

The UK and European Human Rights: Some Reflections

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Following so many detailed explorations in this book of the different issues which comprise the relationship between the UK and European human rights is a difficult task. This conclusion seeks to reflect upon, and emphasise, some of the major points identified in the collection, as well as offer a limited analysis of the collection's editors on what we view as one of the most pressing issues on the current political agenda in the UK: the future of human rights protection.

I. The Complexity of the 'Strained' Relationship

The relationship between the United Kingdom and European human rights is a multi-faceted one. It operates on many different levels and, it appears, with varied degrees of 'strain':

- between courts at the different levels;
- between layers of standards (domestic/international), with the added difficulty of the unclear separation of the two in the UK;
- between the courts (including the ECtHR) and Parliament;
- between Government (executive) and the courts (including the ECtHR);
- between the UK and the two Europe's: EU and its Charter of Fundamental Rights and Freedoms in addition to the ECHR system;
- between (parts of) the public/media and human rights.

At one level, the relationship operates between different judicial bodies, most notably between the UK Supreme Court and the European Court of Human Rights (ECtHR). This is the relationship introduced so authoritatively by Lord Kerr and Judge Mahoney in the first two chapters of this collection. It is a working relationship, with an explicit judicial and extra-judicial dialogue, and yet it increasingly shows signs of strain. A number of senior British judges have recently spoken out publicly against decisions, and indeed a broader ethos, of the

judges in Strasbourg.¹ For better or worse, the judges in both courts are at the front line of the relationship between the UK and European human rights. Strasbourg judges are frequently required to review decisions of the domestic courts for compliance with the Convention, albeit subject to a margin of appreciation, while domestic judges are explicitly required by the Human Rights Act 1998 (HRA), which is today at the core of the constitutional protection of human rights in the UK, to ‘take into account’ Strasbourg judgments, a deceptively simple instruction.

In addition to the relationship between the ECtHR and the domestic courts, there is an additional layer of complexity in the UK which results from the far-reaching identity of the international and domestic standard of human rights protection which follows from the constitutional solution taken with the 1998 HRA. The UK is not unique in tying the domestic protection of rights to the international one, as the example of Austria demonstrates; and while a multi-layered human rights protection is never without complexity, the duality of the ECHR as both the basis of national human rights protection (through the HRA) and international human rights protection adds to the complexity of the relationship between the UK and European human rights when defining the standard of protection at the domestic level. It is thus not just a relationship between courts at national and international level, each applying their own sets of rights, with the international court and standard providing a minimum safeguard. While that basic relationship certainly also exists for the UK, there is a further layer and complicating factor relating to the need to untangle (or even develop) the domestic standard of protection from the international minimum standard. The approach of the UK courts, perhaps in the light of the relative novelty of the specific task since the HRA came into force in 2000, has been searching in this regard, and the situation was source of potential confusion.

There has, therefore, been some interesting agonising by some UK Court judges, not just on specific issues of human rights protection but also about the general relationship between the two systems. One example is the debate whether the ECHR provides a floor

¹ See, for example ‘Lord Sumption gives the 27th Sultan Azlan Shah Lecture, Kuala Lumpur, The Limits of Law, 20 November 2013,’ available at www.supremecourt.uk/docs/speech-131120.pdf; Lord Mance, ‘Destruction or Metamorphosis of the Legal Order?’ at the World Policy Conference, Monaco, 14 December 2013, available at www.supremecourt.uk/docs/speech-131214.pdf; Lord Justice Laws, ‘Lecture III: The Common Law and Europe’, Hamlyn Lectures 2013, 27 November 2013, available at www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf; and The Rt Hon. Lord Judge, ‘Constitutional Change: Unfinished Business’, University College London, 4 December 2013, available at www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitution-unit/research/judicial-independence/lordjudgelecture041213/.

and/or a ceiling for the interpretation of the ECHR through the HRA by UK judges, culminating in the ‘mirror’ doctrine, expertly explained in Richard Clayton’s chapter. It is now accepted that the ECHR cannot prevent UK judges from affording a higher protection of human rights at domestic level than the level required by the Convention at international level (in line with the practice elsewhere in Europe and Art 53 ECHR). However, the debates within the UK demonstrate the difficulties that may arise from a conceptually complex situation in which the domestic system of human rights protection is largely achieved through incorporation of the ECHR in domestic law without a separate domestic codification. The (questionable) ‘mirror’ doctrine was designed by domestic judges so as to avoid the UK leaping ahead of Strasbourg in the protection of human rights. This was perhaps out of a sense of responsibility not to fragment the Convention system at the international level, particularly given the hope that the HRA might have the effect of increasing the influence of UK jurisprudence on the ECHR in Strasbourg, but it was nevertheless misguided in regard to domestic human rights protection, as pointed out by Lord Kerr in his chapter. The possibility that UK jurisprudence might carry a particular weight at Strasbourg results from the symbiotic way in which rights are protected in the UK, which means that UK courts routinely interpret and apply provisions of the ECHR, and in doing so are at least seen to apply the same standard the ECtHR applies.² This in turn may have at least an indirect influence on the interpretation of the ECHR in Strasbourg because where national case law applies the ECHR as the national standard, it may be easier to map onto a Convention case at international level. Therefore, (unintentionally) decisions from those states might be looked at more than national case law that applies a differently worded standard.

A recent example of domestic judicial agonising over the relationship of the ECHR and the national courts by some Supreme Court judges is the case of *Nicklinson*.³ In this case, the Supreme Court framed for itself a question of whether it remains open to a domestic court to declare that a statutory provision which the Strasbourg Court has held to be within the UK’s margin of appreciation and hence compatible with the ECHR at international level, nonetheless infringes Convention rights as applied in the UK. The Supreme Court clarified that the ‘mirror’ principle does not necessarily assist with the question of whether a statutory provision, in this case the universal prohibition of assisted suicide,⁴ which is within the UK’s

² *R (Ullah) v Special Adjudicator* [2004] UKHL 26, para 20, per Lord Bingham (pointing to the need to interpret the Convention uniformly across the states party to it).

³ *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.

⁴ Section 2 Suicide Act 1961, as amended by Coroners and Justice Act 2009.

permitted margin, is nonetheless a violation of a Convention right at the domestic level. After much (arguably unnecessary) analysis, the Supreme Court judges in *Nicklinson* agreed that it remained open to find such a provision incompatible under the HRA. (The majority chose not to formally declare such incompatibility, for reasons that were more to do with the court's relationship with the Westminster Parliament than with the ECtHR.⁵) That domestic courts must ultimately 'form their own view as to whether or not there is an infringement of Convention rights for domestic purposes'⁶ is a timely reminder that domestic judges retain an essential role in protecting and developing human rights in the UK, a role that is independent of, albeit related to, the ECtHR's protection of rights within the UK. Many controversial rights issues will fall within the UK's margin of appreciation at a regional level, as the UK government was so keen to assert at the high-level conference in Brighton, and which is now explicit in the Convention's Preamble, but this will not, and could not, preclude the UK's own judiciary from considering those issues for compatibility with domestic HRA rights.

