

C L I F F O R D
C H A N C E

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COMMON LAW AND CONVENTION LAW

THE LIMITS TO INTERPRETATION

We are used to reading that the European Convention on Human Rights is a ‘living instrument’. This goes back at least as far as 1978, and the case of *Tyrer v United Kingdom*.¹ A school boy in the Isle of Man was sentenced by the juvenile court to three strokes of the birch for taking part with three other boys in an assault upon an older school boy (apparently, as revenge for reporting them to the school authorities for taking beer into the school, for which they had all been caned by the school). The Strasbourg Court held that the judicial birching was ‘degrading punishment’ contrary to article 3 of the Convention. The British judge, Sir Gerald Fitzmaurice, disagreed. He thought that there was nothing degrading about the judicially ordered birching of a juvenile. He did acknowledge that his view might have been coloured by being brought up and educated under a system in which corporal punishment was regarded as the normal sanction for naughty boys and usually carried out with none of the safeguards there were in this case. He was not aware that anyone found it degrading or debasing. The majority obviously thought this an outdated

¹ (1979-80) 2 EHRR 1.

attitude. They stressed that ‘the Convention is a living instrument which . . . must be interpreted in the light of present day conditions. . . . the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe’.²

The expression ‘living instrument’ is reminiscent of the even more vivid expression used by Lord Sankey in the 1930 Privy Council case of *Edwards v Attorney-General of Canada*.³ There he remarked that the Constitution of Canada should be seen ‘as a living tree capable of growth and expansion within its natural limits’. The issue in *Edwards* was whether women were ‘persons’ who could become members of the Senate, the upper house of the Canadian Parliament. It is scarcely surprising that the Canadian courts had thought that they were not. The British North America Act, which contained the Canadian Constitution, was passed in 1867; and as late as 1909, in *Nairn v University of St Andrews*⁴ the House of Lords had held that women graduates from Scottish Universities were not ‘persons’ who could vote in the election of members of Parliament for the Scottish Universities. This was all blithely swept aside with the assertion that their lordships ‘did not think it right to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries in different stages of development . . .’

Edwards tells me two things. The first is that the image of a ‘living tree’ may be more helpful than the image of a ‘living instrument’. A scalpel is an instrument, but it has no life of its

² Para 31.

³ [1930] AC 124, at p 136.

⁴ [1909] AC 147.

own, only the life it is given by the surgeon who wields it. A tree has a life of its own, but it can only grow and develop within its natural limits. It is not an unstoppable beanstalk grown from a magic bean. At a time when many are worried about how far the ECHR may develop beyond the original expectations of its framers, it seems reasonable to ask whether there are any natural limits to its growth and what those might be. But the second thing that *Edwards* tells me is that the common law is no stranger to what Strasbourg calls the evolutive interpretation of the law, especially in the field of fundamental rights. It is as well to remind ourselves of our own approach, before getting too excited about Strasbourg.

The evolutive approach of the common law

Thus, we are used to adapting our judge-made law to meet new problems and new factual situations. But the theory is that this is what the law has always been. If we depart from previous precedent, we are simply correcting past errors. As the great Scottish Law Lord, Lord Reid, famously put it in 1971:⁵

‘There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.’

We recognise some important limits. First, we are seeking to identify and apply the underlying principles of the law, extending and adapting them to meet new situations but not turning them on their head. Secondly, there are some things which are better left to Parliament. This is not so much that we defer to Parliament, still less that they are more

⁵ ‘The Judge as Lawmaker’ (1972) 12 JSPTL 22.

democratic than we are – the courts are just as essential to a democracy based on the rule of law as is Parliament. It is rather a question of institutional competence. The courts can develop and adapt within existing concepts and principles. So, for example, it seemed to two of us that the principles of the tort of converting other people’s property to one’s own use could readily be extended from chattels to intangible property.⁶ On the other hand, the courts cannot engage in empirical research or conduct public opinion polls, so that there may be dangers in departing from a long-established rule of the common law without a better empirical base than we can have.⁷ And the courts cannot legislate – we cannot devise whole new legislative schemes – and that, as we shall see, is giving us some problems with the implementation of the Convention. There are also some things which *ought* to be decided by a democratically elected Parliament rather than by the courts, although sometimes we despair of their ever doing so.⁸ Thirdly, of course, we are mindful that changes in judge-made law operate retrospectively, so that at the very least we should stay within the bounds of what is foreseeable. We too recognise the importance of legal certainty.

