Revisiting the British Origins of the European Convention on Human Rights

Dr Conor Casey and Dr Yuan Yi Zhu

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Foreword

Lord Roberts of Belgravia, author of Churchill: Walking with Destiny (Allen Lane, 2018)

What would Churchill do? Not a bad question for a parliamentarian to ask, one might think, provided one bears in mind that Sir Winston, while undoubtedly a great statesman, was not right about absolutely everything. In a political career lasting more than half a century, and spanning both world wars, it would be surprising if his views had not changed on some questions and if he had not made some decisions that proved unwise. For his virulent modern critics, of course, he was wrong about almost everything, a sybaritic racist warmonger who is best forgotten – or at least derided. Vandalism of his statue is the least the man deserves.

But there is one subject on which the memory of Churchill is still routinely invoked in hushed tones in polite society, on which he is taken to have spoken and acted with startling foresight and statesmanship, in a manner that his successors in the Conservative Party should take to heart. This exception to the rule is all the more striking since many who invoke his memory in this way might otherwise have been expected to share in the fashionable denunciation of him and all his opinions. The subject is of course the European Convention on Human Rights (ECHR), for the creation and character of which Churchill is now routinely praised.

Praising Churchill for creating the ECHR – and for committing the United Kingdom to membership of it – has become something of a cross-party pursuit. True, the loudest voices in his praise have often come from those on the political left, who are outspoken in their enthusiasm for human rights law and might be suspected of being just a little opportunist in playing the Churchill card when they so often hold the man's other beliefs in contempt. But some on the political right have engaged in similar rhetoric, taking the ECHR to be "Churchill's legacy", and thus to be "in the Conservatives' DNA". On this question, they would seem to be in agreement with the Prime Minister, Sir Keir Starmer, who, speaking at Blenheim Palace in July 2024, pointedly noted that it was the birthplace of Churchill, and went on to say "we will never withdraw from the European Convention on Human Rights. Churchill himself was among the chief architects of the Convention".

The implication is clear. Tories who flirt with ECHR withdrawal are poor heirs to the Greatest Englishman – and should be ashamed of betraying his legacy.

As this powerful new Policy Exchange paper shows, the charge is

groundless. Invoking the memory of Churchill to support the ECHR, or to oppose UK withdrawal from it, is either base opportunism or basic historical misunderstanding. The historical record matters and the memory of Churchill should not be weaponised for political advantage, not least in service of a cause that he would have viewed as wholly incompatible with parliamentary democracy and the prerogatives of the nation state.

The grain of truth in the argument is that Churchill did indeed give his rhetorical support to the process that culminated in the ECHR. But he did so in vague terms, when he was himself out of power, never clarifying whether he thought Britain should in the end join and showing no interest in the Convention when back in office himself.

In fact, as I have written elsewhere and as this paper notes, in all of Churchill's many speeches, he mentioned the European Court of Human Rights only twice, once in 1949 and once in 1951. The first mention, in February 1949, was in the context of denouncing the arrest and show trial of Cardinal József Mindszenty, Catholic Archbishop of Esztergom in Hungary, who had been brave enough to oppose both the Nazis and the Communists. Decrying this "crime of religious persecution committed on an innocent man under the direct orders of Moscow, and carried through with all those feature of police government with which we are familiar in trials under the Soviets", he continued, "There must be means by which such events in any of the countries with which we can consort can be brought to the test of impartial justice." His concern, evidently enough, was with the seemingly inexorable slide in Soviet-dominated Europe into the evils of totalitarian rule.

The second mention, in July 1951, was briefer, noting the importance of the creation of the United Nations, the Council of Europe, and noting that "A European Army is beginning to take shape, and a European Court of Human Rights is shortly to be established." Hardly an enthusiastic endorsement, especially as he opposed the European Army concept in office, denouncing it as "a sludgy amalgam".

As the authors of this excellent paper note, Churchill's rhetorical support for a supranational court was important, but he was very reluctant – perhaps unable – to spell out how he thought it would or should work in practice. He was responsible neither for the drafting of the ECHR nor the UK's adoption of it, which fell instead to the Attlee Government, which harboured grave doubts about the wisdom of entry into the Convention and did its best to limit its scope.

When back in power, Churchill showed no interest whatsoever in the ECHR, clearly sharing the view of the Labour government that Britain was in no need of further human rights protection. Churchill's government did not accept either that the United Kingdom should be subject to the jurisdiction of the European Court of Human Rights or that individuals should be able directly to challenge the actions of the United Kingdom. Indeed, ministers considered leaving the Convention even at this early stage. These historical facts, too often overlooked by those who focus on Churchill's statements out of office in the late 1940s, are fatal to the claim

that he supported, or would have supported, the Convention as it has since become. Bear in mind that the ECHR that existed then was a far more limited instrument than it has since become, yet to be transformed by the so-called "living instrument" doctrine into an open-ended charter for judicial activism across all of Europe.

Recall too that Churchill's focus, in his most substantive reference to a Court of Human Rights, was on the techniques of Soviet oppression – religious persecution and show trials. He clearly did not envisage the ECHR as it has become in the hands of the Strasbourg Court, which has long since shrugged off a narrow concern to address the evils of the police state and instead seems intent on remaking Europe in its own image. Churchill would certainly have been aghast at the way in which the Convention has been put to work to enable illegal migration and to crowbar open our borders.

I commend Policy Exchange for publishing this excellent study of the British involvement in the origins of the ECHR. After its publication, no one can plausibly claim that withdrawal from the ECHR would somehow traduce the memory of Churchill or abandon a singular accomplishment of the Conservative Party that he was proud to lead.

Preface

Lord Sumption OBE, former Supreme Court Justice

Over the past decade, the European Convention on Human Rights has become controversial in Britain, largely though not entirely because of public feeling about current levels of immigration. One of the arguments which is commonly deployed in its defence is that it was a British invention. The implication is that it reflects the legal and political culture of the United Kingdom in which we should feel some pride. This is an exaggeration, as the present paper and the classic historical account by Brian Simpson show. It is true that Britain played a significant part in the project at the outset, although many other hands were also involved. It is also true that the text of the Convention reflected rights most of which had been acknowledged by the common law since the time of Blackstone and some cases earlier. However, what matters today is not the Convention as it was envisaged at its birth, but the Convention as it has now become seventy years later.

The current Convention system is essentially the creation of the European Court of Human Rights in Strasbourg. Neither the Atlee government, nor the Churchill government which succeeded it in 1951, nor the lawyers, official and politicians involved in negotiating the treaty wanted to see it enforceable by a supranational court. They thought that this would infringe the sovereignty of the United Kingdom in ways which were inconsistent with its Parliamentary democracy. Britain was eventually persuaded to agree to the creation of the European Court of Human Rights. But it did so only on the footing that the new court's jurisdiction would be voluntary. Under the Convention as originally agreed, the court could not receive individual petitions against member states unless the state in question had submitted to the jurisdiction of the court for that purpose.

So when, in 1966, the Labour Home Secretary Roy Jenkins decided that Britain would submit to the jurisdiction of the court by allowing individual petitions, he fundamentally changed the basis on which earlier British governments had been willing to sign up to the Convention. The significance of his decision was greater than Roy Jenkins realised. As more states acceded to the jurisdiction of the Strasbourg Court, it became bolder in its interference with the internal legal systems of member states. The Vienna Convention on the Law of Treaties prescribes rules for the interpretation of treaties. The primary rule is that treaties are to be interpreted in accordance with the natural meaning of the language.

This is fundamental because the text is the only thing that the states have actually agreed. However, from the 1970s onward the Strasbourg court began to emancipate itself from the text, a process which has continued to this day. It developed the "living instrument" doctrine, which purports to allow it to invent new rights with no basis in the language of the treaty, in accordance with what it regards as the spirit of the convention.

The effect has been to transform the Convention so that it is no longer recognisable as the instrument which British negotiators and draftsmen envisaged in the years following the Second World War. Having begun as a code of rights which were fundamental to civilised states and almost universally accepted, it has been extended into many areas which are far from fundamental and may be politically highly controversial. Instead of the "system of collective security against tyranny and oppression" which the leading British representative Sir David Maxwell-Fife described, it has become a template for most aspects of human life. The implications of this change were pointed out at an early stage of the Strasbourg court's history in a series of highly critical dissents by the first British judge of the court, Sir Gerald FitzMaurice, a distinguished international lawyer and former legal adviser at the Foreign Office who had been involved in the original drafting. As he observed, the Strasbourg court was transforming itself into a legislative authority standing outside the constitutional frameworks of its member states. Half a century later, it has now became an expanding source of domestic law over which Parliament has no influence or control and which it cannot repeal or amend. The British electorate has no input into it. The constitutional implications are enormous, although hardly appreciated by the public or acknowledged by professional politicians.

