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Human Rights Protection after Brexit: Reassessing the UK's Relationship with the European Convention on Human Rights

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Abstract: *The departure of the United Kingdom out of the European Union has brought back serious constitutional and political controversies on how human rights protection should be safeguarded, especially regarding the European Convention on Human Rights (ECHR). Even though Brexit did not mandate withdrawal of the Convention under the law, post Brexit focus on parliamentary sovereignty and constitutional autonomy has brought into focus the continued participation of the UK in supranational human rights mechanisms. This has raised the issue of the possible undermining of the rights protection that is in place.*

The paper is a critical analysis of post-Brexit human rights framework through the evaluation of the dynamic relationship between UK and ECHR. It follows the historical integration of Convention rights in the Human Rights Act 1998, which provides the integration of human rights into domestic legislation and retains the sovereignty of the parliament. The paper also examines significant legislative projects and court cases since Brexit, such as proposals to revise or abolish the Human Rights Act, and assesses how they affect the access to justice and legal predictability.

The paper states that despite new claims about sovereignty, the further compliance with the ECHR is vital in establishing the proper human rights protection in the UK. Continued participation in the Convention structure not only protects the rights of individuals, upholds the rule of law and retains the international status of the UK as a state adhering to democratic principles and human rights in the constitutional landscape after the Brexit..

Keywords: Brexit, ECHR, Human Rights Act 1998, UK Constitution, Parliamentary Sovereignty, Rule of Law

1. Introduction

The protection of human rights has been a constitutive part of the constitutional system of the United Kingdom since a complicated synthesis of the common law principles, the legislative branch of the parliament, and the binding international law. In contrast to codified constitutional frameworks, the UK has traditionally resorted to judicially created rights, statutory protections and political checks and balances to advance the liberties of individuals. The European Convention on Human Rights (ECHR) is one of the most important external factors that have an effect on this framework, as it is a local instrument of human rights, implemented by the European Court of Human Rights (ECtHR). The Convention has been a key element in influencing the rights adjudication and the accountability of the government to its people since its adoption by the United Kingdom in 1951 and its inclusion into the UK law by the Human Rights Act 1998 (HRA).

The departure of the United Kingdom out of the European Union in 2020 is one of the most significant constitution changes in the contemporary British history. Although Brexit did not require the UK to withdraw formally and legally, as the ECHR is an instrument of the Council of Europe, and not the European Union the UK, instead of the European

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legal institutions, it has had major political and symbolic implications on the UK. The rhetoric of Brexit was often cast in the context of the reassertion of sovereignty, the recovery of parliamentary primacy and the diminishment of external legal restrictions on domestic rule. This wider constitutional account has necessarily spilled over to the ECHR, and the ECtHR role in the UK as a review of law and policy.

The post-Brexit environment has seen a surge of demands to allow greater constitutional autonomy and judicial restraint, especially in connection with the perceived impact of the Strasbourg jurisprudence on the local courts. The increasing lack of confidence in international human rights control and the wish to re-establish her national mastery of rights interpretation are betrayed by political suggestions to reform or repeal the Human Rights Act with a new British Bill of Rights. Critics hold the ECHR to be overly restrictive to the democratic decision-making process and the benefit of allowing unelected judges to the detriment of Parliament. On the other hand, their supporters argue that the Convention offers much-needed checks on the executive, minorities, and the rule of law.

Such discussions present some very important questions on whether the protection of human rights in the United Kingdom is going to be a thing of the past. Has Brexit diluted the normative strength of the human rights law, or has it simply changed the constitutional processes of protecting the rights? What is the extent to which the retention of the ECHR limits the sovereignty of the parliament, and is the domestic judiciary capable of effectively protecting the rights without a strong connection to the Strasbourg jurisprudence? In addition, how will the wider effect of any possible withdrawal of the Convention system on the UK legal duty and international reputation?

