The Future of Human Rights in the UK

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Edited by

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PREFACE

With the eight hundredth anniversary of the signing of Magna Carta having been commemorated in 2015, the time seemed right, if not overdue, for a stock take of the United Kingdom's often fractious relationship with the idea, or ideal, of human rights. However, pressure for a stock take had been growing for some time. In the mid to late Noughties, serious thought started to be given in some quarters to the creation of something called a "British Bill of Rights". Others wondered what a peculiarly British right might look like and why it would not be universal like all the others. In a Report entitled "A Bill of Rights for the UK?", published by Parliament's Joint Committee on Human Rights in 2008, reference was made to Australia, who, in drafting a new preamble to her constitution in 1999, had contemplated including the purported local value of "mateship".[1] The suggestion was perhaps sensibly dropped. It is not clear if enforcement or justiciability were ever discussed.

Then, in 2010, came a new Home Secretary, Theresa May. Mrs May became a tireless opponent of the European Court of Human Rights which she felt was preventing her from deporting the radical Islamist preacher, Abu Qatada. Her party leader, the Prime Minister David Cameron, seemed equally annoyed with the same Court's refusal, as he saw it, to let the UK pursue its historic policy of denying prisoners the vote. There was even talk, by serious journalists, about a case in which, so they said, foreign criminals had been allowed to stay in the country because of a cat. And while this may have produced mirth in some parts of the country, elsewhere people were taking these matters very seriously indeed. As a result of a referendum on 23 June 2016, the UK will bring to an end her membership of the European Union, a move which even the Supreme Court admits will lead to a substantial loss of rights, some of them admittedly outwith the scope of this book, but others very much within it.[2] Mrs May, Strasbourg's Nemesis, is now elevated to Prime Minister, her plans for the Convention on hold. But only for now.

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[1] Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2007–08, HL 165-I, HC 150-I) 34.

[2] See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

With the need for a stock take clear, a location was required. While Brighton might not immediately seem to be the obvious choice, the city does have a connection to the world of human rights. This has nothing to do with Sir Edward Marshall Hall KC, the renowned criminal barrister who lived at 30 Old Steine. A quick perusal of his career shows that he had little to do with the subject, except perhaps the right to a fair trial. His nickname, after all, was the Great Defender. But the city was the location of a Council of Europe "High Level Conference" in 2012 at which important procedural changes were agreed to the Convention regime, the resultant text still known as the Brighton Declaration.

Our conference, also entitled The Future of Human Rights in the UK, was held on the Moulsecoomb campus of the University of Brighton on 10th November 2016. Contributors came from the length and breadth of the United Kingdom and from overseas. The topics discussed were many and varied, taking in the full gamut of rights from classic civil and political rights like the right to freedom of expression and the right to freedom of conscience, through to economic and social rights including the right to healthcare and the right to housing. Perhaps inevitably for the post 9/11 era, with its prioritization of "security", and only a decade on from the deadly attack on London of 7 July 2005, there was much debate around the right to fair trial, with particular focus on constituent rights such as the right to silence and the right to legal aid. The quality of the contributions was extremely high, as we are sure the present tome–which brings together most of the papers given that day–will confirm. Apart from being an excellent read, we hope that it provokes debate, if not for another eight hundred years then at least for some time, and that it inspires further scholarship on these vital topics.

Collectively, we would like to thank Christopher Matthews, Senior Research and Events Administrator at Brighton Business School, for his sterling behind-the-scenes work in helping us to put the event together, as well as all of the participants, but in particular Professor Conor Gearty and Professor Fiona de Londras for agreeing to be keynote speakers, and with especial thanks to Professor de Londras for further agreeing to write the Introduction to this collection. We would extend our gratitude to Professor Marie-Benedicte Dembour who co-convened this conference and to Professor Aidan Berry for his support and his contribution in opening the conference. Special thanks are also extended to two of the University of Brighton's law students, Leigh Hart and Elizabeth Mutter, who gave their time to assist us and their efforts ensured that the conference ran smoothly and to time. We would also like to thank Victoria Carruthers and all at Cambridge Scholars Publishing for their enthusiasm for our conference

and their help in realising this volume. Above all, we would like to thank all those who attended on the day and contributed to the debate.

Individually, Claire would like to thank Professor Marie-Benedicte Dembour for her guidance and assistance in making this conference become a reality; her partner Stephen for his support and Richard Lang for his excellent contribution.

Individually, Richard would only like to thank one person, Claire-Michelle Smyth, for coming up with such a fantastic project, for inviting him to be part of it, and for putting up with the erratic nature of his contribution.