Policy Exchange has been a major contributor to public education on an issue which cries out for informed and objective assessment. It has persistently challenged the lazy assumptions about the Convention which have too often dominated debate on the subject. The present paper is an excellent example. It deals with one of those assumptions, namely that the Convention is to a significant extent a British creation. This is plainly not true of the immense apparatus of judicial lawmaking which the Convention system has now become. Britain needs to confront the problems associated with this radical change. It may well continue to be part of the Convention system. But that is a decision which should be made on purpose and not by default. We should make it with our eyes open.

I. Introduction: The Myth that Leaving the ECHR would betray its British Legacy

In recent years, the United Kingdom's continued membership of the European Convention on Human Rights (ECHR) has been the subject of much political controversy, while calls to reform the ECHR/Human Rights Act (HRA) regime, to supersede or repeal the HRA, or indeed to withdraw from the ECHR entirely, have grown. In response, advocates for Britain's continued membership of the Convention have emphasised what they view as the British origins of the ECHR, in particular the influence of Winston Churchill and Sir David Maxwell Fyfe (later Earl of Kilmuir). The point of the stratagem has been to cast the ECHR as a quintessentially British document, anchored in the thought of British politicians and lawyers - including one of the greatest figures in British history - such that withdrawal from the Convention can be decried as a repudiation of their legacy. While the argument seems likely to be intended to have some resonance with the British public in general, who still rightly honour Churchill, its narrower target is the balance of opinion within the Conservative Party. Conservative parliamentarians and thinkers should be ashamed, so the argument goes, to contemplate such a deeply unconservative course of action as to walk away from the institutional house that Churchill and his Conservative colleagues built.

As early as 2009, Peter Oborne and Jesse Norman argued that the ECHR was "Churchill's legacy" and "an impeccably Conservative document". This argument formed part of their "Conservative case for the Human Rights Act", in a pamphlet that helped to advance a pro-ECHR/HRA campaign sponsored by the NGO Liberty.[1] The report was accompanied by a preface by Shami Chakrabarti (as she then was), the-then director of Liberty, in which she said that the ECHR "largely originated from British common law traditions and it was largely drafted by British conservative lawyers", an approach that has since then been taken up by other pro-ECHR pressure groups[2] The Council of Europe takes a similar approach, maintaining a mini-website emphasising Churchill's links with the institution.[3] Even the left-wing journalist Paul Mason, no friend of conservatism, felt moved to claim that "[t]he government's attack on the Human Rights Act is a betrayal of those Conservatives who helped create

1. Jesse Norman and Peter Oborne, 'Churchill's Legacy: The Conservative Case for the Human Rights Act' (Liberty, 2009), https://jesenorman.typepad.com/Churchills_Legacy.pdf. They do admit that "Churchill's own position on European unity was never absolutely clear, especially as regarded the UK's own involvement" and that "the fact that the Human Rights Act has a Conservative pedigree hardly means it is a conservative piece of legislation", somewhat nuanced remarks that have been lost by later exponents of the idea of the ECHR is a quintessentially conservative document.
2. Saxon Norgard, 'Churchill's Fight for Human Rights', *Each Other* (30 November 2017); Churchill's Fight For Human Rights | EachOther; Mia Hasenson-Gross, 'Preserve Churchill's Vision of Human Rights', *Rene Cassin* (8 February 2017), https://renecassin.org/preserve-churchills-vision-of-human-rights-rene-cassin-tells-prime-minister/; Amnesty International, 'What is the European Convention on Human Rights?' (1 April 2025) https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights; Joshua Edwicker, 'What is the ECHR and how does it work?' (11 October 2024), https://www.bestforbritain.org/what_is_the_echr.https://eachother.org.uk/churchills-fight-human-rights/.
3. Council of Europe, 'Winston Churchill and the Council of Europe', https://www.coe.int/en/web/documents-records-archives-information/winston-churchill-and-the-ce.

it"[4] while the academic Francesca Klug, an erstwhile collaborator of Sir Keir Starmer, has nicknamed the ECHR "Churchill's charter."[5]

The position has also been adopted by a number of former or current Conservative politicians. While campaigning for the United Kingdom to leave the European Union in 2016, Boris Johnson told an audience that "We wrote it… I think [the Convention] was one of the great things we gave to Europe. It was under Winston Churchill, it was a fine idea in the post-War environment."[6] Former Conservative prime minister Sir John Major told the House of Commons Northern Ireland Affairs Committee in 2023 that "the founding father of [the ECHR/Council of Europe] was Churchill and members of his Government: it was a British invention. We would be in pretty rum company if we were to leave."[7] The Conservative MP Sir Bob Neill (a future Chair of the Justice Select Committee) similarly told the House of Commons in 2022 that "It was essentially written by a future Conservative Lord Chancellor, the future Lord Kilmuir, and it was Churchill's Government [sic] who took us into the convention, so it is in the Conservatives' DNA."[8] In 2023, Tory MP David Simmons opposed British denunciation of the Convention to deal with small boats by saying that "[t]he convention is based on British legal rights and principles. It was written by British lawyers on the initiative of Winston Churchill"[9], a claim repeated later that year by Conservative MP John Howell, who added that "[t]he fact that nobody seems to regard the ECHR with any acclaim is sickening".[10]

Even Labour politicians promote this narrative, despite the fact that it was a Labour government that took the country into the ECHR. Former Labour Lord Chancellor Lord Irvine of Lairg told the House of Lords in 2011 that:

> *"it is the Conservative Party, not Labour, that can make the strongest claim to credit for the European convention. Its main proponents were Churchill, Macmillan and John Foster, with some Liberal and Labour support. Its principal author was David Maxwell Fyfe, the future Conservative Chancellor, Viscount Kilmuir."*

Extravagantly, he then claimed that "The convention was substantially the work of British jurists within a tradition going back to the Petition of Right of 1628 and our own Bill of Rights of 1689."[11] In a 2024 debate about the Rwanda Plan, Labour MP Stella Creasy invoked Churchill several times, leading to Tory MP Danny Kruger pointing out that she "constantly and sarcastically evoking Winston Churchill", although even he mistakenly claimed that Churchill "did sign up to the ECHR and he sent lawyers to deal with the drafting process". Creasy retorted that "Churchill himself advocated for the Court as a backstop against overbearing Governments that could speak for people and prosecute people in ways that were being talked about after the second world war without any challenge."[12] In 2024, Sir Keir Starmer, opening the plenary session of the European Political Community at Blenheim Palace, pointedly noted that it was the birthplace of Churchill, then added that "we will never withdraw from the

4. Paul Mason, 'Scrapping our human rights is Brexit 2.0. for Raab and Johnson', *The New Statesman* (10 December 2021), https://www.newstatesman.com/politics/2021/12/scrapping-our-human-rights-is-brexit-2-0-for-raab-and-johnson.
5. Francesca Kulg & Helen Wildbore, 'Protecting rights: how do we stop rights and freedoms being a political football?', *Charter 88* (2009), https://www.lse.ac.uk/sociology/assets/documents/human-rights/publications/unlockDemocracy.pdf.
6. Oliver Browning, 'Boris Johnson claims ECHR is 'one of the great things' UK gave to Europe in resurfaced video', The Independent (15 June 2022), https://www.independent.co.uk/tv/news/boris-johnson-echr-rwanda-churchill-b2101764.html
7. Evidence of Sir John Major to inquiry into the effectiveness of the institutions of the Belfast/Good Friday Agreement, HC 781, Northern Ireland Affairs Committee (7 February 2023), https://committees.parliament.uk/oralevidence/12653/html/
8. https://hansard.parliament.uk/commons/2022-05-16/debates/D9101E0E-FF5E-4AE5-B987-DB4673129252/MakingBritainTheBestPlaceToGrowUpAndGrowOld. Churchill and the Conservative Party were, of course, in opposition when the United Kingdom signed and ratified the ECHR.
9. Adam Forrest, 'UK would be global pariah like Russia if Sunak pulls out of ECHR, Tories warn', (6 February 2023), https://www.independent.co.uk/news/uk/politics/rishi-sunak-russia-echr-asylum-seekers-b2276886.html
10. Leo Cendrowicz, 'Sickening: Tory MP condemns Braverman's threat to pull UK from human rights treaty', (September 28, 2023), https://inews.co.uk/news/world/tory-mp-condemns-suella-braverman-threat-uk-human-rights-treaty-2649962
11. Lord Irving, 'Debate on European Convention on Human Rights', *House of Lords* (19 May, 2011), https://hansard.parliament.uk/lords/2011-05-19/debates/11051953000793/EuropeanConventionOnHumanRights
12. https://hansard.parliament.uk/Commons/2024-01-17/debates/5D699C11-620A-4804-97A6-E49E3F870A23/SafetyOfRwanda(AsylumAndImmigration)Bill

