10

Human Rights

10.1 The Mystery of Human Rights

Most States declare their respect for human rights. This includes the UK, which adopted the Human Rights Act (HRA) in 1998 and is also a member of the European Convention on Human Rights (ECHR) and some other international human rights treaties. Human rights seem to have become a 'secular religion'[1] for our times, and it is hard to disparage the idea of human rights (as opposed to less than optimal applications of them). Therefore, it is important that the UK complies with human rights in actions such as Brexit.

To be sure, sceptical accounts of human rights exist, including Karl Marx's critique, which contended that rights had become ideological tools of the capitalist bourgeoisie, as well as the English tradition of scepticism propagated by Jeremy Bentham. Nonetheless, human rights continue to offer a promise of universality, inalienability, and self-evidence – of 'values for a godless age'.[2]

10.1.1 The Emergence of Human Rights

But how can human rights be recognized as universal in nature if they were not identified as necessary before the modern era? Oppressed Europeans in the Middle Ages, for example, would have been more likely to look to a patron saint for relief. Prior to the eighteenth century, such rights as were legally recognized were conceptualized as particularistic in nature, for example as the rights of Englishmen, not as self-evident and universal.

Yet, as Lynne Hunt[3] remarks, somewhere between 1689 and 1776 (the latter being the date of the American Declaration of Independence, with its claim for 'self-evident' rights) a shift took place, and rights which had previously been viewed as pertaining only to particular persons, under particular traditions, transformed into human rights, which all could lay claim to. The second half of

[1] E Wiesel, 'A Tribute to Human Rights', in Y Danieli, E Stamatopoulou, and C Dias (eds.), *The Universal Declaration of Human Rights* (New York: Baywood, 1999).

[2] F Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000).

[3] Lynne Hunt, *Inventing Human Rights* (New York: Norton, 2007).

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the eighteenth century saw not only the 1789 *French Declaration of the Rights of Man and the Citizen* and the US 1776 *Declaration of Independence*, but also other American documents asserting the existence of human rights superior to State law – including the federal Bill of Rights of 1789.

The expression 'human rights' is usually understood to derive from what John Locke meant by 'natural' rights – that is, those entitlements held simply by reason of being human beings. These rights are 'natural' because their source is human nature. Locke himself asserted that humans had natural rights to life, liberty, and property.[4] These rights were pre-societal, and possessed by humans in a state of nature, prior to any government. But Locke argued that government was nonetheless necessary to secure these inalienable, natural rights, which could not be adequately protected in the state of nature. And so he posited a (hypothetical) social contract, between government and the ruled, deemed necessary to protect natural rights. Locke's theories were influential in North America, and his influence can be seen on the American Declaration of Independence, which famously proclaimed: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'.

Social contract theory posits free and equal individual beings who can rationally bargain in order to ensure the benefits of government. The rights it tends to give rise to – such as free expression, liberty, property – are premised on autonomy. But note that, in the forming of the contract that is the US federal Constitution, many parties were quite definitely excluded from this process – notably women, slaves and native Americans.

It also seems that a greater focus on human rights in the eighteenth century relates to a changing notion of the self in that period. Liberal theories tend to identify human rights with rationality, agency, and autonomy. Rights are linked to a recognition of persons as separate individuals who are capable of moral judgement. This emphasis was partly a product of seventeenth-century revolutions of political thought, ranging across the Levellers, Lockean philosophy, and Grotius' juristic work. However, Hunt highlights not only this definition of self in terms of autonomy but also in a growing *empathy* – an increased awareness that others were like oneself. It might seem unrealistic to trace a growing empathy to the eighteenth century which witnessed penal practices such as torture, and the Bloody Code in England, in which capital punishment could be imposed for minor offences. Yet, torture had been a focus of critique since Montesquieu's criticism of it in *The Spirit of the Laws* in 1748, which was followed by Beccaria's rejection of the death penalty in his 1764 Treatise.[5]

[4] Locke, *Second Treatise of Civil Government* (1690) section 124.
[5] Cesare Beccaria, *Treatise on Crime and Punishment* (1764).

To be sure, empathy did not spring from nowhere in the eighteenth century – it is apparently a capacity of biological origins rooted in our brains.[6] Notably, Adam Smith, best known for *The Wealth of Nations*, was also the author of the earlier *Theory of Moral Sentiments*, a work of a quite different nature. In this work Smith explained, using the example of torture, how we identify and sympathize with another, even if they are a stranger: 'we enter as it were into his body and become in some measure the same person with him.'[7] As spectators of others, we imagine how we would feel in their situation. If we might share their motives, we approve of their action. If not, we disapprove. That knowledge forms conscience, an imagined 'impartial spectator' who informs us whether an action is right or wrong.

This openness to empathy, and the ability to imagine oneself in another's place, then opened the door to the possibility of a wider ranging body of rights, extending beyond one's own countrymen and class, and – even if neither the US nor the French eighteenth-century Declarations went so far as to open up rights to women, or in the case of the US, slaves – many groups who had previously been denied rights, that is, Jews and Protestants in France, were now able to be conceived as rights holders. Therefore, the eighteenth-century mindset is an important backdrop to the growth and dissemination of human rights and underlines their singular historical and western origins.

10.1.2 Why Are We *Still* So Preoccupied with Human Rights?

We are of course no longer living in the eighteenth century. A growth of nationalism (with a focus on ethnic ties rather than a universally shared humanity) explains why human rights as a doctrine was somewhat eclipsed in the nineteenth century and beyond. Although the horrors of twentieth-century totalitarianism may account for the impetus to draft Rights Charters in the post-war period, such horrors might just as easily have convinced us that 'inalienable' and 'universal' rights are incapable of mitigating human cruelty and serve no purpose. Why then does our preoccupation with rights continue?

If a combination of rational theorizing and a greater recognition of empathy help explain their origins, then perhaps a different philosophical and factual turn helps explain the continued obsession with rights. That framework is one of nihilism and disappointment. When social and religious motivations are absent, for many people human rights are the closest many possess to moral motivation. The contemporary world displays a breakdown of order, and a dearth of any basis for objective value. Likewise, the political realm manifests injustice and a corrosion of political structures. Secular liberal democracy exerts too little motivating force. Law is too often experienced only as externally binding by coercion and not internally compelling.

[6] C Gearty, *Can Human Rights survive* (Cambridge: Cambridge University Press, 2006).
[7] Adam Smith, *The Theory of Moral Sentiments* (London, 1759) Chapter I 'Of Sympathy', para. 2.

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In this situation, human rights provide a counterbalance and can appear the nearest thing to religion, gaining at least a partial consensus across the political spectrum. Jacques Maritain, for example, in his 1954 'The Rights of Man', described how 'proponents of violently opposed ideologies' would announce at UNESCO meetings that '[w]e agree on these rights providing we are not asked why.'[8] Yash Ghai has highlighted the way in which human rights can appeal to a great variety of cultures and legal systems, and be successfully used to mediate complex ethnic and cultural claims, despite their apparent origins in eighteenth-century Europe. Ghai remarks that:

> For multicultural states, human rights as a negotiated understanding of the acceptable framework for coexistence and the respect for each culture are more important than for monocultural or mono-ethnic societies, where other forms of solidarity or identity can be invoked or minimized to cope with conflicts…. And most states are today multicultural, whether as a result of immigration or because their people are finding new identities.[9]

Whatever the source of conflict, human rights provide the essence of a common language, a currency that all can understand, a means of importing morality and ethics into law, and a reminder that we should not tolerate the intolerable, nor suffer the insufferable.

10.2 Human Rights in the UK

10.2.1 Introduction

In the past, Britain believed itself to be the home of liberty. Documents such as Magna Carta, Habeas Corpus, and the 1689 Bill of Rights were proffered as illustrations of British, and formerly English, constitutional arrangements that favoured liberty. Dicey chronicled how, when 'Voltaire came to England – and Voltaire represented the feeling of his age – his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by caprice.'[10] Many eighteenth-century North American colonists claimed English liberties for themselves.[11] Blackstone had praised English liberties, contrasting them with continental despotisms:

> The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection…. Very different from the modern constitutions of other states, on the continent of Europe,

[8] J Maritain, 'The Rights of Man', in *Man and the State* (Washington DC: Catholic University of America Press, 1998).

[9] Y Ghai, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims' (1999) 21 Cardozo LR, at 1102.

[10] Dicey, *Lectures Introductory to the Law of the Constitution* (1885) 174.

[11] As detailed in the chapter on the loss of the North American colonies.

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> and from the genius of the Imperial law, which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject in the prince, or in a few grandees.[12]

Blackstone, like John Locke, asserted the existence of 'natural rights' and the necessity of government to protect them. However, unlike the direction taken in the US, Blackstone believed the preservation of liberty to be so effective in Britain that formal Bills of Rights were not needed. Moreover, Blackstone asserted the sovereignty of Parliament, and did not adhere to the older tradition of the 'fundamental' constitutional laws of England, unchangeable by Parliament.[13] But what if a sovereign Parliament were to abolish rights? According to Blackstone, such a diminution of freedom was not possible, as the very structures of the British Constitution ensured liberty,[14] and its institutions operated as checks upon each other.

