Contested Justice

Brexit, Human Rights and the Culture War on Europe

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As the UK and the EU are entering the final phase in the negotiations over a post-Brexit trade deal, it has become clear that there is a fundamental clash of interests not only about fishing and governance issues but also about human rights. As a key condition for the future collaboration on security issues, criminal prosecution and law enforcement, the EU demands from Britain a formal commitment to its continued adherence to, and domestic application of, the European Convention on Human Rights (ECHR), a commitment the UK government refuses to make.

While the British government frames its refusal as a question of national sovereignty, this dispute, in fact, represents the latest episode of the British Conservatives' attempts to dismantle universal human rights norms and standards in domestic law by undermining the UK Human Rights Act (HRA) and the application of the European Convention. In a parliamentary committee hearing Cabinet Office Minister Michael Gove was forced to admit that the British government refuses to "sign up to human rights safeguards demanded by the EU in exchange for a trade deal so that the government has the option of changing the Human Rights Act." Introduced by the Labour government in 1998, the Human Rights Act entrenched the civil and political rights of the ECHR in domestic law and embodies the British equivalent of a constitutional bill of rights. Although Gove denied the Tory government's intention to leave the European Convention, leading members of the Johnson Cabinet are known as human rights critics, and the Prime Minister's chief adviser, Dominic Cummings, is on record considering Britain's withdrawal from the ECHR to be "high on the agenda" after Brexit.

For people outside the UK it has often been difficult to comprehend the persistent contestation of the HRA and the European Convention, as well as their lack of public support – perhaps even more difficult than understanding the campaign for leaving the EU. Indeed, opposition to human rights and the ECHR especially from political nationalists in Britain may seem all the more surprising given that the European Convention was created after World War II largely on the initiative of the Churchill government, drafted by British lawyers and exported to the constitutions of many Commonwealth countries.

There are three main reasons behind this conundrum, as I will show in this contribution: first, the uneasy footing of the British constitutional tradition and common law with the idea of codified universal human rights; second, the lack of an adequate discursive translation of the European Convention into the British context upon the introduction of the Human Rights Act; and third, the depiction of British human rights adjudication and the European Convention as a "foreign intervention" and their (more or less deliberate) conflation with the culture war on Europe by the right-leaning press and the political establishment.

The "unwritten" British constitution vs. codified human rights

The fact that large parts of the British political elite are so fundamentally opposed to the idea of codified universal human rights as a limitation of political power is, to a considerable extent, the cultural reflection of the British constitutional structure.

Before the introduction of the HRA, Britain was one of only two liberal democracies in the world lacking both a codified body of fundamental legal principles regulating the government of the state and a national framework for the protection of human rights – what is usually dubbed the UK's "unwritten" consti-

tution. English common law and the British constitution as a whole sit rather uneasily with the notion of human rights as expressed in most modern constitutional bills of rights and the European Convention. This is because, historically, the British constitution evolved around an understanding of constitutionalism not as the limitation of political power by codified universal rights, but as a politico-legal process concentrating political power in a single institution, the Queen in Parliament, that should be unfettered by legal constraints and directly accountable to the electorate.

This was reflected in the traditional constitutional doctrine of the absolute sovereignty of Parliament as the only authority with the right to make or unmake any law. This meant that there was no fundamental law or right in the sense that it would have enjoyed special constitutional protection against parliamentary interference. From the perspective of the disciples of William Blackstone and A.V. Dicey, the idea of a rights-based society with a formalised constitution was commonly considered as immature for a civilised nation such as the English. In the English common law tradition of civil liberties, individual rights were conceptualised not as positive entitlements to particular goods but as "negative freedoms," as the personal liberty that is "left over after all prohibitions are accounted for". Accordingly, UK law protected individual rights and freedoms largely indirectly, as a byproduct of the judicial review of administrative action, not as actionable legal claims binding all powers of the state.

The uneasy footing of the British constitutional doctrine of parliamentary sovereignty with the idea of universal human rights as a constraint of governmental action was mirrored in the political culture and in the leadership of the major parties. Despite parliamentary reforms having increased the legislative influence of both parliamentary chambers since the 1970s, the initiative in law and policymaking in Westminster continues to lie almost entirely with the executive, which derives its constitutional legitimacy primarily from the popular vote, not from rights conformity. As a result, for both Labour and the Conservatives the prospect of an unrestrained government long appeared as too promising to give in to the demands from lawyers and activists to incorporate the European Convention into domestic law. But while the Labour leadership has overcome the traditional ideological antagonism of the Left toward the judiciary since the 1990s, large factions within the Conservative Party continue to be fundamentally opposed to New Labour's constitutional and human rights reforms.

