Human rights: *Making them work for the people of the UK*

Robert Broadhurst

With foreword by:

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Foreword

We are proud of the United Kingdom's record of supporting human rights, both at home and abroad. Fundamental rights are precious and must be constantly defended. As elected representatives we take that responsibility very seriously.

However, it is obvious that something has gone badly wrong. When we are ordered by the European Court of Human Rights, against our firmly held beliefs and those of our constituents, to scrap a provision of an Act of Parliament that stops convicted prisoners from voting, it is time to reflect on how human rights are being applied.

As such, this thorough and incisive analysis by Robert Broadhurst is very timely. Mr Broadhurst shows that the main problem with current human rights law is that we all have to accept judges' interpretations of human rights, even when those interpretations strike us as a gross distortion of such rights. Who really believes that some or all convicted prisoners have an inherent right to vote while they are behind bars for their crime? Not us. And yet the only opinion that matters is that of the judges in Strasbourg. This cannot be right in a democracy.

This effective supremacy of the European Court of Human Rights stems from the European Convention on Human Rights (ECHR), a treaty that binds the UK internationally. The power of judicial interpretations of human rights, however, was greatly increased within the UK by the introduction of the Human Rights Act, under the previous Labour Government. For instance, the Human Rights Act allows (indeed, obliges) British courts to contort the meaning of legislation so that it fits with judges' constructions of human rights. The ordinary meaning of legislation, including the will of Parliament when enacting it, can be put aside. However, as Mr Broadhurst points out, our judiciary has no democratic mandate or accountability to make law in this way.

Fortunately, this book charts a new approach, so that human rights can command the widespread support they deserve. We agree with the recommendations for action Mr Broadhurst makes. We must radically change our relationship with the ECHR so that the European Court of Human Rights can no longer impose perverse notions of rights on the people of this country. If necessary, the UK should be prepared to withdraw from the ECHR, something it is perfectly entitled to do. The Coalition Government is pushing for reforms to the European Court of Human Rights, so that it would interfere less in British affairs. We support these efforts as far as they go, but would like to see a firmer guarantee that the Strasbourg Court will no longer be able to override the mainstream British understanding of human rights.

Alongside this, the UK Parliament should enact a new British Bill of Rights, to replace the Human Rights Act. This would uphold broadly the same rights as those found in the ECHR (and perhaps more), and these rights would continue to be applied by the independent British judiciary. However, where judges believed clear *legislation* approved by Parliament – when read in the ordinary way – breached human rights, they would refer the decision on alteration of that legislation to our democratically accountable legislature. This would allow Parliament to check whether a legislative change was needed to respect human rights, or if the judges' verdict had gone beyond those rights.

In short, these proposed reforms seek to end rule by judges and reinstate parliamentary democracy in this area.

It is only by fully restoring human rights to the democratic arena that we can rebuild public confidence in them. Applying particular interpretations of human rights, against most people's understanding of those rights, has done huge damage to how human rights are perceived. The law cannot be forever divorced from the people it governs. The sooner we reconnect human rights with the British people, the better.

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Executive summary

Human rights are to be cherished. Freedom of speech, the prohibition of torture and the right to a fair trial are just some of the fundamental entitlements dear to the people of this country, and which the United Kingdom has long propounded. That is why this country signed up to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) in 1950, as a treaty enunciating certain human rights.

As the Convention itself recognises, though, most human rights are not absolute. Exactly what they mean in practice often involves some difficult choices, balancing an individual's rights against the rights of others and the need to uphold a civilised and well-functioning society. No document setting out fundamental rights can give precise guidance about what those rights mean in most cases – the coverage of these rights is just too wide, applying in principle to all spheres of human activity.

The application of human rights, then, can confer on the judiciary sweeping discretion over what the law requires, given the great ambiguity of the meaning of these rights in particular cases.

Few courts have exploited this discretion more than the European Court of Human Rights (ECtHR), based in the French city of Strasbourg. This court is established by the ECHR, but only since 1998, under an amendment to the Convention, has it been a requirement for all countries that are party to the ECHR to accept the Court's power to pass binding judgements, in cases regarding the rights in the Convention. Now, any individual can take an ECHR country directly to the European Court of Human Rights, claiming that country has violated one or more of their Convention rights. Under the ECHR, the relevant country must abide by any resultant judgement of the Court.

Between when it first subscribed to the Court's jurisdiction in 1966 (when acceptance of this jurisdiction was voluntary) and the end of 2010, the United Kingdom faced over 350 rulings from the judges in Strasbourg on whether or not it had violated an ECHR right. In about three-quarters of these judgements the Court ruled that the UK had breached a Convention right. And the cases keep on coming. Indeed, the volume of cases heard against the UK in the ECtHR increased dramatically over this period.

The Strasbourg Court has shown a willingness to interpret the human rights in the ECHR in such a way as to impose detailed requirements on Convention countries across many areas of national life. The Court's judgements sometimes fly in the face of the common understanding of human rights in the country on the receiving end of the ruling. One only has to look at the Court's demand that the UK give convicted prisoners the vote to see how the idea of human rights has been twisted through judicial interpretation.

This situation was exacerbated by the introduction of the Human Rights Act 1998 by the previous Labour Government. The Human Rights Act (HRA) brought into domestic UK law most of the human rights contained in the ECHR (which is a treaty existing in international law).

Specifically, the HRA directs that British courts must interpret and apply legislation in the UK in conformity with these ECHR rights, "so far as it is possible to do so". This has seen British judges effectively re-writing provisions of legislation, including Acts of Parliament, to make that legislation compatible with judges' interpretations of human rights. For instance, the High Court has ruled that section 1 of the Malicious Communications Act 1988, which makes it an offence to send someone an article of "an indecent or grossly offensive nature" for the purpose of causing them distress or anxiety, may sometimes violate a person's right to freedom of expression – and that the courts can read the section as though it contains a provision disapplying its terms where this violation would occur.

In addition, the HRA obliges all public authorities in the UK – such as the police, local authorities, maintained schools and NHS trusts – to act in compliance with ECHR rights, unless "primary legislation" (mainly Acts of Parliament) so clearly provides for a public authority to act differently that it is not possible to interpret it otherwise. The effect of this is often to require public authorities to operate in accordance with judges' constructions of human rights, even if legislation, on an ordinary reading, permits the public authority to act differently. Any person who is directly affected by a public authority's alleged breach of its duty to abide by ECHR rights can take that authority to court over the matter.

When interpreting ECHR rights, the HRA obliges British judges to "take into account" the rulings of the European Court of Human Rights, directly introducing that Court's (often flawed) case law into the UK legal system.

Where UK courts do not believe it is "possible" to construe "subordinate legislation" in accordance with judicial conceptions of ECHR rights, the HRA empowers judges to strike down that legislation in most circumstances. Subordinate legislation includes the great majority of legislation that is not itself an Act of Parliament but which is made under the authority of an Act, including much legislation that has been approved by a resolution of each House of Parliament.

On the other hand, where British judges do not believe it is "possible" to interpret *primary* legislation in a way that complies with their idea of ECHR rights, they cannot strike down that legislation. Instead, under the HRA they can issue a "declaration of incompatibility" between that legislation and the ECHR right(s) in question. This does not affect the validity or operation of the relevant legislation. Moreover, neither the Government nor Parliament is obliged by the HRA to do anything in response to a declaration of incompatibility.

However, in all cases except – as it stands – prisoner voting[1], provisions of Acts of Parliament that have been declared incompatible with ECHR rights by British judges have been altered (or, in a couple of instances, the Government is currently seeking their alteration). This is despite the fact that in some cases there has been little apparent enthusiasm on the part of the Government and Parliament for the change. This is certainly true of the proposed right for serious sex offenders to have their place on the sex offenders register reviewed, following a declaration of incompatibility by the UK Supreme Court regarding the Sexual Offences Act 2003.

While it is not entirely clear why the Government has moved to alter statute in such cases, it seems the threat of a claim being taken to the European Court of Human Rights under the ECHR has been a key motivation. If a British court deemed legislation incompatible with Convention rights (often drawing on ECtHR jurisprudence), it seems likely the Strasbourg Court would reach the same conclusion – perhaps encouraged to do so by the British ruling. Furthermore, as noted above, the UK has an international legal obligation under the ECHR to abide by judgements of the European Court of Human Rights, where it is a party to the case in question. This applies even if conforming to the judgement means overturning provisions of Acts of Parliament against the wishes of the British people.

In sum, the main problem the United Kingdom faces when it comes to human rights based on the ECHR, both internationally and at home, is one of *judicial interpretations* of human rights that offend the common understanding of those rights, but which the country is forced to accept. This appears to be a result of both judicial activism and the inherently ambiguous nature of human rights, combined with the UK's obligations under the ECHR.

The Prime Minister and some other Cabinet ministers are well aware that there is a problem with the way human rights are being applied. The Coalition Government has established a Commission to investigate the creation of a UK Bill of Rights. However, this Bill of Rights would incorporate and build on all the UK's obligations under the ECHR.

The Coalition Government has also said it will be pressing for reform of the European Court of Human Rights, including measures to implement the principle that "where Member States are applying the Convention effectively, the [Strasbourg] Court should intervene less."[2] Any amendments to the ECHR aimed at achieving this would need to be agreed by all 47 countries that are party to the Convention.

However, there is a big question mark over how such new rules governing the operation of the European Court of Human Rights would work in practice. Ultimately, their effect would depend on who interpreted and applied them. For instance, the Strasbourg Court would probably still have deemed the prisoner voting case against the UK to have been sufficiently important to warrant its intervention.

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[1] : A declaration of incompatibility was issued by a Scottish court regarding the statutory provision barring convicted prisoners from voting, after the European Court of Human Rights had ruled against this provision.

[2] : HC Deb 26 October 2011, c9WS

Any method of deciding whether or not the ECtHR should hear a case, in which that decision was outside the UK's control, would leave this country open to outlandish rulings of the Strasbourg Court. As much as anything else, this is about the inherently ambiguous nature of the ECHR rights, along with the very wide scope the Strasbourg Court has given to them. What some may regard as a serious breach of those rights may be entirely in line with human rights according to mainstream British opinion.

To ensure the Strasbourg Court did not impose on the British people interpretations of human rights that offended their common understanding of those rights, the democratically accountable UK Parliament[3] should be given the power to overturn such ECtHR judgements directed at the UK.[4]

To be legal in international law, this right for Parliament would have to be recognised in the ECHR.

This would clearly represent a major amendment to the Convention, which would have to be agreed by all other ECHR countries.

If, despite the UK's efforts, other ECHR states were not willing to accept this change to the Convention, the only viable option would be for the UK to extract itself from the jurisdiction of the Strasbourg Court altogether.

As noted, since 1998 the Convention has required countries that are party to the ECHR to accept the binding jurisdiction of the Strasbourg Court. Therefore, if the UK wanted to remain party to the rights and freedoms set out in the Convention[5], but not be subject to the ECtHR's interpretations of those rights and freedoms, it would need the agreement of all other ECHR states to this new arrangement.

If this agreement could not be obtained, the UK would need to withdraw from the ECHR to prevent itself being bound by perverse rulings of the Strasbourg Court.

The ECHR clearly provides that a country can withdraw from the Convention if it wishes – it just needs to give six months' notice. There are no fines or other legal sanctions; withdrawal would be entirely lawful.

Following any of these proposed reforms, the UK would be free democratically to determine its laws and policies, with respect for human rights, without the European Court of Human Rights imposing its own – often strange and damaging – ideas on this country.[6]

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[3] : This power would be entrusted to the House of Commons specifically, as the elected Chamber.

[4] : Given the objectionable judgements that have already been levelled at the UK, this power would need to apply both to future rulings and those already handed down.

[5] : Clearly, before embarking on these reforms a democratic decision would have to be taken about whether the UK did wish to remain bound by these rights and freedoms *as they are set down by the ECHR*.

[6] : In the case of withdrawal from the ECHR, the Convention provides that a withdrawing country remains under its ECHR obligations (including abiding by any relevant judgement of the ECtHR) in respect of acts it performed before it withdrew. However, this should not require the UK, after it had withdrawn, to pursue general policies called for by the Strasbourg Court.

Even if the UK withdrew from the ECHR, such a move would certainly not require this country to abandon human rights of the kind enshrined in the Convention.

Instead, the UK Parliament could enact such rights in a new British Bill of Rights, which would replace the Human Rights Act 1998.

These human rights would continue to be applied by the independent British judiciary. However, the British Bill of Rights would remove the rule, introduced by the Human Rights Act, that judges must twist and strain the meaning of legislation, "so far as it is possible to do so", to make it comply with their interpretations of human rights. The courts' ordinary rules of legislative interpretation would apply.

Where British judges believed that clear legislation approved by Parliament breached human rights, the British Bill of Rights would enable the courts to issue a declaration of incompatibility regarding that legislation. As at present, such a declaration would not affect the validity or operation of the legislation in question. Instead, the courts would refer the decision on alteration of that legislation to Parliament, as the democratically accountable legislature.

In these cases, the British Bill of Rights would place the Government under a new obligation to issue a statement setting out what legislative changes would be required to comply with the judges' interpretation of human rights. If the Government did not propose to make such changes, the Official Opposition or a group of 200 MPs could bring forward these legislative amendments, and there would be a decision in the House of Commons on whether to adopt them.

Where UK courts believed that "subordinate legislation" that had not been positively approved by Parliament violated human rights, they would have the power to strike that legislation down in essentially the same circumstances as now.

Public authorities in the UK would continue to be under a general duty to abide by human rights. However, where legislation, *when read in the ordinary way*, clearly allowed (or required) a public authority to undertake particular acts, that public authority could not be held in breach of the law for those actions.[7] As well as better upholding the democratic will of Parliament, this would increase legal certainty for public authorities, significantly reducing their need to second-guess the possible interpretations of legislation that might be handed down by the courts. While continuing to promote human rights, this change would help public authorities – such as our police, immigration officers, hospitals and local authorities – get on with the job of providing excellent public services without unwarranted costs and obstacles.

[7] : Though the courts might be able to exercise their usual powers to require public authorities to do (or not to do) certain things so as to adhere to the judicial conception of human rights, in cases where a court struck down the subordinate legislation upon which the public authority was acting.

The British Bill of Rights and accompanying reforms proposed in this book would ensure that all judicial declarations of incompatibility regarding UK legislation were given full consideration by Government and Parliament. There would be special provision so that consequential proposals for changes to the law could be considered by Parliament (and adopted, with sufficient support) despite Government opposition. The profile of such rulings would be raised, and if parliamentarians or another party thought the Government's response to a declaration of incompatibility was inadequate, they could make that case, armed with all the necessary information. This could apply public pressure to the Government, and voters could factor the various parties' and MPs' positions into their voting intentions.

In fact, it is likely that in at least some cases the Government will be keen to change the law to ensure it complies with human rights as applied by British courts. This is only likely not to be the case when there are very good arguments against the change.

The question Parliament would typically be addressing is not whether human rights should be overridden by legislation, but whether the judges' interpretation of human rights was correct.

The fundamental justification for these proposed reforms – and what is wrong at root with current human rights law – is that we should have rule by the people (in general through their elected, accountable representatives), not rule by judges.

The drafting and application of human rights in law is done by fallible human beings; their every word cannot be taken as incontestable. Applying particular versions of human rights regardless of the opinion of the community in which those rights have force amounts to a dictatorship by judges and the authors of human rights laws. It undercuts the most fundamental individual attribute of all, which is given expression by democracy – that each person has an inherent dignity and identity entitling them, as a rule, to a say in how their community is run.[8]

Furthermore, particular interpretations of human rights must command the confidence of most of the people in the community in which they are enforced, or the whole idea of human rights may become discredited.

Final decisions on the precise human rights in force must rest with the people's elected representatives. Parliamentary democracy moderates any crude majoritarian impulses that might arise – MPs would not curtail human rights just because it was convenient for a majority of the population, with the judiciary ready to sound the alarm about such a course of action.

Practically the same British Bill of Rights could be introduced if the UK remained party to the ECHR after achieving the amendments to the Convention described above, allowing Parliament to overturn outlandish rulings of the European Court of Human Rights or withdrawing from the jurisdiction of the Strasbourg Court altogether.

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[8] : Though they may lose this entitlement, for instance, if they choose to break the democratically-decided law of the community.

Some have suggested that the UK would have to leave the European Union (EU) if it withdrew from the ECHR. This is not plausible, assuming a British Bill of Rights was put in place. All else being equal, the UK would remain party to the separate treaties establishing the EU. It should be noted that EU law, and national law within the scope of EU law, is subject to human rights as interpreted and applied by the EU's Court of Justice, based in Luxembourg. Even if it withdrew from the ECHR, this would continue to be the case in the UK while it remained a member of the EU on current terms. However, while the scope of EU law is very significant, it is not all-embracing. For instance, EU law does not cover the franchise for British prisoners in Parliamentary elections, or deportation of most foreign nationals who are not citizens of another EU Member State.

The UK is also a member of the Council of Europe. This is a separate organisation to the EU, predating the latter and based on its own treaty. It has 47 member countries across Europe, compared to the EU's 27. The ECHR was devised by Council of Europe countries, and the Council's Committee of Ministers oversees the implementation of judgements of the European Court of Human Rights. All Council of Europe members are currently party to the ECHR.

However, there is no clear requirement in the Council of Europe's constituent treaty that member countries be bound by the ECHR. It does not seem likely that the UK would have to leave the Council if it withdrew from the Convention, assuming a British Bill of Rights was also introduced. The UK would be strengthening its democracy and continuing to uphold human rights and the rule of law, the basic common principles of the Council. Even in the unlikely scenario that the UK did have to leave, it would very likely be able to take part in most of the Council's work if it wished to do so, given the Council's practice of involving countries other than its members.

Finally, there is a notion that, if it withdrew from the ECHR, the UK would be abandoning its international drive for human rights. This idea does not stack up, where ECHR withdrawal was accompanied by the enactment of a British Bill of Rights. By its deeds and example, the UK would continue to lead the world in human rights under the reforms proposed in this book. It would enshrine human rights in its law, to be applied by its independent judiciary, which would highlight any instances where it believed legislation approved by Parliament was not adhering to those rights. Our democratically elected and accountable Parliament would then take a final view in these cases. The world would see that only highly questionable interpretations of human rights, in minor matters compared to the gross human rights abuses the UK is rightly challenging across the globe, would be those not implemented by the freely elected representatives of the British people.

The European Convention on Human Rights

The **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)** is a treaty that was first agreed in 1950 and which entered force in 1953. The UK signed up to the ECHR at the outset. Since then, various treaty Protocols have been agreed between countries that are party to the ECHR, which amend the ECHR's original text or supplement it with new rights. However, not all ECHR countries have signed up to all of these Protocols – the UK, for instance, is not bound by all ECHR rights because it has not ratified Protocols 4, 7 and 12, signed in 1963, 1984 and 2000 respectively. This book is primarily concerned with the ECHR as it applies to the UK. The ECHR will sometimes be referred to as 'the Convention'.

The Convention is built on fine principles. It draws on individual rights and freedoms that should be recognised in law. Basically put, the main rights and freedoms it contains (the ones the UK has accepted, that is) are as follows:

- The right to life (Article 2 ECHR)
- Prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR)
- Prohibition of slavery and forced labour (Article 4 ECHR)
- The right to liberty and security of the person (Article 5 ECHR)
- The right to a fair trial (Article 6 ECHR)
- Prohibition of punishment without law (Article 7 ECHR)
- The right to respect for private and family life (Article 8 ECHR)
- Freedom of thought, conscience and religion (Article 9 ECHR)
- Freedom of expression (Article 10 ECHR)
- Freedom of assembly and association (Article 11 ECHR)
- The right for men and women to marry and found a family (Article 12 ECHR)
- The right to peaceful enjoyment of personal property (Article 1 of Protocol 1 to the ECHR)
- The right to education (Article 2 of Protocol 1 to the ECHR)
- The right to free elections, whereby ECHR countries agree to hold free elections for the legislature at reasonable intervals, by secret ballot (Article 3 of Protocol 1 to the ECHR)

Accepting the necessarily general nature of human rights, which means they have to be drafted relatively broadly in law, the way these rights and freedoms are set down in the ECHR is, on the whole, sensible. One may take issue with certain aspects of the ECHR text, such as the lack of clarity on how Convention rights apply to those who are due to be deported to protect national security or after their conviction for a serious crime.[9] On another matter, the right to a fair trial is silent about a right to trial by jury in criminal cases – a product of the fact that juries, as British people would recognize them, barely exist in Europe outside the British Isles, Malta and Gibraltar. Overall, though, the text of the ECHR's rights and freedoms seems more or less fit for purpose.

