Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights

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Abstract
The United Kingdom’s relationship with the European Court of Human Rights (ECtHR) has been historically fraught. This paper examines this relationship with a view to understanding how the UK’s conceptions of human rights protection, both domestically and in Europe, shape its willingness to comply with ECtHR judgments. The paper argues that the UK maintains a sense of a distinctly ‘British’ – as opposed to ‘European’ – legal culture, based on principles of parliamentary sovereignty and the common law. In doing so, the paper explores an important analytical gap in terms of understanding the relationship between compliance behaviour and international law, as current theoretical explanations for norms influencing state behaviour do not necessarily translate into effective practice of the law and protection of human rights.

Keywords: United Kingdom; human rights; norms; legal culture; compliance

I. Introduction
For as long as ‘Europe’ as a social and political construct has existed, the United Kingdom has grappled with how its identity and traditions fit with those on the continent. As a state with its own composite nations, distinct traditions, cultures and identities, and a long history steeped in notions of independence and exceptionalism, the UK was the poster child for ‘reluctant Europeans’ well before current debates about Britain’s place in Europe resulted in the landmark vote to leave the European Union (EU) in June 2016.¹ Yet, for all its fraught history with European institutions, the UK continues to swiftly and effectively meet almost all of its commitments. In particular, the UK’s relationship with the Strasbourg-based European Court of Human Rights (ECtHR) is a key illustration of the tensions that define how the UK interacts with Europe; despite fiercely criticising the ECtHR for ‘overreaching’ its mandate and undermining domestic legal processes, the UK was a primary architect of the European human

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rights system following the Second World War, and is one of the ECtHR’s best role models for how to comply with international legal obligations and protect human rights. The dynamics of this ‘awkward’ or ‘begrudging’ relationship are clearly informed by a long and complicated history of competing ideas and expectations about national and European roles in the legal protection of rights. Nonetheless, the extent to which this history affects the UK’s commitment to its international legal obligations – in particular, how it interprets and decides to follow European human rights norms – thus far remains underexplored. This article therefore examines the UK’s interactions with the ECtHR with a view to understanding how British conceptions of human rights and legal norms, both domestically and in Europe, shape its willingness to comply with ECtHR.

The article makes two interrelated arguments. First, that current theoretical accounts of compliance behaviour do not sufficiently appreciate the nuances of individual states’ experiences with, and understandings of, law and human rights. Closer examination of the domestic historical and cultural context in which states receive and interpret international human rights norms is essential for understanding how and why a state comes to view those norms as legitimate and in their interest to follow. In other words, recognising how a state perceives the role of law and human rights domestically provides insight into how it responds to, and decides to comply with, international human rights law.

The second part of this argument is that the UK’s fractious relationship with the ECtHR can be explained by examining how the UK uses its legal culture and long-standing human rights tradition as a litmus to interpret and accept or reject norms. Specifically, the article is interested in the broad national trends and ideas that determine attitudes about what the British legal and human rights traditions entail, and how they resonate with, or differ from, perceptions of the Strasbourg tradition. This approach reveals a discourse in the UK – advocated by politicians, judges, and the public alike – that the British legal culture and way of protecting human rights

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3 Stephen George’s famous classification of Britain as an ‘awkward partner’ refers specifically to its membership of the European Community, but also serves as an apt description of Britain’s relationship with the whole European project. S George, *An Awkward Partner: Britain in the European Community* (3rd edn, Oxford University Press, New York, 1998) 1.

are distinct from, if not outright superior to, the ‘European’ system. This perception champions the British institutions of parliamentary sovereignty, the common law and so-called ‘common sense’ values as the best way to uphold rights, and is built on a narrative that (apocryphally) traces the ‘British’ approach to rights protection to the 1689 Bill of Rights and the creation of the Magna Carta in 1215. This view also paints the ECtHR as ‘foreign’, run by judges that cannot comprehend the specific human rights need of British society because they do not appreciate British culture. In this sense, the UK’s relationship with the ECtHR is tainted by a notion that human rights are better protected at home than in Strasbourg. In exploring this attitude, the article demonstrates that the UK is most likely to perceive ECtHR judgments as legitimate when they closely reflect ‘British’ conceptions of rights and law, while non-compliance arises when ECtHR judgments fundamentally challenge these principles.

To this end, the belief that the British approach to rights and law is ‘better’ than the European approach illustrates that the intersection between normative preferences and interests is not, as dominant explanations of compliance suggest, informed solely by domestic institutions or international pressure. Rather, the UK case demonstrates that the normative influences motivating the state to comply with international law are not necessarily the norms promoted from the top down by external laws or institutions (in this case, the ECtHR), but more powerful domestic norms and cultural traditions that determine the UK’s notions of what is or is not legitimate. Thus, the conclusions offered here provide valuable insight into why, and in what circumstances, the UK is willing to comply with the ECtHR, as well as a clearer understanding of how states interpret and internalise international human rights norms.

II. Theoretical Accounts of Compliance

The distinctly normative nature of human rights treaties, and the general absence of tangible incentives to obey them, expose major frailties in International Relations’ explanations of compliance with international law. Although current theories can draw attention to broad patterns of likely or unlikely compliance, they remain limited in their ability to pinpoint how states decide to comply with particular cases, and to predict which cases states will obey and which they will resist. This is especially important to understand in Europe, where many states – including the UK – have high, but not yet perfect, compliance rates. This indicates that states’

decisions to comply, or not comply, are informed by a precise and deliberate balancing of national interests, values, and expectations about international law that is more intricate than dichotomous rationalist or normative perspectives allow. To this end, there is a lacuna where the unique decision making processes and normative beliefs of individual states lie, which holds the key to more nuanced insights into the nature of international law and its relationship to state behaviour.

Realist approaches to compliance downplay the effect of international law on state behaviour; to the extent that law has a role in international politics, it is usually a reflection of existing interests of, and power relations between, states. In particular, the unenforceability of international law has led realists to relegate it to the status of ‘primitive’ or ‘not real’ law, such that ‘where there is neither community of interest nor balance of power, there is no international law.’ Realist explanations of compliance therefore emphasise either ex ante compliance, or compliance under coercion. That is, states follow obligations because of a ‘coincidence of interest’, and would likely behave that way regardless of the presence of international law; or because a more powerful actor has influenced them through the promise of incentives or the threat of punishment. Yet, given the Council of Europe’s reliance on ‘naming and shaming’ and ‘self-enforcement’ techniques to produce compliance with ECtHR judgments, coercion does not explain any European states’ motivations, let alone the large and relatively influential UK.

