



# UK Withdrawal From the European Convention on Human Rights: A Disaster for LGBT People

*Paul Johnson*

Executive Dean of the Faculty of Social Sciences and Professor of Sociology,  
University of Leeds, Leeds, United Kingdom

*p.j.johnson1@leeds.ac.uk*

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## Abstract

Since the European Convention on Human Rights entered into force in 1953, lesbian, gay, bisexual, and transgender people have consistently sought to utilise it as a means of challenging discrimination against them. In the United Kingdom, various aspects of discrimination on the grounds of sexual orientation and gender identity have been addressed by the European Court of Human Rights. In the context of vehement criticism of the European Court of Human Rights in the United Kingdom, this article explains the vital importance of the United Kingdom remaining a party to the European Convention on Human Rights in order to maintain and develop the protection of lesbian, gay, bisexual, and transgender people from discrimination.

## Keywords

European Convention on Human Rights – European Court of Human Rights – gender identity – LGBT – sexual orientation – SOGI

## 1 Introduction

It is very easy for me to summarise my view of what a United Kingdom (UK) withdrawal from the European Convention on Human Rights (ECHR) would mean for lesbian, gay, bisexual, and transgender (LGBT) people in the

UK: it would be disastrous. This is because the principal bulwark preventing interference with the human rights of LGBT people would be removed, rendering LGBT people significantly more vulnerable to and at risk from discrimination and hatred. The protections that LGBT people in the UK have progressively accrued under the ECHR since it entered into force in 1953 – through a piecemeal process of litigation against the UK in the European Court of Human Rights (ECtHR),<sup>1</sup> as well as through the wider development of ECtHR case law and the alignment of the UK national courts with it – would no longer exist. In short, if the UK withdrew from the ECHR, LGBT people would lose the security of a system of international law that safeguards their human rights and fundamental freedoms. That would be a disaster for LGBT people in the UK.

Therefore, I want to explain why it is of vital importance for LGBT people that the UK should remain a party to the ECHR. I will explain that within the context of the vehement criticism of the ECtHR that has become an entrenched aspect of mainstream debate about the ECHR in the UK. An example of such criticism is the recent comments made about the ECtHR by the former UK Home Secretary, Suella Braverman MP:

I would say it's a court which is politicised, it is interventionist and it doesn't always follow a process that we would recognise as being due process. In a whole range of policy areas, I think sometimes the jurisprudence from the Strasbourg court is at odds with the will of Parliament or British values more generally.<sup>2</sup>

A further example of such criticism is comments made by Lord Sumption, then a Justice of the Supreme Court of the United Kingdom, about the ECtHR:

It has become the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying [...] [The ECtHR's] approach has transformed the Convention from the safeguard against despotism which was intended by its draftsmen, into a template for many aspects of the domestic legal order. It has involved the recognition of a large number of new rights which are not expressly to be found in the language of the treaty [...] The effect of this kind of judicial

1 For a history of litigation concerning sexual orientation discrimination see, P Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016).

2 'European Court at Odds with British Values, Says Suella Braverman' (BBC News, 10 March 2023): <<https://www.bbc.co.uk/news/uk-politics-64907772>>.

lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention and transform them into questions of law to be resolved by an international judicial tribunal.<sup>3</sup>

The comments by Braverman and Sumption are examples of criticism of the ECtHR now regularly made in the UK.

Although criticism of the ECtHR in the UK is expressed in different ways, by people with different political views, such criticism is often based on one or more of three principal claims:

- I. That the ECtHR actively interprets the provisions in the ECHR in ways that go beyond what the original drafters intended and the UK signed up to;
- II. That, as a consequence, the ECtHR expands rights or creates new rights that the ECHR was not designed to protect and the UK did not agree to;
- III. That, as a result, the ECtHR intervenes in areas that should be the preserve of UK policy-makers and, in doing so, harms British democracy and overrides British values.

