The Eurosceptic right and (our) human rights: the threat to the Human Rights Act and the European Convention on Human Rights is alive and well

Dimitrios Giannoulopoulos*

The Conservative party's policy on the Human Rights Act (HRA) and the European Convention on Human Rights (ECHR) has, in recent years, mutated from direct political aggression (with the pledge to repeal the Act in the 2015 manifesto)[1] to a strategy of creating ambiguity and chipping away at its democratic legitimacy (with the 2017 and 2019 manifestos). In the latest development in the saga of UK hostility towards the ECHR and the HRA, Britain has refused to commit to the ECHR as an essential element in any future partnership with the EU. This article examines the significance of this development, deducing from it that the Eurosceptic right in the UK quite openly spies another chance to fulfil its long-held ambition of getting rid of European human rights, having identified Strasbourg as the next target in the project to "take back control". The article also contends that the magnitude of the risk that the HRA and ECHR are facing in the UK post Brexit cannot be fully grasped absent an analysis of how deep a Eurosceptic, anti-human rights, executive sovereignty-centred ideology now runs within the governing party. The article undertakes such analysis with reference to some of the Eurosceptic, anti-human rights ideologues in the Conservative party. It concludes by bringing into focus the potential impact of two external developments – the Covid-19 crisis, and the election of Sir Keir Starmer as leader of the opposition – upon the future of the HRA and the ECHR in the UK.

Writing after the referendum in 2016, in the preface of his disturbingly timely *On Fantasy Island: Britain, Europe and Human Rights*, Conor Gearty warned: "Now that the larger European entanglement has been successfully seen off, the time has come for finishing the unfinished business of human rights destruction."[2] "The opponents of human rights are feeling emboldened by Brexit", said Sir Keir Starmer in 2017; "there are those that want Britain to

* Dimitrios is the Inaugural Professor and Head of the department of Law at Goldsmiths University of London, and the director of the Knowing Our Rights (www.knowing-our-rights.com) research project. The author would like to thank the anonymous referees for their insightful feedback and invaluable editorial support. He would also like to express his gratitude to Professor Conor Gearty and Professor Julian Petley for commenting on early drafts, and to the editor of the E.H.R.L.R., Jonathan Cooper OBE, for the enlightening exchange of ideas over a number of topics central to this article. Some of the key ideas developed in this article were previously briefly explored in D. Giannoulopoulos, "The next target in the project to 'take back control'? Strasbourg and the Human Rights Act", 4 March 2020, *Prospect magazine,* https://www.prospectmagazine.co.uk/politics/the-next-target-in-the-project-to-take-back-control-strasbourg-and-the-human-rights-act-brexit-law-constitution [Accessed 14 May 2020].

[1] *Conservative party manifesto 2015, p. 73*, http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf [Accessed 14 May 2020].

[2] C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford: Oxford University Press, 2016), p.xiii.

retreat further from the obligations of […] internationalism, including from the Council of Europe and the European Convention on Human Rights" (ECHR).[3]

The fact that Britain has now communicated to the EU, in the course of the first two rounds of the negotiations on the future relationship, that it "does not want to formally commit to continuing to apply the ECHR" as an essential element in the future partnership,[4] brings us one step closer to Gearty's and Starmer's ominous warnings becoming reality: the UK standing in near-complete isolation, as far as *democratic* countries go, in attempting to unravel its basic human rights infrastructure, putting at grave risk the international system for the protection of such rights in the process.[5]

This is the latest episode in the saga of Eurosceptic right antipathy in the UK towards the ECHR, which has fed into, or helped generate, attacks on the Human Rights Act (HRA) and continues to pose a significant threat to both. How far the UK government will actually go in translating this antipathy towards the ECHR and HRA into "repealing" or "updating" the HRA or "withdrawing" from the Convention is, of course, impossible to tell; we do not have a crystal ball that can look into the future. What we can do is point to the nuanced narrative, which has evolved from a pledge to repeal the HRA (if not withdraw from the Convention), to staying in the Convention until Brexit is done, to updating the HRA so as to balance individual rights with security and effective government, and which now provides the backdrop for analysing

---

[3] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 107.

[4] Press conference by Michel Barnier following the first round of negotiations with the UK, 5 March 2020, https://audiovisual.ec.europa.eu/en/video/I-185570 [Accessed 14 May 2020].