Claire-Michelle Smyth and Richard Lang
Brighton, 30 June 2017

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CHAPTER ONE

INTRODUCTION: THE FUTURE OF HUMAN RIGHTS

FIONA DE LONDRAS

Human rights and human rights law have now become such an engrained part of our everyday political, legal and activist talk that we are in danger of taking for granted an embeddedness that may not in fact exist. Of course, in a legal doctrinal sense, human rights *are* embedded in the United Kingdom, not only through the Human Rights Act 1998 but increasingly through adaptations and developments of the common law. But legal doctrinal embeddedness is hardly the end of the story; the future of human rights in the United Kingdom will depend to a great extent not only on the doctrinal basis for their continued protection (which may, or may not, be the Human Rights Act 1998 or some version of a 'British Bill of Rights'), but also on its anchoring in the political and popular discourse. We can hardly say that Griffin's pronouncement that the constitution is politics and politics is the constitution is still a complete description of the UK's constitutional corpus, but the basic proposition retains relevance. Politics matters, and for human rights law politics matters a great deal.

The essays in this collection show that very well indeed. Alan Greene argues compellingly that the failure to embrace fully human rights as a part of the UK's constitutional culture is related to numerous phenomena, rooted both in the constitutional heritage of the United Kingdom (and, indeed, the political constitution *per se*) but also in the development of a British culture of control. As in any culture of control, those tools that act as a source of resistance are easily presented as part of the 'problem' needing control, 'monstered' by the media (considered with great acuity by Gies in her chapter) and politicians alike. Whether that is the Human Rights Act 1998 or 'activist left-wing human rights lawyers', a lack of firm anchoring in the politico-legal space can make human rights vulnerable to attack. Add to that a politically febrile context, such as that of Brexit, and the dynamics become all the more challenging. In their

essays in this collection, Coleman, Casla and Lang present Brexit as a moment of both opportunity and risk. Of course, there is always opportunity in chaos (and how else, in politico-legal terms, could the proceedings so far after triggering of Article 50 be described?) but in order to take advantage of that chaos there must be a firm foundation in which the value that we try to advance—in this case the protection and fulfilment of rights through, *inter alia*, law—is rooted in order for it to succeed. And here, then, is where reading the contributions to this collection as one a grain of doubt begins to appear. Can we really say that human rights are sufficiently entrenched in the UK's politico-legal culture to effectively withstand Brexit? I am not sure that this is at all clear, although an interesting question that requires further exploration is whether the clear embeddedness of human rights within the European Union (as a constitutional principle and in the Charter) might be such as to force human rights onto the agenda, and keep them there, in a way that would have positive effects in the post-Brexit UK.

Even then, however, key questions about the sufficiency, reach and operation of human rights law persist. Whether it is human rights' ability effectively to shape surrogacy law (considered by O'Connor in her chapter), the recognition of the right to silence as fundamental to a fair trial (considered by Quirke), the compatibility of citizenship stripping with human rights (considered by Pougnet), or the right to strike (Barrow) questions of the content of human rights persist. Perhaps the prickliest questions relate to material wellbeing. In spite of years of scholarship, activism and advocacy socio-economic rights continue to be considered in the second place to civil and political rights, even though it seems quite clear that a basic condition of material wellbeing is fundamentally important not only to human flourishing but also to the exercise of civil and political freedoms. In this context, human rights law has had some successes in Austerity Britain (for example, in challenging the so-called Bedroom Tax) but socio-economic rights discourse continues to evade effective embeddedness in domestic law, with arguments of their non-justiciability still enjoying significant traction (on which see Smyth in this collection) and the clearly acknowledged harm caused by austerity still not being effectively countered by human rights (see the chapter by Casla in this collection). If we are to think of the future of human rights, then, we must, it seems, think not only about the resilience of human rights law and discourse in formal and political terms, but also about the expanse of human rights law and about how that relates to the material conditions of people's lives. A human rights law that leaves one hungry, homeless, and

in ill-health in a wealthy economy and supposed welfare state is a strange human rights law indeed.

In that, lawyers play an important role. Neither lawyers nor the law are the answer, at least on their own, to challenges of material well-being, to ill-health, to inequality, to injustice. But neither are they insignificant. Wilding nimbly illustrates the role of law and lawyers in making rights accessible, but of course we must also think critically about the arguments that will convince politicians, judges, policy-makers, and indeed the general public that there is a compelling and a justifiable case for burdening some for the purposes of advancing the rights of others (on which see Williams' chapter in this book). Fundamentally, the future of human rights in the UK is dependent not only on legal doctrinal structures, on lawyering and on politics, but on making this first principles argument that the rights of some are to the benefit of all. That is the challenge that faces us, and rising to it is an important task indeed.

CHAPTER TWO

THE HUMAN RIGHTS ACT IN A CULTURE OF CONTROL

ALAN GREENE

Introduction

The UK is currently in the midst of a robust backlash against human rights. The election of a Conservative majority to Government in the 2015 general election with the express pledge of repealing the Human Rights Act 1998 (HRA) in its manifesto has placed both its future and the UK's continued accession to the European Convention on Human Rights (ECHR) high on the political agenda. That stated, the HRA was always on politically contentious ground with calls for its repeal being voiced since its enactment and this enactment itself delayed due to concerns regarding its impact.[1] Such 'rights hostility' in the UK may be explained by political scepticism towards all things 'European'— a hostility that still persists even after the UK's vote to leave the European Union (EU)— and the UK's constitutional order that has always had an, at best, ambivalent attitude towards the judicial vindication of human rights. This chapter, however, argues that these explanations are not the entire picture.