Despite some provocative speeches from senior British judges, the relationship between domestic and Strasbourg judges is one of dialogue and respect. Where it faces strain, there are formal and informal mechanisms for relief (discussed more fully below). This relationship is but the tip of the iceberg, however, because the relationship between the UK and European human rights also encompasses the relationship between the Westminster Parliament and the ECtHR, and here the strain seems to be increasing. The most obvious example of this is the prisoner voting saga, which remains unsettled at the time of writing. As discussed in the chapter by Ruvi Ziegler and elsewhere,⁷ the focus of the disagreement between many UK MPs and Strasbourg judges is the weight to be given to a majority decision of an elected representative legislature. While the UK clearly has a margin to decide on how to regulate this area, and the demands of the ECtHR are much more minimal than many opponents are prepared to acknowledge,⁸ the political conflict has built around an assertion that a relevant majority decision by the Westminster Parliament should be the final word on compatibility with the Convention. From this perspective, the breaking point could have been on a variety of issues and this may explain why prisoner voting, rather than extradition of suspected terrorists or deportation of immigrants, has been the rallying cry for

⁵ This has been discussed more fully elsewhere: E Wicks, 'The Supreme Court Judgment in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2014) 23 *Medical Law Review*.

⁶ *Nicklinson* (n 2), para 74, per Lord Neuberger.

⁷ See also E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 503.

⁸ It is the absolute nature of the ban that has been found incompatible with the Convention.

opposition to the ECHR: only the prisoner voting decisions require explicit revision of an Act of Parliament, and thus majority support within Westminster. The battle for supremacy between Westminster and Strasbourg plays out against a backdrop of the margin of appreciation, the principle of subsidiarity, and debates about judicial supremacy. It is, perhaps, the relationship most directly connected to the ‘strain’ discussed in Section II below.

Related to the relationship between Westminster and Strasbourg is that between UK government ministers and the ECtHR. It is not new for government ministers to criticise a Strasbourg judgment: the domestic response to the first finding of a violation of the right to life (Article 2 ECHR) in the *McCann* case reminds us of that.⁹ In recent years, however, the language has become heightened. David Cameron, the Prime Minister, for example famously claimed that it made him ‘physically ill even to contemplate having to give the vote to anyone who is in prison.’¹⁰ With a general election imminent, such emotive language seems likely to escalate, especially in a scenario where proposals to repeal the HRA and potentially withdraw from the ECHR are regarded as vote-winners. More ominous than political rhetoric, however, are the concrete steps taken by governments, led by the UK, to seek to restrict the judicial powers of the ECtHR. As discussed by Noreen O’Meara in her chapter, Protocol 15 will add explicit recognition of the margin of appreciation and the principle of subsidiarity to the Preamble of the Convention, two principles which had until now been regarded as mere interpretive tools. Indeed, the Declarations from the high-level conferences at Interlaken, Izmir and Brighton, all focus on clarification of the relationship between national authorities and the Court (a focus which somewhat overshadows the Court’s workload issue). The Brighton Declaration, for example, encourages the ECtHR to give ‘great prominence to and apply consistently’ the principles of subsidiarity and the margin of appreciation. This is a reminder that the contracting states’ governments, and especially that of the UK, feel free to try to influence the overall direction and approach of the judicial body charged with enforcing the Convention. Such tendencies can be observed not just at the political level but also judicially, in particular through the use of the procedural mechanism to intervene. For

⁹ Nicholas Bonsor, the Minister of State for Foreign and Commonwealth Affairs, in reply to a question on *McCann* said: ‘The judgement of the majority, based on no new evidence and defying common sense, has done nothing for the standing of the court in the United Kingdom.’ (HC Debs, Vol 265, col 60, written answers). Sir Nicholas Lyell, the Attorney-General, gratefully pointed out in Parliament, however, that the judgment had ‘no effect in our law save in relation to costs.’ (HC Debs, Vol 265, col13, 30 Oct 1995). Thus, unlike in relation to the prisoner voting cases, there was no need for majority support at Westminster in order for the UK to comply with the Strasbourg judgment.

¹⁰ A Hough, ‘Prisoner vote: what MPs said in heated debate’ *Daily Telegraph* (London, 11 February 2011) www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html.

example, the UK government has not just intervened in order to indirectly ‘reopen’ the litigation against the UK in the prisoner voting context, but also in an attempt to change the approach of the Court of upholding the absolute prohibition of torture under Article 3 ECHR.¹¹ Clearly it is open for states to make use of procedural tools available. However, in the light of the fundamental nature of the protection of Article 3 ECHR in the Convention system, an approach of ‘silent’ erosion seems not only inappropriate, but also conflicts with the conscious responsibility at times demonstrated by UK judges in dealing with the Convention. Efforts to restrict the extraterritorial application of the Convention, as discussed in the Clare Ovey’s chapter in this collection, also form part of this ‘silent’ erosion.

While the voluntary nature of the ECHR as an international treaty does give contracting parties a residual influence over its future, the Convention’s role of ensuring protection for human rights across Europe, including protecting individuals from their own governments, cautions against such governmental interference. Threats such as those seen in the Conservative Party’s recent proposals which envisage withdrawal from the system unless the system changes to suit that political party’s priorities, not only belittle and deprecate the position of human rights throughout Europe; they also reflect a fundamental misunderstanding of the function and significance of an external human rights control – for any state.