I disagree with these claims because, from the point of view of LGBT human rights, they are not supported by evidence relating to how the ECtHR has operated. Rather, as I will show below by addressing these claims in turn, in respect of LGBT human rights the ECtHR has generally operated with great restraint, has not created new rights, and has not acted in ways that are harmful to British democracy or values. In providing an evidence-based account of how the ECtHR has approached LGBT human rights I want to show why contemporary criticism of the ECtHR in the UK should be rejected by LGBT people and, moreover, why LGBT people in the UK should argue in favour of the UK remaining a party to the ECHR.

## 2 No Judicial Activism, but a Lot of Judicial Restraint

The first principal aspect of contemporary criticism of the ECtHR is the claim that ECtHR Judges actively interpret the ECHR in ways that go beyond what its drafters intended and the UK has committed itself to. This claim is not supported by evidence in respect of how the ECtHR has usually responded

3 Lord Sumption, 'Lord Sumption Gives the 27th Sultan Azlan Shah Lecture, Kuala Lumpur: The Limits of Law' (Kuala Lumpur, 20 November 2013): <<https://www.supremecourt.uk/docs/speech-131120.pdf>> 7–8.

to complaints made by LGBT people. The ECtHR and the former European Commission of Human Rights (ECmHR) have certainly issued a number of decisions and judgments that have led to fundamental changes to law in the UK – for example, in response to complaints about the total prohibition of male same-sex sexual acts in Northern Ireland,<sup>4</sup> discrimination created by the higher ‘age of consent’ for male same-sex sexual acts,<sup>5</sup> and the prohibition of homosexuality in the armed forces.<sup>6</sup> However, the ECtHR and ECmHR (the ECHR organs) have generally adopted a highly conservative interpretation of the rights and freedoms contained in the ECHR when dealing with cases relating to sexual orientation and gender identity, even when upholding complaints made by LGBT people. It is restraint rather than activism that has been a hallmark of how the ECHR organs have approached the issue of discrimination experienced by LGBT people.

Such restraint is evident throughout the case law of the ECHR organs relating to discrimination on the grounds of sexual orientation and gender identity. This case law, which extends back to 1955,<sup>7</sup> demonstrates a distinct pattern in respect of how the ECHR organs have responded to applications by LGBT people about aspects of discrimination against them: the ECHR organs have tended to reject the first application relating to an aspect of discrimination and then, often after rejecting several subsequent applications over many years, finally recognised that the ECHR does provide protection from that aspect of discrimination. For example, it took many complaints by different individuals over 26 years about criminal laws that maintained a total prohibition of male same-sex sexual acts until the ECtHR finally held that such laws amounted to a violation of Article 8 ECHR.<sup>8</sup> This pattern has been repeated in respect of many aspects of sexual orientation discrimination: it took 16 years for the ECHR organs to say that being discharged from the armed forces for being gay or lesbian is a violation of human rights;<sup>9</sup> it took 17 years for the ECHR organs to say that evicting a person from the home they had shared with a same-sex partner who died is a violation of human rights;<sup>10</sup> it took 21 years for the ECHR

4 *Dudgeon v the United Kingdom* [Plenary] 7525/76 (ECtHR, 22 October 1981).

5 *Sutherland v the United Kingdom* 25186/94 (ECmHR, report, 1 July 1997).

6 *Smith and Grady v the United Kingdom* 33985/96 and 33986/96 (ECtHR, 27 September 1999).

7 See Johnson (n 1).

8 From the decision in *WB v Federal Republic of Germany* 104/55 (ECmHR, dec, 17 December 1955) to *Dudgeon* (n 4).

9 From the decision in *B v the United Kingdom* 9237/81 (ECmHR, dec, 12 October 1983) to *Smith and Grady* (n 6).

10 From the decision in *Simpson v the United Kingdom* 11716/85 (ECmHR, dec, 14 May 1986) to *Karner v Austria* 40016/98 (ECtHR, 24 July 2003).

organs to say that preventing the same-sex partner of a child's parent from becoming the child's 'step' parent is a violation of human rights;<sup>11</sup> it took 27 years for the ECHR organs to say that the relationship of a same-sex couple falls within the scope of the right to respect for family life;<sup>12</sup> and, it took 50 years for the ECHR organs to say that the ill-treatment of a person in prison because of their sexual orientation is a violation of human rights.<sup>13</sup> A similar pattern can be seen in respect of how the ECHR organs have dealt with aspects of discrimination on the grounds of gender identity.

