A tale of two Europes: How conflating the European Court of Human Rights with the European Union exacerbates Euroscepticism

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Abstract
This article focuses on the phenomenon of conflating the European Court of Human Rights with the European Court of Justice and European Union in British political and media discourse. Scholars of the European Court of Human Rights and Euroscepticism often acknowledge conflation, but rarely specify the forms it takes or its specific effects on British perceptions of the legitimacy of European institutions. This article identifies three main forms of conflation: muddled conflation, ambiguous conflation, and deliberate conflation. It shows that conflation can be both a symptom of deeper Eurosceptic disregard for the roles and purposes of distinct European institutions, and a deliberate rhetorical tool, intended to weaken the legitimacy of separate institutions by tying criticisms of one to the other. The article demonstrates that conflating the different Europes contributes to the persistence of Strasbourg sceptic narratives in the British political sphere by exacerbating pre-existing concerns and providing additional opportunities to raise them in public.

Keywords
conflation, European Court of Human Rights, European Union, United Kingdom, Euroscepticism, Strasbourg scepticism, legitimacy

Introduction
Between 2008 and 2016, the British press covered a series of stories about the Government’s efforts to deport foreign criminals and terror suspects being blocked by European law. ‘European judges thwart attempts to deport foreign terrorist suspects’, the Times declared (Ford, 2008), while the Telegraph wrote of British courts winning ‘back the power to deport terrorist suspects, criminals and failed asylum seekers after European judges were
told to stop interfering’ (Whitehead, 2011). Later, the Telegraph used similar language again to announce ‘European court challenges Britain’s right to deport all foreign criminals’ (Holehouse, 2016). Similarities in the headlines and concerns about decisions of the British Government and courts being overruled are clear. But the articles refer to two different Europes. The first two articles focus on rulings by the European Court of Human Rights (ECtHR), based in Strasbourg and established by the Council of Europe in 1959 to interpret the European Convention on Human Rights (ECHR). The latter refers to a ruling by the Court of Justice of the European Union (CJEU), charged since 1952 with interpreting European Union (EU)/European Community (EC) law from its seat in Luxembourg.

Referring to distinct European institutions under the broad umbrella of ‘Europe’ is a well-known phenomenon in British politics. From headlines about judicial rulings being handed down by unspecified ‘meddling European judges’ (Slack, 2011), to politicians misunderstanding the relationship between the ECtHR and EU, acts of conflation are a central feature of public discussions of the United Kingdom’s interactions with the continent. They are regular reminders that when the United Kingdom conceives of specific institutions, they are attached to a bigger geographical, cultural and historical whole – one from which the United Kingdom is often perceived as irreconcilably different. For the ECtHR in particular, this rhetorical shorthand results in confusion about what the Court does and to which parent body it is accountable, as the Court is subsumed by the better-known EU’s more expansive remit and more direct influence over domestic law.

But what effects does conflation of the ‘Two Europes’ have on the United Kingdom’s relationship with the Strasbourg human rights system? Given that the ECtHR faces its own criticisms and legitimacy challenges, to what extent does conflation add to or exacerbate more substantive concerns about the role of Convention law in the British constitutional order? In studies of the politics of the ECtHR, scholars regularly point to the conflation of the Strasbourg Court with the EU to explain the Court’s legitimacy problems, suggesting that the legitimacy of the ECtHR is undermined by its intrinsically European nature and perceived association with the EU (Drewry, 2007: 102; Lambrecht, 2019: 49; Voeten, 2013: 422; Ziegler et al., 2015: 506). Yet, this argument is only ever made in passing; the assumption that conflation reinforces Euro- and Strasbourg scepticism is taken for granted. Less attention is paid to the different forms conflation might take or the precise nature of its effect on British perceptions of European institutions. In return, Euroscepticism literature focuses almost exclusively on the EU. It rarely examines how criticisms of the EU overlap with or differ from criticisms of the Council of Europe and ECtHR, assuming that opposition to other parts of Europe is primarily ‘collateral scepticism’ (Leruth et al., 2018: 4).

This article focuses on the phenomenon of conflation – the combining, treating interchangeably or subsuming of separate institutions under the same umbrella – in British political and media debate about the Two Europes. It argues that conflation is a crucial factor for understanding what I call here ‘Strasbourg scepticism’ as a ‘persistent and embedded’ (Usherwood and Startin, 2013) feature of the United Kingdom’s relationship with the European human rights system. Using qualitative content analysis of language employed to describe European institutions, the article identifies three main forms of conflation: muddled conflation, where different European bodies are confused or incorrectly labelled; ambiguous conflation, where actors refer to ‘Europe’ without specifying the relevant bodies; and deliberate conflation, acts which purposefully draw connections between the EU and ECtHR to cast the separate institutions as part of a broader entity. The article then turns to two case studies – conflation in discussion of the ECtHR and
Brexit, and conflation in a series of ECtHR cases about prisoners’ rights – to demonstrate how different forms of conflation operate when it comes to criticising the ECtHR and EU. The case studies reveal that conflation can be both a symptom of deeper Eurosceptic disregard for the roles and purposes of distinct institutions, and a deliberate rhetorical tool, deployed by critics to weaken the legitimacy of separate institutions by tying criticism of one to the other. In doing so, the article demonstrates that conflating the different Europes contributes to the persistence of Strasbourg-sceptic narratives in the British political sphere by exacerbating pre-existing concerns and providing additional opportunities to raise them in public. Thus, while acts of conflation tend to be a reflection of deeper substantive scepticisms, their presence in British political discourse plays a key role in shaping how British political and public actors view and interact with the ECtHR.

