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The Value of the European Court of Human Rights to the United Kingdom

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Abstract

National debates concerning the appropriate role of the European Court of Human Rights (ECtHR) in the United Kingdom (UK) recently intensified with the suggestion by the government that the UK might leave the European Convention on Human Rights system. It has been argued that a British Bill of Rights, to replace the current system of national human rights protection provided by the Human Rights Act 1998, would provide better protection than the ECtHR, making its role in the national system redundant. Claiming that the ECtHR is legitimate and has an impact that is usually illustrated by the transformative power of judgments more than 10 years' old, have not provided a convincing answer to this claim. In this article, rather than legitimacy or impact, the value of the ECtHR to the objective of protecting human rights through law is assessed. Three different levels of value are identified from the relevant literature and then applied to the judgments of the Court concerning the UK from 2011 to 2015 to determine what has happened in practice. It is concluded that given that the UK government's objective remains to protect human rights through law, although some types of value are now more relevant than others, overall the potential value of the Court to the UK in achieving this objective is still clearly evident.

1 Introduction

The United Kingdom (UK) was one of the founding states of the Council of Europe, ratifying the Statute of the Council of Europe in 1949 and the European Convention on Human Rights (ECHR) in 1951. However, since accepting the right of individual petition to the European Court of Human Rights (ECtHR) in 1966, its relationship with

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the Council of Europe, the ECHR and, in particular, the ECtHR has, at many times, been far from loving. In a lecture delivered in 1983, James Fawcett, president of the European Commission from 1972 to 1981, found it necessary to defend the ECtHR, which had recently found against the UK on corporal punishment in state schools and on the criminalization of homosexual acts in Northern Ireland. He explained the importance of human rights law to a country that has no 'useful Bill of Rights' and also argued in favour of the Council of Europe, 'an organisation which gets far less publicity than it deserves for its contribution to the integration of Europe'.[1]

The coming into force of the Human Rights Act 1998 (HRA) in 2000, giving further effect to the ECHR in national law, means that the UK now has much more effective protection of human rights through law than it had in 1983.[2] However, the animosity towards the ECtHR, particularly when it finds against the UK on controversial political issues, such as the blanket ban on prisoner voting, has not dimmed and has only intensified in recent years. Nicholas Bratza, formerly the UK judge at the ECtHR, has written of the 'vitriolic' and 'xenophobic' fury directed against the ECtHR by the UK press, parliamentarians and members of government over the prisoner voting judgments.[3] Capitalizing on such sentiments, in the run up to the May 2015 general election, the Conservative Party published its proposals for changing human rights law.[4] In these proposals, it accused the ECtHR of 'mission creep' by expanding the ECHR into new areas beyond what the framers of the Convention had in mind and also of attempting to overrule 'decisions of our democratically elected Parliament and overturn the UK courts'.[5] In order to remedy these problems, it proposed that the judgments of the ECtHR no longer be binding over the UK Supreme Court or Parliament and that it become an advisory body only.[6] It stated that it would attempt to reach agreement on these issues with the Council of Europe, and should such an agreement not be forthcoming, the UK would withdraw from the ECHR.[7]

The Conservative Party won the May 2015 general election and formed a government with a small majority in the lower house of Parliament, the House of Commons. Almost immediately, the new government pledged that within 100 days it would 'scrap' the HRA and replace it with a British Bill of Rights that would alter the relationship between the UK and the ECtHR. This plan was soon dropped, and, more than

1 J. Fawcett, 'Human Rights: Our Country in Europe', Child and Co Oxford Lecture 1983, 10 March 1983.

2 On the Human Rights Act 1998, see generally M. Amos, *Human Rights Law* (2nd edn, 2014). Human Rights Act 1998, 1998, c. 42 (HRA).

3 Bratza, 'The Relationship between UK Courts and Strasbourg', *European Human Rights Law Review* (*EHRLR*) (2011/5) 505, at 505–506.

4 Conservative Party, *Protecting Human Rights in the UK* (2014), available at www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf.

5 *Ibid*, at 3.

6 *Ibid*, at 5.

7 *Ibid*, at 8. This threat was not repeated in *The Conservative Party Manifesto 2015* (2015), at 60, available at www.conservatives.com/manifesto. Only the UK Independence Party promised in its manifesto to remove the United Kingdom (UK) from the jurisdiction of the European Court of Human Rights (ECtHR). See UK Independence Party, *Believe in Britain* (2015), at 53, available at www.ukip.org/manifesto2015.

two years later, still nothing has happened, although it has been confirmed that it is not a part of present plans for the UK to withdraw from the ECHR.[8] While the government's case against the ECtHR is a limited one, generally only relying on judgments affecting prisoners or foreign nationals and ignoring the impact of the vast majority of ECHR jurisprudence, its position that a British Bill of Rights could offer equivalent or better protection for human rights than the ECHR and the ECtHR, at the same time as reclaiming national sovereignty,[9] has not been effectively rebutted. Some have also argued that there is actually no need for the ECtHR or the HRA since English common law would develop to fill the gap should either be removed from the national legal system.[10] Judgments of the ECtHR utilized by its proponents to illustrate its impact and transformative power in the UK are generally more than 10 years old,[11] and there is little discussion of its contemporary value.

Against this backdrop, the purpose of this article is twofold. First, to determine what 'value' the ECtHR potentially has for a contracting state, which is distinct from assessing the Court's impact at the national level or its legitimacy. The second purpose is to apply this value framework to a five-year period of ECtHR jurisprudence concerning the UK to determine what value the Court might have currently for a state such as the UK.[12]

2 The Question of Value

In this article, the question of value is not approached as a philosophical question concerning the utility of protecting human rights through law. The assumption is made that protecting human rights through law is an important and worthwhile objective that is also shared by contracting states, including the current UK government. In its October 2014 proposals, the Conservative Party stated that protecting fundamental

8 See evidence given by former Lord Chancellor Michael Gove to Parliament's European Union (EU) Justice Sub-Committee, 26 January 2016, available at www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/news-parliament-2015/gove-hra-repeal-evidence/.

9 *Ibid.*

10 See, e.g., Elliott, 'Beyond the European Convention: Human Rights and the Common Law', 68 *Current Legal Problems* (2015) 85; Sales, 'Rights and Fundamental Rights in English Law', 75 *Cambridge Law Journal* (2016) 86. Such arguments have been dismissed as 'optimistic' and 'naive' by many. See, e.g., Dickson, 'Repeal the HRA and Rely on the Common Law?', in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights* (2015) 115; Clayton, 'The Empire Strikes Back', *Public Law* (2015) 3.

11 See, e.g., Rights Info, *50 Human Rights Cases That Transformed Britain*, available at http://rightsinfo.org/infographics/fifty-human-rights-cases/. The Council of Europe's Parliamentary Assembly recently published a report on the impact of the ECHR on states parties. The most recent judgment concerning the UK listed was ECtHR, *S. and Marper v. United Kingdom*, Appl. nos 30562/04 and 30566/04, Judgment of 16 January 2007. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

12 Judgments from 2011 to 2015. This period of time has been chosen since the national human rights protection, provided by the HRA, has now fully bedded down, making it possible to assess what additional value is provided by the ECtHR.

human rights through law was a 'hallmark of democratic society' and 'central to the values of the Conservative Party'.[13] Protecting human rights at the international level is also an objective of the current government, whose policy is to 'stand up for human rights by working with international bodies and priority countries … because a safer, more prosperous world is in the UK's national interest'.[14]

What is examined in this article is the value to the objective of protecting human rights through law of having an extra layer of human rights law protection above that which is provided at the national level – which, in the case of the UK, is the HRA (or any future British Bill of Rights). Asking what value the ECtHR has in this context is a different question from asking whether or not the ECtHR has an 'impact' at the national level[15] or if the Court is 'legitimate',[16] and the answer can provide a very different way of looking at the same facts. To estimate the value of the Court to a contracting state is to assess its worth, desirability or utility to the achievement of a particular objective – which, in this case, is the protection of human rights through law. The ECtHR clearly has an impact with effects felt in the UK, and often elsewhere, whenever it hands down a judgment. But merely considering this impact, without considering the value of the impact to the government's objective of protecting human rights through law, means that any ensuing debate about the judgment is missing this additional evaluative element and is therefore not as rich as it might be. In short, while many of the same effects will be discussed, the question of value allows an additional, and often different, perspective to also be considered.