However, arguments for English liberty began to take a different turn over the next 100 years or so. Following after Blackstone came Burke, who although sympathetic to the case for the American colonies, was highly critical of the developments of the French Revolution, including its language of liberty and emancipation.[15] A little later, the utilitarian reformer Jeremy Bentham criticized English law for its unnecessary delay, cost and complexity. Yet, Bentham did not recommend Bills of Rights as remedies – indeed, he famously described the *French Declaration of the Rights of Man* as 'nonsense on stilts.'[16] He and his follower, John Austin (who was to become highly influential over subsequent generations of English lawyers) were traditionally seen as founders of the English legal positivist school, with its emphasis on law as 'posited' by the sovereign, rather than on any rights inhering in the individual.[17] This left little room for the development of any human rights law in England.

10.2.2 Dicey

Dicey followed in this positivist tradition and was extraordinarily influential in his late nineteenth-century writing on the British Constitution, and in his derision of Bills of Rights. Dicey identified parliamentary sovereignty as one of the pillars of the British Constitution, along with the rule of law which was supposedly protective of liberty. Human rights did not figure in this constitutional analysis.

[12] Blackstone, *Commentaries*, vol. I, 119–141.
[13] JW Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1955) *passim*.
[14] Blackstone, *Commentaries*, vol. I, 142–151.
[15] Burke, *Reflections on the Revolution in France* (London, 1790).
[16] J Bentham, 'Anarchical Fallacies', in *The Collected Works of Jeremy Bentham*, vol. II, John Bowring (ed.), 489 (1843).
[17] J Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995 ed W. Rumble).

Dicey's rule of law, as detailed in the *Introduction to the Study of the Law of the Constitution*, had three elements. First, that 'no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'. 'In this sense', he maintained, 'the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint'. Second, '… every man, whatever be his rank or condition, is subject to the ordinary law of the realm'. This was meant to contrast with other legal systems, such as Administrative law in France. But Dicey neglected the peculiar status of the Crown in English law, which rested on a great deal of prerogative powers for the government, even in Dicey's day. Third, according to Dicey,

> the constitution is pervaded by the rule of law on the ground the general principles of the constitution are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.[18]

Dicey's conception is generally interpreted as a formal or thin conception of the rule of law.[19] For Dicey, the Constitution existed as a corpus of generalizations mainly derived from common law cases. Dicey's position, in so far as it left any room for rights, viewed them as residual liberties rather than as positive entitlements.[20] This meant that liberty was what remained after various actions were declared illegal. Ewing and Gearty denigrate this as a 'subordinate status' for rights, Simpson as an 'impoverished' account.[21] Yet, Dicey refused to admit any advantage for 'foreign' Bills of Rights declared in a Constitution, writing that the Habeas Corpus Acts: 'declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.' Furthermore, because English rights were ingrained in the general common law, this meant for Dicey that the right of personal liberty 'is one which can hardly be destroyed without a thoroughgoing revolution in the institutions and manners of the nation.'[22] But nowhere did Dicey list any of those rights that he considered fundamental. The problem with Dicey's conception is that there exists no concrete core of protection, no positive measure

[18] *Law of the Constitution*, 195.

[19] See Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PL 467.

[20] E.g. K Ewing and C Gearty, *Freedom under Thatcher* (Oxford: Clarendon Press, 1990) 'Introduction'.

[21] K Ewing and C Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford: Oxford University Press, 2001); B Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004) at 37.

[22] *Law of the Constitution*, 199 and 77.

that can be asserted in response to any repressive law or court decision. Unlike Blackstone, Dicey did not believe in natural, innate rights, and instead, following Bentham and Austin, took a positivist approach, based around actual existing laws. But the existing laws in his time offered very little concrete rights protection. Nor did Dicey want any. Although both the draft 1886 and 1893 Government of Ireland Bills contained some limitations on legislative power to restrict liberty, neither Bill was implemented and Dicey's attack on Irish Home Rule is well known. For example, in *England's Case Against Home Rule*, he attacked the 1886 Home Rule Bill, writing that formal guarantees of rights were: 'nugatory; they are worth neither more nor less than the pompous securities for every kind of inalienable right which adorned the most splendid and the most transitory among the Constitutions which have during a century been in turn created and destroyed in France – that is, they are worth nothing'.[23]

10.2.3 A Constitutional Heritage of Rights Scepticism

This Diceyan legacy continued well after his death. Although, after the Second World War, international discussion began over the introduction of Bills of Rights, this was a concept alien to English law. There existed no treatise analysing what rights were protected under English law, and little, if any, scholarly interest in the international protection of rights.[24] There was, however, a great deal of complacency as to protection of liberty in Britain. For example, in 1946 Sir Cecil Carr (Counsel to the Speaker of the House of Commons) writing for the first UN *Yearbook on Human Rights* declared that British liberty was secured by 'the good sense of the people and in the system of representative and responsible government which has been evolved.'[25]

Such complacency about British liberty was underpinned by the notion that the British system of government had survived the extension of the franchise in the nineteenth and twentieth centuries. Very little had changed constitutionally. However, as a result of this franchise extension, in order to survive, political parties had become much more disciplined, and the power of back-bench MPs waned, with the result that the Executive dominated Parliament. But it is in just such circumstances that rights are needed as counterbalances to an overbearing Executive.

Dicey had vaunted the common law and the judiciary as guardians of British liberty. Yet, until quite recently, British judges tended to defer to the Executive.

[23] *England's Case against Home Rule* (London, 1886) 260.

[24] Simpson remarked that 'the first book on the general protection of human rights by an English writer, albeit an immigrant from Poland not brought up as a common lawyer, was Lauterpacht's *An International Bill of the Rights of Man* (1945).' [Simpson, *Human Rights and the End of Empire*, 38.]

[25] Simpson, *Human Rights and the End of Empire*, 47.

Authors such as John Griffith, Keith Ewing and Conor Gearty[26] argued that the record of British judges was not a salutary one. The courts consistently upheld repressive Government measures – such as wartime restrictions of liberty,[27] measures taken against Irish nationalists,[28] against suffragettes,[29] and the sweeping restrictions of the Public Order Act 1936.[30] Courts were particularly deferential in cases where 'national security' was cited – this attitude extended to later twentieth-century litigation such as *GCHQ*, and *Spycatcher*.[31] Cases such as *Entick v Carrington*,[32] in which John Entick successfully sued the King's Secretary of State for trespass, are held up as beacons of British liberty defended by the courts. Yet, the case rested on Entick's property right – that the King's messenger might not enter his private dwelling on a general warrant. It did not establish Entick's freedom to publish independently of his property rights. Even *Beatty* v. *Gillbanks*[33] of which Dicey enthused, 'No better instance can be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies'[34] is more limited in ambit than Dicey's enthusiastic description might suggest. The case was an appeal against an order binding over Salvation Army members to prevent them parading for fear of provoking violence by a rival group. Their appeal succeeded on the basis that to stop the Salvation Army marching would be to punish them for doing a lawful act. But there was no assertion of a right to political liberty, which, as Ewing and Gearty assert, 'is a very insecure base on which to build a theory of political liberty, particularly as there is no fixed definition of what constitutes unlawful action, so that the general principle can readily be swallowed in the shifting sands of its exception.'[35]

A change in judicial attitude would only come later in the twentieth century, after Britain had become a member of the ECHR, and also introduced its own Human Rights Act in 1998. A new generation of judges appeared more willing to embrace the concept of a right.

[26] K Ewing and C Gearty, *Freedom under Thatcher*, and *The Struggle for Civil Liberties;* JAG Griffith, *The Politics of the Judiciary* (2nd ed., London: Fontana, 1997).

[27] E.g. *Liversidge* v. *Anderson* [1942] AC 206, in which Lord Atkin, in a famous dissent at 244, stated that the judges, 'show themselves more executive minded than the executive.'

[28] E.g. *O'Kelly* v. *Harvey* [1883] 15 Cox CC 435, in which an Irish Land League meeting was banned and the right to peaceful assembly denied.

[29] E.g. *R* v. *Hewitt* [1912] 28 TLR 378; also *Nairn* v. *University of St Andrews* [1909] SC 10, in which the House of Lords notoriously held that women did not qualify as 'persons' for the purposes of voting for MPs for the universities of Edinburgh and St Andrews.

[30] This Act was in principle drafted against the British Union of Fascists and prohibited wearing political uniforms in any public place, but was widely used against IRA demonstrations in Britain in the 1970s, and during the 1984/5 miners' strike.

[31] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1984] UKHL 9, often known as the 'GCHQ' case. There were many cases in the 'Spycatcher' saga, including *AG* v. *Guardian Newspapers Ltd. (No. 2)* [1988] 3 All ER 545 (HL).

[32] *Entick* v. *Carrington* [1765] EWHC KB. [33] *Beatty* v. *Gillbanks* [1882] 9 QBD 308.

