Britain and the ECHR

Past myths, present problems and future options

By The Rt Hon The Lord Lilley

Centre for Policy Studies

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Introduction

It is often argued that the European Convention of Human Rights was a British idea, largely drafted by British lawyers, who simply codified longstanding British rights and freedoms. So any perceived problems must be trivial or exaggerated – and certainly worth putting up with to prevent other countries from reverting to torture, slavery, arbitrary arrest etc.

But as this paper will show, this 'creation myth' is false. In fact, the ECHR was reluctantly ratified by Clement Attlee, only on condition that it had no jurisdiction in the UK: the position upheld by Winston Churchill. Indeed, leading figures in both main parties – from Attlee and Churchill to Tony Blair, Jack Straw and John Reid then David Cameron, Theresa May and Rishi Sunak – have either rejected the authority of the European Court of Human Rights, ignored its rulings, or publicly considered resiling from the Convention in part or in whole, temporarily or permanently.

'The ECHR was reluctantly ratified by Attlee, only on condition that it had no jurisdiction in the UK. This was the position upheld by Churchill'

The arguments over the ECHR, in other words, go far beyond the present outbreak of concern over small boats and border crossings. They have been with us for decades.

This paper will therefore seek to answer, and set in context, a series of vital questions. Why are the ECHR and its Court so much more of an issue in the UK than in most other signatory states? Has the impact of its rulings been trivial but exaggerated, or serious but downplayed?

Are future Court rulings likely to be fewer and less significant, as any remaining differences between our statute book and the ECHR are ironed out? Or is the Strasbourg Court, by interpreting the Convention as a 'living instrument', set to increase its impact?

Is meaningful reform of the ECHR possible? Are there realistic options between accepting the status quo and withdrawal, and what are the pros and cons of each of them? What, for example, would be the impact on the Good Friday Agreement?

Should the UK put up with unwelcome impacts of the ECHR rather than, by leaving it, risk undermining respect for human rights at home and abroad? Or will growing resentment at novel laws, made by judges unaccountable to the electorate, undermine public respect not just for human rights but for the law itself?

These are serious questions which need dispassionate analysis rather than precipitately selecting or rejecting options. This paper attempts to contribute to that debate.

Chapter 1 – The Origins of the ECHR

Whenever rulings of the European Court of Human Rights provoke criticism of the Court, its legal and political champions from both left and right rush to reassure critics that the ECHR is the embodiment of all that is best in British law.[1]

In his first month as Prime Minister, Sir Keir Starmer claimed that *'Churchill himself was one of the principal architects or the ECHR'* as he promised that his government would never leave it.[2] Lord Hermer, his Attorney General, asserted that *'the creation of the Convention … is also a source of national pride … created under the leadership of Winston Churchill and many of its provisions drafted by British lawyers'*.[3]

It is paradoxical here to see Labour politicians giving credit to a Conservative hero, and arch-enemies of populist chauvinism evoking national pride to defend supranational policies. But Labour supporters can also be reassured that the ECHR itself was negotiated by Clement Attlee's government, which was the first to ratify it. Under Harold Wilson, UK citizens were given the right to appeal to the European Court of Human Rights. And Tony Blair gave the Convention direct effect in the UK via the Human Rights Act. Left-wing critics may even be assured that the ECHR injects some of the radical human rights approach of the French Revolution into Britain's more conservative legal tradition.

'The most fervent assurances about the ECHR have been given to Conservatives by Conseratives'

But the most fervent assurances have been given to Conservatives by Conservatives. Here, for example, are Jesse Norman and Peter Oborne in 2009, making 'the Conservative case for the Human Rights Act':

'The European Convention of Human Rights, which the Human Rights Act incorporates into British law, is an impeccably Conservative document. It was inspired by Sir Winston Churchill, drafted in large measure by the Tory politician David Maxwell Fyfe (later Lord Chancellor Kilmuir), and ratified by Britain in March 1951, the first nation to do so. And … all of the great ideas embodied by the European Convention – including those of freedom under law, restraint on the power of the state and a deep understanding of the link between individual liberty and private property – are based on ancient conservative beliefs … the HRA is a charter against socialism and state interference.'[4]

1 The term 'British law' is used throughout to cover the separate systems of English law (which also covers Wales) and Scottish law.

2 Addressing the European Political Summit at Blenheim Palace July 2024. See: K. Starmer, 'PM's remarks at the opening plenary session of the European Political Community: 18 July 2024', Prime Minister's Office, 10 Downing Street (18 July 2024). Link

3 R. Hermer, 'The Rule of Law in an Age of Populism, Bingham Lecture 2024' (14 October 2024). Link

4 J. Norman & P. Oborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act* (2009).

Although these claims are impossible to reconcile with the history of the ECHR, let alone its contents, they are often quoted by those trying to bolster Conservative support.[5]

Yet in truth, the initial driving force for a declaration of human rights as a war aim was American, not British.

Even before entering the war, Franklin Roosevelt wanted to give the conflict a moral purpose to justify his support for Britain. Hence his 'Four Freedoms' speech and signing the Atlantic Charter in 1941. The commitment to *'human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'* first appeared in the UN Charter drawn up in San Francisco in April 1945, which set up a committee chaired by the President's widow Eleanor to draft an international bill of human rights.

This process led to calls for a more binding commitment to human rights for Europe, culminating in the European Convention of Human Rights. But the impetus came from the Continent in the wake of the horrors of Fascism and Nazism, and in the context of an internal and external Communist threat and a West European movement towards unity.[6] British supporters of this proposal saw it as primarily of benefit to the newly liberated Continent for the same reasons.

'Government officials were concerned from the start that giving a court the right to interpret a list of abstract rights would give judges the power to make new law'

The British government responded to both the proposed UN Declaration and European Convention by submitting a draft list of key rights and freedoms, hedged around with limitations. However, the aim was damage limitation. Government officials were concerned from the start that giving a court the right to interpret a list of abstract rights would give judges the power to make new law. They hoped that making the proposed rights less absolute and open-ended than might otherwise be the case would restrict the scope for creative interpretation.

So when the British government published (as a 'Draft International Bill of Rights')[7] its proposals for what became the UN Declaration of Human Rights, the publication made clear that such a charter could not override Parliamentary sovereignty – but also did not need to, since these very rights had evolved within Britain's parliamentary system and become embedded in our national consciousness.[8] That is why the British draft did not mention any methods of enforcing these rights.

5 To be fair to the authors, their aim was to persuade the Conservative Party to drop its pledge to repeal the Human Rights Act. Their central argument was that it was better to have the ECHR interpreted by British courts rather than the Strasbourg Court. They took adherence to the ECHR as a given, and so had to defend it, since at that stage 'no reputable commentator has suggested [leaving it]'. For a precis of their argument, see: P. Oborne, 'Enough poison about the Human Rights Act. It is Churchill's legacy', *The Guardian* (4 October 2009). Link

6 The full chronology has been meticulously documented by Geoffrey Marston and Brian Simpson, on whose accounts this summary draws heavily. See: G. Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950', *The International and Comparative Law Quarterly* vol.32 (1993), pp.796-826. Link. And also: A.W. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2004). Link

7 HMSO, 'The United Kingdom Draft of an International Bill of Human Rights' (June 1947). A copy of this submission is readily available online through the UN Digital Library. See: UNDL, 'International Bill of Rights documented outline: texts / prepared by the Division of Human Rights' (10 June 1947). Link

8 See above, *'Comment to Article 2': 'Proposals that the provisions of the Bill of Rights should be embodied in the constitution of State parties … are not practical for … some countries, like the United Kingdom … no enactment can be given greater authority than an Act of Parliament, and one Act can repeal any other Act of Parliament. Therefore, … human rights can only have as their special safeguard the solemn international obligations undertaken in this Bill together with the firm foundations which these principles have in the deepest convictions of Parliament and the people.'*

In the event, no enforcement mechanisms were included in the Universal Declaration of Human Rights adopted by the UN General Assembly on December 10, 1948. But in March of that year Britain, France and the Benelux countries signed the Brussels Treaty which reaffirmed their *'faith in fundamental human rights … proclaimed in the Charter of the United Nations'*. And in May, the congress of a non-governmental International Committee of Movements for European Unity, chaired by Churchill, called for *'a Charter of Human Rights … and a Court of Justice with adequate sanctions for [its] implementation'*.

A deputation from the congress, led by Churchill, met Attlee and Ernest Bevin to discuss these ideas in June 1948. But again, the idea of the British as whole-hearted enthusiasts for this process is hard to sustain. The Civil Service brief for this meeting said that the British Government would oppose any idea of an International Court. A Foreign Office internal briefing stated that: *'it seems inconceivable that any Government, when faced with the realities of this proposal would take the risk of entrusting these unprecedented powers to an international court, legislative powers which Parliament would never agree to entrust to the courts of this country…'*.[9] The brief concluded that: *'an international court to which individuals had recourse against the judicial, legislative and executive decisions of their own country would be abused by pressure groups, provide a small paradise for some lawyers …'*. In the event, it appears that Churchill and his colleagues did not even mention the idea of a Court at the meeting, which focussed on setting up a European Assembly.[10]

'Maxwell Fyfe was certainly involved in composing the first draft, but his role could better be described as diligent midwife than principal author'

The Council of Europe, created by the Brussels Treaty, came into being in May 1949 and its consultative assembly soon started work on a Human Rights Convention, to be accompanied by a Commission[11] and a Court. David Maxwell Fyfe (who, having been the British prosecutor at the Nuremburg trials, was a supporter of a Court of Human Rights) *'was certainly involved in composing the first draft … [but] his role could better be described as diligent midwife rather than one of its principal authors'*.[12]

Maxwell Fyfe and fellow Conservatives certainly played a part in ensuring that the Convention did not include the positive rights contained in the universal Declaration of Human Rights e.g. the right to social security; the right to work and fair pay; and the right to an adequate standard of living. In the Consultative Assembly, he called for the safeguard of only *'negative rights and freedoms'*, implicitly threatening to withhold British support if *'so-called economic or social rights'* were included.[13] Maxwell Fyfe, a 'free enterprise Tory', shared Churchill's ill-judged fear that Labour's *'Socialism is inseparably interwoven with totalitarianism'* which would lead to *'some form of Gestapo'*.[14]

Labour delegates to the Convention, by contrast, were afraid that simple negative rights could be used by the courts to thwart their economic programme, citing how the US

9 W.E. Beckett, Legal Advisor to the Foreign Office, Chairman of the Working Party on Human Rights established by the Cabinet Office Steering Committee on International Organisations. See: National Archives, CAB 134/424 [IOC(HR)(49)7].

10 Simpson, *Human Rights*, p.6.

11 The Commission initially had a filtering role but was abolished in 1998 to streamline processes.

12 M. Torrance, 'Maxwell Fyfe and the origins of the ECHR', *Journal of the Law Society of Scotland* (19 September 2011). Link

13 M. Duranti, 'Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politic', *Humanity* vol.3 (2023), pp.361-383. Link

14 W. Churchill, 'Party politics again' (4 June 1945). See: The Papers of Sir Winston Churchill, Churchill Archives Centre, GBR/0014/CHAR 9/208A-C, 'Speeches: Non House of Commons: Speech notes and source material., 04 Jun 1945 - 21 Jun 1945'. Link

Supreme Court had struck down key parts of Roosevelt's New Deal. In the end they nearly all abstained in the vote on the draft Convention.[15]

Foreign Office officials, having failed to dent the momentum behind the Convention and for a Court, reported back that an enforcement mechanism (the right of citizens to 'petition' – i.e. take cases to a Court) *'has now come to have a symbolic significance as a proof that the Council of Europe and its professed concern with Human Rights is not, like the similar professions of the Communist Governments, a hollow mockery'*.

Official advice concluded that refusal to sign up to the full Convention *'acceptable to nearly all the remaining states of the Council of Europe would appear to be almost indefensible'*. Subsequent advice to the Cabinet asserted that *'the consequences of our being one of a small minority … which refuses to accept the Convention would be serious'*, albeit in some unspecified way. It seems that, even in those days, Foreign Office officials had a horror of being isolated.

The Foreign Office paper to Cabinet claimed that the draft *'definitions of rights and limitations thereto … follows almost word for word the actual texts proposed by the United Kingdom … consistent with our existing law in all but a small number of comparatively trivial cases'*.[16] So the impact of accepting the Court and right to petition would be minimal.

> **'The Chancellor, Sir Stafford Cripps, argued that a government committed to a planned economy could not ratify the Convention'**

This, however, failed to convince the Cabinet. The main concern, expressed by the Lord Chancellor, was that *'it was intolerable that the code of common law and statute law which had been built up in this country over many years should be made subject to review by an International Court administering no defined system of law'*.[17]

There was also predictable opposition from the Colonial Secretary, who was concerned that a Human Rights Convention, with the possibility of a right to petition a Court, could be used to provoke unrest in the colonies whether Britain accepted it or rejected it, and whether or not the colonies were within its purview.

Less predictably, the Chancellor, Sir Stafford Cripps, argued that *'a government committed to a planned economy could not ratify this Convention'*. Various articles restricting entry to private premises were supposedly *'inconsistent with the powers of economic control essential to a planned economy'*. This rather extreme argument was later rejected by Bevin, who had not been present.

The Cabinet therefore refused to accept the proposals and instructed the Foreign Secretary to remit the draft for further consideration by other governments. Its members were clearly angry that this issue had been drawn to their attention so late in the day. The minutes demanded *'a memorandum explaining how it came about that a draft*

15 Duranti, 'Curbing Labour's Totalitarian Temptation'.

16 In fact, the final text differed substantially from the UK submission, which did not even include articles on family life or the right to marry.

17 Jowitt had previously set out his concerns more fully: *'I feel grave apprehension … Our whole constitution is based on the principle that it is for Parliament to enact laws and for the judges to interpret the laws when enacted. Is it proposed that the Human Rights Commission can invalidate a law on the ground that it is opposed to the Treaty, and put themselves in the position of the Supreme Court of the United States, who can declare laws are unconstitutional or is it proposed merely that they can alter a decision arrived at by the judges on the true interpretation of the law?'*

Convention … should have reached such an advanced stage of preparation before it was considered by Ministers'.

