Human Rights and the Rule of Law

Richard Ekins KC (Hon)

Foreword by Lord (David) Wolfson of Tredegar KC

Preface by Sir Patrick Elias

Human Rights and the Rule of Law

Richard Ekins KC (Hon)

Foreword by Lord (David) Wolfson of Tredegar KC

Preface by Sir Patrick Elias

Policy Exchange

About the Atkin Lecture

The Atkin Lecture takes place in the Library of the Reform Club every year. The first lecture took place in 1985 and the present lecture was the 37th of the series. Lord Atkin was a member of, and for many years served as a trustee of, the Club. The original idea for the lecture came from Professor Graham Zellick QC as a way to recognise and celebrate the enormous contribution to the law of Lord Atkin. It provides an opportunity for members of the Club, and their guests, and in accordance with the traditions of the Reform Club, to hear and consider a lecture on a topic of current legal interest, in particular one where reform may be required. The lecture is given by a distinguished jurist (academic, judicial or practising) and recent past lecturers include Sir Terence Etherton, Sir Jack Beatson, Sir David Bean, Sir Edward Garnier QC and Phillipe Sands KC.

About the Author

Richard Ekins KC (Hon) is Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government in the University of Oxford.

Published by
Policy Exchange, 1 Old Queen Street, Westminster, London SW1H 9JA

www.policyexchange.org.uk

ISBN: 978-1-917201-03-2

Contents

Foreword

Lord (David) Wolfson of Tredegar KC, former Justice Minister

Lord Atkin was one of the greatest of common law judges and it is fitting that the Reform Club, of which he was such a distinguished member, has honoured his memory with an outstanding series of lectures. It is a credit to the Club's good judgement that it chose to invite Professor Ekins KC, who leads Policy Exchange's Judicial Power Project, to deliver the 37th lecture. The lecture, which I had the pleasure to hear delivered in January this year, was a tour de force, illuminating both the idea of human rights and also the ideal of the rule of law, and helping to showcase the continuing appeal of the common law constitutional tradition to which Lord Atkin himself was firmly committed.

If Lord Atkin was one of the greatest judges of his generation, the same must be true of the late Lord Bingham. In addition to his many judgments of the highest importance, his book, *The Rule of Law*, published shortly before his death in 2010, has been immensely influential – and not only because of its well-chosen title. However, there is no authority in legal philosophy, and Professor Ekins is quite right to put to the test Lord Bingham's claim that one of the eight principles of the rule of law is that the law must "afford adequate protection of fundamental human rights". The problem with Lord Bingham's account, Professor Ekins shows, is that it runs together two separate ideals, the rule of law and human rights, and, more controversially, takes human rights to be almost indistinguishable from European human rights law.

The question is not *whether* the law should protect human rights; that question answers itself. Rather, the question is *how* human rights are best protected, and in particular whether (and if so, when) courts should be able to second-guess Parliament's decision about different rights and interests should be balanced. In that regard, as Professor Ekins reminds us, the "ordinary" law of the land also protects human rights in this country – the criminal law of murder or theft, detailed schemes of police powers, employment rights, or protections for children and vulnerable adults. Some of these rules are laid down by the common law, anchored in precedent and subject to legislative correction, but many more are now set out in statute. Whatever their source, we rightly expect the rules in question to be clear, stable and prospective.

But when it comes to human rights law, too many lawyers are less concerned about clarity, stability or predictability. Human rights law has a rule of law problem, as Professor Ekins vividly puts it. The problem is evident in the twists and turns of the case law of the Human Rights Act 1998 across the last quarter-century. It is also on display in the approach taken by the European Court of Human Rights, which treats the ECHR as a "living instrument", jettisoning the traditional lawyerly concern for

close analysis of the text, the context of its adoption, and the travaux préparatoires.

Strictly speaking, the Strasbourg Court is not our apex court. It cannot strike down or disapply domestic legislation. Under Article 46 of the ECHR, the UK is obliged only to comply with a final judgment of the Court, with responsibility for monitoring compliance left to the Committee of Ministers. However, in its treatment of Rule 39 of its own rules of court, the Strasbourg Court has upended this picture, attempting to seize and exercise a free-standing power to grant binding interim relief – a power which the member states deliberately withheld from the Court. While the recent procedural reforms to Rule 39 – adopted by the Strasbourg Court on 23 February 2024 – are to be welcomed, those procedural improvements necessarily do not address the substantive jurisprudential argument advanced by Professor Ekins.

Professor Ekins is the leading public critic of the Strasbourg Court's Rule 39 practice. His Atkin Lecture powerfully outlines the glaring mismatch between the Court's practice and the ECHR itself, which limits the Court's authority over member states. It was for this reason that I raised the lecture in the House of Lords in the Second Reading debate on the Safety of Rwanda Bill, and his critique of the Court's practice, which I find compelling, was much debated in the Committee Stage of the Bill. The support that the argument received from distinguished legal peers, including notably Lord Hoffmann, another towering common law judge, shows that, putting the point at its lowest, there is a respectable argument that the UK is not obliged as a matter of international law to comply with Rule 39 interim measures. As and when the Bill comes into force, there will likely be an attempt to derail its implementation by way of an application to the Strasbourg Court for a Rule 39 measure. It will then be important for His Majesty's Government not to be intimidated by the persistence with which some commentators assert that Rule 39 measures are binding simply because the Court says they are.

The rule of law problems to which Professor Ekins's lecture draws our attention are not limited to the migration context. Last week's climate change judgment, *KlimaSeniorinnen*, highlights the tension between the ideal of the rule of law and the reality of the Strasbourg Court's case law. The judgment appears to be incompatible with the terms the member states agreed, which it is the Court's duty to uphold. In that regard it is perhaps ironic that the Court seeks to insulate itself from criticism by invoking the ideal of the rule of law.