European Convention on Human Rights. Churchill himself was among the chief architects of the Convention."[13]

Other British politicians who were involved in the drafting of the ECHR have also been posthumously enlisted in the effort to shore up support for continued British membership of the Convention. Most prominent among them is David Maxwell Fyfe who, as an opposition MP, was part of the British delegation to the Parliamentary Assembly of the Council of Europe and was one of the three rapporteurs of the committee tasked with drafting the ECHR. Although Maxwell Fyfe was a strong social conservative – and a strong proponent of the continued criminalisation of homosexuality and of hanging, both of which are prohibited under the ECHR today – in recent years he has been reinvented as a sort of progressive *avant la letter* due to his involvement in the ECHR's drafting. In 2019, the future Labour minister Nick Thomas-Symonds mused to the Commons as to what he "would make of some of the modern-day Conservative party's ambiguity towards" the ECHR.[14] Somewhat eccentrically, members of Maxwell Fyfe's family have taken to perform a song cycle, based on his life, in promoting British membership of the ECHR.[15]

It is only fair to note that some sceptics about continued membership of the ECHR also invoke the memory of the dead, such as when Robert Jenrick suggested that Churchill would have been "appalled" at abusive use of the ECHR by illegal immigrants.[16] But this is unusual: in modern British discourse, the idea that the ECHR was the brainchild of Churchill and of British lawyers seems close to being accepted by many, including many who should know better, as a historical fact, and it forms a cornerstone of the political campaign in favour of Britain's continued membership of the ECHR.[17]

Of course, the ECHR which the United Kingdom signed in 1950 is very different to the ECHR as it exists today: the former explicitly allowed for the death penalty (subsequently superseded by Protocol No. 13) and had no provision for individual petition to a pan-European court unless the state party allowed for such access (which was made mandatory by Protocol No. 11). In addition, the Convention's drafters did not contemplate judicially invented doctrines such as the "living instrument", which have, since the mid-late 1970s been aggressively deployed to remake European human rights law, departing sharply, and often quite openly, from the terms agreed in 1950. Even if it were the case that Churchill was one of the architects of the ECHR 1950, as Sir Keir Starmer has asserted, it would scarcely follow that the UK should remain in the ECHR 2025, in view of the radical change across the last 75 years and the responsibility that each successive generation of Britons has for constitutional self-government.

But most importantly, much of this popular historical narrative about British involvement in the creation of the ECHR is simply wrong. The story of Britain's participation in the development of the ECHR is far more complex, and far more equivocal, than the simplistic narrative propounded by its supporters suggests. While it is true that British lawyers and officials had a considerable influence in its drafting, they sought to

13. Prime Minister Sir Keir Starmer MP, 'PM's remarks at the opening plenary session of the European Political Community: 18 July 2024', https://www.gov.uk/government/speeches/pms-remarks-at-the-opening-plenary-session-of-the-european-political-community-18-july-2024

14. Nick Thomas-Symonds, 'Debate on Human Rights in the UK', *House of Commons, Westminster Hall* (13 February 2019), https://hansard.parliament.uk/Commons/2019-02-13/debates/D3018F3E-4DAB-4D0C-B9D7-CF1B84DBD204/HumanRightsInTheUK

15. Scottish Legal News, 'David Maxwell Fyfe's life and legacy remembered in Edinburgh performance', (14 September 2023), https://www.scottishlegal.com/articles/david-maxwell-fyfes-life-and-legacy-remembered-in-song-cycle

16. Charlie Hymas & Ben Riley-Smith, 'Churchill would be appalled ECHR allows migrants to abuse system, says immigration minister' *The Telegraph* (24 October 2023), https://www.telegraph.co.uk/news/2023/10/24/robert-jenrick-echr-migrants-abuse-system-churchill-asylum/

17. Invocations of the legacy of Churchill and Maxwell Fyfe's involvement in the creation of the ECHR were on prominent display on the recent House of Lord's debate acknowledging the 75th anniversary of the Convention. See European Convention on Human Rights: 75th Anniversary - Hansard - UK Parliament

keep the Convention to a limited document that would guarantee basic and already-existing rights against the threats of totalitarianism, instead of the open-ended "living instrument" that exists today.[18]

Moreover, there was significant opposition within the British government of the time—a Labour government, rather than a Conservative one, as many have suggested or now wrongly assume—many of whose members feared that the Convention would limit British sovereignty, harm the common law tradition of law and government, and would hinder the Labour Party's ability to carry out its economic agenda. And while it is true that Churchill did give his rhetorical support for the project, he did so in vague terms, never clarifying whether he thought Britain should in the end be part of the European project embodied by the ECHR. Strikingly, he demonstrated a total lack of interest in the Convention when he returned to power, with the government that he led opposing the acceptance of the jurisdiction of the European Court of Human Rights.

Part II of this paper provides an account of British involvement in the drafting of the ECHR. Our examination of the historical record shows why it is anachronistic to argue that leaving the ECHR system *in its current form* would be a betrayal of the UK's role in the Convention's drafting.

While British actors did have considerable influence over the shape of the Convention, their ambition was to create a human rights instrument that would act as a safeguard against regression to tyranny and oppression. The way in which the Convention system has developed today, particularly the very prominent role of the European Court of Human Rights and its dynamic living instrument approach to interpretation, is utterly inconsistent with any reasonable account of what those British officials and lawyers involved in its drafting thought they were creating. The dynamic approach of the ECtHR and the intrusiveness of its jurisprudence into what were once viewed as purely domestic matters, was simply never dreamt back at the time of ratification. The record of Britain's involvement in the ECHR's creation gives strong reason to think that if "politicians then been able to foresee this intrusiveness then it is most improbable that the convention would ever had been ratified".[19]

18. This view was shared by most of those involved in the drafting process. Moravcsik puts it as follows: "by far the most consistent public justification for the ECHR, to judge from debates in the Council of Europe Constituent Assembly, was that it might help combat domestic threats from the totalitarian right and left, thereby stabilizing domestic democracy and preventing international aggression." Andrew Moravcsik, 'The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217, 237.

19. AWB Simpson, *Human Rights at the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001) 4.

II. British Influence on the Drafting of the European Convention on Human Rights

British lawyers, officials, and politicians played a significant role at different stages of the creation and drafting of the ECHR.[20] One important group of actors included British Conservative Party figures who were enthusiastic and senior participants in the European Movement, including then then-former prime minister Winston Churchill and Sir David Maxwell Fyfe, a former solicitor-general and attorney-general who would go on to become home secretary and lord chancellor. This group played an important role in advocating for the establishment of the Council of Europe and for planting the idea of a European charter of rights onto its agenda. Maxwell Fyfe would also play a pivotal role in shaping the drafts that formed the basis for debate and discussion over on what would emerge as the final Convention text. The second group includes members of Clement Attlee's Labour government and senior civil servants. This group would exercise an outsized influence amongst negotiating states over the shape of the final Convention – including the definition of its rights provisions and the precise nature of its enforcement mechanisms.