One major caveat to that judgement is entered here, however. It has been argued[10] that any law setting out human rights should also set down fundamental individual responsibilities to society. The rationale for this is that it would clearly reaffirm the principle that personal rights in relation to society are always accompanied by personal duties towards society, as it is only in a well-functioning community that rights can be fully enjoyed and an individual may flourish. Civil responsibilities set out explicitly in the same law would also ensure the courts balanced human rights with these duties.

It is clear that individuals do have duties towards society, which reflect the requirements for a civilised society to function, and that, in general, personal rights should be balanced against those duties. It is noteworthy that Article 29 of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in 1948, includes the following:

"(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

"(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

As such, there is logic in setting out these personal responsibilities alongside individuals' fundamental rights, and it would be interesting to see if sufficient agreement existed on their content to include them in a possible UK Bill of Rights. A person's basic civil duties may include:

- rendering civil or military service when their country requires their support for its defence
- supporting, nurturing and protecting their minor children
- respecting and upholding basic public order

[9] : In fact, it seems the Convention was not originally intended to apply to deportation cases: Dominic Raab MP, *Strasbourg in the Dock: Prisoner Voting, Human Rights and the Case for Democracy*, Civitas, London, April 2011, p.40

[10] : Such as by Jonathan Fisher QC in *A British Bill of Rights and Obligations*, Conservative Liberty Forum, 2006

Of course, such basic duties could not form free-standing, direct legal obligations on the British people. Given the open-ended nature of these duties, such a move would place individuals under potentially sweeping obligations, with huge discretion for the courts in their application. Instead, the function of these duties in law would be to act as a reference point in balancing – in practice, qualifying – some human rights. Even while recognising these duties, though, it seems certain human rights and freedoms should never be qualified in their name, such as the prohibition of torture.

At this juncture it should be pointed out that most rights and freedoms set out in the ECHR are qualified by that document. For instance, the right to respect for private and family life, the freedom of thought, conscience and religion, the freedom of expression, and the freedom of assembly and association are subject to broadly similar caveats, as follows:

- A public authority may interfere with the right to respect for private and family life if the action 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."

- Limitations may be placed on an individual's freedom to "manifest his religion or belief, in worship, teaching, practice and observance" where those limitations are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

- The exercise of the freedom of expression "carries with it duties and responsibilities" (though these duties and responsibilities are not spelt out) and may be subject to such restrictions "as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

- The freedom of assembly and association (including the right "to form and to join trade unions") can be subject to restrictions that "are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

While these qualifications do not enumerate the basic duties individuals have towards society, they do, on the face of it, allow for certain social needs to be weighed against the personal rights and freedoms set out.

If codified basic duties were added alongside human rights and fundamental freedoms, the rights and freedoms deemed amenable to such qualification could state that they may be restricted by any public action (or inaction) proportionate to the aim of securing observance of those duties. Depending on the range of duties listed, provision for restricting the relevant human rights with laws necessary to attain and/or preserve certain social goods, like that in the current ECHR text, could be retained in addition.

As recognised at the outset, human rights and fundamental freedoms (and, typically, qualifications entered to them) need to be drafted relatively broadly. This is because they are intended to apply over a huge range of human activity. The result, of course, is that significant ambiguity exists about what they mean in particular cases.

The text of the ECHR shows this. After all, what exactly is "inhuman or degrading treatment"? What constitutes "adequate time and facilities" for a person to prepare their defence when they have been charged with a crime? What is a person's "private" life, as opposed to their non-private life? And, with reference to the qualifications quoted above, what restrictions on fundamental rights and freedoms are "necessary in a democratic society"?

It seems inevitable that codified human rights will be very much open to interpretation. Of course, it is the job of the courts to apply human rights, as with all law. The wide range of their interpretation, though, means human rights can give judges sweeping discretion over what the law requires.

The European Court of Human Rights

This brings us to the **European Court of Human Rights** (often abbreviated to 'ECtHR'). This Court was created by the ECHR, and is based in the French city of Strasbourg.

It is worth pointing out that until November 1998[11] the ECHR did not require states party to the Convention to recognise the binding jurisdiction of the European Court of Human Rights, or the right of individuals to file a case against them for an alleged violation of Convention rights. This was, instead, optional for ECHR states, all of which had nonetheless committed to respecting the rights set out in the Convention. The UK did not accept either of these optional rules until 1966, having becoming bound by the ECHR in 1953, and even then only accepted them for several years at a time, subject to renewal, as the Convention allowed their acceptance for specified periods.

[11] : When Protocol 11 to the ECHR, which had been signed (including by the UK) in 1994, entered force.

However, since November 1998 recognising the jurisdiction of the European Court of Human Rights to set down binding judgements, including in cases brought by individuals, has been an integral part of a state's obligations under the ECHR.

Article 32 of the present-day ECHR says, "The jurisdiction of the Court [of Human Rights] shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47."

In terms of the number of cases, by far the most significant route by which the Court receives claims about the meaning and application of the Convention is under Article 34 ECHR. Article 34 allows individuals, groups of individuals or non-governmental organisations to file claims that a state party to the ECHR has violated their Convention rights. Before submitting a case to the Strasbourg Court, the claimant is required to exhaust all possible remedies in national law regarding the alleged violation.

Article 46(1) ECHR says that countries party to the ECHR "undertake to abide by the final judgement of the Court [of Human Rights] in any case to which they are parties." This is a treaty obligation.

Between when it first signed up to the Court's jurisdiction in 1966 and the end of 2010, the UK faced over 350 rulings from the judges in Strasbourg on whether or not it had violated an ECHR right. In about three-quarters of these judgements the Court ruled that the UK had breached a Convention right.[12] Furthermore, in over 50 other cases the UK concluded a "friendly settlement" with the claimant, typically agreeing to pay a certain financial award to them if they dropped their case, thereby avoiding a possible adverse Court ruling.[13]

And the cases keep on coming. Indeed, the volume of cases heard against the UK in the ECtHR has increased dramatically over time. In the 1980s, the average number of cases concluded per year in the Court concerning an alleged UK violation of a Convention right was 2.6; in the 1990s it tripled to 7.8; in the 2000s, it almost quadrupled again to 29.3.[14] The number of cases really took off after the reforms introduced in November 1998, which included allowing individuals to take cases directly to the ECtHR for the first time.[15]

As noted, in a high proportion of judgements involving the UK the Strasbourg Court has found a breach of an ECHR right. **So how does the Court tend to apply these rights?**

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[12] : European Court of Human Rights, *Violation by Article and by Country 1959-2010*, December 2010, p.2

[13] : European Court of Human Rights, *Chronological List of Judgments, Advisory Opinions and Published Decisions*, 5 April 2011; House of Commons Library, *UK Cases at the European Court of Human Rights since 1975*, 19 April 2011

[14] : *Ibid*

[15] : Until October 1994, when Protocol 9 to the ECHR entered force, individuals could not refer their case to the ECtHR, only the now-abolished European Commission of Human Rights. From October 1994 until November 1998, individuals could only refer their case to the ECtHR after it had been considered by the European Commission of Human Rights.

One of the key tenets of the Court's approach is that the ECHR is a **'living instrument'**. In its judgement in the *Tyrer v United Kingdom* case, the Court said, "…the Convention is a living instrument which…must be interpreted in the light of present-day conditions."[16] In other words, the Convention rights can be given a meaning at odds with that intended by the relevant states when they drafted and signed the ECHR, and indeed this meaning can continually change over time. There is nothing in the text of the Convention calling for such an approach. Nevertheless, it might sound reasonable to allow human rights to evolve over time, given their intended wide range of application, so as to keep pace with, for instance, technological change.

A fundamental problem with the 'living instrument' doctrine, however, is that it allows the *Strasbourg Court* to determine the demands that "present-day conditions" make of respect for human rights. In practice, it can give the Court huge freedom in the application of ECHR rights, building on the inherently wide range of interpretation the broadly drafted rights already entail.

Furthermore, the sentence in the *Tyrer* judgement following that quoted above gives an indication of how the Court determines the "present-day conditions" that apply: "In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[17] In other words, if an ECHR state is out of sync with the bulk of other ECHR states when it comes to the matter in hand, that is likely to count against it in a determination of whether it is respecting Convention rights as brought 'up to date' by the Court. This is despite the fact that such matters may be politically sensitive and unsuitable for homogenisation across Europe due to national historical and cultural differences.

It should be noted that the jurisprudence of the ECtHR also includes the doctrine of the **'margin of appreciation'** for states party to the Convention. The margin of appreciation is basically a degree of discretion afforded by the Court to ECHR countries in how they construe and apply Convention rights. It was first referred to explicitly by the Court in the case of *Handyside v United Kingdom*; when considering whether a restriction on the right to freedom of expression was necessary for the protection of morals, as allowed under Article 10 of the Convention, the Court noted: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morality] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."[18]

[16] : *Tyrer v United Kingdom*, 25 April 1978, §31, Series A no. 26
[17] : *Ibid*
[18] : *Handyside v United Kingdom*, 7 December 1976, §48, Series A no. 24

However, the Court went on, "Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which…is responsible for ensuring the observance of those States' engagements [under the Convention], is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it".[19]

In short, the Court retains the final say, and the scope of the margin of appreciation it has granted ECHR countries has varied significantly with different cases. As the current UK Government has put it: "...[the margin of appreciation] can vary from right to right, from case to case, and over time."[20] For instance, where the Court has divined a 'European consensus' on the subject of the case – that is, where it believes most ECHR states take the same or similar approach regarding the matter in hand – it will be inclined to restrict the margin of appreciation. The margin of appreciation barely applies, if at all, to some of the rights and freedoms in the Convention, such as the right to life and the prohibition of inhuman or degrading treatment or punishment, on the grounds that these are especially strict requirements in the ECHR text, with little or no room for their balancing against other objectives.

Another important aspect of the Court's jurisprudence concerns the **limitations that may be placed on the rights contained in Articles 8-11** of the Convention. As noted above, these articles allow ECHR states to restrict the rights therein for various (mainly social) ends, such as the protection of health or morals or for public safety. All such restrictions must be, in the words of those Convention articles, "necessary in a democratic society". The Court set down a seminal interpretation of this phrase in the *Handyside v United Kingdom* case: it said there must be a "pressing social need" for the restriction in question so as to attain one or more of the authorised aims for such restrictions listed in the relevant Convention article; and the restriction must be "proportionate" to its aims.[21]

In practice, this test often leads the Court to make essentially political decisions, weighing different policy considerations and objectives to come to its own view on the substance of the action taken. This contrasts sharply with the traditional approach of British judicial review of the public actions of public authorities. Under judicial review traditionally, the judge would ensure that a public authority's decision was within the powers conferred on that authority (including conditions for the exercise of those powers), that the decision-making process had been conducted properly, and that the decision was not, on the facts of the case, completely unreasonable. Other than that, the court left the substance of decision-making in the hands of the designated decision-maker, who was usually accountable to the public through an electoral channel. Furthermore, British judges would not question the validity of an Act of Parliament.

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[19] : *Handyside v United Kingdom*, §49
[20] : HC Deb 4 March 2011, c725W
[21] : *Handyside v United Kingdom*, §§48-49

Added to these elements of the ECtHR's jurisprudence, there is of course the open-ended nature of many other terms used in the ECHR text, allowing the Court broad discretion in their interpretation.

The following cases give a couple of examples of how the Strasbourg Court's application of ECHR rights has impacted on the UK.

Prisoner voting rights – *Hirst (No. 2)*

John Hirst used an axe to kill his landlady in her home in 1979. In 1980 he was convicted of manslaughter, rather than murder, on the grounds of diminished responsibility due to a serious personality disorder. He was sentenced to life imprisonment with a tariff of 15 years, after which it was possible for him to be released on licence. In fact, he was not released until 2004, due to concerns at the time about the danger he may have presented to the public.

Teaching himself law while in prison, Hirst became a serial litigant against the authorities. In July 2001, he submitted a claim to the European Court of Human Rights based on Article 3 of Protocol 1 to the ECHR. This states the following:

"Article 3 – Right to free elections

The High Contracting Parties[22] undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Applicable throughout the UK, section 3 of the Representation of the People Act 1983 bans convicted prisoners, for the duration of their time in custody, from voting in elections to the House of Commons and local government. Indirectly, through reference by the relevant Acts of Parliament[23] to its provision, it also bans these people from voting in elections to the European Parliament, the Scottish Parliament and the Wales and Northern Ireland Assemblies. The exceptions are prisoners jailed for contempt of court following a summary process, and those imprisoned because they have defaulted on their sentence, for instance because they have failed to pay a fine. These convicted prisoners do have the franchise.

Hirst claimed that his right to vote under Article 3 of ECHR Protocol 1 was violated by section 3 of the Representation of the People Act 1983.

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[22] : In this case, the High Contracting Parties are all the ECHR states apart from Switzerland and Monaco, which have not ratified Protocol 1.

[23] : Or, in the case of Northern Ireland, through reference by the Northern Ireland Assembly (Elections) Order 2001, which was approved by both Houses of the UK Parliament. The other relevant Acts of Parliament are: the European Parliamentary Elections Act 2002; the Scotland Act 1998; and the Government of Wales Act 2006.

As can be seen straight away, the wording of Article 3 does not actually confer a right to vote on individuals. At most, the text entails an individual right to live in a country that has elections ensuring "the free expression of the opinion of the people in the choice of the legislature". Indeed, in its Grand Chamber judgement in Hirst's case (***Hirst v United Kingdom (No. 2)***), delivered on 6 October 2005, the ECtHR itself said: "Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom."[24]

However, in an example of its creative interpretations of ECHR provisions, the ECtHR found in the case of *Mathieu-Mohin and Clerfayt v Belgium*[25] that Article 3 included an individual right to vote and stand for election.

The Court in *Hirst (No. 2)* held, though, that this right to vote was not absolute; it could be restricted. Furthermore, it ruled that ECHR countries have a "wide" margin of appreciation (that is, discretion) in deciding the exact application of the right to vote.[26]

Nevertheless, the Court ruled: "It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions [on exercising those rights] do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate".[27]

The UK Government submitted that the prisoner voting ban pursued the legitimate aims of preventing crime, by imposing an additional sanction on those sent to prison, and enhancing civic responsibility and respect for the rule of law, by depriving those who breached the law of their right to have a say in its formation for the duration of their imprisonment. The ban was also proportionate to its aims as it only affected those whose crimes were serious enough to attract a sentence of imprisonment, and the period during which their right to vote was suspended was set by the court when deciding the term of incarceration.

Furthermore, Parliament had considered the prisoner voting ban on several occasions, when enacting the relevant legislation. Section 3 of the Representation of the People Act 1983 replaced an equivalent provision of the Representation of the People Act 1969. That provision had resulted from a recommendation of a cross-party Conference on Electoral Law made up of MPs and presided over by the Speaker of the House of Commons, which reported in 1968 and concluded that convicted prisoners should not be allowed to vote.

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[24] : *Hirst v United Kingdom (No. 2)* [GC], no. 74025/01, §56, ECHR 2005-IX
[25] : 2 March 1987, Series A no. 113
[26] : *Hirst v United Kingdom (No. 2)*, §§60-61
[27] : *Ibid*, §62

Since the 1983 Act, the Representation of the People Act 2000 has been considered and passed by Parliament. This Act amended the 1983 Act to enable prisoners on remand (who have not been convicted of an offence) to vote; the 1969 and 1983 Acts had not sought to disenfranchise these people, but in practice they were denied the vote as they could not register to vote while in prison. At the same time, the Government said in its explanatory notes presented to Parliament in 1999 with the Representation of the People Bill: "This Bill does not alter the franchise (except in relation to offenders detained in mental hospitals (see clause 2) [who were disenfranchised by the 2000 Act])."[28] Clearly, given that the 2000 Act did not alter section 3 of the 1983 Act, Parliament decided at that time that the voting ban on convicted prisoners remained right.

In its submissions in the *Hirst (No. 2)* case, the Government said that Parliament's consideration of and decision on this matter should be seen as falling within the UK's margin of appreciation regarding the right to vote. The Government also argued that this margin was wide given the lack of consensus among ECHR states on the issue; in at least 5 other ECHR countries, including Estonia, Hungary and Bulgaria, there is a complete ban on prisoners voting, and in around half of the Convention nations there are certain restrictions on prisoner franchise.[29] In Italy, for instance, people sentenced to more than five years in prison *permanently* lose the right to vote, whereas those sentenced to between three and five years in prison lose the franchise for at least five years[30]– though this law has also been under attack from the ECtHR.[31]

The Court, however, was adamant. First, it stated that "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty".[32] When it comes to denying anyone the right to vote, "the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned."[33]

[28] : Home Office, *Representation of the People Bill: Explanatory Notes*, November 1999, para 25
[29] : House of Commons Library, *Prisoners' voting rights*, 27 April 2011, p.43
[30] : *Ibid*, p.44
[31] : *Scoppola v Italy (No. 3)*, no. 126/05, 18 January 2011 [judgement only available in French]
[32] : *Hirst v United Kingdom (No. 2)*, §69
[33] : *Ibid*, §71

The Court gave little heed to the Government's arguments in favour of allowing Parliament to impose the voting ban contained in section 3 of the Representation of the People Act 1983, under the UK's margin of appreciation. It ruled that "there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote".[34] Regarding Parliament's consideration of what became the Representation of the People Act 2000, the Court stated, "It may be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless, it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote."[35] The Court accepted that, "it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States."[36] The Court batted this off, though, saying, "the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed".[37]

The Court concluded, "…while the Court reiterates that the margin of appreciation is wide, it is not all-embracing…section 3 of the 1983 Act remains a blunt instrument…The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."[38]

There are many things wrong with this judgement. One is the departure from the wording of the Convention article in question. Is the Court seriously contending that the UK does not have elections that enable the free expression of the British people in how the House of Commons is composed, just because it denies the vote to convicted prisoners while they are in custody? Such a claim is as ludicrous as it is an insult to the United Kingdom, with its long-standing democratic credentials.

The judgement also exposes the uselessness of the margin of appreciation doctrine in preserving national discretion. The Court went as far as it could to overturn a long-standing provision of an Act of Parliament even though a "wide" margin of appreciation applied. As with many aspects of the Court's jurisprudence, what this doctrine actually means in any given case seems to be largely at the whim of the Strasbourg judges.

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[34] : *Hirst v United Kingdom (No. 2)*, §79
[35] : *Ibid*
[36] : *Ibid*, §81
[37] : *Ibid*
[38] : *Ibid*, §82

Furthermore, in applying the margin of appreciation the Court conducted an apparently very tendentious inquiry into how Parliament had considered the ban on prisoner voting. While there may not be much debate on the issue in the official Parliamentary record of proceedings on the Bill that became the Representation of the People Act 2000, that is clearly not to say that parliamentarians did not consider the matter, given prisoner voting was a subject covered by that legislation. On the contrary, it might be taken as a reflection of the continued breadth and depth of support for the ban, in the face of an opportunity to change it. Moreover, the Court's evaluation of Parliament's proceedings and motives is very out of place in the British constitutional context, in which the Bill of Rights 1689 has long preserved Parliament's business from being questioned by the courts.

In addition, the Court seemed to think it legitimate to count against the UK the fact that it was in a "minority" of ECHR states in its approach to prisoner voting. This raises the possibility of something like a qualified majority of ECHR countries being sufficient to count as a "European consensus" in the Court's judgements – leaving the law of the remaining nations susceptible to a negative ruling.

Finally, the Court's adverse ruling ultimately hinged on its assessment of the "proportionality" of the prisoner voting ban. The judgement shows how the principle of proportionality can give the Court huge scope for making essentially political decisions on the substance of the law. This test, however, is integral to the Court's application of most ECHR rights.

Following the Court's Grand Chamber judgement in *Hirst (No. 2)* (against which there was no appeal under the ECHR), the then Labour Government held two consultations on how to implement the ruling, but never arrived at a clear proposal for the way forward. To this day, section 3 of the Representation of the People Act 1983 remains on the statute book.