It would be a mistake to focus solely upon external relationships when considering the UK and European human rights. Some of the most problematic and strained relations are entirely internal to the UK. Under the HRA, the Westminster Parliament gave a clear instruction to domestic courts to interpret legislation in a way that is compatible with Convention rights so far as it is possible to do so, together with a power to issue a declaration of incompatibility where such interpretation is not possible. It also, and this may be the most significant element in the present context, ensured that courts and tribunals were themselves bound by the Convention rights, meaning that it would be unlawful for a court to reach a decision that is incompatible with the Convention rights. Despite this, the role of domestic courts in upholding the Convention rights can bring them into conflict with the UK’s Parliament and executive branches. Thus, for example, the declaration of incompatibility

¹¹ Following *Chahal v United Kingdom*, App no 22414/93, Reports 1996-V, (1997) 23 EHRR 413, paras 76 and 79 ff (submission of the UK government and the ECtHR’s response, respectively). See in particular: *Saadi v Italy*, App no 37201/06, ECHR 2008, (2009) 49 EHRR 30, paras 117 ff and *Othman (Abu Qatada) v UK*, App no 8139/09, ECHR 2012, (2012) 55 EHRR. See also H Fenwick, ‘Enhanced Subsidiarity and a Dialogic Approach – or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-terrorism at Strasbourg against the UK?’, Chapter 10 in this volume.

issued in the *Belmarsh Detainees* case¹² met with severe criticism from senior members of government and in *Nicklinson*, discussed above, we see a majority on the Supreme Court supremely cautious in issues of constitutional propriety and not overstepping the appropriate boundaries between the courts and parliament.¹³ Mark Ockelton's chapter also reveals some of the controversies in the domestic enforcement of Convention rights which can arise independently of the ECtHR.

So far, the relationships outlined between UK institutions of government and the ECtHR have assumed a homogenous 'UK' approach. That, of course, is not an accurate reflection of the United Kingdom at the start of the twenty-first century. There are well-established devolved regimes in Scotland, Wales and Northern Ireland, and the relationships of those devolved legislatures/executives with Strasbourg are far more positive than those based in London. The Convention Rights are a fundamental part of the devolution settlements and there is far less support for a denigration of these rights, or the role of the ECtHR in the UK nations and regions beyond England. Indeed, the Conservative Party's proposals on human rights met with a significant outcry north of the border.¹⁴ The future evolution of the UK, and the nature and extent of devolution, remains on the political agenda. The state is not symmetrical, but it never was, and dealing with complexities and asymmetries is unavoidable. This all suggests that relations between each of the devolved regions and Strasbourg will continue to develop in their own right, and any settlement of the current controversies between England and Strasbourg will not necessarily be replicated elsewhere in the UK.

As many chapters in this collection have emphasised, the very concept of 'European human rights' is broad and encompasses the EU and its Charter of Fundamental Rights and Freedoms in addition to the ECHR system. Thus when considering the relationship between the UK and European human rights, it is impossible to disregard the UK's relationship with the EU as such and EU human rights more specifically. As with the ECHR system, this also of course is a multi-faceted relationship, including relations between domestic courts and the Court of Justice of the European Union (CJEU); and between the Westminster Parliament and UK executive with the CJEU, and the other institutions of the EU. The supremacy of EU law within the domestic law of the UK, as well as the wide-ranging scope of EU influence,

¹² *A v Secretary of State for the Home Department* [2005] 3 All ER 169.

¹³ *Nicklinson* (n 2). Lord Kerr's and Lady Hale's dissenting judgments take a less cautious approach.

¹⁴ See, for example, 'Tory Human Rights Plan Provokes Holyrood Rebellion', *The Scotsman* (Edinburgh, 4 October 2014) www.scotsman.com/news/uk/tory-human-rights-plan-provokes-holyrood-rebellion-1-3562556.

raises particularly challenging issues for these relationships. Furthermore, the possibility of EU accession to the ECHR would further strengthen the link between the two Europes in the area of fundamental rights and add another potential strain and sources for confusion to the relationship ('Euro-scepticism meets ECHR-scepticism and rights scepticism?'). In the unexpected outcome of *Opinion 2/13*, in which the draft accession agreement was held to be incompatible with the Union Treaties,¹⁵ the CJEU may have expressed its own version of ECHR-scepticism (besides or as part of pursuing an institutional interest). In light of this recent development, the evolving relationship between the CJEU and the ECtHR as well as the EU and Council of Europe Member States, will be the centre of debate for the near future, with repercussions for the UK's own relationship with European human rights.

Finally, it should be noted that any evaluation of the relationship between the UK and European human rights should not focus only on the viewpoint adopted by the three branches of UK government, but also more broadly on the views of the British people towards the ECtHR, influenced greatly by the relationship between the British media and the Court. The chapters by Lieve Gies and David Mead expertly demonstrate the influence and negative impact that press reporting has upon public perceptions of human rights.¹⁶ Indeed, it might even be claimed that a significant reason for a strained relationship between the UK and European human rights is the nature of media reporting on the latter.¹⁷ The response to judgments of the ECtHR and domestic judgments under the HRA is often misleading, uninformed and one-sided. This not just an issue with the media, and is particularly harmful when resorted to by those in power. When the government mirrors the popular press in adopting sceptical positions it can serve to alienate large sectors of the public from the judicial decision-making both in the UK and in Strasbourg. However, as has also been shown by these chapters, the role of the media is also multi-faceted: it may motivate government to take a particular stand, but the media may also be used by government to further its agenda; it may shape whom the public perceive as 'deserving' of human rights protection. In all these

¹⁵ *Opinion 2/13, EU Accession to the ECHR* [2014] ECR I-(nyr).

¹⁶ Adam Wagner has recently written a number of contributions on the *UK Human Rights Blog* to expose and fight misreporting by the media, eg. *UK Human Rights Blog* (29 September 2014) ukhumanrightsblog.com/2014/09/29/is-this-the-best-human-rights-correction-ever-or-the-worst/ with links to other incidents. See also A Wagner, 'The Monsterring of Human Rights', *ibid* (22 September 2014), ukhumanrightsblog.com/2014/09/22/the-monsterring-of-human-rights/.

¹⁷ Notably, the relationship between courts and the media recently has also been an area of discussion between judges of the ECtHR and judges of the German Federal Constitutional Court on the occasion of a visit of a Strasbourg delegation to Karlsruhe on 2 February 2015, www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2015/bvg15-007.html.

ways it is doubtlessly a ‘fourth power’, but that power also depends on the freedom of expression itself (as discussed by Robert Uerpmann-Witzack).

Thus, the relationship between the UK and European human rights has many strings to it. Some are strained to breaking point; others remain in a condition conducive to productive dialogue. Having outlined these different types of relations, it will now be considered why some are under strain.

II. Why the ‘Strain’?

The strain identified and discussed throughout the chapters in this collection seems to arise from a number of distinct issues, albeit issues that are interrelated and frequently fudged beyond recognition which, in itself, is part of the problem.

- the ‘sovereignty’ elements,
- the ‘rights’ element;
- the ‘foreign’ (or ‘Europe’) element and the externalisation of rights;
- the nature of the debate in the UK and other observations.