[34] *Law of the Constitution*, at 271. [35] *The Struggle for Civil Liberties*, at 31.

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10.3 The UK's Role in Establishing the ECHR

Yet, the account so far raises a salient question. Why was Britain willing to sign up to the ECHR when it had no domestic tradition of a Bill of Rights and believed its own rights protection to be satisfactory? Human Rights Conventions, at least if they contain the enforcement mechanisms of the ECHR, constrain what States may do to those within their own territories. Why would the British Government willingly undertake these obligations?

Brian Simpson provides a salient explanation – that Britain's engagement with the Convention was 'a product of British foreign policy not of the British legal tradition, much less of British domestic policy.' The UN was already taking initiatives in the human rights field, and had produced the Universal Declaration of Human Rights in 1948 (described by Eleanor Roosevelt, one of its prime instigators, as a 'Magna Carta for mankind') and, as Simpson writes: 'unless the British Foreign Office was willing to stand aside from the work of the United Nations it had little choice but to break with the Diceyan tradition of opposition to formal statements of rights.'[36] Foreign policy dictated action in the face of a growing Soviet threat. UN activity increased the momentum for greater cooperation in Europe, and the ECHR was generated by the Council of Europe, with its driving force the protection of western Europe from Soviet power. These were Foreign Office responsibilities, and Foreign Office officials, rather than those with domestic legal training, took a primary role.[37]

However, although the ECHR might be seen as just the sort of continental Bill of Rights deprecated by Dicey, in fact Britain went further than passively accepting it. The UK played a key role in its genesis (as described in the chapter on Britain and Europe). David Maxwell-Fyfe's important role, and his insistence that the ECHR be not just 'a declaration of moral principles and pious aspirations', but 'a binding convention', has already been noted.[38] Indeed, the UK was the first country to ratify the ECHR, in March 1951.

Nonetheless, the ECHR is very different in structure and philosophy from the British common law approach to rights. The Convention asserts the existence of its rights, rather than leaving them with a residual or interstitial status, as the traditional Diceyan approach would have. Under the Convention, rights such as freedom of expression are asserted to exist (e.g. under Article 10(1) ECHR), and governments may only justify restricting them by clear laws in certain limited, specified situations (as under Article 10(2)). The ECHR also provides specific judicial mechanisms and requires its member States to

[36] Simpson, *Human Rights and the End of Empire*, both quotes at 39.
[37] Simpson details the key role of the foreign office legal advisor, Eric Beckett, who had an enthusiasm for human rights.
[38] 'First session of the Consultative Assembly at Strasbourg 1949' [in *Travaux Préparatoires Vol 1* (Martinus Nijhoff, 1975)].

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recognize the jurisdiction of its Court and to permit the right of individual petition[39] (structures that the British Government initially opposed).

Notably, the UK, when it ratified the ECHR, also extended its application to UK dependencies, unlike most other European colonial powers. As a result, the UK soon found its conduct challenged under the ECHR – as in proceedings brought by Greece against Britain in 1956 and 1957 over Cyprus.[40] It seemed that the British tradition of liberty might not thrive in all of the UK's dependencies. This came as rather a shock in some quarters, and there was even a suggestion of denouncing the Convention, but, as Sir Hilton Poynton of the Colonial Office concluded in a minute written in 1956: 'we have got ourselves committed to this wretched Covenant and can't get out of it now …'[41] However, Brian Simpson's characterization – that 'it was as if ratification and extension to the colonies had all been a horrible mistake, or the consequence of some bizarre fit of absence of mind'[42] – reads very familiarly in the larger context of Britain's imperial actions. 'Absence of mind' seems to have been a common condition in the UK's relations with its colonies and dependencies. This might, however, go some of the way to explain Britain's present day conflicted approach to the ECHR, whereby some still apparently perceive it as this 'wretched Covenant'.

10.4 'Liberty Is Ill' in Britain

10.4.1 General

The ECHR has been dealt with quite extensively in the chapter on Britain and Europe and will not be analyzed further here. We will instead return to the domestic scene, to see how human rights protection fared in Britain in the post-war years.

For many, all was not well. In majoritarian political systems such as the UK, minorities risk being subject to discrimination and other unjust and irrational treatment, which is why Bills of Rights are often established as checks on the Executive. Although the common law is a source of some rights in Britain, these are mostly administrative in nature, being a component of a supervisory judicial review jurisdiction exercised by the English High Court over all 'inferior courts and tribunals' – which includes administrative decision-makers in all public bodies except primary legislation. Additionally, shortly prior to the 1998 Human Rights Act, courts had also established the existence of a very few common law 'constitutional' rights of especial significance – mostly concerned with access to justice – which could only be overridden expressly, and not impliedly, by Parliament.[43] Nonetheless, in 1988, on the tercentenary of

[39] Made compulsory with the 11th Protocol to the ECHR in 1998.
[40] *Application of 7 May 1956* (176/56) and *17 July 1957* (299/57).
[41] CO 936/296, Sir A Hilton Poynton.
[42] Simpson, *Human Rights and the End of Empire*, at 13.
[43] E.g. *Raymond* v. *Honey* [1983] 1 AC 1; *ex parte Leech*, [1994] QB 198; *ex parte Witham*, [1998] Q.B. 575; *Pierson* [1997] 3 All ER 577, HL; *ex parte Simms*, [2000] 2 AC 115.

the 1688 Bill of Rights, academics and intellectuals formed 'Charter 88' to campaign for a UK written Constitution. Ronald Dworkin famously published an article in *Index on Censorship* stating that 'Liberty is ill in Britain'.[44] The general thrust was that the Executive was insufficiently balanced by Parliament or the courts. Britain might have had a 'culture of liberty' but there existed no Bill of Rights to enforce particular liberties.

Many argued for a new Bill of Rights for Britain, or for incorporation of the ECHR (i.e. its domestic implementation). While unincorporated, the ECHR could not be directly enforced in UK courts, and if the language of a UK statute was in clear conflict with the ECHR, the statute rather than the ECHR had to be applied by the courts. According to Jonathan Cooper,

> the common law provided hotchpotch protection. The rule of law worked efficiently in respect of issues such as legality, but the notion of the rule of law could not actually guarantee rights. Civil liberties were flimsy and stood no chance against the doctrine of Parliamentary Sovereignty…. By the mid-90s, uniquely at the time across the Council of Europe, the UK had been found to violate all of the substantive ECHR rights except [freedom from] slavery, and a violation of that right was to follow.

Cooper concluded that the introduction of the 1998 HRA 'was a necessity.'[45]

However, not everyone was in favour of a new court-enforced Bill of Rights for Britain, nor of incorporating the ECHR. This included both conservative and progressive commentators. For example, Ewing and Gearty, in *Freedom under Thatcher*, counselled against judicially enforceable Bills of Rights in the UK. Their primary argument was that it would confer enormous power on judges. To support this argument, they analyzed decisions of British judges over the past half century, noting for example that in the *Spycatcher* case, 'They have accepted that Government can avoid scrutiny of its conduct by calling to its aid a concept, "national security", the definition of which the judges are content to leave to the executive.' They also considered the record of the Privy Council on constitutional rights (in its capacity as final Court of Appeal for Commonwealth cases) and found it wanting. Their recommendation was instead 'to introduce some real and effective political constraints on the power of the Prime Minister.'[46] To be sure, scepticism of Bills of Rights is part of a long tradition in Britain. As soon as the eighteenth-century Declarations of Rights came into being, critics such as Bentham and Burke were voicing their opposition to them. Bentham remarked that:

> Give the judges the power of annulling [Parliament's] acts; and you transfer a portion of the supreme power from an assembly which the people have had *some*

[44] *Index on Censorship*, 8 September 1988.

[45] J Cooper OBE, 'The Human Rights Act: Delivering Rights and Enhancing Dignity', in K Dzehtsiarou, S Falcetta, D Giannoulopoulos, and P Johnson (eds.), *Human Rights in Action: Assessing the Positive Impact of the Human Rights Act 1998 in the UK* (Submission to the IHRAR March 2021).

[46] *Freedom under Thatcher*, Conclusion.

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share, at least, in choosing, to a set of men in the choice of whom they have not had the least imaginable share.[47]

Nonetheless, not everyone shared this distrust of British judges. Support for a Bill of Rights was to be found across major political parties – for example, both Dominic Grieve (former Conservative Attorney-General) and Harriet Harman (former Labour front bencher) were prominent Bill of Rights supporters during the 1990s. In any case, a new generation of judges were in place, replacing earlier judges such as Lords Widgery, Lane, and Denning. These newer judges were arguing for incorporation of the ECHR into domestic law.[48] According to Conor Gearty, 'You only have to name them to see how different the atmosphere is now.'[49]

10.5 The 1998 Human Rights Act

In 1998, Parliament adopted the UK Human Rights Act (HRA). The key aim of this legislation, according to the 1997 Labour Government *White Paper*, was that of 'bringing rights home',[50] empowering UK courts to enforce the ECHR domestically, and enabling litigants to avoid the expense and delay of going to Strasbourg. Thus it did not aim to introduce a specifically British Bill of Rights. The HRA implements most but not all ECHR rights into domestic law.[51] Under s6 HRA, all public authorities, including courts, and devolved parliaments, must comply with ECHR rights. All new UK laws should also be compatible with Convention rights and, under s19 HRA, the Minister in charge of a Bill is required to make a statement that its provisions are compatible with Convention rights. However, the sovereignty of the UK Parliament means that it can nonetheless pass laws which are incompatible with the ECHR. Notably, the HRA is not entrenched, so Parliament may amend or repeal it. In this way, and by excluding any 'hard' judicial review with a strike down power of statutes, parliamentary sovereignty is maintained, and ultimately human rights protection remains conditional on parliamentary will and acceptance.