Anyone who questions the merits of human rights law, or the ever-growing reach of the Strasbourg Court, is liable to be accused not only of failing to respect fundamental rights, but also of having contempt for the rule of law. Policy Exchange deserves praise for working tirelessly to show that this accusation is unjust and that human rights law – like any area of law – warrants careful evaluation and criticism. For, as Professor Ekins's lecture powerfully establishes, when it comes to the ideal of the rule of law, human rights law should not be given a free pass.

Preface

Sir Patrick Elias, former Lord Justice of Appeal

This is the text of a stimulating Atkin Lecture given by Professor Ekins KC earlier this year. It is a provocative and challenging discussion of the relationship between human rights and the rule of law. These are both slippery concepts, and philosophers and constitutionalists alike are engaged in heated debate as to the most principled form of government. Should rights govern, or should the laws of a duly elected Parliament? If the former, significant creative power is given to the judiciary; if the latter, the concern is with popular legislation which might offend fundamental rights, perhaps of minorities.

Professor Ekins is a strong champion of parliamentary sovereignty: this, he believes, should be the fundamental underpinning principle of the constitution. Human rights are important and should be protected by law, but this can best be achieved – as it was for centuries – by Parliament and common law development. Indeed, he develops an argument as to why the current protection afforded to human rights in the UK is itself, in certain respects, inconsistent with the rule of law.

But what is one to do when Parliament itself requires judges to give effect to human rights, as it has in the Human Rights Act? Parliament has chosen to delegate important controls over law-making to the courts. It is true that the courts cannot strike down primary legislation, but they can make a declaration of incompatibility which certainly weakens parliamentary autonomy. Professor Ekins recognises the dilemma and gives cogent reasons why, if judges are not to usurp legislative power, they must exercise considerable restraint. He is also highly critical of the approach taken by the European Court of Human Rights, whose judgments are so influential in this field.

A particularly contentious area arises out of the Safety of Rwanda Bill, clause 5 of which gives power to Ministers to decide whether the UK will comply with interim orders made by the Strasbourg Court. Critics say that this is a flagrant breach of international law. We have signed up to the European Convention on Human Rights and that requires us to follow Strasbourg rulings. An interim order is a ruling of the Court and is thus binding. Professor Ekins contests this on the grounds that these rulings must themselves be a lawful exercise of jurisdiction by the Strasbourg Court. He advances a very powerful argument indeed why interim rulings are not within the Court's powers. The Court itself did not treat its own interim orders as binding until 2005. Until very recent procedural changes, the rulings have typically been made by an opaque process when the individual judge making the order was not even identified – an astonishing

procedure for a human rights' court to adopt. In future the judge will be identified, and it has been made clear that interim orders should be made only in exceptional cases to avoid potentially irreparable harm. These are welcome and overdue developments, but they do not address Professor Ekins' fundamental objection, namely that even a procedurally fair process falls outside the jurisdiction of the Court, at least in so far as it seeks to make orders which are binding on the state.

I find his argument convincing. The question whether interim orders ought to be within the powers of the Court was expressly considered and rejected when the system was created. States did not sign up to this. This does not mean that binding interim orders protecting the legal process cannot be made: the issue is whether it is for domestic courts or the Strasbourg Court to do so. Professor Ekins contends that the Strasbourg Court's Rule 39 practice is a usurpation of power which itself infringes the rule of law.

Attempts to justify the making of interim orders rely upon various articles of the Convention. Professor Ekins, in my view convincingly rebuts articles 34 (no hindering access to the court) and article 25 (power to create rules of court) as sources of this power. Another article sometimes relied upon is article 32 which provides that "In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide". But that concerns jurisdictional disputes concerning the interpretation and application of the Convention; it cannot give carte blanche to the Court to give itself fresh powers. There has to be a genuine question whether the jurisdiction exists, not whether it would be a good idea for the Court to have it.

This is an issue of some moment. It should be obvious that the merits or otherwise of this argument ought to be considered entirely independently of the desirability or otherwise of the Rwanda Bill. Similarly, it is an entirely separate question whether it is politically wise for the Government to adopt this position now. But on the legal question, Professor Ekins's Atkin lecture is compelling. I commend it to you.

Human Rights and the Rule of Law

I.

It is a great honour to have been invited to give this year's lecture in memory of Lord Atkin,[1] one of our country's greatest judges, and I am very grateful to the Reform Club for asking me to speak. What I intend to do tonight is to reflect on the relationship between human rights and the rule of law and then to evaluate modern human rights law and adjudication.

You will be familiar, I trust, with the widely held view that the UK's respect for the rule of law can be measured in part by the extent of our commitment to European human rights law. On this line of thought, repeal of the Human Rights Act 1998 or withdrawal from the European Convention on Human Rights (ECHR) would undermine the rule of law. The same would be true for legislation that disapplied parts of the 1998 Act.

My perspective is rather different. I argue that human rights law has a rule of law problem. We do not need human rights law to protect human rights or to maintain the rule of law. And if we are to have human rights law, then we are entitled to insist that rights adjudication conforms to the requirements of the rule of law, which it routinely does not.

I will illustrate some of these claims in relation to the Human Rights Act. I will then consider some aspects of the case law of the European Court of Human Rights in Strasbourg, focusing in particular on the Court's assertion of a legal power to issue binding interim relief, under Rule 39 of the Rules of Court, which has been much discussed in recent times. The Strasbourg Court's assertion of this power showcases the way in which European human rights law departs from the strictures of the rule of law. It warrants sharp criticism.

II.

But before I say anything more specific about the Human Rights Act and the ECHR, I would like to speak in more general terms about human rights and the rule of law. I am sceptical about human rights law; I am not sceptical about human rights.

There are some things that no human being should ever do to another, absolute prohibitions which correspond to absolute rights – not to be murdered, raped, tortured or enslaved. And there are some standing

1. This paper is the text of the 37th Atkin Lecture, which was delivered on 23 January 2024. I have added a small number of footnotes to provide references to relevant cases and scholarly commentary.

human goods that warrant protection and security, and arrangements that help secure those interests, which ought to be upheld and maintained. The freedom to raise a family, to work and trade, to think and speak, to practice one's religion, to travel, and to have a share in government, all these and more should be protected by law. Part of the challenge of government is to work out how exactly these freedoms should be specified, in this time and place, in view of the interests of others and what we owe to one another.

