

## **The Common Law and the ECHR**

**Master Reed<sup>1</sup>**

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When I was invited to give this lecture, it was suggested that my background in human rights and European law might make a topic in that area appropriate. I should say at the outset that I have had the privilege of sitting on the European Court of Human Rights as an ad hoc judge, and I am currently a member of the court's panel of ad hoc judges. There is no doubt in my mind as to the importance of the European Convention on Human Rights and of the role of the Strasbourg court in promoting human rights protection across Europe. Its body of case law is a substantial achievement. When it comes to applying the Convention and the case law of the Strasbourg court in our own courts, there are however distinctions between an international instrument and national law, and between an international court and domestic courts, which have to be borne in mind. With that in view, the issue I want to discuss is the relationship between the common law and the Convention. Does the common law still have a meaningful role to play in the era of Convention rights? What sort of rights are Convention rights? Are the judgments of the Strasbourg court authorities as we understand that term? I will focus particularly on some recent judgments of the Supreme Court in which these issues have been discussed. I should however make it clear that my remarks reflect a purely personal view.

I would like to begin with an anecdote. I spent a few weeks some years ago with the Criminal Chamber of the Cour de Cassation in Paris, the highest criminal appeal court in France. The President of the court made the sign of the cross when he first met me, jocularly warding off the influence of the Strasbourg court, on which I had recently been sitting. The

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<sup>1</sup> The Rt Hon Lord Reed, Justice of the Supreme Court of the United Kingdom.

French courts were at that time implementing reforms which had been made to the Code of Criminal Procedure to introduce more adversarial elements, following a judgment against France in the Strasbourg court. The President and other members of the court were courteously critical of Strasbourg as a body which appeared to them to have diluted French tradition in the field of criminal law by introducing ideas about evidence and procedure derived from what they called the Anglo-Saxon tradition. It became evident to me how different our ways of thinking were. Although French procedure was designed to meet the same fundamental objectives as our own, it did so by very different means.

I sat for example on a hearing before the commission which determines whether convicted persons should be granted permission to appeal to the Cour de Cassation on the ground of fresh evidence, and whether they should be granted interim liberation. It comprises five judges of the Cour de Cassation, who have the power to carry out investigations, but must hold a hearing in court, with an adversarial procedure, before reaching their decision. The case was based on an affidavit by a newly discovered witness to the effect that he had seen the applicant painting the outside of his house at the time when the robbery of which he had been convicted was being committed many miles away. Shortly after the applicant's counsel had begun his submissions, the President of the Commission interrupted him and said that she had telephoned the witness and had been told by him that he had no real recollection of the matter and had been pressurised by lawyers into signing the affidavit. The application was dismissed on that basis. My sense of shock reflected assumptions about the role of the judiciary which are not shared on the other side of the Channel.

During my time with the French court, the Convention was rarely referred to, and I cannot recollect any occasion on which reference was made to a judgment of the Strasbourg court. French lawyers rarely referred to the Convention in the pleadings that I saw, and it

appeared that the French judges did not regard it as their function to attempt to anticipate how the Strasbourg court might view French law or practice.

I had a less dramatic but not altogether different experience during a visit by Supreme Court Justices in 2012 to the German Federal Constitutional Court. Our German colleagues were keen to discuss relations with the European Court of Justice, but the Strasbourg court appeared to be of less interest to them. Issues of human rights were discussed by them under reference to the guarantees of fundamental rights in the Federal Constitution, which has a higher standing than the Convention in their legal system. Their approach to these issues was again based on different assumptions from our own. For example, when we discussed the use in legal proceedings of material which could not be made public or disclosed to one of the parties for reasons of national security, we explained how some recent UK statutes seek to secure participation on behalf of the party who cannot see the material through the appointment of a security-cleared special advocate. The procedure thus enables an adversarial hearing to take place without national security being compromised. We learned that under the German system that is considered unnecessary: the court examines the material itself, without its being discussed at the hearing of the case.<sup>2</sup> As we discussed this, it became clear that it is regarded as the responsibility of the German court to arrive at the truth, not to adjudicate between competing versions of the truth; and the participation of lawyers in a hearing of the case is therefore not regarded as absolutely essential to the court's performance of its function. As in the example I gave of the French criminal appeal, the German procedure for protecting national security in legal proceedings thus approaches differently from ours the claims of establishing the truth, on the one hand, and respecting the rights of the parties, on the other. I find it difficult to imagine the German approach being any more acceptable in this country than the Lord Chief Justice's telephoning a witness, but it illustrates how the same