This chapter commences with a brief over-view of these standard rights critiques in public law discourse: namely, from the conception of rights by political constitutionalists as inherently political constructs, the scope of which should be left to the political branches; and Euro-scepticism which views human rights as a foreign imposition on the UK. Both of these critiques ultimately evoke an image of state sovereignty similar to Hobbes' famous Leviathan, with preservation of this all-powerful state from being weakened by human rights the primary

[1] Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford University Press 2016) 3.

motivation.[2] However, the death of Leviathan cannot be understood only through these two narrow lenses. A fuller understanding of this Leviathanic death, and by extension, the backlash against human rights in the UK, would entail looking at the complex sociological and political changes that the UK has gone under since the end of World War II. These changes have posed a profound challenge to the myth of the sovereign state, particularly in the area of criminal justice. Criminal justice has always been a key theatre for the performance of state sovereignty and the changes and challenges faced by the sovereign state in what David Garland calls a '*culture of control*' need to be confronted.[3] By illustrating and contextualising the changes that this field and society has undergone, a broader and more critical understanding of rights hostility in the UK can be attained.

One must be careful, however, when constructing grandiose narratives concerning the general condition of modernity, particularly in a short chapter like this. The ambitiousness of such a project is daunting and whatever the result, it will invariably fall short of this stated goal. Outliers may be misidentified as the end-point of a trend, subjective preferences may distort the narrative by exaggerating certain aspects and downplaying others; certain trends may be ignored altogether.[4] The purpose of this chapter therefore is not to provide such a comprehensive description of the condition of modernity, or even of Garland's account of modernity; rather, it is to stimulate and provoke debate in the existing literature, in particular in the field of law. It is to challenge lawyers to expand beyond their discipline to look at arguments from other fields such as criminology, sociology and politics, thus bridging the gap between theory and practice.

Explaining Rights Hostility in the UK: Parliamentary Sovereignty and Euro-Scepticism

The UK has always had, at best, an ambivalent attitude towards the judicial protection of human rights, in particular regarding their enforcement against the sovereign will of Parliament. JAG Griffith's famous conception of the UK's political constitution as being 'no more and no less than what happens,' eschewed any notion of judicial rights

[2] See Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985).

[3] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001).

[4] Lucia Zedner, 'Dangers of Dystopia in Legal Theory' (2002) 22(2) Oxford Journal of Legal Studies 341, 343.

protection against a legislature.[5] Rights are instead conceptualised as inherently political contestations, the resolution of which should be for the more democratically legitimate Parliament to decide rather than in courts. To illustrate this point, Griffith highlights the right to freedom of expression in Article 10 of the ECHR, arguing that it 'sounds like the statement of a political conflict pretending to be a resolution of it'.[6]

The HRA and Political Constitutionalism

Against this constitutional backdrop, the enactment of the HRA in 1998 saw the UK incorporate the ECHR into domestic law while at the same time seeking to maintain the supremacy of Parliament. Inspired by the New Zealand Bill of rights, the HRA took a 'third way' approach to human rights, allowing courts to review, and invalidate administrative decisions if they were incompatible with human rights norms.[7] It also sought to foster a 'dialogue' between Parliament and the courts if the rights violation is traceable back to primary legislation and the legislation cannot be interpreted in a way compatible with these human rights obligations.[8] Thus a section 4 declaration of incompatibility under the HRA does not affect validity of the legislation in question, meaning that the HRA avoids the degree of judicial protection of rights as seen, for example, in states like the USA or Ireland where the judiciary can strike down legislation as unconstitutional.

Within this culture of constitutional ambivalence towards the judicial protection of rights, it is of no surprise that the HRA, notwithstanding its copious genuflections towards the supremacy of Parliament, has become a target for political debate when particularly contentious judgements are reached. Benedict Douglas argues that this is further compounded by the lack of a fundamental justification for the HRA, such as the concept of dignity which has hampered the 'ownership' of rights in the UK and

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[5] JAG Griffith 'The Political Constitution' (1979) 42(1) Modern Law Review 1, 19.
[6] ibid 14.
[7] See Francesca Klug, 'The Human Rights Act— a "Third Way" or "Third Wave" Bill of Rights' [2001] European Human Rights Law Review 361-372; Section 6 of the HRA requires public authorities to act compatibly with Convention rights.
[8] Section 3 of the HRA requires courts to interpret legislation compatibly with Convention rights 'so far as it is possible to do so while section 4 of the HRA empowers a court to make a declaration of incompatibility. See Roger Masterman, 'Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' [2009] Public Law 112, 114-115.