What the history of ECHR case law demonstrates is that a key aspect of the development of LGBT human rights under the ECHR is the struggle that LGBT people have had – and continue to have – in persuading the ECHR organs that the rights and freedoms guaranteed by the ECHR are applicable to and protect LGBT people. It is a fantasy to think that when LGBT people have complained to the ECHR organs about discrimination that such complaints have been welcomed by a group of judicial activists intent on interpreting the ECHR in order to help them. On the contrary, in respect of complaints by LGBT people about discrimination, the ECHR organs have often interpreted the ECHR in the most conservative way possible in order to reject such complaints. Even in those cases where the ECtHR has upheld a complaint by an LGBT person and found that discrimination against them amounts to a violation of the ECHR, the ECtHR has often adopted a highly conservative interpretation of the ECHR in order to strictly limit the protection available under the ECHR – an interpretative approach which began when, at the time of finally recognising that the total prohibition of male same-sex sexual acts amounted to a violation of the ECHR, the ECtHR made clear that certain aspects of discrimination against gay and bisexual men by the criminal law could continue because of the 'legitimate necessity in a democratic society for some degree of control over homosexual conduct'.<sup>14</sup> Such an approach requires LGBT people to keep making applications to the ECtHR in an attempt to gradually and incrementally gain full recognition and protection of their human rights.

The approach taken by the ECHR organs to the discrimination suffered by LGBT people has very often conformed to the view of Sir Gerald Fitzmaurice (former ECtHR Judge for the UK) that, because the ECHR makes 'heavy inroads

11 From the decision in *Kerkhoven, Hinke and Hinke v the Netherlands* 15666/89 (ECmHR, dec, 19 May 1992) to *X and Others v Austria* [GC] 19010/07 (ECtHR, 19 February 2013).

12 From the decision in *X and Y v the United Kingdom* 9369/81 (ECmHR, dec, 3 May 1983) to *Schalk and Kopf v Austria* 30141/04 (ECtHR, 24 June 2010).

13 From the decision in *X v Federal Republic of Germany* 986/61 (ECmHR, dec, 7 May 1962) to *X v Turkey* 24626/09 (ECtHR, 9 October 2012).

14 *Dudgeon* (n 4) para 62.

on some of the most cherished preserves of governments', by allowing 'private persons [...] to (in effect) sue their own governments', this should 'not only [...] justify, but positively [...] demand, a cautious and conservative interpretation' of the ECHR by the ECtHR.<sup>15</sup> In response to one of the most 'cherished preserves' of governments – the asserted right to maintain anti-LGBT laws, policies, or practices – the ECtHR has very often adopted a cautious and conservative interpretation of the ECHR to absolve governments of any obligation to address discrimination against LGBT people. It is usually only because of repetitive and tenacious petitioning by LGBT people over many years that the ECtHR has finally upheld a complaint about an aspect of discrimination. The long and ongoing struggle of LGBT people to persuade those charged with interpreting the ECHR to recognise LGBT human rights demonstrates a distinct absence of judicial activism in the ECtHR. The judicial caution and conservatism that LGBT people have encountered during nearly 70 years of petitioning the ECHR organs in order to develop a suite of protections under the ECHR should make LGBT people feel deeply fearful of the UK withdrawing from the ECHR. If the UK did withdraw from the ECHR, not only would LGBT people in the UK be stripped of hard-won protections under the ECHR, they would also, when encountering discrimination, have to begin the long and difficult process of building up legal protections by other means from scratch.