A good example of these principles in operation, sanctioned by Strasbourg, was the recognition that marital rape was a crime. In *R v R (Rape: Marital Exemption)*,⁹ the House of Lords abolished the long-standing rule that a wife was deemed always to consent to sexual intercourse with her husband. Although they do not say so, I am pretty sure that they were heavily influenced by the detailed discussion of the policy issues in the Law Commission’s

⁶ *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

⁷ *Jones v Kaney* [2011] UKSC 13, [2011] 2 WLR 823.

⁸ Eg in *Airedale NHS Trust v Bland* [1993] AC 789.

⁹ [1992] 1 AC 599.

consultation paper on the subject.¹⁰ But on the face of it the change offended against article 7 of the ECHR, the imposition of punishment for conduct which was not a crime at the time that it was committed. Nevertheless, Strasbourg held that the concept of lawfulness does not prevent the gradual clarification of the criminal law from case to case, 'provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'.¹¹

When it comes to the interpretation of statutes, we can likewise develop the law. We can hold that a lower court has got it wrong, even though many people have hitherto arranged their affairs on the basis of the earlier interpretation.¹² We can also hold that the House of Lords (or in future the Supreme Court) has got it wrong in the past.¹³ But once again, the theory is that we are trying to divine what Parliament really meant. We are trying to uphold the intention of Parliament rather than to subvert it (which is why, to my mind, it may be easier to justify a departure from a precedent which interprets a statutory provision, if we become satisfied that a previous interpretation was a mistake, than it is to justify abandoning a long-standing rule of the common law). Divining the intention of Parliament is mostly an illusion, because on most points which come before us Parliament did not have any intention at all. It had never been thought of. So we have to deduce the intention *of the legislation* from the words used, read in the light of the statutory purpose.

¹⁰ Law Commission, Working Paper No 116, *Rape within Marriage* (HMSO, 1990).

¹¹ *SW v United Kingdom* (1996) 21 EHRR 363, at para 36/34.

¹² See, eg, *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 All ER 680, where the House of Lords gave serious consideration to whether or not a change in interpretation might be held to operate only prospectively.

¹³ Eg in *A v Hoare* [2008] UKHL 65, [2008] AC 844.

However, it is in a comparatively rare case that an Act of Parliament has to be construed and applied exactly as it would have been applied when it was first passed.¹⁴ Statutes are said to be ‘always speaking’ and so must be made to apply to situations which would never have been contemplated when they were first passed. Thus in 2001, a ‘member of the family’, first used in 1920, could be held to include a same-sex partner.¹⁵ In 1998, ‘bodily harm’ in a statute of 1861 could be held to include psychiatric harm.¹⁶ And in 2011, ‘violence’ could be held to extend beyond physical violence into other sorts of violent behaviour.¹⁷

In all of these examples, the court is seeking to further the purpose of the legislation in the social world as it now is rather than as it was when the statute was passed, but to do so in a principled and predictable way which will not offend against either the intention of Parliament or the principle of legal certainty.

The evolution of the Convention

So how do our notions, of the ‘Aladdin’s cave’ of the common law and the ‘always speaking’ statute, differ from the Convention concept of the living instrument? Of one thing we can be clear: there is no room for the more extreme versions of the American doctrine of originalism, whether this is based on what the original drafters must be taken actually to have meant (intentionalism) or on what the original readers must be taken to have thought that they meant (textualism). The landmark Strasbourg decisions were *Golder v United*

¹⁴ See Lord Clyde in *Fitzpatrick v Sterling Housing Association Ltd* [2001] AC 27, at pp 49H-50A

¹⁵ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

¹⁶ *R v Ireland* [1998] AC 147.

¹⁷ *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433.

Kingdom,¹⁸ *Tyrer v United Kingdom*,¹⁹ *Marckx v Belgium*²⁰ and *Airey v Ireland*.²¹ I do not think it any coincidence that three out of these four cases came from common law countries. It was common law advocates who persuaded the Court to take this line, even in the teeth of strongly argued dissents from the United Kingdom judge in *Golder*, *Tyrer* and *Marckx* (he did not sit in *Airey*).