For example, should the Court decide in a particular case that the UK has violated the ECHR, this decision will generate a variety of impacts. The applicant will have a judgment of the Court in his or her favour with which the UK will be obliged by international law to comply. The judgment may clarify or expand relevant ECHR jurisprudence for all contracting states. National human rights law, which is closely linked to ECHR jurisprudence, may have to adjust to accommodate a new development. Affording a remedy to the applicant may involve affording a remedy to a number of other similarly placed potential applicants. If the subject matter of the judgment is politically contested, the judgment may also give rise to a national backlash against the ECtHR and human rights law generally. But if the value of the judgment to the government's objective of protecting human rights through law – nationally and internationally – is considered alongside, or as an alternative, to simple 'impact', the

[13] Conservative Party, *supra* note 4, at 5.

[14] Foreign and Commonwealth Office, *Policy Human Rights Internationally*, available at www.gov.uk/government/policies/human-rights-internationally.

[15] See further H. Keller and A. Stone Sweet (eds), *A Europe of Rights* (2008); A. Donald, J. Gordon and P. Leach, *The UK and the European Court of Human Rights* (2012), available at www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf.

[16] See further Kumm, 'The Legitimacy of International Law: A Constitutional Framework of Analysis', 15 *European Journal of International Law* (*EJIL*) (2004) 907; Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', 25 *EJIL* (2014) 1019.

narrative is in some respects different. For example, a judgment against the UK might have value, as well as impact, to a state that is intent upon protecting human rights because it demonstrates that gaps in national human rights protection are filled by the ECtHR. If the Court changes and develops ECHR jurisprudence in a particular area for all contracting states, it may be valuable to improving international human rights standards. At the national level, it could also have value if it prompts reform in an area that has remained resistant to national initiatives including those sponsored by the government.

The question of the value of the ECtHR must also be distinguished from the question of its legitimacy, which has generated a significant amount of scholarship in recent years.[17] It has been suggested that a judgment of a court such as the ECtHR is more likely to be considered legitimate if those affected have had a say in it, either directly or via their elected representatives; if it reflects shared beliefs; or if it has been made by an expert and authoritative person or institution.[18] The value of a judgment to the objective of protecting human rights is very different. For example, a judgment of the Court in favour of a state and in agreement with that state's national legislature and the highest national court is likely to be perceived by many as legitimate for all of the above reasons. It might even be argued that the judgment actually has no impact in such circumstances. Considering the judgment from the perspective of value provides a more detailed picture. The individual applicant has had the opportunity to have his or her claim determined by a court that is independent of national political pressures. While the judgment may have provided no advancement in human rights law at the national level, it may have implications for the future acts of other contracting states, particularly if the margin of appreciation was engaged. And confirmation from an international court that national law is in accordance with the ECHR has a special unique value in itself.

However, despite the importance of the question, estimating value where there is no obvious monetary value is notoriously difficult. Andrew Williams has observed that when it comes to the ECtHR, we lack a 'clear cost-benefit analysis',[19] and, as Oona Hathaway states, the claim that international law matters was until recently, 'so widely accepted among international lawyers that there have been relatively few efforts to examine its accuracy'.[20] It is not the purpose of this article to develop a cost-benefit

[17] See, e.g., Bellamy, *supra* note 16; K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015); Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of Democratic Society', 5 *Global Constitutionalism* (2016) 16; Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands', 20 *International Journal of Human Rights* (2016) 407.

[18] Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights', 61 *International and Comparative Law Quarterly* (2012) 557, at 575–576.

[19] Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy', 24 *EJIL* (2013) 1157, at 1174. See also Cassel, 'Does International Human Rights Law Make a Difference?', 2 *Chicago Journal of International Law* (2001) 121, at 131; K. Alter, *The New Terrain of International Law* (2014), at 341, 343, 363.

[20] Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* (*YLJ*) (2002) 1935, at 1938.

analysis or to test the accuracy of the claim that international law really does matter. Instead, existing scholarship concerning the actual and potential value of international law – in particular, international human rights law – is utilized to assemble a value framework. While all of the different types of value that international human rights law and courts might have are rarely considered together, many authors have tested one or two types of value in their research, and from this, three broad categories of value can be identified. In the following paragraphs, these are separated into levels. First, there is value identified at the individual level where the ECtHR has an impact on the individual. Second, there is value at the global level where the ECtHR operates as a setter of minimum standards or strives to achieve solutions to particular global problems. Third, there is a value at the national level where the ECtHR has relevance for national law, policy or practice or the operation of national institutions.

3 The Value of the ECtHR

A *Value at the Individual Level*

The individual justice model utilized by the ECtHR enables victims, once domestic remedies have been exhausted, to bring their application to the ECtHR to argue that their state has breached their rights under the ECHR. Victims are able to determine for themselves whether or not they want to complain 'with no State or third party to do so on their behalf'.[21] Philip Leach observes that it is important not to forget this individual human aspect:

> We owe it to the victims of State violence, and of domestic violence, to the victims of human trafficking and those subjected to extraordinary rendition, to people languishing in inhuman prisons, and many others, to ensure that we maintain a strong and independent human rights court for the whole of Europe.[22]

Furthermore, it is likely that feelings of justice and acceptance of the national decision are enhanced where an application is made to the ECtHR, regardless of the outcome.

Second, the ECtHR grants to the disenfranchised and those marginalized and possibly even excluded from mainstream society an opportunity to have their human rights claims considered by a specialist court, independent of national political pressures at minimal cost, albeit with considerable delay. Allen Buchanan and Russell Powell observe that it is entirely possible for well-functioning constitutional democracies to fail to provide 'equal protection of the human rights of some of their citizens'.[23]

[21] Greer and Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights', 12 *Human Rights Law Review* (2013) 655, at 666.

[22] Leach, 'What Is Justice? Reflections of a Practitioner at the European Court of Human Rights', (4) *EHRLR* (2013) 392, at 400. See also Greer and Wildhaber, *supra* note 21, at 678; Cassel, *supra* note 19, at 122.

[23] Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law: Are They Compatible?', 16 *Journal of Political Philosophy* (2008) 326, at 330. See also O'Cinneide, 'Human Rights Law in the UK: Is There a Need for Fundamental Reform', *EHRLR* (2012/6) 595, at 595; Dothan, 'In Defence of Expansive Interpretation in the European Court of Human Rights', 3 *Cambridge Journal of International and Comparative Law* (2014) 508, at 509; Bellamy, *supra* note 16, at 1039.