### 3 No New Rights, but an Evolving Recognition of the Rights of LGBT People

The second principal aspect of contemporary criticism of the ECtHR is that it routinely expands rights or creates new rights that the ECHR was not designed to protect and that the UK did not agree to. The UK Conservative Party has described this as 'mission creep', stating that the ECtHR:

adopts a principle of interpretation that regards the Convention as a 'living instrument'. Even allowing for necessary changes over the decades, the ECtHR has used its 'living instrument doctrine' to expand Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it.<sup>16</sup>

<sup>15</sup> *Golder v the United Kingdom* [Plenary] 4451/70 (ECtHR, 21 February 1975) Separate Opinion of Judge Sir Gerald Fitzmaurice, paras 38–39.

<sup>16</sup> The Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014): <[https://www.amnesty.org.uk/files/protectinghumanrightsinuk\\_conservativeparty.pdf?vhzrAQkxzwCH8hbjeYhhcu5B5lyPp\\_gK=>](https://www.amnesty.org.uk/files/protectinghumanrightsinuk_conservativeparty.pdf?vhzrAQkxzwCH8hbjeYhhcu5B5lyPp_gK=>) 3.

It is certainly the case that the ECtHR does sometimes engage in an evolutive interpretation of the ECHR through the application of its 'living instrument' doctrine that allows it to interpret the ECHR 'in the light of present-day conditions'.<sup>17</sup> Without such an interpretive approach the ECtHR would not be able to 'have regard to the changing conditions' in states and ensure that the ECHR is 'interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.<sup>18</sup> Nor would the ECtHR be able to interpret the ECHR in the context of the Preamble of the ECHR, which distinguishes between the 'maintenance' and the 'further realisation' of human rights and fundamental freedoms.

Yet, in the UK, this interpretative approach is now invoked to evidence the claim that the ECtHR is expanding the ECHR to create new rights that the UK, as a party to the ECHR, did not agree to. Such a claim in respect of LGBT rights is without foundation, because the ECHR organs have never created 'new rights' for LGBT people. In general, when dealing with issues relating to discrimination on the grounds of sexual orientation or gender identity, the ECHR organs have taken a highly cautious and conservative approach to interpreting the ECHR in order to limit any evolution in recognising the rights of LGBT people. This cautious and conservative interpretative approach has taken two principal forms: first, the ECtHR has sometimes adopted an originalist interpretation of the ECHR; secondly, and more commonly, the ECtHR has applied the concept of European consensus.

The ECtHR's originalist approach to interpreting the ECHR – which is enshrined in its long-standing principle that, although the ECHR and its Protocols must be interpreted in the light of present-day conditions, the ECtHR 'cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset'<sup>19</sup> – has often been the basis on which it has rejected complaints by LGBT people about discrimination. The clearest current example of this is the ECtHR's repeated rejection of complaints by same-sex couples against states that do not allow them to marry. The ECtHR has advanced an originalist interpretation of the right to marry contained in Article 12 ECHR in order to assert that the choice of wording in that Article – which grants the right to marry to 'men and women' – must be 'regarded as deliberate' and understood in 'the historical context in which the Convention was adopted' when, in the 1950s, 'marriage was clearly understood

17 *Tyrer v the United Kingdom* 5856/72 (ECtHR, 25 April 1978) para 31.

18 *Scoppola v Italy (No 2)* [GC] 10249/03 (ECtHR, 17 September 2009) para 104.

19 *Johnston and Others v Ireland* [Plenary] 9697/82 (ECtHR, 18 December 1986) para 53.

in the traditional sense of being a union between partners of different sex'.<sup>20</sup> I have argued elsewhere that the ECtHR's historical understanding of the choice of wording in Article 12 ECHR is wrong – because the origins of the choice of wording do not in any way relate to a concern to limit marriage between a man and a woman<sup>21</sup> – but the ECtHR's originalist interpretation is central to its continuing view that Article 12 ECHR does not impose an obligation on states to grant same-sex couples access to marriage.