[5] Even Russia's defiance of Strasbourg has not gone so far as to include the pursuit of a blanket policy of withdrawal from the ECHR. This despite the fact that Russian antagonism to the European Court of Human Rights has led to the enactment of legislation that enabled the Russian Constitutional Court to declare rulings of international bodies "impossible to implement" as well as suspending part of its annual contributions to the Council of Europe, coupled with a decision not to send a delegation to the Council's parliamentary assembly, following sanctions imposed by the Council of Europe in 2014 for its annexation of Crimea. See, generally, L. Harding, "Russia delegation suspended from Council of Europe over Crimea" (10 April 2014), *The Guardian, https://www.theguardian.com/world/2014/apr/10/russia-suspended-council-europe-crimea-ukraine* [Accessed 14 May 2020]; *P. Leach and A. Donald, "Russia Defies Strasbourg: Is Contagion Spreading?", EJIL: Talk!, 19 December 2015*, https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/ [Accessed 14 May 2020]. See also Colm O'Cinneide, who, back in 2015, spoke of the "dreadful carelessness" of the Conservative party proposals to replace the Human Rights Act with a UK Bill of Rights, in relation to both "the internal ramifications", but also in relation to their "external implications within Europe, undermining of the world's most successful, rule of law, human rights mechanism" and the "messages [the UK] projects about rule of law, about convenience, about the attitude that countries should adopt towards international human rights mechanisms". *The Human Rights Act: The Bill of Rights for the 21st Century?, King's College, 24 March 2015*, https://youtu.be/zJkCNVIxlSs?t=3384 [Accessed 14 May 2020].

the government's unwillingness to commit to abide by the Convention as a requirement of the future relationship with the EU.

Such analysis is intrinsically of value, regardless of how quickly a political way may be found out of the current impasse in the negotiations. Even if such a scenario were to occur, nothing would have changed at the political ideology level. The HRA and ECHR would continue to be vulnerable to the populist attacks that have fuelled anti-European sentiment in the first place and have brought the UK to the current state of affairs, with "the ideas, visions and laws of human rights […] under sustained attack" in the country.[6]

The Eurosceptic right's continued hostility towards the ECHR and HRA must also now be evaluated against the backdrop of two seismic developments – seismic, in very different ways, with impact of clearly different magnitude – that may have the capacity to change the momentum in the debate about the future of the HRA and the ECHR in the UK: Covid-19 as a turning point for our democratic society, first of all, affecting our perception of the importance of human rights, concerning the need for government to protect the right to life first and foremost. Secondly, the election of Sir Keir Starmer as leader of the opposition, which automatically creates the conditions for a more effective defence in Parliament – and with the public – of the ECHR and the HRA. It is far from certain that the future of these two foundational legal instruments for the protection of human rights in the UK will have been played out within the life of this government anyway. The Conservatives' 80-seat majority may currently appear as an insurmountable obstacle to Labour mounting an effective defence of the HRA and ECHR. But, on the other hand, it is not outlandish to think that we will be in this fight for the long haul, in which case Sir Keir Starmer is very well placed to attempt to deviate the country from the road to the HRA and ECHR's perdition.

The latest episode in the HRA and ECHR saga

Just before the launch of the first round of the negotiations on the future relationship with the EU, the Sunday Telegraph reported – in the deeply Eurosceptic, tabloid-like tone that has become symptomatic of its coverage of Brexit – that the "PM will not let independent UK be

[6] *Prospect magazine, Can there ever be any progress in politics? With David Runciman and Francesca Klug*, 31 October 2019, https://soundcloud.com/prospect-magazine/can-there-ever-be-any-progress-in-politics-david-runciman-francesca-klug [Accessed 14 May 2020].

bound by 'abusive' European human rights laws", and that it "understands" that the government's refusal to accept the proposed ECHR clauses in a post-Brexit trade agreement leave "the door open to break away from the treaty as soon as next year".[7]