provided no bulwark against the criticisms of rights levied by Griffith and his predecessors, Jeremy Bentham and Edmund Burke.[9] The balance struck by the pyrrhic remedy of section 4 has also been criticised from a political constitutionalist perspective. While Section 4 declarations of incompatibility do not affect the validity of the law in question, some commentators argue that this 'weak-form' judicial review eventually evolves into strong form judicial review given that such declarations of incompatibility are rarely, if ever, ignored.[10] Indeed, a number of political reactions to such section 4 declarations would corroborate this.[11] However, the subsequent political pushback regarding prisoner enfranchisement following a declaration of incompatibility from a British court and subsequent finding of a violation of the ECHR would suggest that this is not necessarily the case in the UK.[12]

Political constitutionalism does, to an extent, explain why there is political and media hostility towards certain aspects of the HRA and human rights norms more generally in the UK; however, what political constitutionalism does not tell us is *which* judgments may be the ones that are electorally salient. For although Griffith highlights Article 10 of the ECHR to illustrate the inherently political nature of rights, it is not the cases pertaining freedom of expression that are the subject of tabloid or political indignation. Indeed, the very same newspapers that support a repeal or reform of the HRA are eager to invoke Article 10 when it is their rights that are at stake.[13] Instead, it is those cases involving the rights of individuals who society perceives as 'others' that provoke the most hostile reactions towards the HRA.[14]

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[9] Benedict Douglas, 'Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom' [2015] Public Law 241, 246.

[10] See Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101(8) Michigan Law Review 2781.

[11] See, for example, the enactment of the Sexual Offences Act (Remedial) Order 2013 in response to a declaration of incompatibility made in *R(F) v SSHD* [2011] 1 AC 331 regarding the proportionality of a lifelong requirement, without review, for registered sex offenders to keep the police informed of their whereabouts. For a discussion of the political debate surrounding this decision, see Gearty (n 1) Ch 5.

[12] *Smith v Scott* [2007] SC 345; *Hirst v UK* App no 74025/01 (ECHR 6 October 2005); *Greens and MT v UK* App nos 60041/08 and 60054/08 (ECHR 23 November 2010). See text to (n) below for a further discussion of this issue.

[13] *Miller v Associated Newspapers* [2016] EWHC 397 (QB).

[14] text to (n 55) below.

Euro-scepticism

This 'otherness' of human rights norms is not just limited to the individuals invoking rights claims but may also affect the norms themselves. In this regard, human rights norms the UK are often framed as a foreign imposition from Europe. The Conservative Party's 2015 manifesto, for example, pledged to:

> …scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.[15]

This representation of human rights law as a foreign imposition on the UK is a politically potent one in a climate where Euro-scepticism is widespread and has not abated— but arguably accelerated— following the referendum to leave the EU in 2016.[16] Press coverage on human rights often conflates the Council of Europe and the ECHR with the European Union (EU).[17] To counter this European narrative, defenders of the HRA and ECHR may attempt to repatriate human rights, pleading to British input into the drafting of the ECHR or emphasising the link between the ECHR and traditional British civil liberties.[18] From its inception, the Labour Party famously embraced this patriotic narrative by naming the policy document that gave birth to the HRA 'Rights Brought Home'. Winston Churchill is often mentioned at this point of the debate and Magna Carta may also be referenced too in this narrative— both by those

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[15] 'The Conservative Party Manifesto 2015' (May 2015) <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> accessed 8 January2017, 60.

[16] See, for example, Christopher Hope, 'Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed' *The Telegraph* (28 December 2016) < http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/> accessed 7 January 2017.

[17] See David Mead, '"They offer you a feature on stockings and suspenders next to a call for stiffer penalties for sex offenders": do we learn more about the media than about human rights from tabloid coverage of human rights stories?' in Michelle Farrell (ed), *Human Rights in the Media: Representation, Rhetoric, Reality* (Routledge, forthcoming).

[18] This is a common theme stressed by human rights campaigning project RightsInfo. See, for example, 'Human Rights' What could be more British than that?'(*RightsInfo* 30 September 2016) < http://rightsinfo.org/what-could-be-more-british-than-that/>accessed 7 January 2017.

in favour and against the HRA.[19] These counter-narratives to Euro-scepticism may also downplay the legal relation between the HRA and the ECHR, by stressing that UK courts only have to 'take into account' judgments of the European Court of Human Rights (ECtHR), rather than being absolutely bound by them.[20]

Hostility therefore may not be towards the rights themselves per se but to their source as emanating from Europe and a fear of a loss of sovereignty to an external entity beyond the state. Again, however, not every case before the ECtHR attracts the same level of media and political interest.[21] Euro-scepticism, while explaining to a certain extent why judgments of the ECtHR are considered to be unpopular, also does not help to identify which judgments will be the most contentious.

There is an additional element to the 'other' dimension of human rights norms that is hinted at by the Conservative Party's 2015 manifesto:

> We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.[22]

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[19] Terry Kirby, 'The Human Rights Act: 800 Years in the Making' *The Guardian*, (2 June 2009); Jon Stone, 'Scrapping the Human Rights Act will 'restore' Magna Carta's Legacy, says David Cameron' *The Independent* (15 June 2015) < http://www.independent.co.uk/news/uk/politics/david-cameron-says-his-plan-to-scrap-the-human-rights-act-will-restore-magna-cartas-legacy-10320232.html> accessed 7 January 2017; Philip Johnston, 'In the land of Magna Carta, individual liberties already exist – Human Rights Act or no' *The Telegraph* (2 June 2015).