The paper aims to answer those questions by reviewing the relationship between the UK and the ECHR in the post-Brexit scenario. It looks at how Convention rights have been incorporated historically under the Human Rights Act 1998, the most important changes to the framework of human rights in the wake of the Brexit, and critically assesses the suggestions to reform or substitute the current human rights framework. This paper states that in spite of the renewed focus on the sovereignty of the parliament, the ongoing year-after-year interaction with the ECHR is necessary to guarantee the effective protection of human rights, legal certainty, and the credibility of the UK as a democratic state with the rule of law in the post-Brexit constitutional order.

2. The UK and the European Convention on Human Rights: Historical Context

2.1 Adoption of the ECHR

The United Kingdom was central to the formulation of the European Convention on Human Rights (ECHR) which took place following the Second World War. Following the extensive abuse of human rights that the totalitarian states practiced, the European states wanted to come up with a common system that would protect the basic rights and democratic principles. The UK with its common law traditions and adherence to liberal democracy played an active role in the drafting of the Convention especially in advancing the civil and political rights like liberty, fair trial and freedom of expression1.

UK became one of the first signatories of the ECHR in 1951, thus confirming its adherence to the supranational protection system of human rights. Nevertheless, adoption of the Convention did not, however, lead to direct national enforceability of Convention rights. The UK did not ratify the jurisdiction of the European Court of Human Rights (ECtHR) and did not accept individual petitions, which means that individuals could file claims against the state due to the alleged breach of the rights stipulated in the Convention, until 19662.

In spite of these engagements, the Convention rights were over the course of several decades extraneous to the domestic legal system of the UK. The complainants had to exhaust all possible local remedies before appealing to the ECtHR in Strasbourg in the case of violations. The process was usually time consuming, expensive and procedural in nature and it led to high delays in the attainment of justice.

1 Council of Europe. (1950). European Convention on Human Rights. Strasbourg: Council of Europe.
2 Dicey, A. V. (1982). Introduction to the study of the law of the constitution (10th ed.). London, UK: Macmillan.

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Therefore, the Convention was a matter of international obligation on the UK but at the time was not of much practical effect on the work of the common law courts in domestic judicial decision-making, until the passing of the Human Rights Act 1998.

2.2 Incorporation through the Human Rights Act 1998

The adoption of the Human Rights Act 1998 (HRA) brought a new constitutional twist by integrating the Convention rights in the domestic legislation of the UK. The Act was intended to take the rights home by introducing the capacity of the UK courts to deal with human rights claims without having to go to the Strasbourg. Key features include:

Section 2: Duty to Take ECtHR Jurisprudence into Account (Section 2 HRA)

The Human Rights Act 1998, section 2, imposes on the UK courts a duty to consider the jurisprudence of the European Court of Human Rights when addressing the questions which are connected with the Convention rights. This was meant to enhance uniformity of domestic human rights interpretation and Strasbourg case law without going the extra mile of rendering ECtHR decisions to be authoritative on the UK courts. The expression has been crafted in order to maintain judicial discretion with domestic courts capable of taking into account both the Strasbourg judgments and domestic law principles and constitutional traditions.

Section 2 in practice has been helpful to allow a positive dialogue between the ECtHR and the UK courts. Although the UK courts usually adhere to Strasbourg jurisprudence in order to make sure that they do not violate international obligations, they have the right to leave it under the circumstances of the overwhelming domestic reasons. This moderating attitude affirms the consistency of international human rights law with parliamentary sovereignty and judicial independence and refutes the argument that the Convention exercises a strict external control over local adjudication.3

Section 3: Interpretative Obligation (Section 3 HRA)

Under section 3 of the Human Rights Act 1998 there is a high interpretative burden on the courts to interpret and apply the legislation in a sense that is consistent with the Convention rights as far as possible to do so. This has greatly helped in safeguarding the human rights in the domestic legal system since the courts can interpret the primary and secondary legislation in line with the Convention without repealing the Acts of Parliament.

Section 3 interpretative power extends past traditional statutory interpretation and has enabled courts to take purposive and rights-consistent interpretations of legislation. Nonetheless, its boundaries are closely guarded, and the courts are not allowed to pursue an interpretation that is inconsistent with the basic characteristics of a legislation. Section 3 therefore maintains sovereignty in the parliament and at the same time encourages rights-friendly governance. It is one of the most revolutionary constitutional practices of the Human Rights Act, which incorporate human rights considerations into the direct legislation4.