**Strasbourg-scepticism as persistent Euroscepticism**

Scholarship on British Euroscepticism now firmly understands political opposition to Europe as ‘persistent and embedded’ (Usherwood and Startin, 2013). Far from a temporary or marginal phenomenon, British Euroscepticism permeates any and all matters concerning Europe, producing a ‘broadly Eurosceptic political environment that persistently manifests Eurosceptic outcomes’ (Gifford and Tournier-Sol, 2015: 5). Sceptical attitudes towards the EU are apparent across the British public sphere, not only in government and parliament but also the judiciary, media and public debate. Moreover, persistent Euroscepticism is characterised as being an ‘essential’ or intrinsic part of British culture and identity (Spiering, 2015: 18). Narratives of British (especially English) exceptionalism emphasise Britain’s distinctive history, constitutional and political traditions, and language and culture, to tell an ‘Island story’ that casts the European continent as fundamentally and incompatibly different from the United Kingdom (Wellings and Baxendale, 2014: 10). These narratives are central to understanding how the United Kingdom interacts with and perceives Europe, colouring not only the country’s relationship with the EU but other European institutions, including the Council of Europe and Strasbourg human rights system. This context of entrenched, persistent and intensifying scepticism towards ‘Europe’ in British politics produces an environment ripe for conflation, as separate bodies with independent remits are framed as part of a nebulous, all-encompassing political project and continent. But research on Euroscepticism overwhelmingly focuses on the EU, while studies of criticism of the ECtHR tend to emphasise legal and rights-based criticisms (Lambrecht, 2019; Popelier et al., 2016). There is a gap where the perceptions and consequences of the ECtHR’s ‘Europeanness’ are neglected or taken for granted. In order to understand the distinct effects of conflation on British perceptions of the legitimacy of the ECtHR, then, understanding where generalised Euroscepticism diverges from Strasbourg-specific critiques is key.

Differences between EU-scepticism and Strasbourg-scepticism are not so much a matter of substance but of delivery. The basic content underpinning both strands is broadly similar. Narratives concerning both Brussels and Strasbourg emphasise British sovereignty and push for the United Kingdom to stand up to overbearing foreign institutions. The EU and ECtHR are both accused of ‘mission creep’ and being ‘overweening’ foreign institutions that defy British notions of common sense (Conservative Party, 2014: 3; Evans-Pritchard, 2016b; Redwood, 2011). For the CJEU and EU, this criticism can apply broadly to any policy area affected by EU law. Strasbourg rhetoric tends to focus more narrowly on Britain’s unique constitutional institutions such as the absence of formally
entrenched rights and the common law to suggest that the ‘British approach’ to rights, politics and law (Jay, 2017) is intrinsically different to the ‘European way of thinking’ (Dale, 1976: 302). Likewise, the language of ‘taking back control’, which first served as a slogan for the Vote Leave Campaign during the 2016 EU membership referendum, has entered debates about the Strasbourg system through calls to ‘take back control of human rights’ (Russell, 2019). Both phrases also echo the Home Office (1997) assertion that introducing the Human Rights Act (HRA) would ‘bring rights home’. Regardless of the institution, the message throughout these narratives is clear: a degree of sovereignty has been removed from the United Kingdom by ‘Europe’, and must be returned.

The strands differ, however, in two key respects. First, while the United Kingdom joined the European Community well after its creation, it was a founding member of the Council of Europe and key drafter of the Convention on Human Rights. This fosters an ‘originalist’ view of the ECHR in Strasbourg sceptic narratives, emphasising the Convention’s initial purpose (as conceived by the British drafters) as a safeguard against totalitarianism and as a document which should ultimately be applied and enforced by national authorities (Hoffmann, 2009; Nicol, 2005). The original intent critique emphasises a sense of British ownership over the Convention system which cannot be claimed over the EU. Criticisms of Strasbourg therefore often stress reform or a ‘return’ to the system’s original focus – as demonstrated by the Conservative Government’s shift from proposals to withdraw from the Strasbourg system in favour of reforming the HRA – in contrast with the more widespread demands for a ‘hard’ withdrawal from the EU.

Second, the CJEU is framed (accurately) as one part among many in the larger EU apparatus. The Court is accused of meddling, but so are the European Commission and the EU as a whole. The CJEU is described as the ‘EU’s court’ (Daily Mail, 2017; Howard and Aikens, 2016), while the ECtHR – when not being conflated with the EU – is framed almost exclusively as a stand-alone institution. The Council of Europe, despite being the political body that established the Court and oversees compliance with its rulings, is barely mentioned in the United Kingdom (for exceptions, see Hall, 2012; Hirsch, 2010). Whether the Council is overlooked because the ECtHR is often conflated with the EU or the other way around may vary, but this dynamic creates an environment in which it is unclear to whom the ECtHR is accountable, making it an easy target for scepticism.