Those concerns rumbled on after the Cabinet meeting as the Lord Chancellor, Lord Jowitt, complained that the Convention *'is so vague and woolly that it may mean almost anything … this document is a monument of lack of precision'*. Because of the need to secure compromise, *'vague and indefinite terms have been used just because they were vague and indefinite'*. He blamed this partly on entrusting the negotiations to *'officials – who would probably [admit] their complete inability to draft a Bill (for example) to prevent the docking and nicking of horses – [yet] had to take their share of drawing up a code compared to which the Code Napoleon – or indeed the Ten Commandments – are comparatively insignificant'*.

The Attorney General, Sir Hartley Shawcross, expressed his general agreement with Jowitt and added that *'the right of individual petition [is] wholly opposed to the theory of responsible Government'*.

Subsequent negotiations within the Council for Europe secured some further concessions and above all ensured the vital provision that signatories to the Convention could choose whether or not to accept the jurisdiction of the Court and the right of subjects to petition it. There was clearly no question of the British government accepting either of these.

'The Cabinet eventually agreed to sign the Convention, but not to accept the right of individual petition or the jurisdiction of the Court'

However, there was concern about whether even signing up to the list of rights in the Convention would have legal consequences. Although officials had assured ministers that Britain's existing body of law was consistent with the text, they acknowledged that there were some differences in *'a small number of comparatively trivial cases'*.

The question then arose as to whether the UK should exercise the option under Article 64 to seek reservations in respect of these. Jowitt successfully argued that we should not do so lest it give the impression *'that we intend to amend our law to conform in detail with every provision in it on which we have not made a specific reservation'*. The Attorney General advised that *'no legislation is required to give effect to the Convention'*.

The Cabinet eventually agreed to sign the Convention, but not to accept the right of individual petition or the jurisdiction of the Court. The UK duly signed in November 1950 and ratified in March 1951 – the first country to do so.[18] But the Attlee government chose to regard the Convention as a statement of general principles which could not override UK laws.

When Churchill returned to No 10 the next year, he accepted this position, as did Maxwell Fyfe – first as Home Secretary, then as Lord Chancellor as Viscount Kilmuir. Churchill did not give the Court jurisdiction over UK laws and governance by extending to UK citizens the right to petition the Court, nor alter any laws which conflicted with the Convention, which Britain continued to treat as declaratory.

This raises the question as to whether Churchill had ever believed that the UK should itself be subject to a European *'Court of Justice with adequate sanctions'* whose establishment he had welcomed when he was in Opposition.

18 This speedy ratification is often cited as implying UK enthusiasm. In fact, most other countries had time-consuming domestic processes between agreement, signature and ratification, whereas the UK did not.

In fact, Churchill only ever made three explicit references to a European Court of Human Rights.[19] The first was to the European Movement, of which he was Chairman, in Brussels in 1949: *'The European Assembly is now on the point of being achieved. … We have now to take the second step forward and try to establish … the setting up of a European Court of Human Rights. Such a court in no way challenges the authority of a world court, but … Let Europe judge Europe.'* He cited the recent Communist show trial and incarceration of Cardinal Mindszenty as the sort of thing to be prevented by a European Court.

Second, he told the newly established Council of Europe in Strasbourg in August: *'Once the foundation of human rights is agreed on the lines of the decisions of the United Nations at Geneva – but I trust in much shorter form – we hope that a European Court might be set up, before which cases of violation of these rights in our own body of 12 nations might be brought to the judgment of the civilized world. Such a court, of course, would have no sanctions and would depend for the enforcement of its judgments on the individual decisions of the States now banded together in this Council of Europe. But these States would have subscribed beforehand to the process, and I have no doubt that the great body of public opinion in all these countries would press for action in accordance with the freely given decision.'*[20]

Finally, in London in 1951: *'There can be no Europe unless it be based upon a solid foundation of trust and comradeship between the French and German peoples … a Council of Europe has been set up. A European Army is beginning to take shape, and a European Court of Human Rights is shortly to be established. These are important and much-needed gains because the international situation has deteriorated, and the need for uniting and strengthening Europe has become ever more urgent.'*

'Churchill did not give the Court jurisdiction over UK laws and governance by extending to UK citizens the right to petition the Court, nor alter any laws which conflicted with the Convention'

Much ink has been spilled over whether Churchill ever intended Britain to be subject to such a Court, any more than he really envisaged the British Army becoming part of a European force – or whether he saw the proposed Court as essentially designed for the Continental countries emerging from Fascism and facing the threat of domestic Communist parties.

But actions speak louder than words. Once back in Downing Street Churchill upheld the policy adopted by the previous Labour government, which meant that the Court could not rule on cases involving the UK, nor would our laws be changed to conform to the Court's interpretations of the Convention. Nor can I find any specific discussion about this in government documents of this period – which itself belies the idea that Churchill and Maxwell Fyfe brought with them enthusiasm for giving the Court or Convention full effect in the UK.

Indeed, within a month of returning to Downing Street, Churchill issued a Cabinet memo spelling out that he supported European integration on the Continent but did not intend Britain to participate. *'Our attitude towards further economic developments on the Schuman lines resembles that which we adopt about the European Army. We help, we dedicate, we play a part, but we are not merged with and do not forfeit our insular or Commonwealth character. Our first object is the unity and consolidation of the British Commonwealth … Our second, 'the fraternal association' of the English-speaking world;*

19 The Churchill Project at Hillsdale College cite only the first and last of these quotes.

20 W. Churchill, 'Speech to the Council of Europe' (17 August 1949). Link

and third, United Europe, to which we are a separate closely – and specially – related ally and friend.'[21] His approach to legal integration in Europe conformed to this.

Similarly, in 1949 Maxwell Fyfe had declared that *'We cannot let the matter rest at a declaration of moral principles and pious aspirations, excellent though the latter may be. There must be a binding convention.'*[22] Whether he intended it to be binding on the UK or just on European countries emerging from Nazism is not clear. But again, actions or inactions speak louder than words. He served Churchill as Home Secretary from 1951 to 1954 then as Lord Chancellor until 1962 under Anthony Eden and Harold Macmillan. Yet he appears never to have tried to ensure that the Convention was binding on the UK and rejected a call to do so in 1958.

'The view of both Labour and Conservative leaders was that Britain had done its bit by persuading our neighbours to entrench British rights via an international court'

In summary, the view of both Labour and Conservative leaders was that Britain had done its bit by persuading our neighbours to entrench British rights via an international court. But we had no need to accept its jurisdiction since we already had those rights – a view Lady Hale recently derided as the British *'export theory of human rights'*.[23]

So it is a gross exaggeration to justify British adherence to the European Convention by invoking the authority of Winston Churchill or David Maxwell Fyfe, or indeed Clement Attlee.[24] Both Churchill and Maxwell Fyfe, when in Opposition, supported the idea of a Convention backed by a Court. But they were above all intended for Western European countries emerging from Nazi tyranny and facing the threat of Communism. When they had the opportunity to extend these institutions' jurisdiction to the UK, neither took any steps to do so.

Those – from the BBC to Liberty – who claim Churchill as the author of the European Human Rights Court and Convention never mention that, as Prime Minister, he never allowed the jurisdiction of the Court to apply to the UK nor changed a single law to align with the Convention.[25] Liberty even anachronistically say that *'between 1951 and 2000 [the Strasbourg Court] found many violations by the UK government against UK citizens'*, ignoring the fact that UK citizens could not bring cases until 1966.[26] Even less excusably, the new Attorney General, Lord Hermer, has retailed the myth of Churchillian enthusiasm for, and the British roots of, the European Court and Convention of Human Rights without mentioning that both Attlee and Churchill kept the UK outside their jurisdiction.[27]

The ECHR was certainly not an *'impeccably Conservative document'* – still less was it impeccably conservative with a small 'c'. From the start, the Convention was recognised – particularly by law officers – as being radically incompatible with UK legal and constitutional traditions.

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21 W. Churchill, 'Cabinet Memo, November 29, 1951', National Archives, CAB129/48C(51)32.

22 Consultative Assembly of Council of Europe (19 August 1949). See: Torrance, 'Maxwell Fyfe'.

23 B. Hale, as reported in: Hansard, 'European Convention on Human Rights: 75th Anniversary' (20 March 2025). Link

24 Maxwell Fyfe is a particular unlikely hero for modern human rights activists since as Home Secretary he started a campaign to rid England of homosexuality ('this male vice … this plague') and supported the death penalty.

25 The BBC Newsbeat video 'Your Guide to the Human Rights Act' begins with partisan inaccuracy by asserting that after the horrific abuses of human rights during the Second World War, 'the then Prime Minister, Winston Churchill, asked lawyers to draw up the ECHR'. The ECHR was not drafted at his request, he was not PM when it was drafted, and as PM he did not give it jurisdiction within the UK. See: BBC Newsbeat, 'The Human Rights Act', *YouTube* (22 May 2015), esp. 00.36-00.45. Link

26 Liberty, 'What is the ECHR and why does it matter?' [accessed 25 May 2025]. Link

27 Hermer, 'Bingham Lecture 2024'.

They realised that the vagueness of the Convention would give the Court the power to create new legislation rather than simply apply clearly defined laws. And this new law made by a foreign Court would not be accountable to representative government. Legislation without representation was as unacceptable as taxation without representation. They also feared that it would promote a *'rights culture'* and create *'a paradise for lawyers'*. Hence the decision by the Labour government, endorsed by its Conservative successors, to opt out of the Court and to treat the Convention as a declaration of principles.

It was not until 1966 that a subsequent Labour government, under Harold Wilson, signed up to the jurisdiction of the European Court of Human Rights, giving British residents the right to petition the Court. The decision was announced during the Christmas recess, never debated in Parliament, and barely mentioned in the media. Wilson apparently made the decision to prepare the ground for a renewed bid to join the Common Market – to demonstrate Britain's willingness to accept the jurisdiction of an international Court – as a precursor to accepting that of the European Court of Justice. It was a bizarre olive branch given that France, which was the main opponent of UK membership, had not even ratified the Convention. Indeed, it did not do so until 1974 and did not give French citizens the right to petition the Strasbourg Court until 1981.

Chapter 2 – The ECHR in Practice

The lengthy review of the origins of the ECHR is important.[28] If the 'creation myth' were true – that the ECHR simply codified longstanding UK rights – it would mean that it would have few impacts on law or governance in the UK. The number would decline over time as our statute book was brought into line with the codified rights; any impacts would be minor; and such impacts would be a price worth paying to prevent our Continental neighbours relapsing into tyranny and cruelty.

In which case only constitutional pedants and right-wing chauvinists would have a problem with the ECHR. Moreover, introduction of the Human Rights Act in 1998 – which gave the European Convention of Human Rights direct effect in domestic UK law – should have largely removed any resentment felt about the involvement of foreign judges while respecting the sovereignty of Parliament.[29]

So how has it worked out in practice?

Have ECHR cases been few and declining?

The claim that the ECHR simply codified existing British rights implies that few, if any, laws or practices in the UK would be incompatible with the Convention.

In fact, the Strasbourg Court has made judgments in 567 cases concerning the UK and found us to be in violation in one or more respects in no fewer than 329 of them. In addition, 25,647 British cases had been 'decided' by the Court – the vast majority being declared inadmissible or rejected (after creating plentiful business for human rights lawyers).

To be fair, the overwhelming majority of British cases decided by Strasbourg were initiated before the Human Rights Act came into force in October 2000. The HRA was presented as *'bringing human rights home'* – a typical Blairite slogan intended to appeal to those who could not trust Johnny Foreigner in Strasbourg to adjudicate on our rights. The more substantive justification was to make it simpler and cheaper for UK citizens to invoke convention rights by doing so domestically.

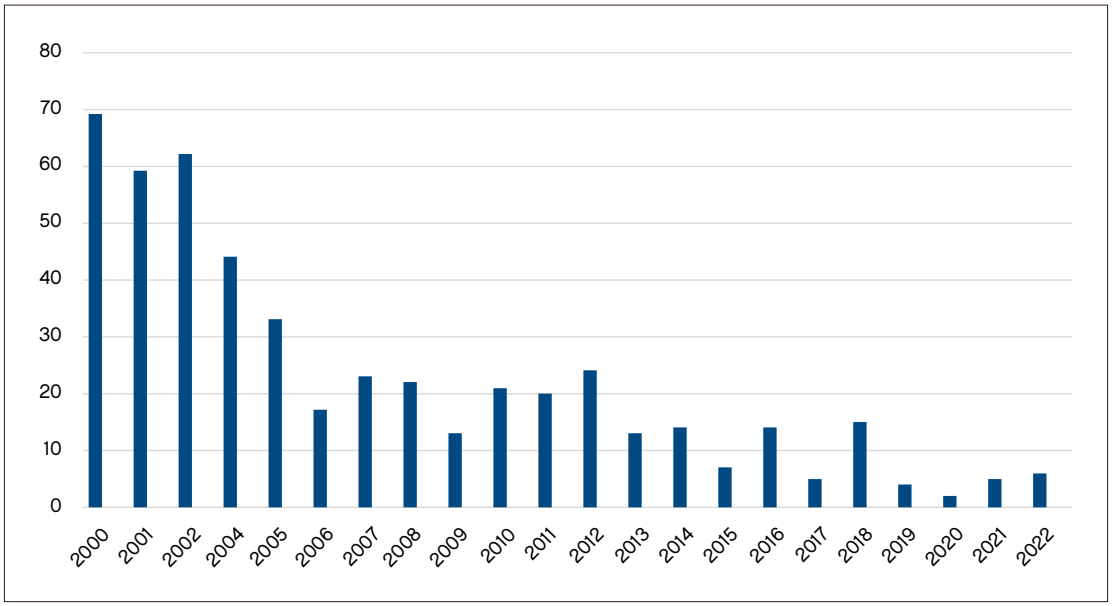
In recent years, around 100 cases a year have been 'allocated for judicial formation' in Strasbourg, but the number making it through to final judgments has been in low single figures. However, the idea that this decline in numbers means the impact of the ECHR has subsided is an illusion. Many more cases involving human rights are heard by domestic courts than ever reached Strasbourg. It would be astonishing if that were not the case, given that the justification for the HRA was that British courts would be more accessible to British people than taking cases to Strasbourg.