A. The ‘Sovereignty’ Element(s)

In many ways, the UK’s relationship with European human rights is largely influenced by the ‘European’ element or, in other words, perceived ‘sovereignty’ issues. This in itself breaks down into two distinct concepts. First, there are issues of the UK’s national sovereignty (state sovereignty) and the manner in which it is reduced by membership of the EU and also arguably, although less obviously, by ratification of the ECHR. Second, there is the Westminster Parliament’s parliamentary sovereignty which is often confused or conflated with the first notion of sovereignty.

National, or state, sovereignty is a defining feature of statehood and refers, in brief, to a range of relevant characteristics, which include the existence of an internal body with authority to rule the state and the effectiveness of the exercise of its control throughout the territory, and an ability to make decisions on action to be taken on the international plane, including the degree of freedom of decision and action from external restraints and influences, as well as the ability of the state to influence other states. In its internal dimension, relevant in our context, sovereignty entails the right of a state to be free from intervention in internal affairs which is overlapping with the expression of the right to self-determination of its population. The right to choose its own constitution and form of

government fall into this category. State sovereignty is not absolute. It operates on a spectrum, thus acknowledging the existence of international co-operation, and political, economic and military interdependence, whilst equally recognising that such factors may affect the degree of sovereignty which a state enjoys. It operates within the limits of international law and may also be limited factually. It may thus be said to operate on a spectrum of factual and legal limitations. Legal limitations, amongst others, result from entering into treaties by means of which states limit their sovereignty. Thus international co-operation, integration, and political, economic and military interdependence are possible, whilst equally recognising that such factors may affect the degree of sovereignty which a state enjoys. The UK's sovereignty is reduced by collaboration within Europe, and especially by membership of the EU. But it remains a sovereign state and any reduction in sovereignty is counter-balanced by an increase in legal protection for human rights.

There is another important sense of sovereignty in the present context, however, and one which is often confused with the former, in particular in the debates about 'Europe'. This is the Westminster Parliament's sovereignty. The UK's constitutional framework prioritises a Diceyan concept of parliamentary sovereignty.¹⁸ Traditionally this has meant that the UK Parliament is legally unlimited and indeed cannot be limited by any legal restraints. More recently, it has been acknowledged that such an absolute conception (owing much to Austin's nineteenth century positivist view of the sovereign) is 'out of place in the modern United Kingdom.'¹⁹ Those are the words of Lord Steyn; Lord Hope has further explained that

Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled ... It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.²⁰

Crucially, however, both of these senior judges make very clear that they still regard parliamentary sovereignty as an important principle of the constitution.²¹ Therefore, while membership of the EU, devolution, and even the HRA may have chipped away at the

¹⁸ AV Dicey, *The Law of the Constitution*, 10th edn, (London, MacMillan, 1959).

¹⁹ *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, para 102 (per Lord Steyn).

²⁰ *Ibid*, para 104 (per Lord Hope).

²¹ Lord Hope, for example, claims the constitution is 'dominated by the sovereignty of Parliament.' (*ibid*).

Diceyan tradition, the UK's constitution continues to elevate a (if not 'the') principle of parliamentary sovereignty to the very centre of its workings. Such a view is unique in Europe. It is also less than ideal for encompassing external influences (from European bodies) or issues of legality (in relation to legally enforceable human rights).

Thus, while all member states have concerns about sovereignty and all have certain sacrosanct constitutional concepts, the UK's preoccupation with a supreme legislature which is not and cannot be legally restricted in its freedom to legislate does present particular conceptual and practical difficulties when considering the implementation of European human rights. While it may, at first glance, seem ironic that a state with such obstacles to the acceptance of external restraints should rely upon the Convention rights (i.e. rights drafted and originally implemented externally) within its domestic scheme of protection for human rights, it is in fact entirely understandable because of an absence of home-grown rights. As Brice Dickson fully explains in his chapter, the home-grown element of rights protection (namely common law rights) remain under-developed. And this is for the very reason identified above: the idea of a court imposing legal restraints upon parliament is an anathema to the UK constitution, or at least has been so for hundreds of years.

Although it must also be said that the 'flexible' UK constitution has been able to accommodate European influences much more easily than some continental systems which are corseted into non-derogable constitutional principles. For example, it can be said that the parliamentary sovereignty has been able to accommodate supremacy of EU law as a formal concept – on a formal construction of parliament limiting itself but not legally irreversible – much more easily than other states in Europe which are tied by substantive clauses in their constitution. However, under even this more evolved version of parliamentary sovereignty in the UK, human rights are exactly such a substantive limit which it is more difficult to accommodate within the UK's constitutional framework.

B. The 'Rights' Element

This leads onto the second element in the UK's relationship with European human rights, namely the growing scepticism about the very concept of human rights. This is not just a rejection of a particular European mechanism for protection of rights, but a broader distrust of human rights in general. Indeed the phrase 'human rights' is increasingly used as a shorthand for meddling bureaucracy, in a similar way to the denigration of 'health and safety' from something that should be overwhelmingly positive to something that carries with it an implicit pejorative sense.

There is some history of rights scepticism within the UK, partially linked to scepticism towards courts which historically were extremely conservative in the era of establishing labour rights. There is also an increasing move towards rights scepticism in academic literature.²² However, times and paradigms have changed. The scepticism about rights within our current context of European human rights seems far removed from these other movements.

So, what exactly are the objections to human rights today? One obvious objection, evident in most newspaper reports critical of ‘human rights’ (and in many casual conversations as well), is that they protect the wrong people. This perception is analysed by Lieve Gies in her chapter on the media, including the rather arbitrary nature of who is considered ‘deserving’ in this context. The idea that there are people who deserve human rights and other people who have forfeited them is simply irreconcilable with the concept and function of human rights, based as it is upon inherent values of equality and human dignity and the functional rationale of limiting government which is not to be trusted.

Such popular hostility towards human rights is frequently based on a lack of understanding of how human rights operate. It should also be remembered that very few rights (especially in the Convention rights) are absolute in nature. The fact that every single human being is entitled to the protection of all of the rights does not mean that those rights cannot be legitimately limited on the basis of conflicting interests within a democratic society. Human rights law (at least in its current manifestation within Europe at this time) does not prioritise an individual right over all other considerations; it simply requires, in general terms, that any limitation of such a right is non-arbitrary and pursues a legitimate aim in a proportionate manner. To draw from a commonly discussed scenario: the fact that an immigrant has a family life within the UK does not preclude deportation if that is a proportionate response to the need to protect society from crime, but it does require a sensitive balancing of those potentially conflicting interests, rather than a knee-jerk reaction.

A second common objection to human rights at the present time, especially in the context of European human rights is the claim that those rights are being expanded. This is seen particularly in the context of the right to respect for private life in Article 8 ECHR. Consider, for example, the comments by Lord Sumption in November 2013:

²² See, for example, T Campbell, KD Ewing and A Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford, Oxford University Press, 2011).