A second explanation, posited by rational choice theorists and liberal institutionalists, similarly focuses on the pursuit of interest as the primary motivation for behaviour; here, states decide to comply with international law or not by making ‘rational’ assessments of what is in their

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8 Morgenthau, Politics Among Nations, 273–274.
interest. The analytical focus is broader than realists’, however, drawing on key liberal notions about the role of institutions. Whereas realists tend to perceive international law as being endogenous to state interests – as an opportunity through which to impose their goals and values (or as something that can be ignored when there are no discernible interests or advantages) – rationalists argue that ‘legal rules can be used to structure international politics.’

Rules and institutions provide a framework of expectations and incentives around which states can determine their interests, and enhance individual and collective gains for members by limiting uncertainty amongst actors. Compliance occurs when states believe they gain more from participation in these institutions than abrogation from them, and ‘enforce’ the obligations upon themselves to ensure that such benefits continue. However, interest-based approaches are too narrow to explain compliance with international law in the absence of any incentives or coercion. Their salience to the field of human rights law, where states ostensibly gain very little from impinging on the sovereignty of other states to comment on their domestic human rights practice, is therefore limited.

The argument that has gained the most traction in terms of explaining the case of the UK emphasises domestic, rather than international, factors. This perspective asserts that compliance is contingent on the strength of states’ domestic institutions. States with independent judicial and parliamentary branches, free press and civil society, and democratic traditions are much more likely to adhere to international legal obligations because these institutions can exert pressure on executive governments to accept international law in the first place, and play key roles in helping to enforce and implement obligations domestically. The domestic institutionalist view has some value in the UK context; the parliamentary Joint Committee on Human Rights (JCHR), for example, has proved to be a powerful institution in terms of boosting the UK’s compliance rate by reviewing the compatibility of British legislation with the European Convention on Human Rights (ECHR) and Human Rights Act

(HRA). However, purely institutionalist accounts are still too narrow to sufficiently explain why the UK obeys most ECtHR judgments, but not all; nor do they shed light on which types of cases the UK is likely to comply with or otherwise. This approach also struggles to account for the fact that a number of British institutions, most notably the (tabloid) press and Eurosceptic political parties, have led the charge against compliance with a number of ECtHR judgments, rather than putting pressure on the government to uphold its international commitments.

In contrast, approaches that emphasise the underlying normative influences on states and institutions offer pertinent insight into compliance behaviour. Constructivist explanations of compliance tend to argue that states follow norms of international law because they have internalised the norm. In particular, constructivists assert that international law reflects the ideas and values of its creators, or resonates with an actor’s pre-conceived identity (what Jeffrey Checkel calls a ‘cultural match’), and ‘exerts a strong pull towards compliance’ through socialisation processes, especially through dialogue and interactions between states that generate understandings of what is or is not ‘appropriate behaviour.’ Thus, compliance occurs when actors are socialised to comply, and respect for international law becomes part of the state’s ‘internal value set.’ Moreover, constructivists argue that once actors have internalised norms, these norms begin to influence how the actors perceive the world, leading to changes in interests and values, and ultimately in state behaviour. In this sense, the diffusion of norms through socialisation is a self-reinforcing process, as once a state internalises a norm or practice, they come to see it as being in their interest, and then continue to pursue it as habit. Continuous engagement with the norm or law is crucial to its being internalised because, as Louis Henkin notes, ‘with acceptance [of international rules] comes observance, then the habit and inertia of continued observance.’ Central to this approach is

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the notion of legitimacy; whether or not a norm is perceived as ‘right’ or ‘good’ by an actor. As Thomas Franck famously argued, ‘powerful nations obey powerless rules’ when they believe the rules are legitimate, and operate ‘in accordance with generally accepted principles of right process.’\textsuperscript{21} Importantly, this argument emphasises the quality of the rule or rule-making institution, meaning that they possess an inherent authority that states believe is worth obeying because their own beliefs and values are compatible with those promoted by the rule. To this end, a legitimate law will exert a ‘compliance pull’, encouraging and persuading states to adhere to the law because they believe they should ‘do the right thing.’

The constructivist approach tends to take acceptance of norms as a starting point from which socialisation and internalisation processes can occur. However, in doing so, this view fails to address a key problem: whence states’ decisions to accept and internalise a norm, and how do they determine whether a norm is legitimate? To this end, constructivist explanations for compliance behaviour miss a critical step in terms of demonstrating how the internalisation of norms translates into effective practice of the law and protection of human rights, because an account of the original norm acceptance process is absent. Indeed, as Harold Koh has suggested, approaches that take norm acceptance as the starting point for compliance ‘avoid explaining the evolutionary process whereby repeated compliance gradually becomes habitual obedience’, thereby overlooking the process of interaction with and interpretation of international norms by domestic legal systems which is ‘pivotal to understanding why nations “obey” international law.’\textsuperscript{22}

This process can be accounted for by closer examination of states’ interactions with the norms with which they are confronted and how they understand the role of international and domestic law in facilitating this interaction. The relationship between a state and institution is shaped by the state’s past experiences and legal culture, as these determine how a state decides or is persuaded that a norm is legitimate. States’ domestic legal cultures and human rights traditions are essential to understanding this relationship, because the discourses, practices and principles that make up the legal culture provide insight into how the state interprets the role and importance of international law as a constraint on, or source of, behavioural motivation. Knowing what international law means to a state helps to clarify why and in what

\textsuperscript{21} See (n 17) 3.
\textsuperscript{22} See (n 18) 2603.
circumstances the state will comply, as it provides a context for understanding why and when they perceive compliance as legitimate action.

III. The British Approach to Human Rights and Law

The concept of a uniquely ‘British’ approach to protecting human rights operates on two levels. First, there are a number of institutional differences between the UK and Strasbourg legal systems. For instance, the Strasbourg system emphasises codified, positive rights and dynamic legal interpretation. The ECtHR was created by the Council of Europe in 1959 to uphold the rights enumerated in the ECHR and to act as a safeguard against European states ‘sliding back’ to totalitarianism in the wake of the Second World War.\(^{23}\) The Convention codifies fourteen specific human rights, many of which create positive obligations on Contracting States to expressly protect through domestic law. The Court also takes a dynamic approach to legal interpretation, developed to ensure that the Convention is a ‘living instrument’ that is applied flexibly over time as new rights and circumstances arise.\(^{24}\) This approach emphasises broad interpretation of the ‘spirit’ of the text rather than the precise letter of the law. Strong, evolutive interpretation also brings the ECtHR in line with the Court of Justice of the European Union (CJEU) and many national legal systems in Europe, reflecting what a member of the British delegation to the ECtHR during *Golders v United Kingdom* referred to as ‘a European way of thinking’ that ‘construe[s] texts in the “continental”, not the common law manner.’\(^{25}\)

In contrast, the UK has neither a written constitution, nor any formally entrenched fundamental rights. Instead, a collection of laws, customs and principles comprise the constitutional order and enumerate the functions and limitations of the state.\(^{26}\) The British legal system is further distinguished by principles of parliamentary sovereignty and common law. Since the 1689 Bill of Rights reaffirmed the ‘ancient rights and liberties’ that placed limitations on the monarchy, Parliament has been sovereign in the British legal order.\(^{27}\) This means that, although the courts develop much of the UK’s law through common law and precedent, judge-made law can


\(^{24}\) *Tyrer v United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) at para 31.


