Potential Conflict between Parliamentary Sovereignty in the UK and One of the Principles Adopted by the European Court of Human Rights

This statement raises the issue of the potential conflict between Parliamentary Sovereignty in United Kingdom (UK) and one of the principles adopted by the European Court of Human Rights (ECtHR) to interpret the European Convention on Human Rights (ECHR), the ‘living instrument’ approach.

Parliamentary Sovereignty is one of the fundamental principles of Constitution. Being the UK’s supreme legislative body, Parliament has absolute sovereignty and is supreme over all other government institutions including Executive or Judicial bodies. It has the dominant authority and control over law thus it is duly responsible to create, amend or end any laws.

The ECHR is an international convention which, through its articles, guarantees basic human rights and political freedoms of people in countries belonging to the Council of Europe (CoE) and prohibits unfair and harmful practices. The UK refused for decades to transform the ECHR into domestic law because Parliamentary Sovereignty prevents the enactment of a legally entrenched Constitution and is not bound by any form of highest or entrenched law e.g. ECHR. The UK, being a Dualist Legal System, considers International law and National law as separate. Nevertheless, the ECHR influenced judicial interpretation in UK thus domestic courts could discretionary take ECHR into account to interpret domestic legislation along with the already applicable precarious approach of Civil Liberties i.e. the presumption that subjects are free to do whatever is not specifically unlawful.

Coming into force in 2000, the Human Rights Act 1998 (HRA) made a significant change in legal system. By creating a domestic scheme of human rights protection, the HRA now protects fundamental key rights set out in the ECHR. The Act imposes a duty on all public authorities to act compatibly with the ECHR’s rights making it possible for individuals to sue public authorities before national courts when these rights are violated instead of bringing directly a case to ECtHR as before the enactment.

Carefully crafted, the HRA is an interpretative Act which gives effect and implements the ECHR’s rights and freedoms in domestic law without incorporating them directly into UK’s law and without entrenching the ECHR in the UK’s legal system. The rights set out in it, arising under the ECHR, are considered domestic preserving the distinct role of the judges allowing them to interpret ECHR’s rights in a manner different to that of ECtHR and at the same time safeguarding the Parliamentary Sovereignty.

The tension between Parliamentary Sovereignty and the ECHR derives from the provisions of the HRA requiring under s. 2 HRA a court or tribunal to take into account the ECtHR’s judgments when interpreting questions in connection with ECHR’s rights and requiring under s. 3 HRA that legislation must be read and given effect in a way which is compatible with ECHR rights but only so far as it is possible to do so. Where this is not possible, the higher courts may issue under s. 4 HRA a Declaration of Incompatibility. ECtHR’s judgments are binding upon

UK's Government and, as a result, the effect of Parliamentary Sovereignty rises every time there is a dispute between the Government and the ECHR because UK's courts are not bound under the ECHR (as explained in paragraph 4 above) thus are not obliged to follow the ECtHR's jurisprudence, they just cannot ignore it. In addition, the EU's Charter of Fundamental Rights, containing the ECHR's rights, has legal force within the EU having same legal value as the Treaties establishing the obligation of the UK to those rights. As a result, the ECtHR, being the guardian of the ECHR, considers the protection of ECHR so fundamental that it should limit the sovereignty of Parliament under the principle of 'pacta sunt servanda'.

The above mentioned approach of s. 2 HRA was strongly demonstrated by the House of Lords (HoL) in the fundamental case of R (Ullah) v Special Adjudicator following the ECtHR's jurisprudence on whether Article 9 ECHR could be relied on to prevent the deportation of Mr. Ullah from the UK. Lord Bingham laid down the "Mirror Principle" stating 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.' This principle, later developed by domestic courts in applying the ECtHR's decisions, means that giving effect to rights contained in the ECHR, UK's law must, as far as possible, take into account of any ECtHR's decisions ("mirror" ECtHR law). As such, UK's courts subject to a duty imposed by s. 2 HRA should not '…without strong reason dilute or weaken the effect of the Strasbourg case law...' but to seek, where possible, to interpret domestic legislation compatibly with ECtHR. The appeal was dismissed because the breach of a right must be strongly proved to be flagrant, grossly violated and fundamental.

However, the ECtHR's jurisprudence need not be followed if it provokes a well-established principle or procedure of UK's law. Re R v Horncastle the UK's Supreme Court (UKSC) declined to follow a ECtHR's decision concerning Article 6 ECHR. Later on, when the Al-Khawaja v UK case raised the same issue as in R v Horncastle, the ECtHR took into consideration the UKSC's judgment in the latter case, demonstrating the 'concept of dialogue' between the two courts, impliedly permitted by s. 2 HRA, over complex questions of human rights law.

The ECtHR, established by ECHR, applies and protects the rights and guarantees set out in the ECHR, thus it is the legal enforcement machinery of the ECHR. Its approach to interpretation of the ECHR is to treat it as a 'living instrument' seeking to interpret human rights flexibly in the light of present day conditions and social norms rather than assess what was intended by the drafters of it decades ago by giving the ECHR a monolithic and rigid interpretation. Reflecting the social, cultural, legal and technological changes (e.g. status of children born to unmarried parents, the criminalisation of homosexuality, the legal status of transsexuals etc), this 'living instrument' approach justifies the ECtHR's different interpretation of the ECHR over time supported by the principle of European consensus when the ECtHR takes the advantage to develop its jurisprudence.

