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"CONSTITUTIONALISM AND JUDICIAL PRECEDENT IN THE UK"

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INTRODUCTION

This paper sets out to explore the doctrine of judicial precedent in the UK in the context of a developing constitutionalism. By this latter term I mean a move from the constitution being seen in purely descriptive terms as 'what happens' in the UK to a situation where legal as well as political forces both limit and direct state power according to constitutional principles which accord with international norms. I will begin by setting out the current constitutional context within which precedent operates, will move on to explore the scope of the doctrine and finally I will assess the operational impact of the doctrine in relation to United Kingdom cases on the European Convention on Human Rights and Fundamental Freedoms, before concluding.

THE CONSTITUTIONAL CONTEXT OF THE HIGHER COURTS IN THE UK

There are no separate constitutional courts in the UK. Constitutional issues may come to be adjudicated at any level but important issues are likely to work their way up through the appeal process to reach the highest court.

On the first of October this year (2009) a new Supreme Court replaced the House of Lords Appellate Committee as the highest court of appeal in the UK.[1] There are no new powers given to this new Supreme Court and unlike the Supreme Court in the United States of America it is not intended to hold an overriding position in the constitution: Parliament will remain sovereign in the UK. [2] Despite this it marks a clearer separation of powers between the courts and the legislature. Current Justices of the Supreme Court will remain members of the House of Lords but will be unable to sit or vote on debates which take place there. These changes, though apparently cosmetic and symbolic, are significant in that they reflect the growing role of the courts in the UK constitution.

What is the constitutional position of judges in the UK– do judges make law? The answer to this depends on your interpretation of "law making" and it also depends on what type of law we are referring to.[3] The Common law, law that is not codified in statutes and has been established over the years through case-law, is subject to incremental development by the judiciary. In contrast statute law created by the legislature is subject only to "interpretation" by the judiciary. In both cases judges are clearly aware of the limitations on their power, which is constrained by Parliament's constitutional position as the highest law-making body in the UK. For this reason statute law always takes precedence over Common (judge made) law and when developing the Common Law judges are mindful not to address an area of law which would be better addressed by Parliament. Lord Thorpe in *Dart v Dart* [4]expresses the case for this judicial reticence when he stated

"If a fundamental change is to be introduced it is for the legislature and not the judges to introduce it. Not only is the legislative process the democratic process but it enables the route of future change to be surveyed in advance of adoption by extensive research and consultation."

Two examples from criminal law illustrate occasions when judges have caused controversy in relation to their constitutional role in developing the Common Law. In *Shaw v DPP* [5]in 1961 the House of Lords Judicial committee manufactured a Common Law offence of Conspiracy to Corrupt Public Morals because they considered that publishing a booklet which listed the names and addresses of women offering to sell sex was improper. In this case there was a strong dissent from Lord Reid who considered the action of the majority unconstitutional, "Parliament is the only proper place and I am firmly of the opinion the only proper place to settle that. When there is sufficient public opinion Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the Courts to Jump in." In the second, *R v R*[6] 1991 the House of Lords judicial committee removed the common law immunity held by husbands in relation to prosecutions for rape of their wives.

[1] In fact this is slightly misleading – as with the House of Lords Appellate Committee the Supreme Court is the highest appeal court across the UK on civil matters but only hears appeals on criminal matters from England Wales and Northern Ireland. In Scotland the High Court of Justiciary is both the first instance court and the highest court of appeal in relation to criminal matters.

[2] http://www.supremecourt.gov.uk/ at 29 October 2009.

[3] A government website on the judiciary describes as "myth" the idea that judges make the law http://www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/index.htm. In contrast Simon Lee suggests it is a "fairy tale" to suggest that judges do not make the law Simon Lee, Judging Judges, Faber and Faber, London 1989 (See Chapter Two Fairy Tales).

[4] 2 Family Law Reports 286.

[5] [1962] Appeal Cases 23.3

[6] [1992]1 Appeal Cases 599.