However, the ECtHR has since toughened its stance further. In November 2010 the Court issued its judgement in the case of *Greens and M.T. v United Kingdom*[39]. This involved two British men who claimed that, as convicted prisoners, their right to vote under Article 3, Protocol 1 ECHR had been violated in the 2009 European Parliament and 2010 General elections, primarily by section 3 of the 1983 Act but also by section 8 of the European Parliamentary Elections Act 2002, which by reference to the 1983 Act excludes the same convicted prisoners from voting in elections to the European Parliament. The ECtHR had already found that elections to the European Parliament fell under Article 3 of Protocol 1, in its 1999 judgement in *Matthews v United Kingdom*.[40]

[39] : nos. 60041/08 and 60054/08, 23 November 2010
[40] : [GC], no. 24833/94, ECHR 1999-I

Intriguingly, when it came to the substantive arguments in *Greens and M.T.*, the UK Government simply accepted that this violation of the prisoners' right to vote had occurred.[41] Perhaps the Government did not think, at this point, that there was any chance of the Court rowing back on its judgement in *Hirst (No. 2)*. Unsurprisingly, the Court went on to find that the UK had breached the men's right to vote, because it had not amended the relevant primary legislation since the *Hirst (No. 2)* ruling.[42] Indeed, the Court said, "The failure of the respondent State [the UK] to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery [that is, the Court]".[43] The Court was worried about the large number of cases being submitted to it by UK prisoners, each of whom could claim a violation of their right to vote.

One of the features of the *Hirst (No. 2)* case is that the judgement did not indicate the rules for prisoner voting that *would* comply with the Court's interpretation of Article 3 of Protocol 1. Indeed, it is arguable whether the Court has the power to do this under the ECHR. The main provision of the Convention in this regard[44] is that the Court's jurisdiction extends to deciding claims by individuals that an ECHR state has breached their Convention rights. On a strict reading, this would be limited to determining whether or not a violation has occurred – not also formulating alternative laws that the country in question must apply.

In fact, this stricter approach is typically how the Convention has operated. The Court will identify a breach of an ECHR right if it believes one exists (and thereby require that breach to be rectified), but it will not specify precise remedial measures that have to be taken. The judgement is then sent to the Council of Europe's[45] Committee of Ministers, made up of a representative of each ECHR country government, which will "supervise" the implementation of the ruling, as stated by Article 46(2) ECHR. However, while an ECHR state is obliged under Article 46(1) of the Convention to adhere to ECtHR rulings, where it was a party to the case in question, the Committee of Ministers has no power under the Convention to oblige an ECHR state to do anything in particular in response to a Strasbourg judgement.

This established practice, though, has been blurred by some recent judgements of the Court, in which it has mandated particular actions to address the breach of rights it has found.[46]

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[41] : *Greens and M.T. v United Kingdom*, §74
[42] : *Ibid*, §110
[43] : *Ibid*, §111
[44] : Part of Article 32 ECHR, in conjunction with Article 34
[45] : The Council of Europe should not be confused with the European Union; they are legally distinct organisations with different memberships. The Council of Europe is discussed later in this book.
[46] : Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', in *European Journal of International Law*, volume 19, issue 1 (2008), p.147

Nevertheless, in *Greens and M.T.* the Court decided to leave open the question of what precisely would abide by its construction of Article 3, Protocol 1 when it came to prisoner voting, saying it was for the UK to choose the details of the policy. The judgement did note, though, that any new legislation enacted could be challenged by a prisoner before the Strasbourg Court.[47]

On the other hand, the Court did stipulate a timeframe: "…the Court concludes that the respondent State must introduce legislative proposals to amend section 3 of the 1983 Act and, if appropriate, section 8 of the 2002 Act, within six months of the date on which the present judgment becomes final, with a view to the enactment of an electoral law to achieve compliance with the Court's judgment in *Hirst* according to any time-scale determined by the Committee of Ministers."[48]

As with all ECtHR judgements, this is binding under Article 46(1) of the Convention. The Court seems to have played a sleight of hand regarding a deadline for the UK to *enact* a change to its law on prisoner voting (which can only be done by Parliament). As noted, under the ECHR itself the Committee of Ministers cannot oblige a state to take particular measures in response to a Strasbourg judgement. However, on one reading, the Court's ruling in *Greens and M.T.* empowers the Committee to set a binding deadline for the UK to change its electoral law. Under the rules of the Committee, the UK Government could not block a proposed Committee decision setting such a deadline.[49]

As for the first deadline, for the Government to *propose* changes to the law on prisoner voting, this was due to expire on 11 October 2011. This was six months after the ECtHR refused to consider an appeal by the UK Government against the ruling in *Greens and M.T.*, causing the judgement to become final. The Government's appeal was partly in light of the fact[50] that the House of Commons had held a dedicated debate on prisoner voting following the Court's judgements, and had voted by 234 to 22 to keep the disenfranchisement of convicted prisoners contained in section 3 of the 1983 Act.[51] The lack of such a debate was of course one of the factors the Court had apparently taken into account when applying the UK's margin of appreciation in *Hirst (No. 2)*. Evidently, though, the Court did not believe the elected Chamber's considered and clear view meant its ruling needed to be re-evaluated.

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[47] : *Greens and M.T. v United Kingdom*, §114
[48] : *Ibid*, §115
[49] : HC Deb 5 September 2011, c287W
[50] : As described in the Government's answer to a written Parliamentary question (HC Deb 1 March 2011, c428W)
[51] : HC Deb 10 February 2011, c493 et seq

As it turns out, the Court has since extended its deadline for the Government to propose the enfranchisement of some or all convicted prisoners. It did this after deciding to hear an appeal from the Italian Government against its ruling in the *Scoppola (No. 3)* case, where it had found an Italian law on disenfranchisement of prisoners violated Article 3 of Protocol 1. The UK Government applied to intervene in this appeal – so it could put arguments to the Court regarding the ECHR and prisoner voting – and also asked for the deadline for proposing UK legislation on prisoner enfranchisement to be extended, to enable the Court's appeal ruling in *Scoppola (No. 3)* to be taken into account. The Court agreed to both requests, saying the deadline would now be six months after the final ruling is set down in *Scoppola (No. 3)* (while saying, at the same time, that implementation of the *Hirst (No. 2)* ruling would still have to begin at that point). The *Scoppola (No. 3)* appeal is ongoing.

Section 3 of the Representation of the People Act 1983 is surely right; convicted prisoners should lose their right to vote while in custody. By committing an offence warranting prison, these people have shown a serious contempt for democracy, by flouting important provisions of the law as democratically decided. Why, for the duration of their sentence of imprisonment, should they have a say in making the law that governs us all, when they have shown they are prepared to ignore key aspects of it?

Blocking deportation and extradition - *Chahal*

Karamjit Singh Chahal, an Indian national, entered the UK illegally in 1971 in search of work, before being given indefinite leave to remain under an amnesty in 1974. Mr Chahal was a Sikh who became very active in the UK's Sikh community in the 1980s, including in support of a campaign for an independent Sikh homeland, formed out of roughly the present-day Punjab, which is a state of India. In the late 1980s and early 1990s many terrorist attacks were carried out in Punjab by Sikh separatists; there were also many reports of violence and killings perpetrated by Indian security services.

In August 1990 the then Home Secretary, David Waddington, decided that Chahal should be deported to India on grounds of national security and the international fight against terrorism. Sections 3 and 5 of the Immigration Act 1971[52] allow the Home Secretary to order the deportation of a foreign national if he or she deems this to be "conducive to the public good". The 1971 Act also allows a person subject to a deportation order (or a planned deportation order) to be detained pending their deportation, and Chahal was taken into custody.

As it existed at the time, the 1971 Act provided for a process to appeal against the Home Secretary's deportation decision, apart from when it was made on the grounds of "national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature". Deportation decisions made on these grounds were subject to a special non-statutory procedure. This allowed the subject of the deportation decision to make representations to an independent panel and to call witnesses on his or her behalf, but the panel's conclusion was not binding on the Home Secretary, and was not published. A key motivation behind these provisions was preserving the secrecy of the work of the intelligence services.

In the procedure before the independent advisory panel regarding his planned deportation, Chahal was told by the Home Office that the reasons for his deportation included his involvement in both the provision of funds and equipment to Sikh terrorists in Punjab and planning of terrorist attacks in India and the UK. Chahal denied the allegations of his involvement in and support for terrorism. After completion of the panel procedure, the then Home Secretary, Kenneth Baker, signed a deportation order for Chahal in July 1991.

Chahal then filed claims for judicial review of the deportation order, during which proceedings the Government refrained from deporting him. Furthermore, it was during these proceedings that Chahal submitted a case to the then-operational European Commission of Human Rights under the ECHR. In turn, his case was referred to the European Court of Human Rights.

[52] : In combination with section 2A of the Act, when it comes to non-British Commonwealth citizens who have the right of abode in the UK under the 1971 Act. Section 2A was introduced by the Immigration, Asylum and Nationality Act 2006.

Among Chahal's claims were that if the UK deported him to India, it would breach his guarantee under Article 3 ECHR, which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." To support his case, Chahal claimed that there was a real risk that if he was returned to India he would be targeted by elements in the Indian security services for violence or even killing, given the UK Government had publicly said, in effect, that he was a Sikh terrorist.

The primary obligation on states that are party to the ECHR is contained in Article 1 of the Convention, which says, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Of course, ECHR countries are not responsible for the actions of foreign governments inside their own territories. If, following deportation, Chahal was subjected to torture or to inhuman or degrading treatment or punishment by the security services in India, those actions would be the responsibility, ultimately, of the Indian Government, not the UK.

However, in its judgement in *Soering v United Kingdom*, the ECtHR ruled that an ECHR country would breach its obligation to ensure that no-one within its jurisdiction was subjected to the maltreatment identified in Article 3, if it transferred someone out of its jurisdiction when there were "substantial grounds" for believing there to be a "real risk" that person would experience such maltreatment in the country of destination.[53] Among other arguments it made against this doctrine in the *Soering* case, the UK Government contended that its obligation under the Convention could only be engaged if the mistreatment in the destination country was "certain, imminent and serious"[54] – not that there was simply a risk of it happening, under circumstances outside the UK's control. The Court, though, rejected this argument.

In its *Chahal* judgement[55], the ECtHR upheld the *Soering* test. Perhaps more importantly, the Court insisted that where a "real risk" of treatment contrary to Article 3 ECHR in the country of destination had been shown, that was the end of the matter – no matter how serious the reasons for deportation or extradition, it could not take place.

The UK Government had indicated to the ECtHR that the domestic independent advisory panel that had considered Chahal's deportation had agreed he should be deported to protect national security. However, the ECtHR ruled: "In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration…It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security."[56]

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[53] : *Soering v United Kingdom*, 7 July 1989, §91, Series A no. 161
[54] : *Ibid*, §83
[55] : *Chahal v United Kingdom*, 16 November 1996, *Reports* 1996-V
[56] : *Ibid*, §§80 and 82

The UK Government had unsuccessfully argued that the level of risk of Chahal being subjected to torture or inhuman or degrading treatment or punishment should be weighed against the gravity of the reasons for his deportation. If substantial doubt existed that Chahal would be maltreated in India in a way that would be contrary to Article 3 ECHR, the risk of this happening could be outweighed by the threat (asserted by the Government) that he posed to national security, justifying his deportation.[57]

It should be pointed out at this juncture that, under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[58], the UK is obliged not to deport or extradite a person if there are "substantial grounds" for believing there to be a danger they will be *tortured* in their country of destination. As a rule, it is for the UK to apply the test of whether there are substantial grounds for believing such a danger exists.

Part of the problem with the ECtHR's approach is that the Strasbourg Court has shown itself willing to act as a court of appeal, taking the facts of a case and applying its own judgement on whether there are "substantial grounds" indicating a "real risk" of torture or inhuman or degrading treatment or punishment. The *Chahal* ruling displayed this approach. This creates significant uncertainty for British governments, who – along with British courts – might endeavour to apply the test in deportation and extradition cases, but who know the ECtHR could simply substitute its own view if a case goes before it. In the *Chahal* case the UK Government had concluded that there was no real risk of Chahal being tortured or subjected to inhuman or degrading treatment or punishment if he was returned to India, but the ECtHR disagreed, even though the evidence about the risk was mixed. The Court therefore found in Chahal's favour and blocked his removal.

Furthermore, the ECtHR prohibits deportation and extradition when there are substantial grounds for believing there to be a real risk that *inhuman or degrading treatment or punishment* of the individual will take place. The UN Convention cited above deliberately only applies this test to risks of torture. Torture is recognised as being of a higher order of severity to other inhuman or degrading treatment or punishment. While this other treatment or punishment is also wrong and should be prohibited, we are talking here about the *risk*, not the certainty, of it happening, set against the need for an individual to be removed from the country.

Moreover, the Strasbourg Court has set a rather low threshold on what may constitute, in particular, degrading punishment.

[57] : *Chahal v United Kingdom*, §76

[58] : Agreed in 1984 and which entered force in 1987. The UK signed this Convention in 1985 and ratified it in 1988.

In the 1978 case of *Tyrer*[59], the Court considered the case of a 15-year old male youth on the Isle of Man who, in accordance with Manx law, had been sentenced to, and received, three strokes of the birch, after pleading guilty to assault occasioning actual bodily harm against another young person. Manx legislation regulated the number of strokes of the birch a male convict could be sentenced to, as well as the birch's dimensions; the sentencing court had to receive a medical report on whether the convict was fit to receive such punishment before passing sentence; a medical practitioner had to be present during execution of the sentence, and could order the birching to stop at any point; and those under 17 years old could have a parent or guardian present during the carrying out of the sentence. Anthony Tyrer, the youth in question, was birched in private over his bare buttocks. The punishment did not break his skin, and the ECtHR heard that he was sore for about a week and a half afterwards.

The Strasbourg Court ruled that this constituted degrading punishment, and was therefore a breach of Tyrer's rights under Article 3 ECHR. On the rationale for its finding, the Court said: "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State…Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3…to protect, namely a person's dignity and physical integrity…The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender…Accordingly, viewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of "degrading punishment"".[60] The Court made no reference in its reasoning to Tyrer's age, and said that the fact the birching was administered over his bare posterior was *not* the decisive factor in its finding of a breach of Article 3.[61]

Regardless of whether it is desirable to have such corporal punishment in the criminal justice system, it seems to be greatly stretching the meaning of an article aimed at torture and other gross maltreatment of people to include within its prohibition the sort of punishment Tyrer received. This extension is even worse if it results in an inability to deport or extradite someone, such as for national security reasons or to uphold immigration law, because there are substantial grounds for believing there to be a risk that person will receive this sort of punishment in the destination country, or a punishment or treatment that is equally "degrading".

It should also be noted that the UN Convention cited above expressly excludes from its definition of *torture* any act that is part of "lawful sanctions" against a person, such as a court-imposed sentence for a criminal offence. This means that such punishments do not prevent deportation or extradition under that Convention.

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[59] : *Tyrer v United Kingdom*, 25 April 1978, Series A no. 26
[60] : *Ibid*, §§33 and 35
[61] : *Ibid*, §35

Clearly, it would be beneficial to have a better definition of the concepts of, in particular, degrading treatment and punishment, which reflected the graveness associated with those terms and which justified the absolute prohibition on such maltreatment (no exceptions to the Article 3 prohibition are allowed under the ECHR).

Based on this, if it was a near certainty that inhuman or degrading treatment or punishment would be inflicted on a person in the destination country, that should probably prohibit their deportation or extradition, except perhaps where the need for their removal from the country was imperative, such as for pressing national security reasons.

However, in cases where there was more uncertainty over whether such maltreatment would occur, the decision regarding deportation or extradition should be a balancing exercise, with the level of risk of the maltreatment happening, and the severity of that potential maltreatment, weighed against the need for the person's removal. Where deportation was required for national security reasons, for instance, this would weigh very heavily indeed in favour of an individual's removal from the country.

Torture **is particularly reprehensible and the UK should support the global fight against it. As such, it is laudable that the UK adheres to the provision of the UN Convention against Torture prohibiting someone's deportation or extradition if there are "substantial grounds" for believing there to be a danger that person will be tortured in their country of destination.**

None of this, of course, prejudices debates about the procedure for deciding whether or not a person threatens national security and should be deported, such as whether intelligence evidence should be cross-examined in court. It also does not prejudge debates about the broader circumstances in which British nationals should and should not be extradited.

The Human Rights Act

As noted at the outset, the ECHR is a treaty. This means the Convention binds the UK in international law. However, it is a principle of the UK's constitution that treaties do not have force in domestic UK law unless they are incorporated by an Act of Parliament – sometimes known as 'transforming' a treaty into domestic law. Furthermore, treaties only have force in UK law to the extent they are implemented by an Act of Parliament; in other words, it is open to Parliament only to give force to certain parts of a treaty, rather than all of it. From 1953 to 2000, the ECHR was not incorporated into UK law in whole or part.

That is not to say, though, that treaties do not have any effects in UK law in the absence of incorporation by Act of Parliament. British courts have for many years taken the stance that where a piece of UK legislation is ambiguous, and is capable of a meaning in conformity, on the one hand, and conflict, on the other, with the UK's treaty obligations in international law, the courts will apply the interpretation of legislation that is in conformity with the treaty requirements falling on the UK. This rule was upheld in the context of ECHR obligations by the House of Lords (acting as the UK's top court) in the 1991 *Brind* case.[62]

The House of Lords, in another case[63], also said that whenever the judge-made common law in the UK was unclear or required the relative weights of different public interests to be assessed, British courts should take into account the UK's obligations under the ECHR with a view to rendering the common law compatible with those obligations.

Of course, the UK's obligations under the ECHR include adhering to judgements of the European Court of Human Rights on the Convention's provisions, when the UK is a party to the case in question before the Strasbourg Court.

This was not enough for the Labour Party, however, when it won power in 1997. In October of that year the new Government brought forward the Human Rights Bill, to incorporate into British law all of the ECHR human rights and fundamental freedoms the UK had accepted internationally.[64]

In a White Paper published to accompany the Bill, then Prime Minister Tony Blair justified what would become the Human Rights Act by saying: "It will give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society. And it stands alongside our decision to put the promotion of human rights at the forefront of our foreign policy."[65]

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[62] : *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720
[63] : *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109
[64] : With the exception of the right, under Article 13 ECHR, to an 'effective remedy' before a national authority for a breach of any of the ECHR rights or freedoms.
[65] : Home Office, *Rights Brought Home: The Human Rights Bill*, Cm 3782, October 1997, p.1

The Human Rights Bill was passed by Parliament and became the **Human Rights Act 1998 (the 'HRA')**. The Act's main provisions, including those incorporating ECHR rights into UK law, entered force in October 2000.

The key provisions of the Human Rights Act are as follows:

- **Section 3 HRA:** "So far as it is possible to do so", British courts (along with everyone else) are obliged to **interpret and apply** legislation in the UK in a way that is compatible with the ECHR rights contained in the HRA.

  This applies both to "primary legislation" – which includes Acts of Parliament – and to "subordinate legislation", which includes legislation that is not itself an Act of Parliament but which is made under the authority of an Act, with the key exception of such legislation that amends primary legislation (this type of amending legislation itself also being classed as primary legislation[66]). Legislation made under an Act is often made by the Government with some form of Parliamentary oversight. However, the common 'negative resolution procedure' for subordinate legislation represents extremely weak Parliamentary scrutiny and control, requiring neither a debate nor positive approval of the legislation in Parliament for it to continue in force.

  Section 3 HRA states that if it is *not* possible to interpret and apply *primary* legislation in a way that is compatible with the ECHR rights in the HRA, the force and operation of that legislation is unaffected – the courts must still apply it. Similarly, if subordinate legislation cannot be read and applied compatibly with the ECHR rights, *and* primary legislation prevents the incompatibility being removed, that subordinate legislation continues to be valid and have force. This could apply, for instance, where an Act of Parliament authorising the making of subordinate legislation included specific requirements for what that legislation should do. When construing the relevant primary legislation, of course, the courts are obliged to interpret it in conformity with the Convention rights, "so far as it is possible to do so".

  On the other hand, one effect of the HRA is to empower judges to strike down subordinate legislation that they do not believe it is possible to interpret and apply in a way that conforms to the relevant ECHR rights, where they also do not believe primary legislation prevents the incompatibility from being removed.

[66] : Though legislation of the devolved legislatures and executives in Scotland, Wales and Northern Ireland is never classed as primary legislation.