Focusing on individual rights may give rise to a neglect of common duties and to an excessive, almost idolatrous, veneration of autonomy, heedless of the impact of our actions on others. But these pathologies are not inevitable. The idea of human rights warrants a central place in political thought and action insofar as it picks out a fundamental truth about the limits and objects of reasonable human action. The point of government is to protect and promote the common good, which includes upholding individual rights, giving to each person what he or she is owed as a matter of justice.

None of this is to say that identifying human rights, or working out what they require in this or that particular context, will be straightforward or uncontroversial. On the contrary, argument about how human rights are properly to be understood and how they should be specified or qualified is a routine feature of any reasonable politics. This is not a type of argument that the law can somehow bypass or overcome, although acts of lawmaking are needed to settle what is to be done, here and now, on some question. The law answers to morality and whatever laws we make, even laws that proclaim themselves to be *human rights laws*, may fail to reflect what morality truly requires.

That said, part of what morality requires is that we establish institutions that can exercise authority in order to settle, here and now, how this political community is to be ordered. Without authority, the common good will not be secure, and that insecurity importantly includes the fact that human rights will not be sufficiently upheld. The question then is not *whether* we should protect human rights – of course we should – rather it is *how* we should protect them and, especially, *whose* choices should be authoritative.

III.

In the common law world, there have been two main models for how rights are to be protected.[2] The first, the British model, is to rely on a sovereign Parliament to protect human rights, imposing no legal limits on that Parliament's authority, instead relying on political competition, parliamentary deliberation and a decent political culture to result, over time, in good lawmaking. The second, the American model, is to rely on judicial review of legislation, authorising a Supreme Court to enforce legal limits on the legislature, limits set out in general terms in the Constitution, with the Court's understanding of these limits settling what is to be done.

2. R Ekins, "Models of (and Myths About) Rights Protection" in L Crawford et al (eds.), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 224

This is a crude contrast. In the British model, rights are protected not only by acts of legislation but also by the common law. In the United States, many of the most significant advances for human rights have been secured by ordinary legislation, rather than by judicial intervention. The Civil Rights Act 1964 and the Voting Rights Act 1965 are obvious examples; legislation protecting workers from exploitative conditions is another, although of course for much of the early twentieth century this legislation was routinely quashed by courts, whose priority was protecting liberty of contract. In other words, even in those political communities, like the United States, that authorise judges to protect individual rights against acts of the legislature, the main protection for human rights will be found in the ordinary law of the land, primarily in legislation.[3]

In the British constitutional tradition, courts have not stood in judgement over Parliament. We have instead trusted Parliament, in conversation with the people and over time, to exercise its authority reasonably, to make lawmaking decisions that take rights seriously and to correct legislation that seems, in retrospect, to have been misconceived or unjust. In the social and political conditions of Britain, this has not been a reckless gambit. The same is true for Australia and New Zealand, and for Canada prior to 1982,[4] countries that long managed to secure human rights and decent government without authorising judges to supervise Parliament. Importantly, in each of these countries, as in the UK, the rule of law has long been established: violations of human rights have been routinely punished or neutralised as crimes, torts, breaches of contract or trust, or as any of the forms of judicially cognisable *ultra vires* actions.

It is no part of the rule of law that judges must enjoy authority to quash legislation that they think is unjust or that is somehow incompatible with individual human rights.[5] The British model of rights protection is entirely consistent with respect for the rule of law. Indeed, the American model has some obvious shortcomings so far as the rule of law is concerned. It means that the legal validity of legislation is often uncertain and unstable. It leads to highly political litigation, the results of which often turn on the political disposition of the judges. This is all very hard to square with the ideal of the rule of law, which is first and foremost a moral ideal about the role that law should play in public life.[6] It is an ideal in which the political community is ordered by law, law which is in a fit state to settle how we should act and thus how we may confidently expect others, including officials, to act.

When the rule of law is in place, the authority to make law is subject to the discipline that law must be made in a form that is fit to be taken up by the subjects of the law. Thus, lawmakers need to choose rules that are prospective, clear, general and possible to obey. And these legal rules need to be upheld in practice, not only by members of the public, but also, and especially, by police, ministers, judges and civil servants conscientiously striving to do their duty. In the event of disputes about what the law requires, including disputes with government, independent courts should have authority to settle the dispute, making clear what should be done.

3. R Ekins and G Webber, "*Legislated Rights* in the Anglo-American Tradition" (2018) 10 *Faulkner Law Review* 129-169; G Webber et al *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018)
4. J Finnis, "Patriation and Patrimony: The Path to the Charter" (2015) 28 *Canadian Journal of Law & Jurisprudence* 51
5. R Ekins, "Judicial Supremacy and the Rule of Law" (2003) 119 *Law Quarterly Review* 127
6. J Finnis, *Natural Law and Natural Rights* (2nd edition, Oxford University Press, 2011), chapter X

The rule of law requires independent courts that provide fair and fearless adjudication. But it does not follow that every question in public life, or about how government should act, should be settled by litigation or judicial decision.[7] On the contrary, the proper role of the courts is limited to upholding settled law in the course of adjudication and clarifying how the law should be understood in a particular context when this is in dispute.

It is no loss for the rule of law, if ministers are sometimes free to act without judicial supervision, accountable to Parliament and the public for their actions but not to the courts. Likewise, Parliament's freedom to decide what legislation should be enacted is not an arbitrary power that is somehow an affront to the rule of law that needs to be brought to heel.