Section 2 HRA 1998 requires UK courts to 'take into account' the jurisprudence of the European Court of Human Rights (ECtHR). Although initially, judges were urged to 'mirror' Strasbourg jurisprudence,[52] this approach was

[47] J Bentham, 'Fragment on Government' (Cambridge: Cambridge University Press, 1988) ch IV, para. 32.

[48] E.g. Sir Thomas Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390.

[49] C Gearty, 'I've Changed My Mind about the Human Rights Act', *The Guardian*, 30 December 2009.

[50] 'Rights Brought Home: The Human Rights Bill' (1997).

[51] The HRA does not incorporate Art. 1 ECHR nor Art. 13. The view was that the HRA itself was the fulfilment of both of those Articles. But in *A* v. *UK*, 2009 at [158] the ECtHR held that the declaration of incompatibility is not an effective remedy.

[52] *ex p Ullah* [2004] 2 AC 323 para. 20 per Lord Bingham.

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abandoned for a more nuanced one, and, on some occasions, UK courts have departed from ECtHR jurisprudence.[53] Notably, the HRA does not enable judges to invalidate incompatible primary legislation, as is the case with the US Federal Bill of Rights, and in Germany, South Africa and Canada. However, s3 HRA requires courts to interpret all statutes 'as far as possible' compatibly with ECHR rights,[54] and if this is not possible, superior courts (i.e. High Court or above) may adopt a 'declaration of incompatibility' under s4 HRA.[55] In this way, the HRA reconciles human rights with parliamentary sovereignty (by in fact leaving parliamentary sovereignty unconstrained) and it is up to Parliament to decide if to repeal incompatible legislation. It does not have to do so.[56] This contrasts with the 1972 ECA, which required UK law to be set aside if it conflicted with directly effective EU law. Thus, it has been said that the HRA adopts a 'dialogue' approach between Parliament and the courts.[57] In fact, relatively few declarations of incompatibility have been made, and almost all have been complied with.[58] One notable exception was where Parliament ignored the declaration of incompatibility regarding the ban on prisoner voting for over a decade, although did finally take measures to rectify the Strasbourg judgement.[59]

One high-profile occasion in which a declaration of incompatibility was issued was *A and others* v. *Secretary of State for the Home Department,*[60] which dealt with the legality of detention of suspected terrorists. The House of Lords found that s23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the HRA because it discriminated against non-nationals, permitting their indefinite detention. The House of Lords also found that the UK was not entitled to derogate from Article 5 ECHR (the right to liberty) as the Government had not proved that the exigencies of the situation warranted such a derogation, although only Lord Hoffmann found that there was no 'public emergency threatening the life of the nation.' In so finding, the House of Lords disagreed with the Court of Appeal and refused to defer to the Secretary of State. In particular, Lord Bingham stated that 'The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as somehow undemocratic,' continuing that the HRA 'gives the courts a very specific, wholly democratic, mandate'.[61]

[53] E.g. *R (Hallam)* v. *Secretary of State for Justice* [2019] UKSC.
[54] E.g. *Ghaidin* v. *Godin Mendoza* [2004] UKHL 30.
[55] E.g. *Bellinger* v. *Bellinger* [2003] 2 AC 467. [56] See s10 HRA.
[57] See Alison Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017).
[58] 2015 JCHR report.
[59] UK courts issued a declaration of incompatibility in *Smith* v. *Scott* [2007] SC 345, following the ECtHR decision in *Hirst* v. *UK*. Eventually, the UK Government introduced measures to allow prisoners on temporary licence to vote. On 6 December 2018, the Council of Europe Committee of Ministers adopted final resolution CM/ResDH (2018) 467.
[60] [2004] UKHL 56. [61] Ibid., para. 42.

The *Belmarsh* (as *A* v. *Home Secretary* is often known) decision illustrates how the judiciary scrutinized violations of rights, even in national security contexts – a clear move forward from the earlier approach in *Spycatcher*. The Government swiftly responded to the Court's judgement with new legislation – the Prevention of Terrorism Act, 2005 – which replaced detention with the control order system, which did not discriminate against foreign nationals (but raised other issues, which were subsequently litigated[62]).

Reaction to the HRA in the UK has been a bit mixed, although generally favourable.[63] The HRA has enabled individuals to litigate their rights claims in UK courts, and gain an effective remedy there, rather than spending time and money going to Strasbourg. However, the HRA was never welcomed by certain elements in Britain. These included right wing politicians and the press. The criticism usually accuses the HRA of 'mission creep', of being too foreign, or of infringing parliamentary sovereignty.[64] Many particularly disliked what they perceived as the strengthening of the right of privacy by English courts at the expense of the press (who were finding it more difficult to report sensational details of celebrities' private lives). This perception was coupled with the assertion that the Human Rights Act, along with the creation of the UK Supreme Court by the UK Constitutional Reform Act 2005, had led to an increase in judicial power and judicial review.

10.6 The Critique of Judicial Enforcement of Human Rights

It has been complained that the HRA has had an overly intrusive effect, and empowered judges. But human rights litigation frequently involves controversial moral or policy issues. Have UK judges acted inappropriately, become too activist? Judges do not, unlike Plato's fictional guardians, have any especial knowledge of justice, and *pace* Dworkin's ideal judge Hercules, they are not philosopher kings – and recent decisions of the US Supreme Court may be giving judicial review a bad name. No doubt examples of regrettable, poorly reasoned, judgments can be found.[65] But so can the opposite, as illustrated by former South African Constitutional Court judge, Albie Sachs, in *The Strange Alchemy of Life and Law*. Sachs conveys the sincerity of a judge

[62] E.g. *Home Secretary* v. *AP* [2010] UKSC 24 – challenging length and conditions imposed by control orders.

[63] For academic responses e.g. A Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge: Cambridge University Press, 2009); T Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010).

[64] E.g. 'Protecting Human Rights in the UK: The Conservatives' Proposals for changing Britain's Human Rights Laws', www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf.

[65] My personal choices might be, from the UK House of Lords, *Bromley LBC* v. *GLC* [1983] 1 AC 768; the US Supreme Court, *Bowers* v. *Hardwick* 478 US 186 [1986]; and the ECtHRs *Otto Preminger-Institut* v. *Austria* [1994] ECHR 26.

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grappling with crucial, value laden questions.[66] And the late Lord Bingham, speaking extra-judicially, remarked that it is inevitable and even: 'desirable that judges should on occasion give decisions that are deeply unwelcome to the powers that be. There are … countries in the world where every judicial decision finds favour with the government, but they are not places where one would want to live'.[67]

The 2019 Conservative party election manifesto declared, 'We will ensure that judicial review is … not abused to conduct politics by another means.'[68] This manifesto appears to suggest limiting judicial review, especially where perceived to be 'political.' Apart from anything else, what is meant by 'political' here? Although all legal issues might, following the lead of John Griffith or the Critical Legal Studies movement, be cast as 'political' (e.g. who should bear the risk of defective products) public law contains an inherently political element, because it deals with the workings of the Constitution, frequently operated by politicians. But there is a difference between courts making political judgements, and judges determining legal issues that arise in cases that have political dimensions – and it is the latter that were at issue, for example, in the *Miller* cases.

10.6.1 The Sumption Critique

In *Trials of the State: Law and the Decline of Politics*,[69] former Supreme Court Justice, Jonathan Sumption, criticized what he perceived as judicial activism, arguing that judicial decision-making had undermined legislation and the political process in the UK.[70]

Sumption's interpretation of the rule of law is a minimal one, which includes only a very limited range of human rights, leaving little room for judicial discretion. This contrasts with many current rule of law standards, such as those of the late Lord Bingham and the Venice Commission, which include a broader, more substantive spectrum of human rights. Sumption argued that to go beyond basic legal rights (i.e. rights to life, liberty and property, and those rights essential to democracy, namely freedom of expression and the right to vote) allows too much of a role for judicial legislation. Sumption was particularly critical of Article 8 ECHR, regarding it as vastly overexpanded by judicial activism into a more general right of personal autonomy which now

[66] A Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009).
[67] Tom Bingham, *Lives of the Law* (Oxford: Oxford University Press, 2011) 146.
[68] The Conservative Party election manifesto 2019: www.conservatives.com/our-plan
[69] *Trials of the State: Law and the Decline of Politics* (London: Profile Books, 2019) – developing Sumption's 2019 BBC Reith lectures.
[70] Sumption's approach was robustly rebutted by retired senior judges (e.g. Baroness Hale, *Law and Politics: A Reply to Reith*, 8 October 2019; Sir Stephen Sedley, 'A Boundary Where There Is None' *LRB,* 12 September 2019).