Churchill, for his part, had a much more symbolic role, but also less straightforward: perhaps reflecting his very early involvement when the aims and structure of any European entity were unsettled. At times he saw the idea of a rights charter as merely a 'ticket of entry' for membership of as European political union;[21] at other times, a substantive court with decisions enforced by military force;[22] still again, with no coercion in enforcement but just voluntary compliance.[23] As this narrow example shows, his views were clearly not fixed at the time, and some of his most detailed musings were co-authored by others;[24] his speeches were high-minded but light on detail. Most of his interventions were made while his party was languishing in opposition, and Labour were transforming the country beyond recognition. Churchill attending important summits on possible forms of European integration was perhaps a way to remain involved in international diplomacy and maintain his profile in Europe. When he finally did return to power, he lost no time in disowning his earlier involvement in the European project, writing in a memorandum that he had "never given the slightest support to the idea", making no mention of his earlier involvement in the European Movement.[25] Some historians have observed that the sincerity of his earlier statements "remain

20. We have found the accounts of the drafting process in AWB Simpson, *Human Rights and the End of Empire: Britain and the Genisis of the European Convention* (Oxford University Press, 2001) and Ed Bates, *The Evolution of the European Convention on Human Rights*, (Oxford University Press, 2010) to be of immense assistance.

21. Simpson, *Human Rights at the End of Empire*:, 605.

22. Ibid, 228.

23. Marco Duranti, *The Conservative Human Rights Revolution* (Oxford University Press, 2017) 185.

24. See, for example, Simpson, *Human Rights and the End of Empire*, 228.

25. Ibid, 606.

obscure", but the fact is that when he was back in government "he did nothing practical to further European federalism".[26]

Putting Churchill's variable views to one side, study of the historical record and legal scholarship on the topic shows that the main impetus behind British support for the idea of the Convention, and involvement in its drafting, stemmed from a desire to preserve basic and largely already existing rights and liberties common in Western European democracies, and to safeguard them from totalitarian threats, especially the threats posed by Fascism, Nazism, and Marxist-Leninism. The main British actors involved in the creation of the ECHR shared a broad understanding that its objective and purpose was to afford protection for the kind of basic, common denominator standards and rights that are liable to suffer greatly under authoritarian regimes. British figures saw the Convention as an instrument that would serve the important, but limited purpose, of providing security against the kinds of abuses of state power that accompany highly authoritarian regimes.

The desire of British officials to keep the rights in the Convention limited and basic is reflected in their consistent efforts to ensure that any rights included in the Convention would take precise and determinate form, such that their text would limit the risk of expansive interpretation that might go well beyond the terms agreed and might thereby impose unexpected legal obligations on the signatory states. British actors emphatically did not understand the Convention they were involved in drafting to be an instrument that created a radically new set of legal rules and standards or empowered supranational tribunals to dynamically interpret the content and scope of its rights provisions to impose obligations the signatory states could not possibly have envisaged.

This is not to say there was unanimity amongst those British figures involved in the drafting process. Some, like Maxwell Fyfe, strongly argued that the Convention should be judicially enforceable and that citizens of the signatory states should have the right to individually petition the court (a position which he later resiled from, as will be discussed later on). This position on enforcement was firmly rejected by the British Government, who lobbied hard against this position. There was also some disagreement within the Government about whether to sign the ECHR at all. But across the two groups of actors (Conservative opposition and Labour government) on major questions concerning the intended point, purpose, and scope of the Convention there was considerable agreement.

Conservative Politicians and the European Movement

On 8 May 1948, Churchill presided over a Congress of non-governmental movements that had gathered at The Hague for an intensive, high-level study of the possibilities for greater political and economic union in Europe.[27] Out of this meeting was born the European Movement, a pan-European group of prominent politicians, scholars, artists, and citizens interested in building closer ties amongst the peoples of Europe. Deeply shaken by their experiences in the Second World War, this group viewed

26. Ibid, 606.

27. Marco Duranti, *The Conservative Human Rights Revolution* (Oxford University Press, 2017) 100-101.

political integration as essential to the preservation of peace and civilised European society. Churchill, along with Conservative politicians like Maxwell Fyfe were amongst its leading figures and involved in spear-heading the creation of the Council of Europe and putting the notion of a European rights charter onto the political agenda.

During his opening speech at the Hague Congress, Churchill put the idea of a Charter of Human Rights at the heart of plans for closer European union, arguing that:

> *"The movement for European Unity must be a positive force, deriving its strength from our common spiritual values. It is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law...We aim at the eventual participation of all European peoples whose society and way of life are not in disaccord with a charter of human rights and the sincere expression of free democracy".*[28]

While Churchill's involvement in pushing for a European rights instrument was critical to its eventual creation, his "often vague rhetoric left much to the imagination" when it came to how he thought the Convention system would work in practice.[29] We know that Churchill, at least while he was out of office, did support the idea of a supranational human rights court to help enforce the Convention. He was however very reluctant—or perhaps unable—to spell out how he thought it would work in practice. Sir George Rendel, the British ambassador to Belgium, wrote that while Churchill attached "great importance to the proposal for a Court of Human Rights...I was unable to find out from him how he proposed that this court should function".[30]

What we can say for sure is that Churchills views swung significantly. Simpson points to a 1949 joint-foreword by Churchill and Paul-Henri Spaak[31] where they describe an ambition for the Council of Europe to be an "effective League, with a High Court to adjust disputes, and with forces, armed forces, national or international or both, held ready to impose these decisions and prevent future aggression and the prevention of future wars."[32]Only a few months later it appeared that Churchill did not envisage the Court's rulings being enforced by a coercive supranational mechanism like a European army or police force, but through "the individual decisions of the States" of the council of Europe voluntarily complying with them. Churchill was confident member state governments would, in practice, feel compelled to implement the Court's decisions; wagering that the rulings of the Court would be supported by the "great body of public" opinion in each State.[33] As we will see, there is an irony in Churchill's early support for a ECtHR given his later refusal to sign-up to its jurisdiction when he was returned to power in 1951, which will be discussed later.

The Hague Congress and the movement it generated had a significant influence on the establishment of the Council of Europe in 1949. The Council initially comprised of a Committee of Ministers and a Consultative Assembly;[34] the former being the decision-making body (although its

28. Ibid, 118.

29. Ibid, 187.

30. Ibid, 185.

31. 899-1972, Belgian politician and diplomat. Served as Belgian Prime Minister and Secretary General of NATO.

32. Simpson, *Human Rights and the End of Empire*, 228.

33. Duranti, *Conservative Human Rights Revolution*, 185.

34. Initially it had a membership of ten Western European states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and the United Kingdom.

decisions could not bind the governments of member states) and the latter serving as a deliberative chamber. Article I of the Council's founding statute explicitly stated that the protection of human rights and freedoms was one of its core aims:

> *"the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and to facilitate their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters, and in the maintenance and further realisation of human rights and fundamental freedoms…"*

The European Movement were keen to influence the shape of any future charter of rights the Council might adopt. To this end, they appointed an "International Juridical Section" to draft a version for consideration by the newly established Committee of Ministers and Consultative Assembly. The section included Pierre-Henri Teitgen,[35] Fernand Dehousse,[36] and Maxwell Fyfe as rapporteurs. Maxwell Fyfe drew on the assistance[37] of legal scholars Arthur Goodhart[38] and Hersch Lauterpacht[39].

In his memoirs, Maxwell Fyfe gives a summary of this draft report and its core objective, stating that it had as its:

> *"basis security for life and limb, freedom from arbitrary arrest, freedom from slavery and compulsory labour, freedom of speech, freedom of religion, freedom of association, freedom of marriage, the sanctity of the family, equality before the law, and freedom from arbitrary deprivation of property. I was very anxious that we should get an international sanction in Europe behind the maintenance of these basic decencies of life."*[40]

In the explanatory notes which accompanied this European Movement convention, the authors argued their draft would represent the "creation among the European democracies of a system of collective security against tyranny and oppression. Each signatory to the Convention will bind itself by treaty to respect fundamental human rights within its territory and to submit itself to the jurisdiction of a European Court in respect of alleged infringements."[41] As Bates puts it, the European Movement convention was intended to:

> *"facilitate democratic stability across the union by preventing the emergence or re-emergence of totalitarian regimes…*[42]*the proposed Convention was not about creating for the European democracies a new set of legal rules and standards; it was concerned with making sure standards remained in place and that democratic security was safeguarded."*[43]

The most contentious proposal in the European Movement draft proved to be its provision for judicial enforcement by a European Court through a right of individual petition. This latter question, as we will outline below, came to be the most serious cause of concern amongst British lawyers

35. 1908–1997; French politician and jurist. Later judge of the ECtHR.
36. 1906 –1976; Belgian politician.
37. David Maxwell Fyfe, *Political Adventure: The Memoirs of the Earl of Kilmuir* (1964) 176.
38. 1891–1978; Professor of Jurisprudence at the University of Oxford and Master of University College, Oxford.
39. 1897 –1960; legal academic and judge of the International Court of Justice, 1955 –1960.
40. Maxwell Fyfe, *Political Adventure*, 176.
41. Bates, *Evolution of the European Convention*, 53-54.
42. Ibid, 52.
43. Ibid, 53.

and officials. But what was uncontroversial was the idea the Convention would have as its core objective curbing the risk of authoritarianism and the dangers its (re)emergence posed to the most basic of rights common to civilised societies.