Section 4: Declarations of Incompatibility (Section 4 HRA)

Section 4 of the Human Rights act of 1998 grants the power to the higher courts to make a declaration of incompatibility where the legislation cannot be applied in a manner consistent with Convention rights in Section 3. Critically, these statements do not overrule the obstructing law and hence maintain the theory of parliamentary sovereignty. They instead legally inform Parliament that a statutory provision is invalid in the ECHR.

This process establishes constitutional dialogue between the law making body and the judiciary. Parliament still reserves the right and manner to respond, and most frequently this is by remedial legislation. Such statements of incompatibility thus strengthen democratic accountability as well as transparency on the rights violations. Part 4 shows that the Human Rights Act does not offer the courts ultimate authority over the Parliament but instead incorporates the human rights review into a constitutionally balanced system5.

3 Klug, F. (2000). Values for a godless age: The story of the United Kingdom's new bill of rights. London, UK: Penguin.

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Section 6: Unlawful Acts by Public Authorities (Section 6 HRA)

Under section 6 of the Human Rights Act 1998, it is unlawful that the public authorities can act in a way that will not be compatible with the Convention rights unless it is mandatory by primary legislation. This provision literally instills the human rights commitments within the daily administrative decision making and governance by citizens. It is generalized to courts, government departments, local authorities, and bodies, which execute public functions.

Section 6 empowers human rights to turn into standards of behavior as legal responsibilities on governmental authorities are enforced. Citizens are allowed to pursue rights-infringing activities in the local courts, enhancing the right to justice and responsibility. This has been the key to the real efficiency of the Human Rights Act in which human rights factors play a central role in the policy execution and executive discretion of the policy at any level of government6.

The HRA preserved parliamentary sovereignty while embedding human rights into everyday legal decision-making.

3. Brexit and Its Constitutional Implications for Human Rights

3.1 Brexit and the ECHR: Legal Distinction

The United Kingdom was legally not obliged to withdraw out of the European Convention on Human Rights (ECHR) because its withdrawal out of the European Union did not imply withdrawal out of the Council of Europe since the Convention is a tool of the European Convention and not the European Union. This legal difference is a key to the interpretation of the post-Brexit framework of human rights. The European Union (Withdrawal) Act 2018 expressly saved Human Rights Act 1998 and thus ensured the domestic enforceability of Convention rights and the continued adherence of the UK to the ECHR7.

However, the effects of Brexit have generated major constitutional impacts regarding rights protection. Brexit eliminated the concept of EU law supremacy which formerly limited the powers of parliament by restoring the legislative dominance over EU law. Also, the Charter of Fundamental Rights of the European Union came to be no longer applicable to national law, which deprived it of an added protection of rights that had been operating in parallel with the ECHR. Although much of the Charter comes into conflict with Convention rights, some of the protections particularly in such areas as data protection and labor rights were more generous under EU law.

Consequently, Brexit has not necessarily reduced the Convention rights but changed the constitutional background of such rights. The abolition of the EU supervision has put larger responsibility on local institutions to protect the human rights. This change has increased the political and legal relevance of ECHR and Human Rights Act as the main instrument of rights enshrinement in the post-Brexit constitutional order.

3.2 Sovereignty and Judicial Authority

Brexit was often presented as a constitutional project, which sought to re-establish the sovereignty of the parliament and minimise foreign legal interference with internal governance. The story has spread out even outside the institutions of the European Union to include wider distrust of international judicial supervision, even that of the European Court of Human Rights (ECtHR). Opponents believe that the use of Strasbourg jurisprudence compromises democratic decision-making in that foreign unrelected judges clarify domestic law and policy.

This criticism has been most evident in politically charged spheres like immigration, national security and criminal justice. Critics of the ECHR argue that Parliament should be free to act in response to the preferences of the people, and national autonomy should be protected by the fact that the judiciary should not interfere in such areas. This argument has had a resurgence in the post-Brexit political environment, whereby sovereignty has risen to a constitutional level of priority8.