- **Section 4 HRA:** Higher courts in the UK (the High Court, or its equivalent in Scotland, and above) can issue a **"declaration of incompatibility"** if they judge that a provision of primary legislation cannot be interpreted and applied in a way that is compatible with the ECHR rights in the HRA. They can also issue a declaration of incompatibility if they believe that a provision of subordinate legislation, made using a power conferred by primary legislation, cannot be read and applied compatibly with the Convention rights, and the parent primary legislation prevents removal of the incompatibility.

  A declaration of incompatibility does not affect the validity or force of the relevant legislation – the courts must still apply it.

  The courts' power to issue a declaration of incompatibility is discretionary; judges are not obliged to make such a declaration if they find a relevant provision of legislation incompatible with the Convention rights in the HRA.

- **Section 10 and Schedule 2 HRA:** If a declaration of incompatibility is made,[67] or if the European Court of Human Rights delivers a judgement in a case brought against the UK which seems to the Government to mean that an aspect of UK legislation is incompatible with a UK obligation under the ECHR, the Government *may*, if it considers that there are "compelling reasons" for doing so, change *by order* the legislation that has been deemed incompatible, in the way the Government considers necessary to remove the incompatibility.[68] If a provision of subordinate legislation is at issue, the Government can also change by order the primary legislation under which that subordinate legislation was made, if it believes there are "compelling reasons" for doing so and the changes are necessary to enable the incompatibility of the subordinate legislation to be removed.

  These orders altering legislation are called **"remedial orders"**. They can be retroactive ie. change the law as it applied before the order was made.

  Typically, a remedial order can only be made by the Government after a draft of it has been approved by a resolution of each House of Parliament. This means, among other things, that the Government can change Acts of Parliament through a remedial order after receiving just a single nod of approval from each House of Parliament – rather than the several stages of scrutiny and debate on a Parliamentary Bill that is usually required to alter an Act.

  Indeed, under the HRA a remedial order can be made and can alter the relevant legislation before any Parliamentary approval at all. This occurs if the Government declares that the order needs to be made before Parliamentary approval due to "the urgency of the matter". If 120 days (not counting Parliamentary recesses) passes from the date of the making of the order without both Houses of Parliament adopting a resolution approving it, the order ceases to have effect.

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[67] : And after any appeal against the judgement that issued the declaration has been concluded.

[68] : The order can also include any "incidental, supplemental, consequential or transitional provision as the person making it considers appropriate", which can include changes to legislation other than the legislation deemed incompatible.

- **Section 6 HRA:** Every **"public authority"** in the UK is obliged to act in a way that is compatible with the Convention rights in the HRA – except where an authority cannot act compatibly due to a provision of primary legislation, or where the authority is giving effect to a provision of, or made under, primary legislation that cannot be interpreted and applied in a way that is compatible with the Convention rights. These circumstances in which a public authority can act contrary to ECHR rights are deliberately very narrowly drawn, being linked to the duty under section 3 HRA to interpret all primary legislation in conformity with the Convention rights (so that this legislation does not provide for public authorities to infringe those rights), "so far as it is possible to do so".

  Section 6 makes clear that a court or tribunal is a "public authority" for these purposes, as is an organisation "certain of whose functions are functions of a public nature" – though such an organisation is only a public authority when exercising its public functions. Section 6 also states that Parliament, and a person exercising functions in relation to proceedings in Parliament, is *not* a "public authority".

  Other than that, however, the HRA does not define the term "public authority" (or "functions of a public nature"). At the time of publishing the Human Rights Bill, the Labour Government made clear that it intended the term to have broad coverage: "The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities."[69] While the courts have sometimes taken a relatively restrictive view of which private bodies carry out "functions of a public nature", the section 6 duty to act compatibly with ECHR rights applies, as a rule, to all public sector bodies, ranging from NHS trusts to maintained schools to the Crown Prosecution Service.

  Section 7 HRA provides that anyone can bring a legal action against a public authority for an act or failure to act – or a *proposed* act or omission – that breaches (or would breach) the authority's duty to abide by the ECHR rights in the HRA, if the person bringing the claim is a "victim" of the act or failure to act, or would be a victim of the proposed act or omission if it occurred. Furthermore, section 7 enables a "victim" of such an act or omission by a public authority (or a would-be victim of such a proposed act or omission) to rely on the ECHR rights (and the public authority's duty to respect them) in any other legal proceedings. These legal proceedings would be brought on the basis of other provisions of the law, and could be brought by the public authority itself – for example, a criminal prosecution.

[69] : Home Office, *Rights Brought Home: The Human Rights Bill*, para 2.2

In determining the meaning of "victim", section 7 requires British courts to apply the same test as the European Court of Human Rights uses in cases that come before it. Broadly speaking, this means the term extends to any individual, group of individuals or non-governmental organisation (including a company) that is, or would be, actually and directly affected by the act or omission in question, or is subject to a real risk that they may be so affected.

In addition, the pool of potential litigants under the HRA was widened by the Equality Act 2006, which created the Equality and Human Rights Commission out of the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The 2006 Act empowered the new Commission to bring judicial review proceedings against public authorities under the HRA and argue that an authority had breached, or would breach, its duty to respect Convention rights, even though the Commission itself was not a victim of the alleged breach. However, the Commission would need to show that actual or potential victims of the alleged breach did exist.

Where a court finds that a public authority has failed, or would fail, in its duty under section 6 HRA to act compatibly with the relevant Convention rights, it is empowered by section 8 HRA to grant any remedy it considers "just and appropriate" that is within its usual powers. Apart from in cases before the criminal courts, this includes awarding damages (sums of money) where the court is satisfied that this is "necessary to afford just satisfaction" to the victim. Other remedies open to at least some courts are quashing orders, whereby an act of a public authority is nullified, prohibiting orders, which prevent a public authority from carrying out an act, and mandatory orders, which require a public authority to perform a particular act.

- **Section 2 HRA:** When interpreting a Convention right in the HRA, British courts are obliged to **"take into account" any ruling of the European Court of Human Rights**, any decision of the now-defunct European Commission of Human Rights, and any decision of the Council of Europe's Committee of Ministers under Article 46 ECHR, where they consider it relevant in determining the application of the right in question. As described above, the Committee of Ministers is tasked, under Article 46 ECHR, with supervising the implementation of European Court of Human Rights judgements by the ECHR countries involved in each case. The Committee can decide that an ECHR country is refusing to abide by an ECtHR judgement, and can recommend measures a country should take to comply with a ruling of the Strasbourg Court.

While section 2 HRA states that British courts only need to "take into account" decisions of these Strasbourg bodies, rather than abide by them, the House of Lords (acting as the UK's top court) has said that the purpose of section 2 is to ensure that the same rights are enforced in British courts as would be applied by the ECtHR, meaning UK courts must keep pace with the Strasbourg Court's jurisprudence.[70] British judges will attach most weight to judgements of the ECtHR, especially when it sits as a Grand Chamber (its highest formation for deciding cases, against which there is no appeal under the ECHR), and will decline to follow its judgements only in "rare"[71] cases. On the other hand, British courts have held[72] that, apart from in very exceptional circumstances, this does not overturn the usual system of precedent in the British judicial system – meaning lower courts must follow decisions set down by higher domestic courts rather than turning to Strasbourg for a different view.

- **Section 19 HRA:** When a Government minister is in charge of a Bill in either House of Parliament, he or she is required to publish a written statement before that House's Second Reading[73] of the Bill, stating either that, in his or her opinion, the Bill is compatible with the ECHR rights in the HRA (a **"statement of compatibility"**), or that he or she cannot say the Bill is compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.

  Unlike most provisions of the HRA, section 19 came into force in November 1998.

  From November 1998 to October 2011, only once did the Government not feel able to make a statement of compatibility when it presented a Bill to Parliament.[74] The Bill in question became the Communications Act 2003, and the provision at issue was the long-standing general ban on political advertising on television and radio that the Bill sought to carry over from previous statutes. The European Court of Human Rights had ruled, in a 2001 judgement[75], that similar legislation in Switzerland contravened the ECHR right to freedom of expression. While the Government at the time nevertheless believed the provision in the Communications Bill was compatible with ECHR rights, it could not be sure when presenting the legislation to Parliament.

  This provision was enacted by Parliament as part of the Communications Act 2003, and was subsequently challenged by an animal rights group that wished to advertise on television. The House of Lords, however, ruled that the ban on political advertising provided for by the 2003 Act *was* compatible with the ECHR right to freedom of expression.[76]

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[70] : *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323
[71] : *R v Horncastle and others* [2009] UKSC 14, [2010] 1 Cr App R 17 at [11], *per* Lord Phillips
[72] : *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465
[73] : Second Reading is a House of Parliament's initial agreement to a Bill's broad principles.
[74] : HC Deb 10 October 2011, cc165W-166W
[75] : *VgT Verein Gegen Tierfabriken v Switzerland*, no. 24699/94, ECHR 2001-VI
[76] : *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 312

> Combined with the fact that British courts have found provisions of Acts to be incompatible with ECHR rights even though the Government accompanied them with a statement of compatibility when presenting them to Parliament, this case shows that the courts will not take a section 19 statement of compatibility (or a lack of one) as conclusive in determining whether an Act conforms to Convention rights. Lord Hope, in his opinion in the House of Lords judgement in *R v A (No. 2)*, said of such statements: "...they are no more than expressions of opinion by the minister. They are not binding on the court, nor do they have any persuasive authority."[77]

When words don't mean what they say they mean: section 3 of the Human Rights Act

Clearly, a central provision of the HRA is section 3, which obliges British courts to interpret and apply legislation in the UK in a way that complies with the ECHR rights in the HRA, "so far as it is possible to do so". Under section 6 HRA, only primary legislation (including Acts of Parliament) that it is not possible to give an ECHR-compatible meaning may provide British public authorities with a basis not to act in conformity with Convention rights – otherwise, they have a legal duty to do so.

When introducing the Human Rights Bill, the Labour Government boasted about how radical a change section 3 would be:

"The Bill provides for legislation – both Acts of Parliament and secondary legislation – to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.

"This "rule of construction" is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law, taking into account the Convention rights."[78]

Since its entry into force, section 3 has indeed had a radical effect on how British judges apply legislation in the UK.

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[77] : *R v A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45 at [69]
[78] : Home Office, *Rights Brought Home: The Human Rights Bill*, paras 2.7 and 2.8

The **leading judgement** on the application of section 3 is the 2004 ruling of the House of Lords, when it was the UK's top court, in ***Ghaidan v Godin-Mendoza***[79].

This case concerned a provision of the Rent Act 1977 as it had been amended by the Housing Act 1980 and the Housing Act 1988. As amended by the Housing Act 1980, the Rent Act provided that the "spouse" of a person with a statutory (secure) tenancy would succeed to that tenancy when the statutory tenant died, if they had been living in the property immediately before the tenant's death. The Housing Act 1988 amended this to state that anyone who was living with the statutory tenant "as his or her wife or husband" would be treated as their "spouse", and would therefore succeed to the tenancy in the event of their death.

Mr Godin-Mendoza had been the same-sex partner of a statutory tenant who had died in 2001. He had lived with his partner for many years in a monogamous and stable homosexual relationship. Following the death of his partner, Godin-Mendoza claimed the statutory tenancy as a successor to his partner. His landlord argued that the Rent Act did not provide for same-sex partners to succeed to a statutory tenancy.

Before the arrival of section 3 HRA, the British judiciary's interpretation of an Act of Parliament centred on the ordinary meaning of the Act's words when viewed in their context, taken with the intention of Parliament when enacting those words.[80] In its 1999 judgement in *Fitzpatrick v Sterling Housing Association Ltd.*[81], the House of Lords ruled on a case with essentially the same facts as *Ghaidan v Godin-Mendoza*, but of course it did so before section 3 HRA had entered force. In *Fitzpatrick*, the House of Lords found unanimously that a same-sex partner could not succeed to a statutory tenancy. This was because the words "wife" and "husband" used in the Rent Act were gender-specific – a person could not live with another person of the same sex as their wife or husband – and if Parliament had intended to extend the same statutory protection to same-sex partners as to co-habiting heterosexual couples it would have clearly done so via the Housing Act 1988.

In *Ghaidan v Godin-Mendoza*, the House of Lords reiterated that the finding in *Fitzpatrick* was the correct interpretation of the Rent Act on an "ordinary reading".[82] Godin-Mendoza claimed that this difference in provision for heterosexual and homosexual couples was a violation of his right under Article 14 ECHR, taken with Article 8 ECHR.

Article 14 ECHR binds the UK in international law and is included in the rights given effect in UK law via the Human Rights Act. Article 14 provides that all the ECHR rights and freedoms are to be secured for people "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Article 8 ECHR gives everyone a "right to respect for his private and family life, his home and his correspondence", subject to some possible limitations that are framed in ambiguous terms.

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[79] : *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557
[80] : Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act*, Cambridge University Press, Cambridge, 2009, p.19
[81] : *Fitzpatrick v Sterling Housing Association Ltd.* [2001] 1 AC 27
[82] : *Ghaidan* at [5], *per* Lord Nicholls

While the European Court of Human Rights has ruled that Article 8 ECHR does not confer a right to have one's housing problem solved by public authorities[83], the Strasbourg Court has also ruled that Article 14 ECHR applies wherever the facts at issue "fall within the ambit" of a Convention right or concern matters "linked" to the exercise of such a right.[84] In other words, the prohibition of discrimination on the grounds referred to in Article 14 can apply in matters that are not actually a person's right under another Convention article, but are simply associated with that right.

Under the ECtHR's jurisprudence, Article 14 prohibits discrimination on the grounds it refers to if that discrimination does not pursue a "legitimate aim" and there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[85]

The House of Lords felt no difficulty in deciding that the Article 14 prohibition of discrimination applied to Godin-Mendoza's treatment under the Rent Act regarding succession to a statutory tenancy: the court believed this was sufficiently linked to his right to respect for his home under Article 8 ECHR. The House also ruled that the Act's treatment was discrimination on the basis of sexual orientation, a form of discrimination covered by Article 14[86], and that the discrimination did not pursue a "legitimate aim".

Hence, the House found that on an ordinary reading this provision of the Rent Act violated Godin-Mendoza's right under Article 14 ECHR, taken with Article 8 ECHR. Lord Nicholls stated that this provision of primary legislation, "fails to attach sufficient importance to the Convention rights of cohabiting homosexual couples".[87]

However, by a majority of four to one the House of Lords ruled that, based on section 3 HRA, the phrase in the Rent Act "living with the original tenant as his or her wife or husband" should be read and applied as including someone who had lived with the original tenant in a close and stable/long-term homosexual partnership – enabling them to succeed to the statutory tenancy.

In applying section 3, Lord Nicholls stated, in reasoning broadly endorsed by the other judges in the majority, "...the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation."[88]

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[83] : *Marzari v Italy* (dec.), no. 36448/97, 4 May 1999
[84] : *Petrovic v Austria*, 28 February 1998, §§22 and 28, *Reports* 1998-II
[85] : *Ibid*, §30
[86] : The European Court of Human Rights has held that Article 14 covers discrimination on grounds of sexual orientation, even though it is not mentioned explicitly, given the list of grounds in the article is non-exhaustive: among other judgements*, Fretté v France*, no. 36515/97, §32, ECHR 2002-I.
[87] : *Ghaidan* at [20]
[88] : *Ibid* at [30]

His Lordship continued: "The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament."[89]

As to the scope of a court's interpretative power (and obligation) under section 3, Lord Nicholls said: "Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant."[90]

Lord Rodger stated the following in his judgement: "Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting."[91]

Lord Nicholls did, however, recognise limits to what can be done by a court on the basis of section 3: "Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a **fundamental feature** of legislation...The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed...Nor can Parliament have intended that section 3 should require courts to make decisions for which they are **not equipped**. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."[92] (Emphasis added)

In describing these limits on the scope of section 3, Lord Nicholls referred to other judgements that had ruled section 3 could not be used to render the statutory provision in question compatible with ECHR rights: "Both these features were present in *In re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291. There the proposed 'starring system' [read into statute by the Court of Appeal using section 3, before being overturned by the House of Lords] was **inconsistent in an important respect** with the scheme of the Children Act 1989, and the proposed system had **far-reaching practical ramifications** for local authorities. Again, in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 section 29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section a meaning **inconsistent with an important feature expressed clearly** in the legislation."[93] (Emphasis added)

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[89] : *Ghaidan* at [30]
[90] : *Ibid* at [32]
[91] : *Ibid* at [124]
[92] : *Ibid* at [33]
[93] : *Ibid* at [34]

Evidently section 3 HRA sanctions some effective re-writing of Acts of Parliament by the judiciary, and the test for what goes beyond the scope of section 3 – in particular, what constitutes a "fundamental feature" of a statutory provision – appears fairly fluid, to be determined, of course, by the judges themselves.

For example, in its 2007 judgement in ***Connolly v DPP***[94] the High Court applied section 3 HRA to section 1 of the Malicious Communications Act 1988. Section 1 is the sole substantive provision of the 1988 Act, and was amended by the Criminal Justice and Police Act 2001, which expanded the section's terms while retaining the essence of its original provisions. As amended, section 1(1) of the 1988 Act provides the following (with emphasis added):

"(1) Any person who sends to another person—

(a) a letter, electronic communication or article of any description which conveys—
(i) a message which is indecent or grossly offensive;
(ii) a threat; or
(iii) information which is false and known or believed to be false by the sender; or

(b) any article or electronic communication which is, in whole or part, of an **indecent or grossly offensive nature**,

is **guilty of an offence if his purpose, or one of his purposes**, in sending it is that it should, so far as falling within paragraph (a) or (b) above, **cause distress or anxiety to the recipient** or to any other person to whom he intends that it or its contents or nature should be communicated."

The High Court found that, on an ordinary reading, section 1 of the Malicious Communications Act 1988 may in some cases breach a person's right to freedom of expression under Article 10 ECHR.[95]

Article 10(1) ECHR provides that this right includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority".

However, Article 10(2) ECHR states that it is justifiable to limit this right with restrictions that are "prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Applying section 3 HRA, however, the High Court ruled that the 1988 Act could be rendered compatible with Article 10 ECHR by "reading into section 1 a provision to the effect that the section will not apply where to create an offence would be a breach of a person's Convention rights, ie a breach of article 10(1), not justified under article 10(2)."[96]

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[94] : *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276
[95] : *Ibid* at [18]
[96] : *Ibid*

This, of course, is a radical departure from the wording of the Malicious Communications Act. Parliament effectively re-endorsed section 1 of this Act in 2001, after it had passed the Human Rights Act in 1998 and incorporated ECHR rights into UK law. It might be thought that Parliament, in using the clear language of the 1988 Act (the High Court in *Connolly* had little trouble applying the terms "indecent" or "grossly offensive" on an ordinary reading of the statute), either believed that these provisions were compatible with ECHR rights, or intended to legislate contrary to those rights. In either case, it is hard to see how the judiciary has the democratic legitimacy to overturn those words when it sees fit.

Much the same could be said in relation to the 2001 judgement of the House of Lords in ***R v A (No. 2)***.[97] The Youth Justice and Criminal Evidence Act 1999 lays down particularly significant restrictions on the ability of defendants charged with certain sexual offences to submit evidence and questions at trial regarding the sexual behaviour of the alleged victim of their crime, other than behaviour which occurred at or about the time of the alleged offence, when it comes to the question of whether the victim consented to the sexual act to which the charge relates. The Act only allows such evidence and/or questions to be submitted if the court believes that not permitting this risks an unsafe conclusion by the jury *and* the evidence goes no further than rebutting evidence about the alleged victim's sexual behaviour submitted by the prosecution *or* the evidence relates to sexual behaviour that is alleged to have been so similar in any respect to the behaviour that occurred at or about the time of the alleged offence that "the similarity cannot reasonably be explained as a coincidence".