The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications.²³

This criticism of the ECtHR is misconceived. It assumes that any specific issues not mentioned within the terms of Article 8 must be an unwarranted extension of that provision, and yet a vague notion such as ‘respect for private life’ will inevitably require interpretation on a case by case basis. And what was regarded a part of a private life in the late 1940s may well be different from what we would so regard today. The ECtHR has long used a ‘living instrument’ doctrine to help it to interpret the Convention. This means that the Convention is interpreted in the light of present-day conditions.²⁴ The approach encourages the Court to recognise new aspects and applications of the rights expressed in the text and this invariably proves to be controversial. However, to argue, as Lord Sumption appears to above, that there is, for example, no right to abortion in the Convention misses the point that abortion is an aspect of a woman’s private life, dynamically interpreted, to which the Contracting Parties undoubtedly owe an obligation of respect. The Court’s use of this evolutive interpretation not only responds to scientific advances and social changes, but can also serve as a response to the higher standards of compliance with human rights expected of today’s state governments. This latter point can, of course, prove particularly controversial, and perhaps there are occasions on which the Court’s application of the ‘living instrument’ doctrine could be explained more fully by the Court. Indeed, as Mowbray has pointed out, a ‘greater willingness to elaborate upon the application of the doctrine in specific cases would help to alleviate potential fears that it is simply a cover for subjective ad-hockery.’²⁵ There are

²³ ‘Lord Sumption gives the 27th Sultan Azlan Shah Lecture, Kuala Lumpur, The Limits of Law, 20 November 2013,’ available at www.supremecourt.uk/docs/speech-131120.pdf, 7-8.

²⁴ *Tyrer v United Kingdom*, App no 5856/72, Series A No 26 (1978), (1979–80) 12 EHRR 1

²⁵ A Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 *Human Rights Law Review* 57, 71.

certainly substantive debates to be had about the scope and application of specific rights. Constructive criticism and debate is acceptable and important for it invariably leads to better reasoning. But a constructive engagement with the interpretation of a particular right is far removed from a sweeping rejection of the very concept of rights under the ECHR.

The two distinct elements of European human rights identified so far – namely the sovereignty element and the human rights element – although distinct, also crucially overlap within the UK. This is because the UK's constitutional commitment to parliamentary sovereignty leads to a distrust of judicial restraints on parliament's freedom to make laws which feeds into and enhances the distrust of legally enforceable 'rights' as these, by their very nature, impinge on parliament's sovereignty. Thus, the UK's constitutional framework has traditionally prioritised democratic accountability and civil liberties, based around a concept of residual freedom whereby we are free to do anything provided that it is not prohibited by the law – a very limited idea of 'freedom'. Legal rights in codified documents are new and thus seen as 'foreign' (even when found in a domestic Act of Parliament such as the HRA). This conjunction of the two elements discussed above partially explains the strained nature of the relationship between the UK and European human rights, in the form of the issue of 'human rights law'. The role of a court, whether based in London or Strasbourg, in telling the elected branches of government what to do is part of a broader constitutional debate about the role of judges and the nature of the constitution. It is the legal enforcement of European human rights – as foreign 'impositions' (see below), a question thus closely linked to the sovereignty element – that causes concern for some. In particular, there is the question of who should have the final say on 'our' rights: a judge who is at least widely perceived to be unelected and unaccountable (and maybe even foreign) or an elected, and thus removable, politician? Broader constitutional debates about political or legal constitutionalism are a backdrop to this question, but it should also be remembered that the UK constitution is an evolving one, and in recent years senior judges have expressed the view that it is the 'rule of law enforced by the courts [which] is the ultimate controlling factor on which our constitution is based.'²⁶ This change, from the absolute power of the sovereign to a constitutional democracy suggests that a gradual recognition of the acceptability of judicial enforcement of rights (even perhaps against a supreme legislature) might also be evolving.

²⁶ *Jackson* (n 19), para 107 (per Lord Hope).

C. The ‘Foreign (or European?)’ Element: Externalisation of Rights

As mentioned above, it is the legal enforcement of European human rights as foreign ‘impositions’ that causes concern for some. The ‘foreign’ element entails significant consequences. It allows for externalisation, disowning human rights as foreign ‘grafts’ and scapegoating or instrumental use of human rights, in particular in political discourse. The ‘foreign’ influence element is not only visible in the context of human rights but informs much of the Euro-sceptic discourse (as in EU-scepticism). One aspect is the lack of care in differentiating the EU and the ECHR, fudging ‘Europe’ to an amorphous huge, almost omnipresent beast and object on which all sorts of scepticisms are transferred. Wherever the centre of gravity of scepticism and hostility is seen to lie today (it used to be clearly the EU, but the tide in the UK has turned also against the ECtHR), fudging the ‘two Europes’ into a collective ‘Other’ does not help either Europe.

A culmination of fudging even to the point of contradiction can be seen in the combination of rights scepticism and Euro-scepticism directed against the EU Charter on Fundamental Rights – with contradictory arguments (as a Euro-sceptic could be expected to welcome rights to limit ‘Europe’, but that clashes with a rights scepticism) and debates verging on the absurd (as Sionaidh Douglas-Scott exposes).

Related to this UK-centric distrust of legal rights, at a more detailed level of substantive analysis of rights, there may be also elements of clashes of legal cultures (bluntly: common law meets codification, or parliamentary sovereignty meets constitutional rights) which may add to the strain. Helen Fenwick and Brice Dickson in their chapters discuss the example of the more flexible approaches to ‘overall fairness’ of trials under the common law in the UK versus strict review of rights of defence in regard to specific evidence. The dividing line between whether there is a violation of the Convention or just a different legal culture with a different solution is a thin one and not easy to decide, and there is an inherent risk of watering down the protection of the Convention in order to accommodate specific ‘traditions’ of legal culture of whatever origin (together with a risk of oversimplification and overemphasising differences). However, with the necessary sensitivity to the coming together of a wide variety of legal cultures such issues should be dealt with at the level of interpretation of rights and the margin of appreciation doctrine should provide the appropriate tool to resolve such questions.

D. The Nature of the Debate in the UK and Other Observations

The debates about European human rights in the UK reflect some characteristics which distinguish them from debates in other European states. The chapters in this collection that address other countries' relationships with European human rights indicate that the British debates appear to be more extreme, both in the sense of elevating a specific issue to a reason to criticise the entirety of the system, and perhaps also in the sense of the vitriol of the language used, especially by the media, in contributing to the debate.