Some jurists have made just such an argument, deploying the majesty of the rule of law as a purported ground for British judges to abandon parliamentary sovereignty and to assert authority to quash legislation that seems to them to be unjust. If judges were to act in this way, they would break the most fundamental rule of our constitutional law, which is a course of action that the moral ideal of the rule of law firmly condemns.[8] I note that Lord Bingham, the greatest judge of his generation, took the same view. In his highly influential book, *The Rule of Law*,[9] he makes clear that there are no plausible legal grounds for British judges to abandon parliamentary sovereignty and that the rule of law cannot reasonably be deployed as a justification for judges to act in this unconstitutional, unlawful, indeed lawless way.[10]

IV.

Philosophers of law disagree about the extent to which the rule of law is an unqualified human good.[11] I take the rule of law to be an ideal that captures part of the reason why legal order is so valuable and to articulate part of what it is for a legal system to be working as it should work. For this reason, I think it is a condition of decent government and a matter of high importance. However, one should avoid overweighting the rule of law, transforming it into an all-encompassing ideal about the justice of the law and the merits of each legal rule.[12] The reason to avoid this transformation is that it dulls the sharpness of the ideal, which is valuable precisely because it picks out an important aspect of how government should be carried out. This is all relevant to whether the rule of law may be honoured when human rights are breached.

Lord Bingham argued that one of the principles of the rule of law was that the law must afford adequate protection of fundamental human rights. He reasoned that it would strip the rule of law of much of its value if it was formally compatible with human rights breaches. With respect, his argument is unconvincing. One should not breach human rights because this would be unjust. It does not follow that when the law breaches human rights, the ideal of the rule of law is to that extent compromised or abandoned.

7. T Endicott, "The Reason of the Law" (2003) 48 *American Journal of Jurisprudence* 83
8. Ekins, "Judicial Supremacy and the Rule of Law" and R Ekins, "Legislative Freedom in the United Kingdom"
9. T Bingham, *The Rule of Law* (Penguin, 2011; first published by Allen Lane, 2010)
10. Ibid. 196
11. Compare J Raz, "The Rule of Law and its Virtue" (1977) *93 Law Quarterly Review 195* and Finnis, *Natural Law and Natural Rights*
12. See also J Tasioulas "The inflation of concepts" *Aeon*, 29 January 2021

Lord Bingham's mode of argument in the relevant chapter of his book is to review each of the substantive rights in the ECHR, to comment briefly on its moral importance, and to ask in the end, rhetorically, which of these rights would one wish to do without?[13] The argument fails, not only because it tends to collapse the justice of particular legal rules with the wider question about the extent to which the legal system is fair, reliable and open, but also because it tends to conflate human rights with European human rights law. But as I suggested earlier, human rights law is not the main way in which human rights are protected in our law. And the undoubted moral importance of human rights does not sanctify human rights law, which, like any other set of legal rules, is open to question and criticism and should comply with the demands of the rule of law.

My argument in this lecture is that human rights law is hard to reconcile with the rule of law, save by a kind of definitional fiat in which human rights law is asserted to be necessary to protect human rights which are asserted in turn to be a constituent part of the rule of law. Part of my argument is that the rule of law is not a master legal principle that justifies courts, or anyone else for that matter, in ignoring or bypassing constitutional law or other legal rules. The same is true for human rights. The importance of human rights does not justify courts in setting aside or remaking the propositions of constitutional law that settle how authority is to be exercised.

V.

How does all this bear on the Human Rights Act? Well, Parliament chose to enact the Act and so I make no criticism of judges for doing their best to apply the duties the Act imposes on them. However, I do say that the Act, as it has been understood and developed across the last quarter century, undermines the rule of law and should be reformed to that extent.

The Act works by setting out the substantive rights in the ECHR as a schedule to the Act and giving domestic legal effect to them, making them statutory rights in the UK. Section 2 of the Act provides that in determining any question that arises in connection with Convention rights, the courts must take into account judgments of the Strasbourg Court. Quite how section 2 should be understood has been the subject of a long and convoluted series of judgments.

One particular question that has repeatedly arisen is whether it is open to British courts to interpret and apply Convention rights in a way that goes beyond the Strasbourg Court. That is, can a British court find that government action or parliamentary legislation is incompatible with Convention rights even when, if the case came before the Strasbourg Court, the Strasbourg Court would not hold the UK had acted in breach of the ECHR?

This is an extremely important question. I have long argued that Parliament did not intend the Human Rights Act to authorise courts to go beyond Strasbourg in this way. However, between 2008 and 2021, our

13. Bingham, *The Rule of Law*, chapter 7

highest courts seemed to take a different position, or at least in a string of cases they held open this possibility and sometimes acted on it.[14]

Even setting aside this point, the application of Convention rights is often unclear. The text of the ECHR does rule out certain types of actions, but is often framed in general terms, setting out a series of qualifications that seem to invite evaluative choice about how best to act. In common with other courts elsewhere in the world, the Strasbourg Court often deploys a test of proportionality, which appeals to judges because it seems technical and lawyerly. In some rare cases, the test may help pick out government action that was needlessly excessive, where the state could have acted in some other way without interfering with an individual. But much more often, proportionality simply requires the court to second guess the considerations that the policy maker has taken into account and the decision it has made.[15] Thus, the lawfulness of government policy or of secondary legislation may stand or fall on the court's view of the merits of the policy or legislation.

In addition, the logic of proportionality tends to undermine the certainty of legal rules. Consider the Supreme Court's well-known *Ziegler* judgment in 2021.[16] The majority held that a protestor cannot lawfully be convicted of the offence of deliberately obstructing the highway unless the prosecution establishes that a conviction would not be a disproportionate interference with the protestor's Convention rights of speech or assembly. This judgment has had very damaging consequences for the rule of law.