The main rationale behind this provision of the 1999 Act was to curtail the admission of irrelevant and prejudicial sexual history evidence regarding the alleged victim in, in particular, rape trials, so as to avoid unnecessary humiliation of the alleged victim and the deterrent effect this could have on people (mainly women) bringing rape cases at all.[98] The provision replaced section 2 of the Sexual Offences (Amendment) Act 1976, which had restricted the submission of evidence regarding sexual experiences of an alleged rape victim with persons *other than* the defendant. The 1976 Act allowed such evidence to be admitted if, and only if, the trial judge believed it would be "unfair" to the defendant to refuse admission. Section 2 of the 1976 Act had been much-criticised from some quarters on the grounds that it had not prevented irrelevant sexual history evidence from being aired in court, with questions raised about whether the broad discretion given to trial judges was adequately protecting victims.[99]

In *R v A*, the defendant was charged with rape. He claimed that the alleged victim consented to the act of sexual intercourse that was the subject of the charge, which he said was part of a consensual sexual relationship that had begun approximately three weeks beforehand, with the last act of sexual intercourse before the alleged offence having taken place about one week earlier. The defendant wished to submit evidence and ask questions about this prior sexual relationship, but the trial judge ruled that this was not permissible under the Youth Justice and Criminal Evidence Act.

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[97] : *R v A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45
[98] : Kavanagh, *op. cit.*, p.20
[99] : *R v A (No. 2)* at [57], *per* Lord Hope

The defendant appealed against this ruling, and the matter went up to the House of Lords. In particular, the defendant asked the House to construe this provision of the Youth Justice and Criminal Evidence Act using section 3 HRA, so as to make it compatible with his right to a fair trial under Article 6 ECHR. The relevant parts of Article 6 ECHR provide:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

"(3) Everyone charged with a criminal offence has the following minimum rights: ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

In judgement on *R v A*, Lord Steyn said: "It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand...The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society."[100]

Lord Hope said: "...[Article 6(1)] is a fundamental and absolute right, to which the rights listed in articles 6(2) and 6(3) are supplementary. The rights listed in article 6(3) include the accused's right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...But article 6 does not give the accused an absolute and unqualified right to put whatever questions he chooses to the witnesses. As this is not one of the rights which are set out in absolute terms in the article it is open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial in article 6(1). The test of compatibility which is to be applied where it is contended that those rights which are not absolute should be restricted or modified will not be satisfied if the modification or limitation "does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved" [citing a judgement of the European Court of Human Rights]".[101]

The House of Lords ruled that it was possible the Youth Justice and Criminal Evidence Act could, on an ordinary reading, prevent the submission of evidence relevant to a defendant's case and violate that person's Article 6 right to a fair trial. Lord Steyn opined: "While the statute pursued desirable goals, the methods adopted amounted to legislative overkill."[102]

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[100] : *R v A (No. 2)* at [38]
[101] : *Ibid* at [90] and [91]
[102] : *Ibid* at [43]

The House then ruled that under section 3 HRA the relevant provision of the 1999 Act could, where necessary, be re-constructed so that the test to be applied by the trial judge on whether evidence could be admitted was, with "due regard always being paid to the importance of seeking to protect the complainant [alleged victim] from indignity and from humiliating questions", "whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention."[103] Evidence that met this test could be admitted.

Again, this was a major departure from the wording of the statute, effectively inserting a new provision into it and going a considerable way to restoring the discretion of the trial judge that Parliament had sought to limit with the 1999 Act.

As applied by the courts, therefore, section 3 HRA amounts to an instruction to British judges to overturn clear words enacted by Parliament, and/or effectively to add words to statute, where it is necessary to give effect to judges' interpretations of the ECHR rights in the HRA, with only some limited exceptions.

It may be argued that this does not usurp Parliament's legislative authority because Parliament enacted (and has maintained) section 3 HRA, so that its effects throughout the statute book can be seen as Parliament's intent.

Even assuming this to be the case, section 3 is harmful to the balance between, and respective roles of, democratically-accountable Parliament and the judiciary. It draws the latter much too far down the road of law-making, something judges do not have the popular mandate or accountability to do in our democracy. The very wide range of possible applications of the ambiguous ECHR rights, combined with section 3, gives the courts far-reaching power effectively to rewrite statutory provisions agreed by elected representatives, including by drawing on rulings of the European Court of Human Rights. We might approve of legislative changes brought about by judgements based on section 3. However, if we want such alterations to, for instance, Acts of Parliament, we should be prepared to win the argument in the democratic arena, not have these changes introduced by judges 'by the back door'.

[103] : *R v A (No. 2)* at [46], *per* Lord Steyn

When democracy gets trapped between British judges and Strasbourg: section 4 of the Human Rights Act

In some cases where British judges have ruled a provision of legislation, read in the ordinary way, is incompatible with ECHR rights, they have not felt able to use section 3 HRA to mould that legislation into compliance with their interpretation of the Convention.

As described above, where this concerns *primary legislation* (mainly Acts of Parliament) the higher UK courts may, under section 4 HRA, issue a **'declaration of incompatibility'** between the legislation and ECHR right(s) in question.

Under the Human Rights Act, declarations of incompatibility have no obligatory effects. They do not affect the validity or operation of the legislation declared incompatible. Neither the Government nor Parliament is obliged to do anything in response. The main legal effect is that the 'fast track' procedures for amending the relevant legislation by remedial order, contained in section 10 and Schedule 2 HRA, become available to the Government. The Government, however, does not have to use them.

Between the entry into force of section 4 HRA in October 2000 and November 2011, 19 final declarations of incompatibility were made.[104] Despite the fact that the Government and Parliament were under no obligation to change legislation to comply with these declarations, in every case bar one the legislation in question was altered (or, in a couple of instances, the Government is currently seeking its alteration).[105]

In some cases this may plausibly be because Parliament and/or the Government agreed in principle with the change. However, such support is far from apparent in some of the responses to declarations of incompatibility. **The following two judgements are examples of these declarations made by UK courts under the HRA.**

[104] : HC Deb 26 April 2011, cc144W-149W; HC Deb 6 September 2011, c383W; HC Deb 24 November 2011, cc573W-574W; 'final' in that the declarations were not subsequently overturned on appeal.
[105] : *Ibid*. The one exception is the disenfranchisement of convicted prisoners, declared incompatible by the Scottish Registration Appeal Court (following the judgement of the European Court of Human Rights in *Hirst (No. 2)*); here, the Government has merely said that it is "considering afresh the issue of prisoners' voting rights" (HC Deb 26 April 2011, c149W). In a small minority of cases, legislation had already been altered or was in the process of being altered when the declaration of incompatibility was made.

Immigration and public assistance with housing – *Morris*

The Housing Act 1996 includes provision on the duties of local authorities to persons who are homeless or threatened with homelessness. Local authorities have a duty to secure accommodation for people who are homeless and have a "priority need". Among those groups of people who have a priority need under the Act are those who live with, or would be expected to live with, dependent children.

However, section 185 of the 1996 Act provides that local authorities do not have this duty towards "a person from abroad who is ineligible for housing assistance". Section 185 states that this includes a person "subject to immigration control", unless he or she falls into a class of persons set down by the Government by regulations. A person "subject to immigration control" is anyone who requires leave to enter or remain in the UK under the Immigration Act 1971. This is everyone who is not a British citizen, subject to certain exceptions (a key one being, in many circumstances, citizens of other European Union countries).

Under section 185 of the Housing Act 1996, the Government can also set down by regulations further categories of persons, who are *not* subject to immigration control, who will fall under the definition of "a person from abroad who is ineligible for housing assistance".

Finally, section 185(4) of the Act stipulated that a person from abroad who was ineligible for housing assistance could not be taken into account for the purpose of determining whether someone else was homeless or had a "priority need" for accommodation. This would apply, for instance, where a dependent child was, or would be, living with an adult, where the adult was eligible for help with housing but the child was "a person from abroad...ineligible for housing assistance".

Indeed, this was the situation with regard to Sylvianne Morris. Morris was from Mauritius, in the Indian Ocean, but was a British citizen by descent under UK law. In April 2002, Morris and her young daughter came to the UK, and were given leave to enter as visitors. This leave expired in June 2002, but they did not depart the country then. Instead, Morris applied for a British passport on the grounds that she was a British citizen, and this was granted to her. At this point, though, her daughter was recognised as a citizen of Mauritius only.[106] Morris and her daughter stayed with relatives until August 2002, when Morris's aunt refused to let them stay there any longer. Morris then applied to the area's local authority (Westminster City Council) for housing.

[106] : Subsequent to the facts that formed the basis of the court judgement in *Morris*, Morris's daughter was also recognised as a British citizen.

Westminster City Council, however, refused Morris's application on the grounds that she did not have a "priority need". This was because, under the Housing Act 1996, her daughter was a person "subject to immigration control" and was not in a class of persons set down by the Government as nevertheless being eligible for housing assistance – the main categories here being refugees and those with indefinite leave to remain in the UK, where that leave is not conditional on not having recourse to housing assistance and certain other state welfare provision. Other than living with her daughter, Morris had no grounds for establishing a priority need for accommodation.

Morris took Westminster City Council to court and claimed that its refusal, under section 185(4) of the 1996 Act, to treat her as having a priority need violated her right under Article 14 ECHR taken with Article 8 ECHR.

As noted above in relation to the *Ghaidan* case, Article 14 ECHR states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 8 ECHR gives everyone a "right to respect for his private and family life, his home and his correspondence", subject to some possible restrictions that are described in vague terms.

Also as noted above, while the European Court of Human Rights has ruled that Article 8 ECHR does not confer a right to have one's housing problem solved by public authorities[107], the Strasbourg Court has stated that Article 14 ECHR applies wherever the facts at issue "fall within the ambit" of a Convention right or concern matters "linked" to the exercise of such a right.[108] Put another way, the prohibition of discrimination on the grounds referred to in Article 14 can apply in matters that are not actually a person's right under another Convention article, but are simply associated with that right.

Under the ECtHR's jurisprudence, Article 14 prohibits discrimination on the grounds it refers to if that discrimination does not pursue a "legitimate aim" and there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[109]

In its 2005 judgement in *Morris*[110], the Court of Appeal held that section 185(4) of the Housing Act 1996 was *not* incompatible with Morris's right to family life under Article 8 ECHR, taking that article on its own.[111] In other words, Article 8 itself did not give Morris a right to public assistance with housing for herself and her daughter.

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[107] : *Marzari v Italy* (dec.), no. 36448/97, 4 May 1999
[108] : *Petrovic v Austria*, 28 February 1998, §§22 and 28, *Reports* 1998-II
[109] : *Ibid*, §30
[110] : *R (on the application of Sylvianne Pierrette Morris) v Westminster City Council and the First Secretary of State (No. 3)* [2005] EWCA Civ 1184, [2006] 1 WLR 505
[111] : *Ibid* at [18], *per* Lord Justice Sedley

However, in accordance with Strasbourg jurisprudence, the Court of Appeal then held that section 185(4) came within the "ambit" of Article 8 for the purposes of applying Article 14 ECHR. This was because it prevented Morris from benefitting from the Housing Act's provision that typically ensured housing support for homeless people with dependent children, which the court decided was "a legislative policy of preserving family life for the homeless"[112].

Morris claimed that, contrary to Article 14 ECHR, the discrimination created by section 185(4) was based on grounds of nationality (the nationality of her daughter), which was covered by the phrase "national origin" in Article 14.

The Government, on the other hand, argued that, if section 185(4) was held to come within the ambit of Article 8 (something it argued against), the discrimination was based on complex grounds including habitual residence in the UK and the nature of the daughter's immigration status. Taking into account regulations made by the Government under section 185, it was not simply the case that those "subject to immigration control" – in the main, those without British citizenship – were ineligible for housing assistance; refugees and many foreign nationals with indefinite leave to remain in the UK, for instance, *would* qualify for such support. By the same token, many British citizens from abroad who were not habitually resident in the UK would be *ineligible* for housing assistance.

However, drawing on the open-ended nature of Article 14's list of grounds on which it is unlawful to discriminate (the list finishes with "or other status" of a person), the court held that whatever the ground of the discrimination, it would require some objective justification.

In terms of whether section 185(4) had a "legitimate aim" and was proportionate to that aim, the Government argued that the provision helped to complete the UK's system of immigration control. The Immigration Rules, adopted under the Immigration Act 1971, included a provision preventing the entry or continued residence of a non-national child who could not be accommodated without recourse to public funds. The court received a statement from a senior Whitehall official who said: "....the Government's immigration policy is that those who have not established a right to remain permanently in the UK, who are settled here on an undertaking that their relatives will support them, or whose entry is conditional on them not having recourse to public funds, should not have welfare provision on the same basis as those whose citizenship or immigration status gives them an entitlement to benefits when in need. Denying access to certain benefits and to publicly funded housing provision for those who are subject to immigration control helps protect public resources and strengthens immigration control by reducing the incentive for people to come to Britain for the purpose of claiming benefits or services. It also encourages people to regularise their stay if they are here illegally."[113]

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[112] : *Morris* at [25], *per* Lord Justice Sedley
[113] : *Ibid* at [38], *per* Lord Justice Sedley

However, focusing on the situation of Morris herself, the court held that "...immigration control has no legitimate bearing at all on a British citizen."[114] Hence, the differential treatment applied by section 185(4) to a British citizen with a dependent child subject to immigration control, where both are habitually resident in the UK, was ruled to be incompatible with Article 14 ECHR read with Article 8 ECHR – and a declaration of incompatibility was issued in relation to section 185(4).[115]

This judgement highlighted several key problems with Article 14 ECHR and its application by the courts.

First is the expansionist approach to Article 14 pursued by the European Court of Human Rights, and now followed by British courts. Article 14 is not written so as to create a free-standing right against discrimination; it only prohibits discrimination in implementing the other rights and freedoms set out in the ECHR. As can be seen above, however, the Strasbourg Court has gone some way to fashioning a free-standing right out of Article 14, so that its prohibition of discrimination applies to some matters not otherwise covered by the other rights and freedoms in the Convention.

Secondly, the drafting of Article 14 seems far too open-ended when it comes to the grounds on which it is unlawful to discriminate. Discrimination on the basis of any "status" of a person could potentially come within the scope of Article 14; it would then be for judges to decide whether that discrimination was justified. A better approach would be to agree those grounds on which society thought it was, as a rule, unacceptable to discriminate, and to set these out exhaustively.

Third is the highly subjective nature of the test as to whether discrimination falling under Article 14 is justified. This mirrors the highly subjective test applied under other Convention articles when deciding whether a restriction on a right is "proportionate" to a "legitimate aim". The Court of Appeal in *Morris* did not think there was a justifiable link between, on the one hand, the aims of combating illegal immigration and protecting UK public money from those coming to Britain for the purpose of claiming benefits and, on the other, section 185(4)'s restriction on public housing assistance as it affected British citizens living in the UK. **However, it is plain that such a restriction can help combat these serious immigration problems, and that it is perfectly reasonable to refuse to grant public support with housing on the basis of someone who should not even be in the country or whose right to stay here is conditional on them not drawing on public funds.**

[114] : *Morris* at [45], *per* Lord Justice Sedley
[115] : *Ibid* at [54], *per* Lord Justice Sedley

However, the judgement in *Morris* was soon after followed by the ruling of the High Court in *R (Gabaj) v First Secretary of State*[116]. Under the Housing Act 1996, a person who is homeless or threatened with homelessness also has a "priority need" for accommodation if they live with, or would be expected to live with, a pregnant woman. Gabaj was a British citizen but his pregnant wife was not, and she was "a person from abroad...ineligible for housing assistance" under section 185 of the Housing Act. Due to section 185(4), therefore, Gabaj could not establish a priority need for housing on the basis of his wife.

Following the main reasoning of the Court of Appeal in *Morris*, the High Court in *Gabaj* declared section 185(4) to be incompatible with Article 14 ECHR taken with Article 8 ECHR, to the extent that it required a pregnant member of a British citizen's household who was ineligible for housing assistance to be disregarded when determining whether the British citizen had a priority need for accommodation, where both people were habitually resident in the UK.

In response to these declarations of incompatibility, the then Labour Government brought forward amendments to the relevant provisions of the Housing Act 1996, which were enacted as part of the Housing and Regeneration Act 2008 and which entered force in 2009.

Now, a "person from abroad who is ineligible for housing assistance" under the 1996 Act *will* be taken into account when determining whether a person who is eligible for housing assistance and not subject to immigration control, or a person who is eligible for housing assistance, subject to immigration control and is a citizen of another EEA country[117] or Switzerland, is homeless and has a priority need for accommodation.

[116] : (Administrative Court; unreported; 28 March 2006)
[117] : EEA stands for the European Economic Area, which consists of all European Union Member States along with Norway, Iceland and Liechtenstein.

The Sex Offenders Register – *F and Thompson*

Under the Sexual Offences Act 2003, individuals convicted of one of a range of sexual offences must notify the police of certain categories of their personal information, at certain times.

The offender, within 3 days of their conviction (though not counting any time in custody), must notify the police of their name as it was on the date of conviction and as it is on the date of notification, their date of birth, national insurance number, home address on the date of conviction and at the time of notification, and the address of any other place in the UK they regularly reside or stay.[118]

After this, within 3 days of a change in their name or home address or their having stayed at a different place in the UK for at least 7 days within 12 months, the offender must notify the police of the new information and re-notify them of the rest of the information above. Furthermore, the offender is required to submit all the information above within each year following the last time they gave such a notification.

Finally, under regulations made by the Government using powers granted by the 2003 Act, the offender must notify the police before they leave the UK for a period of three days or longer, informing them of the date of departure, the country (or first country) of destination and point of arrival there, and, where known before departure, the identity of the international carrier or carriers to be used on their journey, their accommodation arrangements on the first night outside the UK, their intended point of arrival in subsequent countries if they intend to travel to more than one foreign country, and their intended return date and point of arrival in the UK, if they plan to return. Under the regulations, this information must be notified to the police at the very latest 24 hours before the offender's departure from the UK. Upon return to the UK, if the offender has not previously notified the police of their date of return and point of arrival in this country, or has returned at variance with the information previously given, they must notify the police of the date of return and point of arrival, within 3 days of coming back.

The Sexual Offences Act 2003 (and the Government regulations on notifications regarding foreign travel) requires all these notifications of information to be given in person by the offender at a police station.

Section 82 of the 2003 Act sets down the period different categories of offender are subject to these notification requirements, beginning with their conviction. For the most serious sexual offences, where the perpetrator has been sentenced to two and a half years in prison or more, the notification requirements apply for life.

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[118] : In Scotland, further types of information must also be notified, but that was not a material issue in this court case. In England, Wales and Northern Ireland, the Sexual Offences Act also requires the notification of any further categories of information that may be prescribed by Government regulations, which require the approval of both Houses of Parliament. At the time of writing, however, no further categories of information have been prescribed.

These requirements to provide certain information to the police are often referred to informally as creating a **sex offenders register**. Such notification requirements were first introduced by the Sex Offenders Act 1997, and were built on by the Sexual Offences Act 2003, which replaced the 1997 Act.

The obligation on sex offenders to inform the police of where they are living and staying helps prevent and detect further sexual offences – offences, of course, that often have devastating and long-lasting consequences for the victims. The information submitted enables the police to identify and trace suspected re-offenders quicker, and the knowledge of this may deter an offender from committing further sexual crimes. Knowing the usual whereabouts of sexual offenders also underpins work between the police and other public bodies to monitor and reduce risks to the public.

The case of *F and Thompson* arose from court challenges brought by a rapist and a man convicted of indecent assault on his daughter. Both were given prison sentences of sufficient length to mean that, under the Sexual Offences Act, they became subject to the notification requirements for life. They challenged the fact that, under the 2003 Act, there was no possibility of a review of whether they should remain subject to these lifelong requirements. They claimed that this breached their right to respect for their private life under Article 8 ECHR.

In full, Article 8 ECHR says:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

"(2) 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."

In its 2010 judgement[119], the Supreme Court found that the notification requirements interfered with sex offenders' right to respect for their private life. As a result, the question was whether the requirements were justified under paragraph (2) of Article 8 ECHR. The interference they brought about was clearly in accordance with the law (in that it was set down by the Sexual Offences Act), and the court ruled that it was in the interests of the prevention of crime and the protection of the rights and freedoms of others (the right to be protected from sexual crime). This meant the notification requirements had "legitimate aims".[120]

The court then considered whether the requirements' interference with sex offenders' right to respect for their private life was "necessary in a democratic society". Under the Strasbourg Court's jurisprudence, this entails deciding whether the interference is "proportionate" to the legitimate aims pursued. In particular, the case concerned whether the lifelong notification requirements, *in the absence of a right to review of those requirements* for individual offenders, were proportionate.

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[119] : *R (on the application of F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17, [2010] 2 WLR 992

[120] : *Ibid* at [41], *per* Lord Phillips

In assessing proportionality, the Supreme Court sought to 'weigh' the extent of the interference with sex offenders' right to private life against the value of the lifelong notification requirements without a right of review.