[20] HRA section 2. For how section 2 has operated in practice see Roger Masterman, 'Aspiration or Foundation? The Status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law' in Helen Fenwick, Roger Masterman and Gavin Phillipson (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 57; Aileen Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after *Re P*?' (2009) 72(5) Modern Law Review 828; Roger Masterman, **'**Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court of Human Rights' (The Constitution Unit, School of Public Policy, UCL 2015) < https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/166.pdf> accessed 10 January 2017.

[21] Mead (n 17).

[22] Conservative Manifesto (n 15) 58.

This is contained in a section labelled, 'Fighting crime and standing up for victims'. Related arguments are made in a section regarding the 'Real change in our relationship with the European Union', pledging that a newly enacted British Bill of Rights 'will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation'.[23] The United Kingdom Independence Party's (UKIP's) 2015 General Election manifesto also explicitly makes the link between human rights and criminal justice with discussion of repealing the HRA and withdrawal from the ECHR placed in the 'crime and justice' section of its manifesto. It elaborated as follows:

> We will remove ourselves from the jurisdiction of the European Court of Human Rights: the Strasbourg Court whose interpretation of the European Convention of Human Rights has been known to put the rights of criminals above those of victims. Our own Supreme Court will act as the final authority on matters of Human Rights.
>
> We will also repeal Labour's Human Rights legislation. It has given European judges far too much power over British law making and law enforcement and prevented us deporting terrorists and career criminals and from implementing whole-life sentences.[24]

There is therefore a clear link drawn between human rights, crime, and other 'others' such as terrorists and immigrants. Conor Gearty terms this representation of the HRA and ECHR as 'a charter for the bad'[25] while Adam Wagner calls it the 'monstering' of rights.[26] Wagner's interesting account of this monstering of rights begins in 2005; however, this chapter argues that one must go back further than this.

Human Rights in a Culture of Control

Since the mid-twentieth century, the UK has, without a doubt, experienced a marked increase in judicial power. While the HRA was a significant contributor to this increase, it certainly was not the starting point. Thus

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[23] ibid 73.
[24] 'United Kingdom Independence Party Manifesto 2015' < https://d3n8a8pro7vhmx.cloudfront.net/ukipdev/pages/1103/attachments/original/1429295050/UKIPManifesto2015.pdf?1429295050> accessed 7 January 2016, 53.
[25] Gearty (n 1) ch 8.
[26] Adam Wagner, 'The Monstering of Rights' (19 September 2014) < https://adam1cor.files.wordpress.com/2014/09/the-monstering-of-human-rights-adam-wagner-2014.pdf> accessed 8 January 2017.

while many have heralded the death of Leviathan;[27] this death, however, if it has occurred, was not so much a slaying by a single blow as it was a death by a thousand cuts. According to the Judicial Power Project, a project founded and supported by the right-wing Think Tank Policy Exchange, 'No single political or legal decision, including the human Rights Act 1998, alone explains the rise of judicial power within the United Kingdom.'[28] Nevertheless, this project, as its name suggests, is focused almost exclusively on changes in judicial power, rather than on changes to public power and the function of the state as a whole. Certainly, the rise in judicial power has affected the 'Leviathanic' image of the state as an all-powerful entity, with the executive— and the legislature to an extent— checked by judicial scrutiny in both domestic and international courts.[29] However, a key question remains as to whether this growth in judicial power is a pro-active one on the part of the judiciary or reactive to the changing nature of society and, by extension, the function and expression of state power. A fuller exploration of the changing nature of judicial power would involve looking these changes in this broader sociological and political context.

Such an approach would not look at judicial power alone but would require analysing how the role of Parliament itself has changed. While Parliament has endorsed international human rights norms and the institutional checks that these norms entail, state power has been ceded in other policy areas, not least to the EU. Lamentations decrying the 'decline of parliaments,' and the rise of experts and technocracy were heard, long before the HRA, the EU and, indeed were not limited to the UK.[30] This advance of technocracy and expertise could also be seen internally with the advance— and rollback— of the welfare state and the administrative institutions designed to deliver its goals. For example, while the welfare state did lead to a growth in state power, it differed from the classic Leviathanic image of power expressed from a unitary source. Instead, Parliament often conferred broad decision-making and norm-making powers on administrative bodies who, in turn, exercised such power according to their 'expertise' and best practice accumulated. In turn, the

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[27] Eoin Carolan, 'Democratic Accountability and the Non-Delegation Doctrine' (2011) 33 Dublin University Law Journal 220, 220.

[28] 'About the Judicial Power Project' (*Judicial Power Project*) < https://judicialpowerproject.org.uk/about/> accessed 8 January 2017.

[29] Carolan (n 27).