It appears to be a particularly British approach to adopt an all or nothing scenario and to readily and repeatedly discuss an exit from the EU and ECHR. Other European countries, even when encountering their own culture clashes with the ECtHR do not seem to resort so quickly to exit scare scenarios, as we can see in the comparative chapters in this collection. For example, France, as described by Constance Grewe in her chapter, experienced some severe conflicts going to the structure of government institutions and the organisation of the judiciary (in relation to the participation of the *commissaire du gouvernement* in deliberations of judges in administrative proceedings which conflicts with Article 6 ECHR)²⁷ which was received with an outcry. However, criticism was discussed in a subject matter oriented way and even segued – over time – into an acknowledgment of an overall improvement of the human rights protection in France.

Similarly, as Julia Rackow demonstrates in her chapter in this collection on the German perspective, while there is some criticism of the ECtHR in legal and political circles, and within public opinion, such criticism tends to be issue oriented rather than, as in the UK, fundamentally challenging the legitimacy of the entire ECHR system. Rackow also notes that, in Germany, issues concerning adverse judgments of the ECtHR tend to be viewed as judicial matters, for resolution by the courts, and not matters on which the legislative or executive branches of government would generally seek to intervene. This again stands in stark contrast to the approach in the UK, where the question of the appropriate role of the courts and Parliament is central.

In Russia, constructive judicial engagement with the Convention has made a direct contribution towards ensuring that confrontation has been avoided. As Bill Bowring explains in his chapter, an issue which had potential to be as politically sensitive in Russia as the prisoner voting saga is in the UK did not result in the level of outrage experienced in the UK when dialogue and pragmatism won out. Growing confidence in using the language of rights

²⁷ *Kress v France*, App no 39594/98, ECHR 2001-VI.

among the legal profession, Chernishova suggests, is rooting the Convention increasingly firmly in Russian law. What is particularly striking is the demonstrable way such engagement can occur without undue concern on the part of the judiciary about the diminishment of their constitutional role or the legitimacy of Strasbourg. Yet it is clear that an established legal rights culture alone is not always sufficient to protect against even the more serious rights violations.

In relation to Italy, Oreste Pollicino's chapter identifies a strained relationship between the ECtHR and the Italian Constitutional Court (ICC), but this seems largely based on potential conflicts between a constitutional system of fundamental rights and the ECHR system. In Italy, review for conformity with the ECHR has become part of domestic constitutional review, going beyond a mere 'taking into account' of the ECHR. Pollicino notes how the ECHR has moved from being 'an almost unknown walk-on character in the case law of ICC to being one of its central protagonists'²⁸ but this has also necessitated the elaboration of new judicial techniques by the ICC in order to achieve a balance between Italy's constitutional system of fundamental rights and the ECHR system.

A similar struggle can be identified in France and Germany. However, it must be noted that although the German Federal Constitutional Court (FCC) has rejected the ECHR as its formal standard of review in favour of German constitutional rights (on the basis of a dualist approach to unincorporated treaties), it would be too simplistic to present this as an inward looking reliance on the own bill of rights and possibly even 'constitutional identity'. The FCC is required to take the ECHR and ECtHR decisions into account, and only departs from them if important reasons warrant it. Moreover, the German Constitutional Court recently has developed its cooperative approach further in declaring decisions of the ECtHR (against whatever state party) as 'factual precedent', as Julia Rackow points out in her chapter.

Austria is perhaps the country with the closest comparison to the UK, given that the domestic fundamental rights regime in both countries relies heavily on the ECHR. Andreas Th. Müller's chapter in this collection is, therefore, illuminating in illustrating the additional complexity resulting both from multiple sources of human rights within one constitutional setting and from relying on an external source domestically. It shows that a multiplicity of sources of domestic human rights protection may be manageable. There may even be

²⁸ O Pollicino, 'The European Convention of Human Rights and Italian Constitutional Court: No 'Groovy Kind of Love'', Chapter 18 in this volume, at end.

additional benefits for the continuous evolution of a modern system of human rights protection. It also highlights the potential for courts to use such complexities not just for a judicially activist human rights protection but to further their own institutional interests.

In addition, the public and media response to judgments of the ECtHR is of a very different nature in other European countries. For example, as Constance Grewe's chapter makes clear, some adverse judgments by the ECtHR in relation to serious problems in relation to French prisons and anti-terrorism policy have simply failed to attract wider public interest. In Russia, which between 2002-2012 had the greatest number of new cases lodged at the ECtHR, there is (as yet) no sign of the vitriol unleashed against the ECtHR in the UK. As Olga Chernishova argues in her chapter, robust domestic institutions with the capacity and willingness to implement the Court's rulings are needed in any contracting state if the ECtHR's judgments are to make a difference, and alongside that capacity (and no doubt an inspiration for it) is a secure position for the ECtHR jurisprudence within a larger domestic culture of rights.

Significantly, the two chapters on the Russian perspective in this collection both express concern at the risk of 'contagion' of the negative attitude towards the ECHR system from within the UK. There is genuine concern that the UK might lead a trend towards non-cooperation in the face of unpalatable judgments, and even 'exit talk' from the ECHR. The nature of human rights issues facing Russia is far removed from the current position of human rights within the UK and any act of defiance by the UK government against a judgment of the ECtHR is therefore a dangerous precedent elsewhere in Europe. As Bill Bowring notes, adverse judgments against Russia in the context of Georgia and/or Ukraine carry the potential to lead to outright defiance, or even denouncement, of the ECHR. It is a terrible time for the UK to be setting such a bad example.

III. Relieving the Strain?

Having considered the different types of relationships between the UK and European human rights, and analysed some possible causes of strain in, at least some of, those relationships, it is now necessary to consider how that strain could be relieved.

Before doing so, it may be worthwhile to note that the two contributors to this volume with greatest experience in living the relationship are inclined to deny the existence of strain, at least within the judicial context. While there are certainly some signs of strain in extra-judicial pronouncements of other senior judges, it may be that the dialogue which already

undoubtedly exists between senior domestic courts and the ECtHR plays a key role in relieving strain. As such it may be a lesson to draw upon.

A. Dialogue

Dialogue will have a vital role in increasing understanding. It can take many forms, including within court judgments (whether UK judges explaining their reasoning in ways that Strasbourg judges can subsequently take into account, or Strasbourg judges sending judicial messages to domestic judges). Dialogue is already written into the HRA and thus a declaration of incompatibility is the start of a dialogue with parliament, informing it that the legislation in question is not compatible with a Convention right, but leaving Parliament to determine how best, if at all, to remedy that incompatibility. Dialogue between UK politicians and Strasbourg judges tends to take a political rhetoric approach (and be driven by ulterior agendas) that may not be conducive to improving relationships. There is, however, scope for behind the scenes dialogue that can avoid this danger. The British media also contributes to dialogue with Strasbourg and not always in a productive manner. As Robert Uerpmann-Wittack explains in his chapter, a free press is essential in order to play a watchdog role, but with that role should also come some responsibilities to present accurate information and informed comment (which is not currently always the case, as investigated by David Mead in his chapter). The British people are part of the dialogue too, not least at elections when their choice of politicians will have long-term influences on the future relationship between the UK and European human rights.