B *Value at the Global Level*

Many have written of the history of the ECtHR and how it was established to solve pressing global problems – in essence, to prevent a recurrence of the atrocities occurring in World War II and as a 'safeguard against tyranny and oppression'.[24] According to Armin von Bogdandy and Ingo Venzke, in more recent times, international courts are still geared towards helping to solve some of the 'most pressing global problems', including the maintenance of peace. To this end, they are able to overcome problems in cooperation and 'mend failures of collective action'.[25] Hathaway observes that systems such as that provided by the ECHR have positive benefits for all states:

> [H]uman rights treaties and the process that surrounds their creation and maintenance may have a widespread effect on the practices of all nations by changing the discourse about and expectations regarding those rights … All countries, having received the message transmitted by the creation and widespread adoption of a treaty, are arguably more likely to improve their practices or at least less likely to worsen them than they would otherwise have been.[26]

In addition to helping to solve global problems, the ECtHR also can highlight problems that have arisen in a contracting state that could escalate into conflict, either internal or external, which may have repercussions for the people of that state and possibly other contracting states. Laurence Helfer and Anne-Marie Slaughter conclude that states committed to the rule of law at the national level are more law abiding at the international level. Conversely, states wavering on their commitment to the rule of law at the national level are likely to display difficulties with the rule of law at the international level, indicating to other contracting states that something is going wrong:

> [S]tates committed to the rule of law domestically will be more law-abiding in the international realm, through the projection or transferal of their domestic habits. Accustomed to self-imposed constitutional constraints at home, constraints enforced by an independent judiciary, they are more likely to accept the constraints of international law as enforced by an international or supranational tribunal.[27]

The ECtHR also helps to set minimum standards across the 47 contracting states of the Council of Europe as well as, indirectly, the 28 European Union (EU) member states.[28] Janneke Gerards states that it is really only an institution such as the ECtHR that is able to 'uniformly establish the meaning of fundamental rights and to define a minimum level of fundamental rights protection that must be guaranteed in all the

[24] Bates, 'British Sovereignty and the European Court of Human Rights', 128 *Law Quarterly Review* (2012) 382, at 385.

[25] Von Bogdandy and Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *EJIL* (2012) 7, at 8.

[26] Hathaway, *supra* note 20, at 2021. See, e.g., the impact in Israel as noted by Borelli, 'Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights', 46 *Israel Law Review* (2013) 369.

[27] Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *YLJ* (1997–1998) 273, at 332.

[28] Andreadakis, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams', 24 *EJIL* (2013) 1187, at 1189.

States of the Council of Europe'.[29] For example, at the global level, the UK has a much better chance of dealing with like-minded states and has an external and neutral reference point – the ECHR, as enforced by the ECtHR – which can be appealed to rather than national guarantees or national perspectives that are vulnerable to the accusation of cultural bias.[30]

Finally, at the global level, the ECtHR has played a role in scrutinizing the actions of other international organizations such as the institutions of the EU, the United Nations and the International Criminal Court. This is an important function of the ECtHR, which might not otherwise occur.[31] Its work is also an inspiration to other global and regional human rights institutions. For example, Brice Dickson predicts that, despite the EU Charter being a more modern human rights instrument than the ECHR, the Court of Justice of the European Union will eventually take its lead from the ECtHR.[32]

C *Value at the National Level*

Most scholarship is directed at examining the value of the ECtHR at the national level. Such is the volume of the literature, that it is helpful to break it down into two overarching types of value. First are the values that can be grouped together as 'static' where the ECtHR essentially operates as a safety net against national acts in violation of the ECHR. Here, the claim is that its mere existence is a disincentive for national institutions, particularly governments, to act incompatibly with the ECHR. Where such incompatible acts occur, the ECtHR can hold the national institutions to account and prompt a reversal or modification to ensure compatibility. Second are the values that can be grouped together as 'dynamic' where it is claimed that a judgment of the ECtHR prompts the improvement of existing laws, policies or practices to ensure compliance with the ECHR or where it might even prompt entirely new laws, policies or practices.

These two types of value come to fruition in the same ways, either through a direct impact on the contracting state's institutions via international law, including the obligation imposed by Article 46 of the ECHR to abide by the judgment of the ECtHR in cases to which they are parties, or via an indirect impact through empowering national courts. Both types of value are explained in more detail in the following sections.

[29] Gerards, 'The Prism of Fundamental Rights', 8(2) *European Constitutional Law Review* (*ECLR*) (2012) 173, at 184–186. See also Dzehtsiarou and Lukashevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court', 30 *Netherlands Quarterly of Human Rights* (*NQHR*) (2012) 272, at 273–274.

[30] Bellamy, *supra* note 16, at 1032.

[31] See further, Andreadakis, *supra* note 28, at 1189; Ryngaert, 'Oscillating between Embracing and Avoiding Bosphorus: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the EU', 39 *European Law Review* (2014) 176, at 190.

[32] Dickson, 'The EU Charter of Fundamental Rights in the Case Law of the European Court of Human Rights', *EHRLR* (2015/1) 27, at 40. Charter of Fundamental Rights of the European Union, OJ 2012 C 326.

1 Static Value at the National Level

In the scholarship, it is asserted that the ECtHR plays a role in relation to three 'static values', essentially acts that preserve the *status quo* in a contracting state. First, the existence of the ECtHR and its jurisprudence can act as a strong disincentive where states are contemplating a possible breach of ECHR rights.[33] The disincentive can arise as a result of successful litigation before the Court against that state, or a judgment concerning another state can indicate that a similar course of action will result in a finding of violation. No state is above the temptation to violate ECHR rights, as Buchanan and Powell note: '[I]n cases of perceived dire national emergency, such as war and terrorist attacks, every constitutional democracy is at risk for unjustifiably infringing civil rights generally, not just those of minorities.'[34]

Second, the ECtHR can hold a state accountable for its acts that are incompatible with ECHR rights, even if this does not prompt more widespread change at the national level. Williams observes that the Court operates as a 'check on the outrages of government which are not or cannot be challenged by the domestic courts'.[35] It is independent from political authorities and 'political modes of dispute resolution' and has demonstrated that it is willing to 'decide against governments in big cases'.[36] Egbert Myjer states that the independence of the ECtHR from national institutions is key – it does not 'look at the case with the eyes of a national judge who is a product of national traditions'.[37] It does not face the 'kind of political and legal pressure that domestic judges do'.[38] Dia Anagnostou and Alina Mungiu-Pippidi observe that contracting states 'eventually adopt some measures, even if token and minimal, in response to most of the ECtHR's adverse judgments against them'.[39]

Finally, Karen Alter concludes that a judgment of the ECtHR can help a government maintain the *status quo* in the face of pressure for change. International courts, can 'co-opt governments, providing legal rulings that governments can use to deflect blame and overrule the arguments of domestic opponents'.[40] Enduring debates can be put to rest with the Court introducing a 'finality to disagreements about what the law means'.[41]

2 Dynamic Value at the National Level

'Dynamic value' is different to static value in that a judgment of the ECtHR can facilitate a process of change and progress. It has been argued that states may be prompted

[33] Alter, *supra* note 19, at 23.
[34] Buchanan and Powell, *supra* note 23, at 330.
[35] Williams, *supra* note 19, at 1184.
[36] Helfer and Slaughter, *supra* note 27, at 313.
[37] Myjer, 'The Success Story of the European Court: The Times They Are a – Changin', 30 *NQHR* (2012) 264, at 270.
[38] Cali, 'The Purposes of the European Human Rights System: One or Many?', *EHRLR* (2008/3) 299, at 302. See also Alter, *supra* note 19, at 9.
[39] Anagnostou and Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *EJIL* (2014) 205, at 206.
[40] Alter, *supra* note 19, at 21.
[41] *Ibid.*, at 29.

by a judgment to improve existing laws, policies and procedures in order to comply with the ECHR. Or the jurisprudence of the Court might encourage the adoption of entirely new laws, policies and procedures. As above, such values can be realized as a result of a judgment against that particular contracting state or another contracting state. The potential of international courts as agents of change is the key finding of Alter in her book *The New Terrain of International Law*:

> ICs [International courts] are new political actors on the domestic and international stage. Their international nature allows ICs to circumvent domestic legal and political barriers and to create legal change across borders. Their legal nature allows ICs to provoke political change through legal reinterpretation and to tap into diffuse support for the rule of law and pressure governments. Their legal and international nature allows litigants to harness multilateral resources and to knit together broader constituencies of support.[42]

Similarly, von Bogdandy and Venzke note that the judgments of an international court can achieve outcomes in the collective interest that the normal political process 'has been unable to deliver'.[43] A judgment of the ECtHR can be an important focus point for non-governmental organizations (NGOs) and others lobbying for a particular change. Douglass Cassel observes that the international articulation of human rights norms has 'reshaped domestic dialogues in law, politics, academia, public consciousness, civil society and the press'.[44] According to Helfer and Slaughter, where individuals of a state are mobilized in support of the judgment of a supranational tribunal, 'compliance with that judgment becomes less a question of ceding sovereignty than of responding to constituent pressure', and 'sovereignty becomes inextricably interwoven with accountability'.[45]

It is also claimed that the living instrument approach utilized by the ECtHR ensures that the now very dated ECHR can be applied in new ways to respond to new threats to human interests.[46] Nicolas Bratza maintains that the ECtHR keeps track of developments across the 47 contacting states so as to ensure its jurisprudence keeps pace with, but does not 'leap ahead of, societal changes within Europe'.[47] States that may lag behind are not given a choice but must keep pace with developments forming a 'consensus' in the other 47 contracting states. It is not only other states that the ECtHR keeps pace with but also developments at the international level, taking into consideration the EU and the UN perspective, for example.[48]

4 The Value of the ECtHR to the UK

This summary of the relevant scholarship demonstrates that the work of the ECtHR can be of value to a contracting state at a number of different levels, assuming it is

[42] *Ibid.*, at 5. Simmons reaches the same conclusion in relation to treaty commitments rather than the oversight of an international court. See B.A. Simmons, *Mobilizing for Human Rights* (2009), at 8.

[43] Von Bogdandy and Venzke, *supra* note 25, at 24.

[44] Cassel, *supra* note 19, at 122.

[45] Helfer and Slaughter, *supra* note 27, at 388.

[46] Bratza, 'Living Instrument or Dead Letter: The Future of the European Convention on Human Rights', *EHRLR* (2014/2) 116, at 118–119.

[47] *Ibid.*, at 124. See also Dzehtsiarou and Lukashevich, *supra* note 29, at 273–274.

[48] Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments', 7 *ECLR* (2011) 173, at 178.

genuinely committed to the protection of human rights through law. However, the scholarship also indicates that the value of the ECtHR to each contracting state will be different depending on what is happening at the national level at that particular point in time. National law and politics can change, and values not at the fore at present might come to have greater relevance, particularly if national human rights protection veers away from utilizing the ECHR and the jurisprudence of the Court as a benchmark.

The second purpose of this article is to apply the value framework set out above to the judgments of the Court concerning the UK from 2011 to 2015 to test the claims made and to determine what specific value the Court now has for the UK. While the various types of value identified by scholars may all be reflected in the experience of some contracting states, is it correct to claim that the ECtHR still has value for the UK, a state that continues to have relatively strong national human rights protection, an independent judiciary and a commitment to democracy and the rule of law? In short, is the present UK government right to argue that the UK no longer needs the Court to continue to protect human rights?

A *Value at the Individual Level*

In 2015, 575 applications against the UK were allocated to a judicial formation, and 720 were allocated in 2014.[49] In 2015, 13 judgments were delivered concerning the UK, with four judgments finding at least one violation and nine judgments finding no violation.[50] Also in 2015, 136 interim measures sought under Rule 39 against the UK were refused.[51] It is not true, therefore, to state that individuals from the UK are no longer interested in applying to the ECtHR or that there is complete satisfaction with, or access to, the human rights remedies available at the national level. Furthermore, there are still violations found on the part of the UK by the ECtHR.

In addition to the figures, it is important to consider the substance of the applications made. While it is often represented that the HRA now affords human rights remedies to all at the national level, this is not actually the case in relation to some claimants. Over the last five years, a number of successful applications have been brought to the ECtHR by the families of those who died during 'The Troubles' in Northern Ireland. These claims are not possible under the HRA since it has been held by the House of Lords (now the UK Supreme Court) that the HRA only applies in those instances where the death occurred after 2 October 2000, the date on which the HRA came into

[49] ECtHR, *Analysis of Statistics 2015* (2016), available at www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf at page 60.

[50] ECtHR, *Violations by Article and Respondent State 2015* (2016), available at www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf.

[51] Here the applicants were seeking interim protection under Rule 39 against expulsion from the UK prior to the determination of their application by the ECtHR. ECtHR, *Interim Measures by Respondent State and Country of Destination 2015* (2016), available at www.echr.coe.int/Documents/Stats_art_39_02_ENG.pdf.

force.[52] In these applications, the ECtHR has always found a violation of Article 2.[53] It might also be that a claim is not possible under the HRA because it is precluded by a particular interpretation of the HRA or of the Convention rights, which have not yet been confirmed by the ECtHR. For example, the application in *Hassan v. UK* was not possible under the HRA as it concerned the alleged ill-treatment of an Iraqi civilian by the British armed forces in Iraq.[54] At the time the claim was brought under the HRA, it had been held by the House of Lords in its judgment in *Al-Skeini v. Secretary of State for Defence*[55] that the HRA had no application to such events since the victim was not within the jurisdiction of the UK.[56]

Almost all of the applications brought against the UK in the last five years have been brought by members of marginalized groups, including prisoners, disabled people, welfare recipients, foreign nationals who have committed a crime and are facing deportation, failed asylum seekers, Iraqi civilians, and those caught up in the criminal justice or family justice systems. Despite the ever-improving record of the UK, it is important to note that in a number of these applications the ECtHR found at least one violation of the ECHR.[57]

B *Value at the Global Level*

Judgments of the ECtHR concerning the UK over the last five years have contributed to various aspects of value at the global level outlined above. For example, in *C.N. v UK*, the ECtHR held that the UK was in breach of Article 4 of the ECHR for failing to have in place criminal laws penalizing forced labour and servitude, thereby addressing an important global problem and also setting a standard for other contracting states to meet in this area.[58] The Court's numerous judgments concerning deportation and extradition from the UK over this period, while setting important common standards, have also served to expose pressing human rights issues in other states.[59]

[52] *In re McKerr*, [2004] UKHL 12, [2004] 1 WLR 807.

[53] ECtHR, *Case of McDonnell v. United Kingdom*, Appl. no. 19563/11, Judgment of 9 December 2014; ECtHR, *Case of Collette and Michael Hemsworth v. United Kingdom*, Appl. no. 5855/09, Judgment of 16 July 2013; ECtHR, *Case of McCaughey and Others v. United Kingdom*, Appl. no. 43098/09, Judgment of 16 July 2013.

[54] ECtHR, *Case of Hassan v. United Kingdom*, Appl. no. 29750/09, Judgment of 16 September 2014.

[55] *R. (Al-Skeini) v. Secretary of State for Defence*, [2007] UKHL 26. The ECtHR held that the ECHR did apply to the facts in ECtHR, *Case of Al-Skeini v. United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011. This was adopted by the UK Supreme Court in its judgment in *R. (Smith) v. Secretary of State for Defence*, [2013] UKSC 41.