[30] 'The Decline of Parliament' (1963) 34(3) The Political Quarterly 233,233; A Moravcsik, 'In Defence of the Democratic Deficit' (2002) 40(4) Journal of Common Market Studies 603, 613.

subsequent rollback of the welfare state and the rise of privatisation of public services must also present a profound challenge for this Leviathanic image of the state and, relatedly, attempts to check these new developments through judicial review. Consequently, whether the growth in judicial power is a proactive or reactive phenomenon must be interrogated further.

The '*Culture of Control*'

A further key area of state authority which has seen 'dramatic changes' around the same time as this concerns regarding the 'decline of parliaments' were heard is that of criminal justice policy. Up until the mid-twentieth century, criminal justice policy in the UK was dominated by the 'rehabilitative ideal' or 'penal welfarism' —that crime was essentially a social malaise that could be 'cured'.[31] Central to the idea of rehabilitation was a conceptualisation of deviant behaviour as something that could be cured. Under this understanding, criminal justice and penal policy should be directed towards 'rehabilitating' and reforming prisoners; making them model citizens and incorporating them back into society. Criminal justice policy, as a result, was left to unelected experts to manage and was of low electoral salience. This view of criminal justice policy was closely linked to the welfare state, tackling the underlying social causes of crime such as poverty through education or other programmes, with the prison central in delivering this. This, however, began to change in the 1970s with the increased politicisation of crime, described by Ian Loader as 'the Fall of the Platonic Guardians'.[32] These platonic guardians sought to:

> …secure a better understanding of the ways in which crime and its control have become a key site for struggles over the meanings and import of such ideas as order, authority, legitimacy, freedom, rights and justice; a battleground for contests over the nature of political responsibility; a means of thrashing out debates about the relationship between state and citizens – in short, a conduit for championing and pursuing competing visions of the 'good society'.[33]

[31] Garland (n 3) 8.
[32] Ian Loader, 'Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46(4) British Journal of Criminology 561.
[33] ibid 562.

There are a number of reasons as to why this occurred. From a rise in the belief that 'nothing works,' and the related shift to 'popular punitiveness' to the rise of neo-liberalism and the increasing emphasis on individual responsibility, a comprehensive exploration of the causes of this change are beyond the scope of this chapter.[34] What is key, however, is that criminal justice policy thus shifted from being shaped by 'experts' insulated from the slings and arrows of politics, to becoming an electorally salient issue where being 'tough on crime' became a legitimate electoral position to take.[35]

This decline of the Platonic Guardians is one aspect of broader changes in criminal justice policy and, indeed society as a whole at that time—what David Garland terms a 'culture of control'. In Garland's own words:

> *The Culture of Control* develops a sociological description of the contemporary field [of crime control], a genealogical account of its emergence, an analysis of its central discourses and strategies, and an interpretation of its social functions and significance.[36]

The *'Culture of Control*' is Garland's attempt to catalogue the changes in penal and social policy in the late Twentieth Century. Through this historical account of the recent past (or a 'history of the present' as he terms it), Garland explains how we have arrived at the state of the world as it exists today, or, at least, how it existed when *The Culture of Control* was published in 2001.[37] *The Culture of Control* is aimed at explaining contemporary crime control but also has the more ambitious task of tracing the 'breakdown of modernist conceptions of the state and new ways of organising security'.[38] In *The Culture of Control*, David Garland identifies 12 'indices of change' which he suggests reveals a major transformation to the way in which Anglo-Saxon societies in modernity (specifically the US and UK) respond to crime. These are:

> the decline of the rehabilitative ideal; the re-emergence of punitive sanctions and expressive justice, changes in the emotional tone of crime policy; the return of the victim; the protection of the public as paramount; the politicisation of crime, and populist rhetoric and policies; the reinvention of the prison; the transformation of criminological thought; the

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[34] Garland (n 3) ch 1.
[35] ibid 8-9.
[36] David Garland 'Beyond the Culture of Control' (2004) 7(2) Review of International Social and Political Philosophy 160,161.
[37] Garland (n 3) Ch 1.
[38] Garland (n 36) 163.

> expanding infrastructure of crime prevention and community safety; the commercialisation of crime control; new management styles and working practices; and a perpetual sense of crisis.[39]

As a result of this 'punitive turn', criminal justice policy came to be dominated by populist polices such as harsher sentencing and increased use of imprisonment, 'three strikes' and mandatory minimum sentencing laws; 'community notification laws and paedophile registers zero tolerance policies and Anti-Social Behaviour Orders, and the rise in victims' rights.[40] A key driver behind these measures was a more proactive legislature, one that in other areas of public policy was experiencing a decline.