It overturned the earlier understanding of the law and left the police uncertain about when it would be lawful even to arrest someone for obstructing the highway. It required criminal courts to consider highly political argument about whether in view, say, of the significance of climate change a conviction would be reasonable, all things considered.[17] The judgment spilled over into prosecutions involving criminal damage, and while the courts have managed subsequently to limit its reach in this context, the offence of obstructing the highway remains unstable and difficult to apply, whether on the streets or in the courtroom. The Supreme Court did not set out to encourage lawless protest on the streets of London, of course. But its judgment has done major damage to the integrity of the law of public protest.[18]

While the Human Rights Act did not strictly require the Supreme Court's *Ziegler* judgment so much as enable it, section 3 of the Act does enable courts to gloss the statute book more generally. The section requires other legislation to be read and given effect, so far as is possible, consistently with Convention rights, a provision which has been used in a number of cases to read legislation in a way that is very hard to reconcile with its text or the intention of the Parliament that enacted it. Whether section 3 will be used in this way is difficult to predict. Courts have often stayed their hand and not read legislation in the implausible way that the case law otherwise says is possible.

It is significant that the Human Rights Act introduces into our law an uncertain ground on which the clear meaning and effect of other legislation

14. The first of the cases is *In re G (Adoption: Unmarried Couples)* [2008] UKHL 38.
15. P Yowell, *Constitutional Rights and Constitutional Design* (Hart Publishing, 2018)
16. *DPP v Ziegler* [2021] UKSC 23
17. C Wide, *Did the Colston trial go wrong? Protest and the criminal law* (Policy Exchange, April 2022)
18. R Ekins, D Spencer and P Stott, *The 'Just Stop Oil' Protests: A legal and policing quagmire* (Policy Exchange, 2022)

may be, but will not necessarily be, disrupted. This is not consistent with the strictures of the rule of law. Not every application of section 3 will fall afoul of the rule of law. It is reasonable for courts to presume, as they have for centuries, that Parliament does not intend to interfere with settled rights, including the liberty of the subject, unless and until it makes it intentions clear.[19] In some cases, section 3 may support this long-standing principle of our constitution. However, alarmingly, in some of these cases, our courts have failed to apply section 3 and have not upheld the legal rights of the parties before them.

Consider the Supreme Court's unanimous judgment in *Doogan* in 2015.[20] This case concerned the conscience exemption in the Abortion Act 1967. The Supreme Court read the exemption very narrowly. Strikingly, the Court simply declined to consider the relevance of freedom of conscience or to apply section 3 of the Human Rights Act in this context. The Court thus narrowed the conscience rights of a politically unpopular minority who had sought the Court's protection, without even addressing their arguments under the 1998 Act or the common law principle of legality. This was a misuse of adjudicative authority.

Consider next the most famous Human Rights Act case of them all, the *Belmarsh* case,[21] which the House of Lords decided in 2004. The case concerned legislation authorising indefinite detention of foreigners suspected of involvement in terrorism. The majority of the House of Lords declared the Labour Government's legislation to be an interference in liberty that unjustifiably discriminated on the grounds of nationality. Parliament responded to the judgment by changing the law.

Belmarsh is sometimes compared to *Liversidge v Anderson*.[22] In *Liversidge*, as many of you will know, a majority of the House of Lords held that indefinite detention was lawful if the Home Secretary merely thought that he had good cause to detain a person. Lord Atkin dissented on the grounds that the legislation clearly made it a condition of the authority to detain that the Home Secretary in fact had good cause to detain a person, not just that he thought that he had good cause.

The point of comparing the two cases is to suggest that the House of Lords in *Belmarsh* followed the example set by Lord Atkin's courageous dissent in 1941, protecting liberty in dangerous times. This is not a plausible comparison. The legislation under consideration in the *Belmarsh* case applied to foreign terror suspects rather than British terror suspects because it involved detention pending deportation, albeit in circumstances where there was an obstacle to deportation at the present time. The majority of the House of Lords ignored the deportation context, partly because of the way in which the case was presented by the Attorney General.

Strikingly, the Court did not consider the relevance of section 3 of the Human Rights Act, which would have forced the Court to confront the fact that the legislation could have been interpreted compatibly with the Convention right to liberty insofar as it only authorised detention with a view to deportation. The legislation required the Government to show to the court's satisfaction, every three months, that it was attempting to

19. Lord Sales, "Legislative Intention, Interpretation, and the Principle of Legality"

20. *Greater Glasgow Health Board v Doogan* [2014] UKSC 68; for criticism, see R Ekins, "Abortion, Conscience and Interpretation" (2016) 132 *Law Quarterly Review* 6

21. *A and others v Home Secretary* [2004] UKHL 56; for criticism, see J Finnis, "Nationality, Alienage and Constitutional Principle" (2007) 123 *Law Quarterly Review* 417 and J Finnis, "Judicial Power: Past, Present and Future" in R Ekins (ed), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018), 26.

22. [1942] AC 206

overcome obstacles to deportation. This was a condition on the authority to detain. The Court overlooked the condition in its haste to denounce the merits of the legislation. In so doing it failed to give the applicants their legal rights, a state of affairs in which the applicants were complicit insofar as the main aim of the litigation was precisely to secure the Court's political support in denouncing the legislation.

The case is thus not an improvement on *Liversidge v Anderson* so much as a distorted echo of it. In *Liversidge*, the majority of the Court misread the legislation because of its view about wartime conditions; in *Belmarsh*, the Court misread the legislation, perhaps because of the Attorney General's litigation tactics and the temptation to stand in judgement over the government's policy. The leading case under the Human Rights Act is thus a failure of disciplined adjudication.

Let me turn to the temporal and territorial scope of the Human Rights Act, an unstable body of case law in which the courts have at times applied Convention rights with retrospective effect. The Act makes clear that it has a very limited effect on events that took place before the Act came into force in October 2000; in all other cases, the Act applies prospectively. However, in a string of early cases, the courts indulged the argument that human rights are so important that the provisions of the Human Rights Act must apply regardless of when the events in question took place. Lord Hoffmann firmly closed down this argument in 2004,[23] when the question arose in relation to deaths that took place during the Northern Ireland Troubles. But this sensible resolution was unravelled in 2011,[24] when a majority of the Supreme Court concluded that a recent Strasbourg Court judgment required them to apply the Act to deaths that took place well before its enactment.