**Mainstreaming Strasbourg scepticism**

In the first decades of the United Kingdom’s relationship with Strasbourg, calls to radically curtail the jurisdiction of the ECtHR, or leave it altogether, remained on the margins of public discourse. Enoch Powell’s complaint that Britain should withdraw from ‘the monstrous contraption’ that was the ECHR is one such example (Belfast Telegraph, 1977), although it was not a stance the Government took seriously (Bates, 2015). Instead, British Governments ultimately accepted adverse judgements against the United Kingdom, albeit sometimes reluctantly. These Governments also continued to renew the United Kingdom’s optional jurisdiction to the Court, indicating that while they disliked certain rulings, the legitimacy of the Convention and Strasbourg system as a whole remained intact.

But moderate concerns, similar to those expressed by other States Parties to the ECHR, have evolved into scepticism bordering on hostility among some members of the British political and judicial elite. Claims that the Court has ‘aggrandised its jurisdiction’ and undermines British sovereignty have intensified noticeably since the mid-2000s (Bates,
The intensification and mainstreaming of Strasbourg scepticism in this period have several causes. First, incorporation of European human rights law into the domestic legal order has altered the balance between parliament and courts in the domestic constitutional order. The HRA, intended to give domestic judges greater interpretive control over the Convention’s application in the United Kingdom (Straw and Boateng, 1997: 71), was instead perceived by critics as exposing the United Kingdom to abstract, European-style judicial review, at the expense of pragmatic, issue-based common law interpretation and parliamentary sovereignty (Gearty, 2016; Masterman, 2016). The HRA thus became a vector through which Strasbourg sceptics could channel narratives of British sovereignty and constitutional exceptionalism.

At the same time, the ECtHR heard several high-profile cases against the United Kingdom. Cases concerning the deportation of terror suspects and the right of prisoners to vote were perceived, especially among Conservative MPs (members of parliament) and the tabloid press, to be disrupting the existing balance in the United Kingdom between individual human rights and national and public security, and threatening the right of the directly elected and sovereign parliament to legislate as it saw fit. The ECtHR was accused of ‘mov[ing] the goalposts’ to keep the government from acting to deport dangerous criminals (May, 2013). These adverse rulings make up a tiny fraction of the total cases brought against the United Kingdom, but they play directly into the original intent critique, fuelling perceptions that the HRA is a foreign instrument, designed to grant excessive power to judges in Strasbourg.

Finally, growing concerns about judicial overreach in Strasbourg run parallel to the United Kingdom’s deepening relationship with the EU. Accepting the supremacy of EU/EC law via the European Communities Act 1972 occurred separately but contemporaneously to the ECtHR’s first judgements against the United Kingdom, marking the beginning of the United Kingdom’s relationship with ‘Europe’ defined along separate, but twin institutional tracks. The overlap is clearest in the Conservative Party’s (2014: 73) parallel election promises to not only hold a referendum on Britain’s EU membership but also ‘scrap Labour’s HRA and introduce a British Bill of Rights’. Polling by YouGov in 2013 and 2014 revealed that between 41% and 48% of those polled believed the United Kingdom should withdraw from the ECHR – figures which closely resembled simultaneous polling on British withdrawal from the EU (YouGov, 2014). Similarities in the dynamics of the twin-track relationships and overlaps in the language used to describe them mean that mainstreaming of opposition towards one institution creates additional opportunities to express opposition towards the other, effectively doubling Europe’s perceived control over British law and politics. The mirror-image criticisms generated by similarities in the United Kingdom’s relationships with the Two Europes are thus a key factor in understanding the persistence and mainstreaming of opposition towards Strasbourg.

**Conflating the Two Europes**

Conflation of the Two Europes is frequently acknowledged by scholars of the ECtHR as a symptom of a broader Eurosceptic disregard for any and all European institutions (Drewry, 2007: 102; Lambrecht, 2019: 49; Masterman, 2016: 451; Ziegler et al., 2015:
However, despite widespread awareness of the phenomenon, less time has been dedicated to exploring the forms conflation takes, or the precise nature of its effect on British perceptions of European institutions. One notable exception is David Mead’s (2015) research on the British media’s coverage of human rights, which identifies conflation of separate European institutions as one form of misleading reporting on human rights stories. The muddling of both Europes contributes to inaccurate understandings of human rights, and plays into bigger narratives about the British justice system and who is deserving of rights. Likewise, Lieve Gies (2015: 43) emphasises the central role of the British media in blurring the distinctions between different European institutions, noting that the

strong Eurosceptic stance of the right-leaning press and the perceived alien nature of human rights have created a climate in which distrust of Europe infects anything that is directly or even indirectly associated with human rights in a European context.

This echoes similar arguments about the Eurosceptic press’ role in mainstreaming hard-line opposition to the EU and support for a membership referendum (Startin, 2015), highlighting the significant influence of the media over public perceptions of both the EU and ECtHR. Still, Mead and Gies do not identify differences in specific forms of conflation, which vary considerably depending on factors such as intent, context and the precise language used in particular acts of conflation. Their work also stresses the effects of such conflation on domestic media consumers’ impressions of human rights in the United Kingdom, rather than on the consequences it may have for the dynamics of British Euroscepticism and the United Kingdom’s relationships with the ECtHR and EU.