\(^{27}\) *Bill of Rights 1689* chapter 2, 1 William and Mary Sess 2.
ultimately be trumped by Acts of Parliament.\textsuperscript{28} Parliamentary sovereignty also embodies the idea that law-making should be a ‘dialogue’ between the courts and parliament, the purpose of which is ‘to keep the idea and dynamic of human rights alive, rather than to close down the debate about them and hive them off to a rarefied court.’\textsuperscript{29} The significance of parliamentary sovereignty to British culture is evident in repeated criticisms by Members of Parliament that the ECtHR overrides parliament’s function as the primary law maker in the UK, and in references to the need to ‘restore’ parliamentary sovereignty by limiting the powers of the ECtHR. It is also apparent in the fact that, prior to the creation of a separate Supreme Court in 2009, the highest British court – the Lords of Appeal in Ordinary, or ‘Law Lords’ – sat within the House of Lords. Whereas continental legal systems tend to have a more distinct separation of powers, the judiciary and executive in the UK have traditionally been ‘fused’ together within the parliament, meaning that the British parliament has historically represented a particularly strong source of power and is uniquely equipped to protect the constitutional rights of the British people relative to the executive and judiciary.\textsuperscript{30} This posturing about the need to protect British legal institutions from the influence of Strasbourg reflects a sense among Britons that the concept of human rights, and principles of parliamentary democracy and rule of law, are British inventions. Input from the ECtHR (or any external source) is perceived as a threat to a legal system and culture – especially the notion of dialogue between law making bodies – that has been built up over centuries.

Likewise, the common law is grounded in the notion that the law should be flexible and able to develop over time in response to evolving social needs, but ultimately should be tempered by the sovereign and democratically representative Parliament.\textsuperscript{31} The evolutionary nature of the common law and the absence of a written constitution reflect what is arguably a uniquely British tradition of ‘negative’ liberty, whereby British citizens inherently possess rights and freedoms, unless explicit limitations are imposed through statute or common law. Thus, as Lord Brown-Wilkinson asserts:

‘Basic constitutional rights in this country such as freedom of the person and freedom of speech are based not upon any express provision conferring such a right but on

\textsuperscript{28} The only exception to this is law of the EU and judgments from the CJEU, which have immediate effect in the UK in accordance with the European Communities Act 1972.


freedom of an individual to do what he will save to the extent that he is prevented from doing so by the law…These fundamental freedoms therefore are not positive rights but an immunity from interference by others.\textsuperscript{32}

The common law therefore represents a system in which fundamental rights are an intrinsic possession of Britons, rather than something that can or should be defined and applied by external sources. This is an important distinction that helps to explain the UK’s resistance to the explicit enumeration of rights through statutes, or, in the case of the ECHR, through international treaty law.

On the second level, a narrative, or mythology, has been built up around the British legal system, that frames the British approach to human rights as unique in Europe. This narrative is especially powerful because it paints the British rights tradition as ancient, intrinsically guaranteed to British citizens, and, most importantly, the source of modern principles of parliamentary democracy and the rule of law. As such, the notion that the UK is a type of ‘rights entrepreneur’ underpins how the UK believes rights should be protected through law, and thus how it interprets international legal norms.

The Magna Carta especially has garnered a mythical status in the UK as the foundation of a now 800-year old tradition of protecting rights and freedoms through law. The actual legal protection of rights by the Magna Carta is contested; many of its original provisions have been repealed and bear little resemblance to modern human rights.\textsuperscript{33} Nonetheless, the belief that the Charter established the first rights of individuals against their sovereign is an important part of British (especially English) identity and public narrative, and is crucial for understanding how long-standing Britons believe their legal and human rights traditions are. Additionally, the narrative emphasises the ‘common sense’ nature of British legal principles; parliamentary sovereignty, common law, and the focus on individual, negative liberties are the ‘right’ or ‘sensible’ way to make law and uphold rights because they allow for flexible application of the

\textsuperscript{32} Wheeler and Leicester CC [1985] AC 1054, 1065.
\textsuperscript{33} Lord Dyson calls Magna Carta a ‘curious hotch-potch’, noting that although many of its provisions ‘cannot by any stretch of the imagination be described as principles…it is undeniable that Magna Carta does contain a number of chapters which we would recognise as setting out important principles and which have real relevance today.’ Lord Dyson, ‘Delay Too Often Defeats Justice’, Speech at The Law Society, London (22 April 2015). Available at: <https://events.lawsociety.org.uk/uploads/public/Law%20Society%20Magna%20Carta%20Lecture_Lord%20Dyson.pdf>
law to meet the specific circumstances of individual cases. This notion of common sense specifically implies the pragmatic application of ‘plain facts’ and reason to produce ‘standard’ or literal interpretations of the law – a practice that is evident in common law judges’ reluctance to establish broad legal principles. In this view, the ECtHR’s broad interpretations of the ECHR are too abstract to be practical, and have entitled the ECtHR to engage in judicial activism that imposes on the independence of national systems.

Combined, these elements imply that the rights guaranteed under British law are more extensive than those provided for by the ECHR, producing a sense that Britain does not need international human rights regimes, and British rights culture is what informed the European system in the first place. As former Prime Minister John Major asserted: ‘we have no need of a Bill of Rights because we have freedom.’ The perception of the British legal culture as unique has also generated a belief that only British law-makers can truly understand British law. Lord Irvine of Lairg argues that Britons ‘should trust our own judges to reach a “better” answer’ than Strasbourg, because ‘[i]t is our own Judges who are embedded in our culture and society and so are best placed to strike the types of balance between the often competing rights and interests which adjudication under the HRA requires.’ This narrative permeates the UK’s interactions with the ECtHR, and has a significant impact on how the UK perceives and decides to comply with ECtHR judgments by contributing to beliefs that ‘British’ rights are more legitimate than ‘European’ rights.