The former example of *Shaw* illustrates exactly the problem of judicial over-activism. There the new offence was created out of nothing and contradicted the rule of law (and the human rights principle) against the retrospective creation of criminal offences. The latter example of *R* differs. In this case the issue had been subject to heavy criticism over a long period of time from a range of groups including the police, Members of Parliament, women's groups. The court argued that it need not leave this change to Parliament as it was not creating a new offence but rather removing a " ... common law fiction which has become anachronistic and offensive …"[7]; breached the rights of wives to human dignity and had no place in modern law. The case was appealed to the ECtHR but though the change was retrospective in relation to UK domestic law it was found not to conflict with Article 7 but rather to reflect respect for Article 3 of the European Convention of Human Rights and Fundamental Freedoms.[8]

When interpreting statutes judges aim to give effect to Parliament's will or intention. Yet Lord Slynn argues that it is wholly proper for the courts to consider the application of existing law to new factual situations. To do so he says "… is not to usurp Parliament's function..." and "...not to do so would be to abdicate the judicial role... " He reasoned that "... if Parliament takes the view that the result is not what is wanted it will change the legislation."[9] However Lord Slynn was clear that when filling in gaps in legislation "... judges must not substitute their own views to fill gaps." [10]

The process of statutory interpretation starts with a literal approach – just giving the words of the statute their ordinary meaning – wherever possible. If this does not provide a workable application of the law judges may adopt a more purposive approach, looking to see what problem the law was passed to address. Until 1993 the purposes of the law were gleaned from a construction of the statute as a whole and also from an examination of the previous law before the Act. Then in the case of *Pepper v Hart*[11] the Judicial Committee of the House of Lords held that courts could look at and rely on parliamentary materials in order to establish Parliament's intention. Lord Browne-Wilkinson noted that courts could do this only where the legislation was "ambiguous or obscure."[12] Moreover Courts were limited to examining statements made in Parliament by the promoter of the legislation along with any other parliamentary materials necessary to understand the statements and their effect, and these statements could only be relied on if they were clear.[13]

While this appears to support the constitutional position of Parliament it is controversial and has also been argued to be contrary to the constitution because the courts will not be examining the whole of the parliamentary debate and are therefore privileging the interpretation of the promoter

[7] *Ibid* per Lord Lane at 611.

[8] *CR v UK* Application 20190/92.

[9] *Fitzpatrick* v *Sterling Housing Association* [2001] 1AC 27 at p33.

[10] *Ibid.*

[11] *Pepper* v *Hart* [1993] AC 593.

[12] *Ibid* at parargraph 640C

[13] *Ibid*

of the legislation – usually the government – over Parliament as a whole. [14] It is also suggested that this practice leads to greater costs in court cases because lawyers need also to research parliamentary materials as well as case-law and the legislative text.[15]

Even a literal approach to statutory interpretation may be controversial since a literal interpretation of words may change over time.[16] In *Fitzpatrick v Sterling Housing Association*[17] the Judicial Committee of the House of Lords found that the word 'family' in a Rent Act passed in 1977 should be interpreted according to its 2001 meaning rather than any meaning it had at the time the Act was passed in 1977. Parliament had not provided a fixed definition of the word in the statute[18] so it was suggested that it should be given a "loose and flexible"[19] "everyday" meaning. The courts considered that in 2001 this meaning included longstanding homosexual partners, since most ordinary people would consider this relationship to constitute 'family.' [20]

SCOPE OF THE DOCTRINE OF PRECEDENT

The doctrine of binding precedent or *stare decisis* in the English legal system is the process of deciding cases according to "like" cases or similar cases which have previously been decided by precedent making courts. Not all cases form precedent, only those decided in the High Court, Court of Appeal and Supreme Court form precedent. It may seem a trite (but very important) point to say that the doctrine of binding precedent cannot be established and operate properly without clear acceptance of a hierarchical structure of the different courts. This is necessary so that we know what decisions will bind which courts. When discussing the development of precedent in the English Legal system the jurist Professor Dias states that "A clear pyramid of authority was essential to the operation of binding precedent…" [21]

Judges do not make the ratio of case explicit in their judgments. So an analysis of the legal motivation or legal reasoning of individual judges in reaching their decision is crucial in determining the ratio of a case. We need to ascertain 'why have the judges decided that the law applies in this way?' Though unless a shared clear line of legal reasoning can be discovered which supports the

[14] Johan Steyn (Lord Steyn), "Pepper v Hart; A Re-examination," Oxford Journal Of legal Studies, Vol. 21, No.1 (2001), pp 59-72 at p.64

[15] *Ibid* p63

[16] See Lord Hutton's dissenting judgement in Fitzpatrick *v Sterling Housing Association* [2001] AC 27.