**Methods**

In order to examine the different forms conflation takes and how they relate to Strasbourg scepticism, I conducted a qualitative content analysis of the terms used by politicians, judges and the media to describe European institutions (both independently and in discussions about more than one), followed by analysis of two case studies. Qualitative content analysis provides the flexibility necessary to examine the relatively fluid forms conflation can take and different contexts in which it can occur, while the case studies allow for closer interpretation and ‘thick description’ (Geertz, 1973) of how different forms of conflation relate to Euro- and Strasbourg scepticism to affect the United Kingdom’s interactions with European institutions.

Using keyword searches for the terms ‘European court’, ‘European judges’ and ‘European rights’ in the Gale One and NewsBank databases and media outlets’ websites, I collected 1646 articles and editorials from the national broadsheet and tabloid newspapers (Times, Guardian, Telegraph, Independent, The Sun, Daily Mail, Express and the BBC’s written online articles) between 2010 and 2019. For the case studies, I supplemented the media dataset with politicians’ speeches and media appearances, party manifestoes and policy documents, judges’ extrajudicial writings and public lectures, and additional online media coverage not available in the print databases, using a snowballing technique from secondary literature and from within the media coverage. The keywords are deliberately broad to capture articles that refer to both the ECtHR and CJEU. Even
with the broad search terms, the collected articles are not an exhaustive list of all instances of conflation, or all coverage of topics relating to either European court. The articles were selected on the basis of having at least one keyword or related term in the headline, meaning articles about a European court with headlines that focused on the details of a case rather than the court itself were not included in the dataset. Nonetheless, I focused on the presence of keywords in headlines because of the role headlines play in alerting audiences to the content of an article, and to ensure that at least one European institution was a subject of each article.

The 2010–2019 period captures several of the major ECtHR cases which served as triggers for Strasbourg scepticism, as well as the Brexit referendum and negotiation era, during which Britain’s place in Europe has been a topic of mainstream concern. On a practical level, selecting this decade made it easier to include the BBC’s online content, which was not available in the print edition databases. Collecting data across the 10-year period – rather than from a shorter period or using constructed week sampling – also enabled analysis of longer term patterns of conflation.

I identified three main forms of conflation: muddled, ambiguous, and deliberate. These categories are derived from a preliminary analysis during data collection of how precisely actors describe separate institutions, that is, whether actors misconstrue or inaccurately describe an institution or relationship between institutions (muddled); whether they do not specify which part of ‘Europe’ they are referring to at all, either in the headline or the text (ambiguous); or whether they specify a distinction or accurate relationship between separate institutions but draw links between them anyway (deliberate). This categorisation is broad; the focus is on capturing differences in the language used to discuss European institutions, but the motivation behind the language – whether conflation is intentional or accidental – may vary across actors and context.

To examine both how frequently conflation of any type occurs relative to non-conflation, and how frequently different types appear relative to each other, I coded each article by conflation or no conflation (Table 1), and by type of conflation (Table 2). Whether an act of conflation is perceived as ambiguous or deliberate will vary depending on how much additional context a particular reader understands, so the results presented here are indicative of patterns of conflation rather than definitive classifications. For this study, I classed articles with any reference to the specific institutions (such as ‘EU’, ‘rights court’, ‘Luxembourg’, ‘Strasbourg’, ‘CJEU’ and ‘ECtHR’) as instances of no conflation, but classed articles where knowing details of the case is necessary to determine the relevant court (terms such as ‘prisoners’ rights’ or ‘right to be forgotten’) as ambiguous conflation.

Importantly, within the content collected, the bulk of the instances where distinct institutions appear to be conflated or referred to ambiguously come from the media or from politicians addressing local audiences. This finding suggests that conflation is a predominantly inward-facing phenomenon, related to the ways in which European institutions are portrayed by elite actors to the public within the United Kingdom. In outward-facing interactions, such as judicial dialogue between British and European courts, or in political speeches directed towards European audiences, the language used to describe the relevant bodies tends to be much clearer. Ultimately, the three distinct forms reveal some of the different ways Strasbourg sceptic criticism of the ECtHR is connected to similar criticisms regarding the EU, and vice versa.
Table 1. Prevalence of at least one form of conflation in UK newspaper articles featuring references to ECtHR or CJEU in headlines, 2010–2019.

|                | BBC       | Times     | Guardian  | Independent | Telegraph | Daily Mail | The Sun   | Express | Total     |
|----------------|-----------|-----------|-----------|-------------|-----------|------------|-----------|---------|-----------|
| Conflation, any form | 62.83% (120) | 41.48% (112) | 30.63% (68) | 40.78% (42) | 44% (132) | 54.72% (145) | 68.42% (91) | 52.47% (85) | 48.30% (795) |
| No conflation   | 37.17% (71) | 58.52% (158) | 69.37% (154) | 59.22% (61) | 56% (168) | 45.28% (120) | 31.58% (42) | 47.53% (77) | 51.70% (851) |
| Total           | 191       | 270       | 222       | 103         | 300       | 265        | 133       | 162     | 1646      |

ECtHR: European Court of Human Rights; CJEU: Court of Justice of the European Union.
|       | BBC         | Times       | Guardian    | Independent | Telegraph   | Daily Mail  | The Sun     | Express     | Total       |
|-------|-------------|-------------|-------------|-------------|------------|-------------|-------------|-------------|-------------|
| Muddled | 0% (0)      | 3.57% (4)   | 7.35% (5)   | 9.52% (4)   | 11.36% (15)| 8.28% (12)  | 25.27% (23) | 7.06% (6)   | 8.68% (69)  |
| Ambiguous | 98.33% (118)| 91.96% (103)| 86.76% (59) | 88.09% (37) | 81.82% (108)| 85.51% (124)| 74.73% (68) | 92.94% (79) | 87.54% (696)|
| Deliberate | 1.05% (2)  | 8.93% (10)  | 5.88% (4)   | 4.76% (2)   | 10.60% (14)| 17.93% (26) | 6.59% (6)   | 4.93% (8)   | 9.06% (72)  |