IV. Bringing Rights Home: The ECHR as a ‘British’ Invention

As a founding member of the Council of Europe, the United Kingdom played a prominent and vital role in the drafting of the ECHR. Although the British Government had previously expressed concerns about entrenched human rights catalogues limiting the flexibility of the common law system, the Foreign Office recognised collective international protection of

34 The importance of ‘common sense’ in British (especially English) culture has roots in the Enlightenment and Victorian eras, as an anti-intellectual tradition that is wary of the abstract philosophies and ideologies advocated by continental (and Scottish) intellectuals. See C Henke, Common Sense in Early 18th Century British Literature and Culture: Ethics, Aesthetics, and Politics, 1680-1750 (De Gruyter, Berlin, 2014); D Allan, Making British Culture: English Readers and the Scottish Enlightenment, 1740-1830 (Routledge, New York, 2008).
35 See (n 31) 12.
human rights as being ‘part of a larger effort to promote a stable Europe’ in the wake of the Second World War.\(^{38}\) The ECHR was largely drafted by British representatives and thus closely reflects existing British rights and freedoms, as well as British common law principles.\(^{39}\) As Kenneth Younger, the Minister of State for the Foreign Office in 1950, noted in correspondence to the Cabinet, the final draft of the ECHR:

> ‘contains a definition of the rights and limitations thereto which follows almost word for word the actual texts proposed by the United Kingdom representatives (Articles 2-17), and which is thought to be consistent with our existing law in all but a small number of comparatively trivial cases.’\(^{40}\)

Despite this, the UK initially opposed the creation of an international court to enforce the Convention, as well as the right of individuals to petition the court – especially before the Convention rights were finalised – lest the UK be subject to a ‘blank cheque’ of judicial review.\(^{41}\) The UK nonetheless became the first state to sign the Convention in 1950 and accepted the jurisdiction of the Court in 1959 as it became clear that the other European states involved in drafting the Convention would be signing it, so as to avoid being ‘one of an embarrassingly small minority in opposing it.’\(^{42}\)

Nonetheless, a sense of distrust of an international court with an expansive jurisdiction and strong review powers has remained apparent throughout the UK’s membership in the ECHR system. Prime Minister Margaret Thatcher articulated the belief that although the UK was ‘committed to, and supported the principles of human rights in the European Convention on Human Rights’, it was nonetheless ‘for Parliament rather than the judiciary to determine how these principles are best secured.’\(^{43}\) Selective renewal of the Convention’s optional clauses and the Court’s jurisdiction prior to its gaining compulsory status in 1998 served as a key opportunity for the UK to remind the ECtHR that the UK itself retained control over which laws would take effect within Britain.\(^{44}\) Likewise, attempts in the 1970s in cases such as *Golder*

\(^{38}\) See (n 26) 36.


\(^{41}\) Foreign Office 371/78936 [UNE 3567/17311/96/1949], cited in Marston (n 40) 806.

\(^{42}\) Ibid 812.

\(^{43}\) HC Deb, 6 July 1989, col WA252 Available at: <http://hansard.millbanksystems.com/written_answers/1989/jul/06/human-rights#column_252w>

\(^{44}\) See (n 23) 316.
v United Kingdom and The Sunday Times v United Kingdom to limit the scope of the ECtHR and retain national control over human rights issues largely backfired, with the Court’s rulings in these cases expanding its interpretational capabilities and establishing much tighter control over when respondent states could apply the margin of appreciation.\(^{45}\) Thus, although these are landmark cases in the evolution of the ECtHR, they also contributed to notions within the UK that human rights were better protected at home than in Strasbourg.

The view that rights should be protected by the UK was also apparent in the decision to incorporate the ECHR into domestic law. Although the UK was the first state to sign the Convention in 1950, it was one of the last original members to integrate the Convention rights into domestic law. The shift in position occurred as judges and legal scholars became increasingly concerned over the 1980s and 1990s that the common law was failing to adequately protect human rights.\(^{46}\) Incorporation was thus advocated as an opportunity to ‘bring rights home’ and grant Britons greater control over how the Convention affects British law.\(^{47}\) Labour MPs, Jack Straw and Paul Boateng, in particular argued that incorporation would ‘repatriate British rights to British courts’, by allowing British citizens to have the rights they have possessed under the ECHR since 1950 examined within the domestic legal system, and by enabling British judges to develop ‘a body of case law on the Convention which is properly sensitive to British legal and constitutional traditions.’\(^{48}\) In other words, incorporation would give Britons access to rights that were essentially ‘British’, rather than ‘European’.

Thus, the Blair Government released a White Paper in 1997 entitled Rights Brought Home: The Human Rights Bill to advocate for the incorporation of the ECHR into domestic law. The paper argued that incorporating the ECHR into domestic law would open a dialogue between British courts and the ECtHR, noting that although: ‘United Kingdom judges have a very high reputation internationally…the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and

\(^{45}\) Golder v United Kingdom, App No 4451/70 (ECtHR, 21 February 1975); The Sunday Times v United Kingdom, App No 6538/74 (ECtHR, 26 April 1979).

\(^{46}\) In the 1980s, almost one third of all applications brought to the European Commission on Human Rights concerned the UK, due to the lack of positive, codified rights available for lawyers to build cases on in the UK. See (n 23) 314.


\(^{48}\) Ibid.
followed. Incorporation would thus grant British judges greater scrutiny and interpretive power over the application of Convention rights within the UK, and in turn enable British judges ‘to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe’ through the creation of British human rights case law and dialogue with the ECtHR. In other words, giving the ECHR direct effect in British law would both enable the UK to retain sovereignty over human rights issues, and to more effectively influence how, and in what circumstances, Convention rights would evolve and be applied in the UK and Europe. Incorporation therefore marks an important point in the UK-Strasbourg relationship, as it demonstrates that, even among advocates of the ECHR, there is a sense that ‘British’ rights and law are intrinsically superior to European rights, and that incorporation could be used to strengthen the influence of British judges over the ECHR relative to that of Strasbourg.

V. Britain’s Relationship with Strasbourg

The British perspective on the UK-Strasbourg relationship can therefore be seen as resting principally on the assumption that the ECHR system reflects British notions of rights and law (albeit while simultaneously being an ‘inferior’ copy). This has created a peculiar dynamic wherein the UK claims great ownership over the Convention and is eager to promote norms that reflect its own view of rights and law, but is also deeply reluctant to have new interpretations of those same norms imposed on the UK from outside. This paradox is apparent in both the judicial and political relationships with Strasbourg.