It seems to me that there are three governing *ideas* behind the evolution of the living instrument. These in turn have led to the 'further development' of the Convention rights in at least four different ways. The first, and perhaps the most important, of the governing ideas is that of a purposive rather than a literal construction of the language used. Thus in *Golder v United Kingdom*, the Court relied upon article 31 of the Vienna Convention on the Law of Treaties (although not yet in force) to give priority to the 'object and purpose' of the Convention. As stated in the Preamble, this was 'as governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'. Access to the courts was an essential prerequisite to the rule of law. Hence the right of access to a court was 'inherent' in the right to a fair trial under article 6(1).

The second idea, articulated in *Tyrer v United Kingdom*, is that the Convention must be interpreted in the light of present day developments and practices among the member

¹⁸ (1979-80) 1 EHRR 524 (Judgment of 21 February 1975).

¹⁹ (1979-80) 2 EHRR 1 (Judgment of 25 April 1978).

²⁰ (1979-80) 2 EHRR 330 (Judgment of 13 June 1979).

²¹ (1979-80) 2 EHRR 305 (Judgment of 9 October 1979).

states.²² If most of Europe thinks that judicially ordered corporal punishment is seriously degrading, then this will influence the interpretation of the Convention rights.

The third idea, first articulated in *Airey v Ireland*, is that the rights protected must be 'practical and effective' rather than 'theoretical or illusory'. There is no point in having the right to go to court if you cannot in practice exercise it.

Views may differ on whether this living instrument idea is a good or a bad thing. Sir Gerald Fitzmaurice dissented vigorously in *Golder* and *Marckx* as well as in *Tyrer*. In *Golder*, he argued forcibly that judge-made law might be acceptable in domestic adjudication, but not in international adjudication which depends upon the agreement between states. This finds an echo in the views of Lord Bingham, a strong supporter of the Convention and of the values it represents, in *Brown v Stott*:²³

'In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention . . . But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.'

²² Para 31.

²³ [2003] 1 AC 686, at p 703.

He returned to this theme in *R (Gentle) v Prime Minister*,²⁴ when we were being pressed to rule that the right to life in article 2 implied a duty to conduct an inquiry into whether the United Kingdom had taken sufficient care to ascertain whether the invasion of Iraq would be legal before putting its troops in harm's way. He found it

‘impossible to conceive that the proud sovereign states of Europe could ever have contemplated binding themselves legally to establish an independent inquiry into the process by which a decision might have been made to commit the state's armed forces to war.’

More controversially, Lord Bingham thought that these principles set limits to what a national court might do when interpreting the Convention rights. Thus his oft-quoted words in *R (Ullah) v Special Adjudicator*:²⁵

‘It 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 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.’

‘No more’ is controversial in some quarters, but that is not my current concern. ‘No less’ focuses our attention on how Strasbourg develops the law. There are at least four different ways in which the Convention jurisprudence has developed beyond the expectations of the original parties, some of which have proved more problematic than others. I refer to (a) the interpretation of the ‘autonomous concepts’ in the Convention; (b) the implication of

²⁴ [2008] UKHL 20, [2008] 1 AC 1386, at para 9.
²⁵ [2004] UKHL 26, [2004] 2 AC 323, at para 20.

further rights into those expressed; (c) the development of positive obligations; and (d) the narrowing of the margin of appreciation permitted to member states.

(a) The autonomous concepts

This too goes back to the early days, to *Engel v Netherlands* (1976), where it was held that states could define conduct *into* the concept of a criminal charge for the purpose of the right to a fair trial, but not *out of it*. It stands to reason that, once a state has committed itself to certain minimum standards, it cannot contract out of those by defining the terms used in its own way. Certain key terms must have a common meaning across the *espace juridique*. It also stands to reason that the meaning of those terms can develop over time, in just the same way that our domestic understanding of words such as ‘family’ and ‘violence’ has developed over time.