28 Another excellent recent account is given in the May 2025 Policy Exchange paper 'Revisiting the British Origins of the European Convention on Human Rights' by Dr Conor Casey and Dr Yuan Yi Zhu, including a foreword by Lord Roberts of Belgravia and preface by Lord Sumption. Link

29 For a summary of these issues, see: P. Lilley, 'Debunking the myths about the ECHR ', *The Spectator* (14 March 2025). Link

Statistics on the total number of human rights cases considered by domestic courts under the HRA are not available. However, in the Immigration and Asylum Tribunals, where human rights cases are identifiable, they have accounted for 40% of the 350,000 cases received over the past eight years – dwarfing the number of British cases of all kinds ever taken to Strasbourg.[30]

Judgments on UK cases in Strasbourg since the Human Rights Act



The Impact Assessment for Dominic Raab's draft Modern Bill of Rights recorded that: *'Human rights cases represented 5% of the total caseload of the House of Lords (as the then final appellate court) in 1996. This proportion gradually increased following the introduction of the HRA, peaking at 41% in 2005. Since 2012/13 the annual reports and accounts of the Supreme Court (which replaced the appellate jurisdiction of the House of Lords) have included information on the number of human rights judgments. The Supreme Court gave judgments in 10 human rights cases in 2014/15, out of a total of 81 judgments that year, nine in 2015/16 out of 81, four in 2016/17 out of 74 and three in 2017/18 out of 78. Since 2018/19, the Supreme Court annual reports do not include judgments on human rights grounds in the same way anymore. Any judgments relating to judicial reviews or other cases that have included human rights grounds are also not recorded.'*[31]

Moreover, the number of cases coming before UK courts is not a reliable metric, since it reflects not only the number of cases where UK residents lodge a claim against the Government, but also the propensity of public authorities to contest such claims.

30 MoJ, 'Tribunal Statistics Quarterly: January to March 2025' (12 June 2025). Link

31 MoJ, 'Impact assessment: Draft Bill of Rights' (June 2022), p.13. Link

Have ECHR judgments been mainly on minor or substantive issues?

Although the political focus has frequently been on cases involving asylum and foreign criminals, Strasbourg's rulings have covered a wide range of other issues. And they have been substantive enough to cause problems for successive governments.

In many cases this is because the Strasbourg Court has imposed specific duties on public authorities affecting public expenditure and use of resources, decisions previously made by Parliament not the courts.

This novel tendency was noted as long ago as 1993 by Professor John Merrills, who wrote:

'Every government is aware that by subscribing to the Convention … domestic laws and practices may have to be modified to avoid impinging on the various liberties the Convention was brought into being to protect. What a government may not bargain for is to find itself put to considerable trouble and expense … to advance particular social or economic policies which it may not wholly support.'[32]

'Although the political focus has frequently been on cases involving asylum and foreign criminals, Strasbourg's rulings have covered a wide range of other issues'

Court rulings causing problems to governments have ranged across a whole range of issues, including:

- The McCann and others case, involving three IRA terrorists killed by the SAS in Gibraltar. The Court (by a majority of 10 to 9, with the President and three most senior judges in the minority) held the UK (not the soldiers) responsible for loss of life because of 'inadequate planning'.[33]

- The operations of the Armed Forces. Although the Convention provides that contracting states shall secure the rights of *'everyone within their jurisdiction'*, the Court has held that this applies outside UK territory where UK forces exercise control – even though the Convention gave member states the option not to apply it in their dependent territories.[34] Former Defence Secretary Ben Wallace condemned this as 'lunacy', not least because it means the Armed Forces may opt to use lethal force to avoid ECHR complications if suspected terrorists are captured.

- The Osman case.[35] This ruled that *'it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'*. As a result, where police have intelligence of a death threat or risk of murder, but not enough evidence to justify arresting the possible offender, the police must devote considerable resources to giving 'Threat to Life Warnings' and advice. In practice the main beneficiaries (75% in the case of Manchester police) are criminals involved in gang feuds who are probably well aware that their rivals are hostile and violent.

32 J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993).
33 Case of McCann and Others v The United Kingdom (European Court of Human Rights, September 1995).
34 Case of Al Skeini and Others v The United Kingdom (European Court of Human Rights, July 2011).
35 Case of Osman v The United Kingdom (European Court of Human Rights, October 1998).

- The Tigere case, where the UK Supreme Court ruled that requiring students to be lawfully ordinarily resident in the UK for three years to be entitled to a student loan was unlawful discrimination under the ECHR.[36]

- The Chahal case, where the Strasbourg Court ruled that the Government cannot weigh the risk a person poses to national security against the risk of ill-treatment they might face if deported (in this case to India). It ruled that Article 3, which forbids *'torture or inhuman or degrading treatment or punishment'*, provides *'absolute'* protection against deportation if there is any substantive risk of this in the destination country.

- The Hatton case, in which the Court established that Article 8, the Right to Family Life, can extend to environmental matters.[37] Even though it found that in this case the UK had properly balanced benefits to the economy from night flights at Heathrow against the impact of noise on the appellants (under their right to family life), this had profound implications for the future.

'The Swiss government was ordered to set aside a previous referendum result, in order to eliminate more rapidly Switzerland's negligible 0.2% share of world CO_2 emissions'

- Manchester City Council v Pinnock and Others, in which the Supreme Court overrode the Anti-Social Behaviour Act 2003, which gave local authorities the right to regain possession of 'demoted tenancies' from anti-social tenants. The Court ruled that the courts would have to assess in each case whether repossession was proportionate to the right to family life under Article 8, making repossession much more uncertain despite the clear intent of the Act.

All these cases, however, have recently been put in the shade by the Strasbourg Court's momentous decision in favour of 2,000 elderly Swiss ladies who argued that their lives were vulnerable to heatwaves unless their government did more to tackle global warming. The Swiss government was ordered to set aside a previous referendum result which had rejected further costly measures, in order to eliminate more rapidly Switzerland's negligible 0.2% share of world CO_2 emissions.[38] *'Democracy,'* the Court ruled, *'cannot be reduced to the will of the majority of the electorate and elected representatives in disregard of the requirements of the rule of law.'* In other words, the opinions of the Strasbourg judges.

What about asylum and immigration?

Despite the wide range of issues raised by ECHR judgments, the media focus has generally been on the impact of human rights legislation on the ability of governments to remove failed asylum seekers and foreign criminals.[39]

The 'Travaux Preparatoires' for the ECHR show that there was little discussion of how it would affect deportation of criminals or return of migrants. This was probably because

36 Case of R (Tigere) v Secretary of State for Business, Innovation and Skills (Supreme Court, July 2015).

37 Case of Hatton and Others v United Kingdom (European Court of Human Rights, July 2003).

38 A 2020 referendum rejected as too extreme a Parliamentary target of 30% reduction in emissions by 2030. It was replaced by a more moderate staged reduction to Net Zero by 2050.

39 This is not a uniquely British concern: as mentioned elsewhere, France declared that it would deport foreigners it deemed a threat to security, even if that meant ignoring Article 39 orders from Strasbourg, and has subsequently done so. Germany recently sent a plane of Afghan criminals to Afghanistan. Italy's court ruled that migrants processed in Albania could not be returned to countries (like Egypt) which were not safe throughout their territory.

the Geneva Refugee Convention was being negotiated at the same time and enshrined the principle of non-refoulement, ie that no one should be returned to a country where they would face harmful, degrading or illegal treatment.

However, the ECHR did require signatories to *'secure to everyone within their jurisdiction'* the rights and freedoms defined in the Convention without discrimination on the basis of *'national or social origin'*. ECHR rights, therefore, apply to anyone in a country not just to citizens of that state.

As a result, the ECHR has had a major impact on the Government's ability to remove foreign criminals and rejected asylum claimants, and has extended protection to migrants who are fleeing from war zones, famine etc. rather than persecution.

'ECHR rights, therefore, apply to anyone in a country not just to citizens of that state'

In particular, the articles on family life, torture and fair trials have had a significant impact.

- There is particular concern about the impact of Article 8, covering respect for family life. It was not originally envisaged that people could gain the right to stay in the UK by acquiring a spouse, partner or child here.

- Nor was it envisaged that Article 3, prohibiting torture, would provide an absolute barrier against deportation to someone's home country if there was deemed to be a substantive risk of *'torture or inhuman or degrading treatment or punishment'*. As mentioned above, the Strasbourg Court ruled in the Chahal case that this right could not be weighed against the risk a potential deportee might pose to national security. This was despite the UK Supreme Court having ruled that such a balanced judgement could be made under the UN Convention Against Torture, justifying the deportation of Mr Chahal to India.

  The Chahal ruling also prevented the Supreme Court weighing the lives which might be saved by deterring small boats crossing the Channel against the risks of sending asylum claimants to Rwanda.

- Article 6 – the right to a fair trial – has been interpreted to mean people cannot be deported if they would face an unfair trial abroad. The deportation of Abu Qatada took 12 years and nearly £2 million in legal fees (and even more in benefits) due to the risk of evidence secured under torture being used in the trial he would face overseas.

- Prior to the Supreme Court ruling that Rwanda was unsafe, the Rwanda scheme was literally prevented from getting off the ground by an Article 39 order from the Strasbourg Court until individual appeals had been heard from those on board the flight.

- The proportion of asylum claims resulting in positive approval at first instance in the UK has risen from 25% in 2010 to 67% in 2023.[40] This can only partly be explained by the higher proportion of applicants coming from countries like Afghanistan and Iran, whose nationals are rarely refused asylum. It may also reflect the increasingly generous interpretation of human rights legislation in the UK which has been incorporated in guidance to officials.

40 Data via Oxford Migration Observatory. This includes both full recognition of refugee status under the Geneva Convention and other positive outcomes due to conflict etc. in country of origin. There was a sharp and unexplained fall to 44% in the first quarter of 2024 – possibly reflecting the increased standard of proof for asylum claims following the Nationality and Borders Act 2022 and other attempts to tighten up before a pending general election. See: P.W. Walsh & N. Jorgensen, 'Asylum and refugee resettlement in the UK', Oxford Migration Observatory (1 July 2024). Link

- There may also have been an attempt by Home Office officials to reduce the high number of successful appeals by accepting more cases on first application. However, the proportion of appeals which are successful, far from diminishing, has increased from 29% in 2010 to 48% in 2024.[41]

- Despite the increase in the rate of initial acceptance, about half of rejected applicants appeal against refusal. Appeals must generally be lodged within 14 days. Some may fail to do so for lack of advice. Others may wait to lodge a fresh appeal on new grounds or lodge an appeal when the removal process starts, often on ECHR grounds.

- By the end of 2024, 42,000 asylum seekers were awaiting the outcome of their appeals. About 40% of appeals received by the Asylum and Immigration Tribunals specifically cite human rights. This has given rise to suggestions that human rights claims are being made almost automatically in the hope of striking lucky or to delay the process.

- There has been a similar long-term upward trend in asylum approvals across Europe. A study of 20 EU countries between 2003 and 2018 showed that the total recognition rate rose from 11.9% to 38.5%.[42]

- It is not easy to distinguish the proportion of UK applicants who are granted refugee status under the Geneva Convention and those which are granted right to remain on some other basis. In the study of 20 EU countries, over 40% of acceptances were not based on Geneva Convention rights.[43]

- The proportion of asylum claims accepted at first instance varies greatly between countries. In 2023 the UK rate of 67% was significantly higher than the EU average of 53% and far higher than neighbouring France at 31%. Such differences partly reflect differences in the countries of origin of refugees claiming asylum. However, whereas the UK gave sanctuary to 99% of claimants from Afghanistan, France accepted only 69% of Afghans (though what they did with those refused is not clear).[44] This does suggest that the interpretation of human rights under the ECHR is highly subjective and that the UK courts and tribunals may interpret them more generously than most countries.

Have ECHR rulings been mainly problematic or desirable?

Inevitably, the media and governments tend to focus on cases in which Strasbourg and now domestic courts find the UK to be in violation of Convention rights – as do critics of the ECHR.

Equally, supporters of the ECHR cite rulings which they like and expect will find general approval.

For example, Lord Purvis listed: *'Ending the ban on gay people in the military, ending teachers hitting children in schools in Scotland, ending the retention for life of DNA samples of innocent people, ending the persecution of gay people in Northern Ireland because of their sexuality, and ending the practice of imprisoning and hospitalising autistic people are all areas in which campaigners have had to fight, but they are rights provided by virtue of our membership of the Convention.'*[45]

41 Refugee Council analysis of UK Government statistics for year ending March 2025. See: Refugee Council, 'Top facts from the Latest Statistic on Refugees and People Seeking Asylum' [accessed 25 June 2025]. Link

42 T.J. Hatton, 'Asylum Recognition Rates in Europe: Policies and Performance', *European Journal of Political Economy* vol.76 (2023). Link

43 Ibid.

44 Ibid.

45 J. Purvis, as reported in: Hansard, 'European Convention on Human Rights: 75th Anniversary' (7 January 2025). Link

Lady Hale has given her own list: *'It was the Convention which insisted that: children whose parents were not married to each other were entitled to the same family relationships as children whose parents were married; … if the state wished to remove children from their homes to protect them from abuse or neglect, the process had to be fair to everybody involved, both children and their families; … people with mental disorders and disabilities should not be deprived of their liberty without proper safeguards and the opportunity to challenge it; … there should be no discrimination in the enjoyment of the convention rights because of a person's sex, race, colour or other characteristic such as sexuality or disability; … the survivor of a same-sex relationship should have the same right to remain in the family home as did the survivor of an opposite-sex relationship.'*[46]

Some rulings have been welcomed as much on the freedom-loving Right (and by this author) as by the humanitarian Left. Notably, two which do reflect the core issues the Convention was intended to address: detention without trial and torture.

- The Belmarsh case. Following 9/11, the Blair government had to decide how to deal with foreign terrorist suspects against whom there was insufficient evidence to secure a conviction but who could not be deported to their homeland because of the risk of torture or death. They introduced indefinite detention orders, effectively setting aside habeas corpus.[47] The Supreme Court ruled that these contravened the HRA/ECHR. The Government resolved the issue by legislating to introduce Control Orders, restricting the movement of terrorist suspects without detaining them.