Dialogue may relieve the strain but at what price? Dialogue might present some dangers to the effective protection of European human rights. Dialogue could amount to appeasement; a concession to the political priorities of a government of the day, rather than a neutral application of human rights norms. Could such appeasing dialogue have the result of watering down human rights protection (perhaps in order to rescue the overall Convention system from the threat of a UK exit)? Such dialogue might present one solution, as discussed by Helen Fenwick in her chapter, but what impact will a lower level of European human rights protection have on other European states, and what message does the UK's negative approach to human rights send within and even beyond Europe? Kenyan President Uhuru Kenyatta, facing war crimes charges in the Hague, recently made a speech in which he drew support from the UK Prime Minister in his efforts to assert Kenyan supremacy: 'The push to defend sovereignty is not unique to Kenya or Africa. Recently, the Prime Minister of the United Kingdom committed to reasserting the sovereign primacy of his parliament over the

decisions of the European Human Rights Court. He even threatened to quit the court.’²⁹ The manner in which the UK redefines its relationship with the ECtHR, if it seeks to do so, will have implications within the EU, the Council of Europe and across the world.

B. Strengthening the Institutional Aspect of Human Rights Protection in the UK

Other means of relieving the strain in the relationship between the UK and European human rights might involve a strengthening of the independence of the judge, or at least, as a start, more sensitivity that the independence of the judiciary is even a relevant issue in the circumstances. Such an awareness amongst government might help to alleviate the worst forms of ‘scolding’ of courts and lead to a shared appreciation of the importance of a convention that it is not acceptable for government to scold judges for the content of their judgments.³⁰ In other words criticism by other branches of government should not significantly go beyond what the constitutional division of power provides to correct judicial mistakes and to protect independence of the judges where they are prevented from ‘talking back’ (as Mark Ockelton’s chapter demonstrates).

Approaching the perceived problem from the opposite angle, it could be asked whether a unique UK solution might be to add and strengthen a majoritarian overlay to human rights, by entrusting Parliament with the final word on human rights issues. Alice Donald’s chapter suggests the possibilities that lie in this direction. Clearly, ultimately a tension will remain as the very rationale of human rights lies between majority decisions and minority protection. However, such tensions can be reduced by a process that is linked to the constitutional tradition of the UK, open and informed debate in the parliamentary process of the human rights issues and problems involved. The creation of the Joint Committee on Human Rights points in this direction, but might be strengthened.

C. Home-grown Human Rights

More optimistically, further development in ‘owning’ human rights or developing *home-grown human rights* would be a positive move, and may relieve the strain both on the two

²⁹ U Kenyatta, ‘Ruto the Acting President as I attend ICC case’ (CapitalFM, 6 October 2014) www.capitalfm.co.ke/eblog/2014/10/06/ruto-the-acting-president-as-i-attend-icc-case. See also Adam Wagner, ‘Kenyan President uses Tory human rights plans to defend war crimes charges’ (*UK Human Rights Blog*, 24 October 2014) ukhumanrightsblog.com/2014/10/24/kenyan-president-uses-tory-human-rights-plans-to-defend-war-crimes-charges.

³⁰ The erosion of the existing convention was recently discussed by The Master Of The Rolls, Lord Dyson, ‘Criticising Judges: Fair Game Or Off- Limits?’, The Third Annual Bailii Lecture, 27 November 2014, available at www.judiciary.gov.uk/wp-content/uploads/2014/11/bailli-critising-judges.pdf.

sovereignty elements and on the foreign/European elements of this relationship. By home-grown human rights we do not mean home-grown rights designed to lower the standard by the Convention, to emphasise a traditional notion of sovereignty, or to provide a stronger bargaining chip in the relationship with Strasbourg (by providing opportunities to rely on newly created national constitutional identity in order to bypass international human rights obligations – or even worse: water them down throughout Europe). A domestic bill of rights is unlikely to be a recipe to give the government more leeway in human rights issues as the tension between the courts and the government will continue also under a domestic bill of rights. A domestic bill of rights will allow a clearer distinction between the international and the domestic layer of human rights (and thus end any debates about the ‘mirror’ principle), but its mere existence will not automatically and overnight embed a human rights culture. Rackow, for example, points out that in Germany the human rights culture is closely linked to a ‘constitutional review culture’. But what becomes apparent is that the dwindling acceptance and consensus about human rights in the UK may be part of the problem, and exacerbated by the ‘foreign’ element. As law as a social construct depends ultimately on its acceptance, drastic debates are deeply concerning and must be taken seriously. Ultimately the significance of human rights and their persuasiveness must speak for themselves, i.e. under the proverbial Rawlsian veil of ignorance, abstracting from specific situations. However, the development of a basic social consensus may be supported by the existence and development of home-grown human rights, their institutional embeddedness, be it in the powers of review by the courts or institutions such as the JCHR, and a more widespread human rights education, leading, so it is hoped, to more informed public debates, responsible use by those in power and the development of a more principled human rights jurisprudence by the courts.

The HRA may have been designed to ‘bring rights home’ but many in the UK do not yet accept them – and they are not ‘forced’ to as the ‘foreign’ element discussed above always provides for a convenient escape – the externalisation of human rights. Home-grown human rights could be developed in a variety of ways, such as by the common law or by a domestic codification. A written domestic bill of rights may be a faster, more structured and overall more appropriate way of developing domestic constitutional principles and human rights, as argued by Sionaidh Douglas-Scott in her chapter, but the common law can be used more to assist in the task, and maybe the answer is to pursue both alleys in a complementary, mutually supporting way.

The common law has potential to do far more than it does currently to protect human rights. Indeed, there is a history of common law rights dating back to Coke CJ in the

seventeenth century which was briefly revived pre-HRA in an extra-judicial capacity in the 1990s. The HRA seemed to negate the need for common law protection and, as Brice Dickson's chapter discusses, the courts have turned their back on earlier attempts to develop common law rights to work alongside the rights in the ECHR. However, the failure of the public to engage with the Convention rights within the HRA suggests that, whether the HRA survives the next election or not, there is an important role to be played by the common law in protecting home-grown rights at a domestic level. Questions will remain to be answered, of course, as to how such rights might be effective against a sovereign Parliament and it is clear that they could not alone provide a sufficient replacement for the HRA.