The HRA and the failed translation of international human rights law

Another reason for the HRA's continuing lack of public and political support is that the legal entrenchment of European Convention rights was not matched with an adequate political narrative of Convention rights as fundamental *domestic* norms for the legitimate exercise of state power. Nor was the incorporating statute underpinned with a strong narrative of the HRA as the functional equivalent of a constitutional bill of rights. Labour's failure to translate the international human rights norms of the European Convention into the domestic political discourse created a perceived gap in the legitimacy of the HRA's operation because it inhibited the development of a sense of public ownership and a wider understanding of the Act as a *de facto* British bill of rights.

Normally, the sustainable domestic implementation of norms and standards appropriated from international law requires some degree of adjustment both to local structures and discourses in order to find acceptance – a process that the legal anthropologist Sally Engle Merry has characterised as "cultural translation". In structural terms, the HRA was indeed carefully crafted to adapt the norms and standards of the European Convention to the British constitution and law. On the one hand, the Act was designed to enable people in Britain to directly invoke Convention rights in domestic courts, and to enhance the constitutional power of the judiciary by establishing new mechanisms for rights review. On the other hand, the HRA formally preserved the constitutional doctrine of parliamentary sovereignty and the executive's extensive legislative powers in the Westminster system by

refusing to vest British courts with the power to strike down Acts of Parliament which are found to be incompatible with Convention rights.

By contrast, very little effort was made to translate the European Convention into the local political discourse. There was no extensive public consultation process, and the HRA was neither before nor after its enactment consistently presented to the public as the British equivalent of a constitutional bill of rights although it was designed to fulfil its key functions. The limited justification that *was* provided for incorporating the European Convention oscillated between a technical and a nationalistic framing, both of which downplayed the significance of the incorporating statute and undermined its legitimacy.

After the HRA's enactment in 1998, the Labour government made rather limited efforts to embed human rights in the public sector and to educate the public about their new domestic rights safeguards. The resulting gap in the public sense of ownership and the perceived legitimacy of the HRA was easily exploited by parts of the media and the political elite – including the Labour government itself – who subsequently called for the HRA's amendment or repeal.

The HRA and the culture war on Europe

As Conor Gearty has pointed out so forcefully, it is the same ideological forces, the same myths and narratives that have swept Britain out of the EU which continue to threaten the existence of the Human Rights Act and UK membership to the ECHR. Although the EU and the European Convention system are separate entities, the HRA and the application of Convention rights by British courts have been portrayed by right-leaning politicians and the press as "a foreign intervention" from "Europe" almost from the beginning, and have subsequently been conflated in public political discourse with the project of "reclaiming" national sovereignty from the EU.

After the United Kingdom joined the United States in the so-called "war on terror" in 2001, leading Labour and Conservative politicians have authorised and fuelled a media narrative in which the human rights norms protected by the HRA were considered as primarily benefitting terrorists and criminals ("The Criminals' Rights Act 1998"), and that portrayed British human rights laws and adjudication as "being imposed from Europe". Indeed, the "monstering" of the HRA as a "villain's charter" and the persistent misreporting of domestic and European human rights adjudication as "political correctness gone mad" by large parts of the British media is well documented and should not be underestimated in its damaging effect on the public perception of the Act.

Yet, key political actors have persistently and actively contributed to the polarisation and increasing hostility within public debate toward human rights, the HRA and the European Convention. While the Labour government under Blair sought to derogate from the Convention and considered amending the HRA, following Conservative-led governments under David Cameron and Theresa May called for the Act's repeal and made plans to replace it with a British bill of rights that was openly justified as a measure to limit the standards of rights protection and the powers available to British courts under the HRA. Although the Conservatives' plans to repeal the HRA were officially put on hold after the Brexit referendum in June 2016, the current government under Boris Johnson was elected on a manifesto promising to "update the Human Rights Act" and to establish a "Constitution, Democracy, and Rights Commission" that should develop proposals for the "proper balance between the rights of individuals, our vital national security, and effective government."

There can be no doubt that any restriction of the Convention's domestic enforceability would do considerable damage to Britain's international reputation and credibility. But it would be the people in Britain who would be hit hardest by any dilution of the HRA: Once deprived of the human rights safeguards offered under EU law and the Charter of Fundamental Rights of the EU after Brexit, the Human Rights Act will be the strongest remaining instrument in domestic law for the effective protection of basic civil and political rights representing the bedrock of any liberal democracy.

If the Conservative government under Boris Johnson should succeed in realising its constitutional reform plans and restrict access to judicial review, bring judicial appointment procedures under political control and tinker with the last remaining code of universal human rights applicable in domestic law after Brexit, Britain might indeed be teetering on the brink of regressing to an illiberal democracy like Hungary and Poland – or, indeed, of developing into the "elective dictatorship" that Lord Hailsham famously cautioned against in 1976.

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For a more detailed analysis of the creation of the UK Human Rights Act in the context of the postwar history of British bill of rights campaigns, see the author's article: "Out of sync: The failed translation of international human rights in the creation of the UK Human Rights Act", *Journal of Human Rights* (2020) 19:3, 325-343.

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