The court ruled that the notification requirements were "capable of causing significant interference with article 8 rights"[121] of sex offenders, especially with regard to the need to give notifications in person at a police station about many types of travel, which the court believed leads to an "obvious risk"[122] that third parties will become aware of an offender's conviction.

On the other side of the equation, the court stated that, "If some of those who are subject to lifetime notification requirements no longer pose any **significant risk** of committing further sexual offences and it is possible for them to demonstrate that this is the case, there is no point in subjecting them to….the interference with their article 8 rights involved in visits to their local police stations in order to provide information about their places of residence and their travel plans [emphasis added]."[123]

Crucially, though, the Government argued in court that the evidence showed it was not possible to conduct a reliable assessment of whether someone guilty of the most serious type of sexual offence (who are those subject to the lifelong notification requirements) posed a significant risk of re-offending. The court noted that no evidence had been submitted to it showing that such an assessment was possible. However, it then ruled (via Lord Phillips, who gave the leading judgement): "If uncertainty exists can this render proportionate the imposition of notification requirements for life *without review* under the precautionary principle? I do not believe that it can [emphasis in original]."[124]

His Lordship continued: "I think that it is obvious that there must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted **to the extent that continuance of notification requirements is unjustified** [emphasis added]."[125] In this opinion Lord Phillips drew on the fact that there are other legal circumstances in which the authorities have to make an assessment of the risk posed by a serious sex offender, such as whether to release them from prison on licence or whether to subject them to more active supervision in the community.

However, these are decisions about much more intensive control or management of an offender than subjecting them to the Sexual Offences Act's notification requirements, presumably based on an assessment of whether a much greater risk to the public exists. All else being equal, identifying when this greater risk is present will be more feasible, as such a risk will require the presence of more weighty factors that will be more apparent. The 2003 Act's notification requirements are a comparatively slight incursion into the lives of sex offenders, and (applied in isolation) aim at a lower level of risk to the public. As the Government in fact contended before the Supreme Court, it may not be feasible reliably to determine in any one serious sex offender's case whether they pose this level of risk, given the finer distinctions and less apparent factors involved.

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[121] : *F and Thompson* at [44], *per* Lord Phillips
[122] : *Ibid* at [43], *per* Lord Phillips
[123] : *Ibid* at [51], *per* Lord Phillips
[124] : *Ibid* at [56]
[125] : *Ibid* at [57]

In the language of proportionality, Parliament has decided through the 2003 Act that the need to tackle the risk to the public posed by many or all serious sex offenders who are not such a risk as to be in prison, taken if relevant with the lack of feasibility of reviews to determine whether individual offenders pose this risk, justifies the relatively modest interference in the private lives of serious sex offenders caused by the notification requirements under the 2003 Act, as applied for life and without the right to a review.

Aside from concerns over the feasibility of reliable assessment, the judgement in *F and Thompson* catapults to the fore, without an answer, the question of what level of risk to the public justifies subjecting a serious sex offender to the notification requirements.

Under human rights jurisprudence, this is a classic question of proportionality. The final quotation of Lord Phillips above indicates that the Supreme Court believed *some risk could exist but the notification requirements would be unjustified*.

Lord Phillips did go on to say that, "…it is open to the legislature to impose an appropriately high threshold for review"[126]. It is not entirely clear whether this threshold relates to the level of risk itself or the burden of proof in showing that the risk does not exist. They may in practice amount to much the same thing. The key word in this statement, though, is "appropriately", which lays open the possibility of judicial evaluation. The danger is that the review test, and its application by public authorities, could be successfully challenged by serious sex offenders before the courts, not least on grounds of their ECHR rights.

Even if the review threshold was set high enough so that, in practice, no serious sex offender could pass it, and this withstood human rights challenges, such a move would create a pointless procedure absorbing scarce public sector manpower and money.

Following on from its findings cited above, in *F and Thompson* the Supreme Court declared section 82(1) of the Sexual Offences Act 2003 incompatible with serious sex offenders' Article 8 ECHR right, to the extent that section 82(1) imposed on those offenders lifelong notification requirements without a right to review for individuals of whether the requirements were proportionate in their case.[127]

The response to this judgement from Home Secretary Theresa May was, rhetorically, blistering. In an oral statement to the House of Commons, Mrs May said: "The Government are disappointed and appalled by that ruling. It places the rights of sex offenders above the right of the public to be protected from the risk of their reoffending, but there is no possibility of further appeal…we will make the minimum possible changes to the law in order to comply with the ruling."[128]

The Home Secretary also expressed frustration with the operation of current human rights law more generally: "It is time to assert that it is Parliament that makes our laws, not the courts; that the rights of the public come before the rights of criminals; and, above all, that we have a legal framework that brings sanity to cases such as these."[129]

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[126] : *F and Thompson* at [57]
[127] : *Ibid* at [58], *per* Lord Phillips
[128] : HC Deb 16 February 2011, c959
[129] : HC Deb 16 February 2011, c960

Despite the fact that ministers had no obligation to do so under the Human Rights Act, the Home Secretary announced that the Government would bring forward amendments to the Sexual Offences Act 2003 so that it complied with the Supreme Court's judgement.

In June 2011, the Government laid before Parliament its proposals for the amending legislation, which took the form not of a Parliamentary Bill but a proposed remedial order under section 10 HRA.[130]

This remedial order would insert five new sections into the Sexual Offences Act, providing a right for serious sex offenders to a review of their lifelong notification duties under that Act.

Such a review would take place upon an application submitted by a serious sex offender. Typically, an offender could only submit an application 15 years after being released from custody in relation to their conviction. Where the offender was under 18 years old at the time of their conviction, however, they could submit an application 8 years after being released. If the review went against an offender and they remained subject to the notification requirements, typically they would not be able to submit a new application for review until a further 8 years had elapsed. This would apply to all subsequent applications.

The review would be conducted by the police force in whose area the offender was living. Within 14 days of receiving it, the police would have to acknowledge to the offender receipt of the review application. They would also have 14 days to notify the local probation board(s), the Government department dealing with prisons and certain other bodies including the local education authority, local housing authority, local social services authority and local NHS trust(s), if they wished to obtain information from these authorities relating to the review. For their part, each of these bodies would be obliged to pass on to the police "information which it considers to be relevant to the application", within 28 days of being notified of the application by the police. Following the deadline for these other bodies to pass information to the police, the police would have 6 weeks to reach a decision on the review and inform the offender of the outcome. If they decided that the offender should not remain subject to the notification requirements, these would no longer apply to the offender as soon as he or she received notice of the decision.

If, on the other hand, the police decided that the offender should remain subject to the notification duties, they would have to inform the offender of the reasons for their decision and tell the offender that he or she could, within 28 days, submit new written representations in support of their application. After the deadline for further submissions from the offender had expired, the police would have 14 days to pass any new submissions to the relevant public authorities identified above, if they wished to do so, and these authorities would then have 14 days to send the police any information they held that they considered relevant to those new submissions.

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[130] : In fact, this remedial order would only apply in England and Wales. Other changes to the Sexual Offences Act in response to the Supreme Court's judgement have already been adopted in Scotland and, at the time of writing, are being considered in Northern Ireland.

The police would be required to make a final decision on the review, and notify the offender of the result, within 6 weeks of the deadline for the offender to submit new representations in support of their application. Under the Sexual Offences Act, there would be no appeal against this final decision.

However, the proposed provisions do not make clear what the test would be when the police were deciding whether or not an offender should remain subject to the notification requirements. The draft remedial order simply lists a range of factors that the police would have to "take into account", including the seriousness of the original offence, the period of time that had elapsed since the offence was committed, and any convictions the offender had for other sexual offences. The concept of the "risk of sexual harm" posed by the offender is present, "sexual harm" being defined as "physical or psychological harm to the public in the United Kingdom or any particular members of the public caused by the…offender" committing one of a range of sexual offences. However, it is not entirely clear whether this would be the decisive factor in a review, whether the onus would be on the offender to prove that they did *not* pose a risk of sexual harm, or what level of risk would be required to support a police decision to keep the offender under the notification requirements.

This lack of clarity would only exacerbate the potential for court challenges against review decisions of the police, irrespective of the absence of a right of appeal against a final police decision under the proposed legislation. The police, like all other "public authorities", are obliged under section 6 of the Human Rights Act to act in accordance with ECHR rights in the HRA, in the great majority of circumstances. This means they would have to balance the Article 8 ECHR right of serious sex offenders against the aim of crime prevention and the right of others to be protected from sexual crime. Applying section 6 HRA, the courts could rule that the police had not conducted the balancing exercise properly in an individual's case.

The Home Office has published an impact assessment accompanying the draft remedial order, describing the policy options considered.[131] This estimates that the cost of reviews under the proposed system could be up to £1m in an average year,[132] with each review costing on average £760 and absorbing 13 hours of police time and 6 hours of other public authorities' time.[133] Offenders would not be asked to contribute to the cost of their review.[134]

[131] : Home Office, *Impact Assessment: Reviewing offenders subject to indefinite notification requirements (Part 2 of Sexual Offences Act 2003)*, June 2011
[132] : *Ibid*, p.3
[133] : *Ibid*, p.11
[134] : *Ibid*, p.13

Government figures show that near the end of 2010 there were around 25,310 sex offenders subject to the indefinite notification requirements in England and Wales[135], and that, given the proposed restrictions on when they could apply for a review, an estimated maximum of about 1,200 offenders would be eligible for a review in an average year. However, this average is calculated over a ten year period following the planned introduction of the new system, while the impact assessment shows a sharp increase in the estimated maximum number of serious sex offenders eligible for a review in the final year of that period – 2,048, bringing a maximum cost of reviews that year of £1.6m.[136] This might be a more accurate reflection of the scope and potential cost of the proposed system further into the future. Moreover, this cost estimate does not include any allowance for responding to court cases brought against the police over their review decisions.[137]

Perhaps of even more concern is the fact that the Government feels unable to estimate the proportion of reviews that would result in a serious sex offender being released from the notification requirements.[138] Furthermore, the impact assessment states: "It has not been possible to assess the possible impact of ending notification requirements on re-offending rates and detection rates."[139]

At the time of writing, it is not clear when the proposed new legislation will be put to Parliament for its approval.

Given the lack of an obligation to do so under the Human Rights Act, why has the Government moved to change legislation in response to some declarations of incompatibility, when it made clear that it did not agree with the judges' finding of a violation of ECHR rights, or at least strongly argued during the relevant court case that no violation existed?

The answer may well be that it feared a challenge to the legislation in question being brought before the European Court of Human Rights. If a British court deemed the legislation incompatible with Convention rights (often drawing on ECtHR jurisprudence), it seems likely that the Strasbourg Court would reach the same conclusion – perhaps encouraged to do so by the British ruling. Moreover, as noted above, the UK has an international legal obligation under the ECHR to abide by judgements of the ECtHR, where it is a party to the case in question.

In essence, the main problem Britain faces when it comes to human rights based on the ECHR, both internationally and at home, is one of *judicial interpretations* of human rights that offend the common understanding of those rights, but which the country is forced to accept. This appears to be a result of both judicial activism and the inherently ambiguous nature of human rights, combined with the UK's obligations under the ECHR.

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[135] : Home Office, *Impact Assessment: Reviewing offenders subject to indefinite notification requirements (Part 2 of Sexual Offences Act 2003)*, p.7
[136] : *Ibid*, p.12
[137] : *Ibid*, p.14
[138] : *Ibid*, p.3
[139] : *Ibid,* p.14

The solution

The Prime Minister and some other Cabinet ministers, such as the Home Secretary, are well aware that there is a problem with the way human rights are being applied. In March 2011 the Coalition Government established a **Commission** composed of lawyers, an academic and a former civil servant to "investigate the creation of a UK Bill of Rights".[140]

The Commission's terms of reference are quite restrictive, however, as they stipulate that the investigation will be into a Bill of Rights that "incorporates and builds on all our obligations under the European Convention on Human Rights", though the Commission will also "examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations". Finally, the Commission was asked to provide "interim advice" to the Government on the Council of Europe's "process to reform the Strasbourg Court", ahead of and following the UK's Chairmanship of the Council of Europe's Committee of Ministers, November 2011 – May 2012.[141]

As described above, the UK's obligation under the ECHR to abide by final judgements of the European Court of Human Rights, in cases to which the UK is a party, is clear and unequivocal.

On the other hand, **the Coalition Government has stated that the UK "will be pressing for significant reform of the European Court of Human Rights, building on the reform process underway...We will be pressing in particular to reinforce the principle that states rather than the European Court of Human Rights have the primary responsibility for protecting convention rights."**[142]

Addressing the UK's relationship with the ECHR

It might be useful at this stage to say a few words about the **Council of Europe (CoE)**. This is a separate entity to the European Union, predating the latter and based on its own treaty – the Statute of the Council of Europe, which was agreed in 1949 and entered force the same year. The UK signed up to this treaty, thereby joining the Council of Europe, at the outset, and has remained a member ever since. 47 countries are currently members of the Council, which is based in the French city of Strasbourg.

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[140] : HC Deb 18 March 2011, cc31WS-32WS. The members of the Commission are: Sir Leigh Lewis (Chairman), Jonathan Fisher QC, Martin Howe QC, Baroness Kennedy of The Shaws QC, Lord Lester of Herne Hill QC, Philippe Sands QC, Anthony Speaight QC, Professor Sir David Edward QC and Dr Michael Pinto-Duschinsky.
[141] : HC Deb 18 March 2011, c32WS
[142] : *Ibid*

According to Article 1 of its Statute, the Council of Europe's aim is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". The main decision-making body of the Council is its **Committee of Ministers**, which consists of a representative of the government of each member country. Under the Statute of the Council of Europe, the Committee considers the action required to further the Council of Europe's aim, and can adopt resolutions accordingly. It does not, however, have the power to instruct national governments to pursue particular policies.

Within the structure of the Council of Europe, member countries also negotiate international agreements on various topics, which they can subsequently sign up to (or not). The ECHR was the first of these agreements, and currently all Council of Europe members are parties to the Convention. As described above, the Council of Europe's Committee of Ministers has an integral role under the ECHR, 'supervising' the implementation of judgements of the European Court of Human Rights. As stipulated under the ECHR, the Council of Europe also funds the Strasbourg Court.

In describing its plans to seek reform of the European Court of Human Rights, the Coalition Government refers to an existing Council of Europe process for such reform. In fact, the Court has already seen significant changes over the past couple of decades. The first wave of these changes was actually about radically expanding the remit of the Court – allowing individuals to bring cases before it, then making its binding jurisdiction a compulsory part of adherence to the ECHR. The second set of changes attempted to deal with the practical fallout from this, which (combined with an increase in the number of countries signing up to the ECHR) has seen the Strasbourg Court overwhelmed with case applications. However, thus far these latter changes have not worked; at the end of October 2011 there were over 153,000 cases pending before the Court, representing a huge backlog that shows little sign of significant reduction.[143]

Spurred mainly by this case overload at the Strasbourg Court, a ministerial conference of all the member countries of the Council of Europe issued the **'Interlaken Declaration'** (named after the meeting's location in Switzerland) in February 2010.

This Declaration expressed the "strong commitment" of ECHR countries to the Strasbourg Court, but said that new measures are "indispensable and urgently required" in order to, among other things, "enable the Court to reduce the backlog of cases and to adjudicate new cases within a reasonable time, particularly those concerning serious violations of human rights", as well as to "ensure the full and rapid execution [implementation] of judgments of the Court and the effectiveness of its supervision by the Committee of Ministers".

[143] : European Court of Human Rights, *Pending applications allocated to a judicial formation*, October 2011

Despite the case backlog, the Declaration reaffirmed the commitment of ECHR countries to the right of individuals to take cases to the Strasbourg Court (rather than there being some intermediary body, for instance national courts, deciding whether cases could go to the ECtHR). Currently, there are around 800 million people living in all ECHR countries put together – a rather large pool of potential claimants. Much depends, then, on the rules governing whether the Strasbourg Court hears a case submitted to it.

It is the Council of Europe's so-called 'Interlaken process' for reforming the ECtHR (as initiated by the Interlaken Declaration) that the Coalition Government is focusing its efforts on.

As noted above, the Government's stated objective includes reinforcing "the principle that states rather than the European Court of Human Rights have the primary responsibility for protecting convention rights."[144] Drawing on a term used in the Interlaken Declaration, the Government has also referred to this principle as that of 'subsidiarity': "As part of the reform process, the Government would wish to see a strengthening of the principle of subsidiarity; that is, that the Convention should principally be implemented at a national level."[145]

Lord Chancellor and Secretary of State for Justice Kenneth Clarke has written: "The key issue here is the weight decisions at a European level give to the strength of domestic legal systems – and the extent to which they allow for genuine democratic differences in national approach. I believe that it is primarily for national parliaments and courts to protect the rights contained in the Convention. Strasbourg...should not step in where cases have already been properly considered by independent, reputable national courts."[146] A more qualified position was expressed by the Minister for Europe in an official statement on the UK's Chairmanship of the Council of Europe's Committee of Ministers: "Where Member States are applying the Convention effectively, the [Strasbourg] Court should intervene less."[147]

To begin with, it is important to recognise that there are already some restrictions in the ECHR on the right of individuals to have their case heard by the European Court of Human Rights.

Most of these restrictions are found in Article 35 of the Convention. For instance, the Court is only allowed to deal with a case "after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final [domestic] decision was taken."

[144] : HC Deb 18 March 2011, c32WS
[145] : HC Deb 4 March 2011, c725W
[146] : 'Our courts, not Europe's must have the final say', *Daily Mail*, 28 April 2011
[147] : HC Deb 26 October 2011, c9WS

As the UK's Commission on a Bill of Rights has commented: "Article 35(1) of the Convention provides that (unless they are ineffective) domestic remedies must have been exhausted before an application may be made to the Strasbourg Court. This is to provide the State with the opportunity to remedy the matter itself. The Strasbourg Court is thus intended mainly to be a supervisory Court of last resort, and the main responsibility for enforcing human rights is meant to be that of the domestic authorities, who are in the best position to do so."[148] In other words, the Convention already recognises, at least to some extent, the principle of 'subsidiarity' – and this provision has been in the Convention from its inception.[149]

Furthermore, in other provisions that have been present since the introduction of the Convention, an individual application cannot be heard by the Court if the Court considers that it is "manifestly ill-founded" (that is, it has no chance of success) or that it is "an abuse of the right of individual application".

Article 35 ECHR also states, in a provision agreed in 2004 and which came into effect in June 2010, that the Court must throw out an individual application if the Court considers that the applicant "has not suffered a significant disadvantage, **unless** respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal [emphasis added]."

Nevertheless, the Interlaken Declaration did call for "a strengthening of the principle of subsidiarity".

As part of this, the Declaration "invites" the ECtHR to: "avoid reconsidering questions of **fact** or **national law** [not ECHR law] that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court [emphasis added]"; "give full effect to the new admissibility criterion" that came into effect in June 2010; and to "consider other possibilities of applying the principle *de minimis non curat praetor* [the court does not concern itself with trivial cases]."

Under the Declaration, though, the principle of subsidiarity also means that ECHR countries should commit to "fully executing the [Strasbourg] Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations", and to "taking into account the Court's developing case-law".

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[148] : Commission on a Bill of Rights, *Discussion Paper: Do we need a UK Bill of Rights?*, August 2011, para 23

[149] : Before its abolition, the restrictions on admission of cases were applied by the European Commission of Human Rights, as this was the body that received applications in the first place.

The Declaration invited the Council of Europe's Committee of Ministers, "where appropriate in co-operation with the Court", to implement by June 2011 the measures set out in the Declaration that did not require amendment of the ECHR. It also invited the Committee of Ministers to initiate the drawing up of specific proposals that would require amendment of the Convention, to be ready by June 2012, though this was focused on establishing a streamlined *process* for determining whether case applications to the Court were admissible, and on creating a future "simplified procedure" for amending the Convention when it came to "organisational issues". No reference was made to inserting new criteria into the ECHR governing the admissibility of cases.

Finally, the Declaration stated that by the end of 2015 the Committee of Ministers should decide "whether there is a need for further action" to improve "the situation of the Court", though it went on to say that the Committee should decide before the end of *2019* "on whether the measures adopted have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention [mainly, the Court] or whether more profound changes are necessary".