Judicial relationship

The relationship between the UK’s domestic courts (particularly the Supreme Court, or House of Lords prior to 2009) and the ECtHR is a key source of the UK’s sense of a distinctly ‘British’ legal culture and approach to interpretation of human rights. Prior to the incorporation of the ECHR into domestic law via the HRA, British judges were not compelled to apply the Convention or case law from the ECtHR in their proceedings. As such, the influence of the Convention on UK human rights protections was largely indirect, stemming from the Government’s responses to ECtHR cases. Where the Convention was applied directly by British judges, the applications were often limited, and only used to clarify ambiguous

50 Ibid 7.
51 See (n 26) 39.
legislation. For example, in *R. v Secretary of State for the Home Department, Ex parte Brind*, the House of Lords acknowledged that where a provision in domestic legislation has a meaning that may either conform to or conflict with the ECHR, the courts will presume that Parliament intended the legislation to conform with the UK’s international treaty obligations, establishing a built in understanding that the UK and its courts anticipate compliance with international law as a general principle. 52 Nonetheless, the Lords argued that this general principle did not apply to *Brind*, asserting that applying the ECHR right to freedom of expression did not need to be considered, as the applicants claimed, as it was not then part of English law and its application would have been beyond the scope of the English courts’ obligation to consider the ECHR. 53 Indeed, Francesca Klug and Keir Starmer note that, of the 316 cases in which the Convention was cited in English courts between 1975 and 1996, the ECHR influenced the interpretation of legislation (that is, the courts would likely have come to different conclusions without it), in just 11 cases, thereby highlighting the minimal and narrow application of Convention rights in domestic law prior to incorporation. 54

Interactions between British courts and the ECtHR have increased substantially since incorporation, especially due to the requirement under section 2 HRA that UK courts ‘take into account’ the judgments and case law of the ECtHR. 55 This extends to the entire jurisprudence of the ECtHR, not just those cases brought against the UK. However, it does not oblige domestic courts to follow judgments of the ECtHR, but rather, requires them to consider relevant judgments in the same way that they consider pertinent domestic case law under the common law rules of statutory interpretation. Architect of the HRA, Lord Irvine, asserts that “‘take into account’ is not the same as…‘be bound by’”, emphasising Parliament’s deliberate choice to maintain the independence of British courts. 56 The UK courts do sometimes divert from Strasbourg jurisprudence to apply alternative interpretations that more appropriately reflect the British legal culture, particularly when Strasbourg has only limited relevant case law on an issue. 57 For the most part, however, the courts have generally accepted the notion that although ECtHR case law is ‘not strictly binding’, UK courts should nevertheless, ‘in the absence of some special circumstances, follow clear and constant jurisprudence of the

52 *R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL).
53 Ibid.
56 See (n 37) 3.
57 See *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45.
Strasbourg court.’\(^5\)\(^8\) This indicates that, despite provisions for retaining parliamentary sovereignty and national control over human rights decisions, UK courts have generally expressed a desire to produce domestic law consistent with the ECHR, or at least, to engage in dialogue and compromise with the ECtHR.

Recently, however, British case law has shifted away from this approach and debate has emerged about whether British courts should ‘mirror’ Strasbourg judgments and interpretations, or more readily move beyond Strasbourg to take its own approaches. In *R v Horncastle*, Lord Phillips notes that where British courts are concerned that Strasbourg has not appropriately understood or accommodated domestic processes, ‘it is open to this court to decline to follow the Strasbourg decision’ and that this in turn ‘is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court’.\(^5\)\(^9\) Similarly, in *Manchester CC v Pinnock*, Lord Neuberger asserts that British courts are ‘not bound to respect every decision of the [ECtHR]’ and that doing so ‘would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law’.\(^6\)\(^0\)

These cases reflect a growing demand within the UK for British courts to re-establish their own authority and legitimacy away from the ECtHR. For the lawyers and judges who engage regularly with Strasbourg and the Convention, this is a practical step to improve British courts’ ability to make useful and original contributions to the development of ECHR case law. As Lord Irvine notes, ‘[a] Court which subordinates itself to follow another’s rulings cannot enter into a dialogue with its superior in any meaningful sense’;\(^6\)\(^1\) mimicking or predicting the exact decisions of the ECtHR all the time denies British judges the opportunity to draw on their unique experiences with law and human rights protection, which was largely the point of implementing the HRA in the first place. Yet, in the context of increasingly Euro- and HRA-sceptic political and public discourse more broadly, this demand indicates that too close a relationship between UK courts and Strasbourg – even a healthy, dialogue-based relationship – may in fact undermine British courts’ perceived independence and legitimacy. This is echoed

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61 See (n 37) 9.
by Merris Amos, who notes that in cases where UK courts assert a margin of appreciation over an issue, or argue that the ECtHR’s decision is incorrect, the courts are perceived as having greater legitimacy than cases in which they do not, because the UK courts are asserting their values over the ECtHR.62

**Political relationship**

The idea of a unique, or superior, ‘British’ approach to human rights law is most apparent in the political relationship between Strasbourg and the British Government. The UK’s political relationship with Strasbourg is complicated, reflecting a number of tensions between balancing the state’s international legal obligations and human rights values with democratic governance and the public interest. Particularly in recent years, the UK seems to have vehemently opposed decisions made by the ECtHR – especially those pertaining to British national security or which expand the power and influence of the international court. The British media and public also often blame Strasbourg for undermining the UK’s ability to balance individual rights with the needs and security of British society as a whole by allowing criminals and terrorists to make spurious rights claims to avoid punishments. Then Home Secretary, Theresa May’s claim that the ECtHR’s ‘crazy interpretation of our human rights laws’ in *Abu Qatada v United Kingdom* were responsible for preventing the UK from being able to deport a terror suspect to Jordan is a key example of this.63 Likewise, following the infamous prisoner voting case, *Hirst v United Kingdom*, headlines in *The Sun* such as ‘Prison paedos “will get vote”’64 and a call from Prime Minister Cameron that ‘if Parliament decides that prisoners should not get the vote then I think they damn well shouldn’t’65 created the impression that Strasbourg is imposing its rulings on Britain at will, without considering the practical implications for Britons or understanding British law.

Resentment towards Strasbourg is further complicated by the fact that the ECtHR is often discussed and reported on inaccurately, particularly by the tabloid press, which regularly

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conflates concerns about the Convention system with concerns about other European issues and the EU. This ties the Strasbourg Court to the perceived democratic illegitimacy of the EU and to the binding and automatically-effected nature of EU regulations, creating the impression that Strasbourg rulings are much more frequent and are enforced with much greater institutional power than they actually are. This in turn fuels public opposition to intervention in British political issues by an international court, and is a key factor in terms of understanding why the UK often feels aggrieved by Strasbourg rulings.

Tensions in the relationship between the UK and ECHR, and British perceptions of the illegitimacy of the ECHR and HRA, have reached an apex within the UK. The re-election of the Conservative Party to (majority) government in May 2015 means that the UK is now on the cusp of a potentially fundamental change in how it engages with the Strasbourg system. In October 2014, the Conservative Party released a policy document, Protecting Human Rights in the UK, which argues that the HRA requirement for British judges to ‘take into account’ ECHR decisions has resulted in UK courts going to ‘artificial lengths to change the meaning of legislation so that it complies with [the ECHR’s] interpretation of the Convention rights’, and therefore undermines British judges’ capacity to come to their own interpretations based on ‘British’ – rather than ‘European’ – definitions of rights and law. The HRA, in this view, also undermines parliamentary sovereignty and democratic accountability by granting too much power to unelected judges (who then ostensibly just follow Strasbourg jurisprudence anyway). In light of these complaints, the Conservative Manifesto for the 2015 election featured a promise to ‘scrap Labour’s Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK.’