- Harsh interrogation techniques used in Northern Ireland during the Troubles. In 1978 the European Court of Human Rights ruled that five techniques used by the British security forces did not constitute torture but did involve inhuman and degrading treatment.

'Some rulings have been welcomed as much on the freedom-loving Right as by the humanitarian Left'

Many less publicised decisions of the Court would also be found acceptable or harmless across the political spectrum.

However, evaluation of UK adherence to the ECHR and its Court should not be based on the extent to which its rulings meet one's approval or disapproval – anymore than belief in democracy should depend on how much of the legislation passed by elected Parliaments one approves of.

Many of the decisions listed above could have been taken by Parliament and probably would have been in due course. For example, the UK Parliament could have changed the law on gay rights in Northern Ireland, or the use of corporal punishment in schools in Scotland or (in practice, though not directly) the Isle of Man – as it had done long before in most of the UK. However, those decisions are devolved to the Northen Ireland Assembly, Scottish Parliament and Manx Tynwald, to respect the different or more slowly changing social attitudes in those territories – granting what the Strasbourg Court would call a 'margin of appreciation'.

The fundamental issue with the ECHR – as Lord Sumption has powerfully argued[48] – is the extent to which decisions are intrinsically political, and if so, whether they are best made by a Parliament accountable to the electorate, or by courts accountable to no one?

46 See fn. 43.

47 The legislation did require the Government to satisfy the Court, every three months, that it was attempting to overcome the obstacles to deportation.

48 J. Sumption, *The Challenges of Democracy and the Rule of Law* (2025).

Is ECHR membership a price worth paying to rid our continent of abuses?

The original purpose of the ECHR was not to fine-tune each country's statute book but to protect fundamental freedoms – from torture, slavery, arbitrary imprisonment etc. – which had been lost under Fascism and Communism. Many would argue that the Court's involvement in far less fundamental matters is a price worth paying if it has also rid our continent of those more horrific abuses. But has it done so?

It was always unrealistic to imagine that any regime which was prepared to use torture, slavery or arbitrary arrest would be put off by the prospect of adverse rulings by a foreign court. In practice, whenever an authoritarian regime has come to power in Europe, that country's prior adherence to the ECHR has not dissuaded them from trampling on human rights.

> **'The EU was required by the Lisbon Treaty in 2007 to ratify the European Convention of Human Rights, but has failed to do so, since the EU cannot accept that European institutions should be subordinate to any other court but the European Court of Justice (ECJ)'**

When the Greek colonels took power and faced an adverse ruling about the use of torture, Greece simply withdrew from the Convention. Russia under Putin revived many cruel features of the Soviet regime while still adhering to the Convention. It was expelled not for its rampant domestic human rights violations, but for the full-scale invasion of Ukraine.

Belarus was only ever an observer, a status it abandoned rather than implement Convention rights. Both Azerbaijan and Turkey have gone pretty far down the road to authoritarian regimes while still remaining in the Convention. One reason France – the most enthusiastic early advocate of the ECHR and home to its Court – did not ratify the Convention until 1974 was that it was aware of the use of torture and other abuses of human rights during the war in Algeria.

Similarly, the claim that if Britain left it would be joining 'Belarus and Russia' is puerile. We would be joining other common law democracies – Australia, New Zealand and Canada – who uphold human rights without relying on a supranational court.

Indeed, within Europe, the UK would find itself in the same category as the European Union. The EU was required by the Lisbon Treaty in 2007 to ratify the European Convention of Human Rights, but has failed to do so, since the EU cannot accept that European institutions should be subordinate to any other court but the European Court of Justice (ECJ).

Chapter 3 – The Expanding Impact of the ECHR

As noted above, Britain's human rights are no longer subject solely to the jurisdiction of Strasbourg. The ECHR has been adopted into British law by the Human Rights Act, which came into force in 2000.[49]

The HRA has several key effects. It incorporates the rights in the European Convention into UK law so that:

- All public authorities must act in ways which respect Convention rights unless primary legislation provides no other choice.
- The courts must interpret UK law, insofar as possible, in ways which make it compatible with the Convention (taking account of rulings of the Strasbourg Court).
- In the case of secondary legislation, if compatible interpretation is not possible, the courts may quash or disapply the offending provision.[50]
- In the case of primary legislation which cannot be interpreted in line with the Convention, the Court may make a formal declaration that the legislation is incompatible with the Convention. This does not nullify statutes passed by Parliament: it is up to ministers to decide whether to ask Parliament to amend the legislation to make it compatible. The Act gives ministers an expedited way of doing so.

'Challenging a judicial ruling would also mean ministers acknowledging that they had ceded to the courts the task of making what are essentially political decisions'

Technically, restricting British courts to making 'declarations of incompatibility' respects Parliamentary sovereignty. However, this is very misleading. As long as we adhere to the ECHR, 'declarations of incompatibility' are effectively imbued with the power of the ECHR to which appeal may be made and which governments are treaty-bound to obey. So, governments invariably feel obliged to amend legislation to make it compatible with the Supreme Court's interpretation of Convention rights. If they did not do so, a subsequent appeal to Strasbourg would almost certainly endorse the Supreme Court ruling.

In addition, it would be politically embarrassing to defend something which judges had declared contrary to human rights. Challenging a judicial ruling would also mean ministers acknowledging that they had ceded to the courts the task of making what are essentially political decisions.

49 K. Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (1999).

50 This is analogous to the normal judicial review power to quash subordinate legislation which is outside the power granted by the primary legislation. In practice it has been used rarely. Between 2014 and 2020, human rights challenges to delegated legislation succeeded in only 14 cases, in which the Court quashed or otherwise disapplied the offending provisions in just four of them. As outlined in: Public Law Project, 'Independent Human Rights Act Review (IHRAR): Response to Call for Evidence' (March 2021), p.19. Link

Therefore, the Strasbourg Court remains the ultimate court of appeal on human rights matters – capable of overruling Parliamentary statutes and indeed the UK Supreme Court. Furthermore, only UK individuals and non-governmental organisations can appeal to Strasbourg – governments cannot appeal against adverse rulings.

There is only one case in which the Government has refused to make the law compatible with a Strasbourg ruling: votes for prisoners. In that case the Council of Ministers backed down – perhaps because of the embarrassment of insisting that prisoners must have votes while depriving law-abiding citizens and their elected representatives of the right to use their votes to decide such matters.

Since the Human Rights Act came into effect, UK courts have made 47 declarations of incompatibility, of which 12 have been overturned on appeal.[51] The fact that over a quarter of the initial decisions that a given statute violated human rights were subsequently overturned illustrates the extent to which interpreting abstract Convention rights is a subjective process – giving judges scope, in effect, to legislate based at least in part on their personal opinions.

'Since the Human Rights Act came into effect, UK courts have made 47 declarations of incompatibility, of which 12 have been overturned on appeal'

The HRA requires UK courts to *'take into account'* Strasbourg rulings. Lord Bingham ruled that this means: *'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less … the Convention should be interpreted as consistently as possible with the jurisprudence of the Strasbourg Court, and in the absence of some special circumstances, it would be wrong for national courts to depart from principles established by the Strasbourg Court.'*[52]

UK courts have subsequently developed a more flexible approach: taking advantage of the 'margin of appreciation' and being willing to deviate from Strasbourg case law where there is no consistent line, or it is based on a misunderstanding of UK law, or it fails to take proper account of an important principle of UK law.[53]

Even so, Lord Faulks argues that the HRA obligation to *'take into account'* the rulings of the Strasbourg Court (not just those arising in cases brought against the UK) means our courts *'pay far greater heed to the Court's decisions than any other countries in the Council of Europe'*.[54] UK courts had to reinterpret legislation to make it compatible with the Convention in some 83 cases up to 2023.[55]

The overall impact of the Convention on UK law, however, is far more extensive than the number of cases where it is adjudicated upon in courts and tribunals. Public bodies do their best to avoid infringing Convention rights, taking into account past rulings by both domestic courts and Strasbourg as well as legal advice.

This can involve predicting not just how the courts may interpret somewhat vague or abstract rights but also how courts may reinterpret the legislation governing the public

51 MoJ, 'Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022–2023' (13 November 2023). Link

52 Case of R (Ullah) v Special Adjudicator (House of Lords, June 2004).

53 HMG, 'The Independent Human Rights Act Review' (October 2021). Link

54 E. Faulks, as reported in: Hansard, 'European Convention on Human Rights: 75th Anniversary' (20 March 2025). Link

55 See MoJ, 'Cases involving an interpretation under section 3 of the Human Rights Act 1998' (October 2023). Link. This is a collection of cases in which section 3 of the Human Rights Act 1998 was used to interpret legislation.

body's role to make it comply with the Convention *'insofar as possible'*. Because of the resultant uncertainty, public bodies usually err on the side of caution, which widens the impact of the Convention.

The effect is wider still because the incorporation of the Convention has helped change both public and legal cultures.

Both Michael Howard and David Cameron, as leaders of the Conservative Party, expressed concern that the HRA had promoted a culture of rights rather than responsibilities – 'I know my rights' rather than 'I accept responsibility for my actions' – not least among those accused of breaking the law and those claiming entitlements. Of course, the extent to which this culture has grown and how much of that is attributable to the Human Rights Act is hard to quantify.

The impact on legal culture may ultimately be more profound. The HRA empowers the courts to undertake roles which previously were ultimately subject to the approval of Parliament. The courts now have to explicate the meaning of abstract Convention rights which effectively gives them licence to legislate – as in the creation of a law of privacy.[56]

'The HRA empowers the courts to undertake roles which previously were ultimately subject to the approval of Parliament'

The courts are also, as outlined above, obliged to reinterpret statutes insofar as possible to be compatible with the Convention – even if that means ignoring Parliament's original intent. This has boosted the culture of legal creativity and emboldened the courts to challenge Parliament and the executive. As a result, clashes between the courts and the executive, Parliament and public opinion have become more frequent.

The HRA is not the sole factor generating this culture. The decision to move the Law Lords out of Parliament and rename them the 'Supreme Court' – a title previously reserved for Parliament itself – has also given lawyers a greater sense of constitutional importance. That decision itself probably reflected the growing tendency of British lawyers to look enviously across the Atlantic, where the Supreme Court's role in interpreting the Constitution makes it supreme over Congress.

Some British lawyers have also been attracted by American legal activism, fuelled by doctrines entitling the courts to inject modern values into old laws and constitutional precepts far removed from their original intent. The Strasbourg Court's similar notion that the Convention is a 'living instrument' encourages British lawyers to take the same attitude. But it is the Human Rights Act which has more than anything given substance to those tendencies and promoted a change in the legal culture.

As Hayek remarked: *'When a general philosophy of the law which is not in accord with the greater part of the existing law has recently gained ascendancy … the same lawyers (who are normally rather conservative) become a revolutionary force as effective in transforming the law down to every detail as they were before in preserving it.'*[57]

56 The Cabinet in which I served twice considered introducing a law of privacy. But it drew back partly because it recognised that any law would restrict press freedom and in practice would only protect the rich and powerful who could afford injunctions to prevent intrusion into aspects of their private lives which they wished to keep private. Such a law would probably be little use to, say, the chairman of a golf club who wanted to stop members hearing about his affair with the secretary.

57 F.A. Hayek, 'Principles and Expediency', in *Law, Legislation and Liberty* (1982), pp.55-71, esp. p.66.

So where did this 'living instrument' doctrine come from?

The Strasbourg Court first enunciated the doctrine that the Convention is a *'living instrument which … must be interpreted in the light of present-day conditions'* in the case of Tyrer v UK in 1978.

Courts often have to apply laws in cases involving circumstances unforeseen at the time a law was formulated. This is particularly true where new technologies or new commercial practices are involved. But the Strasbourg Court doctrine goes way beyond that: it entitles the Court to apply modern values to extend or create rights beyond those envisaged when Convention rights were agreed, and to develop rights in areas which the signatory states have never authorised.

This is particularly egregious since member states can create, and have created, new rights by agreeing new Protocols. For example, Protocol 1 introduced the rights to property, education and free elections, while Protocol 13 introduced the total abolition of the death penalty.[58]

In the Tyrer v UK case, in which the living instrument doctrine was first enunciated, the Court ruled that judicial corporal punishment (birching) of a 15-year-old boy was a degrading punishment under Article 3.

'Courts often have to apply laws in cases involving circumstances unforeseen at the time a law was formulated'

Whether a punishment is 'degrading' is an intrinsically subjective matter; arguably, the current subjective view is as appropriate as that which might have prevailed in 1950. However, the Court has often subsequently invoked a current 'consensus' to generate or extend rights where no consensus exists – and, if it did exist, could be expressed via a new protocol.

For example, in the Hirst case the Court claimed there was a European consensus against blanket bans on prisoner voting, whereas in fact many states imposed restrictions. Likewise, in the Goodwin v UK case, the Court claimed that there was a growing European consensus in favour of gender recognition, even though only a minority of states had comprehensive laws recognising gender change.

The Swiss climate change case is the most egregious use of the living instrument doctrine, extending the reach of the Court to environmental matters which do not feature in the Convention at all.

Prior to the living instrument doctrine, the role of the Court seemed set to diminish over time – the more successful it was in bringing member states' statute books and administrative practices into line with the Convention, the fewer cases it would have to consider. By adopting the living instrument doctrine, however, it has ensured an expanding role for itself and human rights practitioners.

58 The UK has not ratified Protocols 4, 7 and 12.

Chapter 4 – The UK vs The ECHR

As mentioned above, the interpretation of vaguely worded Convention rights by Strasbourg and now UK courts has provoked conflict with politicians and public opinion – no surprise, given the bipartisan consensus during its creation that both the Convention and the Court would be incompatible with Britain's legal and parliamentary constitutional principles.

But there is a common view, expressed by Lord Hermer among others, that it is only right-wing politicians (or constitutional pedants) who take issue with the Convention.

In fact, Prime Ministers and Home Secretaries of both parties have considered resiling from the ECHR in part or in whole, temporarily or permanently.