Leaving the common law to develop UK human rights (apart from the slower, haphazard nature) would in all likelihood also not significantly engender public debate and education of human rights – they would remain a technocratic matter confined to the judicial process. Embarking on a codification exercise has at least the potential, if linked to a widespread consultation, to promote wider discussion, and provide more opportunity for the development of a human rights 'culture' within and outwith the courts. It could also be used to fundamentally debate the relationship between parliamentary sovereignty and the rule of law, and the relative weight of these principles in a modern constitution of the United Kingdom. Such an exercise of codification – along the lines of the experiences of Canada 1982, New Zealand 1990, at territory level in Australia (ACT 2004, Victoria 2006) and the EU Charter on Fundamental Rights 2000 – could also provide a modern impulse to the development of human rights and put the UK back into a position of a forerunner on this issue. It may be asked, however, whether untangling domestic human rights protection from the ECHR in the UK would decrease the influence of the UK jurisprudence in Strasbourg which results largely (but not only) from the direct application of the ECHR and the volume of jurisprudence generated by UK courts (recalling that this an important potential benefit of the HRA). But this would merely put the UK on an equal footing with virtually all other states in Europe. Moreover, the influence depends on a number of factors which either continue to exist or are in the control of the UK, such as whether the ECHR would continue to be directly applicable in the UK (a feature that distinguishes it from some continental jurisdictions, including Germany where the ECHR only informs the interpretation of domestic law); the quality of human rights reasoning; and, last but not least, the accessibility

of domestic judgments: undoubtedly the UK enjoys the huge advantage of using a *lingua franca*.³¹

D. Developing a Human Rights ‘Culture’

Despite being one of the intentions underlying the ‘bringing rights home’ ethos of the HRA in the later 1990s, there is still a lack of human rights culture in the UK, where the scepticism about human rights has only increased in the intervening years. Education of the public, media, politicians and lawyers about the nature and function of human rights would inevitably lead to better informed debates and better judgments at all levels. By human rights ‘culture’, we mean an informed approach to human rights, both by those in power and ordinary citizens, an owning of human rights as a valuable achievement of the polity and citizens, and good quality human rights reasoning in the legal sphere, derived from principle. In other words, we are seeking a culture of substantive and constructive debate rather than an a priori dismissal of human rights as foreign, insidious and self-serving; an environment where scapegoating of human rights is not acceptable.

One persistent obstacle to building a constructive rights dialogue in the UK is the conflation of the two Europes. While historically the EU and the Council of Europe share a common overall goal – the preservation of peace and liberal democracy in Europe – they are distinct organisations. They are two different ‘clubs’ with overlapping membership but significantly different rules. This does not seem to be a difficult concept to grasp and yet it seems to elude many interested parties from members of the press, to members of the government, to a significant proportion of first year law students.

In part because of this coalescing of the two Europe’s in public perceptions, it would be extremely useful to distinguish the rights issue from other ‘Europe’ issues. Whatever one’s position on the UK’s place and role in ‘Europe’, an effective guarantee of individual rights necessitates an external oversight. The oversight does not have to come from Strasbourg, and indeed there may be scope for reform there, but it has to come from somewhere outside of the UK. The Strasbourg system is by far the most advanced and successful of human rights regimes, and it would be unfortunate and short-sighted were that success to alienate the UK, one of its founding parties, but the need for external oversight on human rights issues is not

³¹ The importance of accessibility of their judgments in order to contribute to European or international debates is not lost on higher national courts as it becomes increasingly common for courts outside the English-speaking world to provide English translations or summaries of some of their judgments.

inevitably linked to the UK participating in ‘Europe’ (much less the EU) and both debates would benefit from being untangled from the other.

Finally, and related to the above issue, it is important to emphasise that public fears and misgivings about ‘European judges’ telling ‘us’ what to do are entirely misplaced in the human rights arena. In cases against the UK, the ECtHR judges are informing the UK government where the limits of its powers lie. Similarly the CJEU in this context will inform the EU where the limits of its powers lie. It is the job of these courts to protect the people of Europe from their governments and the institutions of the EU respectively. Without such protection, there would be inadequate legal remedies when a public body kills, tortures, degrades, or infringes freedom, nor would there be such incentive to prevent these actions. The UK government does infringe rights, as does every other government to a greater or lesser extent, and it will not always be just the rights of other people that are infringed.

IV. The Future Relationship

At the time of writing, the future relationship between the UK and European human rights looks undeniably bleak. The Conservative Party’s proposals to repeal the HRA, rewrite so as to limit the application of, the Convention rights and even potentially withdraw from the ECHR entirely are a sobering reflection on what is likely to be the nature of the debate about human rights in the UK at the upcoming election and beyond. Perhaps it is only in the UK, with its unique combination of a constitutional commitment to an out-dated concept of parliamentary sovereignty, a Eurosceptic tabloid press, and a distinctly British island mentality, that a proposal to repeal the only domestic legal protection for human rights is likely to be seen as a political asset ahead of an election.

From a number of perspectives (historical, institutional interest, perhaps even political), it is not in the least surprising that a political party which hopes to form a government would wish to remove the legal restraints upon its powers imposed by human rights laws; yet, from the perspective of a modern constitutional state and considering that those campaigning for a removal of such restrictions aspire to hold government office, it is utterly surprising. For those of who believe in, and support the application of, human rights, the task is to change the perception of human rights amongst the public so that it is no longer a vote winner to promise to remove them. Common sense speaks to this: human rights have their strongest instinctive appeal when they are viewed as benefits for us as individuals against the exercise of public power; they have a weaker appeal for many when seen only as benefits for other (often ‘undeserving’) people. It is, of course, no surprise that most human

rights cases involve the least popular members of society (prisoners, suspected terrorists, mental health patients, immigrants) because it is they who are most likely to have their rights infringed. But a government unrestrained by human rights law puts us all at risk. The ECHR system is currently the best means of ensuring that the UK government respects the rights of everyone within the UK's jurisdiction, and future developments within the EU are likely to strengthen that protection. There is room for debate on how specific rights are interpreted, how proportionality is determined, what measures are needed to remedy violations, and many other important issues on which even human rights experts are divided, but if the UK wishes to contribute to answering these questions, it needs to be an active participant in the protection of European human rights. The multi-faceted relationship between the UK and European human rights has to be worked upon at all levels in the hope that one day 'human rights' will not have a more negative connotation in the UK than in the rest of Europe and the world beyond.