the Human Rights Act came into force on 2 October 2000, the national courts were presented with the exciting challenge of ‘bringing rights home.’ In the absence of any legal mandate, the House of Lords in *Ullah* has indicated that it has no desire to embrace fully such a role.⁹⁷ The timorous souls have, thus far at least, prevailed over the bold spirits.

This said, it is encouraging to finish by highlighting that there may still be bold spirits which lie within. Recently, the House of Lords has not been entirely consistent in applying the comity principle; there has been an occasional divergence between the judicial approaches *de jure* and *de facto*.⁹⁸ Their Lordships’ inconsistency is particularly evident in the two recent cases of *R (Countrywide Alliance) v Attorney General*⁹⁹ and *Home Secretary v JJ and Others*.¹⁰⁰ The former case remained loyal to the *Ullah* dictum. The House of Lords had to address the question of whether the scope of Article 8 could extend to cover a right to hunt foxes. Despite acknowledging that hunting is ‘integral to their identity,’¹⁰¹ the House was unanimous in rejecting the plaintiffs’ claim that Article 8 was engaged by the hunting ban. Baroness Hale, citing *Ullah*, explained that ‘the Strasbourg jurisprudence has not gone so far in its interpretation’ of Article 8.¹⁰² This should be contrasted with the case of *JJ and Others* which was handed down only one month before. It is contended that the *Ullah* dictum was disregarded by the majority in this case. The House of Lords, by a majority of 3-2, held that various ‘control orders’ which imposed a curfew on the complainants between 4 p.m. and 10 a.m. (and a myriad of other requirements) amounted to a deprivation of liberty under Article 5. Such an interpretation was made despite acknowledging that Strasbourg had not yet ruled on ‘any case at all closely comparable with the

⁹⁶ *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178.

⁹⁷ Instead, it is merely seen as an incorporated treaty which allows domestic remedies for the violation of international rights.

⁹⁸ For example, in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 where it was acknowledged that modern attitudes had changed ahead of Strasbourg (the *evolutive* principle); in *Limbuella* (n 92) where the scope of Article 3 was extended beyond previous Strasbourg interpretations (the *dialogic* principle) and in *R (Begum) v Denbigh High School* [2006] UKHL 15 where foreign rights jurisprudence was used (the *comparative* principle).

⁹⁹ *R (Countrywide Alliance) v Attorney General* [2007] UKHL 52.

¹⁰⁰ *JJ and Others* (n 89).

¹⁰¹ *R (Countrywide Alliance)* (n 99) para [55] (Lord Rodger).

¹⁰² *Ibid.* para [115] (Baroness Hale).

present.¹⁰³ In fact, Lord Brown explicitly applied the *evolutive* principle when he expressed that ‘nowadays a longer curfew regime than 16 hours a day...would surely be classified in Strasbourg as a deprivation of liberty.’¹⁰⁴

One of the few positives about the presently negative *Ullab* approach is that it can ‘be reversed quite easily by the courts should they choose to do so.’¹⁰⁵ This paper has contended that it is time to do so. In its place, the domestic courts must embrace a more principled and dynamic interpretative role in demarcating the scope of the new municipal rights that the Human Rights Act has created. It is only through doing so that the Act will achieve its full and intended potential.¹⁰⁶

REFERENCES

Arden, ‘*The Changing Judicial Role*’ (The Constitutional and Administrative Law Bar Association Annual Lecture, 26 November 2007).

Beloff and Mountfield, ‘Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales’ [1996] *European Human Rights Law Review* 467.

Bonner, Fenwick and Harris-Short, ‘Judicial Approaches to the Human Rights’ (2003) 52 *International and Comparative Law Quarterly* 549.

Clayton, ‘*The Human Rights Act – Two Years On*’ (Constitutional and Administrative Law Bar Association Lecture, 2 October 2002).

Dworkin, ‘Does Britain Need a Bill of Rights?’ in Gordon and Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford University Press 1996).

Ewing, ‘The Futility of the Human Rights Act’ (2004) *Public Law* 829.

Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2004).