Conservative politicians in the Consultative Assembly of the Council of Europe

During its first Session, the Consultative Assembly proposed to include in its agenda the study of "measures for the fulfilment of the declared aim of the Council of Europe in accordance with Article I of the Statute in regard to the maintenance and further realisation of human rights and fundamental freedoms".[44] The British Government announced that the UK would be represented in the Consultative Assembly by a delegation of 17 MPs from several parties in the House of Commons. Both Churchill and Maxwell Fyfe were included as representatives.[45] Other members of the British delegation were drawn from the Labour, Conservative, and Liberal parties. The Consultative Assembly itself was dominated by delegates with ties to the European Movement, with almost two-thirds of its participants being members.[46]

At its first session, Churchill successfully put down a motion in the Consultative Assembly seeking permission from the Committee of Ministers to debate the idea of drafting a European rights convention.[47] After permission was granted, Teitgen put down a motion calling on the Assembly to approve the idea of a Convention that would "maintain intact the human rights and fundamental freedoms assured by the constitutions, laws, and administrative practices actually existing in the respective countries at the date of the signature of the Convention".[48] He also introduced for the Assembly's consideration the *European Movement* convention he and Maxwell Fyfe had recently drafted. The Assembly agreed to explore the idea of drafting a rights convention and appointed two dozen jurists to its Legal and Administrative Committee to consider the question. Maxwell Fyfe was appointed as Chairman of the drafting Committee and Teitgen as its rapporteur.[49]

The Legal Committee's report was, perhaps unsurprisingly, close in content to the European Movement draft.[50] The Committee took as the basis of its work the Universal Declaration of Human Rights (UDHR), and listed several rights which it proposed should be the subject of a guarantee.[51] These rights included:

- Security of the person
- Exemption from slavery and servitude
- Freedom from arbitrary arrest, detention, and exile
- Freedom of thought, conscience, and religion
- Freedom of opinion and expression
- Freedom of assembly
- Freedom of association

44. Consultative Assembly of the Council of Europe, doc. 108.pdf
45. House of Lords Debate, COUNCIL OF EUROPE: BRITISH DELEGATION TO CONSULTATIVE ASSEMBLY (Hansard, 2 June 1949)
46. Duranti, *Human Rights Revolution*, 183.
47. Ibid, 185.
48. Bates, *Evolution of the European Convention*, 60.
49. Ibid, 61.
50. Simpson, *Human Rights and the End of Empire*, 672.
51. Ibid.

- Freedom to unite in trade unions
- Right to marry and found a family

Several provisions from the UDHR were omitted from the list, including the right to freedom of movement and to leave any country, a right to asylum, and the right to a nationality. None of the economic and social rights included in the UDHR were proposed either.[52] The rights chosen were, according to Teitgen, those:

> *"essential rights and freedoms...which are, today, defined and accepted after long usage, by democratic regimes. These rights and freedoms are the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates. That is why they must be subject to the collective guarantee."*[53]

In terms of enforcement mechanisms, the report made provision for enforcement by a supranational court and a right of individual petition from citizens. In his own words, Maxwell Fyfe reported in his memoir that his vision for the draft Convention involved accepting:

> *"a system of collective security against tyranny and oppression. I argued that the convention should set out a short list of basic personal rights, to be acknowledged by all governments, and a minimum standard of democratic conduct for all members. This would provide a moral basis for the activities of the Council. As a transitional stage the contracting states would be bound to guarantee the rights contained in the convention to the extent that they were ready to enforce them. Right would be given to petition the Council and machinery provided in the form of a Commission on Human Rights and an International Court to handle the cases of alleged violation. I said that there was nothing in all this which the States concerned were not pledged to work for. The difference was that they were now asked to take action at once and put an international sanction behind a scheme so simple and practical that it could take effect immediately. It was, I said, a simple and safe insurance policy."*[54]

In presenting the report produced by the Committee to the Assembly, Teitgen similarly stressed its important but limited ambition in combatting the risk of totalitarianism and safeguarding the most basic of rights common to democratic societies. He argued the draft report protected:

> *"a list of rights and fundamental freedoms, without which personal independence and a dignified way of life cannot be ensured; the fundamental principles of a democratic regime, that is, the obligation on the part of the Government to consult the nation and to govern with its support, and that all Governments be forbidden to interfere with free criticism and the natural and fundamental rights of opposition".*[55]

The report drafted by Maxwell Fyfe and his colleagues was approved by the Assembly in September 1949, but only after heated debate over whether rights to property and parental choice in respect of their children's education should be included. It was decided, in the end, not

52. Ibid.
53. Bates, *Evolution of the European Convention*, 65.
54. Maxwell Fyfe, *Political Adventure*, 180.
55. Bates, *Evolution of the European Convention*, 64.

to include these rights in the draft that would be sent to the Committee of Ministers for their consideration. These rights would later form the First Protocol to the Convention. In a development that foreshadowed the Labour Government's attitude to the Convention, all members of the Labour party delegation to the Assembly either abstained or voted against the proposal, including future prime minister Jim Callaghan and future High Court judge Lynn Ungoed-Thomas.[56]

British Government Involvement in Drafting the Convention

When the Committee of Ministers received the draft report approved by the Consultative Assembly, it did not accept the Assembly's own proposals but insisted on re-examining the idea of a Convention by creating a committee of its own legal experts. The Committee of Legal Experts was drawn from the participating states. The British representative was Sir Oscar Dowson, a recently retired legal adviser to the Home Office.[57] He was assisted in the later stages of the committee meetings by Sir Martin Le Quesne of the Foreign Office.[58]

The reaction of the British Government to the Assembly proposal was quite critical. The overall view was that the proposal would "invite judicial activism and inhibit the autonomy of government."[59] Nagi writes that the then Labour government's deep-seated scepticism of the idea of a court and individual petition were based on a rejection of supranational structures and oversight that risked shaping and limiting domestic social and economic policies.[60]

The Foreign Office brief for Dowson consequently stressed several priorities for the British Government to counteract these risks. First, that the Government would not accept the addition of rights like the right of asylum, protection of aliens from expulsion, or the right to nationality by place of birth.[61] More generally, he was instructed to oppose the inclusion of any socio-economic rights.[62] Second, in terms of enforcement Dowson was instructed to reserve his position but, if he had to adopt a position, to say that a commission and court were not needed.[63]

During the meetings of the Legal Expert Committee in March 1950, Dowson pushed for a draft Convention to include a "precise definition of the rights to be safeguarded and the permitted limitations to those rights".[64] He also duly opposed the creation of a court and the right of an individual petition for citizens.[65]

Disagreement amongst the Legal Experts about how precisely the content and scope of rights should be defined, about the creation of a Court, and over the right of individual petition, all ensured that a single draft text could not be agreed. Taking the view that resolving these points of disagreement demanded political decisions be made, the Legal Expert Committee produced several different drafts for consideration by the Committee of Ministers.[66] Each different draft took a different approach to how rights should be defined (with precision or in very general terms)

56. Sanjit Nagi, 'Broadening the Debate: The Attlee Government, Untrammelled Sovereignty, and Socialistic Reasons for Resisting the European Convention on Human Rights; 1949–1950' (2025) *Public Law*.
57. Simpson, *Human Rights and the End of Empire*, 687.
58. 1917–2004; British diplomat. Simpson, *Human Rights and the End of Empire*, 695.
59. Nagi, 'Broadening the Debate'.
60. Ibid.
61. Simpson, *Human Rights and the End of Empire*, 688.
62. Ibid, 689.
63. Ibid.
64. Ibid, 692.
65. Ibid, 697.
66. Ibid, 700-701.

and enforced (whether there was a Court or right of individual petition). A report produced by the Legal Expert committee recounted the UK's views on the enumeration of rights, and stated that:

> *"In the view of the United Kingdom government, until the subject matter had been properly and sufficiently formulated it was not possible to say what provisions were suitable for inclusion in the Convention for the purposes of its execution and enforcement. For example, in the absence of clear and precise definitions, States might be in great doubt as to whether they were in a position to accede to the Convention; how could a country feel sure that its laws were consistent with the obligations it would assume on accession if it did not know precisely what were the obligations involved?"*[67]