The article set the tone for what is now proving to be the latest episode in the saga of UK hostility towards the ECHR, that has, for so many years now, cast a long shadow on Britain's international reputation as a country that speaks of its passion for respecting human rights at home and promoting their application abroad. The UK prides itself for having "a longstanding tradition of ensuring rights and liberties are protected domestically and of fulfilling [its] international human rights obligations", and for its commitment to "continue to call on other countries to comply with their international human rights obligations, and to take action to tackle human rights violations globally", as a recent Ministry of Justice report to the Joint Committee on Human Rights highlights for instance.[8] Having no reason to doubt that these claims are made with honesty and integrity, one still finds it very difficult to square them with the UK government staging political attack after political attack at the European Court of Human Rights and on the HRA, the pillars, in other words, that support human rights enforcement domestically whilst allowing the UK to be part of arguably the most advanced regional system for the protection of international human rights.[9]

In fact, if we accept that Lord Bingham was right, when he wrote in 1993, that incorporation of the ECHR into UK law would "restore this country to its former place as an international

---

[7] E. Malnick, "PM will not let independent UK be bound by 'abusive' European human rights laws", 1 March 2020, *The Sunday Telegraph.*

[8] Ministry of Justice, "Responding to Human Rights judgments: Report to the Joint Committee on Human Rights on the Government's response to Human Rights judgments 2017-18" (CP 182, October 2019) 6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842553/responding-human-rights-judgments-2019.pdf [Accessed 14 May 2020], presented to Parliament by the Lord Chancellor and Secretary of State for Justice. See also Conservative Party, "Protecting Human Rights in the UK" (October 2014) https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document [Accessed 14 May 2020], which refers to the UK's "long history of protecting human rights", from the "Magna Carta in 1215, to the Bill of Rights and the Claim of Right in 1689, and over the centuries through [the] Common Law tradition".

[9] See e.g. Helfer who comments that "[t]he European Court of Human Rights is the crown jewel of the world's most advanced system for protecting civil and political liberties". L.R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime" (2018) 19 E.J.I.L. 125. See also Guido Raimondi, former President of the European Court of Human Rights, who expresses the view that the Court is "admired across the world, unanimously admired as a success, though sometimes criticised too". Discours de Guido Raimondi, Visite de Son Excellence Monsieur Emmanuel Macron, Président de la République française", 31 October 2017, https://www.echr.coe.int/Documents/Speech_20171031_Raimondi_Macron_FRA.pdf [Accessed 14 May 2020].

standard bearer of liberty and justice",[10] then we are entitled to deduce from the reverse – the continued threat to repeal the HRA (and now the refusal to commit to continued membership of the ECHR) – that the UK is flirting with a return to that prior state of relative isolation vis-à-vis its domestic regime for the protection of international human rights, at least within the community of the countries that together form the Council of Europe. The former Attorney General, Dominic Grieve, has put it more directly (at a time, notably, when he was still holding Attorney General office): "UK withdrawal … would make Britain a pariah state".[11]

"The driver [for this approach] is UK domestic politics", Conor Gearty argued in "On Fantasy Island" ("UK domestic" meaning "Conservative party" in that context) (with the effect that the HRA has "become a political football", as Francesca Klug has put it, from the reverse angle).[12] The ECHR and the HRA are seen as "another example of foreign intrusion", Gearty went on to explain, "an alien contamination that needs now to be washed away altogether so that the UK's fresh start can be properly made".[13] Gearty's explanation is as illuminating today – nearly four years after the EU referendum – as it was when originally offered, just weeks after the UK public had voted to take the country out of the EU. I will attempt here to offer a demonstration of that, by engaging with Conservative government politics steeped in intrinsic antipathy towards the ECHR and HRA, and all things European, with the aim to take stock of where we are, and where we are heading towards, as regards the UK's fractured relationship with European human rights (rights that since 1998 happen to have formed the backbone of the UK's domestic human rights system), particularly with further negotiations on the future partnership between the EU and the UK ahead of us. It will be possible to deduce from this analysis – and express significant concern about the fact – that the Eurosceptic right in the UK quite openly spies another chance to fulfil its long-held ambition of getting rid of European human rights, having identified Strasbourg as "the next target in the project to 'take back control'".[14]

---

[10] T.H. Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109 *Law Quarterly Review* 390.

[11] P. Wintour and A. Sparrow, "I won't give prisoners the vote, says David Cameron", 24 October 2012, *The Guardian, https://www.theguardian.com/society/2012/oct/24/prisoners-vote-david-cameron* [Accessed 14 May 2020].

[12] F. Klug, "A Magna Carta for all Humanity: Homing in on Human Rights" (2015) 60 *Soundings* 130.