There are many obvious examples: recognising that that unmarried fathers may enjoy a family life with their children which is worthy of respect under article 8;²⁶ that homosexuals have as much right to respect for the private expression of their sexuality as anyone else;²⁷ or that discrimination under article 14 may include, not only direct but indirect discrimination, for example, in schools selection criteria which discriminate indirectly against Roma children.²⁸ Indeed, some may be wondering why it is taking the Court so long to recognise that same sex couples may enjoy family life together with one another and their children.²⁹

²⁶ *Keegan v Ireland* (1994) 18 EHRR 342.

²⁷ *Dudgeon v United Kingdom* (1982) 4 EHRR 149.

²⁸ *DH v Czech Republic* (2008) 47 EHRR 3.

²⁹ Cf *JM v United Kingdom*, app no 37060/06, Judgment of 29 September 2010.

These are all examples of applying the language of the Convention to situations which may not have been contemplated by the original framers, but which are entirely capable of being covered by the language used and are consistent with its underlying principles and purpose. It is also an approach which can have built-in limits. In *R (Countryside Alliance) v Attorney General*,³⁰ it was argued that the ban on hunting with dogs in the Hunting Act 2004 was an interference with the right to respect for private life. Two of the Law Lords, Lord Rodger and Lord Brown, neither of whom is noted for an expansive approach to the Convention rights, took the view that the notion of 'private life' in article 8 might well be capable of covering activities such as hunting which a person saw as essential to his personality and ability to develop relationships with other people. They were only persuaded that it was not because of the very public nature of hunting as an activity. In *Friend v United Kingdom*,³¹ Strasbourg agreed that private life did not extend to public activities. Is that perhaps a natural limit to its growth?

On the other hand, there are concepts which have been developed in such a way that we have had some difficulty in anticipating what the natural limits might be. The best example is a 'civil right' for the purpose of the requirement in article 6 for access to a court. In particular, what kinds of public law claims now count as 'civil rights'? For the time being, we have decided that, while it can cover claims to defined financial benefits, such as housing benefit,³² it does not cover claims to public services, such as health, social care and housing

³⁰ [2007] UKHL 52, [2008] 1 AC 719.

³¹ App no 16072/06, 15 December 2009.

³² *Salesi v Italy* (1993) 26 EHRR 187; *Tsfayo v United Kingdom* (2006) EHRR 457.

for the homeless.³³ For what it is worth, our view is that this development has now reached its natural limit: claims for services, which require a high degree of discretionary judgment on the part of officials, are not readily susceptible to court-like adjudication on the merits. Furthermore the money which might be devoted to this would be better devoted to providing and improving the services themselves. But we have been wrong about this sort of thing before and no doubt will be wrong again.

(b) The implication of rights

It is not difficult to understand how certain implied rights evolved. The right of access to the courts to determine one's civil rights and liabilities is inherent in the right to a fair trial. It is also part of making the right practical and effective rather than theoretical or illusory. Still more important, there is not much point in the state having a duty not to take life if no-one can find out how and why a person died (or disappeared). So I think we all understood the need for the investigative duty in article 2, recognised by the Court in the 'death on the rock' case.³⁴ But until recently we had thought that it was ancillary to the principal duty. Hence in 2004,³⁵ the House of Lords held that, for the purpose of the Human Rights Act 1998, which translated the Convention rights into rights in domestic law, the investigative duty did not apply to deaths which took place before the Act came into force. (We recognised, of course, that the United Kingdom might still be taken to Strasbourg for any breach which took place after we ratified the Convention, but that was not a matter for the domestic courts.)

³³ *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39; also *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 433, *R (A) v Croydon London Borough Council* [2009] 1 WLR 2557.

³⁴ *McCann v United Kingdom* (1996) 21 EHRR 97.

³⁵ *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.

But then came the decision of the Grand Chamber in *Šilih v Slovenia*.³⁶ The investigative duty under article 2 had now evolved into a ‘separate and autonomous duty’, detached from the main duty not to take life. It was therefore capable of binding the member state even where the death took place before the Convention came into force (para 159). If the obligation persisted after that date, there could be an interference with it for which the state was accountable. Thus a significant proportion of the steps required either will have been or should have been carried out after the critical date (para 163).