4 McLean, I., & McMillan, A. (2015). State of the union: How the UK really works. Oxford, UK: Oxford University Press.

5Young, A. L. (2009). Turbulent times: Creative destruction and the Human Rights Act. Oxford Journal of Legal Studies, 29(3), 509–541.

6 Clayton, R., & Tomlinson, H. (2016). The law of human rights (2nd ed.). Oxford, UK: Oxford University Press.

7 European Union (Withdrawal) Act 2018, c.16.

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On the other hand, the supporters of the ECHR believe that the international human rights surveillance strengthens and does not undermine democratic leadership. The ECtHR judicial review can be discussed as the preventive action against executive power abuse or majoritarianism, especially in the situation concerning vulnerable minorities. Also, the interpretation freedom of UK courts under the Human Rights Act is not strictly binding upon the decisions of the Strasbourg, because such decisions are not binding. This well-balanced solution maintains the sovereignty of the parliament and makes sure that the standards of the fundamental human rights are met, which enhances the idea of the rule of law in the post-Brexit constitutional system.

4. Legislative and Policy Developments since Brexit.

4.1 Reform or Replace the Human Rights Act Proposals.

Reform of the HRA has been suggested by the post-Brexit governments, such as the addition of a British Bill of Rights. Proposed reforms include:

4.1.1 Restricting the ECtHR Judgment Impact.

The restriction of the impact of the judgments of the European Court of human rights (ECtHR) on the domestic courts is one of the main proposals in the human rights reform in post-Brexit. Although the Human Rights Act 1998 already states that the Strasbourg jurisprudence is inapplicable, reform proposals aim to diminish the necessity to follow the ECtHR decisions even more. Advocates claim that these restrictions would bring back more interpretative independence to national jurisdiction and enhance democratic responsibility. Nevertheless, critics warn that a reduction of adherence to Strasbourg jurisprudence would have the peril of shredding the human rights standards and jeopardizing the ability of the UK to adhere to its international law. A decreased conformity with ECtHR case law can have the effect of creating a greater number of negative rulings against the UK and undermining the legal certainty. The positive judicial dialogue is still necessary in the context of providing sustainable and efficient protection of human rights in the constitutional framework of the post-Brexit9.

4.1.2 Strengthening Parliamentary Supremacy

It is often highlighted in proposals to reform the Human Rights Act that the supremacy of the parliament has to be reinforced. HRA opponents note that extensive judicial interpretation has caused constitutional power to be removed out of Parliament. The purport of reform is to make it clear that the Parliament has the ultimate responsibility to determine the extent of rights and to establish the manner in which the rights are weighted against the interests of the population. Although the idea of parliamentary supremacy is one of the principles of the constitution, excessive restraint of judicial control can decrease the protection of rights into effect. The courts are important in the review of the legislative and executive operation to facilitate its appropriateness with fundamental rights. This is because a balanced constitutional system demands that there should be an interplay between the Parliament and the judicial system as opposed to excluding judicial review. It is imperative to preserve this balance in order to have democratic legitimacy and the rule of law10.

4.1.3 Narrowing the Scope of Positive Obligations

The other reform that has been suggested is to tighten the focal range of duties in the positive obligations of the public authorities in instances of the Human Rights Act. Positive obligations compel the state to be proactive in order to safeguard individuals against the violation of their rights especially in the fields of policing, healthcare, and social welfare. The opponents hold that expansive positive obligations exceed the duties of the public authorities and promote judicial activism in the process of making policy. Nevertheless, restriction of such commitments can diminish the security of vulnerable populations and decrease the responsibility of system failures. Positive obligations have played significant roles in dealing with domestic violence and the prison conditions.

8 Dicey, A. V. (1982). Introduction to the study of the law of the constitution (10th ed.). London, UK: Macmillan.
9 Young, A. L. (2022). Democratic dialogue and the Human Rights Act. Public Law, 2022(2), 179–198.

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Limiting them to the scope is dangerous to the practical usefulness of human rights law and reduces the duty of the state to guarantee significant protection of rights11.