Schizoid Criminology and Human Rights

According to Garland, this culture of control has given birth to new criminologies that attempt to explain this new reality.[41] Lucia Zedner describes this aspect of Garland's thesis as 'schizoid criminology'—oscillating between two, apparently contradicting schools of criminological thought: criminologies of the 'self' and criminologies of the 'other'.[42] Garland describes the 'criminologies of the 'other' as the representation of a criminal as: a threatening outcast, a 'superpredator', some of whom are 'barely human, their conduct being essentialised as "evil" or "wicked" and "beyond all human understanding".'[43] This 'criminology of the other 'demonises the criminal, arouses popular fears and hostilities and strives to enlist support for drastic measures of control.'[44] This criminology of the other results in a rise in 'punitiveness' where a fearful public seeks both security from and retribution against this criminal other. Criminal justice thus becomes one of the last bastions whereby the Leviathan could assert its sovereignty, realising Hobbes' classical justification for the existence of a state as a necessary sacrifice of liberty to increase individuals' security that cannot be achieved in a state of nature. Indeed, law enforcement has always been a key feature of

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[39] Garland (n 3) 8-20.
[40] ibid 142
[41] ibid 137-138.
[42] Zedner (n 4) 351-353.
[43] Garland (n 3)135
[44] David Garland, 'The commonplace and the catastrophic: Interpretations of crime in late modernity' (1999) 3(3) Theoretical Criminology 353, 354.

sovereign power; the meting out of punishment, in particular.[45] Judgments of the ECtHR therefore pertaining to forms of punishment that breach Convention obligations – e.g. the Article 3 prohibition on torture and inhuman and degrading treatment and punishment, or Article 5 and the deprivation of liberty – are therefore stepping on particularly sovereign toes.[46]

With the increased electoral salience of crime, the legislative branch has reclaimed criminal justice policy from the 'experts' or 'platonic guardians' who were entrusted with it for most of the Twentieth Century. This more 'hands on' approach manifests itself, according to Garland, with legislators becoming:

> …more directive, more concerned to subject penal decision-making to the discipline of party politics and short term political calculation… One sees this reverse transfer of power in a series of measures (fixed sentence law reforms, mandatory sentences, national standards, truth in sentencing, restrictions on early release, etc.) that have shifted detailed decision-making tasks back to the centre – first to the courts and later to the legislature itself.[47]

In *The Culture of Control*, Garland emphasises the role of the decline of faith in rehabilitation as the primary catalyst for the introduction of sentencing guidelines. With the reduction in use of indeterminate sentences, mandatory minima and maxima terms were introduced. Garland also suggests that the curtailment of judicial discretion by mandatory sentencing regimes results in a more streamlined system of pain delivery from the legislature and executive to the prisoner.[48] Judicial discretion is therefore portrayed by Garland as an obstruction to the delivery of pain, chaining the Leviathan by checking legislative and executive power. Such an argument implies that judges act like Loader's 'platonic guardians,' constructing a bulwark against a punitive public. It is in this indicator of the culture of control where the clash between sovereignty and human rights is most sharply actualised. For example, in *Vinter v UK*, the Grand Chamber of the ECtHR ruled that 'whole life tariffs' under the Criminal

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[45] See David Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36(4) British Journal of Criminology 445; Paul Kahn, 'Torture and Democratic Violence' (2009) 22(2) Ratio Juris 244.

[46] See, for example where the ECtHR found that the UK system of whole life sentences without review constituted a breach of Article 3 in *Vinter and Others v UK* App No 6609/09 (ECHR 9 July 2013).

[47] Garland (n 3) 13.

[48] ibid

Justice Act 2003 were incompatible with Article 3 of the ECHR and the prohibition on torture or inhuman and degrading treatment or punishment. In this regard, we can see how the majority of politically contentious human rights cases stem from individuals that are labelled as 'others'—prisoners, terrorists or even asylum seekers. Attempts to counter these narratives can be seen for example in Liberty's 'What have Human Rights Ever Done for You?' campaign.[49] Consequently, what the culture of control tells us is that this 'monstering' of rights, is nothing new. It also suggests that its causes and explanations lie deeper than legal or philosophical disagreements regarding the nature of rights and their role in the constitutional order.

At the same time as the criminology of the other was revived, an almost paradoxical 'criminology of the self' appeared and co-existed alongside this criminology of the other. Complementing the rise in neo-liberal thinking in power structures, these criminologies emphasised crime as a rational choice, an everyday, permanent phenomenon and something everybody was capable of.[50] Rather than attempting to rehabilitate individuals by curing their propensity for deviant behaviour, criminal justice strategies instead focused on reducing the opportunities for individuals to commit crime.[51] This 'supply side criminology' consisted of measures such as 'target-hardening' and increased securitisation of spaces.[52] By stressing crime as a rational choice to an opportunity that presents itself, the criminology of the self, at first instance, obliterates the distinction between the criminal and the ordinary citizen; between the self and the other. On this narrow reading, the criminology of the self would to reduce the Leviathanic role of the state in the area of criminal justice policy at the same time as the emphasis on the 'otherness' of the criminal sought to revive it.

This shift towards the 'supply side', however, also entails a more macro perspective on crime. While the criminal law and criminal justice is

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[49] Liberty, 'What Have Human Rights Ever Done for You?'<https://www.liberty-human-rights.org.uk/human-rights-what-have-they-ever-done-you> accessed 9 January 2017.

[50] Garland (n 3) 131-132.