The difficult question, of course, is how to determine how long the obligation to investigate did persist. Judge Lorenzen, for example, concurred in the result but considered that the majority’s criterion of ‘a genuine connection’ between the death and the entry into force of the Convention was too vague and potentially far-reaching to be consistent with the declared intention to respect the principle of legal certainty (O-I3). Judges Bratza and Túrman dissented. They thought that to detach the duty to inquire from the death which gave rise to it was tantamount to giving retroactive effect to the Convention (O-IV14). This was contrary to the general approach of international law, enshrined in article 28 of the Vienna Convention on the Law of Treaties. The majority’s formulation also gave rise to serious issues of legal certainty (O-IV16) – especially if the connection could be based simply on ‘the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner’ (O-IV17, referring back to para 163).

³⁶ (2009) 49 EHRR 37.

Thus in the recent case of *Re McCaughey*³⁷ we were invited to depart from *Re McKerr*. This concerned the scope of inquests into people who dies in Northern Ireland [in 1990] allegedly as a result of a 'shoot to kill' policy. The majority in the Supreme Court held that *Šilih* meant that the obligation to inquire could now apply to deaths which took place before the Human Rights Act came into force; but we also took a minimalist approach to when it would do so. As there definitely were going to be inquests, they should comply with the procedural obligation in article 2, even though the deaths took place so long ago. We took the view that, in making the Convention rights enforceable in UK law, Parliament must have known that the Convention was a living instrument which could develop beyond its original intentions. Even so, we sympathised with the view that those developments should be foreseeable, for otherwise states might be landed with obligations which they would not have signed up to had they known.

There is another implied right which is causing a rather different sort of difficulty at present, albeit not in the courts. Once again, there is no real problem with the implication of the right itself. The obligation, in article 3 of Protocol 1, to hold 'free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' must imply that individuals have the right to vote. Indeed, in modern times, it must dictate that universal suffrage be the basic principle.³⁸ But of course it does not dictate what method of counting there should be – first past the post, single transferable vote, or any other method of proportionate representation. The question is how far it should dictate who is entitled to vote.

³⁷ [2011] UKSC 20.

³⁸ *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1.

The right to vote is a sore point with at least one of my colleagues. Before the establishment of the Supreme Court of the United Kingdom in October 2009, the highest court in the United Kingdom was composed of members of the House of Lords. Members of the House of Lords cannot vote in Parliamentary elections. When most of the hereditary peers were expelled from the House, they ceased to be Members and thus regained the vote. We, on the other hand, have not ceased to be Members. We have merely been deprived of the right to speak and vote on the business of the House. And we still cannot vote in Parliamentary elections. One of my colleagues believes this to be a disproportionate interference with his democratic rights. So perhaps one of these days Strasbourg will have to contend with the case of *Lord X v United Kingdom* – and I am puzzled as to how he can exhaust his domestic remedies as at present any panel of the Supreme Court would have a majority who are in the same position as he is.

But it is not this which is so troubling Parliament – and in particular the House of Commons – at present. They are agonising about what – if anything – to do about the Strasbourg decision in *Hirst v United Kingdom*³⁹ that a blanket ban on all prisoners serving a sentence of imprisonment breached article 3 of the first Protocol. The Government, apparently on legal advice, proposed a ban upon all prisoners serving a sentence of four years' imprisonment or more. This proved unacceptable to their own back-benchers. But a compromise proposal of one year or more is also proving unacceptable. The whole debate raises a fundamental question about the purpose and scope of human rights instruments. Is it the right of the democratically elected Parliament to decide who their electorate should be? Or is the whole

³⁹ (2006) 42 EHRR 41.

point of the Convention to protect certain values independently of the will of the majority? Does democracy value each person equally even if the majority does not?⁴⁰ And in any event, who represents the majority? To what extent should any court be sensitive to the strongly held views of the current majority?

It is debates like that which make me very glad of the way in which the Human Rights Act incorporated the Convention into our law. If a provision in an Act of Parliament is incompatible with the Convention rights, the most we can do is make a declaration to that effect. This leaves the provision in question intact and anything which is done under it remains valid. It is up to Parliament to decide what to do about it. But for the purpose of the present discussion, there will be some who think that *Hirst* was an entirely predictable and principled development of the rights enshrined in article 3 of the first protocol, and others who do not.