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<sup>2</sup> See eg BVerfG, Judgment of 27 October 1999 – 1 BvR 385/90, Decisions of the Federal Constitutional Court 101, 106, on s 99 of the VwGO; BGH, Judgment of 4 March 2004 – 3 StR 218/03, Decisions of the Federal Court of Justice in Criminal Matters, 49, 112.

fundamental objective – ensuring a just outcome without jeopardising national security - can be achieved in the context of a different legal tradition.

My final anecdote concerns some work I did a number of years ago when I acted for the EU Commission and the Council of Europe, along with a French judge, on a project to assist Turkey in meeting human rights requirements for accession to the EU. I was told that Turkey had insisted that the external advisers should come from the UK or France, as Turkey had a longer history of continuous democracy than any of the other EU member states of comparable size.

I have narrated these anecdotes to illustrate three related points which I want to emphasise at the outset. First, other contracting states do not construct a domestic jurisprudence on the articles of the Convention, based on an examination of the case law of the Strasbourg court. Secondly, the way in which the different contracting states comply with the Convention may legitimately vary from one system to another. Thirdly, this country has a high reputation as an upholder of the rule of law, human rights and democratic values, based on domestic traditions which are much older than the ECHR.

There is a striking contrast between the approach taken to human rights law in France and Germany and the approach often taken in this country. If you watch a hearing in our higher courts, you are likely to be struck by the amount of time counsel spend citing judgments of the European court, which are discussed and analysed in much the same way as if they were judgments of our own courts. You may also be struck by a comparative lack of attention to our domestic legal tradition, or to the judgments of courts in other common law jurisdictions. This has particularly struck me in the field of public law, and one sometimes sees the same phenomenon in other fields, such as criminal law. Indeed, it is by no means unknown for cases to be argued entirely on the basis of Strasbourg authorities. For example, article 6 of the Convention, which guarantees the right to a fair trial, extends over most of the

territory covered by our law of evidence and procedure, civil and criminal, plus a large part of our administrative law. That being so, why bother citing domestic authorities to the court? Why not cut straight to article 6, and cite judgments of the Strasbourg court concerned with, say, the Ukrainian criminal code? As counsel once assured me in a criminal appeal when I queried that approach, it is quicker just to look at the Strasbourg cases: either the domestic law is in conformity with the Convention, in which case it adds nothing to the Strasbourg cases, or it is not, in which case it is equally pointless to examine it.

This might be thought to be slightly odd. The UK adopts a dualist approach to international law. So there is a distinction of principle between domestic law and the state's obligations under public international law. Given that we differ in this respect from monist legal systems such as those of France and Germany, it would seem paradoxical if we were to attach greater significance than them to the judgments of an international court. The approach is however said to follow from the effect given to the Convention, and to the case law of the Strasbourg court, by the Human Rights Act 1998. And in fairness, it has to be said that there are a number of judgments of the House of Lords which give some support to this approach. In a number of recent judgments, however, the Supreme Court has adopted a different approach, as I shall explain. I am going to focus particularly on four appeals decided during 2012 and 2013.

The first appeal is *S v L*,<sup>3</sup> a family law appeal concerned with legislation under which the court can dispense with parental consent to adoption. We were asked to interpret the legislation compatibly with article 8 of the Convention, in accordance with section 3 of the Human Rights Act, and were referred to numerous Strasbourg cases. In the majority judgment, which I delivered, I found it unnecessary to use section 3, emphasising that common law principles of statutory interpretation require legislation to be interpreted in

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<sup>3</sup> *S v L* [2012] UKSC 30; 2012 Fam LR 108.

accordance with the fundamental values of our society, values which include respect for the rights of parents.<sup>4</sup> I explained however why the result arrived at under our domestic law was also in conformity with Convention rights.