The ECtHR's current interpretation of Article 12 ECHR is also informed by its use of consensus analysis to determine the level of support for same-sex marriage across states. The ECtHR has stated that, although 'the institution of marriage has undergone major social changes since the adoption of the Convention, [...] there is no European consensus regarding same-sex marriage'<sup>22</sup> and, on this basis, has rejected the claim that it should apply the living instrument doctrine to interpret the ECHR in the light of the present-day relationships of same-sex couples. The absence or existence of a European consensus has often been decisive in determining whether the ECtHR has been prepared to evolve its interpretation of the ECHR to provide protection against discrimination on the grounds of sexual orientation and gender identity. For example, the 'clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals'<sup>23</sup> was central to the ECtHR evolving its interpretation of the ECHR in order to protect the right of transgender people to have access to legal recognition of their sex/gender. Similarly, in deciding not to evolve its interpretation of the ECHR in respect of transgender people who are denied legal recognition of their sex/gender unless they terminate a pre-existing different-sex marriage (because they live in a state that does not recognise same-sex marriage), the ECtHR relied on, among other things, the absence of consensus in states which do not allow same-sex marriages on how to deal with gender recognition in these cases.<sup>24</sup>

There is no evidence to support the claim that the ECtHR has deployed an evolutive interpretation of the ECHR to create new rights for LGBT people that go beyond the ECHR's context or its object and purpose. What the

20 *Schalk and Kopf* (n 12) para 55.

21 P Johnson, "'The Choice of Wording Must Be Regarded as Deliberate': Same-Sex Marriage and Article 12 of the European Convention on Human Rights' (2015) 40(2) *European Law Review* 207.

22 *Schalk and Kopf* (n 12) para 58.

23 *Christine Goodwin v the United Kingdom* [GC] 28957/95 (ECtHR, 11 July 2002) para 85.

24 *Hämäläinen v Finland* [GC] 37359/09 (ECtHR, 16 July 2014) para 74.



ECtHR has done, in certain cases, is to use an evolutive interpretation of the ECHR to ensure that it can be practically and effectively applied to deal with contemporary aspects of discrimination suffered by LGBT people. Yet, even when the ECtHR evolves its interpretation of an existing ECHR right in such a way that results in a new obligation being placed on states, this is very often informed by existing consensus on the issue in question. For example, when the ECtHR recently confirmed that, in accordance with their positive obligations under Article 8 ECHR, states are required to ‘provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship’,<sup>25</sup> it explicitly stated that this was ‘in line with the tangible and ongoing evolution of the States Parties’ domestic legislation and of international law’.<sup>26</sup> In this respect, the ECtHR noted that 30 states provided for the possibility of legal recognition of same-sex couples and, in these circumstances, ‘it is permissible to speak at present of a clear ongoing trend within the States Parties towards legal recognition of same-sex couples’.<sup>27</sup> Therefore, although the development of a new obligation (which is not, as is sometimes erroneously claimed, the creation of a ‘new right’) will require some states to make certain changes in order to meet the obligation, such a development is often the result of the ECtHR being cognisant of changing conditions in states and responsive to the ‘emerging consensus as to the standards to be achieved’.<sup>28</sup>

Because the ECtHR very often waits for a consensus among states to emerge on any aspect of discrimination against LGBT people, any evolution in interpretation of the ECHR has usually been chronically slow. Such slowness is epitomised by the evolution of the interpretation of Article 8 ECHR in respect of criminal laws that maintained a higher ‘age of consent’ for same-sex sexual acts between men in the UK. When, in 1978, the ECmHR considered a complaint about English law that maintained a higher age of consent for male same-sex sexual acts (compared to different-sex or female same-sex sexual acts), it explicitly rejected the applicant’s argument that, because the majority of European states had an age of consent that was fixed at 18 years or below, the minimum age of 21 years for male same-sex sexual acts in England and Wales was not necessary in a democratic society.<sup>29</sup> In rejecting the applicant’s complaint the ECmHR stated that ‘[w]hile there is consensus among most European countries that legislation controlling homosexual behaviour is

25 *Fedotova and Others v Russia* [GC] 40792/10 and others (ECtHR, 17 January 2023) para 178.