[56] See also ECtHR, *Case of Dillon v. United Kingdom*, Appl. no. 32621/11, Judgment of 4 November 2014; ECtHR, *Case of Eweida and Others v. United Kingdom*, Appl. nos 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

[57] See, e.g., *Al-Skeini v. UK*, *supra* note 55; ECtHR, *Case of Betteridge v. United Kingdom*, Appl. no. 1497/10, Judgment of 29 January 2013; ECtHR, *Case of McDonald v. United Kingdom*, Appl. no. 4241/12, Judgment of 20 May 2014.

[58] ECtHR, *Case of C.N. v. United Kingdom*, Appl. no. 4239/08, Judgment of 13 November 2012. See also ECtHR, *Case of Othman (Abu Qatada) v. United Kingdom*, Appl. no. 8139/09, Judgment of 17 January 2012, where the ECtHR held that the admission of torture evidence was manifestly contrary to Art. 6 and to the 'most basic international standards of a fair trial' (at para. 267).

[59] See, e.g., ECtHR, *Case of Aswat v. United Kingdom*, Appl. no. 17299/12, Judgment of 16 April 2013; ECtHR, *Case of H. and B. v. United Kingdom*, Appl. nos 70073/10 and 44539/11, Judgment of 9 April 2013.

The clarification of the circumstances in which the ECHR has an extraterritorial effect provided in the judgment of the Grand Chamber in *Al-Skeini v. UK* set the standard for all contracting states on an important question of law.[60] And, in a judgment in 2014 concerning secondary strike action, the ECtHR reached a different conclusion to the European Committee on Social Rights and the International Labour Organization's Committee of Experts, noting that these 'specialised international monitoring bodies' have a 'different standpoint, shown in the more general terms used to analyse the ban on secondary action'.[61]

It is possible that if the UK were to withdraw from the ECHR, and, thereby, the jurisdiction of the ECtHR, these particular types of global value would continue to accrue and the UK would benefit without making any contribution. The greatest risks would be that the UK would find it very difficult to persuade other states to abide by international human rights norms if it was not to do so itself[62] and that the whole ECHR system might collapse, or be considerably weakened, as a result.[63] However, rather than guessing at what might happen, an alternative approach to the question of global value and the UK is to consider what role the UK plays in helping to shape the norms formulated by the ECtHR – in other words, how does the UK contribute to the value of the ECtHR at the global level?

Over the past five years, the judgments of the ECtHR increasingly have reflected the growing influence of the UK courts. While there have been a number of types of influence exerted,[64] the most important when determining the UK's contribution to the global value of the ECtHR is where the UK courts have exerted a strong influence and where a particular judgment by a UK court has made a significant contribution to the development of ECHR jurisprudence that has implications for all contracting states.[65] For example, in *Jones v. UK*, the claimants had issued proceedings in the

[60] *Al-Skeini v. UK*, *supra* note 55. See also ECtHR, *Case of Al-Jedda v. United Kingdom*, Appl. no. 27021/08, Judgment of 7 July 2011.

[61] ECtHR, *Case of National Union of Rail, Maritime and Transport Workers v. United Kingdom*, Appl. no. 31045/10, Judgment of 8 April 2014, at para. 98.

[62] Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', 13 *Human Rights Review* (2012) 279, at 295.

[63] Gerards, *supra* note 29, at 175–176. It is possible that the mere suggestion that the UK would leave the ECHR gave support to similar sentiments in Russia, Poland and Hungary. In December 2015, the Russian Parliament adopted a law allowing it to overrule judgments from the ECtHR. It is now possible for the Constitutional Court to declare international court orders unenforceable in Russia if these contradict the Constitution.

[64] See further Amos 'The Influence of British Courts on the Jurisprudence of the European Court of Human Rights', in R. McCorquodale and J. Gauci (eds), *British Influences on International Law 1915–2015* (2016) 215.

[65] Waters describes this as 'norm export'. See further Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law', 93 *Georgetown Law Journal* (2005) 487. A UK court can also assert a more moderate influence by identifying an area where a margin of appreciation is appropriate. E.g., in ECtHR, *Case of Animal Defenders International v. United Kingdom*, Appl. no. 48876/08, Judgment of 22 April 2013, the ECtHR, clearly influenced by the judgment of the House of Lords, afforded the UK a margin of appreciation and found that its political broadcasting ban was compatible with Art. 10 of the ECHR.

UK against the Kingdom of Saudi Arabia and servants and agents of the Kingdom for various torts and torture that had occurred in Saudi Arabia.[66] The UK House of Lords had held that the State Immunity Act 1978 conferred immunity on all of the respondents and that this was not incompatible with the right of access to the courts conferred by Article 6.[67] It was for the ECtHR to determine whether or not the grant of immunity here was in breach of Article 6; in particular, whether the immunity was proportionate to the legitimate aim pursued. This was an important case for all contracting states given that the ECtHR was considering whether or not an exception should be created for state immunity where civil claims for torture were made against foreign state officials.

The judgment of the House of Lords prevailed, and the ECtHR concluded that there was no violation of Article 6 by affording state immunity to both states and the servants and agents of the state. The strength of the influence of the judgment of the House of Lords on the ECtHR was clear; the Court noting that it had 'fully engaged with all of the relevant arguments' that its judgment was 'lengthy and comprehensive' and that its findings were 'neither manifestly erroneous nor arbitrary'. Furthermore, it was impressed that other national courts had examined the conclusions of the House of Lords and found these to be 'highly persuasive'.[68] Were the UK to leave the ECHR system, such glowing references to its highest court would no longer be possible, and its ability to influence the development of ECHR jurisprudence for all of the contracting states, not only the UK, would be lost.

C *Value at the National Level*

Reflective of the fact that most scholarship concerns the value of the ECtHR at the national level, this is also the level at which the judgments of the Court might have the greatest value to the UK. Considering the past five years of judgments, there is evidence that the jurisprudence of the Court has acted as a disincentive to breach the ECHR, has provided remedies to victims (without any further change) and has also helped the UK government to maintain the *status quo*. However, over the past five years, by comparison to other years, more dynamic change as a result of ECHR jurisprudence has not been as frequent. Judgments falling into each type of national value are examined in more detail in the following sections.

66 ECtHR, *Case of Jones and Others v. United Kingdom*, Appl. nos 34356/06 and 40528/06, Judgment of 14 January 2014.

67 *Jones v. Saudi Arabia*, [2006] UKHL 26, [2007] 1 AC 270.

68 *Ibid.* at para. 214. Other examples from 2011–2015 include: ECtHR, *Case of Al-Khawaja and Tahery v. United Kingdom*, Appl. nos 26766/05 and 22228/06, Judgment of 15 December 2011; ECtHR, *Case of Austin and Others v. United Kingdom*, Appl. nos 39692/09, 40713/09 and 41008/09, Judgment of 15 March 2012 [*Austin v. UK*]; ECtHR, *Case of Babar Ahmad v. United Kingdom*, Appl. nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012; ECtHR, *Case of M.M. v. UK*, Appl. no. 24029/07, Judgment of 13 November 2012; *McDonald v. UK*, *supra* note 57 (but only the judgment of Baroness Hale in the UK Supreme Court in *R. (McDonald) v. Kensington & Chelsea Royal London Borough*, [2011] UKSC 33).