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includes same sex relations, transsexuality, abortion, and 'much else besides'. But why should Article 8 be given the narrow interpretation Sumption proposes, given that its ambit, as drafted in Article 8(1) is broad, encompassing 'private life', 'family life', 'home', and 'correspondence'. Sumption was also critical of *Hirst* v *United Kingdom* (in which the ECtHR found blanket bans on prisoner voting incompatible with the ECHR) seeing this as an example of courts developing a rival notion of democracy to that of representative politics. Yet this matter has now been resolved by limited changes in the UK, such that only approximately 100 inmates were enfranchized as a result – hardly a threat to parliamentary politics.

Sumption did not go as far as recommending repeal of the HRA, nor UK secession from the ECHR, although he did argue that the 'only effective constraints upon the abuse of democratic power are political'.[71] But this cannot be right. The HRA itself legislates that the *courts*, Parliament and the Government work together to protect human rights. In any case, governments cannot always be trusted to protect human rights, and Parliament does not necessarily have the means to combat a strong Executive and act as a constraint on the abuse of power.

10.6.2 The Judicial Power Project

Further criticism of the HRA has come from the *Judicial Power Project* (JPP) (part of Policy Exchange,[72] a right-wing UK think tank) which claims on its website that, 'Judicial overreach increasingly threatens the rule of law and effective, democratic government.'[73]

The JPP has been fiercely critical of the HRA. For example, Richard Ekins (listed as head of the JPP on their website) has argued that that the 'courts are responsible for extending the [Human Rights] Act beyond its intended scope.'[74] Ekins cites judicial interpretation under s3 HRA as an especially serious example, contending that it has been wrongly understood to establish the power to change the meaning of legislation. But Ekins' claim is unsustainable. UK courts have stressed that rights-compatible interpretation under s3 HRA must 'go with the grain of the legislation', be compatible with 'its underlying thrust' and may not 'radically alter the effect of the legislation'.[75] The courts have also generally but not rigidly adhered to a concept of 'due deference' to

[71] J Sumption, 'Rights and the Ideal Constitution', in *Trials of the State: Law and the Decline of Politics*.

[72] Policy Exchange's funding is somewhat opaque – the 2019 UK 'Who Funds You' report rated Policy Exchange at E, its lowest rating. http://whofundsyou.org/org/policy-exchange

[73] https://judicialpowerproject.org.uk/about/. For a critique of the Judicial power project, see P Craig, 'Judicial Power, the Judicial Power Project and the UK' Oxford Legal Studies Research Paper No. 68/2017

[74] R Ekins, The Dynamics of Power in the New British Constitution (2017) Judicial Power Project, www.judicialpowerproject.org.uk/richard-ekins-the-dynamics-of-judicial-power/ 9.

[75] *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30 [33]; *Poplar Housing* v. *Donaghue* [2002] QB 48, [73] Lord Woolf.

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Parliament in matters of social and economic policy. For example, former Lord Chief Justice, Lord Woolf, expressed the courts' obligation of respect and comity for the democratically elected legislature:

> Legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle pay a degree of deference to the view of Parliament as to what is in the interest generally in upholding the rights of the individual under the Convention.[76]

In any case, if UK judges are issuing declarations of incompatibility under s4 HRA, reading statutes compatibly with Convention rights under s3 HRA, or taking into account ECHR jurisprudence in their judgments, this is exactly what the Act – and Parliament which adopted the HRA – requires of them.

10.6.3 Rights Adjudication and the 'Political Constitution'

The UK is one of a tiny handful of countries not to have a codified Constitution. Yes, the UK has a Constitution, but it is a lot harder to determine its content in the absence of codification. Given that this is so, many people have subscribed to the theory of 'Political Constitutionalism'.[77] This view was famously expounded by John Griffith in his 1978 Chorley Lecture, 'The Political Constitution'. It was Griffith's view that the Constitution 'is no more and no less than what happens' and that, 'law is not and cannot be a substitute for politics.' Griffith conceded that:

> For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.

Therefore, he continued, we should not assume that judicial review, nor legal controls, provide any deliverance, for '[o]nly political control, politically exercised, can supply the remedy'.[78] As we have seen, it is not only progressives such as Griffith, who have criticized a judicially enforced, legal Constitution. Those of a more conservative persuasion – including Jonathan Sumption, and the JPP – also do so.

There are however two problems with the theory of the Political Constitution. The first is that it does not accord with the legal system as it operates in the UK today. It is factually inaccurate. True, much of the British Constitution

[76] *R* v. *Lambert* [2001] 2 WLR 211, [16].
[77] E.g. A Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157; KD Ewing, 'The Resilience of the Political Constitution' (2013) 14 German LJ 2111.
[78] JAG Griffith, 'The Political Constitution' (1979) 42 MLR, both citations at 16.

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operates on the basis of political (i.e. legally unenforceable) conventions. But there are also many significant examples of 'legal constitutionalism', which means that Britain has a Constitution that is at least for some matters, controlled and enforced legally, by the courts. For at least 70 years, senior British judges have been issuing judgements, especially in the public law field, limiting the scope of the royal prerogative, reigning in ministers, upholding a separation of powers, and even questioning the extent of parliamentary sovereignty.[79] Both EU membership, while it lasted, and the Human Rights Act, strengthened human rights and empowered judges in those fields.

The second objection to the theory of political constitutionalism is that it is normatively unattractive. It relies over-heavily on the political process sorting out constitutional matters, rejecting the capacity of 'unelected' judges to determine what the Constitution requires. Maybe political constitutionalism appeared attractive at one time, when the UK finally achieved adult universal suffrage. Furthermore, Griffith's major work, *The Politics of the Judiciary*, linked his theory of political constitutionalism with a critique of the judicial conservatism and elitism of his day. However, given Britain's 'first past the post' electoral system, whereby a Government can achieve a majority in Parliament on a minority of votes (often well below 40 per cent), this winner-takes-all mentality all too easily permits a parliamentary majority to abuse its position, and to act contrary to the wishes of the minority (who may in fact be the majority of the total population). Further, because the doctrine of parliamentary sovereignty excludes the possibility of entrenchment in the UK Constitution, any law – however, fundamental – is only as protective as the parliamentary majority of its day permits it to be. The British Constitution is often vaunted for its great flexibility. But flexibility is not always a good thing, as when it enables repeal or amendment of any provision with the ease of a parliamentary majority of one. In this environment, there is a need for checks and balances, and the HRA and the judiciary can provide an important element of these checks.

10.7 Reform of the HRA?

In 2011, the UK Coalition Government established a Commission tasked with considering the creation of a Bill of Rights protecting 'British liberties'. It was suggested that a 'British' Bill of Rights might inculcate a greater sense of public ownership than the Human Rights Act.[80] However, the Commission failed to reach a consensus.[81] Two Conservative members argued for withdrawal from

[79] *CCSU* v. *Minister for the Civil Service* [1985] AC 374 (exercise of prerogative judicially reviewable); *M* v. *Home Office* [1994] 1 AC 377 (government ministers must comply with the rule of law); *ex p Fire Brigades Union* [1995] 2 AC 513 (rule of law and separation of powers); *R (Jackson)* v. *Attorney-General* [2005] UKHL 56 (parliamentary sovereignty).

[80] 'Commission on a UK Bill of Rights launched' (Ministry of Justice, 18 March 2011).