26 *Ibid* para 166.

27 *Ibid* para 175.

28 *Stafford v the United Kingdom* [GC] 46295/99 (ECtHR, 28 May 2002) para 68.

29 *X v the United Kingdom* 7215/75 (ECmHR, report, 12 October 1978) para 147.

necessary there appear to be differing views as to the age of consent, if any, that is appropriate'.<sup>30</sup> Nineteen years later, when the ECmHR changed its opinion and found that a higher age of consent for male same-sex sexual acts amounted to a violation of Article 8 ECHR in conjunction with Article 14 ECHR, it stated that 'equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe'.<sup>31</sup> Whilst such a deference to 'European consensus mitigates the "surprise effect" of evolutive interpretation'<sup>32</sup> of the ECHR, it also means that any evolution of the ECHR to protect LGBT people usually advances at a glacial pace because it depends upon the existence of a level of agreement across states.

The ECtHR's approach to evolving its interpretation of the ECHR in respect of LGBT rights cannot be characterised as one of mission creep but, rather, as one of a sustained deference to the prevailing views across states. Whilst such an approach can be frustrating for LGBT people, who seek a faster evolution of the recognition of their human rights under the ECHR, it is vitally important for LGBT people that the UK remain part of this evolving sphere of legal protection. Although the ECtHR can and should be criticised when it fails to evolve its interpretation of the ECHR to protect LGBT people, such criticism should go hand-in-hand with support for the ECtHR's mission 'to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States'.<sup>33</sup> It is vital for LGBT people that the UK remains part of the ECHR system, which enables them, in light of the evolving standards of human rights protection developed by the ECtHR, to address any inadequacies or failures in public policy in the UK relating to protection from discrimination on the grounds of sexual orientation and gender identity.

#### 4 No Harm to Democracy, but a Safeguarding of Democratic Values

A third principal aspect of contemporary criticism of the ECtHR is that it intervenes in areas that should be the preserve of UK policy-makers and, in doing so, harms British democracy and overrides British values. This, Suella Braverman MP has claimed, is deeply problematic for the UK because it

<sup>30</sup> Ibid para 146.

<sup>31</sup> *Sutherland* (n 5) para 59.

<sup>32</sup> K Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) *German Law Journal* 1730, 1745.

<sup>33</sup> *Karner* (n 10) para 26.

means that the ECtHR can ‘thwart aspects of our domestic policy making’.<sup>34</sup> Braverman has argued that ‘[n]o matter what side of the debate one takes on the scope of fundamental rights [...] the primary and legitimate vehicle to resolve disagreement is Parliament [because] our Parliament is elected by the people, for the people, to enable self-government’.<sup>35</sup> The essence of such claims is that the power and authority of democratic institutions, such as the UK Parliament, is being eroded by the judicial overreach of the ECtHR.

Such claims are made in the context of long-standing debates about the extent to which states should be afforded a margin of appreciation to secure to everyone within their jurisdiction the rights and freedoms contained in the ECHR and at what point they should be subject to ‘European supervision’.<sup>36</sup> Such debates began at the time that the ECHR was being conceived, as demonstrated by remarks made, in 1949, by Winston Churchill MP:

once the foundation of Human Rights is agreed on [...] we hope that a European Court might be set up, before which cases of the violation of these rights in our own body of twelve nations might be brought to the judgment of the civilised world. Such a Court, of course, would have no sanctions and would depend for the enforcement of their judgment on the individual decisions of the States now banded together in this Council of Europe. But these States would have subscribed beforehand to the process, and I have no doubt that the great body of public opinion in all these countries would press for action in accordance with the freely given decision.<sup>37</sup>