(c) Positive obligations

The third area where evolution can be both beneficial and problematic is in the development of positive obligations. We know, of course, that the dividing line is not precise. But in *Marckx v Belgium* it was held that the right to respect for family life required more than that the state should not interfere in the actual family life which an unmarried mother enjoyed with her child. It required the law to recognise that that family life existed and create the circumstances which would allow it to develop. Once again, there was a vigorous dissent from Sir Gerald Fitzmaurice, but few would now see the decision as controversial. The same must apply to the development of positive procedural obligations

⁴⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 132.

under article 8. There is not much point in having a right to respect for your family life if you have no say in the authorities' decisions to interfere with it. The obligation dates back, of course, to the disgraceful state of English law before the Children Act 1989, when public authorities could deny all contact between a child and his family without any access to a court to challenge this. This was put right following the decision in *W v United Kingdom*.⁴¹ But we have just had another example, in the approach of Scottish law to the involvement of unmarried fathers in the decisions of children's hearings about their children's futures.⁴²

The more controversial area is the development of substantive positive obligations – for the state actually to provide some benefit which it would not otherwise be obliged or wish to provide. Are we seeing the glimmerings of the evolution of socio-legal rights? In *N v Secretary of State for the Home Department*,⁴³ the House of Lords concluded, with heavy heart, that the United Kingdom was not precluded from returning a failed asylum seeker with HIV/AIDS to her home country despite the obvious risks to her health. It was not possible to spell out of the prohibition of inhuman treatment in article 3 a positive obligation to continue supply her, and everyone else in her sad situation, with the health care she needed. Strasbourg upheld that decision.⁴⁴ In *R (Limbuella) v Secretary of State for the Home Department*,⁴⁵ on the other hand, the House of Lords held that it was inhuman and degrading treatment deliberately to reduce certain categories of asylum seeker to utter destitution by denying them any access to state support and prohibiting them from taking paid employment. Although the House took comfort from the lack of any clear dividing line

⁴¹ (1988) 10 EHRR 29.

⁴² *Principal Report v K* [2010] UKSC 56.

⁴³ [2005] UKHL 31, [2005] 2 AC 296.

⁴⁴ *N v United Kingdom* (2008) 47 EHRR 39.

⁴⁵ [2005] UKHL 66, [2006] 1 AC 396.

between positive and negative obligations, this did, in reality, amount to imposing upon the state a positive obligation to provide support for those who had nothing else.

On the other hand, what about housing? It has been said that there is no duty to supply a person with a home.⁴⁶ But Strasbourg is developing a duty not to deprive a person of the home he already has, even in circumstances where there is no duty in domestic law to continue to supply him with it.⁴⁷ I quite understand the temptation to apply exactly the same kind of proportionality analysis to depriving someone of their established home as we all apply to depriving someone of their established family life. But in the case of family life, that does not entail a positive obligation to provide it – it is there because of the personal relationships between the people involved; while in the case of a home, it does mean continuing to provide a tangible, material good which would otherwise be available to someone else who may be a much more deserving case. A court hearing an individual possession case is going to find it hard to strike a fair balance between the interests of other, unidentified people who really need the home in question and the particular person before the court. And it brings us straight up against the judgments which Parliament has made as to who is, and who is not, entitled to be provided with subsidised social housing. So are we beginning to see the emergence of socio-economic rights in this field, even though they are nowhere else to be found in the Convention? And is that a good thing or a bad thing?

(d) Narrowing the margin of appreciation

⁴⁶ (2001) 33 EHRR 18.

⁴⁷ *Connors v United Kingdom* (2005) 40 EHRR 9; *McCann v United Kingdom* (2008) 47 EHRR 40; *Kay v United Kingdom*.

This brings me to the final area of difficulty. When it comes to the qualified rights, Strasbourg has usually conceded a wide margin of appreciation to national authorities to judge what is 'necessary in a democratic society'. This is where the potential conflict between democratic *values*, as enshrined in the Convention, and democratic *decisions*, as made by the democratically elected and accountable institutions, becomes most acute. The evolutive approach to interpreting the Convention tends to lead to a narrowing of the margin of appreciation. When only the courts suffer, because Strasbourg takes a different view of the merits from the one which we took,⁴⁸ perhaps we should not mind too much. But what weight should be given to the considered opinion of the legislature?