[17] *Ibid*.

[18] As Lord Clyde pointed out other statutes like the Housing Act 1985 gave a definition of family member and listed those people who could be considered to be "family" ibid p.55.

[19] *Ibid* per Lord Clyde p. 55.

[20] Though the court declined to find that a homosexual partner could be a 'spouse.'

[21] See R.W.M.Dias, *Jurisprudence*, Butterworths, London, 1985. p127

decision of the majority there may be no ratio capable of forming precedent. [22] The ratio itself is made up of the material facts of the case – those facts that are considered relevant to the reasoning of the decision – plus the legal principles involved. This sounds straightforward, yet this formula for the ratio is in itself a tautology. The ratio of a case can only be understood after it has been subjected to scrutiny by subsequent courts seeking to apply or distinguish it. In practice it is the application to later cases that defines the scope of the ratio of the earlier case. This application to later cases also defines what facts are to be considered material. In this way the ratio of the case if it can be discerned at all may be defined broadly – in order to apply it to subsequent cases or perhaps very narrowly so that future application may be avoided. If the latter takes place then the process is called "distinguishing" the case.[23] Thus an understanding of the process of distinguishing cases is crucial when considering the doctrine of precedent because the power to distinguish limits the impact of precedent without challenging either the doctrine of precedent or the validity of the case.

In order to follow the exercise above we need to have a clear record of what was said by the judges or judge in the case. So that Professor Dias argues that a system of precedent requires a reliable system for reporting the cases from precedent setting courts. While the English Legal system has case reports going back to 1282, there was no truly reliable or comprehensive reporting system until the Incorporated Council of Law Reporting for England and Wales was established in 1865.[24]

The Doctrine of Precedent in the English Legal System operates in two ways. In the doctrines vertical application courts are bound to follow precedent set in courts which are higher than themselves and So that the county courts are bound by High Court decisions, Court of Appeal and the Supreme Court (House of Lords). The High Court is bound by the Court of Appeal and Supreme Court. The Court of Appeal is bound only by the Supreme Court. In this way there is the creation of consistency between cases decided in different places and at different times. Precedent also operates horizontally in the higher courts. The County Court does not create precedent and the High Court does not bind itself though previous decisions if reported may be persuasive. The Civil Division of the Court of Appeal binds itself unless one of the exceptions set out in *Young Bristol Aeroplane*[25] applies. First that if there is more than one applicable decision then the court can chose which to follow. Second if the previous decision was decided *per incuriam*[26] it need not be followed. Third if the decision in question has been explicitly or impliedly overruled by a more recent House of Lords decision. We could also add a fourth situation: where the area needs to be revisited in the light of

[22] See Lord Denning's discussion in the Court of Appeal in *Re Harper and Others* v *National Coal Board* [1973] QB 614 – discussing the inability to find the ratio in a case called *Smith v Central Asbestos* [1973] AC 518. Three members of the court found in the appellants favour two did not, however of those who found in favour of the appellant gave a line of reasoning which supported the defendant.

[23] There is a pun in the English legal system which talks of a case being very "distinguished" rather than referring to its high status what it actually meant is that it is avoided wherever possible.

[24] *Stilk v Myrick* provides an example of the difficulties encountered before this. The case was heard in 1809 and has two contemporary reports but each of them record very different reasons for the outcome of the case!

[25] *Young* v *Bristol Aeroplane* Co [1944] 2 ALL ER 293 sets out three exceptions.