The Committee of Ministers also took the view that it was not the right body to choose which version of the Legal Expert drafts to proceed with. They recommended that the member state governments convene a conference of senior officials to resolve any remaining disagreements and produce a final full draft. While the Committee of Legal Experts did not produce a single agreed draft, Bates highlights that their work was of major importance to the Convention's final text.[68]

The British appointed Samuel Hoare, a Deputy Under-Secretary of State at the Home Office, to represent them at the conference of senior officials.[69] Hoare was briefed to persuade the conference of several points. One was to define the rights in the Convention with the "greatest possible precision"[70]. During the proceedings, Hoare said there were:

> *"two reasons for proceeding with great precision. Firstly, the treaty it was desired to draw up would create obligations which States would be bound to perform, and they therefore had to know the precise extent of their undertakings … Secondly, human rights were recognised and observed in all the countries of Western Europe. What was desired was to set up an effective organisation which could take action immediately if, as a result of political changes in any country, the observance of those rights was threatened. If the rights were to be defined in general terms, it would be easier to avoid observing them. Conversely, if they were precisely defined they would be more difficult to violate."*[71]

Nicol rightly observes that it is "noteworthy that this passage assumes that the ECHR's role would be restricted to conserving only the human rights already guaranteed by the contracting states. Indeed, the very conception of human rights is limited to anti-totalitarianism."[72]

The other objectives set for Hoare were to secure a rejection of a right to individual petition and a rejection of the establishment of a court.[73] Nagi documents how Prime Minister Attlee considered the mandatory provision of a right of individual petition to a European Court to be a negotiating red-line for the UK, and that Britain should be "prepared to walk away from negotiations" if concessions on the issue were not made.[74] The Labour government was also hostile to the creation of a court, based on the risk it "would impose standards at the expense of domestic policy and legislative aims."[75]

67. Bates, *Evolution of the European Convention*, 82.
68. Ibid, 84.
69. Simpson, *Human Rights and the End of Empire*, 703. Hoare later went on to be a member of the Human Rights Commission of the UN and member of the Council of Europe's Committee of Experts on Human Rights. Not to be confused with the Conservative politician by the same name who was created Viscount Templewood.
70. Ibid, 705.
71. Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights, Committee of Experts - Committee of Ministers Conference of Senior Officials (30 March - 17 June 1950). - The Hague (Nijhoff, 1977) p.106 (Mr Hoare, on behalf of the British delegation at the conference of senior officials).
72. Danny Nicol, "Original intent and the European Convention on Human Rights" (2005) *Public Law*, 152, 160.
73. Simpson, *Human Rights and the End of Empire*, 705.
74. Nagi, 'Broadening the Debate'.
75. Ibid.

It was during the proceedings of the senior officials that the "detailed text of the Convention of 1950 largely came into being"[76]. The draft produced was one whose different provisions were decided by a majority vote of each of the member states, ensuring that the majority was not the same concerning all questions.[77] As Simpson puts it, its contents can in some ways be considered a "compromise" between the British proposals and those who supported the Assembly's initial draft.[78] The rights provisions were more precisely specified than in the European Movement and Assembly's drafts, as were the limitation clauses setting out the manner in which the exercise of rights could be regulated by member states. The rights remained those considered basic in early drafts and did not include things like social and economic rights or the right to asylum.

In terms of enforcement, there was to be a commission and a court. However, following strong insistence by the UK and several other states, the court's jurisdiction was to be optional. Individuals were also not permitted to bring a case before the court. The parties who could bring a petition before the court after their member state recognized its jurisdiction included the commission, a state who's national was alleged to be a victim, a state which referred a case to the commission, and the respondent state.

The draft the senior officials produced was submitted to the Committee of Ministers and approved with largely minor amendments. The most significant decision made at this late stage was that the right of individual citizens to issue a petition to the commission would only come into effect after a contracting state recognized the commission's competence to receive them.[79]

The draft was sent to the Assembly for its consideration and, in the main, was cautiously welcomed. When it was presented to the UK Cabinet, Churchill's earlier support was invoked, alongside Maxwell Fyfe who expressed "satisfaction" with the draft he had been given to review, although he later expressed disappointment at the watering-down of the right to individual petition and the optional nature of the court's jurisdiction.[80] But he maintained the hope that the Convention as drafted "would help to mobilize democratic opinion and might stop the progress of totalitarianism. It was a beacon to the peoples behind the Iron Curtain, and a passport for their return to the midst of the free countries."[81]

The Assembly's Legal Committee unsuccessfully attempted to add to the senior officials' draft rights to property and parental choice in education, and to make the right of individual petition to the commission mandatory but subject to an opt-out. The attempt failed, although as already noted, the above-mentioned rights would eventually comprise the First Protocol to the Convention, which was adopted in 1952.

76. Bates, *Evolution of the European Convention on Human Rights*, 88.

77. Simpson, *Human Rights and the End of Empire*, 713.

78. Ibid.

79. Simpson, *Human Rights and the End of Empire*, 733-735.

80. Ibid, 727, 728.

81. Maxwell Fyfe, *Political Adventure*, 183.

Resistance in Cabinet to the draft convention

The Labour Government were thus partly successful in their efforts to limit the effect of the initial version of the Convention to a "very narrow and precise set of obligations—none of which, so it was believed, could intrude upon domestic social and economic policy."[82] Notwithstanding this, the Convention drafted by the conference of senior officials still met with "violent" dislike by many in the Government.[83]

Many ministers were concerned about the Convention's impact for Labour's economic agenda. The Chancellor of the Exchequer, Sir Stafford Cripps, expressed fear that the Convention might interfere with the State's ability to intervene robustly in economic affairs.[84] To Lord Jowitt, the drafter "starts with the standpoint of a laissez faire economy and has never realised that we are now living in an age of planned economy". The objections were such that Cabinet invited from the Foreign Office a memo "explaining how it came about that a draft convention which was not in accord with the Government's economic policy should have reached such an advanced state of preparation before it was submitted for consideration by Ministers."

Others attacked the draft convention as being at odds with the common law and British legal tradition. Lord Jowitt, the Lord Chancellor, was particularly critical of the draft Convention, calling it "meaningless and dangerous", arguing that it was "intolerable that the code of common law and statute law which had been built up… over many years should be made subject to review by an international Court administering no defined system of law".[85] He regarded ratification of the Convention with "grave misgiving".[86] He said he could not agree to give power to supranational institutions the "unfettered right to expound the meaning of 17 Articles which may mean anything, or – as I hope – nothing".[87] In a paper circulated to the Cabinet he described the convention as "an unqualified misfortune… so vague and woolly that it may mean almost anything".[88]

While most members of the Government were not as concerned as Lord Jowitt about the Convention, it is fair to say there was little enthusiasm for ratification. In the end, however, a majority in the cabinet was of the opinion it would be politically disastrous to refuse to sign the draft at this late stage. There was concern that failure to sign up to what was viewed as "the only positive achievement" of the Council of Europe to date could lead to its disintegration, and that blame for this might fall on the UK.[89] As Simpson puts it, while a "majority" of the cabinet were "in reality opposed" to the Convention, they felt they[90] had "no option but to agree" to sign up to it. Wicks says that the "view seems to have been that the United Kingdom would have little to lose from accepting the Convention, but in rejecting it the government might lose a degree of its political influence within Europe and a degree of its political strength at home."[91]

Some in Cabinet, like Attorney-General Sir Hartley Shawcross, took comfort in what they saw as the limited nature of the Convention's remit,

82. Nagi, 'Broadening the Debate'.
83. Ibid.
84. Simpson, *Human Rights and the End of Empire*, 728.
85. Ibid, 728.
86. Ibid, 729.
87. Ibid, 742.
88. Ibid.
89. Ibid, 749.
90. Ibid 750.
91. Elizabeth Wicks, 'The United Kingdom Government's perceptions of the European Convention on Human Rights at the time of entry' (2000) *Public Law* 438, 447.

that it was "in essence" a statement of "general principles of human rights in a democratic community, in contrast with their suppression under totalitarian government".[92]