> **'During his campaign for Tory leader, David Cameron raised the possibility of leaving the ECHR entirely – possibly temporarily, to provoke a renegotiation which, if successful, would enable Britain to rejoin'**

In 2006, Tony Blair, despite having written the ECHR into UK law via the Human Rights Act, told his Home Secretary, John Reid, to *'to look again at whether primary legislation is needed to address the issue of court rulings which overrule the government in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights'*.[59] Failing this, *'a further possibility would be for Britain to consider withdrawing from specific clauses of the European rights convention if they led to court rulings which placed 'community safety' at risk'*.

This was prompted by the Court's refusal to allow deportation of nine Afghans who had hijacked a plane to Britain and by a report concluding that probation staff had been so 'distracted' by the human rights claims of a violent rapist who went on to commit murder that they lost sight of their duty to protect the public.

During his campaign for Tory leader, David Cameron raised the possibility of leaving the ECHR entirely – possibly temporarily, to provoke a renegotiation which, if successful, would enable Britain to rejoin.[60] As Prime Minister, Cameron soon came into conflict with the European Court of Human Rights over their ruling requiring that prisoners be given votes. He told Parliament: *'It makes me physically ill even to contemplate having to give the vote to anyone who is in prison'*[61] and subsequently that *'prisoners are not getting the vote under this government'*.[62] Others noted the paradox that the Strasbourg Court wanted to give criminals the vote but was unconcerned that law-abiding electors and their representatives would not be able to vote to affect that decision.

59 N. Temko & J. Doward, 'Revealed: Blair attack on human rights law', *The Observer* (14 May 2006). Link

60 The Guardian, 'Full text: David Cameron's speech' (24 August 2005). Link

61 D. Cameron, as reported in: Hansard, 'Prime Minister', (3 November 2010). Link

62 D. Cameron, as reported in: Hansard, 'Engagements', (24 October 2012). Link

After years of British prevarication, the Council of Europe's Committee of Ministers (the body entrusted to enforce decisions of the Court) *'expressed profound concern that the blanket ban on the right of convicted prisoners in custody to vote remains in place'* and called on the UK to introduce legislation to remedy the situation.[63]

However, Britain has obstinately retained that blanket ban to this day. The Council of Ministers eventually backed down and declared the issue closed in September 2018 after accepting two minor British concessions: all prisoners would be notified that they would lose the vote while in prison and *'offenders who are released back in the community on licence … to prepare themselves for their return to society'* would be allowed to vote.[64]

Theresa May, as Home Secretary, faced major problems in deporting suspected terrorists and advocated leaving the ECHR. She concluded: *'The ECHR can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights.'*[65] As Prime Minister, she briefed that she would seek an electoral mandate to do so at a future election.[66]

'The UK Supreme Court ruled that Rwanda could not be considered safe because of the risk it might 'refoule' refugees to their countries of origin'

Rishi Sunak also faced problems with the impact of Strasbourg's rulings on his attempts to deter Channel crossings. A Judge of the Court issued an Article 39 injunction stopping flights to Rwanda under the Nationality and Borders Act 2022 until appeals from the initial candidates for deportation had been heard. The UK Supreme Court then ruled that Rwanda could not be considered safe because of the risk it might *'refoule'* refugees to their countries of origin.

In reaching that decision the Court was bound by a Strasbourg ruling that it could consider only the safety of the asylum seeker, rather than weighing that consideration against other factors like lives potentially saved by deterring future Channel crossings, or the UK's need to secure its borders.

Sunak subsequently negotiated a Treaty with Rwanda to tackle the refoulement risk and Parliament passed the Safety of Rwanda (Asylum and Immigration) Act which declared Rwanda to be a safe country.[67] The Act also gave ministers the power to ignore Article 39 orders should the Strasbourg Court issue them to delay flights until it had heard individual claims.

Although Sir Keir Starmer was a human rights lawyer, he too may fall foul of the ECHR. According to Lord Pannick, the decision to apply VAT to private school fees violates the first protocol of the ECHR, on the right to education, which says that: *'In any functions which it assumes in relation to education and to teaching, the State shall respect the*

63 Interim Resolution CM/ResDH(2015)251 adopted by the Committee of Ministers on December 9, 2015 at the 1,243rd meeting of the Ministers' Deputies.

64 D. Lidington, as reported in: Hansard, 'Sentencing' (2 November 2017). Link

65 A. Asthana & R. Mason, 'UK must leave European convention on human rights, says Theresa May', *The Guardian* (25 April 2016). Link

66 C. Hope, 'Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed', *The Telegraph* (28 December 2016). Link

67 There was a precedent for this – the Asylum and Immigration (Treatment of Claimants) Act 2004, which created a non-rebuttable presumption that a list of countries were safe. It was a requirement of EU membership and lapsed in 2022.

right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'[68] An opinion written by Lord Pannick and Lord Lester[69] (and subsequently endorsed by Lord Scarman) apparently dissuaded previous Labour leaders from adopting such a policy.

Indeed, within a year of entering Downing Street, Starmer had already proposed legislating to *'clarify Article 8 rules and set out how they should apply in different immigration routes so that fewer cases are treated as 'exceptional'*.'[70] In other words, Parliament will be asked to tell the British courts that they have been wrongly interpreting the ECHR. A paradox, given that the ideology of human rights law is based on the belief that the courts can be relied on to interpret and apply human rights better than Parliament. And that the Strasbourg Court will still be able to override the British courts and Parliament if cases are appealed to it.

'Although Sir Keir Starmer was a human rights lawyer, he too may fall foul of the ECHR'

In short, leaders of both parties have expressed concerns about the impact of ever widening interpretation of the ECHR by the courts and called for something to be done about it. It was therefore wilfully ignorant of Lord Hermer to attribute these concerns solely to his political opponents – describing them as *'a siren song, that can sadly now be heard in the Palace of Westminster, and in some spectrums of the media, that Britain abandons the constraints of international law'*.[71] Still more disgracefully, he equated parliamentarians' desire to re-establish democratic accountability to the doctrines of the *'1930s by [Nazi] 'realist' jurists most notably Carl Schmitt … that state power is all that counts, not law'*. His thesis was not backed up by a single quote from those whose views he denigrated.

68 N. Eastwood, 'Labour's private school tax raid 'likely illegal'', *The Telegraph* (28 June 2024). Link

69 As reported in: J. Hyam, 'Abolishing private schools and redistributing their assets: social justice at the expense of human rights?', *UK Human Rights Blog* (3 October 2019).

70 Home Office, 'Restoring Control of the Immigration System' (May 2025). Link

71 R. Hermer, 'Attorney General's 2025 RUSI Annual Security Lecture' (29 May 2025). Link

Chapter 5 – Is the UK Unique?

The UK is not alone in finding that rulings from Strasbourg clash with its national legal traditions and policies. France announced in 2023 its intention of ignoring Article 39 orders preventing deportation of foreign nationals deemed a threat to the French public. It subsequently deported an Uzbek national, suspected of terrorist leanings, to his homeland despite a ruling that he might risk torture, and disregarding a ruling by the Conseil d'État. Several French legal authorities have begun to question whether the ECHR, as presently interpreted by the Court, is compatible with French sovereignty.[72]

Nonetheless, Britain undoubtedly experiences the greatest discomfort. Why is this?

Britain has never had a list of specific rights and freedoms to which people are constitutionally entitled. Reference is often made to the Bill of Rights of 1689 on the assumption that it must have been a precursor of modern charters and declarations of rights. Gordon Brown and Dominic Raab invoked it when they proposed respectively a British and a Modern Bill of Rights.

> **'Several French legal authorities have begun to question whether the ECHR, as presently interpreted by the Court, is compatible with French sovereignty'**

But the original Bill of Rights spelled out rights primarily of Parliament rather than of individuals.[73] Historically, individuals had looked to Parliament to protect their freedoms against overreaching Kings, Prelates and their *'evill Councellors, Judges and Ministers'*.[74] (Note that judges were included alongside ministers as sources of tyranny: in the age of Judge Jeffries, the idea that they should be given discretion to make laws and override Parliament would have been anathema.)[75]

The original Bill of Rights therefore sought to strengthen the position of Parliament. It called for freedom of speech not for individuals, but for Parliament itself, reinforced by demands for freedom of election and frequent Parliaments and elections.[76]

72 A. Speaight, 'The Rule of Whose Law? Distorted principles in the Rwanda debate', Politeia (29 February 2024). Link

73 The nearest thing to modern human rights in the Bill of Rights were its rejection of 'excessive bail, excessive fines and cruel and unusual punishments', demand for 'empanelling juries', and declaration that 'fines and forfeitures before conviction be void'.

74 See: legislation.gov.uk, 'The Bill of Rights 1688, 1688 Chapter 2 1 Will and Mar Sess 2'. Link

75 The radical tradition in Britain is particularly hostile to the power of lawyers. A 1648 Leveller tract, *Light Shining in Buckinghamshire*, protests that *'Lawyers are as profitable as maggots in meat, and Caterpillers in Cabages and Wolves among Lambs'*. See: G .Winstanley, 'Light Shining In Buckinghamshire', collected in D.M. Hart & R. Kenyon (eds.), *Leveller Tracts: Tracts on Liberty by the Levellers and their Critics (1638-1659), vol.1* (2014). Link

76 ***'Freedom of Election**. That Election of Members of Parlyament ought to be free. **Freedom of Speech.** That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament. **Frequent Parliaments.** And that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently.'*

Furthermore, Britain did not have a list of specific freedoms because people always prided themselves that they were **free to do anything not forbidden by law.**[77] In Britain, laws don't tell us what we *can* do. Laws tell us what we *cannot* do or *must* do. By contrast, **governments can only do what is permitted by law** (and the residual Royal Prerogative).[78]

The Universal Declaration or European Convention can therefore only seek to protect especially important rights and freedoms within this presumption of general freedom under the law. It is tacitly assumed that these special rights and freedoms are simple and absolute.

> **'Even the simplest right, like the right to marry – which existed long before being enshrined in Article 12 of the ECHR – is not absolute'**

Unfortunately, rights are rarely simple and never absolute. Even those which sound simple need to be defined. And the courts, both in Britain and Strasbourg, have to supply that definition.

Take even the first right in the Convention: the right to life. That sounds pretty clear-cut. But when does life begin and how should it end?

Suppose Parliament enacts the Assisted Dying Bill, but the Strasbourg Court then decides that the state cannot legislate for *'intentionally taking life'* – a very plausible interpretation of that article.[79] As it stands, the Court would prevail. Britain would be treaty-bound to annul the Bill. Parliament would be overruled.

Yet suppose the reverse happens and Parliament rejects the Bill. The Strasbourg Court could later rule, having declared the Convention to be a 'living instrument', that state-assisted dying is a human right. The Court, accountable to no one, would prevail over Parliament.

Those are theoretical scenarios.[80] But they show how the power to make intrinsically political decisions has been transferred to unelected judges by the very nature of the Convention regime.

And, in a similar vein, rights are not absolute. They clash with each other and with other public objectives. So rights must almost invariably be restricted by law. Even the simplest right, like the right to marry – which existed long before being enshrined in Article 12 of the ECHR – is not absolute. Bigamy, polygamy and polyandry are forbidden in Britain. Nor can you marry a close relative, nor below the age of consent, nor outside of regulated premises without a licenced person, etc.

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77 Since there was no law of privacy (prior to the ECHR), newspapers were free to publish truths about the private lives of the great and the good. Similarly, since there is no law against trespass on private property: people are free to 'trespass' as long as they do not damage crops or cause disruption. (Signs saying 'Trespassers will be Prosecuted' are a bluff). That is why, when Mr Fagin famously climbed over the wall round Buckingham Palace, entered the Palace and even reached the Queen's bedroom, he could not be charged with 'trespass', only with stealing half a bottle of wine.

78 To Lord Camden is attributed the dictum that: 'The state may do nothing but that which is expressly authorised by law, while the individual may do anything but that which is forbidden by law'.

79 Article 2 Right to Life Clause 1: *'Everyone's life shall be protected by law. No one shall be deprived of his life intentionally …'*

80 The Strasbourg Court has considered calls for the right to assisted suicide and euthanasia (Pretty v UK; Nicklinson v UK; Lambert and others v France) but so far has left a 'wide margin of appreciation' to member states. However, under the living instrument doctrine it may decide in future that its view of what is right should override differing national attitudes.

Most of the ECHR's text is therefore taken up with spelling out how, why and in what circumstances the legislature may restrict each right to balance it against other objectives. Yet since those conditions can only be set out in general terms, the ultimate interpreter of how rights may be curtailed ceases to be the legislature and becomes the Court.

For example, Article 8 says: *'Everyone has the right to respect for his private and family life, his home and his correspondence.'* But the Convention then qualifies this at length by saying: *'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'* Other Articles have similar wording.

Those drafting the ECHR may have assumed that this gave national legislatures ample scope to decide what is *'necessary in a democratic society'* or *'for the prevention of disorder or crime'* or to protect *'the rights and freedoms of others'*. But the Court now interprets this wording as giving itself, rather than Parliament, the ultimate power to decide what is *'necessary'* in each of these circumstances.

> **'The ECHR gives the Strasbourg Court the role of deciding both what vaguely expressed rights mean and also what power the legislature has to balance those rights against other legitimate objectives'**

In short, the ECHR gives the Strasbourg Court the role of deciding both what vaguely expressed rights mean and also what power the legislature has to balance those rights against other legitimate objectives.

Back in 1717, Bishop Hoadly observed that: *'Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is the lawgiver to all intents and purposes, and not the person who first wrote or spoke them.'* As government officials and law officers recognised when the Convention was being drawn up, this effectively makes the Court the ultimate lawmaker.

Of course, British courts have always had to interpret statute laws and apply the common law. But their authority is not 'absolute'. If the courts interpret laws, or develop the law, in ways that Parliament did not intend or feels are out of line with the values and needs of the electorate, Parliament can change the law. And Parliamentarians are accountable to the electorate for the laws they enact. Thus, both Parliament and, indirectly, the courts are ultimately responsible to the electorate.

To entrust lawmaking to a Court which is accountable to no one, whose interpretations of those rights cannot be changed by Parliament, and which can even tell elected Parliaments what laws they must or must not enact, was bound to be uncomfortable to British people. *'No taxation without representation'* was the cry of the American colonists in 1776, which echoed sympathetically back in Britain. A parallel hostility to 'legislation without representation' underlies British friction with the ECHR.