Lord Carnwath added a judgment discussing the citation and analysis of Strasbourg judgments, in which he explained that they are not generally designed to be subjected to the detailed textual analysis which is customary in a common law system. They may offer slightly different formulations and different shades of emphasis, with different ways of summarising the previous case-law, but such differences do not in general bear the same weight as they might, for example, in judgments of the Supreme Court. Such variations are unsurprising given the enormous workload of the Strasbourg court and the varied composition of the chambers to which cases are allocated. The judges no doubt attempt to maintain internal consistency, but their primary task is to outline the main principles and apply them to the facts of the case before them, not to establish any new proposition of law, or even to offer authoritative restatements of existing law.<sup>5</sup>

The second appeal is *R (Sturnham) v Parole Board*,<sup>6</sup> which was concerned with applications for damages under section 8 of the Human Rights Act against the Parole Board, which had failed to hear parole applications speedily as required by article 5(4) of the Convention. We were again referred to a large number of Strasbourg judgments. In the majority judgment, which I delivered, I described the ordinary approach to the relationship between domestic law and the Convention as being one according to which the courts endeavour to apply (and, if need be, develop) the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international obligations; the starting point being our own legal principles rather than the judgments of an international court. In contrast to that approach, section 8 had been construed

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<sup>4</sup> *S v L* [2012] UKSC 30; 2012 Fam LR 108, paras 33-34.

<sup>5</sup> *S v L* [2012] UKSC 30; 2012 Fam LR 108, paras 67 and 76.

<sup>6</sup> *R (Sturnham) v Parole Board* [2013] UKSC 23; [2013] 2 WLR 1157.

by the House of Lords as introducing into our domestic law an entirely novel remedy, inspired by article 41 of the Convention. Reflecting the international origins of the remedy and its lack of any native roots, the primary source of the principles which were to guide the courts in its application had been said to be the practice of the international court that was its native habitat. I observed however that over time, and as the practice of the Strasbourg court comes increasingly to be absorbed into our own case law, the remedy should become naturalised. While it will remain necessary to ensure that our law does not fall short of Convention standards, we should, I said, have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.<sup>7</sup>

I also observed in that judgment that although the court is required by section 8 to take into account the principles applied by the Strasbourg court, it is not bound by them. In particular, important though the guidance provided by the Strasbourg court may be, there are differences between the way in which an international court deals with damages and the approach of a domestic court which have to be borne in mind. One is the Strasbourg court's tendency, for reasons partly reflecting its international nature, to deal with damages as a much broader and more discretionary exercise than would be acceptable in domestic courts. Another difference is the inability of the Strasbourg court to decide disputed questions of fact: an inability which affects the approach it has to adopt. A third difference is the impact on its decisions of differences in the value of money in different contracting states.<sup>8</sup>

The third appeal is *Bank Mellat v HM Treasury (No 2)*,<sup>9</sup> which was concerned with the proportionality of an order preventing the UK financial sector from doing business with an Iranian bank which had been involved in arrangements for the financing of the Iranian

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<sup>7</sup> Para 29.

<sup>8</sup> Paras 33-39.

<sup>9</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2013] 3 WLR 179.

nuclear missile programme. I wrote a dissenting judgment in that case, but my colleagues agreed with what I said about the principle of proportionality.

The lower courts in that case had found some difficulty in analysing European judgments concerned with proportionality. That is unsurprising: the Strasbourg court has described its approach in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. As I indicated in my judgment, one of the differences between Strasbourg judgments and those of our own courts concerns the way in which judgments are written. Judgments of the higher courts in the common law tradition analyse legal issues in detail, and are designed to articulate binding statements of legal principle in the context of a system based on precedent. That method of reasoning is not common to all the 47 contracting states, and one could hardly expect it to be adopted by an international court. In practice, the discussion of the law in Strasbourg judgments is in most cases comparatively short, with a tendency to repeat well-worn formulae, and it is unusual to find authoritative statements of general principle other than in judgments of the Grand Chamber.