[13] C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford: Oxford University Press, 2016), p.xiii.

[14] D. Giannoulopoulos, "The next target in the project to 'take back control'? Strasbourg and the Human Rights Act", 4 March 2020, *Prospect magazine,* https://www.prospectmagazine.co.uk/politics/the-next-target-in-the-project-to-take-back-control-strasbourg-and-the-human-rights-act-brexit-law-constitution [Accessed 14 May 2020].

The Eurosceptic right's continued hostility towards the ECHR

Winston Churchill raised the idea of a Council of Europe in 1946[15] and is still regarded as one of its "founding fathers" and one of the "pioneers of Europe".[16] The Treaty that set up the statute of the Council was signed in London on 5th May 1949. The UK was among the first signatories. The Convention was designed to safeguard "fundamental freedoms which are the foundation of justice and peace in the world".[17] It aimed to stop the horrors of the two world wars of the 20th century from ever occurring again. For Churchill, the creation of such a "Charter of Human Rights, guarded by freedom and sustained by law" was at the centre of a post-WWII "Movement for European Unity".[18] Following the path set by Churchill, the UK played an influential role in the creation of the Convention.[19] British lawyers were central to its drafting, and the UK was the first country to ratify it.[20] But fast forward just over 70 years, to this point in time – a year after we celebrated the synonymous anniversary of the creation of the Council of Europe, a few months prior to celebrating 20 years since the Human Rights Act

---

[15] *Winston Churchill speech in Zurich, 19 September 1946, http://www.churchill-society-london.org.uk/astonish.html* [Accessed 14 May 2020].

[16] *Council of Europe, Founding fathers*, https://www.coe.int/en/web/about-us/founding-fathers [Accessed 14 May 2020].

[17] Preamble to the European Convention on Human Rights.

[18] *Winston Churchill address to the Congress of Europe*, 7 May 1948, The Hague, http://www.churchill-society-london.org.uk/WSCHague.html [Accessed 20 20 April20].

[19] On the ulterior motives generating Churchill's "Europeanism and his critical contribution to the genesis of the ECHR", to quote the historian Marco Duranti, see, generally, Duranti's monograph on *The Conservative Human Rights Revolution: European Identity, Transnational Politics and the Origins of the European Convention* (Oxford: Oxford University Press, 2017). Duranti argues that "conservatives conceived of the treaty not only as a means of containing communism and fascism in continental Europe, but also as a vehicle for pursuing a controversial domestic political agenda on either side of the Channel". See also A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001)*;* J. Norman and P. Oborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act (*Liberty, 2009*).* The common idea explored by these authors – even if done in varied ways, leading to different conclusions – is that, from the Conservative perspective, there was more to the creation of the Council of Europe and the European Convention on Human Rights than defending against the threat of totalitarianism; raising an effective defence against the perceived Soviet threat in Europe, and protecting free-market ideals, for instance. Still, no one denies the cardinal role that Churchill played in this historic development.

[20] See Sir Edward Gardner QC, opening speech, February 6, 1987, *Hansard,* cols 1223-1231. It is, however, worthwhile to note that some commentators are more sceptical about the British role in the creation of the Convention. Taking his cue from Lord Lester's work in this area, Julian Petley has written, for instance, that "[m]uch has been made of Britain's role in drafting the Convention, but it can be convincingly demonstrated that, as in so many matters involving continental Europe, many British politicians and civil servants were motivated chiefly by the desire to water down a measure which they saw as a threat to the sovereignty of Parliament and to the governance of the Empire". Petley also points to the fact that "although [the UK] did sign [the Convention], it refused actually to incorporate it into British law, as it was felt that English common law already offered sufficient – indeed greater – protection to people's rights." J. Petley, "Podsnappery; or Why British Newspapers Support Fagging" [2006] *Ethical Space: The International Journal of Communication Ethics* 42, 47. See also A. Lester, "Fundamental rights: the United Kingdom isolated?" [1984] *Public Law* 46.