The Committee of Ministers met in Rome in November 1950 and agreed the Convention would be open for signing on 4th November in the Palazzo Barberini. In the absence of the Foreign Secretary Ernest Bevin MP, junior minister Ernest Davies MP (Parliamentary Under-Secretary of State for Foreign Affairs) signed on behalf of the United Kingdom.[93]

The ECHR and Churchill's second term

In 1951, Labour was defeated and the Conservatives returned to office under Churchill, with Maxwell Fyfe as home secretary, then lord chancellor from 1954. Yet, despite Churchill's earlier rhetorical enthusiasm, his government's attitude toward the ECHR was largely negative. As Duranti puts it, "Churchill and most of his ministers, like their Labour predecessors, felt that, once in power, they did not need any additional defense of human rights at home".[94]

One may go further than Duranti and look at the government's approach to the ECHR in British colonies, which was a key issue in the early years of Britain's adhesion to the ECHR. In 1957, the Greek government launched proceedings under the ECHR against the United Kingdom over its suppression of the EOKA terrorist insurgency. As part of the proceedings, the sub-commission which had the case before it proposed to visit Cyprus. The reaction of the Tory foreign secretary, Selwyn Lloyd, is worth quoting:

> *"The Foreign Secretary knew very little about it but expressed dismay and incredulity that the Convention could have got us into this fix, and even more incredulity that it applies to so many colonies."*

He also asked for a paper to be prepared by the Foreign Office legal advisor about the possibility of the United Kingdom withdrawing from the ECHR. Eventually, it was decided to not withdraw, both for reasons of political presentation and because withdrawal, which could only take place after six months' notice and five years' membership, was not retrospective and would not have terminated the Cyprus case: thus, immediate considerations trumped long-term ones.

Another issue that is illustrative of the United Kingdom's approach to the ECHR under a Churchill government was the question of the European Court of Human Rights and the right of individual petition to the Commission. Neither Churchill nor Maxwell Fyfe made any move towards accepting either when in government. When in 1958 the Liberal peer Lord Layton asked the government to accept individual petition and the jurisdiction of the ECtHR, Maxwell Fyfe, by then Viscount Kilmuir, defended the government's decision to accede to neither.[95]

On the issue of individual petition, Kilmuir said that such a right "would give rise to an unequalled opportunity for frivolous and vexatious cases, when at the end of the day one would not have got any further forward, because no one seriously says that English Common Law does not protect

92. *Simpson, Human Rights and the End of Empire,* 744.

93. Ibid, 1-2.

94. Duranti, *Human Rights Revolution,* 252.

95. House of Lords Debate on European Convention on Human Rights (18 November 1958 vol 212 cc601-30), https://api.parliament.uk/historic-hansard/lords/1958/nov/18/european-convention-on-human-rights

the rights of freedoms, at least to the extent which the Convention says." On the ECtHR's jurisdiction, the Lord Chancellor said that "an assessment of whether or not a State has infringed one of the provisions of the Convention cannot, with the world as it is, and with the Convention in its present form, always be taken on entirely technical and legal grounds." The goal of successive Labour and Conservative governments in developing the Convention, according to Kilmuir, was "not so much for providing a rigorously defined system of law but rather for setting out a number of general principles which could be applied to the different legal systems of the countries concerned." Whether Kilmuir's change of mind was sincere or not, there is no denying that, as a minister after the drafting of the ECHR, he opposed its expansion as far as the UK was concerned.

What of Churchill? As his biographers have pointed out, his views on European integration were hard to pin down, and he always left some ambiguity as to what the United Kingdom's place in any sort of European union would be. On the ECtHR, however, the record is clearer. According to Churchill specialist Richard M. Langworth, of all of Churchill's public statements made over the course of his life, there are exactly two recorded references to the European Court of Human Rights, one in 1949 and one in 1951.[96] There is no evidence that he made any references in public about the ECtHR during his second period as prime minister, and there is no reason to believe that the attitude of his government toward the question of acceptance of the ECtHR's jurisdiction did not reflect his own attitude.

Hence, any account of Britain's relationship with the ECHR which omits the actions of Churchill and Kilmuir after its ratification, as many of the laudatory accounts of their role quoted at the paper's beginning do, will give a misleading impression of their attitudes toward the Convention and its associated institutions; for while Churchill did give his rhetorical support to the project, and Maxwell Fyfe did take a leading part in its drafting, neither man was willing to accept the United Kingdom being bound to the Court, or to allow individuals to sue the United Kingdom. Any claim that they would support the Convention as it applies today to the UK must therefore be subject to the severest of doubts.

Conclusion

The historical record shows clearly that it is anachronistic in the extreme to argue that leaving the ECHR system *in its current form* would be a betrayal of the UK's role in the Convention's drafting. The ambition of those British officials and lawyers involved in the creation of the Convention was to create a human rights instrument that would act as a safeguard against regression to tyranny and oppression. Their objectives, says Bates, were "directed principally against the repetition of human rights atrocities associated with the Second World War, and occurring on the other side of the Iron Curtain in the late 1940s."[97] The view that the ECHR was a "means of countering the threats of fascism and communism without unduly inconveniencing democratic states" was shared throughout the

96. Richard Langworth, 'Did Churchill Support the European Court of Human Rights?', *The Churchill Project* (December 29, 2022), https://winstonchurchill.hillsdale.edu/european-court-human-rights/

97. Ed Bates, 'British Sovereignty and the European Court of Human Rights' (2012) *Law Quarterly Review* 382, 385.

UK government.[98] For those British officials involved in the drafting and ratifying of the Convention, because the "rights it was to protect were assumed to be of a basic and fundamental nature... the democratic states of Europe were not expected to be found in violation of the Convention very often, if at all".[99]

To the extent that some British figures – like Jowitt – anticipated and feared the Convention institutions could come to play a dynamic role in expanding the remit of the Treaty, they were overwhelmingly hostile to the idea.

The way in which the Convention system has developed today, particularly the very prominent role of the European Court of Human Rights and its dynamic living instrument approach to interpretation, is therefore utterly inconsistent with any reasonable account of what those British officials and lawyers involved in its drafting thought they were creating. A.W.B Simpson – himself an admirer of how the Convention would eventually develop – sums it up well when he said that the:

> *"sheer scale of the activities of the convention's institutions, and their intrusiveness into what were once viewed as purely domestic matters, was never dreamt back in 1950. Indeed, had the politicians then been able to foresee this intrusiveness then it is most improbable that the convention would ever had been ratified".*[100]

98. Wicks, 'Perceptions of the European Convention on Human Rights at the Time of Entry', 443.
99. Bates, 'British Sovereignty and the European Court of Human Rights', 384.
100. Simpson, *Human Rights at the End of Empire*, 4.

III. Why Appeals to British Legacy to Justify ECHR Membership are Unconvincing

Since the late 1970's, the European Court of Human Rights has transformed the ECHR by conceiving of it as a "living instrument", a generative *source* of law that explicitly empowers the Court to unilaterally depart from what was agreed by the signatory states.

The Court's adoption of this method was fiercely criticised by Judge Sir Gerald Fitzmaurice, the third judge nominated by the United Kingdom to serve on the European Court of Human Rights. Judge Fitzmaurice was a leading international law jurist, judge on the International Court of Justice, and Special Rapporteur for what would become the Vienna Convention on the Law of Treaties, 1969. His appointment to the European Court of Human Rights coincided with the Strasbourg Court's embrace of the living instrument approach to construing the Convention. Judge Fitzmaurice's dissented in most cases he sat on.[101]

His judgments stressed the extent to which the Court was departing from the reasonably ascertainable shared intentions of the drafters and ratifiers. He presciently pointed out that a major risk of departing from the intention of the ratifiers and adopting "extensive constructions"[102] of the Convention's text is that such an approach would involve "imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming".[103]

In another case, Judge Fitzmaurice protested the Court's lack of attentiveness to the intentions of those who drafted and ratified the Convention, arguing that along with close attention to the text, that it was of critical importance to sound interpretation:

> *"The objects and purposes of a treaty are not something that exist in abstracto: they follow from and are closely bound up with the intentions of the parties, as expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes. Moreover, the Vienna Convention-even if with certain qualifications-indicates, as the primary rule, interpretation 'in accordance with the ordinary meaning to be given to the terms of the treaty';-and as I have previously had occasion to point out, the real raison d'etre of the hallowed rule of the textual interpretation of a treaty lies precisely in the fact that the intentions of the parties are supposed to be expressed or embodied in-or derivable from-the text which they finally*

101. See Marc J. Bossuyt and Yolanda Vanden Bosch, 'Judges and Judgements: 25 Years of Judicial Activity of the Court of Strasbourg', (1984-1985) 18 *Revue Belge de Droit International / Belgian Review of International Law* 695, 703; J.G. Merrill, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law* (Brill, 1998) 76.