[51] See e.g. Ronald V Clarke and Pat Mayhew, 'Crime as Opportunity: A Note on Domestic Gas Suicide in Britain and the Netherlands' (1989) 29(1) British Journal of Criminology 35; David Lester, 'Crime as opportunity: A test of the hypothesis with European homicide rates' (1991)31(2) British Journal of Criminology 186; Paul Cozens and Terence Love, 'A review and current status of crime prevention through environmental design' 30(4) Journal of Planning Literature 393.

[52] Garland (n 3) 131-132;

invariably focused on individual responsibility for their given actions, viewing crime as a rational choice and the requisite attempts to reduce these opportunities led also to what Malcolm Feeley and Jonathan Simon describe as conceptualising crime as an 'actuarial congregation of aggregates'.[53] These 'new criminologies' replaced the language of morality with the language of risk management, the responsibility of which lay on the individual, rather than the state.[54] Thus while prima facie a simultaneous rise in the 'criminology of the other' with the 'criminology of the self' may seem paradoxical, 'moralising and managerialism need each other badly'.[55] By operating on a macro level, risk assessment and management makes broad assumptions about environments and about individuals. It is in this actuarial assessment of the individual that the stereotypes created by the criminology of the other can, in turn, feed into the criminology of the self. Thus although we are all potential criminals, some have more potential than others. Garland does not, however, delve too deeply into the various factors such as race, sex, religion or social class that go into constructing this other.[56] There is therefore a link between the apparently contradictory actuarial risk-management criminology and the expressive, retributive criminology of the other.

Garland places much of the explanation for this demand for security on 'high crime rates' and feelings of increased insecurity that has produced a 'crime complex of late modernity'.[57] Zedner, however, is critical of this explanation, arguing that Garland assumes that media representation of the popular will are synonymous with the public opinion.[58] Instead, Zedner suggests that the risk-management model fails to satisfy the base urges that can only be done by the more expressive retributive approach, an approach that harkens back to the Leviathanic state.[59] Individuals do not conceptualise risk as an actuarial exercise. Humans are susceptible to a wide array of mental short cuts, heuristics, prejudices, and base fears which can be shaped or 'framed' by politicians, the media, and others with

[53] Malcolm M Feeley and Jonathan Simon, 'The New Penology: Note on the Emerging Strategy of Corrections and its Implications' (1992) 30 Criminology 449, 457-458.
[54] ibid
[55] Zedner (n 4) 358.
[56] ibid 351.
[57] Garland (n 3)163; Zedner ibid 352.
[58] ibid.
[59] Zedner (n 4) 358; Feeley and Simon (n 53) 464.

the capacity to set the agenda of public discourse.[60] A key feature of this culture of control is thus the manner in which political rhetoric shifted from absolving the state from responsibility for the causes of crime or the welfare of its citizens, while correspondingly making greater use of rhetoric that demonised sections of society that were helped by this welfare state.[61] Relatedly, it may be the case that this risk-management itself creates conditions of unease and fear of crime. Thus the pursuit of security becomes an end in itself.[62] Indeed, one may go further and interrogate how the influence of neo-liberal economic policy in creating job insecurity has led to a further demand for security in other areas of peoples' lives.[63]

No more so is this schizoid criminology evident than in the area of counter-terrorism. *A Culture of Control* was published prior to the events of 11 September 2001; nevertheless, many of the dramatic changes that occurred in the area of criminal justice since then can be mapped on to Garland's thesis. The shift in emphasis from Irish terrorism to Islamic extremist terrorism made othering this new threat much easier, with the archetypal terrorist threat now possessing a much more racially and religiously distinct identity from the rest of the population.[64] At the same time, the conceptualisation of this threat as omnipresent and an every-day occurrence meant that securitisation and risk-assessment became the natural response.[65]

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[60] RM Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (1993) 43(1) Journal of Communication 51; Zizi Papacharissi and Maria de Fatima Oliveira, 'News Frames Terrorism: A Comparative Analysis of Frames Employed in Terrorism Coverage in US and UK Newspapers' (2008) 13(1) International Journal of Press/Politics 52, 53. See also Cohen S, *Folk Devils and Moral Panic: The Creation of the Mods and Rockers* (Martin Robertson, 1980).

[61] Mona Lynch, 'Review: David Garland, The Culture of Control: Crime and Social Order in Contemporary Society' (2002) 25 PoLAR: Political and Legal Anthropology Review 109,110.

[62] ibid.

[63] Jock Young, *The Vertigo of Late Modernity* (Sage, 2007) ch5.

[64] See Javaid Rehman, 'Religion, Minority Rights and Muslims in the United Kingdom' in Javaid Rehman and Susan Breau (eds) *Religion Human Rights and International Law* (Martinus Nijhoff Publishers 2007) 521; Chris Allen, 'Fear and Loathing: The Political Discourse in relation to Muslims and Islam in the Contemporary British Setting' (2010) 4(2) Politics and Religion 221.

[65] See Oren Gross, 'Chaos and Rules: Should responses to violent crises always be constitutional?' (2002) 112 Yale Law Journal 112, 1069-1095.