It is a similar story in relation to the territorial scope of the Human Rights Act. The usual rule is that legislation only applies within the UK. In 2007, a majority of the House of Lords followed the Strasbourg Court and held that the Human Rights Act applied outside the UK, but only to military bases and embassies.[25] Lord Bingham dissented. Four years later, the Strasbourg Court abandoned its earlier case law and held that the ECHR had very broad extra-territorial application, including especially to military action overseas.[26] The British courts duly followed suit, applying the Human Rights Act with retrospective effect to military action abroad, with much consequent unfairness for military personnel. The case law that follows vindicated Lord Bingham's concerns about extra-territorial application of the ECHR, which has displaced the law of armed conflict as the controlling body of law.

Some of the problems that I have outlined have now been addressed by the Supreme Court in a series of unanimous judgments in late 2021. In one judgment, the Court has overruled its past case law and held that it is not open to British courts to go beyond the Strasbourg Court in interpreting and applying Convention rights.[27] The Court has also sharply limited the retrospective effect of the Human Rights Act, making it much more difficult to reopen past cases by reference to Convention rights.[28]

23. *In re McKerr* [2004] UKHL 12
24. *In re McCaughey* [2011] UKSC 20
25. *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26
26. *Al-Skeini v United Kingdom* [2011] ECHR 1093
27. *R (Elan Cane) v Home Secretary* [2021] UKSC 56
28. *Re McQuillan* [2021] UKSC 55

In an appeal involving Shamima Begum's deprivation of citizenship,[29] the Court has made clear the importance of deferring to the Home Secretary's assessment of threats to national security and has not allowed a right to appeal to be leveraged into a de facto right for Ms Begum to return to the UK, which would have rendered her challenge to removal of her citizenship moot. In another judgment, the Court has made clear that it will be very deferential to Parliament's decision-making in the context of social policy. The Court has also corrected a line of cases in which judges had wrongly taken unincorporated human rights law treaties into account.[30]

This is a series of decisions that I warmly welcome.[31] These judgments do not answer all the rule of law problems to which the Human Rights Act gives rise – and the instability in the case law before 2021 means there must be a risk that a subsequent generation of judges will undo the Court's handiwork. But credit where it is due: under Lord Reed's presidency, some of the worst excesses have been corrected.

VI.

While the Supreme Court's recent case law is welcome, our human rights law is shaped in large part by the way in which the Strasbourg Court exercises its responsibilities under the ECHR. The content of our domestic human rights law is liable to change, and sometimes will change radically, in line with changes in the Strasbourg Court's case law. This is an unavoidable consequence of the structure of the Human Rights Act, which makes Convention rights in UK law march in company with the Strasbourg Court's understanding of the ECHR. In any case, quite apart from the Human Rights Act, for so long as the UK is a member state of the ECHR, we will be subject to the Strasbourg Court's jurisdiction and must evaluate its exercise.

Let me say again that human rights law is distinct from human rights properly understood. One may reasonably ask of any judgment delivered by the Strasbourg Court whether it upholds, or undercuts, human rights. One may also ask whether the Court's exercise of its adjudicative authority is disciplined by law and consistent with the ideal of the rule of law. In answering this question, it is essential to note that the Strasbourg Court routinely and openly departs from the terms the member states agreed in ratifying the ECHR.

Since the late 1970s, the Court has asserted that the ECHR is a "living instrument", which means that its meaning is to be updated in light of changes since its adoption, including any emerging or developing European consensus. The British judge serving on the Court at the time, Sir Gerald Fitzmaurice, protested strongly at the Court's willingness to gloss the terms that the member states had agreed, substituting for what had been agreed some new, and in the eyes of the majority improved, proposition.[32] But to no avail. The Court has made the "living instrument" approach the centrepiece of its jurisprudence and on this foundation has

29. *R (SC) v Work and Pensions Secretary* [2021] UKSC 26
30. *R (Begum) v Home Secretary* [2021] UKSC 7
31. See for example R Ekins, *The Limits of Judicial Power: A programme for constitutional reform* (Policy Exchange, 2022), 8-9.
32. J Merrills, "Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the European Court of Human Rights" (1982) 53 *British Yearbook of International Law* 115

remade the ECHR in the course of adjudication.

A few examples will have to suffice. In adopting Article 3 of Protocol No 1 to the ECHR, the member states undertook to hold free elections by way of secret ballot at regular intervals. The Strasbourg Court has expanded this provision to constitute a bar on legislation that disenfranchises prisoners, despite the member states clearly intending this provision not to create a right of "universal" franchise.[33] I have mentioned already the expansion of jurisdiction, in Article 1 of the ECHR, from an understanding that centres on the territory of the member state, with very limited extra-territorial application, to an understanding that tracks the use of force anywhere in the world.[34] And perhaps most importantly of all, the living instrument doctrine has been deployed in relation to Articles 3 and 8 of the ECHR to invent out of whole cloth a European law of migration and asylum, a body of law that is routinely deployed to evade the reasonable restrictions imposed by immigration law and to undercut the protections that the Refugee Convention 1950 reserves to states.[35]

This is undisciplined adjudication, with the Court more or less openly taking upon itself the responsibility to remake the Convention in order to make it better, to expand the horizons of rights protection, rather than to limit itself to requiring member states to meet their undertakings.

The Strasbourg Court's practice is sometimes defended by saying that what the member states committed themselves to when they signed the ECHR was to respect whatever human rights people truly have, which the Court must try to discern over time.[36] But this is to collapse human rights with human rights law and to assume that the Strasbourg Court may safely adjudicate disputes without reference to the legal commitments the parties made.[37] In other words, it is simply to give up on the rule of law, while at the same time demanding that member states obey whatever the Court says, however misconceived it may be.