102. *Golder v. United Kingdom* (Application no. 4451/70) February 1975, partly dissenting opinion of Judge Sir Gerald Fitzmaurice, para 39.

103. Ibid.

> *draw up, and may not therefore legitimately be sought elsewhere save in special circumstances; and a fortiori may certainly not be subsequently imported under the guise of objects and purposes not thought of at the time.*[104]

Judge Fitzmaurice clearly articulated how living instrument interpretations of the Convention which *de facto* amend its terms, based on a judge's understanding that its current scope is unsatisfactory and ought to be extended to remedy its perceived deficiency, are incompatible with the intentions of those that created the Convention.

The Court's approach since the mid 1970's, then, has been at odds with the intentions of those that drafted the Convention, including those British actors who helped it take shape. Baroness Hale of Richmond memorably pointed out how little the Court is concerned with the aspirations and objects of those who drafted the Convention, noting that the limits to the Court's living instrument doctrine are seemingly:

> *"not set by the literal meaning of the words used. They are not set by the intentions of the drafters, whether actual or presumed. They are not even set by what the drafters definitely did not intend".*[105]

As Professor Finnis puts it, the Court's approach has ensured that the "postwar declarations and conventions about human rights have not preserved standards identified and adopted by their authors...but instead have given courts a roving licence to amend the laws and the institutions of civil society without democratic approval but in line with the changing fashions of elite opinion"[106] that happens to command a majority of the Court on the day. A handful of the many examples of ECtHR law-making include:

- abandoning the territorial idea of jurisdiction in Article 1;
- inventing and then extending a procedural obligation under Article 2 (right to life) requiring states to investigate deaths that may have occurred in breach of the ECHR, even in conflict theatres;
- using the prohibition of torture and inhuman or degrading treatment in Article 3 to create a considerable corpus of asylum law even though the ECHR almost certainly was not intended to encompass a right to asylum;
- Interpreting Article 3, Protocol 1 in cases like Hirst v United Kingdom (No 2) (2005) (74025/01), 6 October 2005 [GC] as requiring universal suffrage and strict proportionality review of any disqualifications from voting, including for prisoners. The ECtHR's reasoning and conclusions were "quite contrary to the Protocol's *travaux preparatoires* and drafting history."[107]
- departing in a sweeping variety of ways from Article 8's original concern to protect an individual's private and family life and home from what Sir Gerald Fitzmaurice called the "the whole gamut of fascist and communist inquisitorial practices" prevalent in "many countries between the two world wars and subsequently."[108] As interpreted by the Strasbourg Court, Article 8 has been extended

104. *National Union of Belgian Police v Belgium*, Application no. 4464/70, 27 October 1975, separate opinion of Judge Sir Gerald Fitzmaurice, para 8.

105. Lady Hale, 'What are the limits to the evolutive interpretation of the Convention?: Dialogue Between Judges' (Council of Europe, 2011) 18. Emphasis in original.

106. John Finnis, 'On Moyn's Christian Human Rights' (2015) 28 *King's Law Journal* 12, 16.

107. John Finnis, 'Judicial Law-Making and the "Living" Instrumentalisation of the ECHR', eds. NW Barber, Richard Ekins, Paul Yowell, *Lord Sumption and the Limits of the Law* (Hart, 2018) 94-95.

108. *Marckx v Belgium* (App. no. 6833/74) separate opinion of Judge Sir Gerald Fitzmaurice, para 7.

> to cover the "legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant law, and a great deal else besides".[109] As of 2024 and the judgment in *Verein Klimaseniorinnen Schweiz and others v. Switzerland* Application no. 53600/20, the Court has found Article 8 even encompasses a "right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life."[110]

Some will welcome the outcomes achieved via the 'living instrument' interpretative approach. But what is important for the purposes of this paper is that such developments were entirely outside the comprehension of those involved in the creation of the Convention, contrary to their expressed intentions, and cannot reasonably be considered the fruits of their "legacy".

The trajectory of the Court since its adoption of the living-instrument approach underscores just how misconceived the genre of arguments canvassed in Part I are. It is accepted as an uncontroversial fact by legal historians (even those favourably disposed to how the Convention system has evolved) that British lawyers, officials, and politicians involved in the drafting and ratification of the ECHR saw it largely as a bulwark against totalitarianism. Few on the British side would have anticipated, and none would have welcomed, the ECtHR adopting a highly dynamic and unpredictable role to construing the Conventions terms in an evolutive manner, taking the content of the provisions far beyond their reasonably intended scope.

Arguments that the ECHR is a part of "Churchill's legacy", the handiwork of British jurists like Maxwell Fyfe and Dowson, "an impeccably Conservative document" steeped in venerable "British common law traditions", may have been sound in the first two decades of the Convention. Today, however, they lack any plausibility. These kinds of arguments are quite simply *myths* that are deployed for their rhetorical and emotive impact but, upon examination, have little historical or philosophical substance grounding them. In addition to being woefully ahistorical and anachronistic, they are a very poor substitute for real arguments about the merits and detractions of the UK's ongoing membership of the ECHR, or how the UK can best protect and balance important principles and ideals like human rights, self-government, the rule of law, effective government, and national sovereignty.

Those supportive of how the Convention has developed over the last 75 might well argue that the intentions and aspirations of the drafters should not control how the Convention is understood and interpreted today, and that the way the Convention has shifted in its objectives and methodology are welcome developments. But one cannot maintain this argument whilst *simultaneously* saying that leaving would betray the legacy

109. Lord Sumption, 'The Limits of Law' in (eds) Richard Ekins, NW Barber, Paul Yowell, *Lord Sumption and the Limits of the Law* (Hart, 2016).

110. *Verein Klimaseniorinnen Schweiz and others v Switzerland* Application no. 53600/20, para 519.

of Britain's involvement in the Convention's formation and drafting, because this original legacy has long been abandoned by the ECtHR and its jurisprudence.

Summary timeline of drafting of the European Convention on Human Rights

- 8 May 1948: Winston Churchill presides over a Congress of non-governmental movements that had gathered at the Hague for an intensive, high-level study of the possibilities for greater political and economic union in Europe. The European Movement is established.
- May 1949: The Council of Europe is established.
- 1949: the European Movement appoints a "International Juridical Section" to draft a Convention on Human Rights for consideration by the Council of Europe's newly established Committee of Ministers and Consultative Assembly. Henri Teitgen and Sir David Maxwell Fyfe are rapporteurs.
- August/September 1949: the Consultative Assembly of the Council of Europe requests and receives permission from the Committee of Ministers to examine the issue of a European charter of human rights.
- September 1949: the Consultative Assembly asks its Committee on Legal and Administrative Questions to examine measures that might be taken for the protection of Human Rights and Fundamental Freedoms.
- September 1949: the Committee on Legal and Administrative Questions, led by Henri Teitgen and Sir David Maxwell Fyfe, produce a report complete with a draft Convention.
- November 1949: the Committee of Ministers decide to convene a Committee of Legal Experts appointed by the member states of the Council to produce a draft Convention.
- February 1950: the Committee of Legal Experts met.
- March 1950: it submitted to the Committee of Ministers a draft Convention containing various alternative proposals with regard to the form which such a Convention should take and the means by which respect for it should be enforced. The Legal Experts considered that the choice between these various alternatives was primarily a political one which they were not competent to take.
- April 1950: the Committee of Ministers decide that a conference of high officials, specially instructed by their governments, should meet at Strasbourg in early June for the purpose of preparing

decisions on the political aspects of the shape of the Convention.

- June 1950: the conference of senior officials met in Strasbourg. The final text of the Convention is largely agreed by way of majority vote on each of the contested provisions.
- June 1950: the Committee of Ministers receives the report of the senior officials. In August 1950 the Committee of Ministers approve a draft Convention for signing by the Council of Europe Member States, largely based on the text agreed by the senior officials.
- November 1950: The Committee of Ministers met in Rome and agreed the Convention would be open for signing on 4th November in the Palazzo Barberini.
- 4 November 1950: Parliamentary Under-Secretary of State Ernest Davies MP signed on behalf of HM Government, with the UK being the first country to sign.

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