It is also important to recognise that what makes the European Court of Human Rights a problem for Britain – its lack of democratic accountability – is precisely what appealed to its advocates on the Continent after their liberation from Nazi and Fascist tyrannies.

National Socialism and Fascism had come to power, at least in part, democratically. And there was a risk in several postwar democracies of large domestic Communist parties winning a democratic mandate. What the architects of the ECHR and its Court wanted

to create was some kind of constitutional check on democracy to prevent elected governments abusing their power.

That was a perfectly understandable objective, given their history. But whether it is realistic to trust in judicial ability to stand up for legality should a Fascist, Communist or other dictatorial regime be elected is another matter.

In most countries, before the war, the judiciary proved to be a broken reed. During the war itself it was often the domestic authorities – including the courts – of countries defeated by Germany, rather than the occupying power, which perpetrated many of the horrors.[81]

The postwar advocates of the ECHR may have hoped that an international court with judges drawn from a variety of countries might be less prone to nationalistic prejudice or domestic political pressure. But in practice, as explained above, adherence to the ECHR has not dissuaded dictatorial or authoritarian regimes from trampling on human rights.

'The Strasbourg Court still remains conscious that it was specifically created to overrule democratic decisions that it believes to be incompatible with its interpretation of human rights'

By contrast, in Britain neither Fascist nor Communist parties have ever made any democratic headway. Historically we have looked to Parliament to restrain potentially overreaching governments. So the idea of subordinating elected politicians to unelected judges, or to any group of people claiming superior virtue or wisdom, has had little appeal – beyond those claiming to possess such virtue or wisdom.

Unfortunately, that list includes the new Attorney General, Lord Hermer, who in his Bingham lecture called for *'an authority that requires that Parliament maintains in its legislation the ideals of the rule of law'*. He asserts that the rule of law must include adherence to a code of human rights – interpreted by that authority which can *'require'* Parliament to incorporate it in law. So much for the sovereignty of Parliament.

Although the threats of Fascism or Communism have receded since the ECHR was conceived, the Strasbourg Court still remains conscious that it was specifically created to overrule democratic decisions that it believes to be incompatible with its interpretation of human rights. Hence the recent ruling that Switzerland must set aside a referendum result with the, to British ears, chilling statement that: *'Democracy cannot be reduced to the will of the majority of the electorate and elected representatives in disregard of the requirements of the rule of law.'*

Of course, British judges do develop law under the common law process – particularly when dealing with cases for which there is no direct precedent. But the common law technique involves *induction* of general rules from concrete precedents, not *deduction* from abstract principles.[82] Common law courts are therefore constrained by precedent as well as by a tradition which is empiricist and sceptical of fine-sounding pronouncements. By contrast, where courts are tasked with deducing the meaning of vague rights, they inevitably have very wide latitude to create new law.

The European Court of Human Rights itself allows both common law and civil law traditions to be drawn upon. But this, if anything, gives it even greater scope to invent new law than would be possible within either system on its own. The result is less predictable and less consistent than under either system.

81 Simpson, *Human Rights*, p.601.

82 General rules are usually couched in terms no wider than necessary to settle the instant case. Common law judges may sometimes draw on broader societal considerations.

And even if the ECHR had been distilled down from the detailed laws and legal processes which had evolved in Britain over centuries, setting judges free to derive laws from abstract rights would not reconstitute the status quo ante. Cognac is distilled from wine – but adding water back to cognac does not recreate anything resembling wine.

The British people have been protected from governments which wanted to legislate to curtail their freedoms by Parliaments accountable to them. And they are protected from arbitrary action by government, and from officials misapplying or ignoring the law, by access to due legal process – the right to trial by jury (which is not included in the ECHR), habeas corpus, innocent unless proven guilty etc.

To the extent that there is a British list of fundamental rights it is those rights to due legal process – coupled with the right to vote for and petition Parliament. And the status of those rights depends on *'the firm foundations which these principles have in the deepest convictions of Parliament and the people'*, as the government's Draft International Bill of Rights put it back in 1947.

> **'The British people have been protected from governments which wanted to legislate to curtail their freedoms by Parliaments accountable to them'**

Are these tensions tolerable or dangerous?

The last few chapters have shown that Britain finds the ECHR a recurring problem because:

- It gives judges the role of creating law rather than just applying it, both in Strasbourg and in British courts via the Human Rights Act.
- The law created by the courts cannot be altered by Parliament.
- The courts are therefore unaccountable to Parliament or the electors.

Moreover, history shows that this is a feature, not a bug. The Court was empowered to override democratic legislatures because various European states had democratically succumbed to tyrannies.

Unfortunately, giving the courts the essentially political role of making laws inevitably leads to politicisation of judicial decisions, demands for political vetting of judges and ultimately political appointment of judges. This is already happening.

Recently, both the Prime Minister and the Leader of the Opposition have publicly criticised rulings by immigration tribunal judges based on human rights law.[83] Newspapers and magazines have begun to examine the political stance of barristers who also serve as tribunal judges.[84] The Attorney General has been identified with clients he previously acted for in human rights cases. MPs have called for political measures to ensure the impartiality of judges.

But once judges are required to make intrinsically political decisions, they can no more be impartial or apolitical than are MPs.

83 See for example their remarks as recorded in: Hansard, 'Engagements' (12 February 2025). Link

84 R. Clark, 'The radical barristers who really lay down the law in Britain', *The Spectator* (3 May 2025). Link

The United States recognises that Supreme Court judges ultimately make profoundly political decisions. Consequently, they are appointed on the basis of their political opinions and loyalties – and their actuarial life expectancy, so that the President who appoints them can influence legislation for decades ahead.

There is little desire in this country to follow that example. But the alternative is to see the inevitable erosion of respect for the rule of law itself.[85] **It is the threat to the rule of law, rather than concerns about particular judicial decisions, that is the most worrying consequence of the ECHR and the HRA.**

Human rights legislation, by politicising the judicial process, is ineluctably undermining respect for the judiciary, and thereby itself becoming a serious threat to the rule of law.

The question is, what can be done about it?

85 *'When legal interpretations systematically clash with the sense of justice and the reality on the ground, the support for the rule of law itself risks breaking down,'* said Belgium's asylum and migration minister Anneleen Van Bossuyt. See: C. Deconinck, 'Nine EU leaders call for curbing ECHR protections for criminal migrants', *Brussels Signal* (23 May 2025). Link

Chapter 6 – Options for Reform

Successive governments of both parties have considered leaving the ECHR in whole or in part, temporarily or permanently.

Why have they all backed off so far?

Critics of past governments' reticence would say that they acted like the proverbial frog which fails to jump out of a gradually warming saucepan, until too late. Each adverse and in some British eyes unjustified ruling of the Strasbourg Court never seemed of itself to merit the political row which leaving, or threatening to leave, would trigger. But cumulatively they stoke feelings that the courts are political and Parliament is impotent.

> **'Each adverse and in some British eyes unjustified ruling of the Strasbourg Court never seemed of itself to merit the political row which leaving, or threatening to leave, would trigger'**

What can be done to check this process? For conservatives (with both a big and small 'c'), the default position should be to avoid unnecessary change and, if change is necessary, to prefer reform and evolution to radical action where possible. A number of options have duly been proposed.

1. **Ignore the most unacceptable decisions of the Court.** The Court has no enforcement mechanism, short of expulsion from the Council of Europe. Several countries have persistently ignored Court rulings, but this sanction has not been applied to them.

   Moreover, expulsion from the Council of Europe has only been used for grave abuses of human and democratic rights – not non-compliance with Court rulings. Greece withdrew in 1969 to avoid a vote to expel it because of major human rights abuses – notably torture – under the colonels' regime. Russia was suspended following the annexation of Crimea but subsequently readmitted, only to be expelled following the full-scale invasion of Ukraine. Belarus only had observer status, which was terminated as its respect for the democratic and human rights of its citizens deteriorated.

   Ignoring the Court worked when David Cameron refused to implement its decision on prisoner voting. The Council of Ministers tacitly accepted the refusal by closing the case.

   As mentioned above, in October 2023 the French government announced that they would ignore certain Article 39 Orders from the Strasbourg Court. They duly did so in December by 'refouling' back to his home country an Uzbek suspected of extremism. That provoked little reaction abroad and seems to have been quickly forgotten.

   The British Government was given power in domestic UK law by the Rwanda Safety Bill similarly to ignore Article 39 orders. However, law officers reportedly indicated that they might advise against ignoring Article 39 orders, on the (questionable) grounds that previous UK compliance meant that this was now part of customary international law.

In practice, even if British ministers were as robust as their French counterparts, this option of ignoring Court rulings could only be exercised occasionally, in respect of relatively minor Court decisions or when ministers believe the Court to be acting beyond its powers. Even if ignoring major rulings did not provoke a rupture, no British government could honourably remain signed up to an agreement which it intended persistently to flout.

2. **Seek or exercise a wider margin of appreciation.** The Court allows member states what it calls *'a margin of appreciation'* in applying its rulings. This is to allow for *'differences in national circumstances and attitudes'*. Where this flexibility is available, it obviously should be exercised.

   The Government did secure a reaffirmation of this flexibility in the Brighton Declaration in 2012, when the Council of Europe High Level Conference agreed to amend the Convention to recognise explicitly the margin of appreciation and the principle of subsidiarity. This was effected by Protocol 15, which finally came into force in 2021 after ratification by all 47 member states.

   The amended Treaty now affirms that *'the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'*.

   But that in effect means that, despite much diplomatic pressure and a nine-year wait, the margin was not widened. The Court still has ultimate jurisdiction over whether action by member states falls within the margin or not.

   Lord Hoffman has remarked that: *'So far as the margin of appreciation accommodates national choices, the jurisdiction of the European Court [of Human Rights] is unnecessary: so far as it does not, it is undesirable.'* [86] It is hard to see by what mechanism member states could genuinely widen the margin granted by the Court. Even if it were possible, it is vanishingly unlikely that it could be widened *'to accommodate all national choices'*. Nor would the Court change its interpretation of the allowable margin – certainly not in such a way as to *'render the jurisdiction of the Court unnecessary'*.

3. **Withdraw from specific Articles of the Convention.** This option was mooted by Tony Blair, but again it is hard to see how it would work in practice. Article 15 does allow a member state to derogate from certain aspects of the Convention – but only *'in time of war or other public emergency threatening the life of the nation'* and only in so far as strictly required by such an emergency.

   The UK did exercise this opt-out during the Troubles in Northern Ireland in respect of Article 5, the right to liberty (by using detention without trial), and Article 6, the right to fair trial (by introducing non-jury Diplock courts). However, decisions to declare an emergency and whether the derogations are strictly necessary are themselves open to challenge at the Court. Were the UK to declare, for example, that the influx of illegal boats is such an emergency, it would be challenged in the Strasbourg Court. And the verdict is predictable.

86 Case of Osman v The United Kingdom (European Court of Human Rights, October 1998).

4. **Legislate to limit interpretation or application of the Convention by UK courts.** The new Government's White Paper on immigration promises legislation – presumably amending the Human Rights Act – to:

   - '*Strengthen the public interest test*' used by the courts in balancing *'individual family rights and the wider public interest'.*
   - *'Clarify Article 8 rules and set out how they should apply in different immigration routes so that fewer cases are treated as exceptional'.*
   - *'Set out when and how a person can genuinely make a claim on the basis of exceptional circumstances'*.[87]

   The Conservatives have proposed amendments to government legislation which would disapply the Human Rights Act to deportation cases.

   Both these proposals would restrict the scope for UK courts to thwart public policy by broad interpretation of the Convention. But as long as the UK remains party to the ECHR, people would be able to appeal to the Strasbourg Court against rulings based on these narrower interpretations of the Convention or lack of access to a court.

   Moreover, the Court would be able to issue Article 39 orders preventing deportations until the case had been heard in Strasbourg. So this approach will only affect the total number of cases if the UK courts and tribunals have previously been interpreting the Convention even more generously than the Court in Strasbourg.

5. **Withdraw from the jurisdiction of the Court but not from the ECHR.** This would restore the original position adopted by the Attlee and Churchill governments and their successors up to Harold Wilson. However, Protocol 11 removed this option. Britain initially opposed this aspect of the proposed Protocol, arguing that if states kept the right to opt out of its jurisdiction it would discourage the Court from overexpansive interpretation of the Convention. However, Britain conceded, with the result that since 1998 all member states must allow their citizens to take cases to the Court.

6. **Seek substantive renegotiation of the ECHR.** The ECHR can be and has been amended by successive Protocols since it was ratified in 1950. Virtually all of them have extended or strengthened its powers. A minor exception was the decision to reduce the time limit for applicants to bring cases from six months to four after the final national decision. This followed a major British diplomatic effort which failed to rein in the Court's powers but did result in measures to streamline the Court's operations and reduce the backlog.

   There has been an upsurge of interest in reforming the ECHR, not just in Britain but elsewhere. Recently, a letter from nine other member states of the Council of Europe called for a more flexible interpretation of the ECHR.[88] (The fact that the UK was not asked to sign and has not subsequently endorsed the letter shows that the Starmer government's reluctance to stand up to Strasbourg is both well-known and undeniable.)

87 Home Office, 'Restoring Control of the Immigration System' (May 2025). Link

88 It was led by Italy and Denmark and also signed by Austria, Belgium, Czechia, Estonia, Latvia, Lithuania and Poland. Link

The letter calls for:

- *'More room nationally … to expel criminal foreign nationals. [especially for] serious violent or drug-related crime'.*

- *'More freedom to … keep track of for example criminal foreigners who cannot be deported'.*

- *'To be able to take effective steps to counter hostile states … instrumentalizing migrants at our borders'.*

But it does not spell out concrete changes, nor propose any new protocol or other way to achieve these results.

In truth, the chances of a majority of states agreeing to substantive changes are sadly slender. Proposals for amendments face a lengthy drafting and consultation process. The final draft requires at least a two thirds majority of the Committee of Ministers. Any major change would then need to be ratified by all member states to come into force.