More than one form of conflation may be present in one article.
ECtHR: European Court of Human Rights; CJEU: Court of Justice of the European Union.
Muddled conflation

The first form of conflation is muddling: misconstruing or misunderstanding the nature of separate institutions to give the impression that the ECtHR is an EU body. For example, in a media interview in January 2019, then-Labour leader, Jeremy Corbyn, described the ECtHR as ‘only in part an EU institution’ (Corbyn, 2019). Corbyn acknowledges that the ECtHR is somewhat separate with the phrase ‘in part’, but the overall implication is that the ECtHR falls under the general EU umbrella. Similarly, errors in labelling European institutions perpetuate impressions that separate bodies are interchangeable, particularly when they occur in the press. During the Council of Europe’s Brighton Conference in 2012, at which the United Kingdom launched its proposal to reform the ECtHR system to limit the influence of the Court relative to states, articles in both the Independent and Telegraph referred to reforms at the ‘EU court’ (Beckford, 2012; Judd, 2012). The Telegraph article also used the terms ‘European Council’ and ‘Council of Europe’ interchangeably to describe the Council of Europe (Beckford, 2012). More recently, an article in the Times concerning the right of the CJEU to rule on any post-Brexit trade agreements between the United Kingdom and EU mistakenly declared in the headline that ‘Strasbourg would rule on future UK trade rights’ (Waterfield and Wright, 2020).

Muddling is the rarest of the three forms of conflation, occurring in less than 10% of the sampled articles in most UK newspapers (perhaps unsurprisingly, the exceptions are the tabloids The Sun, with 25.27% and Telegraph, with 11.36%). Nonetheless, muddling has particular consequences for how European institutions are perceived, because it fosters confusion about the purpose and function of different bodies. This confusion is multidirectional: an actor speaking about the ECtHR may refer to it in a way that betrays their own misunderstanding of the relationship between separate bodies, or they may speak in a way that generates confusion for others. Muddling may also occur with or without deliberate intent. Real overlaps and similarities between membership of the ECtHR and membership of the EU understandably contribute to accidental errors. For instance, signing the ECHR and accepting the ECtHR’s jurisdiction is a condition of EU membership, while the expansion of the EU’s own human rights jurisdiction through the EU Charter of Fundamental Rights and proposals for the EU to accede to the ECHR further contribute to ‘cross-fertilisation’ of the European human rights landscape (Ziegler et al., 2015: 4).

But muddling may also be intentional, deployed by Euroseptics to play on existing confusion or disregard for how European institutions work. Errors in the media are usually (but not always) corrected, but the original errors and the fact that they are made repeatedly point to what Ziegler et al. (2015: 506) describe as, at best, ‘a lack of care in differentiating the EU and ECHR, fudging “Europe” so that it becomes an amorphous, huge, almost omnipresent beast and object onto which all sorts of scepticisms are transferred’. Moreover, even with corrections, once articles muddling one Europe with another are published, they are seen by readers who absorb and potentially perpetuate the error. Given that UK citizens have among the lowest levels of knowledge about the EU (Daddow, 2012; Startin, 2015), and limited knowledge of the United Kingdom’s own human rights infrastructure (Hartmann and White, 2020: 16), conflation of the ECtHR with the EU in the media and among political actors can be seen as both reflecting and reinforcing poor understanding. This, in turn, affects how Europe is perceived: as a web of overlapping courts and councils either too complicated or too unimportant to distinguish between.
**Ambiguous conflation**

Ambiguous conflation bears similarities to muddled conflation, but where muddling entails misconstruing the nature of the relationship between different institutions, ambiguous conflation occurs when there is no attempt to distinguish between them. Instead, actors refer to ‘Europe’ as a blanket term, without clearly articulating which institution or part of Europe they mean.

Media coverage plays a critical role in this form of conflation through the use of open phrases such as ‘European court’ and ‘Euro judges’ in headlines and articles that refer to both the ECtHR and CJEU (Doran, 2016; Harrabin, 2018; Ledwith, 2017). One online Telegraph article, for example, features both ambiguous and muddled conflation, using the terms ‘EU laws’, ‘European laws’ and the ‘EU convention on human rights’ to discuss both the Cameron Government’s proposal to repeal the HRA and the influence of the CJEU over domestic constitutional law, even while providing a quote from Supreme Court judge, Lord Neuberger, which clarifies the difference between the Strasbourg and Luxembourg courts (McCann, 2015). Most articles do specify to which court they are referring in the subheading or body of the article. Interestingly, references to ‘Europe’ are not exclusive to the Eurosceptic press. Ambiguous conflation is also evident in Euro-neutral and Euro-positive stories, and appears across mainstream as well as tabloid media outlets – the BBC, Guardian, Independent and Times all use ‘European court’ and ‘European rights’ as shorthand to refer to both the CJEU and ECtHR. Moreover, they do so with a frequency that is broadly consistent with that of the Eurosceptic tabloids: instances of ambiguous conflation constitute between 81.82% (Telegraph) and 98.33% (BBC) of the articles featuring any forms of conflation, eclipsing the less frequent instances of muddling or deliberate conflation. Given that all the outlets use the full names of the CJEU and ECtHR in approximately half of all the headlines examined, it is arguable that the use of ‘Europe’ is a deliberate editorial choice, intended to capitalise on the ambiguity.