4.1.4 Restricting Extraterritorial Application of Rights

There are also post-Brexit reform suggestions aimed at limiting the extraterritoriality of the Convention rights, especially with regard to military actions on foreign soil. Advocates believe that the procedures will subject the UK to unwarranted litigation and limit the military efficacy. Extraterritorial interpretation of rights has however been of great significance in providing accountability to the gross violations of human rights that are committed abroad. A restriction on such usage can negatively affect the right to justice of the victims and the adherence of the UK to the international human rights. In addition, extraterritorial commitments strengthen the idea that states should not neglect the fundamental rights when they have an effective control. Any efforts to limit such protection are dangerous to undermine the universality of human rights12.

These suggestions have a question mark on access to justice, legal certainty and undermining of substantive rights.

4.2 Immigration, Asylum and national security.

The field of immigration and national security has particularly been a subject of human rights dispute as the state interest in border control and the safety of her people often collides with the individual rights. In the post-Brexit situation, the legal efforts to restrict deportation processes and limit recourse to interim measures adopted by the European Court of Human Rights are indicative of a growing focus on executive discretion. Such actions are usually explained by the need to be efficient, in the national security, and to preclude what is perceived to be abuse of human rights claims.

Nevertheless, developments like these cause serious constitutional and moral issues. Any narrowing of human rights safeguards to the immigration and incarceration contexts poses a danger to subjugation of the principle of primacy of the fundamental rights relating to all the representatives of the jurisdiction of the state, irrespective of national or legal status. Opponents state that restrictive measures have a disproportionate impact on vulnerable populations, such as asylum seekers, refugees, and immigration detainees, who cannot easily exercise their rights in a political or administrative process.

In addition, limiting judicial control in these fields undermines protection against arbitrary arrest, unlawful deportation and cruel treatment. The law of human rights plays a very important role in making sure that executive authority is used within legal and ethical limits, especially in cases where, an individual is subjected to harsh punishment like deportation or extensive imprisonment. In this, the dilution of protections of Convention in the context of immigration and national security is associated with a threat to the rule of law and the UK perception of the universal human rights standards.

5. Judicial Responses and the Role of UK Courts

The UK courts have historically taken a restrained and moderate stance in interpreting the protection of the Convention rights to ensure that they protect the main freedoms whilst observing the intent of the parliament and the doctrine of the constitution. This strategy has persisted in the post-Brexit legal environment, as courts are still active in applying European Convention on Human Rights (ECHR) standards, but more importantly applying domestic constitutional reasoning. Instead of withdrawing themselves in international human rights law, the UK courts have re-established their involvement in interpretation and application of the Convention rights under the context of the national legal traditions.

10Dicey, A. V. (1982). Introduction to the study of the law of the constitution (10th ed.). London, UK: Macmillan.
11Clayton, R., & Tomlinson, H. (2016). The law of human rights (2nd ed.). Oxford, UK: Oxford University Press.
12Milanovic, M. (2011). Extraterritorial application of human rights treaties. Oxford, UK: Oxford University Press.

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The UK Supreme Court has always insisted that decisions of the European Court of Human Rights are not legally binding to the domestic courts. Nevertheless, these determinations still have a high persuasive power especially when they present clear and consistent direction in interpreting the Convention. This subtle stance helps maintain judicial autonomy, but still makes certain that the domestic human rights adjudication is generally in line with international practices. Consequently, in the post-Brexit period, UK courts still remain as important protectors of human rights, striking the right balance between the issues of sovereignty and the rule of law.

6. International Obligations and the UK's Global Standing

Leaving the ECHR would have much wider implications beyond domestic legislation. It would:

- Weaken the position of the UK as a human rights advocate.
- Affect cooperation with the European states.
- Raise questions about adherence to the Belfast /Good Friday Agreement.
- International human right signal withdrawal.

The further compliance with the ECHR helps to strengthen the UK in terms of the rule of law and its role in international relations13.

