

The Conservatives cannot 'wriggle' their way out of the European Convention on Human Rights, even by introducing a British Bill of Rights.

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The Conservatives have made no secret of the party's desire to roll back its European human rights obligations, with many in the party also advocating repealing the Human Rights Act and establishing a British Bill of Rights. As the party seeks to 'win back' jurisdiction over human rights cases, [Saladin Meckled-Garcia](#) finds the coalition government's stance is nothing less than an attempt to flout the rule of law for political purposes.



Observers of the government's stance with regard to its European human rights obligations will have noticed there is something going on. To get what is going on one has to understand the difficult position in which the Conservative part of the coalition government has found itself when it comes to human rights in the UK.

The UK is signatory to European Convention on Human Rights (ECHR) and subject to the jurisdiction of the European Court of Human Rights in interpreting the Convention rights. When passed into law in 1998, the Human Rights Act incorporated the ECHR's rights directly into UK law. Judges in the UK in precedent setting cases have decided, rightly, that they are bound by ECHR jurisprudence as a bottom limit, a 'floor', on what protections they should give domestically. But judges did not stop there. They also decided that they should not go too far beyond the Strasbourg court's decision by giving more generous human rights protections at home, even where it might be warranted. They do, after all, come from a judicial tradition that works fundamentally on precedent.

At the same time, the right wing of the Conservative party and its own ministers (viz the '[catgate](#)' incident with Theresa May at the Tory party conference) have been pressing for the leadership to come good with its pre-election and post-election promises on the Human Rights Act. The inability to freely deport people it deems undesirable when this would violate their human rights has become emblematic of the government's dissatisfaction with its ECHR obligations. This and the scandalous level of media [misrepresentation](#) of the effects of the act, have added to pressure on the government to do something.

But here's the thing: there is not much they can do. Pulling out of the European Convention, and the Strasbourg court's jurisdiction, the 'nuclear option', would be so catastrophic for UK foreign policy, international standing and moral high ground on human rights that it is not conceivably on the horizon. Certainly the Liberal Democrat side of the coalition would not stand for it. Repealing the Human Rights Act itself, again not favoured by Lib Dems, might assuage the right of the party, but it would not free the government from the troublesome constraints the ECHR places on domestic policy. After all, it was Strasbourg and not a domestic court that led to the ruling on [prisoners voting rights](#) that the government found so incomprehensible. What is more, a long shadow has been cast by the Act over UK jurisprudence. Precedents have been set in specific cases; principles have been developed and deployed in law, which will remain even if the Act itself were to go. With a continued relationship to the Strasbourg court, the attitude to its jurisprudence by UK judges will probably not budge significantly.



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So what is the government to do? Here is where the 'wriggling' comes in. The idea that the government has been trying to sell its discontents on human rights is that somehow it can get some 'wriggle-room' for domestic judges and the government itself when it comes to Strasbourg judgements. Can the UK use its presidency of the Council of Europe (of which the Court is an organ) to obtain dispensation to interpret

ECHR rights more in line with 'domestic priorities'?

It seems some in the Conservative leadership think so. The more sensible part of the party, and government, started pushing this as a kind of compromise option at least as far back as [February](#). They have argued that there are principles, such as '[subsidiarity](#)' and the '[margin of appreciation](#)' used by the court can be used more expansively to allow domestic judges more leeway in developing home-grown human rights jurisprudence.

More recently Ken Clarke has reported being close to a [deal at the Council of Europe](#) to get this extra wriggle-room for the UK, and even the [Lord Judge](#) of England and Wales has got involved in a plea for UK judges to see themselves less bound to follow Strasbourg jurisprudence too closely. The proposal of a British Bill of Rights, on which a [Commission on a Bill of rights](#) is deliberating, is seen as part of this process of creating more wriggle-room.

But this seems somewhat misguided (for more detailed analysis see the [UCL Institute for Human Rights submission](#) to the Commission). First of all, the principles that people like Dominic Grieve (Attorney General), Kenneth Clarke, and Lord Howard have been appealing to as potential sources of wriggle room are nothing of the sort. For example, the margin of appreciation is a principle that makes allowances for states' specific domestic circumstances when applying and enforcing a particular right. The test is whether there are, in fact, sufficient divergences throughout Council of Europe states on how a particular element of a right is understood to warrant treating that question as moot. Significant divergence, say, on whether abortion is a right or even permissible, means in the eyes of the court that different states are given a wide margin with regard to how they treat this practice. Deporting people deemed undesirable by the government irrespective of their family ties, on the other hand, would not get a wide margin because there is consensus on the relevant element of privacy and family life that is protected.

Joining the ranks of states trying to restrict the reach of the court, and those ranks include a number of serial-violating states, misconstrues clear principles of international law. In fact it is an attempt to usurp such principles for political purposes that goes against a fundamental principle applied domestically and inherent to the unwritten UK constitution: the rule of law. The rule of law is not the principle that judges are right when they please us and jurisprudence is binding when it is politically acceptable. It is the principle that judicial decisions and principles apply irrespective of political expediency. That principle preserves the separation of powers, and makes politicians, including the executive, subject to the law like everyone else. Meddling with ECHR judicial practice without a clear legal principle behind you is therefore meddling with the rule of law. In this case, the rule of law for the whole Council of Europe, for the sake of political expediency back home.

Unsurprisingly this attempt at political meddling with the rule of law has provoked some come-back from the Court. Ironically, it was the very Strasbourg judge nominated for the Court by the UK that responded with [accusations](#) that UK government ministers were showing xenophobia and hostility to the Convention. It is difficult to predict what the UK will get out of the negotiations at the Council, although it seems rather optimistic to think the Council will move to interfere with its own Court on such grounds. There is no room to wriggle on this.

The Lord Judge is right about one thing when he says UK judges should not tie themselves too strictly to Strasbourg jurisprudence. That is that this is not an ECHR obligation but rather a self-imposed restriction, and one that might be lifted by future legislative action. That would make room for more home-grown jurisprudence that can, in relation to domestic circumstances, expand and extend the Strasbourg level of protection. So long as this is not interpreted as asking for licence to protect ECHR rights less than Strasbourg does, this move would genuinely bring human rights home whilst respecting the rule of law.

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This article first appeared on the UCL Institute for Human Rights' blog: [The Human Rights View](#).

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