1 *A Disincentive to Act Contrary to ECtHR Jurisprudence*

Determining what disincentive to act contrary to the ECHR is generated by the judgments, or what potential there is for an adverse judgment, from the ECtHR is not an easy task, given that there might be a number of explanations for a course of action on the part of the legislature or public authority.[69] In some instances, it is possible to discover a clear link. For example, in training, police forces throughout the UK are informed of relevant judgments of the ECtHR, and these can be found throughout the standards of professional practice set by the College of Policing.[70] The judgment in *Austin v. UK* is specifically referred to in guidance concerning policing demonstrations.[71] Judgments of the ECtHR are on occasion referred to in parliamentary debates and by parliamentary committees, and the disincentive to take particular courses of action is often clearly spelled out.[72] A recent illustration is the passage of the Investigatory Powers Bill that was introduced to the UK Parliament on 1 March 2016 and has now passed all of its parliamentary stages.[73] In short, the Bill concerns the interception of communications and the acquisition and retention of communications data. Unusually, the Bill was accompanied by an ECHR memorandum prepared by the sponsoring government department.[74] The memorandum contains specific references to relevant judgments of the ECtHR, particularly the need to address the 'foreseeability and compatibility with the rule of law requirements of Article 8',[75] and it is stated that the Bill is in compliance with the minimum safeguards that the ECtHR holds must exist within the legal framework governing the interception of communications.[76] While there may be reasonable disagreement with the Home Office's assessment that the Bill is fully compliant with the ECHR, the jurisprudence of the ECtHR on these issues is clearly operating as a disincentive to the acquisition of much more sweeping powers for the police and security services.[77]

[69] Furthermore, in October 2015, the Ministerial Code was amended to remove the obligation on government ministers to 'comply with the law including international treaty law and treaty obligations'. Ministerial Code (2015), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/468255/Final_draft_ministerial_code_No_AMENDS_14_Oct.pdf.

[70] College of Policing, available at www.app.college.police.uk/.

[71] *Austin v. UK*, *supra* note 68. 'Public Order: Core Principles and Legislation', *College of Policing*, available at www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/?s=human+rights.

[72] The Parliamentary Joint Committee on Human Rights scrutinizes every government bill for its compatibility with human rights. On the influence of human rights standards in Parliament, see further Norton, 'A Democratic Dialogue? Parliament and Human Rights in the United Kingdom', 21 *Asia Pacific Law Review* (2013) 141.

[73] Investigatory Powers Act 2016, 2016, c. 25.

[74] Investigatory Powers Bill, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/506171/ECHR_Memo_-_Introduction.pdf.

[75] *Ibid.*, at 4.

[76] *Ibid.*, at 8.

[77] See also Report of the Joint Committee on the Draft Investigatory Powers Bill (2016), available at www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf at page 5.

On occasion, the disincentive effect of a specific judgment of the ECtHR is also made clear. A high-profile example was the application of Abu Qatada, whose extradition to Jordan to stand trial for terrorist offences had been found compatible with Articles 3 and 6 of the ECHR by the UK House of Lords.[78] The ECtHR reached a different conclusion, finding that there was a real risk of a flagrant denial of justice from the admission of evidence obtained by torture at his trial and that the proposed extradition was therefore incompatible with Article 6.[79] Despite the media furore stirred up by the judgment,[80] it is a testament to the disincentive effect of a judgment of the ECtHR that the UK government did not extradite Qatada until more than 18 months after the judgment once an agreement had been reached with Jordan that his trial would not involve the use of evidence obtained by torture.[81]

2 *A Remedy for the Applicant but No Wider Change*

Given the individual application model utilized in the ECHR system, it is possible that an application may result in a remedy for the applicant but that the specificity of the complaint means that there is no need for more widespread change. For example, where applicants have successfully established an unreasonable delay attributable to the state in violation of Article 6, this can often result in a remedy for the applicant but not an overhaul of the system that gave rise to the delay.[82] Given that the assessment of a real risk of Article 3 ill-treatment in a destination state where an applicant is to be removed from the UK is often very fact specific, there are examples in the immigration and extradition context over the last five years where the ECtHR has reached a different conclusion to the UK courts and afforded a remedy to the applicant, but this has not prompted any further change.[83]

By contrast, in some instances, more widespread change really is necessary to comply with the judgment but does not happen, although the ECtHR can still make the state accountable and provide a remedy to the applicant. The numerous successful applications brought by families seeking effective Article 2 compliant investigations into deaths that occurred during 'The Troubles' in Northern Ireland have forced the government to be accountable for its breaches of the ECHR, but these judgments have not, to date, achieved a change in law, policy or practice.[84]

3 *Helping to Maintain the* Status Quo

In recent years, in the majority of its judgments concerning the UK, the ECtHR has helped to maintain the UK *status quo* in addition to affording remedies to individual

78 *R.B. (Algeria) v. Secretary of State for the Home Department*, [2009] UKHL 10.

79 *Othman v. UK*, *supra* note 58.

80 See further Middleton, 'Taking Rights Seriously in Expulsion Cases: A Case Study', *EHRLR* (2013/5) 520.

81 He was acquitted of the offences in June 2014.

82 ECtHR, *Case of Piper v. United Kingdom*, Appl. no. 44547/10, Judgment of 21 April 2015.

83 ECtHR, *Case of Aswat v. United Kingdom*, Appl. no.17299/12, Judgment of 16 April 2013.

84 See, e.g., *McDonnell v. UK*, *supra* note 53 (death in 1996, investigation concluded in 2013); *Hemsworth v. UK*, *supra* note 53; *McCaughey v. UK*, *supra* note 53. In January 2016, the Secretary of State for Northern Ireland reported to Parliament that the government remained committed to establishing the Independent Commission on Information Retrieval, but no agreement had yet been reached. Similar problems affected the establishment of the proposed Historical Investigations Unit.

applicants with no widespread impact. There are a number of examples, but three help to illustrate this particular value. First, in *Austin v. UK*, a judgment concerning police 'kettling', which involves the lengthy containment of demonstrators,[85] it was argued that such action was incompatible with Article 5 of the ECHR, but the House of Lords had concluded that Article 5 had no application to the facts.[86] The ECtHR agreed, noting that police forces in the contracting states face new challenges and that Article 5 'cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public'.[87] It concluded that the policing tactic adopted in this case was not a deprivation of liberty within the meaning of Article 5.[88] Within limits, police kettling of demonstrators, now commonly employed to police large demonstrations, was essentially given the green light, leading some commentators to ask why the protections of Article 5 had been undermined.[89]

The second example is *Animal Defenders International v. UK*, where the applicant complained to the ECtHR about the prohibition on paid political advertising imposed by section 321(2) of the Communications Act 2003.[90] Its claim under Article 10 had been heard by both the High Court and the House of Lords, and both had refused to find a violation.[91] When the application to the ECtHR was made, many commentators assumed, based on its preceding jurisprudence, that it would find a breach of Article 10.[92] At the outset, the Grand Chamber held that the margin of appreciation was narrow given that the NGO was attempting to draw attention to matters of public interest and 'exercising a public watchdog role of similar importance to that of the press'.[93] It noted that in determining the proportionality of the interference, the 'quality of the parliamentary and judicial review of the necessity of the measure' was of particular importance as the legislative and judicial authorities were 'best placed to assess the particular difficulties in safeguarding the democratic order in their State'.[94] It then carefully considered all of the reviews of the prohibition that had taken place at the national level, including that of the Parliament, the Parliamentary Joint Committee on Human Rights and the Electoral Commission.[95] Added to this were the judgments

85 *Austin v. UK*, *supra* note 68.

86 *Austin v. Commissioner of Police*, [2009] UKHL 5.

87 *Austin v. UK*, *supra* note 68, at para. 56.

88 As it stated, 'so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose' (*ibid.*, at para. 59).

89 See Oreb, 'Case Comment: The Legality of "Kettling" after Austin', 76 *Modern Law Review* (*MLR*) (2013) 735.

90 *Animal Defenders v. UK*, *supra* note 65. Communications Act 2003, 2003, c. 21.