7. Critical Assessment: Has Human Rights Protection Weakened after Brexit?

The Brexit has not led to a formal repeal of Convention rights and the United Kingdom leaving the European Convention on Human Rights. Laws The structure of human rights protection is legally upheld because the Human Rights Act 1998 is still in operation. The post-Brexit political environment, however, is characterized by the increased mistrust of international human rights control, especially, the power of the European Court of Human Rights. This has transformed the culture of normative enforcement where rights are viewed and applied.

It is not the sudden loss of jurisdiction of the law, but a gradual and progressive loss that is the greatest threat to human rights protection. Reform legislative projects to amend the

Human Rights Act, combined with a stricter judicial interpretation and selective adherence to Strasbourg decisions, pose a risk to the effectiveness of Convention rights in practice. These kinds of changes in a gradual manner might decrease access to justice and weaken protections of vulnerable groups without necessarily violating international commitments.

Therefore, although the protection of human rights in the UK is not under threat by law, there is a tendency towards the threat becoming political. There should be sustained dedication of the political institutions and the judiciary to avoid the weakening of the set standards of rights in the post-Brexit constitutional order14.

8. Case Law Analysis: The UK Judiciary, Brexit, and the ECHR

The use of judicial interpretation has been decisive in the context of defining the interrelationship between the domestic constitutional principles and the international human rights requirements. R (Miller) v Secretary of State for Exiting the European Union, R (Nicklinson) v Ministry of Justice, and Hirst v United Kingdom (No. 2), were some of the landmark cases in the post-Brexit situation that offer a useful insight into how the UK judiciary regards sovereignty, protection of human rights, and the role of the European Court of Human Rights.

8.1 R (Miller) v Secretary of State for Exiting the European Union (2017)

The Miller ruling is a constitutional watershed of the Brexit process. The Supreme Court ruled that the government was not allowed to rely on Article 50 of the Treaty on European Union without the authority of the parliament since withdrawal would in all likelihood result in the loss of domestic rights under the EU law.

13Council of Europe. (2021). The European Convention on Human Rights and the United Kingdom: Legal, political and diplomatic implications of withdrawal. Strasbourg: Council of Europe.

14McCrudden, C. (2018). Human rights, Brexit and the future of the United Kingdom. Oxford Journal of Legal Studies, 38(3), 1–20.

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Though it was not an actual human rights case, Miller has a significant implication on the issue of protection of rights. The Court reiterated the primacy of parliamentary sovereignty and at the same time acknowledged that rights of individuals constitute components of the constitutional turban of the UK. The decision highlighted that the executive cannot legally reduce rights without a clear legislative approval.

In his post-Brexit human rights view, Miller shows how the judiciary is ready to take the role of a constitutional protector, so that neither the rights (under either EU law or international duty) can be eliminated by executive decree. This argument in a roundabout way fortifies the Human Rights Act paradigm by affixing the principle that the right protection should have democratic legitimacy and legal security.

8.2 R (Nicklinson) v Ministry of Justice (2014)

In Nicklinson the Supreme Court decided on the question of whether the blanket ban on assisted suicide under the Suicide Act 1961 breached Art. 8 of the ECHR (right to respect to privacy and family life). Most of them refused to make a statement on incompatibility, but a number of judges did accept that the current legal system did access the Convention rights and that it might need revision.

The importance of Nicklinson is in the fact that it provides dialogue about the constitution. The Court acknowledged that it had the mandate to interpret under the Human Rights Act that the Convention rights were compatible, but gave a restraint to the Parliament because the case they dealt with was a morally sensitive matter.

Nicklinson proves after Brexit that the UK courts can strike a balance between the domestic constitutional values and the ECHR requirements without becoming subservient. The ruling defeats the fact that the Convention compromises democratic decision-making process and instead demonstrates that the Convention enables organized consultation between the legislature and the courts15.

8.3 Hirst v United Kingdom (No. 2) (2005)

Hirst v United Kingdom (No. 2) is one of the most politically controversial cases of Strasburger jurisprudence in the UK. The ECtHR considered that the UK blanket ban on the voting of prisoners infringed Article 3 of the Protocol No. 1 of the ECHR.