[26] This translates literally as "with a want of reason" more usually it means that the court made their decision without consideration of an important precedent or a relevant statute.

the Human Rights Act UK 1998 judges may decline to follow their own precedent. In the Criminal Division of the Court of Appeal the position is less rigid – since the question of individual liberty in each case is seen as more pressing – this position was stated in *R* v *Taylor.* [27]

The Supreme Court does not bind itself but in practice it is reluctant to depart from earlier decisions unless there is good justification. The House of Lords Judicial Committee which preceded the Supreme Court was considered to bind itself only from the late nineteenth century,[28] though some exceptions operated even then. The practical rigidity of this position was reversed in1966 by a Practice Statement from the House of Lords Judicial Committee stating that they would from then on be free to depart from previous decisions. The statement was only three paragraphs long but the constitutional significance was clearly recognised. In 1971 a further Practice Statement asked that parties who wished to invite the Judicial Committee of the House of Lords to depart from a previous decision should notify this in advance so that a seven member court could be convened.[29] Departure from previous decisions is still rare and as illustrated by the decision in *R v R* is often controversial.

Under Lord Denning in the 1970's the Court of Appeal attempted to ignore the doctrine of precedent, but on appeal to the House of Lords Judicial Committee the applicability of the doctrine was always reasserted even if where the House of Lords came to the same decision on the case.[30] Allowable exceptions to the doctrine of precedent only prove the rule. A recent exception came in the criminal law appeal of *R v James* and *R v Karami* in 1996 [31] where a 5 member panel of the Criminal Division of the Court of Appeal followed a 2005 Privy Council case rather than a decision of the House of Lords Judicial Committee from 2000. The Privy Council case which was followed determined law in a similar jurisdiction – Jersey – and its committee consisted of the same membership of the judicial committee of the House of Lords. In fact the Privy Council committee consisted of 9 Lords of Appeal in Ordinary and was meant to also represent a sitting of the House of Lords. For this reason it was no ordinary departure from precedent. A further accepted example of a departure from the doctrine of precedent is *D v East Berkshire* [2004] the Court of appeal departed from House of Lords precedent set in 2005[32]because it believed that this precedent could not survive the introduction of the Human Rights Act 1998, which domesticated the European Convention on Human Rights and Fundamental Freedoms. There was clear ruling from the ECtHR to this effect in *Z* v *United Kingdom* [33] This latter departure from precedent by the Court of Appeal was later approved by the House of Lords Judicial Committee.[34]

[27] [1950] 2 KB 368 (Very unusually it was a bench of 7 judges that decided this).

[28] *London Street Tramways* (1898).

[29] Usually only 3 or 5 Judges sit in the House of Lords.

[30] See for instance *Davies v Johnson [*1979] 2AC 264

[31] [2006] EWCA Crim. 14.

[32] *X v Bedfordshire County Council* [1995] 2 AC 633.

[33] (2001) 34 EHRR 97.

[34] *Kay* v *Lambeth* and *Leeds City Council* v *Price* [2006] UKHL 10, this case found that example to be an exception to the usual rule.

Where precedent is not binding it may still be persuasive. This is the usual position of cases decided by the Judicial Committee of the Privy Council. They will be persuasive to courts in the English Legal System but will not form binding precedent. High Court decisions may be followed as persuasive precedent by other High Courts and even by the Court of Appeal or House of Lords. This is more likely where the judgment has been given by a judge who has a strong reputation in that legal field. Decisions from other jurisdictions may also be persuasive. For instance in 1986 the House of Lords Judicial Committee declined to follow their own precedent and instead favoured an Australian High Court decision which they felt better analysed the situation.[35] The UK Human Rights Act 1998 which incorporates the ECHR into UK domestic law actually builds in a duty to consider, but not to follow, ECtHR jurisprudence. Also since the HRA 1998 the courts have been much more likely to refer to decisions from other domestic and international jurisdictions. Canadian decisions under the Canadian Charter of Rights and Freedoms 1982 have been used particularly in relation to the interrelationship between human rights and criminal law.[36] International rights jurisprudence has proved influential when considering the scope of the UK duty in relation to human rights.[37]

THE HUMAN RIGHTS ACT: A CONSTITUTIONAL CHALLENGE?