Here again, I can appeal to Lord Bingham. In the Hunting Act case,⁴⁹ he appealed to 'the degree of respect to be shown to the considered judgment of a democratic assembly'. While acknowledging that this 'will vary according to the subject matter and the circumstances', the case in question was 'pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament'. Strasbourg agreed. Rejecting the huntsmen's complaints, it commented that 'the bans had been introduced after extensive debate by the democratically elected representatives of the State on the social and ethical issues raised by that type of hunting'.⁵⁰

⁴⁸ S Choudry and J Herring, *European Human Rights and Family Law* (2010, Hart), at p 21, comment on the decision in *P, C and S v United Kingdom* [2002] 3 FCR 1 that the 'reference to the wide margin of appreciation in cases involving the removal of children thus belies the actual standard of review'.

⁴⁹ *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

⁵⁰ *Friend v United Kingdom*, App no 16072/06, Judgment of 15 December 2009.

But sometimes we have been troubled by an apparent narrowing of the margin. *Hirst* is one example. *S and Marper v United Kingdom*⁵¹ may be another. It leaves the United Kingdom in the difficult position of being told that a 'blanket and indiscriminate' power to hold fingerprints, cellular samples and DNA profiles, as applied to the applicants in that case, overstepped the margin of appreciation. Yet beyond saying that it went too far in those cases, the decision gives little guidance on what rules would be proportionate to the admittedly legitimate and important aim of detecting and deterring crime. My particular concern is that the positive obligation to protect the vulnerable against rape and other attacks upon the right to respect for their bodily integrity⁵² should not be hindered or hampered by an unduly restrictive approach. It is no wonder that Parliament has taken different views about where the balance should be struck. The United Kingdom courts are in the same position as Strasbourg: they cannot draft a legislative scheme to remedy the problem. The most they can do is to decide whether the right balance has been struck in an individual case.

Conclusion

So what are the limits to the growth of the living tree? They are not set by the literal meaning of the words used. They are not set by the intentions of the drafters, whether actual or presumed. They are not even set by what the drafters definitely did *not* intend. In *Young, James and Webster v United Kingdom*,⁵³ Strasbourg decided that the article 11 right to freedom of association, definitely intended to protect the right to join a trade union, also

⁵¹ (2009) 48 EHRR 50.

⁵² *X and Y v Netherlands* (1986) 8 EHRR 235.

⁵³ (1982) 4 EHRR 38.

protected the right not to join a trade union, a right which had been deliberately omitted from the Convention in 1950.

But there must be some limits. I have sketched out some particular areas of difficulty for a national court which is trying loyally to keep pace with the evolution and on occasions to make a reasonable prediction of where Strasbourg will go next. In the end, the standard most often appealed to in the court's jurisprudence is the common European understanding. But sometimes, as in *S and Marper*, this is judged by the standards to be found in the domestic legislation of the member states; and at other times, as in *Marckx v Belgium*, it is judged by evolving European attitudes and beliefs. And sometimes, as in *Hirst v United Kingdom*, it may get a little way ahead of both, because bans (although not necessarily blanket bans) on prisoners' voting are common throughout Europe.

The key element, it seems to me, is that the development should be a predictable one. It should not contradict the express language of the Convention. It should be consistent with the established principles of Convention jurisprudence. It should also be consistent with the standards set in other international instruments relevant to the subject-matter in hand – such as the UN Convention on the Rights of the Child or the Convention on the Elimination of All Forms of Discrimination against Women. It should reflect the common European understanding, however that may be deduced. And it should seek to strike a fair balance, between the universal values of freedom and equality embodied in the Convention, and the particular choices made by the democratically elected Parliaments of the member states.

Some values, such as the right to life and freedom from torture, are non-negotiable but others are more delicately nuanced.

As a supporter of the Convention and the work of the Strasbourg Court, my plea to them is to accept that there are some natural limits to the growth and development of the living tree. Otherwise I have a fear that their judgments, and those of the national courts which follow them, will increasingly be defied by our governments and Parliaments. This is a very rare phenomenon at present and long may it remain so.