Importantly, this plan emphasises Britain’s commitment to ‘remain faithful to the basic principles of human rights’ of the original ECHR, while reversing Strasbourg’s and the HRA’s

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so-called ‘mission creep that has meant human rights laws being used for more and more purposes.’

Plans to scrap the HRA have been on the Conservative agenda for almost as long as the HRA has been in force, reflecting the sentiment that the exclusively British approach to human rights protection that existed prior to the HRA – namely, dialogue between parliament and common law – is superior to the European approach. It also reflects the notion that while the UK supports human rights norms in principle, the ECtHR’s interpretations of these norms lack legitimacy specifically because they come from outside the UK. The idea that a ‘British’ Bill of Rights that would essentially include most of the same rights as the ECHR can replace the HRA but hold a higher degree of legitimacy and public acceptance by virtue of being ‘British’ is a key indication of this.

*Why don’t rights norms ‘stick’?*

Part of the inability of the HRA and ECHR norms to ‘stick’ and take root effectively in the UK may be explained by the level of support provided to government institutions after the HRA came into effect. The HRA was intended by its proponents to fundamentally transform British society through the development of a human rights culture. This aspiration to ‘inaugurate a gradual [cultural] transformation’ via the HRA is described by then Lord Chancellor, Lord Irvine of Lairg:

> ‘What I mean and I am sure what others mean when they talk of a culture of respect for human rights is to create a society in which our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take, in relation to every piece of legislation they sponsor.’

This assumption builds on the notion that existing common law was struggling to adequately protect human rights within the UK, but jars with the long-standing sense that human rights are an intrinsic element of British political and legal identity by implying that the previous culture was lacking, or non-existent. Moreover, this ‘new culture’ has largely failed to eventuate. Jane Gordon attributes this to an ‘institutional failure’ to establish any mechanisms to support implementation of the HRA and to offer guidance to public authorities and

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69 Ibid.
government institutions on how to facilitate a human rights culture.\textsuperscript{71} The Labour Government noted that ‘with hindsight it is fair to say we took a lot of what we saw as the obvious benefits of the Human Rights Act for granted and…we didn’t spend enough effort on promoting it.’\textsuperscript{72} Similarly, the JCHR has asserted that ‘the Government has done nowhere near enough over the past decade to use the Human Rights Act as a tool to improve the delivery of public services,’ arguing further that ‘this failure has contributed to the poor public image of the Act and “human rights” in general,’ allowing negative, often inaccurate, perceptions of the ECtHR and ECHR to flourish unchecked.\textsuperscript{73} This highlights the fundamental problem in the UK’s relationship with Strasbourg and the ECHR: the legislation intended to legitimate the ECHR by incorporating it into domestic law is not seen, by many within the UK, as a legitimate instrument of human rights protection, because it does not ‘fit’ with the existing legal culture. Without public awareness and acceptance of the domestic legislation that ties the ECHR to British law, the Convention, Court and HRA are likely to continue to be viewed within the UK as ‘foreign’ institutions that do not adequately reflect the British human rights culture, and therefore foster reluctance to comply.

VI. The Effect of the British Approach on Compliance

Compliance

Despite political tensions, the UK has maintained, for the most part, one of the highest compliance rates in the Strasbourg system. As Alice Donald, Jane Gordon and Phillip Leach note, ‘the UK has among the lowest number of applications per year brought against it,’ as well as having only a relatively small number of these applications being declared admissible by the ECtHR.\textsuperscript{74} Moreover, of the approximately 12,000 cases brought to the ECtHR against the UK between 1999 and 2010, the Court found a violation of the Convention in only 215.\textsuperscript{75} In other words, the UK has only ‘lost’ approximately 1 in 50, or 1.8 per cent of the cases brought against it since the ECHR was incorporated into domestic law.\textsuperscript{76} This indicates that the HRA has been largely successful in improving human rights protections in the UK and filling gaps


\textsuperscript{72} Mr Michael Mills MP, Minister of State for Justice, before the EHRC Inquiry, transcript October 13, 2008, cited in Gordon (n 71) 613.


\textsuperscript{74} See (n 2) 181.

\textsuperscript{75} Ibid.

\textsuperscript{76} Ibid.
in the common law by reducing the number of cases taken to Strasbourg because they can now be dealt with more comprehensively at the national level.

In instances where the ECtHR has found the UK in breach of the Convention, the UK has typically been quick to respond to the findings. The average length of time between the ECtHR making a final judgment and the Committee of Ministers adopting a final resolution on the UK’s satisfactory compliance with the judgment is approximately two years and four months, according to calculations by Başak Çali and Alice Wyss. This points to the fact that the UK is generally willing and able to respond to judgments swiftly. It also helps to explain the UK’s relatively low repeat-case numbers, another indicator of a positive approach to compliance with ECtHR decisions. According to the 2014 Ministry of Justice report on the Government’s response to human rights judgments, the UK had only twenty-seven cases pending satisfactory compliance with the Committee of Ministers at the end of 2013. Of these, nineteen were leading, or new, cases, suggesting that the UK deals with most of its judgments before repeat offences can occur. These figures have shifted somewhat in 2016; only five of the nineteen UK cases currently being supervised by the Committee of Ministers are leading (non-repeat) cases, and thirteen of the cases are now under enhanced supervision, meaning that the Committee is thus far not satisfied with the measures taken by the UK Government to amend the violations found in those cases. The bulk of the enhanced supervision cases are repetitive cases following Hirst v United Kingdom (prisoner voting) and McKerr v United Kingdom (failure to adequately investigate deaths in Northern Ireland in the 1980s and 90s). The shift to enhanced supervision reflects the UK’s obstinacy in regards to a few key politically sensitive issues, as their refusal to comply with older cases requires the Committee to liaise with the British Government for an increasing period of time and allows for clone cases to reach the ECtHR.

Nonetheless, the Council of Europe’s Department for the Execution of Judgments asserts that it often relies on states such as the United Kingdom to lead by example ‘to push reluctant


member states [to implement Strasbourg judgments].

The UK’s strong compliance record in the face of political tensions highlights the value it places on human rights protection and adhering to the rule of law, because, as former Attorney-General, Dominic Grieve, asserts, ‘it is only by setting an example at home that the UK is able to exert influence in the international arena and retain the moral authority to intervene and to enforce international law.’