I also explained in my judgment that, in applying the principle of proportionality, the Strasbourg court recognises that it is less well placed than a national court to decide whether an appropriate balance had been struck in the particular national context. It recognises that the Convention cannot be applied in a uniform manner throughout the 47 states which subscribe to it. It recognises that many of the questions of proportionality which come before it turn on an assessment of the social conditions, culture and values of a particular society, which is in principle best carried out by institutions operating within the context of the society in question. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint

practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and culture. For example, the German Federal Constitutional Court, for historical and constitutional reasons, tends to adopt a more assertive role in relation to legislation than a British court would do. For all these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

In practice, as I explained in my judgment, the approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions, in particular the Canadian Charter of Fundamental Rights and Freedoms. I went on, like my colleagues, to adopt an approach based on Canadian case law – an approach which is in turn based on German law.

The fourth appeal is the recent case of *Osborn v Parole Board*,<sup>10</sup> concerned with the right to a fair hearing before the Parole Board. The submissions focused on article 5(4) of the Convention, and paid comparatively little attention to domestic administrative law. In the judgment of the Supreme Court, which I delivered, I explained that that approach does not properly reflect the relationship between domestic law and Convention rights.

As I said in the judgment, the guarantees set out in the substantive articles of the Convention, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial body of much more specific domestic law. That is true in the United Kingdom as in other contracting states. For example, the guarantee of a fair trial, under article 6, is

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<sup>10</sup> [2013] UKSC 61.

fulfilled primarily through detailed rules and principles to be found in several areas of our domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid. The guarantee of a right to respect for private and family life, under article 8, is fulfilled primarily through rules and principles found in such areas of domestic law as the law of tort, family law and constitutional law. Article 5 is also implemented through several areas of the law, including criminal procedure, the law relating to sentencing, mental health law and administrative law: indeed, article 5(4) is said to have been inspired by the English law of habeas corpus.<sup>11</sup> As these examples indicate, the protection of human rights is not a discrete area of the law, based on the case law of the Strasbourg court, but permeates our legal system.

The values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law. The Convention taken by itself is too inspecific to provide the guidance which is necessary in a state governed by the rule of law. As the Strasbourg court has said, “a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct”.<sup>12</sup> The Convention cannot therefore be treated as if it were Moses and the prophets. On the contrary, the Strasbourg court has often referred to “the fundamentally subsidiary role of the Convention”.<sup>13</sup> The court has made it clear that in order for there to be compliance with the Convention guarantees, there must in the first place be compliance with the relevant rules of domestic law.<sup>14</sup>

I went on in the judgment to explain that where domestic law fails fully to reflect the requirements of the Convention, it has always been open to Parliament to legislate in order to fulfil the UK’s international obligations, as it has done many times in response to judgments

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<sup>11</sup> *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, 88.

<sup>12</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271.

<sup>13</sup> See eg *Hatton and Others v United Kingdom* (2003) 37 EHRR 28, para 97.

<sup>14</sup> See eg *Koendjiharie v Netherlands* (1990) 13 EHRR 820, para 27.

of the Strasbourg court. The courts have also been able to take account of those obligations in the development of the common law and in the interpretation of legislation. The Human Rights Act has however given domestic effect, for the purposes of the Act, to some of the Convention guarantees, which it describes as Convention rights. It requires public authorities generally to act compatibly with those guarantees, and provides remedies to persons affected by their failure to do so. The Act also provides a number of additional tools enabling the courts and government to develop the law when necessary to fulfil those guarantees, and requires the courts to take account of the judgments of the Strasbourg court. The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute. Human rights continue to be protected principally by our domestic law, interpreted and developed in accordance with the Act when appropriate.

That approach is now well established. One example I gave was the case of *R (Daly) v Secretary of State for the Home Department*,<sup>15</sup> which concerned a policy that prisoners should be absent from their cells while they were being searched for contraband, as applied to a prisoner who had correspondence with his solicitor in his cell, was held to be unlawful on the ground that it infringed the prisoner's common law right that the confidentiality of privileged legal correspondence be maintained. Lord Bingham noted in the final paragraph of his speech that that result was compatible with article 8 of the Convention. In that regard he adopted the observations of Lord Cooke, formerly the President of the Court of Appeal of New Zealand, who said:

“It is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised

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<sup>15</sup> [2001] UKHL 26; [2001] 2 AC 532.

society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.”<sup>16</sup>

Another example I gave was the case of *R (West) v Parole Board*,<sup>17</sup> which concerned the circumstances in which prisoners recalled to prison were entitled to an oral hearing before the board. The House of Lords took the common law as its starting point, and considered judgments of the Strasbourg court, together with judgments from a number of common law jurisdictions, in deciding what the common law required. It went on to hold that the board’s review of the prisoner’s case would satisfy the requirements of article 5(4) provided it was conducted in a manner that met the common law requirements of procedural fairness.