Likewise, it is no answer to assert that the living instrument is simply an analogue to the way in which common lawyers have always developed legal materials in response to problems as they arise.[38] Lord Atkin understood this well. He always strove, as the late Robert Stevens put it, to "give effect to the wishes of Parliament in interpreting statutes".[39] In his powerful dissent in *Liversidge v Anderson*, he reasoned that "the plain and natural meaning of the words 'has reasonable cause' imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed".[40] In reaching this conclusion, he examined in exhaustive detail the statutory precedents and the legislative context which made the majority's interpretation so unreal. As he showed, the intention of the lawmaker, as reflected in the language it chose to enact, was entirely consistent with the common law's proud history of protecting the fundamental right of liberty.

In another leading case,[41] Lord Atkin for the Privy Council compared Canada's constitution to a ship, saying that "while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original

33. *Hirst v United Kingdom (No 2)* (2005) ECHR 681; for criticism, see J Finnis, "Prisoner' Voting and Judges' Powers" in G Sigalet et al (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019), 337
34. *Al-Skeini v United Kingdom*, abandoning *Bankovic v Belgium* [2001] ECHR 890
35. J Finnis and S Murray, *Strasbourg, Immigration and Judicial Overreach* (Policy Exchange, 2022)
36. G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2009)
37. J Finnis, "Judicial Law-making and the 'Living' Instrumentalisation of the ECHR" in NW Barber, R Ekins and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016), 73
38. See essays by Fredman and King in Barber et al, *Lord Sumption and the Limits of the Law*.
39. R Stevens, *Law and Politics* (UNC Press, 1978) 289
40. [1942] AC 206
41. *Canada (AG) v Ontario (AG)* [1937] AC 326 at 354

structure". This is a very long way indeed from the Strasbourg Court's approach to interpreting the ECHR, which is not much concerned with maintaining the original structure of the Convention.

What is one to do if the Strasbourg Court abuses its jurisdiction and rules that a member state has breached an obligation that the state clearly did not accept in agreeing to be bound by the terms of the ECHR? That is, an obligation that the Court itself has invented.

On one view, the rule of law requires the state to comply even with such a judgment. One must take the rough with the smooth. And adjudicative authority would not be worth much if a party were only to comply when it agreed with the ruling. But this line of thought does not engage with the problem, which is not that the Strasbourg Court makes mistakes but rather that it is openly and clearly acting outside its jurisdiction, which is limited to upholding the terms the member states agreed.

Interestingly, our Supreme Court considered a similar problem in 2015,[42] holding open the prospect that it might rule that the Court of Justice of the European Union had misconstrued its jurisdiction, by radically misinterpreting the Treaties, such that its judgments should not be followed. In making this threat, the Supreme Court was following a trail blazed by the German Constitutional Court.

This is not a game that only courts can play. It would be perfectly reasonable for Parliament or government to conclude that some judgment of the Strasbourg Court is impossible to reconcile with the terms that the UK agreed on entering into the ECHR and to refuse to comply for that reason. Whether this course of action would be prudent or politic, is of course a different question. My point is that the moral ideal of the rule of law, the good of public life being ordered by a legal system in good working order, does not require the UK to comply with judgments of the Strasbourg Court that fall outside the Court's jurisdiction, judgments which invent new obligations.

VII.

These are controversial claims, of course. Let me develop them now in relation to a type of case in which the Strasbourg Court's lack of jurisdiction is at its most glaring. I refer to the Court's assertions that it has a power to grant binding interim relief and that member states thus have a legal obligation to comply with the Court's directions to this effect.

Interim relief is purportedly made under authority of Rule 39 of the Rules of Court. Article 25 of the Convention empowers the plenary Court, that is all the judges jointly, to elect its President and various other officers and to make Rules of Court.

Rule 39 in its current form, which dates from January 2013[43], says that the relevant Chamber of the Court, or a duty judge, may "indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings." This is not the language of legal obligation, even if it is a little more

42. *Pham v Home Secretary* [2015] *UKSC* 19

43. Since this lecture was given, Rule 39 has been updated, with the change coming into force on 28 March 2024.

forceful than earlier versions, which provided simply that the President of the plenary Court could "bring to the attention of the Parties any interim measure the adoption of which seems desirable."

Importantly, the text of the ECHR itself makes no provision for the whole Court or any group of judges, let alone a single judge, to provide interim relief to any person. This is not because the point was overlooked. There was an attempt to introduce such a power to the text in 1950, an attempt that failed. And on multiple occasions since then, proposals have been made to create such a power, but the member states have never agreed to do so.

The Strasbourg Court itself ruled authoritatively in 1991 that interim measures were not binding.[44] It did so again in 2001.[45] But then in a judgment handed down in 2005,[46] the majority of the Court held that a member state, Turkey, had breached the ECHR by failing to comply with an interim measure made under Rule 39. The Strasbourg Court reasoned that Turkey's failure to comply amounted to a breach of Article 34 of the ECHR, which simply provides that the Court may receive applications from individuals and that member states will not hinder this right. The 2005 judgment involved non-compliance with an interim measure that purported to restrain deportation. The Court reasoned that Article 34 had been breached because the applicant had not been able to maintain contact with his lawyers from outside Turkey.

Maybe it is a breach of Article 34 to make it more difficult for someone to continue an application to the Strasbourg Court, although I rather doubt it. But on the Court's own logic, non-compliance with the interim measure seems simply irrelevant. Either deportation had the effect of making it difficult for the person to continue his complaint to the Strasbourg Court or it did not. Why would it matter whether an interim measure had been made or not? The Court does not say. Tellingly, in another judgment handed down a few years later, in 2009,[47] the Strasbourg Court simply asserts that non-compliance with an interim measure constitutes a breach of Article 34, regardless of whether or not there is any impact on the person's ability to apply to the Strasbourg Court or to continue an application.

So the Strasbourg Court has grounded its purported power to grant binding interim relief on two foundations. One is Article 34. The other is Article 25, which lets the Court make Rules of Court. These are hopeless foundations. It beggars belief that empowering the Court to control its own proceedings entails a power to create another power to grant what amounts to an interim injunction.