In April 2011, another ministerial conference of Council of Europe countries was held, this time in Izmir in Turkey. The conference produced the **Izmir Declaration**, which was again prompted mainly by the continuing problem of case overload at the European Court of Human Rights. The Izmir Declaration reaffirmed the principles and actions agreed at Interlaken, while saying that further measures were required to maintain the "effectiveness" of the ECtHR.

While noting a "priority policy" for case applications had been adopted by the ECtHR since the Interlaken Declaration, the Izmir Declaration said that the Court's "admissibility criteria are an essential tool in managing the Court's caseload and in giving practical effect to the principle of subsidiarity", and invited the Committee of Ministers "to initiate work to reflect on possible ways of rendering the admissibility criteria more effective and on whether it would be advisable to introduce new criteria".

The Izmir Declaration also "invites" the ECtHR, "when examining cases related to asylum and immigration, to **assess** and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with **respect for human rights**, to avoid intervening except in the most exceptional circumstances [emphasis added]."

On the other hand, the Declaration "stresses the importance of States Parties [ECHR countries] providing national remedies, where necessary with suspensive effect [suspending a decision of a public authority before a final court ruling is given], which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention **and in light of the Court's case law** [emphasis added]".

Finally, the Izmir Declaration invited ECHR countries, the Committee of Ministers, the ECtHR and the Secretary-General of the Council of Europe to "pursue long-term strategic reflections about the future role of the Court".

The first thing to note is that the Interlaken and Izmir declarations cannot bind the European Court of Human Rights. The only thing that can oblige the Court to act in a particular way is the Convention itself. Any allusion in the Izmir Declaration to Convention amendments that would further limit the admission of certain cases to the Court is very inchoate, with such changes clearly not agreed among ECHR countries at that time.

Even if the Court chooses to act in accordance with the declarations, it will clearly retain the power to oversee national legal systems and intervene in matters it believes concern ECHR rights.

The Interlaken Declaration spoke about the Court not getting involved in trivial cases. This, of course, depends on the definition of trivial, and the ECtHR is starting from a very low base. For example, it has heard cases (in which it has found violations of ECHR rights) concerning an injunction against hanging clothes out to dry over a courtyard[150], and whether widowers should have been entitled to the two-year Widows' Bereavement Allowance in the UK.[151] Tests of triviality are, at least currently, for the Court itself to construe and apply, in much the same way that, under the request made in the Izmir Declaration, it is still for the Court to decide whether national procedures are fair and respect human rights in asylum and immigration cases.

Moreover, the Interlaken and Izmir declarations make clear that the flip-side of subsidiarity is that ECHR countries must diligently implement rulings of the Strasbourg Court.

In accordance with its terms of reference, the **UK's Commission on a Bill of Rights published its 'interim advice'** to the Government on reform of the ECtHR in September 2011.[152]

This included the recommendation that the Government "use its Chairmanship [of the Committee of Ministers of the Council of Europe, beginning in November 2011 for six months] to initiate a time-bound programme of fundamental reform" of the Court, to ensure that it only dealt with **"a limited number of cases that raise serious questions affecting the interpretation or application of the Convention and serious issues of general importance."**

In parallel, the Commission believed it "essential to ensure that the Member States and their national institutions – legislative, executive and judicial – assume their primary responsibility for securing the Convention rights and providing effective remedies for violations. Failure to put in place the necessary machinery for compliance should itself constitute a violation of the Convention."

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[150] : *Micallef v Malta*, no. 17056/06, 15 October 2009
[151] : *Hobbs, Richard, Walsh and Geen v United Kingdom*, nos. 63684/00, 63475/00, 63484/00 and 63468/00, 14 November 2006
[152] : Available at: http://www.justice.gov.uk/about/cbr/index.htm

The ECtHR has built up a very large body of case law that gives an expansive meaning to the ECHR rights, so that these rights touch upon many details of public policy. The Convention would require amendment to ensure the Court did not hear cases that fell below the importance threshold described in the recommendation of the Commission on a Bill of Rights.

To avoid a legal mess, all ECHR countries would have to agree to an amendment to the Convention that limited the type of cases the Strasbourg Court dealt with. This means obtaining the agreement of 47 governments to the change, which would then also have to be ratified by all 47 countries, often requiring the approval of national parliaments.

In advance of the UK taking its turn as Chairman of the Committee of Ministers of the Council of Europe, the Coalition Government said that it would seek agreement from all other ECHR countries to a "package of reforms" of the Strasbourg Court, part of which would "introduce new rules or procedures to help ensure that the Court plays a subsidiary role where member states are fulfilling their obligations under the Convention". The Government's aim was to secure a "political Declaration" of ECHR states on the reforms at the end of the UK's Chairmanship of the Committee, including, "where necessary", agreement to amend the ECHR.[153]

However, there is a big question mark over how a Convention criterion that sought to admit only the most important cases to the ECtHR would work in practice, assuming one was agreed.

Under the current Convention, it is the Court that applies the admissibility criteria for cases. This approach would mean that, for example, the ambiguous test for cases recommended by the Commission on a Bill of Rights could be applied in ways not intended by the UK, and the UK would have to accept it. For instance, it is highly likely that the Court would have deemed both the *Hirst (No. 2)* and *Chahal* cases to have met the Commission's recommended test, and heard them anyway.

It is difficult to see how a sufficiently precise test could be formulated so that, when applied by the Court, it ensured the Court only focused on the most serious alleged human rights violations – in essence, violations that were grave enough to be fairly obvious to most people. This is particularly so given the activist nature the Court has displayed, with its expansive application of terms in the Convention. As for the Court's huge case backlog, that has not stopped the Strasbourg judges from continuing to intervene in recent years in relatively unimportant claims.

In fact, any method of deciding whether or not the ECtHR should hear a case, in which that decision was outside the UK's control, would leave this country open to outlandish rulings of the Strasbourg Court. As much as anything else, this is about the inherently ambiguous nature of the ECHR rights, as well as the very wide scope the Strasbourg Court has given to them. For example, a violation of the right to free elections may on the face of it be extremely serious, but it looks rather different if that violation concerns stopping convicts voting while they're behind bars. What some may regard as a serious breach of ECHR rights may be entirely in line with those rights according to mainstream British opinion.

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[153] : HC Deb 26 October 2011, c9WS

Instead, to ensure that the Strasbourg Court did not impose on the British people interpretations of human rights that offended their common understanding of those rights, the democratically accountable UK Parliament[154] should be given the power to overturn such ECtHR judgements directed at the UK.[155]

To be legal in international law, this right for Parliament would have to be recognised in the ECHR.

This would clearly represent a major amendment to the Convention, which would have to be agreed by all other ECHR countries.

If, despite the UK's efforts, other ECHR states were not willing to accept this change to the Convention, the only viable option would be for the UK to extract itself from the jurisdiction of the Strasbourg Court altogether.

Since 1998, the Convention has required countries that are party to the ECHR to accept the binding jurisdiction of the Strasbourg Court. Therefore, if the UK wanted to remain party to the rights and freedoms set out in the Convention[156], but not be subject to the ECtHR's interpretations of those rights and freedoms, it would need the agreement of all other ECHR states to this new arrangement.

If this agreement could not be obtained, the UK would need to withdraw from the ECHR to prevent itself being bound by perverse rulings of the Strasbourg Court.

Article 58 of the ECHR clearly provides that a country that is party to the Convention can withdraw if it wishes – it just needs to give six months' notice. There are no fines or other legal sanctions; withdrawal would be entirely lawful.

Following any of these reforms, the UK would be free democratically to determine its laws and policies, with respect for human rights, without the European Court of Human Rights imposing its own – often strange and damaging – ideas on this country.[157]

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[154] : This power would be entrusted to the House of Commons specifically, as the elected Chamber.

[155] : Given the objectionable judgements that have already been levelled at the UK, this power would need to apply both to future rulings and those already handed down.

[156] : Clearly, before embarking on these reforms a democratic decision would have to be taken about whether the UK did wish to remain bound by these rights and freedoms *as they are set down by the ECHR* (including the Protocols the UK has signed up to). This includes, for instance, the absolute prohibition of the death penalty in all circumstances.

[157] : Article 58(2) ECHR says that withdrawal from the Convention "shall not have the effect of releasing the High Contracting Party concerned [in this case, the UK] from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation [that is, withdrawal] became effective." The effect of this provision in practice is not entirely clear. It seems the UK would have to abide by ECtHR judgements regarding British laws/policies that existed prior to the UK's withdrawal from the ECHR. However, it would seem absurd for the UK to be obliged to pursue general policies called for by ECtHR judgements (such as giving convicted prisoners the vote) *after* it had withdrawn. General policies following withdrawal would surely be acts subsequent to the UK's departure from the ECHR, and would therefore be outside the scope of the UK's Convention obligations. Article 58(2) is probably aimed more at the obligations of the state concerned towards particular individuals who claim that their rights were breached before the state withdrew from the Convention, providing that the state must still, where relevant, restore and/or compensate those individuals for a breach of rights found.

UK withdrawal from the ECHR – what happens next?

A British Bill of Rights

For the sake of analysis, let us assume that the UK did withdraw from the ECHR.

This move would certainly not require this country to abandon human rights of the kind enshrined in the Convention.

Instead, the UK Parliament could enact such rights in a new British Bill of Rights, which would replace the Human Rights Act.

It was, of course, a Conservative manifesto commitment at the 2010 General Election to replace the Human Rights Act with a UK Bill of Rights, to "…protect our freedoms from state encroachment and encourage greater social responsibility".[158]

The British Bill of Rights should include the following changes compared to the Human Rights Act:

- While many of the rights it enshrined would be the **same or very similar to those found in the ECHR text**, the Bill would **not give effect to the Convention itself or the jurisprudence of the European Court of Human Rights** (or other Strasbourg bodies), because these would no longer apply to the UK.

  Even so, some British judges might still look to Strasbourg case law – with all its flaws – to determine the meaning of similar rights in the British Bill of Rights. To discourage this, the Bill could explicitly assert that the rights it upholds are British, and autonomous from the ECHR.

  The British Bill of Rights could also set out basic individual responsibilities, if there was sufficient agreement on their content, which would be taken into account when construing and applying human rights.

- The British Bill of Rights would maintain the **obligation on the Government**, when presenting any Bill to either House of Parliament, to **state whether or not the Government believed the provisions of that Bill were compatible with the human rights recognised by the British Bill of Rights**.

[158] : Conservative Party, *An Invitation to Join the Government of Britain*, April 2010, p.79

The Bill would also introduce a **new obligation on the Government**, when laying before either House of Parliament a piece of subordinate legislation that required a resolution of approval of that House, or which amended primary legislation[159], to state whether or not the Government believed the provisions of that subordinate legislation were compatible with the human rights in the British Bill of Rights. The Government has been making these statements in practice already (regarding the rights in the HRA), but the British Bill of Rights would ensure this continued.

- The Bill would remove the duty on UK courts to **interpret and apply** legislation in compliance with human rights "so far as it is possible to do so". **The courts' ordinary rules of legislative interpretation would apply.** For example, genuine ambiguity in legislation could be resolved in favour of an interpretation that adhered to judges' conceptions of human rights.

  Some British judges might still be inclined to change the effect of, for instance, clear words in Acts of Parliament to apply their own constructions of human rights. However, this would clearly be against the will of Parliament, given the repeal of section 3 HRA. Indications of Parliament's will could be reinforced by the British Bill of Rights stating that certain courts may issue a declaration of incompatibility (see the bullet point below) if they deem a provision of primary or certain subordinate legislation to contravene human rights, *on an ordinary reading of that legislation*. The Bill would establish a system in which, when they believed a clear provision of legislation that had been approved by Parliament was incompatible with human rights, the courts would refer the decision on alteration of that legislation to the democratically legitimised legislature. Most if not all British judges are likely to respect this settlement.

- The same UK courts[160], when interpreting **primary legislation** (including Acts of Parliament), would be authorised to issue a **'declaration of incompatibility'** if they deemed the relevant legislation to be incompatible with human rights, on an ordinary reading of that legislation. They would also be able to issue a declaration of incompatibility if they deemed subordinate legislation, on an ordinary reading, to violate human rights, and primary legislation (again, read in the ordinary way) prevented that violation being removed. As now, such declarations would not affect the validity or operation of the legislation in question.

  Unlike with the HRA, those courts could also make a declaration of incompatibility in relation to **subordinate legislation that had been approved by a resolution of each House of Parliament** (or, where relevant, by a resolution of the House of Commons), if they judged that legislation to breach human rights, when read in the ordinary way. These declarations would also not affect the validity or operation of the legislation in question.

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[159] : Technically, this latter kind of subordinate legislation is itself classed as primary legislation under the definitions set down by the Human Rights Act.

[160] : The High Court, its Scottish equivalent and above

These provisions on declarations of incompatibility would be combined with an authorisation for the courts, as is currently within their power, to strike down all other kinds of subordinate legislation, if they believed it breached human rights (though this would be determined on an ordinary reading of that legislation). However, in case Parliament disagreed with the way human rights had been applied by the courts in these circumstances, the British Bill of Rights would allow the Government to present to Parliament the subordinate legislation that had been ruled invalid, in the same or amended form, and this would be reinstated if approved by a resolution of each House of Parliament.

Subordinate legislation approved by resolution in Parliament often supplements Acts of Parliament, in a way that has clearly received the approval of the nation's elected representatives. It should not simply be struck down on the basis that judges do not believe it conforms to human rights.[161]

- The British Bill of Rights and accompanying reforms would introduce **new provisions on the legislative effect of declarations of incompatibility**.

  Where a final declaration[162] had been issued, the British Bill of Rights would **oblige the Government**, within 210 days of the declaration, to lay before Parliament a (published) written statement setting out the precise changes to the relevant legislation that would, in the Government's opinion, make that legislation compatible with the construction of human rights set out in the judgement concerned. This statement would also have to include an explanation of the legislative provisions at issue, the court judgement and the Government's position on the matter.

  The Standing Orders of the House of Commons could be amended in parallel, to include specific rules regarding declarations of incompatibility.

[161] : There will be some pieces of subordinate legislation that, because they amend primary legislation, are themselves classed as primary legislation, but which will not have been approved by a resolution of each House of Parliament (or of the House of Commons alone), due to the procedure set out in their parent Act. Already under the Human Rights Act, the courts cannot strike down these pieces of legislation on grounds of human rights incompatibility, and this would remain the case under the British Bill of Rights. However, the British Bill of Rights would introduce strengthened human rights safeguards in the event of judicial declarations of incompatibility, which could be made in relation to these pieces of legislation.

[162] : That is, one not subject to an appeal.

The Standing Orders would provide that where the Government, in its statement required by the British Bill of Rights, had *not* said that it intended to bring forward the legislative changes concerned, or where the Government had said it would bring forward those legislative changes but had not presented them within a year of the statement, the Official Opposition, or any Member of Parliament supported by 199 other MPs, could, within 150 days of the statement (where the Government had not said it was bringing forward its own legislation) or after the passage of a year following the statement (where the Government had not presented its promised legislation), bring forward legislation that would make solely the changes the presenter reasonably believed were necessary to remedy the human rights incompatibility asserted by the court judgement.[163]

Where the legislation proposed under this rule was a Bill, a Second Reading[164] debate would take place on this within 30 days of its presentation to the House. The MP in charge of the Bill would also be allowed to move a motion, should the House give the Bill a Second Reading, setting deadlines for the completion of all subsequent stages of the Bill in the House of Commons. All consideration of the Bill on the Floor of the House (as opposed to in committee, where time is not at a premium) would come out of time for Government business.

Where the legislation declared incompatible by the courts was subordinate legislation approved by a resolution of each House of Parliament[165], the British Bill of Rights would empower any MP to make replacement subordinate legislation, or to repeal the legislation declared incompatible, following approval of that replacement legislation or repeal by a resolution of each House of Parliament. Alongside this, the Standing Orders of the House of Commons could provide that an MP may bring forward a proposed new piece of subordinate legislation (or a proposed repeal) under the conditions described above (where the Government had not brought forward legislation in response to a declaration of incompatibility). This proposal would then be subject to the usual procedure for the House's consideration of such legislation – debate in a committee followed by a decision on the Floor of the House (though a longer-than-usual debate in committee could be allowed). The Government would be required to make time on the Floor of the House for a decision on the proposal within two weeks of it being debated in committee.

All of these provisions would be in contrast to the Human Rights Act, which places the Government under no obligation to respond to declarations of incompatibility.

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[163] : The Speaker of the House of Commons would decide whether or not it was reasonable to believe that the proposed legislation was confined to remedying the human rights incompatibility declared by the judiciary.

[164] : As noted above, Second Reading is a House of Parliament's initial agreement to a Bill's broad principles.

[165] : And the court did not believe that primary legislation prevented the removal of this subordinate legislation's incompatibility.

To ensure the courts did not trigger this process on numerous occasions over the same matter, the British Bill of Rights could bar judges from making a declaration of the same incompatibility within 18 months of the most recent declaration on that subject (except where they decided to re-issue a declaration after hearing an appeal against it).

- The British Bill of Rights would remove the power for the Government, in response to a declaration of incompatibility, to amend Acts of Parliament with a **'remedial order'** approved by a single resolution of each House of Parliament, apart from in cases of urgency.

  In cases of urgency, the order could be made by the Government but would have to be approved by a resolution of each House of Parliament within 40 days (not counting Parliamentary recesses) of its being made for it to remain in force. The Government would have to lay the order before both Houses on the same day as making it, or, where either House was not sitting that day, the first day that House sat after the order was made.

  The British Bill of Rights would provide that if a House of Parliament rejected a remedial order, that order would cease to have effect a week thereafter (or before, if the Government revoked it earlier), and the Government would be prohibited from making a fresh order that was, in its substantive provisions, the same. Any further urgent remedial order made by the Government to address the same incompatibility would have to be approved by a resolution of each House of Parliament within 15 days of its being made for it to remain in force.

  Changes to an Act of Parliament should, as a rule, be subject to the same level of Parliamentary scrutiny that was required to adopt the Act in the first place ie. the process for passing a Parliamentary Bill. This reform to the provisions laid down by the Human Rights Act would not cause a great practical problem in responding to human rights judgements; up to November 2011, the power to pass remedial orders had only been invoked three times in response to declarations of incompatibility, whereas 19 final declarations had been made; moreover, one of those remedial orders was made using the urgent procedure.[166]

[166] : HC Deb 26 April 2011, cc144W-149W; HC Deb 6 September 2011, c383W; HC Deb 24 November 2011, cc573W-574W. The remedial orders (or proposed orders) are: the Mental Health Act 1983 (Remedial) Order 2001 (made using the urgent procedure); the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011; and the proposed Sexual Offences Act 2003 (Remedial) Order.

- Under the British Bill of Rights, **public authorities** would still be under a **general duty to abide by human rights**.[167]

  However, this duty would not apply if a public authority could not act in accordance with human rights due to a provision of primary or subordinate legislation, on an ordinary reading of that legislation. The duty would also not apply if a public authority was giving effect to, or otherwise acting on the basis of, a provision of primary or subordinate legislation that, on an ordinary reading, was not compatible with human rights, including where the intention behind and appearing in that legislation was to give the public authority the discretion to perform the act in question.

  A key change here compared to section 6 HRA is that when applying this test the courts would have to give legislation its ordinary meaning, not a strained or amended meaning as has happened under section 3 HRA. As well as better upholding the democratic will of Parliament, this should increase legal certainty for public authorities, significantly reducing their need to second-guess the possible interpretations of legislation that might be handed down by the courts.

  Legal certainty is also the rationale for including the provisions of subordinate legislation in the exemption for public authorities from the duty to abide by human rights, something the HRA does not do (it only applies an exemption in relation to primary legislation). Though the courts may in some circumstances be empowered to strike down subordinate legislation they deem incompatible with human rights, public authorities should not be held in breach of the law for having diligently followed that legislation.

  However, the courts might be able to exercise their usual powers to require public authorities to do (or not to do) certain things so as to adhere to the judicial conception of human rights, in cases where a court struck down the subordinate legislation upon which the public authority was acting. Moreover, the duty to abide by human rights might apply where the subordinate legislation being relied upon could be struck down by the judiciary and was made by the public authority in question itself. In such a case, the public authority would have control over the legislation's provisions, which would need to comply with judicial interpretations of human rights.

  While continuing to promote human rights, these reforms would help public authorities – such as our police, immigration officers, maintained schools and local authorities – get on with the job of providing excellent public services without unwarranted costs and obstacles.