This environment of ambiguity exacerbates the confusion expressed by politicians such as Corbyn, and allows critiques particular to one institution to transfer to others and feed into bigger ‘Europe-sceptic’ narratives. Ambiguous conflation thus reflects British Eurosceptic notions of Europe as a monolithic whole, and provides an especially useful shorthand for hard Euroskeptics who seek Britain’s withdrawal from all European institutions. As Mead (2015: 456) writes, Euroskeptics do not need to distinguish between the two systems, because their aim is to ‘get out of all of them’.

**Deliberate conflation**

The final form of conflation is more deliberate and is most frequently expressed by more vehement critics of either or both European institutions. Here, actors state the connection between the EU and ECtHR explicitly, acknowledging that the two institutions are distinct bodies but tying them together as part of the same European scheme to meddle in the British political and legal system. Multiple articles suggested that plans to reform or withdraw from the ECtHR are redundant as long as the United Kingdom remained in the EU because ‘EU judges would simply take their place’ (Daily Mail, 2013; Raab, 2013; Slack, 2016). As well as drawing conscious links between the courts, the articles erroneously suggest the ECtHR’s rulings are less forceful and the EU is worse because ‘EU verdicts are legally binding’ (Slack, 2016). An editorial in the Telegraph from 2018
similarly describes the ECtHR as ‘effectively the sister of the EU in the long-running international project to weaken the right of nations to have their own laws made by their elected representatives’ (Moore, 2018). In doing so, the article casts the two European courts as partners in crime, fighting to undermine British national and parliamentary sovereignty on multiple fronts.

Drawing deliberate connections between the separate European bodies is a common tool among political and legal elites. David Cameron’s assertion at the Conservative Party Conference in 2014 that ‘it’s not just the European Union that needs sorting out – it’s the European Court of Human Rights’ is a familiar example (Cameron, 2014). This argument stresses criticisms unique to the ECtHR, pointing to the prisoner voting and deportation of suspected terrorist cases as examples of the need to reform the Court. But it also connects criticism of the ECtHR to the parallel criticism of the EU, raising similar themes about resisting ‘instruction’ from a foreign court, and about the superiority of the British tradition of political constitutionalism and parliamentary sovereignty by advocating withdrawal from the ECtHR to pursue ‘a new British Bill of Rights, to be passed in our parliament, rooted in our values’ (Cameron, 2014). Similarly, Lady Justice Arden of the Court of Appeal of England and Wales, though not questioning the legitimacy of either court, speaks of a coherent ‘European legal scene’, arguing that the ECtHR and CJEU are ‘rapidly becoming a community of courts and working together to produce a new European legal order in which all the domestic legal orders take part’ (Arden, 2014: 36). Thus, even when speaking about European institutions in neutral or positive contexts, treating the separate bodies as linked and as parts of a larger order is a core component of the language used to describe Europe.

**Conflation in action: Exacerbating existing scepticism**

All three forms of conflation have lasting effects on how the ECtHR is understood and responded to in the United Kingdom. Treating the ECtHR and EU as part of the same system reinforces scepticism towards both by linking the two institutions to each other’s perceived failings and democratic or juridical illegitimacy. This connection hits the ECtHR especially hard, as it ties the Strasbourg Court to the more extensive scope of EU laws, creating the impression that Strasbourg rulings are more frequent and are enforced with greater institutional power than they actually are. But the different forms also contribute to Eurosceptic perceptions of the ECtHR in different ways. The following examples demonstrate that deliberate conflation keeps Strasbourg sceptic narratives alive where they might otherwise fade from view.

**Deliberate conflation of the ECtHR and Brexit**

Despite the Conservatives’ temporary shift away from reforming the British human rights landscape, at least until Brexit is complete, the ECtHR and Convention have featured prominently in discussions in Brexit negotiations and discussions about the United Kingdom’s future relationship with the EU. Throughout these discussions, deliberate conflation has served as a key tool for channelling criticisms of both the EU and ECtHR into Brexit discourse, keeping Strasbourg sceptic narratives alive where they might otherwise fade from view.
During the EU membership referendum in 2016, withdrawal from the EU was used as a means to consider arguments for and against withdrawal from Strasbourg as well. Theresa May (2013) famously asserted that it was not the EU the United Kingdom should withdraw from, ‘but the ECHR and the jurisdiction of its court’, while Dominic Raab (in Mason, 2016) expressed concern about the legal gaps to which the United Kingdom might be exposed if it were to withdraw from only one court:

We cannot rule out withdrawal [from the ECHR] forever, but our forthcoming proposals do not include withdrawal from the convention, not least because of the clear advice we have received that if we withdrew from the ECHR while remaining an EU member it would be an open invitation to the Luxembourg court to fill the gap, which could have far worse consequences.