The subsequent UK administrations opposed whole-hearted respect of the ruling and positioned it as an impermissible encroachment on national democratic decisions. Critics have often used the long-standing non-implementation of Hirst as an indication of overreach by ECHR16.

Nevertheless, the fundamental role of the Convention system, as depicted by Hirst, is safeguarding the rights of minorities against the majoritarian preferences. The ultimate but less than comprehensive legislative reaction of the UK proves that adherence to Strasbourg judgments may be tailored to national constitutional customs without a complete abdication of legislative freedom.

Hirst is an example in the post-Brexit context of the conflict between the sovereignty of politics and the rule of law that would help to identify the threats of a selective application of the international human rights law17.

8.4 Judicial Attitudes toward Strasbourg Jurisprudence

The UK courts have always maintained that judgments of ECtHR are not binding in nature but should be considered. As demonstrated in the cases of R v Horncastle and Manchester City Council v Pinnock, the Supreme Court explained that domestic courts could deviate by Strasbourg jurisprudence in situations where it had convincing reasons to do so.

The subtlety has been extended to post-Brexit times, which strengthens the statement that ECHR does not enforce strict limits but permits constitutional pluralism. Even in the context of the international human rights law, the interpretive autonomy of the judiciary is not eliminated18.

15R (Miller) v Secretary of State for Exiting the European Union, [2017] UKSC 5; [2018] AC 61 (UK Supreme Court).
16R (Nicklinson) v Ministry of Justice, [2014] UKSC 38; [2015] AC 657 (UK Supreme Court).

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9. Case Law Assessment: Implications for Post-Brexit Human Rights Protection

Individually, Miller, Nicklinson and Hirst reveal that the UK has never been submissive or subordinate to the ECHR in terms of relationships. Rather, it is typified by constitutional dialogue, judicial discretion and democratic accountability.

Post-Brexit, such cases sabotage arguments of the necessity to withdraw out of the ECHR to reclaim sovereignty. The current system already enables Parliament to maintain ultimate power and at the same time avert arbitrary interference of the basic rights.

10. Conclusion

The relationship between the post-Brexit human rights situation in the United Kingdom should be evaluated by means of a critical analysis of the political processes and judicial practice. Even though Brexit has not caused overt withdrawal of the European Convention on Human Rights (ECHR), it has had a huge restructuring of the constitutional setting within which human rights are enshrined. Sovereignty, lawmaking independence, and opposition to extraterritorial judicial authority are becoming more popular in the discourse of politics, which is causing a question of whether human rights safeguarding can be sustained in the long run. Concurrently, suggestions to change and/or abolish the Human Rights Act 1998 are examples of how there is a shift in the balance between national constitutional imperatives and global human rights obligations.

A more subtle stabilising effect is however seen in judicial practice. The case law reveals that the UK courts remain quite critical and constructive in applying the principles of the ECHR and at the same time maintain the supremacy of the parliament and the democratic decision-making. The case of Miller, Nicklinson, and Hirst depicts that the constitutional system is based on dialogue as opposed to conflict between domestic institutions and international human rights law. The courts have restated that Strasbourg jurisprudence is not binding, but has persuasive power to bring uniformity and legal certainty as well as compliance with basic rights standards.

Instead of undermining the relationship of the UK to the ECHR, judicial developments indicate that a further participation in the Convention framework provides a more balanced and flexible paradigm of rights protection. This model is capable of accommodating constitutional traditions of a nation and protecting individual freedoms and vulnerabilities under arbitrary state action. Finally, continued compliance with the ECHR strengthens the rule of law, increases the democratic legitimacy, and maintains the international plausibility of the UK as a state, which fully adheres to human rights. The ECHR is an essential part of a working and principled human rights protection in the post-Brexit constitutional order.

17 Hirst v United Kingdom (No. 2), Application No. 74025/01, Judgment of 6 October 2005 (European Court of Human Rights).

18 R v Horncastle and Others, (2009) UKSC 14; (2010) 2 AC 373; Manchester City Council v Pinnock, (2010) UKSC 45; (2011) 2 AC 104 (UK Supreme Court).

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