Again, the Strasbourg Court itself clearly recognised this up until 2005. Why the change of heart then? One reason is the example set by the International Court of Justice, the ICJ, which held in 2001 that states had a legal obligation to comply with interim measures that it promulgated.[48] But the Statute of the ICJ expressly empowers the whole Court to indicate interim measures. The ICJ does so after hearing argument and provides reasons for its decisions.

44. *Cruz Varas and Others v Sweden* 15576/89 [1991] ECHR 26, 20 March 1991
45. *Bonka v Belgium* (dec.) no 51564/99, 13 March 2001
46. *Mamatkulov and Askarov v Turkey* (GC) 46827/99; 46951/99 [2005] ECHR 64, 4 February 2005
47. *Paladi v Moldova* (GC), 39806/05 [2009] ECHR 450, 10 March 2009
48. *LaGrand (Germany v United States)*, 27 June 2001, 2001 ICJ 466

On the contrary, nothing in the ECHR empowers the Strasbourg Court, or any judge of the Court, to grant interim relief. This is a practice that the Court invented for itself. And when the Strasbourg Court purports to grant interim relief, notice how it does so. A single judge of the Court, whose identity is not disclosed, may do so without hearing argument from the state and without giving any reasons. Instead, a press release is published which tells the member state what it must do.

This is what happened to the UK in June 2022, grounding the first flight to Rwanda, after the High Court, Court of Appeal and Supreme Court had each held that interim relief should not be granted. We still do not know which judge of the Strasbourg Court issued the Rule 39 indication.

The Court's practice is incompatible with open justice, natural justice and the rule of law. Under pressure, the Court has now said that in future cases it will disclose the identity of the judge who issues a Rule 39 measure, but this does not change the fact that the Court's Rule 39 practice cannot possibly be reconciled with the text and structure of the ECHR. Let me explain.

- The Convention imposes an obligation on member states to comply with final judgments of the Court,[49] which is a term of art that is carefully defined in the ECHR itself.[50] It must follow that there is no obligation to comply with anything else that the Court may do or say.
- The ECHR requires the Court to give reasons for its judgments or decisions.[51] The Court does not give reasons for its Rule 39 measures, but, then again, they are not judgments of the Court at all.
- The ECHR spells out with crystal clarity the limited competence that a single judge of the Court has in hearing applications.[52] The single judge's only role under the scheme of the Convention is to declare some applications to the Court inadmissible.
- In addition, the relevant parts of the ECHR set out a careful sequence by which, and by whom, applications to the Court are to be considered.[53] The Court's Rule 39 practice shatters this sequence, allowing a single judge to give binding orders to member states even before an application to the Court has been made or has been found to be admissible – and even before the applicant has exhausted his or her domestic remedies. This is all totally contrary to the text of the ECHR.
- The Court's Rule 39 practice purports to confer more power on a single judge than the ECHR expressly confers on the Grand Chamber making a reasoned judgment after hearing argument.[54]
- Finally, the ECHR is careful to protect member states by making provision for any Chamber or Grand Chamber of the Court that hears an application to include a judge who was appointed from the member state in question.[55] The Court's Rule 39 practice abandons this protection.

49. Article 46
50. Article 44
51. Article 45
52. Articles 26 and 27
53. Articles 26-29 and 35
54. Article 41
55. Article 26(4)

In a Policy Exchange paper published in June last year,[56] I set out these arguments and others against the conclusion that the UK has an obligation in international law to comply with Rule 39 interim measures. The paper was commended by Lord Sumption and Lord Hoffmann and raised in Parliament. It also elicited a response from Robert Spano, who served as President of the European Court of Human Rights between 2020 and 2022.

Speaking in September,[57] and addressing my claim that under the terms of the ECHR a single judge has no authority to impose legal obligations on a member state, he is reported to have said "It may sound logical, but that's not the case". He went on to say that "You cannot look at the ECHR or any international treaty through the lens of a national lawyer, adopting a very textualist approach to the convention." I am not much moved by this response, which seems to me to confirm the problem. The Strasbourg Court seems to thinks that the rule of law is for other people.

This is the context in which to evaluate the provisions of the Illegal Migration Act 2023,[58] and the Safety of Rwanda Bill,[59] which authorise Ministers to decide whether or not to comply with Rule 39 interim measures. These provisions have been roundly denounced as an attack on the rule of law,[60] as if the proposal was for a Minister to be able to ignore a High Court injunction. On the contrary, this legislation is necessary in order to prevent the Government's migration and asylum policy, after it has been approved by Parliament, from being frustrated by the Strasbourg Court's lawless practice and by some civil servants wrongly thinking that the rule of law requires their loyalty to lie to Strasbourg rather than to Westminster and Whitehall.[61]

The rule of law is a condition of civilization. So too is respect for human rights. Both ideas are misunderstood and abused if they are taken either to require abandonment of the British model of rights protection or to excuse the extent to which human rights law departs from the ideal of the rule of law. Human rights law needs reform. I hope that members of the Reform Club, reflecting on the life and legacy of Lord Atkin, will play a role in securing it.

56. R Ekins, *Rule 39 and the Rule of Law* (Policy Exchange, 2023)
57. J Rozenberg, "Sticking with the ECHR is not just a political issue", *Law Society Gazette*, 15 September 2023
58. Section 55
59. Clause 5
60. See for example House of Lords, Select Committee on the Constitution, Safety of Rwanda (Asylum and Immigration) Bill, 3rd Report of Session 2023-24, published 9 February 2024 at paras 60-63
61. C Casey, R Ekins and S Laws, *Government Lawyers, the Civil Service Code, and the Rule of Law* (Policy Exchange, 2023)

£10.00
ISBN:978-1-917201-03-2

Policy Exchange
1 Old Queen Street
Westminster
London SW1H 9JA

www.policyexchange.org.uk