91 *R. (Animal Defenders International) v. Secretary of State for Culture, Media and Sport*, [2008] UKHL 15.

92 See further Sackman, 'Debating "Democracy" and the Ban on Political Advertising', 72 *MLR* (2009) 475; Lewis and Cumper, 'Balancing Freedom of Political Expression against Equality of Opportunity: The Courts and the UK's Broadcasting Ban on Political Advertising', *Public Law* (2009) 89; Lewis, '*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?', 77 *MLR* (2014) 460.

93 *Animal Defenders v. UK*, *supra* note 65, paras 103–105.

94 *Ibid.*, paras 108, 111; see also the observations made at para. 110.

95 *Ibid.*, para 114.

of the High Court and the House of Lords.[96] It concluded that the broadcasting ban was not in violation of Article 10. Again, various UK commentators were dismayed, leading some to ask whether or not the ECtHR had simply lost its nerve and was not willing to find against the UK on this question.[97]

The third example, already discussed in the context of the UK courts making a contribution to the development of ECHR jurisprudence for all contracting states, is *Jones v. UK*.[98] As noted above, this was an important judgment for all contracting states given that the ECtHR was considering whether or not an exception should be created to state immunity where civil claims for torture are made against foreign state officials. The judgment of the House of Lords prevailed, and the ECtHR concluded that there was no violation of Article 6 by affording state immunity to both states and the servants and agents of the state.[99] Some commentators described the judgment as a 'missed opportunity'.[100]

4 Improvements to Existing Laws, Policies and Practices

In contrast to its static value, the dynamic value of the ECtHR's judgments to the UK in recent years has been minimal. A very small percentage of the judgments of the last five years have required improvements to law, policy or practice. One example is *Eweida v. UK*, which concerned the protection of manifestations of religious belief in the workplace.[101] In order to raise the minimum standard of protection under Article 9, the Court had to revisit its own case law, which had demonstrated a reluctance to find an interference with Article 9 rights in this context. It concluded that where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing jobs would negate any interference with the right, the better approach would be to 'weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'.[102]

Another example is the judgment in *McDonald v. UK*.[103] In this case, the applicant claimed that the decision of the local authority to reduce her care package and no longer fund a night-time carer, resulting in her wearing incontinence pads at night, was

[96] *Ibid.*, paras 115–116.

[97] See Lewis, *supra* note 92.

[98] *Jones v. UK*, *supra* note 66.

[99] Other recent examples of judgments maintaining the *status quo* in the UK include: ECtHR, *Case of Sher and Others v. United Kingdom*, Appl. no. 5201/11, Judgment of 20 October 2015 (anti-terror law); ECtHR, *Case of Fazia Ali v. United Kingdom*, Appl. no. 40378/10, Judgment of 20 October 2015 (allocation of public housing); ECtHR, *Case of N.J.D.B. v. United Kingdom*, Appl. no. 76760/12, Judgment of 27 October 2015 (refusal of legal aid); ECtHR, *Case of Abdulla Ali v. United Kingdom*, Appl. no. 30971/12, Judgment of 30 June 2015 (adverse publicity fair trial); ECtHR, *Case of Magee v. United Kingdom*, Appl. no. 26289/12, Judgment of 12 May 2015 (detention without charge); ECtHR, *Case of O'Donnell v. United Kingdom*, Appl. no. 16667/10, Judgment of 7 April 2015 (right to silence); ECtHR, *Case of Hutchinson v. United Kingdom*, Appl. no. 57592/08, Judgment of 3 February 2015 (review whole life tariff).

[100] Bindman, 'A Missed Opportunity', 164 *New Law Journal* (2014) 9.

[101] *Eweida v. UK*, *supra* note 56.

[102] *Ibid.*, at para. 83.

[103] *McDonald v. UK*, *supra* note 57.

in breach of Article 8. The UK Supreme Court had concluded by majority that Article 8 was not even engaged.[104] The ECtHR, agreeing with the dissenting national judge, Baroness Hale, reached the opposite conclusion, finding that the decision was capable of impacting upon the applicant's dignity and, therefore, her private life as protected by Article 8.[105] Although concluding that the decision was proportionate, balancing personal interests 'against the more general interest of the competent public authority in carrying out its social responsibility of provision of care to the community at large',[106] the fact that the decision was found to be within the scope of Article 8 was an important development, meaning that public authorities making this type of decision would have to carry out a proportionality assessment.[107]

There are also those areas where there might have been some motivation generated to comply with ECtHR jurisprudence, but the change is so wide-ranging that it is difficult to attribute solely to the ECtHR. An example being the situation where changes have taken place to the probation service.[108] In a number of judgments, the ECtHR has found violations of Article 5(4) in that prisoners have been detained in prison past the expiration of the tariff period because of a lack of manpower and resources within the Probation Board. For example, in *Betteridge v. UK*, the ECtHR found that the delay in release that occurred was the direct result of the 'failure of the authorities to anticipate the demands which would be placed on the prison system' as a result of a new type of sentence.[109] Similar conclusions regarding the impact of 'inadequate resources' had been reached in 2012.[110]

5 *New Laws, Policies and Practices*

More fundamental changes to laws, policies or practices or new initiatives as a result of a judgment of the ECtHR concerning the UK over the past five years have been rare. The most dramatic change has not been to statute law but, rather, to the application of the HRA extra-territorially as a result of the UK courts adopting the conclusion of the ECtHR in *Al-Skeini v. UK*.[111] The ECtHR concluded that there were exceptions to territorial jurisdiction where there was state agent authority and control or effective

[104] *R. (McDonald) v. Kensington & Chelsea Royal London Borough Council*, [2011] UKSC 33.

[105] *McDonald v. UK*, *supra* note 57, para. 47.

[106] *Ibid.*, at para. 57.

[107] A small change to the statute providing protection against unfair dismissal resulted from the judgment in ECtHR, *Case of Redfearn v. United Kingdom*, Appl. no. 47335/06, Judgment of 6 November 2012 (Enterprise and Regulatory Reform Act 2013, 2013, c. 24, s. 13). Other possible changes to the statute from judgments of the ECtHR are too recent to have been acted upon by Parliament, including ECtHR, *Case of R.E. v. UK*, Appl. no. 62498/11, Judgment of 27 October 2015, concerning surveillance of a legal consultation.

[108] See further N. Padfield, 'The Magnitude of the Offender Rehabilitation and 'Through the Gate' Resettlement Revolution', *Criminal Law Review* (2016) 99.

[109] *Betteridge v. UK*, *supra* note 57, para. 40.

[110] ECtHR, *Case of James, Wells and Lee v. United Kingdom*, Appl. no. 25119/09, 57715/09 and 57877/09, Judgment of 18 September 2012.

[111] *Al-Skeini v. UK*, *supra* note 55. Adopted by the UK Supreme Court in *Smith v. Ministry of Defence*, [2013] UKSC 41.

control of an area, anywhere in the world. In the present application, it concluded that the UK, through its soldiers engaged in security operations in Basra during the period in question, 'exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link'.[112] As a result, the Court concluded that there was a procedural obligation under Article 2 to investigate the deaths of the Iraqi civilians.