The ECHR system continues to operate in line with how Churchill imagined it: states have the primary responsibility to secure the rights and freedoms defined in the ECHR but are subject to the supervisory jurisdiction of the ECtHR and undertake to abide by the final judgment of the ECtHR in any case to which they are parties. This system allows states to collectively hold each other to account in cases where one state departs from, what Churchill described as, the human rights agreed upon by ‘the civilised world’. This is,

34 S Braverman, ‘The Abuse of Human Rights, the Long Tail of Blairism, the Corrosive Role of Strasbourg – and What We’ll do About it’ (Conservative Home, 12 August 2022): <<https://conservativehome.com/2022/08/12/suella-braverman-the-abuse-of-human-rights-the-long-tail-of-blairism-the-corrosive-role-of-strasbourg-and-what-well-do-about-it>>.

35 Ibid.

36 *Handyside v the United Kingdom* [Plenary] 5493/72 (ECtHR, 7 December 1976) para 49.

37 Consultative Assembly, First Session, 10 August – 8 September 1949, Reports, Part I, Sittings 1 to 6 (Council of Europe, 1949) 284.

therefore, a system that was ‘designed to promote and maintain the ideals and values of a democratic society’.<sup>38</sup>

Yet, whenever the UK has been found by the ECtHR to have violated the ECHR, there have often been claims that this amounts to a problematic interference with and diminishment of British democracy and values. Such claims have certainly been made when the ECtHR has ruled against the UK government in cases relating to LGBT people. For example, when, in 2000, the UK government announced the removal of the blanket ban on gay men and lesbians serving in the armed forces, in response to adverse judgments by the ECtHR, Iain Duncan Smith MP, then Shadow Secretary of State for Defence, stated that one of his ‘greatest concerns’ was ‘the way in which the convention is being applied to the military’ which, he claimed, created the ‘danger that issues such as the role of women in the front line and even our training policy could be decided by the European Court of Human Rights and not by our own Government and armed forces’.<sup>39</sup>

The claim that the ECtHR is a danger to or diminishes democracy should make no sense to anyone in the UK, because a respect for democratic values is so obviously central to the ECHR system. It is obvious, for example, in the long-standing principle of subsidiarity, which ensures that states have the primary responsibility to secure the rights and freedoms defined in the ECHR. One key way the principle of subsidiarity is operationalised in the ECHR system is through the ECHR admissibility criteria, which ensures that the ECtHR may only deal with a matter after all domestic remedies have been exhausted. In essence, this means that states are ‘dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system’.<sup>40</sup> This principle was central, for example, to the decision in the recent and much publicised Northern Ireland ‘gay cake’ case, in which the ECtHR held – wrongly, in my view<sup>41</sup> – that the application was inadmissible because the applicant had deprived the domestic courts of the opportunity to consider his ECHR complaints, was inviting the ECtHR ‘to usurp the role of the domestic courts’, and this was ‘contrary to the subsidiary character of the Convention machinery’.<sup>42</sup>

What the ECHR system provides is a final safeguard, in the form of the ECtHR, to address situations in which a state has failed to secure the rights

38 *Gozelik and Others v Poland* [GC] 44158/98 (ECtHR, 17 February 2004) para 89.

39 HC Deb 12 January 2000, vol 342, col 290.

40 *Vučković and Others v Serbia* [GC] 17153/11 and others (ECtHR, 25 March 2014) para 70.

41 P Johnson, ‘The Love of Law, and the Law of Love: Jonathan Cooper and LGBT Human Rights Advocacy’ (2022) *European Human Rights Law Review* 33.

