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Unintended Consequences: Protocol 12 of the European Convention on Human Rights and Horizontal Effect

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Unintended Consequences

‘...[T]he consequences of purposive action are limited to those elements in the resulting situation which are exclusively the outcome of the action, i.e., those elements which would not have occurred had the action not taken place.’

Merton, *The Unanticipated Consequences of Purposive Social Action*

Introduction

- Article 14 of the European Convention:
 - ‘The enjoyment of the *rights and freedoms set forth in this Convention shall be secured without discrimination on any ground* such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

Introduction

- Protocol 12 of the Convention:
 - The enjoyment of *any right set forth by law shall be secured without discrimination on any ground* such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Introduction

- Article 14 of the Convention prohibits discrimination in the *application of Convention rights*.
- Protocol 12 goes further in creating a general prohibition against discrimination in relation to *'any right set forth by law'*.
- The UK is yet to ratify Protocol 12 on the basis that the Protocol is drafted too widely and goes further than necessary.

Rights Granted by National Law

- The Convention has no standing in UK law it is the HRA that incorporates (most of the) rights from the Convention into domestic law. Does this create a body of rights 'under national law'?
- Do HRA Rights therefore exist independent of Convention Rights?
- Is the HRA essentially a parochially bill of rights?

HRA Rights or Convention Rights?

‘These two sets of rights now exist side by side. But there are significant differences between them... [Convention Rights] are not as such part of this country's law because the Convention does not form part of this country's law...[HRA Rights] came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights... depends upon the proper interpretation of [the HRA].’ Per Lord Nicholls in *Re McKerr* (2004)

HRA Rights or Convention Rights?

‘[Following the HRA 1998, human] rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.’

Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).

Smoke and Mirror Principles?

- The mirror principle:
 - ‘The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: *no more, but certainly no less.*’ Per Lord Bingham in *R (Ullah) v Special Adjudicator* (2003)
- Cracks in the mirror?
 - Following *Re P* (2008) and *Nicklinson* (2014), the Supreme Court have: ‘*clarified beyond doubt that domestic courts... are not only allowed to go beyond Strasbourg jurisprudence, but are even expected to do so*’

So What?

- HRA Rights are set forth in national law, therefore, would fall under Protocol 12.
- The plain text of the HRA Rights is *applicable* in horizontal relationships.
- The only limitation upon the horizontal effect of HRA Rights is s.6 of the HRA 1998. However, the courts themselves are bound to give effect to the HRA Rights.
- Is this limitation **'objective and reasonable'** per Protocol 12?

Objective and Reasonable Discrimination

- Is there a specific justification for limiting the application of the HRA 1998?
- 'A difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised...' *Serife Yigit v Turkey* (2011) 53 EHRR 25 [71]

Is there a legitimate aim and is it proportionate?

- This will be a fact specific enquiry but some examples give an idea of the difficulty that may be faced by the State in arguing that discrimination pursues a legitimate aim and is proportionate:
 - *Larkos v Cyprus* (1999)
 - *McDonald v McDonald* (2014)

Larkos v Cyprus (1999)

'A decision not to extend [statutory] protection to government tenants living side by side with tenants in privately-owned dwellings requires specific justification... However, the Government has not adduced any reasonable and objective justification for the distinction which meets the requirements of Article 14 of the Convention, even having regard to its margin of appreciation in the area of the control of property.'

McDonald v McDonald (2014)

- ‘In my judgment, there is no clear and constant line of decisions in Strasbourg jurisprudence which applies the proportionality test on a possession claim by a private landlord.’ Per Arden LJ in *McDonald v McDonald* (2014)
- This misunderstands the independence of HRA Rights and the ability of the court to go beyond Convention jurisprudence.
- Therefore there is no objective and reasonable justification for denying HRA rights horizontal effect.

Objective and Reasonable Discrimination

‘[The European Court of Human Rights] cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention...’

Khurshid Mustafa v Sweden (2011) 52 EHRR 24 [30]-[31].

Concluding Remarks

'[T]here are other relationships, not only relationships between the individual and government, which can also blight lives, and which for many individuals can result in tragedy. Very serious distress can be caused by an employer, by a landlord, or by a neighbour. Not all wrecked lives are caused by governments.'

Peter Archer MP, HC Deb 2 April 1971, vol 814, cols 1861-1862