A key example of the UK’s willingness to comply with difficult cases is *A. and Others v United Kingdom*, in which the applicants had been detained preventatively as suspected terrorists by UK authorities pursuant to the Prevention of Terrorism Act (2005) and a derogation from Article 5 ECHR (the right to liberty and security) made by the UK following the September 11 attack in 2001. The ECtHR Grand Chamber found that the UK had unlawfully detained the suspects, as well as failed to provide them with appropriate legal recourse. Yet, despite a lack of domestic political support and a warning to the ECtHR from the Home Secretary at the time, Charles Clarke, that the UK’s compliance with the ruling was unlikely due to strong public resistance, the UK ultimately complied quite swiftly. The government paid reparations to the applicants and released them from prison. More importantly, it also rescinded its derogation from Article 5 and amended the Prevention of Terrorism Act to make its deportation and detention provisions more consistent with the HRA, as well as agreeing to ensure that terror suspects had adequate access to fair trials without secret evidence.

Notably, the case followed the House of Lords’ declaration, in *A. v Secretary of State for the Home Department* (commonly known as the *Belmarsh* case), that the Article 5 derogation was incompatible with the ECHR because it discriminated between nationals and non-nationals by only permitting preventative detention of the latter – the British Government argued in *A. and Others* that the ruling of its own highest court in *Belmarsh* was questionable, although

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80 See (n 2) 144.
82 *A. and Others v United Kingdom* App No 3455/05 (ECtHR, 19 February 2009).
83 Clarke warned that ‘if people start to believe that decisions at the European Court, in operating the European Convention, are not broadly in accordance with a consensus about how rights should be defended, then there will be some very difficult questions about the convention itself in Britain…There are already some forces which are asking already whether Britain should still be part of it.’ J Rozenberg, ‘Clarke Raises Issue of Quitting Rights Convention’ *Telegraph* 9 September 2005. Available at <http://www.telegraph.co.uk/news/uknews/1497978/Clarke-raises-issue-of-quitting-rights-convention.html>
See also A Travis, ‘Clarke Confronts Judges on Terror Law’ *The Guardian* 7 September 2005 Available at <http://www.theguardian.com/uk/2005/sep/07/terrorism.immigrationpolicy>
Strasbourg ultimately agreed with the Lords. This suggests that, even in the face of national security concerns, British judges often reach similar conclusions about interpretation of the ECHR as Strasbourg judges, highlighting the close relationship between British and European legal conceptions of human rights. Indeed, in assessing whether the British Government’s derogation from Article 5 was valid, Strasbourg stated that:

‘In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State’s derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had…reached a conclusion which was manifestly unreasonable.’

Strasbourg evidently did not believe the Belmarsh decision was ‘manifestly unreasonable’, and the UK’s claim was subsequently dismissed. To this end, the Lords’ decision in Belmarsh may have softened the blow from Strasbourg’s A. and Others decision by establishing the need for equal treatment of national and non-national suspects in British case law, and thus granting the Lords’ and Strasbourg’s decisions more legitimacy in the view of the Government, because they reached the same conclusion. This helps to explain the UK’s willingness to comply after Clarke and the Blair Government had so publicly foreshadowed non-compliance, as Strasbourg’s ruling was bolstered by British law, and vice versa, meaning the Government had no legal avenue through which to pursue non-compliance and ultimately felt compelled to respect the decisions. In this sense, A. and Others draws attention to the importance in the British legal tradition of respecting the rule of law, if not the substantive law itself. The case’s legitimacy stems from the fact that all possible legal avenues were exhausted, rather than from persuasive legal reasoning or institutional legitimacy of the ECtHR. Thus, the norm acceptance process is largely endogenously motivated; the UK’s own perceptions about the importance of the principle of the rule of law represent a stronger normative ‘pull’ than external forces. This is an important finding in terms of understanding how conceptions of rights and law inform compliance, as it demonstrates that the norm diffusion process is not necessarily top-down (an international institution imposing a norm on a state), or the result of an affiliation with the international norm (where the state accepts it because it recognizes similarities with existing

84 A. and Others v United Kingdom App No 3455/05 (ECtHR, 19 February 2009) at para 174.
domestic norms). Rather, norm acceptance comes from a more diverse range of sources that are contingent on the receiving state’s own culture and pre-existing principles.

Non-Compliance

There remain a few select cases in which the United Kingdom flatly refuses to adhere to the ECtHR’s rulings and to satisfy the Committee of Ministers that is has remedied these violations. These cases suggest that, even for the most willingly compliant states, there remain intractable political issues that test the limits of the Strasbourg system. *Hirst v United Kingdom* is the most infamous example. The ECtHR first found the United Kingdom’s blanket ban on prisoners voting in breach of the right to free elections under Article 3 Protocol 1 ECHR in 2005. Successive governments have failed to resolve the issue of prisoner voting since – Prime Minister David Cameron went so far as to claim that the idea of allowing prisoners to vote made him ‘physically ill.’ Despite a growing collection of repetitive cases appearing before the ECtHR, and warnings from the JCHR that future elections could be declared illegal or invalid, the Committee of Ministers has noted 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.’

Similarly, the ECtHR found in *S. and Marper v United Kingdom* that keeping innocent people’s DNA records on file for up to twelve years constituted a violation of the right to privacy under Article 8 of the Convention. The Government’s initial attempts to address the violation were ‘haphazard at best’; the JCHR asserted that it was ‘alarmed’ that the government had not subjected its legislative changes to parliamentary scrutiny. Moreover, the Association of Chief Police Officers ordered police forces throughout England to ignore the ECtHR’s ruling and to retain all the existing DNA profiles. It was not until the Equality and Human Rights

85 *Hirst v United Kingdom* (No. 2) App No 74025/01 (ECtHR, 6 October 2010).
86 HC Deb, 3 November 2010, Column 921. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101103/debtext/101103-0001.htm>
89 *S. and Marper v United Kingdom* App Nos 30562/02 and 30566/04 (ECtHR, 4 December 2008).
90 See (n 4) 109.
Commission threatened domestic legal action against the Government that the Home Office agreed to reduce the amount of time it held DNA profiles, although the profiles are still retained by the police for up to three years. As former President of the ECtHR, Sir Nicolas Bratza, points out, the ECtHR rejected the House of Lords' claim that Strasbourg did not sufficiently respect the principle of subsidiarity. Rather, the Strasbourg Court concluded that, while the margin of appreciation should be broad where there is no consistent interpretation of a rights issue across Europe, ‘England and Wales was the only European jurisdiction expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who had been acquitted or in respect of whom criminal proceedings had been discontinued.’ That Scotland had taken an approach to DNA retention that was more closely aligned with the European standard was of especial significance to Strasbourg – this highlights that the English view that the retention of suspected and acquitted criminals’ DNA is necessary to protect the broader public is out of step, not only with Europe, but with the rest of the United Kingdom.