It is virtually impossible to imagine therefore how the Convention could be renegotiated to deal with the 'democratic accountability' issue which is at the root of British problems. Remember that, at its origin, other countries wanted to fetter democratic accountability because of the risk of Fascist or Communist parties achieving power democratically.

Admittedly, the UK could propose concrete changes which limit the area subject to that 'democratic deficit'. For example:

- Exclude from the Convention issues of deportation of individual illegal immigrants. (This would not alter Protocol 4, introduced in 1963, which prohibits the *collective expulsion* of aliens.)

- It was not originally intended that the Convention would cover the handling of refugees and migrants, which were the subject of the Geneva Convention on Refugees being negotiated at the same time. Given the changing complexion of European politics in response to mass immigration, it is conceivable that some member states might consider such a change.

- Revise Article 8, which says that *'everyone has the right to respect for his private and family life, his home and his correspondence'*. The nebulous concept of *'respect for family life'* has given rise to the most egregious rulings on everything from protection against aircraft noise to preventing deportation of illegal immigrants and foreign criminals.

- A good precedent here is the Universal Declaration of Human Rights, which has a narrower, and more meaningful, reference to the family. Its Article 12 states that *'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence'.* Legal protection against 'arbitrary interference with family' ought to be less open to imaginative interpretation than *'respect for family life'*.

- However, it cannot be guaranteed that the Court would interpret this new wording any differently from the present Article. So it might be necessary to specify via a Protocol that environmental factors affecting families do not constitute *'arbitrary interference'*, nor does having a family give non-citizens the right to reside in a country if they entered illegally or have committed a crime.

- Introduce a Protocol explicitly rejecting interpretations of the Convention to create 'positive rights' involving claims on public resources.

- Limit the rights in the Convention to those relating to due legal process – no punishment without law, habeas corpus, right to fair trial, presumption of innocence, no retrospective punishment. This would be the most radical change, and most in line with the British tradition of rights.

Such measures would all be welcome. But none, even if attainable, would entirely resolve the 'democratic accountability' issue.

Moreover, it is far from certain that the Court would take much notice of attempts to rein in its freedom to interpret the Convention as it wishes. Since it has adopted the doctrine that the Convention is a 'living instrument', it has effectively declared its own sovereignty in these matters.

In any case, there is currently no realistic possibility of any of these suggestions being acceptable. Too few member states have any serious appetite for renegotiation – let alone for making substantive changes.

7. **Provoke negotiation by leaving or threatening to leave.** To overcome the reluctance of other states to renegotiate the Convention, it has been suggested that Britain could provoke a renegotiation by threatening to leave, or leaving temporarily until acceptable changes were agreed. This was the strategy envisaged by David Cameron when standing to be leader of the Conservative Party.

   It is far from certain that threatening to leave or even actually leaving would persuade all the other member states to negotiate. Nonetheless, it might be preferable at least to try this rather than simply withdrawing from the Convention.[89] However, should the UK threaten to leave, it would be important to set a deadline by which changes would need to be agreed. It would be unwise to threaten to leave, or to leave temporarily, unless the government was willing to leave the Convention permanently in the likely event that no satisfactory agreement was forthcoming.

8. **Enact a British Bill of Rights.** Both Labour and Conservative governments have proposed legislating for some kind of British Bill of Rights. Gordon Brown's proposal was for a British Bill of Rights and Duties[90] – which would supplement, but not alter, the Human Rights Act and ECHR.

   Although everyone liked the sound of 'Duties' or 'Responsibilities', even the White Paper admitted that *'a framework of civic responsibilities – were it to be given legislative force – would need to avoid encroaching upon personal freedoms and civil liberties'*. A moment's thought revealed that making it compulsory to behave in ways that the law deems 'responsible' inevitably encroaches on our freedom to behave otherwise. Far from enhancing our freedoms, such a Bill would reduce them.

   Dominic Raab later proposed a Modern Bill of Rights which would have reformed, but not replaced, the Human Rights Act.[91] However, it would have done so largely in minor and technical ways.

89 Martin Howe KC suggests setting a deadline for leaving unless acceptable changes are agreed prior to that – remote though the chance of such agreement may be. See: M. Howe, 'In Time to Leave the European Convention of Human Rights', Centre for Brexit Policy (November 2023). Link

90 MoJ, 'The Governance of Britain' (July 2007). Link

91 MoJ, 'Human Rights Act Reform: A Modern Bill of Rights' (December 2021). Link

For example, it removed the obligation of British courts under the Human Rights Act to 'take into account' any relevant Strasbourg jurisprudence. Instead, our courts were to be encouraged to interpret the Convention rights (which were to be incorporated in the Bill) using a common law approach constrained by precedents. It was hoped that this would constrain UK courts to interpret rights in a less expansive way than the Strasbourg Court.

If this was the outcome, British jurisprudence would diverge from that of Strasbourg. So there might be fewer occasions when UK courts would declare laws passed by Parliament to be 'incompatible' with Convention rights. But more cases would go to Strasbourg to challenge British courts' narrower interpretation of the Convention.

Neither statements of incompatibility by British courts nor judgments of the Strasbourg Court have direct application in law in the UK. But the Bill of Rights meant we would continue to adhere to the ECHR, under which we are treaty-bound:

a) to ensure that domestic law conforms to the rights in the Convention[92] (we would be perfectly entitled to use the possibly narrow Common Law interpretations of those rights, unless and until they were successfully challenged in Strasbourg), and

b) to implement judgments of the Strasbourg Court.[93]

So Parliament would still be obliged to change laws to comply with the rulings of courts in the UK and Strasbourg – unless it was prepared to breach or resile from the Convention.

The Modern Bill of Rights also purported to reinforce the supremacy of the UK Supreme Court by affirming that judgments of the European Court of Human Rights are not part of the law of the UK and cannot affect the right of Parliament to legislate or not in whatever way it chooses. But that is already the case. So the Bill did not resolve the lack of democratic accountability issue in respect of either domestic courts or the Strasbourg Court.

9. **Retain the Human Rights Act but withdraw from the ECHR.** Under one option, British courts would continue to apply the rights spelled out in the ECHR. If they found a statute to be incompatible with those rights, they would still issue a 'Statement of Incompatibility' – leaving Parliament to decide whether, and if so how, to amend the law. But British people and non-governmental bodies would no longer be able to challenge in Strasbourg a decision by Government or Parliament not to respond to a declaration of incompatibility. Nor could they challenge in Strasbourg any ruling of the British courts.

   For those concerned solely to restore the sovereignty of the UK Parliament, this might seem like an ideal scenario. But it would still leave UK courts considerable scope to create law by interpreting the vague wording of Convention rights. The ability to clothe their unavoidably subjective interpretations with the apparently objective label of 'human rights' would give them immense politico-moral authority to challenge laws made by Parliament. And it would continue to foster the taste for legal activism. (Although the scope for such interpretation could be constrained or circumscribed by Parliament prescribing more detailed interpretations of Convention rights.)

92 Article 1.

93 Article 46.

Another coherent option – proposed by Martin Howe KC[94] – would remove the power of British courts to rule on whether primary legislation is compatible with Convention rights, but allow them to adjudicate on whether actions of public bodies and secondary legislation, including that of devolved legislatures, conform to Convention rights. Given the legitimate and growing concern about weak or non-existent Parliamentary scrutiny of secondary legislation, there could be considerable support for this.

For Conservatives, reform should be the preferred option – if possible. But the unavoidable conclusion of this section is that the only hope of reform (albeit rather tenuous) would require either an unprecedented outbreak of pan-European unanimity on these issues or for the UK to threaten withdrawal or leave temporarily. Which should only be done if the Government is willing to withdraw permanently in the likely event that the threat fails to achieve substantive changes.

‘The only realistic options are ‘do nothing’ or be willing to leave the ECHR unless or until it is satisfactorily reformed’

Resiling from specific clauses is not a practical option. Returning to the Attlee/Churchill solution of accepting the Convention without the jurisdiction of the Court is no longer permitted.

Ignoring judgments of the Court may be tenable for occasional and minor rulings, or where we believe the Court to be acting ultra vires. But it would not be honourable to remain signed up to an agreement while intending systematically to flout it.

The only realistic options therefore are ‘do nothing’ or be willing to leave the ECHR unless or until it is satisfactorily reformed. The next chapter considers what the consequences, and complexities, of such a move might be.

94 Howe, ‘Time to Leave’.

Chapter 7 - The Consequences of Leaving

Leaving the ECHR may ultimately be Britain's only option to resolve the tensions this report has identified. So it is worth outlining more precisely what the consequences might be, and addressing the concerns that have been raised.

1. **Can a member state just leave the ECHR?**
   The Convention allows any signatory to leave the Convention after giving six months' notice.

2. **Would leaving be compatible with continued membership of the Council of Europe?**
   Adherence to the ECHR is not a requirement of membership of the Council of Europe. Article 3 of the Council's Statute says: *'Every member must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.'* Under Article 8, *'any member … which has seriously violated Article 3 may be … requested by the Council of Ministers to withdraw'*.
   The only justification for Britain leaving the Convention would be to re-establish democratic accountability over our laws – not to embark on 'serious violations' of fundamental rights. So our membership could not reasonably be challenged if the UK continued to show the same respect for rights and freedoms as it has historically or as similar, sovereign, common law countries show.

3. **Would withdrawal put human rights in Britain at risk?**
   Undoubtedly, opponents would equate leaving the ECHR and repealing the Human Rights Act with 'losing our human rights' – despite the fact that our human rights long preceded both the ECHR and the HRA.[95]

   The ECHR is supposedly based on the codification of British rights. Yet these developed over the centuries, via the interaction of the courts and common law with a sovereign Parliament, without the help of an abstract code of rights. If we reverted to that approach, those rights would be no more at risk now than they were before we adopted the Convention.

   Countries like Australia, Canada and New Zealand, which have similar traditions to the UK – but no commitments to international human rights courts – have not seen their rights diminish vis a vis the UK since 1950.[96] They are widely considered to be paragons of human rights. If the UK reverts to that approach, why should it be different?

95 It has become a habit on both sides of the Atlantic to give Acts names which proclaim virtues which they do not contain, so that critics can be portrayed as the opponents of those virtues. For example, Biden's Inflation Reduction Act may have had many merits but was bound to aggravate rather than reduce Inflation.

96 Since 1981, Canada has incorporated a charter of rights into its own constitution interpretable by its own courts.

Indeed, successive British governments have refused for technical reasons to ratify three Protocols of the ECHR.[97] Yet no one is seriously concerned that anyone in this country faces threats to their rights because we have not ratified these Protocols.

It is sometimes argued, as did Quintin Hogg, later Lord Hailsham, in the 1960s and 70s, that Britain has become an 'elected dictatorship' because the executive has come to dominate the Commons. Consequently, Parliament cannot be counted on to hold the executive in check. Outside the ECHR, our rights and freedoms would be at the mercy of any government determined to diminish them.[98]

Even if that was true in the postwar decades, the fact that Parliamentarians – from whom the Government was drawn – needed to be re-elected meant that they were still accountable to the electorate for laws they might introduce restricting people's freedoms.

It is true that in the 1950s whole years passed without a single vote being cast by backbenchers against the 'advice' of the government whip. However, from the 1970s onwards, each successive Parliament has been *less* subject to executive control than its predecessor. During Margaret Thatcher's 12 years in office, some 4,259 votes were cast by Conservative MPs against her whip. Tony Blair was likewise PM for 12 years, during which 6,520 votes were cast against him by Labour MPs. Subsequent Parliaments have been even more rebellious. So it is a lazy anachronism to describe modern British Parliaments as 'elective dictatorships', doing whatever the executive tells them.[99]

It has also always been the case that the British Parliament can pass any law it wishes. In our system, the executive proposes but Parliament disposes.

So if – Heaven forfend – the British ever elected a Parliament that was minded, and emboldened by public support, to restrict fundamental human rights, it could do so notwithstanding the ECHR and Human Rights Act (which it could resile from and repeal). It would face only rebukes from the Council of Ministers – unless the latter deemed the measures to be 'serious violations' of liberties, meriting expulsion from the Council of Europe.

It is hard to believe that such a Parliament, confident of public support, would be held in check by fear of leaving a body most people have never heard of.

Ultimately, the only check on an executive determined to erode our liberties is either a Parliament accountable to the electorate or courts accountable to no one. In theory, Parliament could erode our freedoms and rights, even though historically it has done the reverse. Equally, unaccountable judges can in theory interpret the Convention in ways which would restrict some rights at the expense of others. For example, the Strasbourg Court could define the right to life to limit abortion and a woman's right to choose, or to outlaw assisted suicide. Or it could, following its Swiss ruling, require Britain to pursue an even more costly Net Zero strategy. Such developments are

97 Protocols 4, 7 and 12. Protocol 4 covers the prohibition of imprisonment for debt, freedom of movement within a territory, freedom to leave the territory, prohibition of expulsion of nationals and prohibition of collective expulsion of aliens. Protocol 7 addresses procedural safeguards relating to the expulsion of aliens, the right of appeal in criminal matters, compensation for wrongful conviction, the right not to be tried or punished twice, and equality between spouses. And Protocol 12 states that any right set out in law shall be secured without discrimination.

98 'Mr Hogg's way to end the tyranny of Whitehall', *The Times* (12 October 1968). See also his 1976 Dimbleby Lecture.

99 MPs became increasingly sensitivity to opinion of their constituents as deference to authority diminished, party loyalties weakened – a process intensified by the internet and social media. For analysis of this important development – strangely ignored by our commentariat – see: P. Lilley, 'Valedictory' (7 August 2017). Link

unlikely – but not as unlikely as Parliament voting to abolish habeas corpus or the right to a fair trial or other long-established rights.

Indeed, the sad truth is that we have recently experienced a period – during the pandemic – when, rightly or wrongly, our rights and freedoms were suppressed on a previously unimaginable scale. The entire population was forbidden to leave their homes more than twice a day, to visit loved ones on their deathbeds or attend their funerals. Schools were closed even though children were not at risk from Covid. Health care workers and care home staff were required to take a vaccine even though it did not prevent spread of the disease. Whatever one's views about lockdowns, vaccination rules etc. it is significant that neither the courts nor Parliament challenged the necessity or proportionality of these measures. This demonstrates that, ultimately, no institutional mechanism – including the HRA and ECHR – can withstand a powerful consensus that rights must be set aside for a greater good.