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[167] : It might need to be clarified compared to the Human Rights Act that the Government is not under this duty when drafting and making primary legislation (in particular primary legislation other than Bills) and subordinate legislation that is laid before Parliament for its consideration. If the duty did apply to these acts it could allow the courts to intervene in the legislative process on human rights grounds, including in relation to primary legislation and subordinate legislation subject to approval by resolution in Parliament. The proper point at which the courts should exercise oversight of such legislation on human rights grounds is after the legislation has been adopted.

- There should be provision in the British Bill of Rights for genuine **public emergencies**.

  The ECHR allows countries, "in time of war or other public emergency threatening the life of the nation", to disapply most Convention rights "to the extent strictly required by the exigencies of the situation". Even then, ECHR states cannot suspend the right to life (apart from when it comes to deaths resulting from lawful acts of war), the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery, and the prohibition of punishment without law. Any "derogation" from Convention rights established by the UK under this provision of the ECHR can be given effect in UK law as part of the Human Rights Act.

  The British Bill of Rights could include a similar possibility for suspending the application of most[168] of the human rights it contained, to the extent that the suspension was necessary to deal with a public emergency.

  The initial suspension might be enacted by the Government, but this suspension (including, in broad terms, measures to be taken – or not taken – by public authorities pursuant to the suspension) would require approval by both Houses of Parliament within a few days to remain legal. This Parliamentary approval would need to be renewed at least every 10 days (or at shorter maximum intervals, if both Houses so resolved), until the suspension had continued lawfully for 45 days, in which case Parliament could (on a Government proposal supported by both Houses) decide to increase the intervals at which Parliamentary approval was required, to no more than four months.

  When a suspension (including the measures to be taken by public authorities pursuant to it) was valid due to approval by Parliament, the British Bill of Rights would expressly provide that the courts could not overturn that suspension. On the other hand, the Supreme Court might be empowered to make a non-binding declaration that the suspension was not necessary to deal with the public situation, after hearing a challenge. This would ensure further oversight of the suspension, but would leave decision-making in Parliament's hands. To help ensure a proper check on the Executive, the courts would be able to hold public authorities to account on human rights grounds, in the usual way, if they went beyond the measures authorised under the suspension.

[168] : The prohibition of torture, for instance, should never be suspended.

- The British Bill of Rights would necessitate limited amendments to the Acts of Parliament establishing **devolution** in Scotland, Wales and Northern Ireland[169], as these Acts make reference to the HRA (which would be repealed).

  Throughout this book, references to Parliament and Acts of Parliament are to the UK Parliament in Westminster and its Acts. The HRA actually classifies Acts of the Scottish Parliament and of the Wales and Northern Ireland Assemblies as subordinate legislation, and the devolution Acts make clear that the devolved legislatures cannot pass laws that are incompatible with the ECHR rights in the HRA. In practice, this means the courts can strike down Acts of the devolved legislatures because they do not comply with judges' interpretations of ECHR rights.

  As part of the introduction of a British Bill of Rights, this arrangement might be revised so that the courts, instead of being able to strike down an Act of a devolved legislature on human rights grounds, could issue a declaration of incompatibility (which would not affect the validity and operation of the relevant legislation) if they believed such an Act violated the human rights in the British Bill of Rights.[170] Procedures could be put in place in the devolved legislatures that were analogous to the procedural reforms in the House of Commons described above, as appropriate for responding to declarations of incompatibility made in relation to their Acts.

  This change would be based on the same principle that justifies the courts being unable to strike down Acts of Parliament they deem incompatible with human rights: the Acts of the devolved legislatures are passed by democratically elected and accountable bodies, within the powers accorded by Westminster, and should not therefore be torn up by the judiciary because they conflict with what judges believe human rights to entail.

Practically the same British Bill of Rights could be introduced if the UK remained a party to the ECHR after achieving the amendments to the Convention described above, allowing Parliament to overturn outlandish rulings of the European Court of Human Rights or withdrawing from the jurisdiction of the Strasbourg Court altogether.

Whether bound by the Convention or not, this British Bill of Rights would uphold human rights in the United Kingdom, while respecting our democracy.

It is true the Government could seek to whip its majority in the House of Commons to block legislation proposed in response to a judicial declaration that existing legislation violated human rights.

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[169] : The Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998.
[170] : As long as the devolved legislatures could not put the UK in breach of its international obligations.

However, rules requiring 'free votes' (where the party leaderships do not whip their MPs to vote in a particular way) would be effectively unenforceable. A convention might be agreed between the parties that legislation proposed in response to a declaration of incompatibility would be subject to a free vote; in most cases, though, the Government would have a clear view on such proposed legislation (including whether it was actually necessary to abide by human rights), and collective Government responsibility would mean ministers would need to vote with the Government line in Parliament.[171] Furthermore, in practice the Government might feel it had no choice but to whip its MPs if it believed the proposed legislation undermined its legislative/policy programme, and was not needed to respect human rights.

More importantly, though, while the Government may exhort its MPs to vote for a particular outcome, no MP can be compelled to vote one way or another. Ultimately, each MP exercises his or her own judgement as an elected representative.

The British Bill of Rights and accompanying reforms proposed above would ensure that all judicial declarations of incompatibility were given full consideration by Government and Parliament. There would be special provision so that consequential proposals for changes to the law could be considered by Parliament (and adopted, with sufficient support) despite Government opposition. The profile of such rulings would be raised, and if parliamentarians or another party thought the Government's response to a declaration of incompatibility was inadequate, they could make that case, armed with all the necessary information. This could apply public pressure to the Government, and voters could factor the various parties' and MPs' positions into their voting intentions.

In fact, it is likely that in at least some cases the Government will be keen to change the law to ensure it complies with human rights as applied by British courts. This is only likely not to be the case when there are very good arguments against the change.

In essence, the British Bill of Rights would establish a system in which the judiciary monitored compliance with human rights, but where judges believed clear legislation approved by Parliament infringed those rights it would refer the matter back to Parliament for decision. The question Parliament would typically address is not whether human rights should be overridden by legislation, but whether the judges' interpretation of human rights was correct.

The fundamental justification for this system – and what is wrong at root with current human rights law – is that we should have rule by the people (in general through their elected, accountable representatives), not rule by judges.

[171] : In many cases the opposition party leaderships would also have a clear view on the proposals and their Front Bench teams would be expected to vote accordingly.

The drafting and application of human rights in law is done by fallible human beings; their every word cannot be taken as incontestable. Applying particular versions of human rights regardless of the opinion of the community in which those rights have force amounts to a dictatorship by judges and the authors of human rights laws. It undercuts the most fundamental individual attribute of all, which is given expression by democracy – that each person has an inherent dignity and identity entitling them, as a rule, to a say in how their community is run.[172]

Furthermore, particular interpretations of human rights must command the confidence of most of the people in the community in which they are enforced, or the whole idea of human rights may become discredited.

Final decisions on the precise human rights in force must rest with the people's elected representatives. Parliamentary democracy moderates any crude majoritarian impulses that might arise – MPs would not curtail human rights just because it was convenient for a majority of the population, with the judiciary ready to sound the alarm about such a course of action. Greater Parliamentary consideration of human rights could also inform public opinion on this subject.

Would the UK have to leave the Council of Europe if it left the ECHR?

As noted above, the aim of the 47-country Council of Europe is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". This is set down in Article 1 of the Statute of the Council of Europe.

Article 1 says that this aim "shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms."

The main decision-making body of the Council, its Committee of Ministers, does not have the power to instruct national governments to pursue particular policies. Council of Europe member countries, though, have concluded many free-standing treaties between themselves in different policy areas, of which the ECHR is an example.

Article 3 of the Statute of the Council of Europe states: "Every member of the Council of Europe 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, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in [Article 1]."

[172] : Though they may lose this entitlement, for instance, if they choose to break the democratically-decided law of the community.

Article 8 of the Statute allows the Committee of Ministers to expel a country from the Council of Europe if that country has "seriously violated" Article 3. The Committee is made up of one representative of the government of each Council of Europe country, with each representative holding one vote. The decision to expel a member state is taken by a two-thirds majority vote. To take account of any abstentions, those voting to expel a country must also represent a majority of all the representatives on the Committee.

There is no provision in the Statute of the Council of Europe that would automatically mean the UK had to leave the Council if it withdrew from the ECHR.[173]

The only way the UK could be made to leave the Council is if its withdrawal from the ECHR was deemed to be a serious violation of Article 3 of the Council's Statute by, at minimum, a majority of Council of Europe countries, who actively voted to expel the UK.

By putting in place the British Bill of Rights described above and maintaining its time-honoured democracy, the UK would be recognising and implementing human rights for the people of Britain, even though it was not signed up to the exact rights of the ECHR, as applied by the European Court of Human Rights.

Theoretically, some might argue that, by leaving the ECHR, the UK was not collaborating "sincerely and effectively" in realising the Council of Europe's aim of achieving "greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage". At present all Council of Europe members are party to the ECHR, and new countries that wish to join the Council are required, as a matter of policy, to ratify the Convention.

However, the notion that more than half of Council of Europe countries would vote to expel the UK from the Council is dubious. No country has ever been expelled from the Council of Europe, despite apparently serious breaches of human rights having occurred in some members.[174] The UK would clearly not be sliding into dictatorship as a result of the policy actions recommended in this book; on the contrary, it would be strengthening its democracy and continuing to uphold human rights and the rule of the law, the basic common principles of the Council. The UK's diplomatic clout around the world means other Council of Europe countries are likely to be loath to see the UK leave the organisation. In addition, the Council would lose financial support from the UK if it was thrown out. Over the last few years, the UK has paid for about 12% of the Council of Europe's main budget, at an annual cost to this country of around £20 million.[175]

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[173] : This conclusion is shared by Dr Michael Pinto-Duschinsky, a member of the UK Government's Commission on a Bill of Rights, in *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK,* Policy Exchange, London, February 2011, p.52

[174] : In 1969 the Committee of Ministers was due to determine whether to suspend Greece from the Council of Europe after a military dictatorship had been established in that country, but Greece in fact withdrew from the Council first. It re-joined the Council in 1974 after the military regime had fallen. In 2000, the Committee of Ministers chose not to suspend Russia from the Council over its actions in Chechnya.

[175] : HC Deb 15 September 2011, cc57WS-58WS

It would be preferable for this country to remain a member of the Council of Europe. However, in the (unlikely) scenario that the UK would be made to leave as a result of withdrawing from the ECHR, ECHR withdrawal should still be pursued if the necessary amendments to the Convention cannot be agreed, given the major benefits to this country of the policy actions recommended by this book. Even as a non-member of the Council of Europe, the UK would very likely be able to take part in most of that organisation's work if it wished to do so, given the Council's practice of involving countries other than its members.

Would the UK have to leave the European Union if it left the ECHR?

There is an impression in some quarters that UK withdrawal from the ECHR would mean the UK would also have to leave the European Union (EU). As noted above, the Council of Europe and the EU are legally distinct organisations, based on separate treaties and with different memberships (the EU has 27 members to the Council of Europe's 47).

However, it does not seem plausible that the UK would have to leave the EU because it had withdrawn from the ECHR, assuming the policy recommendations of this book were being pursued.

The EU treaties (the Treaty on European Union and the Treaty on the Functioning of the European Union) contain no express requirement for EU Member States to be party to the ECHR.

Article 2 of the Treaty on European Union (TEU) says that the EU's founding values are "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

Article 7 TEU allows the other Member States to decide, by unanimity, that "a serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]" exists. The European Parliament must also agree with this decision. If such a decision is taken, rights held by the Member State in question under the EU treaties (such as voting rights in the Council of Ministers) can be suspended, on a further decision of the other Member States. However, a finding of a breach of the EU's values cannot lead to a Member State's expulsion from the EU per se.

The institution of a British Bill of Rights as recommended above would make clear that the UK, while withdrawing from the ECHR, remained intent on observing human rights, while in fact bolstering its democracy. It is very hard indeed to see the other EU Member States deciding that the UK had breached the EU's values – especially as *all* the other Member States would have to agree to such a decision.

In addition, Article 6 TEU states: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The key aspect of this provision for these purposes is that "the Union's law" only means the EU's own law, though the provision does also cover the law of Member States that falls within the scope of EU law (for instance, national law that implements EU Directives). National law outside the scope of EU law is not bound by the 'fundamental rights general principles' Article 6 refers to. Moreover, these are rights based on the *EU treaties*, ultimately enforced by the top court of the EU, the European Court of Justice in Luxembourg. They do not require an EU Member State to be a party to the ECHR.

Would withdrawal from the ECHR mean the UK was abandoning its international drive for human rights?

People's willingness to recognise and submit to a common system of law generally depends on their self-identification as part of a community that gives rise to that law. Otherwise, they will feel as though decisions are being imposed upon them from 'outside'. As a rule, the nation is the largest community with which people identify sufficiently to support a common system of law that enjoys their consent. It is for this reason that the nation-state should remain the prime political actor in global affairs. The United Kingdom, for its part, is a sound nation-state based on the British nation.

However, there may be broad agreement between nation-states on certain matters, forming what might be regarded as a 'community of nations' when it comes to these issues. In practice, of course, this agreement is not given by the people of those nations directly but by their representatives in government. Needless to say, this presupposes that the governments in question are freely elected by the people of their nation-state and are acting broadly in accordance with the popular will; if not, their opinion cannot be taken as representative of the people on whose behalf they claim to speak.

Basic human rights are one area where truly democratic nation-states tend to share agreement. This may be taken as evidence that the people of other nations, if allowed democracy, would recognise and uphold those rights too. For this reason, it is perfectly legitimate for the UK and other democracies to put pressure on undemocratic nation-states to respect these human rights, which cannot be asserted by the people of those states.

However, the predominance of the nation in people's identification at the global level, and the variations between nation-states, limit the detail of the precepts that can be democratically agreed at the international level. This applies to human rights, which can be seen in the operation of the ECHR. While the democratic nation-states that are parties to the ECHR accept the basic human rights principles it contains, problems have arisen with the detailed intervention of the European Court of Human Rights in the national law of states parties, applying these human rights in very specific ways. As with the prisoner voting rights judgement in the UK, these rulings sometimes fly in the face of the democratic consensus on human rights in the nation-state in question.

Where other democratic countries differ from the UK on the details of human rights, that does not of course stop the UK making the case for its conception of human rights, in an attempt to persuade and inform through dialogue with those states. Such is the hallmark of democratic discourse. It is also entirely right for the UK to highlight any instances where democratic countries are clearly not applying human rights they formally espouse, and to call for that to be remedied.

By its deeds and example, the UK would continue to lead the world in human rights under the reforms proposed in this book. It would enshrine human rights in its law, to be applied by its independent judiciary, which would highlight any instances where it believed legislation approved by Parliament was not adhering to those rights. Our democratically elected and accountable Parliament would then take a final view in these cases. The world would see that only highly questionable interpretations of human rights, in minor matters compared to the gross human rights abuses the UK is rightly challenging across the globe, would be those not implemented by the freely elected representatives of the British people.

Human rights within the European Union

As described above, withdrawal from the ECHR in the circumstances described in this book would not require the UK to leave the European Union. All else being equal, the UK would remain a party to the separate treaties establishing the EU.

Basically put, those treaties lay down a range of obligations on EU Member States, set out the areas in which the EU can pass laws which bind its member countries, and establish EU institutions to create and enforce those laws. The EU's top court is the European Court of Justice (ECJ), which is given the power to pass final judgement in disputes regarding the interpretation and application of the EU treaties and EU laws passed under them.

The ECJ has long applied its own constructions of human rights[176] to EU law, reserving the power to strike down EU legislation it deems incompatible with those rights, or, more frequently, requiring EU law to be interpreted in such a way as to comply with the rights in question.

[176] : The term typically used by the ECJ is 'fundamental rights'.

Furthermore, the ECJ has applied these human rights to the national law of Member States that comes within the scope of EU law – for instance, national law that implements EU legislation, or which affects the exercise of a person's entitlements under EU law. Under EU law as interpreted by the ECJ, this national law can be set aside if it is deemed to contravene the human rights principles of EU law.

In formulating its human rights principles, the ECJ has in part drawn upon the ECHR and the jurisprudence of the European Court of Human Rights. Formally, however, the human rights applied have always been those determined by the ECJ, not the Strasbourg Court.

This could well change, though, if the EU joins the ECHR in its own right, something enabled by the Lisbon Treaty, which amended the EU treaties in 2009. Negotiations are ongoing over the terms of the EU's accession to the ECHR, which will have to be agreed by all EU Member States and all ECHR countries. If EU accession goes ahead, the main effect seems likely to be that it will be possible to take the EU itself to the European Court of Human Rights, when it has allegedly violated ECHR rights, and the EU will have to abide by resultant judgements of the ECtHR. In practice, the Strasbourg Court would be able to overrule the ECJ on human rights matters. However, the EU treaties stress that the EU's accession to the ECHR will not affect the scope of the powers held by the EU or the position of EU Member States themselves in relation to the ECHR.[177]

Of course, EU accession to the ECHR opens up the possibility that the Strasbourg Court will apply more expansive interpretations of human rights to EU law than the ECJ. In some cases, the Strasbourg Court may require the EU to use its powers to legislate, so as to comply with ECHR rights. Changes in EU law required by such judgements would typically have to be applied by the UK.

In sum, UK withdrawal from the ECHR would not affect the UK's obligations as a member of the EU – including its obligations to abide by human rights within the scope of EU law, as construed by one European court or another.

This does not negate the value of the policy actions recommended in this book, however. The UK would still see major benefits from the amendments to the ECHR recommended above, or withdrawal from the ECHR if those amendments could not be obtained. While the scope of EU law is very significant, it is not all-embracing. For instance, EU law does not cover the franchise for British prisoners in Parliamentary elections, or deportation of most foreign nationals who are not citizens of another EU Member State.

[177] : Protocol (No 8) to the EU treaties relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Article 2

ANNEX: The European Convention for the Protection of Human Rights and Fundamental Freedoms, plus free-standing Protocols to the ECHR the UK has ratified

The Convention

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I – Rights and freedoms

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

    a. in defence of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term "forced or compulsory labour" shall not include:

    a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
    b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
    c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
    d. any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

    a. the lawful detention of a person after conviction by a competent court;
    b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
    d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
    e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
    f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

    a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    b. to have adequate time and facilities for the preparation of his defence;
    c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
    d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. 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.

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

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

Article 15 – Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16 – Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18 – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II – European Court of Human Rights

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 23 – Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.

2. The terms of office of judges shall expire when they reach the age of 70.

3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

Article 24 – Registry and rapporteurs

1. The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.

2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's registry.

Article 25 – Plenary Court

The plenary Court shall

a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
b. set up Chambers, constituted for a fixed period of time;
c. elect the Presidents of the Chambers of the Court; they may be re-elected;
d. adopt the rules of the Court;
e. elect the Registrar and one or more Deputy Registrars;
f. make any request under Article 26, paragraph 2.

Article 26 – Single-judge formation, committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4. There shall sit as an *ex officio member* of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

Article 27 – Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2. The decision shall be final.

3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

Article 28 – Competence of committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,

    a. declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
    b. declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b.

Article 29 – Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31 – Powers of the Grand Chamber

The Grand Chamber shall:

a. determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
b. decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and
c. consider requests for advisory opinions submitted under Article 47.

Article 32 – Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 – Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

    a. is anonymous; or
    b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

    a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
    b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36 – Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

Article 37 – Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:

   a. the applicant does not intend to pursue his application; or
   b. the matter has been resolved; or
   c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

   However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38 – Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

Article 39 – Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

Article 40 – Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41 – Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42 – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43 – Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44 – Final judgments

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final:

    a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or
    b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
    c. when the panel of the Grand Chamber rejects the request to refer under Article 43.

3. The final judgment shall be published.

Article 45 – Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46 – Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

Article 47 – Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48 – Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49 – Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50 – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51 – Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III – Miscellaneous provisions

Article 52 – Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53 – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54 – Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55 – Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56 – Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57 – Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58 – Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59 – Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Protocol 1 to the Convention

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4 – Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

Article 5 – Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Protocol 6 to the Convention

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 – Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7 – Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9 – Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 5 and 8;
d. any other act, notification or communication relating to this Protocol.

Protocol 13 to the Convention

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a any signature;
b the deposit of any instrument of ratification, acceptance or approval;
c any date of entry into force of this Protocol in accordance with Articles 4 and 7;
d any other act, notification or communication relating to this Protocol.