These cases have triggered fierce criticism of the ECtHR from numerous British MPs, particularly from the Conservative and UK Independence (UKIP) Parties. The ECtHR has been criticised in particular on the grounds that it overreaches its mandate to interfere in domestic issues, and that it undermines parliamentary sovereignty by subverting the decision-making authority of the democratically elected parliament to an ostensibly undemocratic international court. This feeds into broader debates about the perceived legitimacy of the Strasbourg system. In response to the Hirst decision, for instance, the then Conservative Shadow Attorney General argued that the case was ‘yet another nail in the coffin of justice in Britain. Human rights does [sic] almost nothing to protect the law-abiding citizen and bends over backwards for the criminal,’ highlighting concerns that, rather than trusting the UK to effectively protect human rights by itself, the ECtHR ‘sticks its nose’ in domestic issues about which it knows little, ultimately to the detriment of the UK public.

The refusal to comply in these instances clearly arises from the perception that the British legal system, with its emphasis on ‘common sense’ and the balancing of the rights of individuals

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94 Ibid.
95 Cited in Hillebrecht, above at (n 4) 110.
against the needs of society at large, is superior to the Strasbourg system when it comes to appreciating the specific legal needs of the UK. The UK takes issue with the Court’s interpretations of the Convention rights, which are often seen as taking an abstract, philosophical approach to the Convention without considering the ‘common sense’, practical implications of how their rulings will affect British society. Former Conservative Justice Secretary, Chris Grayling, has argued that the UK:

‘cannot go on with a situation where crucial decisions about how this country is run and how we protect our citizens are taken by the ECHR and not by our parliament and our own courts…We will always stand against real human rights abuses and political persecution. But these plans [to repeal the HRA] will make sure that we put Britain first and restore common sense to human rights in this country.’

This explains why British criticism of the ECtHR is fiercest when the cases pertain to the rights of criminals and terrorists, people whom the British public believe have rescinded their right to human rights by harming British society. This view, and the Conservatives’ plan to curtail the influence of the ECtHR and HRA in British law, capitalises on perceptions that the Strasbourg system is ‘foreign’ and does not adequately respect British cultural and legal traditions.

VII. British Human Rights, Identity and Legitimacy

The belief that the ECtHR cannot appreciate the British legal culture’s idiosyncrasies has particular implications for understanding compliance in terms of how British sovereignty and national identity inform British understandings of the role of international law and human rights norms. In particular, the UK appears to view international law as a means to promote its own normative agenda, rather than to receive external norms or be socialised into an external culture that limits or threatens the UK’s existing values and identity.

In a speech to the British Council in 2004, then-Chancellor, Gordon Brown, argued that British identity is not based on ‘traditional’ identifiers such as race or religion, but on ‘the values we share and…the way these values are expressed through our history and our institutions.’


Human rights are a central component of this identity, as are the principles of parliamentary democracy (which it invented), and respect for the rule of law. These values are all evident in the UK’s compliance record with the ECtHR; it is important to the UK that it is seen to be upholding the principles it advocates abroad. As Lord Irvine asserted when introducing the Human Rights Bill to the House of Lords in 1997, ‘the protection of human rights at home gives credibility to our foreign policy to advance the cause of human rights around the world.’

This idea has also been explored by Çali and Wyss, who point to the emphasis the UK places on using its human rights tradition to set an example for other states to suggest that British human rights ‘are exported rather than imported concepts.’ This ties in to the notion that the original ECHR was a largely British creation, as well as to the emphasis the UK places on promoting human rights in its foreign policy more broadly. In this sense, it is arguable that the UK views itself as a human rights ‘norm entrepreneur’, and has a core interest in demonstrating to Europe, and the world, that it is a leader in human rights protection.

However, this creates tension when the position is reversed and the ECtHR reaches different conclusions when interpreting the ECHR or attempts to criticise the UK on human rights grounds. As Çali and Wyss note, this is seen by critics of the ECtHR as the Court engaging in judicial activism to extend its influence and encroach on parliamentary sovereignty. Given the sovereign Parliament is such a central and powerful law-making institution in Britain, it may also be seen as an affront to the British way of protecting rights, and thus on British identity. To this end, the UK appears to perceive the ECtHR as being more legitimate, and is thus more willing to comply, when it takes stances that closely match Britain’s own interpretation of rights: individual, intrinsically guaranteed, enhanced and defended by the democratic parliament. This legitimacy diminishes as Strasbourg’s approach gets further away from the UK’s, while the likelihood that the UK will actively resist complying with the judgment increases. Nonetheless, because being a role model and practicing the norms it promotes internationally are such important aspects of the UK’s ‘entrepreneur’ identity, the UK often still feels compelled to comply with the ECtHR’s rulings; the UK made a commitment to an international treaty, and it intends to stick to it. It is only when the ECtHR’s interpretations of the ECHR vary so drastically from the UK’s that they fundamentally

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99 See (n 77) 13.
100 Ibid.
compromise the UK’s ‘common sense’ understanding of law that it questions whether compliance is in its interests in terms of upholding its international reputation, or whether it is more important to maintain its distinct identity.

VIII. Conclusion
This article has argued that the narrative of a distinctly ‘British’ approach to human rights plays a critical role in how the United Kingdom determines the legitimacy of international norms and interacts with European institutions. The ‘mythology’ of the British conception of rights as an 800-year old tradition underpins the UK’s relationship with Strasbourg, perpetuating an assumption that although the ECHR is informed by, and closely related to, British conceptions of rights, the UK’s own legal culture and rights tradition ultimately remains ‘better’ at upholding the particular human rights needs of the UK. In this sense, the UK’s relationship with Strasbourg is driven by a determination to ‘keep rights at home’, that is, to ensure that ‘British’ rights are protected first and foremost by the British, rather than European legal system. This discourse is the primary means by which the UK assesses the legitimacy of, and thus decides to accept or ignore, European human rights norms; the more closely ECtHR judgments resonate with the British approach, the more willing the UK is to comply.

Thus, the UK case highlights the power of domestic, rather than international, norms and cultural traditions as determinants of states’ notions of what is legitimate and in their interest. This finding addresses a critical gap in current explanations of states’ compliance behaviour by providing clearer insight into how states’ unique understandings of law and human rights determine how they receive and respond to international rights norms. As questions regarding the legitimacy of the ECtHR system, and of the European project more broadly, continue to gain traction in both the UK and other European democracies, understanding the motivations that inform states’ responses to international law will be increasingly important. By appreciating states’ internal cultural influences and historical narratives, scholars of compliance can develop more nuanced explanations of how norms and international law interact with and influence state behaviour, and ultimately, why states comply with international human rights law.

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