[81] *A UK Bill of Rights: The Choice Before Us Vol I*, December 2012, para. 78.

the ECHR altogether.[82] In contrast, two other members opposed any change at all, stating that it had become 'clear to us that for some of our colleagues a UK bill of rights is a means towards withdrawal from the European convention,' and that 'We believe that such a path would be catastrophic for the UK, for Europe and for the protection of human rights around the world.'[83]

After the Conservatives won the 2015 general election, the Government declared its renewed determination to introduce a British Bill of Rights, although the demands of Brexit put these plans on hold. But the 2019 Conservative election manifesto stated, 'We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.'[84] And, in 2020, an Independent Human Rights Act Review (IHRAR) panel chaired by Sir Peter Gross (retired Lord Justice of Appeal) was set up to review the operation of the Act. At the same time, Parliament's Joint Committee on Human Rights (JCHR) launched its own inquiry into the operation of the HRA. In giving evidence to the JCHR in 2021, Baroness Hale, former President of the UK Supreme Court, stated:

> I do not think that the Human Rights Act causes a problem for parliament, because it is very carefully crafted […] to ensure that parliament remains supreme and can take whatever action it deems fit, including doing nothing at all, even if the courts have said that a particular piece of legislation is incompatible with the convention rights. I do not think there is a problem or any need to fix it. I cannot myself think of a fix that would make things better as opposed to potentially making things worse.'[85]

Although the report of the IHRAR panel[86] suggested very few changes to the HRA, nonetheless, its report was largely ignored and in December 2021 the Ministry of Justice published its own consultation document, *Human Rights Act Reform: A Modern Bill of Rights*,[87] revealing a decision to replace the HRA with some other Bill of Rights. Nearly 12,000 responses were made to this consultation, mostly in favour of retaining the HRA. Nonetheless, in June 2022 (on the same day it published responses to its consultation paper) Secretary of State for Justice, Dominic Raab, introduced a new Bill of Rights Bill, to repeal and supplant the HRA 1998. The title 'Bill of Rights' suggests legislation of historic importance, but, as David Allen Green wrote:

[82] Lord Faulks QC and Jonathan Fisher QC, 'Unfinished Business', in *A UK Bill of Rights* 182.
[83] Baroness Helena Kennedy QC and Professor Phillipe Sands QC, 'In Defence of Rights', in *A UK Bill of Rights* 221.
[84] Conservative party election manifesto 2019 at 48.
[85] Available at https://committees.parliament.uk/oralevidence/1661/pdf/
[86] The report was published in December 2021 and is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf
[87] *Human Rights Act Reform: A Modern Bill of Rights* – consultation, available here: www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation

> the new legislation is designed not to confer new rights or expand existing ones, but to limit the practical effectiveness of rights already in existence. In clause after clause, complicated and detailed provisions seek to make it less possible for rights to be asserted … It is not a bill of rights, but a list of spoilers.'[88]

The Bill gave effect to the same catalogue of ECHR rights as the HRA, although in its clause 9 specifically recognized trial by jury as a fundamental component of fair trials in the UK. However, trial by jury is already recognized in English law, and, given the different laws on access to jury trial in Scotland, raises devolution issues – so its inclusion was both unnecessary and problematic. As with the HRA, superior courts might issue a declaration of incompatibility if they find a law contravenes a Convention right (clause 10).

However, in many other ways, the Bill limited rights protection. First, it mandated a 'permission stage', requiring applicants to show they have suffered 'significant disadvantage' (clause 15) before their claim will proceed. The Bill also required a high level of judicial deference to the Executive in many areas, including deportation, where, under clause 8, 'foreign criminals' could only rely on the right to family life if their deportation would cause 'exceptional', 'overwhelming' and 'irreversible' harm. Significantly, the Bill also removed UK courts' power to interpret legislation to render it compatible with the ECHR (i.e. s3 HRA). It also removed courts' requirement to 'take into account' ECtHR judgments (s2 HRA). Furthermore, the Bill instructed courts to ignore interim measures issued by the ECtHR – a stipulation which surely violates the UK's Convention obligations. This provision appeared designed to avoid rulings such as when the ECtHR issued interim measures[89] to prohibit deportation of an applicant to Rwanda (under the UK-Rwanda asylum agreement) until lawfulness of this agreement had been established. Additionally, clause 3(2) required domestic courts to have 'particular regard to the text of the Convention right'. This would deter 'dynamic' interpretations such as those of the ECtHR itself, and align UK judicial interpretation closer to 'originalist' 'textual' approaches, as in the 2022 *Dobbs* decision of the US Supreme Court, which overruled *Roe* v. *Wade*.[90]

Repealing the HRA, with its dramatic consequences for rights protection and the devolution settlement, would constitute a major constitutional change. As Merris Amos has stressed, in other democracies, this would take considerable time, involving 'constitutional conventions, public consultation, a referendum or special parliamentary majorities.'[91] Yet, the government presented

[88] David Allen Green, 'The Proposed Bill of Rights Is a Pointless Distraction', *Prospect*, June 27, 2022.

[89] Application no. 28774/22 *NSK* v. *UK* (14 June 2022).

[90] See *Tyrer* v. *UK* [1978] ECHR 2, for the ECtHR's use of dynamic interpretation. *Dobbs v Jackson Women 's' Health* 597 US [2022].

[91] M Amos, 'Why UK Approach to Replacing the Human Rights Act Is Just as Worrying as the Replacement Itself', *The Conversation*, 27 June 2022.

no solid reasons for repealing the HRA, nor is there evidence of any substantial demand for its repeal.

In June 2023, following the resignation of Dominic Raab, the Bill of Rights Bill was abandoned. However, there is no guarantee that it would not be resurrected at a future date. Moreover, given the Bill's clauses requiring UK judges to ignore ECtHR interim measures, and empowering them to depart from ECtHR rulings, there would be a strong likelihood that the UK would violate the ECHR. If this occurred sufficiently often, the Council of Europe could exclude the UK (as happened for Russia). If that were to occur, then AG Suella Braverman's proposal for the UK to remove itself from the ECHR[92] would have taken place, without anyone ever voting for it. The 2022 Bill of Rights Bill represented an atavistic and regressive step back to understandings of British liberty in former centuries – where judicial deference was extremely high, rights were narrowly defined, and 'foreign' sources of rights protection decried. It is hoped its provisions will not be resurrected.

10.8 Brexit: The Eradication of Rights

Given the UK's 'first past the post' electoral system, it has been possible for legislation prejudicing minority groups (especially those lacking electoral rights, such as EU nationals) to be passed by a bare majority in Parliament. Furthermore, it is very difficult, if not impossible, to give human rights guaranteed protection under the UK Constitution, because a later act of Parliament can always override an earlier one, under the 'implied repeal' rule. This makes substantive entrenchment almost unachievable in the UK. Therefore, under Britain's uncodified Constitution, human rights, even when set out in primary legislation, such as the UK HRA 1998, have a precarious status, leaving them vulnerable to repeal by ordinary legislation.[93]

10.8.1 Exclusion of the Charter of Fundamental Rights from UK Law

However, one exception to the difficulty of entrenchment in UK constitutional law was provided by EU law. While the UK was an EU member State, the principle of the supremacy of EU law over conflicting national law applied, meaning that rights guaranteed under EU law could be protected from implied repeal by a later UK statute – at the very least, a sort of semi-entrenchment.[94]

[92] E.g. 'Suella Braverman calls for UK to leave "political" ECHR in wake of Rwanda ruling', *The Telegraph*, 10 July 2022.

[93] Although the UK HRA has been classified by UK Courts as a 'constitutional statute', (*Thoburn* v. *Sunderland CC* [2002] EWHC 195, per Laws LJ, at para. 62) namely one that may only be repealed by express and not implied repeal by the legislature.

[94] Case 6/64 *Costa* v. *ENEL* [1964] ECR 585; s2(4) ECA 1972 and *ex parte Factortame Ltd)* (No 2) [1991]. Express repeal would still have been constitutionally possible, but contrary to EU law and membership.

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And EU law provides individuals with many rights 'which become part of their legal heritage.'[95]

During the UK's EU membership, these rights took a number of forms. British citizens used their free movement rights under EU law to move to other EU countries to live, work, holiday and retire there. Other EU citizens likewise moved to the UK. However, the rights at issue are not only migratory in nature. British business enjoyed all sorts of rights of freedom to trade within the EU, without tariff or non-tariff barriers, as indeed did other EU traders with Britain. Workers derived many rights from EU law, such as equal pay, whether they migrated to another EU State or not, and consumers benefited from rights to consumer protection. The EU Charter of Fundamental Rights was legally enforceable in the UK, carrying the same weight as the EU treaties. While the UK was an EU member State, the EU Charter, and other rights in EU treaties, applied, and domestic courts were required, under EU law, to disapply incompatible national legislation. Post-Brexit, however, the EU Charter has been specifically excluded from UK law, and other EU rights are vulnerable to repeal by ministers using secondary legislation.[96] This removes the protection of a very large array of rights from individuals in Britain. The EU Charter is one of the most comprehensive rights documents in the world, protecting fifty different rights, encompassing civil, political, and socio-economic rights. To be sure, Charter rights apply only when a member State operates within the field of EU law, a somewhat murky area. However, the field of EU law is nonetheless wide, and covers much EU State action. So in leaving the EU, Britain has undergone a huge bonfire of rights. Not only have British citizens lost their EU citizenship, with attendant free movement rights, but also a large swathe of other human rights as well. It is hard to find a precedent for such a disengagement with human rights protection in the western world.

Now, to be sure, EU law did not vanish from the UK's legal system on Brexit day. Because so much UK law has derived from the EU since 1973, it was impossible to replace it with new UK legislation by 'exit day'. Therefore, the EUWA 2018 was passed, converting EU law into domestic law (where it becomes 'retained EU law') and then, where perceived necessary, allowing ministers to repeal or amend it. However, despite the general conversion of EU law into national law, s5(4) EUWA excluded the Charter of Fundamental Rights from domestic law from the exit date. The UK Government justified this exclusion by arguing the Charter is not a source of rights but only reaffirms existing rights which are protected by 'retained EU law', the common law, and the ECHR.[97] However this is inaccurate. Neither the ECHR, nor common law rights, match the full spectrum of rights provided by the

[95] Case C-26/62, *van Gend & Loos*, [1963] ECR 1.