¹⁰³ *JJ and Others* (n 89) para [19] (Lord Bingham). Only Lord Carswell, dissenting and citing *Ullab*, recognised that the absence of a comparable Strasbourg precedent meant that the House should ‘exercise some caution’ see para [83].

¹⁰⁴ *JJ and Others* (n 89) para [106] (Lord Brown).

¹⁰⁵ Professor Klug before the JCHR: HC 150-I (3 December 2007)

¹⁰⁶ It is also encouraging to see that, since completing this paper, there has been a dissent in the House of Lords about the validity of *Ullab* in the *Animal Defenders case* (n 82). Lord Bingham, Baroness Hale, Lord Carswell and Lord Neuberger continued to cling onto a ‘cautious approach to interpretation’ see para [53]. However, Lord Scott forthrightly stressed that ‘domestic courts are nonetheless not bound by the European Court’s interpretation’ see para [44].

Havers and Garnham, 'The Convention and the Human Rights Act: A New Way of Thinking' in English & Havers (eds), *An Introduction to Human Rights and the Common Law* (Hart Publishing 2000).

Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' (2005) *Public Law* 306.

Hunt, 'The Human Rights Act and Legal Culture' in Clements and Young (eds), *Human Rights: Changing the Culture* (Blackwell Publishing 1999).

Klug and Starmer, 'Standing Back from the Human Rights Act 1998: How Effective is it Five Years On?' (2005) *Public Law* 716.

Klug, 'A Bill of Rights: Do we need one or do we already have one?' (2007) *Public Law* 701.

Klug, *Values for a Godless Age: the Story of the UK's Bill of Rights* (Penguin 2000).

Laws J, 'Law and Democracy' (1995) *Public Law* 72.

Laws J, 'The Limitations of Human Rights' (1998) *Public Law* 256.

Lewis, 'The European Ceiling on Human Rights' (2007) *Public Law* 720.

Lord Bingham, '*The Way We Live Now: Human Rights in the New Millennium*' (The Earl Grey Memorial Lecture, 29 January 1998).

Lord Cooke, 'The British Embrace of Human Rights' (1999) 4 *European Human Rights Law Review* 243.

Lord Hoffman, 'Bentham and Human Rights' (2001) 54 *Current Legal Problems* 61.

Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *Modern Law Review* 159.

Lord Lester, 'Taking Human Rights Seriously' in R. Gordon and R. Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford University Press 1996).

Lord Lester, 'The Utility of the Human Rights Act: A Reply to Keith Ewing' (2005) *Public Law* 249.

Lord Steyn, '2000-2005: Laying the Foundations of Human Rights Law' [2006] *European Human Rights Law Review* 349.

Martens, 'Incorporating the European Convention: the Role of the Judiciary' [1998] *European Human Rights Law Review* 6.

Masterman, 'Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg' (2004) *Public Law* 725.

Masterman, 'Taking the Strasbourg Jurisprudence into Account' (2005) 54 *International and Comparative Law Quarterly* 907.

McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499.

McLachlin, *Judging in a Democratic State* (Templeton Lecture 3 June 2004).

Morgan, 'Law's British Empire' (2002) *Oxford Journal of Legal Studies* 729.

Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' (1998) *Public Law* 545.

Poole, 'Harnessing the Power of the Past? Lord Hoffmann and the *Belmarsh Detainees Case*' (2005) *Journal of Law and Society* 534.

Ryssdall, 'Opinion: the Coming Age of the European Convention on Human Rights' [1996] *European Human Rights Law Review* 18.

Scalia, '*Ayatollahs of the West: Judges as Moral Censors of Democratic Choice*' (The Tercentenary Lecture in Public Law, Edinburgh University, 11 December 2007).

Sedley, '*Are Human Rights Universal and Does it Matter?*' (Holdsworth Lecture 2005).

Sedley, 'The Rocks or the Open Sea: Where is the Human Rights Act Heading?' (2005) *Journal of Law and Society* 3.

Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' (2005) 11 *European Public Law* 405.

Wintemute, 'The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?' (2006) *Kings College Law Journal* 209.