4. **Would withdrawal be compatible with the Belfast/Good Friday Agreement?**
If, as is sometimes asserted, withdrawal from the ECHR would be incompatible with the Belfast/Good Friday Agreement (GFA), then other issues would pale into insignificance.

Fortunately, although the GFA does involve the European Convention on Human Rights in several of its provisions, it does not explicitly require the United Kingdom as a whole to adhere to the Convention itself. Instead, the GFA includes commitments to specific aspects related to the ECHR in the context of Northern Ireland.

The key points regarding the ECHR within the GFA are:

- Human rights and equality: The GFA mandates the incorporation of the ECHR into Northern Ireland law – not UK law – ensuring that human rights protections are a fundamental part of the legal framework. Specifically, it requires that: *'The British Government'* [which had for other reasons announced its intention to incorporate most ECHR rights into UK law via the HRA] *'will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.'*[100] This obligation was discharged fully by the enactment of Sections 6 and 24 of the Northern Ireland Act 1998.[101]

- Human Rights Commission: The agreement established the Northern Ireland Human Rights Commission, tasked with ensuring that laws and policies in Northern Ireland comply with international human rights standards, including the ECHR.

- British-Irish Agreement: The GFA also includes the British-Irish Agreement, an international treaty between the UK and Ireland, which commits both governments to the principles of human rights and equality as outlined in the ECHR – but not specifically to membership of it.

Thus, the GFA necessitates the incorporation of the ECHR rights explicitly into Northern Ireland law and requires adherence to those human rights standards. But it does not require the UK to remain a member of the ECHR or to enshrine ECHR rights in law covering Great Britain.[102]

100 The corresponding obligation of the Irish Republic, which at the time had no similar plans, was to 'bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context'.

101 R. Ekins & J. Larkin, 'Human Rights Law Reform, How and Why to Amend the Human Rights Act 1998', Policy Exchange (December 2021). Link

102 For an authoritative legal analysis of the implications of the GFA for the ECHR see Howe, 'Time to Leave'.

5. **Would leaving the ECHR breach the Trade and Cooperation Agreement (TCA) with the EU?**
   The TCA does not require the UK to remain a member of the ECHR.

   In the event that the UK decides to leave the ECHR, Article 692(2) gives the EU the right to terminate Part 3 of the Agreement, which relates to *'Law Enforcement and Judicial Co-operation in Criminal Matters'*, from the date we give notice of our withdrawal.

   Equally, Article 526 gives the UK the right to cease to apply the terms of Part 3 to any member state which ceases to *'participate in, or enjoy rights under, provisions of Union law relating to law enforcement and judicial cooperation in criminal matters'*. And Article 692(1) gives both parties the absolute right to terminate Part 3 at nine months' notice (as against immediately under the two rights-related clauses) for any reason whatsoever.

   What is significant, however, is that there is no presumption of automatic termination of Part 3 if either side sees a change in the human rights institutions on the other side. This is because Part 3 is important and valuable to both the EU and the UK – its objective, as spelt out in the agreement, being to facilitate co-operation on *'the prevention, investigation, detection and prosecution of criminal offences and the prevention of and fight against money laundering and financing of terrorism'*. To forgo that co-operation would be a self-inflicted loss.

   Each party also retains the right to terminate this co-operation if the other side, for example, withdraws ordinary rights to fair trial under the law from its citizens who may be extradited, or abuses access to shared confidential information. Leaving the ECHR would not involve either of those things.

6. **Would UK withdrawal from the Convention undermine other signatories' adherence to it?**
   It is a peculiarly British conceit that other countries model their behaviour on what Britain does.

   For 16 years after ratifying the Convention, Britain refused to accept the jurisdiction of the Court. There was no suggestion that this weakened other member states' commitment to the Convention. Nor was any state moved to follow the example of France – which had been the prime mover in establishing the ECHR and was home to its Court at Strasbourg, but refused even to ratify the Convention until 1974 or to accept the jurisdiction of the Court until 1981!

   Regimes which want to bolster their power by violating their citizens' human and democratic rights do not need a flimsy excuse to do so.

7. **Would withdrawal reduce Britain's influence?**
   'Influence' is a vague and unmeasurable concept. One should always be sceptical when it is invoked in the absence of concrete and realistic examples of circumstances in which Britain might fail to 'influence' other countries because of our withdrawal from the ECHR.

   It is hard to think of any form of mutually beneficial cooperation which any country would be 'influenced' to accept by Britain remaining in the ECHR or to reject if the UK withdrew.

Home Office officials, opposed to the UK leaving the ECHR, suggested that it would make the EU less willing to co-operate with Britain on tackling the international traffic in illegal migrants.

Such co-operation already happens and involves sharing information on gangs, their finances, sources of boats, routes across the Mediterranean, and co-ordinated assistance to African and Near Eastern countries from or through which migrants come. The EU values UK inputs which, to the extent that they help reduce the flow of immigrants into the EU, benefit EU countries directly while benefiting the UK only at one remove.

Yet the EU currently works on these issues with states who are not members of the ECHR or any equivalent international treaty covering human rights. It is inconceivable that the EU would spurn such mutually beneficial co-operation with us if we left the ECHR.

8. **Would the UK's reputation be damaged by withdrawal from the ECHR?**
   Reputation is another vague and unmeasurable concept. In any case, the idea of a country doing something simply to burnish its reputation is demeaning. We should adopt policies – particularly on matters as important as human rights and democratic accountability – because they are right, not to win plaudits or avoid criticism in bien pensant circles.

   Britain's reputation as a beacon of liberty grew from practising freedom at home and defending it abroad – not from signing up to declarations. We did not practise freedom in order to be admired, but because a love of freedom is deeply embedded in our culture.

   The claim that the UK would become a 'pariah' if we leave the ECHR is a baseless nonsense. No one suggests that Australia, New Zealand and Canada are pariah states even though they rely on Parliamentary sovereignty, common law and domestic courts to maintain their freedoms. On the contrary, they are respected as epitomes of freedom. We would be in the same position as them.

9. **Would withdrawal secure our borders?**
   How would the situation change if the UK withdrew from the ECHR and repealed the HRA? As long as the UK remained a party to the Geneva Refugee Convention, we would be obliged to offer asylum to anyone with a *'well-founded fear of persecution'*. This involves officials and tribunals making a very difficult assessment about events which the claimant says happened and/or (even more difficult) may happen in future – in a country outside British jurisdiction. In practice, the UK gives claimants a great deal of benefit of the doubt. This is partly driven by the ECHR.

   Also, the Geneva Convention requires refugees to be given access to the courts on the same basis as nationals of the country of refuge. Even if the asylum application is refused, the claimant cannot be 'refouled' to a country which may not be safe nor, in practice, to the safe country through which they may have passed.

   In short, leaving the ECHR may well be a necessary step to reducing the number of those successfully claiming asylum or refugee status and increasing the number who can be removed – but it will not, on its own, be sufficient to resolve the problems.

10. **Would withdrawal cause damaging splits within the Conservative Party and the nation?**
    There is no doubt that, after years of equating commitment to human rights with adherence to the ECHR, suddenly to abandon the latter – particularly over a single issue like deporting asylum seekers – would cause ructions. It is perfectly reasonable for politicians to weigh up risks of splits and divisions within their party.

The best way to avoid divisions is to prepare the ground by encouraging reasoned debate, putting forward the arguments for considering withdrawal and examining the alternatives. This pamphlet is intended to contribute to that process.

More widely, beyond the migration debate the recent judgement about Switzerland's Net Zero policy has forced many people to address the question for the first time. There is no longer a consensus that withdrawal is unthinkable.

In the past, attitudes to the ECHR have depended more on whether parties were in government or opposition. Not just Tony Blair, but *'successive [Labour] Home Secretaries, from Jack Straw and David Blunkett to John Reid, have proved as keen as their Conservative opponents to undermine the HRA'* which enshrined the ECHR.[103] Even the Starmer government is planning legislation to restrict UK courts' interpretation of the ECHR and may find itself at odds with the ECHR over VAT on private schools.[104]

Nor is it any longer lawyers versus laymen. Not surprisingly, most lawyers have tended to favour a system which gives lawyers a prominent role and assumes they are wise and objective. Nonetheless, distinguished jurists like Lord Hoffman[105], Lord Sumption[106] and Professor Ekins[107] have broken ranks to support the case for withdrawal.

Within the Conservative Party, leading members of the One Nation Group like Tom Tugendhat have expressed a willingness to withdraw if satisfactory renegotiation proved impossible. Similarly, James Cleverly suggested he would be willing to leave the ECHR if his preferred option – reforming it – proved impossible.

103 Norman & Oborne, *The Conservative Case for the Human Rights Act.*

104 See for example: C. Hymas, 'Justice Secretary accuses ECHR of blocking foreign criminal deportations', *The Telegraph* (18 June 2025). Link.

105 Lord Hoffman has developed his views in 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture 2009); and in 'Foreword' in M. Pinto-Duschinsky 'Bringing Rights Back Home', Policy Exchange (2011). Link

106 Jonathan Sumption has developed his views successively in his Reith Lecture, 'Human Rights or Wrongs' (June 2019); *Trials of the State* – Law and the Decline of Politics (2019); and 'Judgment call: the case for leaving the ECHR', *The Spectator* (30 September 2023). Link

107 Professor Ekins has developed his views in *Legislated Rights* (2018); 37th Atkin Lecture 2024; and elaborated in 'Human Rights and the Rule of Law', Policy Exchange (17 April 2024). Link

Conclusion

1. The 'creation myth' that the ECHR was a British invention which codified British rights and was enthusiastically adopted by Attlee and Churchill is flattering and reassuring. In fact, it was reluctantly ratified by Attlee only on condition that it had no jurisdiction in the UK. British people were not allowed to access the Court, and Britain refused to amend laws to conform to the Convention – a position immediately upheld by Churchill and his Conservative successors.

2. If the Convention simply codified British rights, its impacts should have been few, minor, and diminishing in number as UK law was brought into conformity with the Convention. In fact, the Strasbourg Court found the UK to be in violation of the Convention in cases which were numerous, serious and wide-ranging.

3. The Human Rights Act has meant fewer cases going to Strasbourg but far more cases being heard in domestic courts and tribunals.

4. The HRA was supposed to respect Parliamentary sovereignty since UK courts cannot require legislation to be annulled or amended, only declare it 'incompatible' with the ECHR. In practice, Supreme Court rulings on incompatibility override Parliamentary sovereignty because they are imbued with the power of the ECHR, to which appeal may be made and which governments are treaty-bound to obey.

5. Leading ministers from Tony Blair, Jack Straw and John Reid to David Cameron, Theresa May and Rishi Sunak have considered resiling from the ECHR in whole or part, temporarily or permanently.

6. The Strasbourg Court can overrule democratic legislatures. This was deliberate because Fascism and Communism had, or threatened to, gain power by democratic means on the Continent (though they had never gained a foothold in the UK). It was hoped that an international court would prove a barrier to any relapse.

7. In practice, authoritarian regimes willing to use torture, arbitrary arrest and suppression of free speech have chosen to leave the Convention or simply ignore its rulings.

8. The reason the ECHR causes more problems in the UK than in other states is because we look to Parliament to make the law (and amend it if the courts interpret or develop it in ways that do not reflect Parliament's intentions or public values) whereas courts must apply it impartially. The idea of courts, let alone an international court, being able to create new laws, still less tell Parliament what laws it may or must pass, is alien.

9. Rights are never simple or absolute – they clash with other rights and legitimate objectives. Defining rights and balancing them against other objectives involves intrinsically political decisions.

10. However, the rights in the Convention are so vague that courts – accountable to no one – are free, in fact obliged, to decide what the law should be on a huge range of important and intrinsically political issues.

11. Decisions about the ECHR should not be based on whether we like or dislike a majority of its rulings, any more than our belief in democracy should be based on whether we approve or disapprove of the electors' choices of government.

12. The key question is: are intrinsically political decisions – involving trade-offs between different objectives – best taken by elected governments subject to elected Parliaments, or by courts accountable to no one?

13. The major consequence of empowering courts to take fundamentally political decisions is that it politicises the courts. This is not the fault of judges – they are required to take essentially political decisions. But it will lead, and is already leading, to demands for political vetting of judges and to a loss of respect for the law and the courts.

14. It would be a tragic paradox if a noble experiment intended to reinforce our legal rights fatally undermined the rule of law itself. But that is the direction in which it is ineluctably headed.

15. For conservatives, reform or evolution are the natural first option rather than abrupt departure. The onus is on those who are reluctant to withdraw to propose concrete reforms which would tackle the central problem that empowering unaccountable courts to make law which overrides that of the elected Parliament, inexorably politicises the judiciary and undermines the rule of law.

16. So far, no reforms which tackle this problem have been proposed and there is little appetite even for reforms which would seriously narrow the scope of the problem. Previous attempts at reform produced nugatory changes after many years of effort.

17. The only – tenuous – hope of achieving reform, barring the emergence of a pan-European consensus, would be for the UK to suspend its membership, or at least threaten to do so, unless or until substantive changes were implemented within a given timetable.

18. Withdrawing from the ECHR is possible while remaining in the Council of Europe, upholding the Good Friday/Belfast Agreement and complying with the Trade and Cooperation agreement with the EU.

19. The UK would need to continue to enshrine in Northern Ireland law the rights defined in ECHR. For the rest of the UK, if the Human Rights Act is retained, it could be revised to enable UK courts to rule on ministerial decisions and secondary legislation, including that of devolved administrations, but not to rule on primary legislation.

20. Withdrawal, should it be necessary, would put Britain in the same position as other common law countries like Australia, Canada and New Zealand who maintain the highest standards of human rights and freedoms without adherence to an international court. The suggestion that we would be like Russia and Belarus is puerile.

21. It is important to recognise that withdrawal may be necessary, but will not be sufficient, to tackle problems of illegal migration.

22. Any decision to withdraw, temporarily or permanently, should not be taken solely due to concern about court rulings on a single issue, but to protect the courts from the politicisation which inevitably follows from them being obliged to take intrinsically political decisions which should be the responsibility of an elected Parliament.

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