The rationale behind this evolutive and dynamic 'living instrument' approach is to evolve the ECHR just like the individuals and societies evolve and change, thus the standards of the rights are not to be regarded as theoretical, static and illusory rather they should be practical and effective. In order to evolve the ECHR based on the living instrument/evolutive approach discussed above, the ECtHR's creative interpretation i.e. the ability to interpret the ECHR differently over time depending on changes, as Tyrer v UK suggests, is perhaps controversial or even misunderstood. It seems that the ECtHR has gone to areas which had not been envisaged when ECHR was originally drafted and it is inarguable that sometimes it expands and develops

rights by growing the ‘living instrument’ approach beyond evolutive interpretation.

For instance, the ECtHR has interpreted Article 8 ECHR in a series of judgments in the exact same way as to include a wide range of rights (e.g. gender, reputation, homosexuality, environmental protection, sexuality, data protection, etc) without neither taking a look at domestic legislations nor making clear how the notion of the ‘living instrument’ applied. Re Lopez Ostra v Spain the ECtHR, by inserting the right to environmental protection, held that there was a breach of the article because the inadequacy of the local authorities to deal with an industrial plant for the treatment of contaminating and toxic liquid and solid waste caused health problems to the nearby residents.

It appears that it is difficult for the UK’s courts to reconcile the need to reflect the intention of the Parliament i.e. the principle provisions of HRA, with the unclear jurisprudence and expanding interpretation of the ECtHR. S. 3 HRA imposes a duty on domestic courts to interpret statutory legislation to comply with the ECHR ‘so far as it is possible to do so’showing the will of the Parliament towards a legislative interpretative approach to adapt in cases where all possible meanings of the statute seem “unfair”.

This duty was seen in the landmark case of Ghaidan v Godin-Mendoza. In order to avoid the violation of Article 14 ECHR, the HoL interpreted the Rent Act 1977 and considered the term ‘same-sex couples’ to be included in the literal meaning of the words ‘spouse’, ‘wife’ and ‘husband’ contained in the aforementioned Act. In his dissenting opinion, Lord Millet argued that this inclusion of the term is legislative intervention and not interpretation.

This interpretative obligation triggered a criticism against ECtHR that it engages in judicial activism i.e. decisions based on personal opinion rather than on existing law, by interpreting the ECHR in controversial ways. Lord Sumption argued in his criticism that UK’s courts, upon their powers under s. 3 HRA, intrude on and undermine Parliamentary Sovereignty and overturn the scope of domestic Acts by interpreting and applying the ECtHR’s expanding interpretative approaches. In this context, it appears that courts give rise to debates by being careless and inconsistence with their approach to s. 3 HRA on exercising their powers leading to judicial vandalism instead of judicial innovation.

It seems broadly accepted that ECtHR’s ‘living instrument’ approach handles ECHR under an extremely broad frame despite the fact that the doctrine of Margin of Appreciation provides flexibility to States, being in a better position than the ECtHR to determine certain issues, to impose limitations on some rights. On the other hand, UK’s legislation is detailed. Therefore, there is a distinction between legislation and interpretation and the dividing line between them is not easy under the HRA.

However, if UK’s courts decide that it is not possible to interpret or give effect to a statutory provision in a way that either is compatible with the ECHR or an Act of Parliament breaches a right(s), they can declare the legislation to be incompatible. This shows that, when HRA contravenes with the ECHR, s. 4 HRA was deliberately designed to respect and maintain Parliamentary Sovereignty without granting the UK’s courts the power to strike down any domestic legislation which does not comply with the ECHR because such a declaration does not affect the operation, validity or enforcement of the law.

This was evident in Hirst v United Kingdom (No2). Although ECtHR ruled against the UK

because the ban on prisoner voting right was incompatible to the Right to free elections and a declaration was made, Parliament did nothing because the decision to make, amend or repeal an Act (through an express provision of an Act of Parliament) as to make it compatible with ECHR rests on its discretion.

Even today, the continued refusal to amend the specific Act raises the issues of breaching international law and criminal justice in UK. On the other hand, s. 4 HRA played a significant role for substantial changes in terrorism acts concerning Article 5 ECHR and the balance between national security and civil liberties.

Conclusively, the HRA brought forward human rights at the centre of the UK's legal system changing the legal landscape of the UK. Apparently, the ECtHR has the ultimate authority to decide what the ECHR means thus the 'living instrument' interpretative approach appears legal under ECHR and International law. Nevertheless, Parliament still appears uncomfortable with the idea that ECtHR's judges decide controversial matters affecting the UK and although HRA is the competent "parliamentary watchdog" to judicial discretion about ECHR, it can be revoked at any time if the 'living instrument' approach threatens significantly its sovereignty.

Invoking the Parliamentary Sovereignty against human rights protection sounds incorrect and a potential withdrawal from the ECHR, because it "binds" the hands of Parliament, is likely to remain a matter of dispute. Therefore, UK's courts should, in order to ensure rulings remain legitimate and at the same time reconcile the ECtHR's evolutive interpretation with Parliamentary Sovereignty, utilise further more via s. 3 HRA the 'living instrument' approach to reflect Parliament's intention of making human rights effective and accessible.