Similarly, when the House of Lords rejected the admission of evidence obtained by torture in *A v Secretary of State for the Home Department*<sup>18</sup>, it did so on the basis of the common law: Lord Bingham observed that English common law had regarded torture and its fruits with abhorrence for over 500 years,<sup>19</sup> and concluded that the principles of the common law, standing alone, compelled the exclusion of third party torture evidence. He noted that that was consistent with the Convention.<sup>20</sup>

More recently, the importance of the continuing development of the common law, in areas falling within the scope of the Convention guarantees, was emphasised by the Court of Appeal in *R (Guardian News & Media Ltd) v City of Westminster Magistrates’ Court*.<sup>21</sup> The case concerned access by the Press to documents referred to in court, and was decided on the basis of the common law, including authorities from other jurisdictions, rather than on the basis of article 10 of the Convention. Toulson LJ stated:

“The development of the common law did not come to an end on the passing of the Human Rights Act 1998 . It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of

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<sup>16</sup> Para 30.

<sup>17</sup> [2005] UKHL 1; [2005] 1 WLR 350.

<sup>18</sup> [2005] UKHL 71; [2006] 2 AC 221.

<sup>19</sup> Para 51.

<sup>20</sup> Para 52.

<sup>21</sup> [2012] EWCA Civ 420; [2013] QB 618.

the benefit which can be gained from knowledge of the development of the common law elsewhere.”<sup>22</sup>

Against the background of those authorities, the court concluded in *Osborn* that the error in the approach adopted by counsel in that case was to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law. Properly understood, I said, Convention rights do not form a discrete body of domestic law derived from the judgments of the Strasbourg court. As Lord Rodger once observed, “it would be wrong ... to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply”.<sup>23</sup>

As the judgments in these four appeals make clear, it is important that we should not neglect the development of our own legal tradition of human rights protection. It is important not only because the coverage of the Convention is in some respects narrower than our domestic law, although that is a relevant consideration. Article 6, for example, does not apply in a number of contexts, such as immigration and deportation, where common law concepts of procedural fairness do apply; and those concepts apply to the Parole Board not only, like article 5, when it is deciding whether a prisoner should be released, but also when it is taking other decisions affecting the prisoner, such as whether to recommend his transfer from closed to open conditions. But there are more fundamental reasons for our courts to take our domestic law as their starting point and to check compliance with Convention rights at a later stage in the analysis.

One factor is the reputation of the common law. The domestic law of the United Kingdom has protected human rights more consistently, and over a longer period of time,

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<sup>22</sup> Para 88.

<sup>23</sup> *HM Advocate v Montgomery* 2000 JC 111, 117.

than any other legal system I know of. For example, the independence of the judiciary has been protected by statute since the end of the seventeenth century and the beginning of the eighteenth. Habeas corpus in England is of course much older. Much of our law of criminal evidence and procedure has its roots far in the past, and has been designed to ensure a fair trial. Our law of tort is designed to protect people's bodily integrity, their reputation, and their freedom to live free of unlawful interference of all kinds. Our law of property protects their possessions. Freedom from illegal searches of premises or correspondence has been protected under the common law since the 18th century case of *Entick v Carrington*.<sup>24</sup> Slavery was held to be unlawful at common law at about the same time, in the case of *Somerset*.<sup>25</sup> As I have mentioned, when the House of Lords recently rejected the admission of evidence obtained by torture, they did so on the basis of the common law.<sup>26</sup> A number of recent cases, such as *Pierson*,<sup>27</sup> *Simms*<sup>28</sup> and *AXA*<sup>29</sup>, have established the special status of common law fundamental rights.