[96] See further EUWA 2018, for provisions enabling UK government ministers to repeal or amend former (or 'retained') EU law by secondary legislation.

[97] UK Government, 'Charter of Fundamental Rights of the EU Right by Right Analysis' 5/12/2017. This analysis has been condemned for its superficiality – C Gallagher, A Patrick and K O'Byrne: *Report on Human Rights Implications of UK Withdrawal from the EU, An Independent*

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Charter,[98] and effective remedies have been removed by the Charter's exclusion. Furthermore, the Government's position placed a heavy reliance on the UK HRA, which the Government has undertaken to repeal.

It is more likely that specifically omitting the Charter reflected a distinct political choice. In March 2017, when David Davis, then Brexit Secretary, declared the EU Charter would not be included in retained EU law, a report in *The Daily Telegraph* read: 'David Davis announced that the first EU law to be scrapped after Brexit will be a charter that helps criminals avoid deportation.' *The Telegraph* also quoted Sir Bill Cash MP (chairman of the House of Commons European scrutiny committee) saying 'Britain would immediately benefit when the charter was dropped because "it provides protection for people who have no right to be protected."'[99]

As Vernon Bogdanor has argued,[100] the EUWA (and Brexit more generally) achieves something unprecedented in the UK's constitutional history. For the withdrawal of the UK from the EU transforms a protected Constitution (i.e. one that contains entrenched provisions) into an unprotected one. While the UK was an EU member, neither the EU Charter, nor other rights provisions in EU law, could be repealed by the UK Parliament, and UK courts were empowered to disapply domestic legislation incompatible with those EU rights, as in the *Benkharbouche* case.[101] Ms Janah and Ms Benkharbouche, both Moroccan nationals, were employed as domestic workers by the Libyan and Sudanese embassies in London. They claimed they were paid below the national minimum wage, forced to work unlawful hours, unfairly dismissed and (in Ms Janah's case) discriminated against on racial grounds. The two defendant embassies argued State immunity (under the UK State Immunity Act) applied to their claims. The UK Supreme Court found for the claimants, and because the Embassies had infringed EU Charter rights, the relevant protections of the State Immunity Act were set aside by the Court. Under EU law, they had an enforceable claim and right to a remedy, but this no longer applies post-Brexit.

10.8.2 EU Citizens' Rights

For many, the issue of human rights and Brexit has been dominated by the status of EU citizens (namely, nationals of other EU States resident in the UK) but also UK nationals resident in other EU States – who are no longer EU

Legal Opinion, 2 March 2018, para. 3.47. See also J Grogan, 'Rights and Remedies at Risk: Implications of the Brexit Process on the Future of Rights in the UK' (2019) *Public Law* 683.

98 Which include for example the right to data protection, and also the right to be forgotten, as established in Case 131/12, *Google Spain SL,* v. *González* [2014] ECR I-000.

99 Both quoted in 'UK takes back the right to deport as Britain repeals powers from EU', *Daily Telegraph*, 31 March 2017.

100 Vernon Bogdanor, 'How Brexit Will Erase Your Rights', *Prospect*, May 2018.

101 *Benkharbouche* v. *Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

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citizens. There are well over 3.5 million EU nationals[102] in the UK, and 1.2m British living in the EU, many of whom have made a permanent home there. EU law required them to be treated equally to host State nationals in many respects – a function of EU citizenship – but this no longer applies after Brexit. Prior to the 2016 EU referendum, some Brexiters insisted these rights would be guaranteed as 'acquired rights' (i.e. those rights not automatically revoked when a treaty no longer applies) under the 1969 Vienna Convention on the law of treaties. This has not been the case.[103] And, despite certain undertakings made to them during the referendum campaign, and pleas made by them not to be treated as 'bargaining chips', their rights were often ignored in the Brexit process.

It was the EU that insisted that EU citizens' status be protected and guaranteed under the EU Withdrawal Agreement. Under that Agreement,[104] EU citizens are granted 'settled status' if they provide evidence of UK residency for over five years. The settlement scheme has not, however, provided the 'automatic grant' of existing rights promised by many members of the Leave campaign, and there have been many unexplained delays in the application process.[105] UK citizens in other EU countries are little better off. They must also register, but will have no automatic right to move to other EU countries, as they will no longer be EU citizens.

Matters were hardly helped when, shortly before the UK general election in December 2019, Boris Johnson told *Sky News*: 'You've seen quite a large of people coming in from the EU – 580 million population – able to treat the UK as though it's basically part of their own country and the problem with that is there has been no control at all.'[106] This statement – met with widespread criticism – is clearly inaccurate. Contrary to Johnson's statement, such migration is not uncontrolled, because EU law makes provision for the expulsion of

[102] 3.8 million EU nationals according to the Migration Observatory Oxford in 2018: https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/

[103] The crucial point is that Article 70 Vienna Convention does not directly address individual rights. See further: A Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007) at 266.

[104] *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, Brussels, 18 October 2019 (OR. en) XT 21054/19.

[105] As Stuart McDonald SNP MP said in the House of Commons in January 2020, 'Imagine a retired French lady and a young Polish guy…. The French lady has been here since the 1970s and had a permanent residence document under the old EU rules. Understandably, she thought she did not need to apply to stay, but it turns out that, of course, she did. The Polish guy was born here and because of that he believed that he was British, so he did not apply. However, it turns out that because his Polish mum and his UK father were not married at the time of his birth, he was not British after all, and he should have applied as well. Under the government's proposals, that French lady and the young Polish lad will be subject to the full force of the hostile environment.' https://hansard.parliament.uk/Commons/2020-01-07/debates/C5ADC5C3-0008-4CBB

[106] See 'Election 2019: Boris Johnson Vows End to Migrants "Treating Britain as Their Own"', *The Times*, 9 December 2019.

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EU citizens who do not find work within 3 months of entry, or who commit criminal offences. And, of course, by no means all 580 million EU nationals came to Britain. And quite a few Britons exercised their free movement rights by going to other EU countries. This vilification of migrants has, however, been a feature of Brexit, dating back to the Referendum campaign. A further example was provided when, at the Conservative party conference, Prime Minister Theresa May labelled opponents of Brexit 'citizens of nowhere.' May said that '… if you believe you are a citizen of the world, you are a citizen of nowhere. You don't understand what citizenship means'[107] – a statement that had unfortunate echoes of the anti-semitic slogan 'rootless cosmopolitans' used as a term of abuse in the former Soviet Union.

10.8.3 The JPP and EU rights

An argument made by legal theorist John Finnis for the JPP at the time of the first *Miller* case illustrates how some conceive of rights in the UK. Finnis argued that the Supreme Court mistakenly assumed that EU rights are 'statutory rights enacted by Parliament' (and therefore the UK Government must not fall foul of the prohibition on using the prerogative to dispense with a statute).[108] Finnis argued instead that the ECA 1972 simply provided a means for making EU law rights enforceable in English law, and drew an analogy with double-tax treaties,[109] arguing that, although UK statutory provision was in both cases (i.e. the ECA and Tax Acts) a necessary condition for those rights' domestic legal efficacy, they were non-statutory in the sense that Parliament was not the original source for the rights. Finnis' argument seems to amount to the suggestion that EU rights are not rights in the relevant sense. Just as British railways have floundered and been delayed by the 'wrong kind of leaves or snow',[110] so Brexit was being held up[111] by the wrong kind of rights. The argument is that rights derived from the ECA are not rights in the full sense because their real authority derives from outside UK law, in an international treaty. It followed, then, that the rights that arose under the ECA could be eliminated by the exercise of the foreign relations prerogative without any need for Parliament's involvement. However, Finnis' analogy does not hold. Bilateral double taxation treaties are not comparable to multilateral EU treaties and do not give rise to rights comparable to rights acquired through EU membership.

[107] But see further, 'Mrs May, we are all citizens of the world', says philosopher' *BBC News*, 29 October 2016 (the philosopher in question was Kwame Anthony Appiah).

[108] J Finnis, 'Terminating Treaty-Based UK Rights', 26 October 2016, available at https://judicialpowerproject.org.uk/john-finnis-terminating-treaty-based-uk-rights/

[109] E.g. the Taxation (International and Other Provisions) Act 2010.

[110] E.g. 'LEAVES ON THE LINE: WRONG KIND OF SNOW', available at https://twsmedia.co.uk/2020/08/06/leaves-on-the-line-wrong-kind-of-snow/

[111] In the sense that the UK Government could not trigger Article 50 TEU without Parliament's consent, and litigation was necessary to confirm the need for this.

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In what sense are tax treaty provisions 'rights'? Double tax treaties are concluded to ensure people do not pay tax twice on the same income. But these tax treaties do not themselves impose taxes, nor create rights. EU treaties do create individual rights. Finnis' argument seems to suggest that there exist different classes of rights, and that rights only really count if they are properly homegrown and British in origin. But then, we might ask, how many homegrown rights actually exist in the UK? Not many. As I have argued, the common law had shown itself inadequate in the protection of rights. That is why the Human Rights Act was necessary in the first place, and why EU law also provided a valuable source of rights when the UK was an EU member.