Before the Human Rights Act 1998, courts in the UK decided cases which involved individual rights on the basis of specific pieces of legislation – for instance the application of equality in employment[38] or on the basis of precedent on rights found under the Common Law.[39] The ECHR had only the status of other international treaties under the dualist English Legal System. The ECHR could be used as a tool of construction for ambiguous statutes and in practice was rarely referred to. Case law variously pronounced that the ECHR provided no more rights than the common law[40] or that it did provide further rights but could not be used since it had not been incorporated.[41] The domestic incorporation of the ECHR through the Human Rights Act has been operation for less than 10 years but from the start it was apparent that it had significant impact. The Human Rights Act 1998 has a requirement in Section 3 that "so far as it is possible to do so, primary and secondary leg-

[35] *Murphy* v *Brentwood District Cou*ncil [1991] 1AC 398, declined to follow *Anns* v *Merton Borough Council* [1978] 1AC 728 and instead followed the Australian high Court decision in Council of the Shire of Sutherland v *Heyman* 157 CLR 424.

[36] See for instance *R v A* [2001] UKHL 25 where the House of Lords followed the Canadian case of *R v Seaboyer and Gayme* [1991] 2 SCR 577

[37] See for instance *A (FC) and Others (FC)* v *Secretary of State* [2004] UKHL 56 and *R* v *Immigration Officer at Prague Airport and another ex parte the Roman Rights Centre* [2004] UKHL 55.

[38] For example the Sex Discrimination Act 1975 and the Race Relations Act 1976.

[39] For instance *Entick v Carrington (1765) 95 Eng. Rep. 807 KB* – which held that the state had no right to search private property or seize possessions without lawful authority and a properly sworn warrant.

[40] See *Derbyshire County Council* v *Times* [1993] AC 534

[41] See *R* v *Secretary of State for the Home Department ex parte Brind* [1991] 1AC 6956.

islation must be read and given effect in a way that is compatible with the Convention rights. If it is not possible to read the two as compatible then s4 allows the higher courts to make a declaration of incompatibility – but the statute still stands. In coming to decisions about the scope of convention rights and the compatibility or otherwise of legislation section 2 requires that a court or tribunal determining a question over a 'Convention Right' must "take into account" decisions, declarations and opinions that make up the jurisprudence of the European Convention on Human Rights and Fundamental Freedoms. The House of Lords is constitutionally invited to overturn previous decisions on the interpretation of statute – where an alternative compatible interpretation is possible. [42] Before the HRA 1998 The UK courts were only to use the ECHR as a tool for constructing legislative intention where the legislation in question was ambiguous. In contrast *Ghaiden v Mendoza* [43]shows the willingness of the House of Lords (and the Court of Appeal) to embrace this constitutional duty and depart from precedent. *Ghaiden* used section 3 to go a step further than the existing precedent in *Fitzpatrick* and find that longstanding same sex couples should be treated as a spouse rather than just as 'family members.[44]

A question also arose following the HRA 1998 as to whether the Court of Appeal should follow jurisprudence from the ECtHR in place of House of Lords precedent. In *Kay v Lambeth* & *Leeds City Council v Price* [2006] UKHL 10 the Non Governmental Organisations *Justice* and *Liberty* argued that where their was an apparent conflict between House of Lords precedent and a later ruling from the ECtHR the lower court should be free to depart from the Doctrine of Precedent and follow the Strasburg ruling provided that four conditions were met. "(1) the Strasbourg ruling has been given since the domestic ruling on the point at issue, (2) the Strasbourg ruling has established a clear and authoritative interpretation of Convention rights based (where applicable) on an accurate understanding of United Kingdom law, (3) the Strasbourg ruling is necessarily inconsistent with the earlier domestic judicial decision, and (4) the inconsistent domestic decision was or is not dictated by the terms of primary legislation, so as to fall within section 6(2) of the 1998 Act.."[45] The Secretary of State for the Home Office, intervening in the case also favoured a relaxation of the doctrine of precedent in these circumstances if the conflict was absolutely clear.