A second factor is the influence of the judgments of our highest courts, in particular the Supreme Court, in other common law jurisdictions around the world. This point was emphasised in the case of *Daly*,<sup>30</sup> as I have explained. It is also important that we should actively engage with the judgments of the highest courts in other common law jurisdictions, as Toulson LJ emphasised in the case of *Guardian News and Media* which I mentioned earlier.<sup>31</sup>

One would expect that the requirements of the Convention can usually be met by our domestic law, developed by the courts if need be, without having to rely specifically on the

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<sup>24</sup> (1765) 2 Wils KB 275; 95 ER 807.

<sup>25</sup> *R v Knowles, Ex p Somerset* (1772) 20 State Tr 1.

<sup>26</sup> *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221.

<sup>27</sup> *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539.

<sup>28</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.

<sup>29</sup> *AXA General Insurance Limited v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122; [2012] 1 AC 868.

<sup>30</sup> *R v Secretary of State for the Home Department, Ex p Daly* [2001] UKHL 26; [2001] 2 AC 532.

<sup>31</sup> *R (Guardian News & Media Ltd) v Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 88

Human Rights Act. For example, as the Supreme Court explained in the adoption case of *S v L* which I mentioned earlier,<sup>32</sup> it is necessary to remember that the special interpretative duty imposed by section 3 of the Act arises only where legislation, if read and given effect according to ordinary principles, would result in a breach of the Convention rights. Those principles themselves protect human rights, by presuming that retroactivity is not intended, that penal statutes are to be narrowly construed, and so on. More fundamentally, the Supreme Court explained in the *AXA* case<sup>33</sup> that legislation has to be construed bearing in mind the values of our society which Parliament can be taken to have intended it to embody. As Lord Hoffmann stated in the case of *Simms*,<sup>34</sup> the courts presume that even the most general words were intended to be subject to the basic rights of the individual. The court will also favour an interpretation of legislation which does not place the United Kingdom in breach of its international obligations, including the obligations arising under the Convention.

There are however situations where our ordinary domestic law does not meet Convention requirements, and where the deficiency cannot be made good by the courts without recourse to the Human Rights Act. In that event, the courts can use the additional tools provided by the Act; or, if the development of the law that is required is too great to be carried out by the courts, they may only be able to grant a limited remedy to the individual claimant under the Act, leaving it to the Government and Parliament to consider what steps may be appropriate.

Drawing together the various threads of these remarks, the Strasbourg court's aim is not to construct a code to be adopted by the 47 contracting states. It knows very well that there are important differences between the various societies and their legal systems. But the court is developing a body of high level principles which can be taken to be applicable across

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<sup>32</sup> *S v L* [2012] UKSC 30; [2012] Fam LR 108, paras 15-17, 33.

<sup>33</sup> *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122; [2012] 1 AC 868, para 153

<sup>34</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131.

the different legal traditions. Bearing that in mind, in the Strasbourg law, as in our own, we need to identify the principles underlying the development of a line of authorities on a particular topic. We can then develop our law, when necessary, by finding the best way, faithful to our own legal tradition, of giving expression to those principles. If we do so, our domestic legal tradition can continue to develop.

Viewed in this way, the Human Rights Act, and the Convention rights to which it gives effect, should not be regarded as exotic interlopers sitting apart from the common law, but rather as guaranteeing standards which have deep roots in the common law and in our Parliamentary tradition. The protection of human rights is not alien to us: it is deeply embedded in our legal and political culture. The Convention system is a particular way of institutionalising respect for human rights at the international level. It is of practical importance at that level, because internationally agreed and enforced standards of human rights protection can facilitate international cooperation in many fields. This country has regarded it as being in its best interests to take part in international arrangements incorporating the Convention, such as the EU. If the UK is to comply with the obligations which it has undertaken at the international level, its domestic law has to comply with those internationally agreed standards. The Human Rights Act is one means by which Parliament has sought to achieve that objective. Properly understood, as it seems to me, it does so not by supplanting the common law but primarily by supporting its continuing development, in step with this country's international obligations.

Thank you for listening to me.