Commitment to one European institution is also levelled against political opponents as an accusation of loyalty to both, and by extension, disloyalty to Brexit. The outrage expressed by high-profile Brexit advocates following the 2017 Conservative Manifesto commitment to the ECHR is a key illustration. As former UK Independence Party leader, Nigel Farage (2017), tweeted, the ‘Tory decision to stay in ECHR shows that despite May’s tough election rhetoric she will lead us to a soft Brexit’. Similarly, when the UK Supreme Court (UKSC) ruled in R (Miller) (2019, UKSC: 41) that Prime Minister Boris Johnson’s prorogation of parliament was unlawful, Eurosceptic media and the Leave.EU Facebook campaign pointed to Lady Hale’s and Lord Kerr’s experiences as ad hoc judges for the ECtHR as evidence of their European sympathies and biases against Brexit (Leave. EU, 2019; Spillet, 2016).

The connections drawn between the EU and ECtHR in these instances have powerful effects in terms of keeping Strasbourg at the forefront of public debates about the United Kingdom’s relationship with Europe. The deliberate merging apparent in statements such as May’s and Raab’s perpetuate pre-existing concerns about the expansionist tendencies of the ECtHR and CJEU, stressing the possibility that leaving one court does not eliminate the problem of the other. Connecting the two courts in this way allows politicians to apply Euro- and Strasbourg sceptic criticisms to both courts simultaneously, and foreshadows arguments in favour of withdrawing from the ECtHR at a later date. Likewise, arguments made by hard Eurosceptic actors criticizing anyone with connections to either or both European institutions reinforce the narrative that European institutions are foreign, and that connections to Europe are a barrier serving British interests. The seeds sewn by this type of conflation suggest that anti-Strasbourg narratives will be further strengthened in the post-Brexit era, because, when it comes to ‘taking back control’ of British laws, Strasbourg and Brussels represent the same form of excessive power.

The effects of deliberate conflation are especially important in light of the EU’s attempts to make commitment to the ECtHR and Convention a condition of any agreement on the post-Brexit relationship between the EU and the United Kingdom. Suggestions from Brussels that the United Kingdom’s commitment to the Strasbourg system is necessary for cooperation on trade and law enforcement likely reflect concerns that the United Kingdom may ultimately seek to withdraw from the ECtHR as well (Boffey, 2018). The Conservative Government is now focusing on reviewing the HRA, rather than replacing it with a British Bill of Rights or reforming the ECtHR, but the possibility of withdrawal remains one of the key potential consequences of deliberate conflation and the gradual erosion of the ECtHR’s legitimacy through its (perceived) association with the EU. While advocates of withdrawal from the ECtHR often raise criticisms unique to the Strasbourg
system and, like Theresa May, do not necessarily advocate withdrawal from all European institutions, the impressions generated by discussing both institutions simultaneously reinforce the different bodies’ perceived similarities, providing further opportunities for hard Eurosceptics to demand independence from the entire European project.

The case of whole-life tariffs

The second example of the influence of conflation on perceptions of the ECtHR concerns the ECtHR case, Vinter and Others v United Kingdom (App no 66069/09 [ECtHR 9 July 2013]) and the issue of whole-life prison sentences. In July 2013, the ECtHR Grand Chamber ruled that the provision in English law that individuals convicted for particularly egregious and violent crimes could be sentenced to life imprisonment without the possibility of review or release – other than in narrowly defined ‘exceptional circumstances’ at the discretion of the Justice Secretary – constituted a violation of the Article 3 ECHR prohibition of inhuman and degrading treatment and punishment. Although the United Kingdom was found to have violated the Convention, the ECtHR stressed that how the United Kingdom adjusted its sentencing provision to provide reasonable hope for review remained within the margin of appreciation, and noted that the ruling did not require the applicants themselves (all convicted of multiple counts of murder) to be released (see Elliot, 2014; Overman, 2013).

The judgement was met with fierce criticism within the United Kingdom, especially from Conservative MPs and Eurosceptic media outlets. Debate focused on the threat that ‘meddling European judges’ ostensibly posed to British democracy and independence (Doyle et al., 2013). The Justice Secretary, Chris Grayling (BBC, 2013), argued that ‘it reaffirms, to me, my own determination to bring real changes to our human rights laws and to see a real curtailing of the role of the European court in this country’. The tabloid Express (McKinstry, 2013) accused ‘Europe’s autocratic institutions’ of debasing human rights, using the case as an opportunity to advocate withdrawal from both the Convention and EU: ‘We have to take back control of our justice system. That means re-establishing our independence by withdrawal from the convention. If such a step also requires our exit from the EU so much the better’. Much of the press coverage also drew attention to earlier conflicts between the United Kingdom and Strasbourg, such as the Abu Qatada deportation and Hirst prisoner voting case, contributing to a sense of consistent and ongoing intervention by the ECtHR in the British justice system (Daily Mail, 2013; Swinford, 2013).