After assessing these arguments the House of Lords was firm that where there was clear precedent set by the House of Lords and there appeared to be a conflicting decision from the ECtHR the lower court should still follow the House of Lords decision and leave it to their Lordships to consider any conflict between their case and the ECtHR. Their Lordships argued that this was necessary for certainty in the English Legal system. In the cases in question the lower courts had shown a variety of opinion in relation to whether the cases conflicted and even where there was agreement on conflict the extent to which the conflict manifested itself. Singularly the House of Lords approved an earlier decision where the Court of Appeal had departed from House of Lords Precedent on exactly

[42] Before the HRA 1998 the ECHR was only to be used as a tool for constructing legislative intention where the legislation is

[43] [2004] UKHL 30

[44] The distinction between a "family member" and a "spouse" was material since the latter received the tenancy under terms which were much more beneficial.

[45] Lord Bingham of Cornwall at Para 41.

those grounds.[46] So the position has been changed to an extent. More usually though the reassertion of the Doctrine of Precedent in this context at worst delays the constitutional development of law but it is doubtful whether it impacts to actually frustrate development of the law. It ensures consistency between different sittings of the Court of Appeal and High Court who might otherwise interpret the ECHR decisions differently.

What is more worrying is the potential for the House of Lords to read s2 of the Human Rights Act as a limiter on their potential to develop the law in a constitutional way. While section 2 only requires courts to take into account decisions and other jurisprudential material some Judges have interpreted this as a form of precedent not to be exceeded. Particularly in relation to this there seems to be some uncertainty in relation to the margin of appreciation and its application for domestic courts. For Instance in *Bellinge*r v B*ellinger*[47] the Court of Appeal, despite seeing a conflict with Convention rights and current UK law – were reluctant to state that they believed there was clear conflict between the UK failure to recognise new gender identity in the context of marriage because the ECtHR had not at that time found a consensus on the matter across Europe. Previous cases had allowed governments (particularly the UK) a margin of appreciation. By the time the House of Lords came to hear the appeal[48] the ECtHR had decided *Godwin v UK*[49] and the House was happy to overturn their previous precedent. What if Godwin had not been decided so? The danger is that the jurisprudence from the ECHR could act as a ceiling on standards instead of a floor. Where this has occurred in UK jurisprudence it has been referred to as the 'mirror principle'– that UK courts should only give effect to rights as interpreted by Strasbourg and not interpret rights more expansively "in the light of domestic traditions."[50] If all countries in the Council of Europe merely mirrored the ECtHR this would have a problematic effect on the development of the ECHR jurisprudence itself, since domestic case law is used by the ECtHR to consider the scope of the margin of appreciation.

CONCLUSION

The legal system in the UK represents one of the strongest illustrations of the doctrine of precedent. The operation of the doctrine in the UK has sometimes been criticised because it can lead to the retention of "wrong" precedents.[51] Its great virtue is that it provides for consistent and stable

[46] See *D v East Berkshire* cited earlier.

[47] [2001] 1 FLR 389

[48] *Bellinge*r v *Bellinger* [2003] UKHL 21

[49] (2002) 35 EHRR 18

[50] Francesca Klug cited in *A Bill of Rights for the UK*? 29th Report of Session 2007-08 House of Lords and House of Commons Joint Committee on Human Rights. HL Paper 165-1 HC 150-1, p21.

[51] B.V.Harris, "Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle." Law Quarterly Review

application of the law. More than this it provides for consistent and stable development of the law according to existing constitutional legal principles and can provide for the infusion of new constitutional legal norms from time to time. Section 3 of the Human Rights Act 1998 could not have been used to request courts to reinterpret all existing and future legislation according to European Convention of Human Rights norms if there had been no clear system of court hierarchy and precedent.[52] That system allows for these important human rights principles to be adjudicated and diffused consistently all the way through the courts and tribunals in the United Kingdom. The system of precedent therefore allows the courts to go beyond a negative constitutional role in restraining the power of government but also to make a positive contribution by promoting and developing new constitutional principles based on human rights. So while ECHR jurisprudence is useful and may be persuasive, like jurisprudence from other domestic and international jurisdictions, it should complement rather than substitute the domestic development and application of constitutional principles.

(2002) 118, 408-427.

[52] A similar provision (s2) had been placed in the UK European Communities Act in 1973 to require courts in the English Legal system to recognise the primacy of EC law.