came into force –[21] and you'll see the Conservatives moving fast in the opposite direction, adopting an ahistorical, isolationist approach to human rights, one that ultimately culminates with taking the UK away from the core system of European human rights protection, leading to domestic human rights inevitably contracting. One wonders what Churchill would make of this historic paradox; how did the UK move from being "pioneers" and "founding fathers" of the Council of Europe to "*enemies* of the Council of Europe", he might ask, perhaps with some hyperbole or genuine puzzlement. David Cameron, Theresa May, Boris Johnson, Dominic Raab, Dominic Cummings and the latest addition to the Conservative family of Eurosceptic thinkers, the new Attorney General, Suella Braverman, might have a hard time explaining to him now how that happened. They would need to start with the fact that the ECHR and the HRA had long been a target of the Eurosceptic right, and that, in the modern history of the party, the Conservatives were never really on board with the idea of a Bill of Rights.[22] They might then rush to clarify that, regardless of prior conceptual discordance between the party's mainstream pro-EU and anti-ECHR/HRA narratives, the Eurosceptic project was at least finally beginning to make sense, to take effect as a whole, now that the Conservatives had become the "party of Brexit" and the country had finally come out of the EU.

From David Cameron to Theresa May to Boris Johnson

The two Conservative Prime Ministers preceding Boris Johnson had exchanged the relay baton of hostility to Strasbourg without anyone really noticing much difference of approach, so it is not too difficult to imagine them – in this fictional, but perhaps intriguing scenario – putting up a defence of their choice to attack the Convention. For example, David Cameron might find it sufficient to refer to "prisoners' rights", stressing how he had "felt 'physically ill' at the idea of giving the prisoners the vote".[23] "[R]esponding properly in terms of terrorism, particularly in terms of deporting those who may do us harm in this country", would be an alternative line

[21] The Human Rights Act came into force on 2 October 2020.

[22] They might go as far as back as the Conservative government's election manifesto of 1979, which, as Tom Hickman reminds us, "included the promise that they would have all-party discussions on a Bill of Rights". "But once in power", adds Hickman, "the Conservative Party under Prime Minister Margaret Thatcher turned instead to making numerous inroads into civil liberties". T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), pp. 15-16. See also F. Klug, "A Bill of Rights: Do We Need One or Do We Already Have One?" [2007] *Public Law* 701, 703-04. See, however, *contra*, initiatives within the liberal part of the Conservatives, to save the Human Rights Act: *Bright Blue, Conservatives should be loudest champions of Human Rights Act*, 22 August 2017, https://brightblue.org.uk/conservatives-should-be-loudest-champions-of-human-rights-act/ [Accessed 14 May 2020].

[23] "Cameron sickened by prisoner vote", 3 November 2010, *The Times,* https://www.thetimes.co.uk/article/cameron-sickened-by-prisoner-vote-j3zf67bbm2 [Accessed 14 May 2020].

of defence; though we should not forget that, on the fight against terrorism, "the ground had already been laid for [Cameron] by the Labour government", whose "own act [had now become] a thorn in their side",[24] overtly eager as Tony Blair's Labour were to fight George Bush's "war on terror". Back to Cameron, who might go on to back-up his securitarian critique of human rights with that well-proven illusory concept, of "writ[ing] our own British bill of rights and responsibilities, clearly and precisely into law, so we can have human rights with common sense".[25] These were the key arguments upon which Cameron's initial attack on the HRA was premised, as far back as 2006; he wanted "[a] US-style bill of rights that would outline the rights of citizens, while the Human Rights Act incorporates European rules into British law".[26] Part "ECHR is a villain's charter", part "take back control" of our own laws, that, in brief, was Cameron's argument for scrapping the HRA.[27]

Theresa May would surely find herself in agreement. The "villain's charter" view of the HRA and ECHR – one of the "large-scale myths [about these two human rights instruments that] have been allowed to take centre-stage" in Britain –[28] were very central too in the anti-human rights narrative she had spent years building as Home Secretary in David Cameron's governments. May was the first Prime Minister to openly argue that the UK should actually leave the Convention, not just repeal the HRA or replace it with a UK Bill of Rights. This was a policy generated by May's time as Home Secretary, explained the director of Liberty, Martha Spurrier, in an interview we did in 2017, as part of a relevant research project. Issues of immigration and deportation struggles – particularly those involving radical cleric Abu Qatada – "dogged" [May's] time in office", Spurrier told me, and "she [was] determined to get her own back, effectively … It really stuck in her craw… As a result she [was] intent on weakening rights protections, particularly for minority groups".[29] It is worth reminding ourselves here that, with less than two months to the EU referendum, Theresa May launched a quite unprecedented