42 *Lee v the United Kingdom* 18860/19 (ECtHR, dec, 7 December 2021) paras 77–78.

and freedoms that it has committed itself to. Those opposed to any form of European supervision, regardless of how effectively it is tempered by the principle of subsidiarity, would wish to remove this safeguard and leave national governments with the final say on matters relating to human rights. LGBT people in the UK, remembering how often governments (and legislative processes generally) have failed to ensure the protection of their human rights, should resist the removal of the ECtHR as a mechanism for defending themselves against discrimination. LGBT people in the UK should subscribe to the Churchillian principle that when their human rights are violated by the state, the ECtHR provides a machinery for bringing that violation to the attention and judgment of 45 other democratic states. This machinery is crucially important for minority groups like LGBT people, who are so often subject to discrimination based on the bias or hatred of a majority. This majority sometimes includes parliamentarians whose bias against LGBT people can become expressed through the creation of discriminatory legislation. In such cases, the ECtHR provides an authoritative method of reminding states of the important hallmarks of a democratic society – ‘pluralism, tolerance and broadmindedness’<sup>43</sup> – and that ‘democracy does not simply mean that the views of the majority must always prevail’ but that a ‘balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’<sup>44</sup>

## 5 Conclusion

My aim in this article has been to explain why it is of vital importance for LGBT people that the UK should remain a party to the ECHR. I have sought to explain this in the context of an intensification of criticism of the ECtHR in the UK, which is sometimes the basis for arguing that the UK should withdraw from the ECHR. LGBT people should reject this argument and, in doing so, seek to foster and promote a climate in which the ECtHR is empowered to take decisions that best protect human rights, regardless of whether these decisions are unpopular with the majority of people in the UK or with governments. In such a climate, the ECtHR will be better able to fulfil its mission and operate effectively as the ‘Conscience of Europe’,<sup>45</sup> thereby maximising the protection of the human rights of LGBT people. Maintaining this protection is crucial

43 *Handyside* (n 36) para 49.

44 *Gorzelik and Others* (n 38) para 90.

45 J Coleman (ed), *The Conscience of Europe* (Council of Europe 1999).

for LGBT people in the UK who, at any time in the future, could be subject to changes in domestic public policy that seek to limit or ‘roll back’ their human rights – changes that LGBT people in the UK should fear as they live through, what Victor Madrigal-Borloz has recently described as, ‘the extreme pressure and hostility of a public debate which, today, questions rights that are directly connected with their dignity and, in some cases, their very existence.’<sup>46</sup>

If LGBT people in the UK need further persuading of the merits of having access to an effective ECtHR, they can recall the lengths to which LGBT people have gone, and the struggles in which they have engaged, to secure the existing protections of their human rights under the ECHR. It has never been easy to persuade the ECtHR to recognise and protect the human rights of LGBT people, but LGBT people have kept ‘chipping away’, ‘bit by bit’, until they ‘break through’ the resistance of the ECtHR.<sup>47</sup> Because of the tenacity of LGBT people, the ECtHR has established important general standards which should protect LGBT people from discrimination – for instance, by stating that if the reason for treating someone differently is based solely on their sexual orientation, this would amount to discrimination under the ECHR.<sup>48</sup> Notwithstanding the continuing shortcomings of the ECtHR – it, lamentably, still too frequently rejects complaints about discrimination suffered by LGBT people – LGBT people in the UK should remember the important armoury of protection they have fought to develop under the ECHR and champion the UK’s continuing commitment to the ECHR system. If the UK were to withdraw from the ECHR, LGBT people in the UK, when suffering violations of their human rights, would have no recourse to a system through which the UK government could be held to account in relation to the evolving standards for protecting human rights in European democratic societies. This would be disastrous for LGBT people in the UK.

46 V Madrigal-Borloz (United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), ‘Country Visit to the United Kingdom of Great Britain and Northern Ireland (24 April – 5 May 2023): End of Mission Statement’ (United Nations, 5 May 2023): <<https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/statements/eom-statement-UK-IE-SOGI-2023-05-10.pdf>> para 93.

47 Mary Simpson, the applicant in *Simpson* (n 10), quoted in Johnson (n 1) 137.

48 *Kozak v Poland* 13102/02 (ECtHR, 2 March 2010) para 92.