10.9 Human Rights and Devolution

The UK is a plurinational state and the situation with human rights is complex across the devolved UK.

10.9.1 Scotland and Wales

The ECHR is written into devolution legislation. For example, s29(2)d Scotland Act 1998 provides that any Act passed by the Scottish Parliament is not law to the extent it is incompatible with any Convention rights covered by the HRA.[112] Devolved governments are also prohibited from acting inconsistently with the ECHR.[113] Repealing or amending the HRA would not remove these obligations but would necessitate amendment of the Devolution statutes. Indeed, it is likely that repeal, or even amendment, of the HRA by Westminster would violate the Sewel Convention, which requires that the Westminster government will not normally legislate with regard to devolved matters without the consent of the devolved Parliaments. Although Raab informed Parliament that the UK government would be 'seeking legislative consent motions'[114] for the Bill of Rights Bill, this seemed unlikely given that the Scottish and Welsh governments[115] made clear their opposition to HRA repeal.

However, the situation is more complex still. Although the HRA has UK-wide application, and is a reserved matter, human rights are partially devolved in Scotland and Wales. This means that devolved institutions have the power to promote human rights. For example, there exists a separate Scottish Human Rights Commission and also the Scottish First Minister's Advisory Group on

[112] s107(6) Government of Wales Act 2006 contains a similar provision.

[113] E.g. ss 29 and 57 Scotland Act 1998; similar provisions in the Government of Wales Act 2006 and Wales Act 2017.

[114] https://hansard.parliament.uk/commons/2022-06-22/debates/5736CBBA-A5F0-45B9-AA54-246FF57FB5EE/BillOfRights

[115] www.gov.scot/publications/human-rights-act-reform-consultation-scottish-government-response/; https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf.

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Human Rights, established in 2017. In March 2021, the Scottish Government announced a new Human Rights Bill, whereby four UN treaties would be incorporated into Scots law, including legislation that enhances human rights for women, disabled people and minority ethnic communities.[116] In parallel, in Spring 2021, the Scottish Government introduced a Bill aimed at directly incorporating the UN Convention on the Rights of the Child into domestic law. It was this Bill that was challenged by the UK Government in the UK Supreme Court and found to be beyond the Scottish Parliament's competence – an example of intra-governmental conflict in the UK over rights protection.[117]

10.9.2 Northern Ireland

The situation in Northern Ireland reveals further complexity in human rights protection across the UK. Northern Ireland had a differentiated Brexit from other parts of the UK but it was already, pre-Brexit, subject to the distinct, enhanced rights protections of the Belfast/Good Friday Agreement[118] (B/GFA) which is a legally binding international treaty signed by the UK and Irish governments. The ECHR is also expressly recognized in the B/GFA. Any unilateral move by the UK to diminish rights commitments in the B/GFA would raise issues of bad faith, and breach of international law. The B/GFA also formed the constitutional kernel of the Northern Ireland Act 1998 (the major devolution statute for Northern Ireland). The HRA is expressly mentioned in the Northern Ireland Act, and the latter Act would have to be amended if the HRA were repealed or changed. The intention had been for Northern Ireland to develop its own Bill of Rights, but to date, none has been enacted, although the task has been taken up again more recently and would certainly be more appropriate for Northern Ireland than the 'British Bill of Rights' mooted by the UK Government earlier. ECHR and HRA protections are essential to the peace settlement and B/GFA. But the now abandoned 2022 Bill of Rights Bill emasculated the ECHR, reducing the protection that has accrued under ECtHR caselaw.

The B/GFA requires 'equivalence' between the human rights protection in both the Republic of Ireland and Northern Ireland, and the principle of 'non-diminution' requires that rights protection should not regress in either jurisdiction. Both Ireland and the UK incorporated the ECHR into domestic law – through the HRA in the UK and the ECHR Act 2003 in Ireland. The revocation of the EU Charter of Fundamental Rights by Brexit raises problems for Northern Ireland, as it is hard to see how rights protection may

[116] 'New Human Rights Bill', Scottish Government, 12 March 2021.

[117] *Reference by the Attorney General and the Advocate General for Scotland* [2021] UKSC 42. See further chapter on Scotland.

[118] *The Agreement reached in the multi-party negotiations 10 April 1998* 'Rights, Safeguards and Equality of Opportunity.'

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remain equivalent between Ireland and Northern Ireland, when only one party enforces EU Charter rights.

Nonetheless, Article 2(1) of the EU/UK Withdrawal Agreement Protocol on Ireland/Northern Ireland[119] provides that there shall be 'no diminution of rights, safeguards or equality of opportunity' in the region as a result of the UK's exit from the EU, maintaining the commitment of the B/GFA. These arrangements are to be overseen by the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Joint Committee of the Human Rights Commissions of Northern Ireland and Ireland.

As a result of the Brexit Protocol, Northern Ireland has a different rights and equality system from the rest of the UK.[120] There has already been friction over rights in Northern Ireland, including disagreements over language rights, and post Brexit friction over Irish citizenship in Northern Ireland. The B/GFA allows people born in Northern Ireland to identify as British, Irish or both, but when Emma de Souza, born in Northern Ireland, claimed Irish citizenship, and requested a residence permit for her US-born husband, this was rejected by the UK Home Office, who deemed her British only, and required her to reapply as a British citizen or renounce her British citizenship and pay a fee to apply as an Irish citizen. Although de Souza's case was eventually resolved, this case revealed the complexity of identity and citizenship in Northern Ireland, and the failure of the UK government to recognize the B/GFA right for anyone born in Northern Ireland to identify as Irish or British.[121]

Therefore, in conclusion, human rights protection is not uniform across the UK. It is hard to see how a new Bill of Rights could function to improve human rights protection across the UK. Although the JCHR in 2008 described a national Bill of Rights as 'an expression of national identity' and 'potentially a moment of national definition'[122] it is hard to fathom how a human rights document could fulfil that function in the UK. This is perhaps why European rights protections, many now eradicated, were more tolerable in devolved territories. Divergent views of rights across the UK provide a potential source of friction and conflict.

10.10 Conclusion: The 'Monstering' of Human Rights

Many human rights have been eradicated in the UK as a result of Brexit. The post Brexit exclusion of the EU Charter from UK law, and the often fragile status of EU citizens' rights, means that rights protected under the HRA become even more important after Brexit. Yet this Act remains at risk of repeal in

[119] *The revised withdrawal agreement and political declaration considered and agreed at European Council on 17 October 2019*.

[120] See further chapter on Ireland.

[121] See e.g. 'Northern Ireland-Born British and Irish Win EU Citizenship Rights', *The Guardian*, 14 May 2020.

[122] Joint Committee on Human Rights, 'A Bill of Rights for the UK?' 2008, at 96.

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future. This is hardly a fertile landscape for rights protection. The claim has been made that, in the UK, rights have been 'monstered.' Adam Wagner has described how: 'Human rights myths and fabrications have proliferated: the fleeing criminal suspect given takeaway fried chicken by police to protect his human rights; the prisoner granted access to hardcore pornography so as not to subject him to inhuman or degrading treatment; the illegal immigrant who avoided deportation because he had a pet cat'.

Wagner attributes much of the blame to the right-wing press that 'have enthusiastically promoted the narrative that the HRA is a charter for terrorists and criminals. Rather than a bulwark for ordinary people against the power of the State, the HRA is said to be a Trojan Horse which has brought terrorists to our shores and allowed convicted prisoners to live in luxury.'[123] All of this has resulted in a monstering of the ECHR, HRA, and EU, as well as of many of those who make human rights claims.[124]

Certainly, there has been too much misrepresentation of the HRA and too little public understanding of it. In late 2015, when it seemed at real risk of repeal, a public awareness campaign[125] (mostly crowdfunded) to save the HRA was introduced, using billboards, as well as short films, which focussed on those who had used the HRA to obtain justice, and did much to increase public understanding of the Act.

But will the HRA survive? Will rights once protected by the EU continue to be as robustly protected as previously? Time will tell. But, if as a result of Brexit, and attacks on the HRA, there is a regression to the view that 'a culture of liberty' (whatever that may mean) by itself, is sufficient to protect rights, then the outlook for human rights protection in the UK looks bleak.

[123] Adam Wagner, 'The Monstering of Human Rights', 19 September 2014, available at https://adam1cor.files.wordpress.com/2014/09/the-monstering-of-human-rights-adam-wagner-2014.pdf

[124] Similar points are made by Gearty, *On Fantasy Island* (Oxford: Oxford University Press, 2016); and Elspeth Guild, 'BREXIT and its Consequences for UK and EU Citizenship or Monstrous Citizenship' (Leiden: Nijhoff Law Specials, Volume 94, 2017) (focusing more on EU rights).

[125] 'Act for the Act', available at https://actfortheact.uk