The judgment has led to applications raising questions of compliance with Articles 2, 3 and 5 under the HRA in the UK courts brought by foreign nationals and members of the UK armed forces who have served abroad.[113] Many of the investigations are conducted by the Iraq Historic Allegations Team (IHAT), which was established in 2010 to 'review and investigate allegations of abuse by Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009'. The scope of its investigations is described as follows:

> The alleged offences range from murder to low-level violence and the time period covers the start of the military campaign in Iraq, in March 2003, through the major combat operations of April 2003 and the following years spent maintaining security as part of the Multi-National Force and mentoring and training Iraqi security forces.[114]

It was reported in *The Guardian* on 22 January 2016 that the government had paid £20 million in settlement for the 326 claims to date.[115] It was stated in Parliament in January 2016 that IHAT's caseload now involves just over 1,500 alleged victims, 1,235 of whom are victims of ill-treatment and 280 of unlawful killing.[116]

5 So What Added Value Does the ECtHR Have for the UK?

At the outset of this article, it was explained that a present-day value-based assessment of the role of the ECtHR would enrich the debate concerning whether or not the UK still needed the Court to help to provide protection for human rights through law at the national level. Having utilized relevant scholarship to establish a value framework, with various potential values of the Court identified at the individual, global and national levels, the discussion has applied this framework to five years of jurisprudence concerning the UK to test the accuracy of the claims made. It is now important to consider what value the Court currently has for a state such as the UK.

[112] *Al-Skeini v. UK*, *supra* note 55, para. 149. See also *Al-Jedda v. UK*, *supra* note 60. In *Hassan v. UK*, *supra* note 54, paras 104–107, the ECtHR confirmed that the ECHR continued to apply even in situations of international armed conflict 'albeit interpreted against the background of the provisions of international humanitarian law'.

[113] See, e.g., *Smith v. Ministry of Defence*, [2013] UKSC 41.

[114] *Iraq Historic Allegations Team*, available at www.gov.uk/government/groups/iraq-historic-allegations-team-ihat.

[115] Matthew Weaver, 'David Cameron "Wrong to Crack Down on Legal Claims against Iraq Veterans"', *The Guardian* (22 January 2016), available at www.theguardian.com/uk-news/2016/jan/22/david-cameron-wrong-to-deter-legal-claims-against-iraq-veterans.

[116] Richard Benyon, MP, *House of Commons Debates*, vol. 605, col. 190, 27 January 2016.

At present, the ECtHR clearly has a value to the UK at the individual level. Applications continue to be lodged and declared admissible, and violations are still found. The ECtHR has a gap-filling function that ensures justice is available to those unable to access it through national human rights law and that provides a legal route that is less influenced by national political considerations for those at the margins of UK society. But, as already noted, value at the global level is a more difficult question. The UK is a key player in the ongoing value of the Court at this level and obviously benefits enormously from human rights protection being maintained throughout the 47 contracting states as well as globally. However, responding to the argument that the global value of the ECtHR will continue to be realized without the UK's input is more difficult. It has been suggested that an alternative way to consider this value is how, at the moment, the UK clearly has a role in shaping the global norms formulated by the ECtHR. Should it exit the ECHR system of protection, the UK may find itself complying with a variety of human rights standards insisted upon by other states that it has had absolutely no role in formulating.

The greatest value of the ECtHR to the UK continues to be at the national level. But with the enhanced national human rights protection through law provided by the HRA, judgments with a dynamic value similar to *Smith and Grady v. UK*[117] (blanket ban on homosexual service personnel), *Osman v. UK*[118] (positive duty on police to protect) and *Campbell and Cosans v. UK*[119] (corporal punishment in schools) are now the exception rather than the norm. However, rather than looking to the ECtHR predominantly as a force for societal change, it is important to also appreciate its static value. It continues to act as a strong disincentive where there is a temptation to breach the ECHR, as recent experience with the Investigatory Powers Bill illustrates. It provides justice and remedy to victims of the breach of human rights law, which, for one reason or another, cannot be rectified at the national level. Most importantly for a government openly hostile to European intervention in national affairs, it helps to maintain the *status quo* by confirming the national courts' interpretation and application of human rights norms to often controversial issues. As noted above, this can provide a finality to national debates that have been ongoing for many years, such as those over political advertising, which no national institution would ever be able to achieve. It also provides a strong affirmation that the UK's overt commitment to protecting human rights through law is working, despite what critics of the judgments of the national courts and the ECtHR might think.

Each of the judgments of the ECtHR concerning the UK will have one or more types of value, and considering judgments from the perspective of value, alongside questions of impact and legitimacy, can provide different insights. For example, the judgment of the ECtHR, which found the proposed extradition of Abu Qatada to Jordan

[117] ECtHR, *Smith and Grady v. United Kingdom*, Appl. nos 33985/96 and 33986/96, Judgment of 25 July 2000.

[118] ECtHR, *Case of Osman v. United Kingdom*, Appl. no. 23452/94, Judgment of 28 October 1998.

[119] ECtHR, *Case of Campbell and Cosans v. United Kingdom*, Appl. nos 7511/76 and 7743/76, Judgment of 25 February 1982.

incompatible with the ECHR,[120] was perceived by many as being highly illegitimate given that it was contrary to the conclusion of the UK Supreme Court and the wishes of elected politicians. But it did have a number of impacts: he was not extradited until an agreement was concluded with Jordan; the law concerning deportation where there was a real risk of a flagrant denial of Article 6 was developed; and a further backlash against the ECtHR and human rights law commenced.

Stopping the analysis of the judgment there reveals only one part of the story – considering the value of this judgment, in accordance with the framework set out above, provides an additional perspective. It could be argued that the judgment had value at the individual level since it provided a remedy to an applicant marginalized and demonized with a highly politicized claim. It also had value at the global level in that the ECtHR established, for all contracting states, that it is not compatible with Article 6 of the ECHR to admit evidence obtained by torture and that it is in flagrant denial of this guarantee to deport or extradite where there is a real risk that this might occur in the destination state. And it had a value at the national level by demonstrating the strong disincentive effect of a judgment of the ECtHR on a government under considerable political pressure, holding it to account and ensuring a change in national law that prevented removal from the UK where a similar risk of a flagrant denial of justice was present.

6 Conclusion

For a state ostensibly committed to protecting human rights through law, but questioning its membership of the ECHR system and the oversight of the ECtHR, determining the value of the Court is an important exercise, alongside questions of impact and legitimacy. However, while the value of the ECtHR to a contracting state is not a question that has been completely ignored in the literature, it is question that is not often considered in detail or applied to the recent experience of a contracting state. In this article, three overarching categories of value have been identified from relevant scholarship: individual, global and national value. The strength of each will vary depending upon the circumstances prevailing in the contracting state at a particular point in time. When this framework is applied to the experience of the UK before the ECtHR over the past five years, the results are very different from that which would have been revealed 10 years ago when the effects of the much improved human rights protection provided by the HRA had yet to filter through to the applications made to the Court. However, it is not correct to claim that the Court therefore no longer has any value for the UK.

It is likely that debates over the UK's future relationship with the ECtHR will continue, particularly if the current government presses ahead with its plans for a British Bill of Rights. But, as has been demonstrated in this article, it is not possible to have a commitment to protecting human rights through law and also dismiss the value of

[120] *Othman v. UK*, *supra* note 58.

the ECtHR in contributing to this objective. Whether politics, nationalism or misplaced considerations of national sovereignty are really driving such debates, highlighting the present-day value of the ECtHR can help to illustrate what will really happen if the UK were to leave the ECHR system and the oversight of the Court. In short, those unable to pursue remedies at the national level will have no alternative; UK courts will lose their remarkable, and growing, influence on the jurisprudence of the Court; the disincentive to violate human rights provided by an independent external arbiter will fall away; the Court's potential as a catalyst for dynamic change will be lost and the value of the Court's regular confirmations that the UK is doing a good job with human rights will be squandered.