Thus, when the English Court of Appeal ruled on the subsequent Newell and McLoughlin (2014, EWCA Crim 188) cases on the same issue – specifically addressing the concerns raised by the ECtHR in Vinter, by clarifying the legislation on whole-life sentences and demonstrating that there was in fact reasonable opportunity for review – the Court of Appeal was painted as ‘defying’ the Strasbourg judgement and standing up for British law in the face of the overbearing European court (Slack, 2014). For its part, Strasbourg accepted the Court of Appeal’s reasoning in McLoughlin, ruling in Hutchinson v United Kingdom (App no 57592/08 [ECtHR 17 January 2017]) that the life-sentence legislation was no longer considered to violate Article 3 ECHR. The ECtHR gave particular consideration to the importance of allowing national authorities to resolve issues concerning domestic law, noting,

[It was a well-entrenched and necessary part of the legal tradition of the United Kingdom to develop the law through judicial interpretation. As the Court of Appeal had specifically addressed]
the doubts raised in *Vinter* regarding the clarity of the applicable domestic law, and set out an unequivocal statement of the legal position, that interpretation had to be accepted by the European Court. (*Hutchinson v United Kingdom*, App no 57592/08 [ECtHR 17 January 2017], para 23)

Importantly, however, the discourse surrounding the whole-life cases continued to cast the ECtHR as the foreign, activist institution which neither understood nor appreciated the nuances of English law. Press coverage of the *Hutchinson* case was less extensive than that of *Vinter*, and the commentary less vitriolic in tone, but the general thrust of the discussion implied that the British courts had been right all along. Headlines suggested that Strasbourg had ‘back-tracked’ on its earlier decision, and that British courts had a ‘right’ to impose whole-life sentences (Barrett, 2015; Travis, 2017). In essence, by overturning its own prior decision in light of clarification of the law from the Court of Appeal, Strasbourg reinforced the perception that British law and human rights should be left to the British courts and parliament. Thus, the whole-life tariff cases are a key example of the persistence of Strasbourg scepticism and the detachment of the actual dynamics of the UK–Strasbourg judicial relationship from political perceptions of it.

Conflation played a key role in sustaining Strasbourg sceptic narratives in this case, albeit in more muted forms than the deliberate merging apparent in Brexit debates. Rather, ambiguity and generalisations dominated the framing of the cases. References to ‘European judges’ and ‘defying Europe’ connect *Vinter* and its related cases to broader Strasbourg sceptic narratives, highlighting the role of conflation as a reflection of deeper scepticism and perceptions of Europe as a singular entity. This, in turn, keeps the cases connected to other European controversies beyond their own lifespan, contributing to the persistence of criticism of the ECtHR even after the United Kingdom has ‘won’. Just as debate around *Vinter* and *Hutchinson* drew on previous ECtHR cases to illustrate continuous European judicial interference, the issue of whole-life tariffs has subsequently been pointed to as further evidence of the same problem in other cases. Since framing the Court of Appeal’s final ruling as an act of resistance against Strasbourg, similar language about ‘defying Europe’s imperial court’ has been used to criticise the CJEU (Evans-Pritchard, 2016a), while the *Daily Mail* has used Supreme Court judges’ views on *Vinter* to imply evidence of the judges’ shifting loyalties and alleged attempts to ‘block Brexit’ (Adams, 2016; Spillet, 2016).

**Conclusion**

The conflation of separate institutions is a central feature of discussions of Europe in the United Kingdom. Differences in the ways European institutions are muddled, merged or misconstrued matter: deliberate conflation ties separate criticisms together to keep Strasbourg scepticism in public view even as the EU dominates mainstream debate, while ambiguous and muddled conflation exacerbate concerns that ‘Europe’ is too big, too powerful, too confusing, attaching single issues to bigger scepticisms and blurring the specific roles and functions of the EU and ECtHR. All three forms therefore contribute to the persistence and mainstreaming of Strasbourg scepticism, generating additional opportunities to raise Euro- and Strasbourg sceptic narratives, and perpetuating myths, inaccuracies and antipathies until criticism of the ECtHR is not only part of the United Kingdom’s relationship with Strasbourg but the primary lens through which the European human rights system is viewed and discussed. This has important consequences for understanding the United Kingdom’s ongoing relationships with the ECtHR and EU. The persistence
of Strasbourg scepticism, facilitated by conflation, means that the current status of the ECtHR and HRA in the UK legal order is far from secure.

Recognising the effects of different forms of conflation also offers insights into Euro- and Strasbourg scepticism beyond the United Kingdom. This article has demonstrated the value of expanding the study of ‘persistent and embedded’ Euroscepticism to the specific strand that is Strasbourg scepticism, and, through the three forms of conflation, has provided a mechanism for understanding how it is kept alive through connections to broader Euroscepticism in the United Kingdom – a model that can also be applied and built on elsewhere in Europe. As other European states grapple with their own Strasbourg sceptic narratives (Oomen, 2015; Popelier et al., 2016), being able to dissect how the conflation of the ECtHR and EU perpetuates scepticism towards both will be essential for understanding how Strasbourg scepticism takes hold in public discourses and, in turn, how to counter it.

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Notes

1. A total of 556 judgements have been delivered by the European Court of Human Rights (ECtHR) concerning the United Kingdom between 1959 and 2020, with 322 rulings finding at least one violation of the European Convention on Human Rights (ECHR). The prisoner rights and deportation cases constitute only a handful of this total (ECtHR, 2021).

2. Some of the major cases covered in this time period include court judgements delivered before 2010. In particular, the ECtHR first ruled on the Hirst prisoner voting case in 2005. However, the parliamentary debate in which MPs rejected the Government proposal to permit some prisoners to vote occurred in 2011, meaning much of media coverage of the case and the United Kingdom’s reluctance to implement the ruling appears from 2011 onwards.

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