[24] F. Klug, "A Magna Carta for all Humanity: Homing in on Human Rights" (2015) 60 *Soundings* 130, 139.
[25] *"Cameron 'could scrap' rights act",* 25 June 2006, *BBC News,* http://news.bbc.co.uk/2/hi/5114102.stm [Accessed 14 May 2020].
[26] *Cameron 'could scrap' rights act",* 25 June 2006, *BBC News,* http://news.bbc.co.uk/2/hi/5114102.stm [Accessed 14 May 2020].
[27] "It is hard to deny that the Cameron package is shot through with legal *confusion,* if not nonsense", commented Francesca Klug, also citing "outspoken criticism" coming from within the Conservative party, notably by Ken Clarke, who described the proposals as "xenophobic" and "legal nonsense". F. Klug, "A Bill of Rights: Do We Need One or Do We Already Have One?" [2007] *Public Law* 701, 716.
[28] C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford: Oxford University Press, 2016), p. 63.
[29] *Director of Liberty, Martha Spurrier, on Brexit, EU citizens' rights and the Human Rights Act, Knowing Our Rights, https://www.youtube.com/watch?v=uR2evejD9ss&feature=emb_logo* [Accessed 14 May 2020].

attack on the ECHR, arguing that it was the convention, rather than the EU, that had caused all sorts of problems, and insisting that Britain should withdraw from the ECHR regardless of the EU referendum.[30] Her summary of why that was the case perhaps qualifies as one of the most acute political expressions of "ECHR nihilism" that one will encounter in the debate, and would serve the former Prime Minister well when attempting to illustrate her disdain for European human rights:

> The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights.[31]

Theresa May's successor, on the other hand, would perhaps find it more difficult to defend his government's current strategy on the ECHR, even from a purely ideological perspective (let alone from the angle of a strategic choice that should facilitate agreement of a future relationship with the EU, an issue I will comment upon later in the article). Just a few weeks after Theresa May's pre-referendum criticism of the ECHR, Boris Johnson is reported as saying – to a Vote Leave rally not least – that we should "keep the European Convention, it's a fine thing… We wrote it. Get out of the EU". "I am not against the Convention or indeed the Court because it's very important for us", he added, even if he rushed to qualify his statements by noting that "the judgments of the European Court of Human Rights do not have to be applied either by the UK courts or by the UK Parliament"; quite an oxymoronic way of saying the Convention was "very important" to the UK, one might object.[32]

We cannot read much into Boris Johnson's statements on the ECHR of course. If Brexit has proven anything, it is that the Prime Minister's strategic choices are mandated by political and personal opportunism, not ideology. My colleague at Goldsmiths, Will Davies, expresses this view with brutal force, applying the logic to Johnson's wider political career, not just Brexit: "Johnson has no ideology and no philosophy" and "seems devoid of a single enduring belief",

---

[30] A. Asthana and R. Mason, "UK must leave European convention on human rights, says Theresa May", 25 April 16, *The Guardian,* https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum [Accessed 14 May 2020].

[31] A. Asthana and R. Mason, "UK must leave European convention on human rights, says Theresa May", 25 April 16, *The Guardian,* https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum [Accessed 14 May 2020].

[32] B. Glaze and D. Bloom, "Passionate Boris Johnson defends European Convention on Human Rights – but says we should still quit EU", 23 May 2016, *The Daily Mirror,* https://www.mirror.co.uk/news/uk-news/boris-johnson-defends-european-convention-8033527 [Accessed 14 May 2020].

he notes.[33] So if "take back control"-driven Conservative politics have "repeal" in store for the HRA, Johnson's supposedly positive – and, in any case, fairly unenthusiastic and ill-informed – personal view of the European Court of Human Rights will certainly not get in the way. Which perhaps makes it vital to look at the (idiosyncratic) views that those close to the Prime Minister, or in places of influence concerning this debate, have on the Convention; the views of his closest political adviser, Dominic Cummings, for instance, or those of the foreign secretary (and acting prime minister, for a while), Dominic Raab, and those of the newly appointed Attorney General, Suella Braverman. I will demonstrate below that these views bring to light all too clearly the anti-human rights narrative of Conservative hard core Eurosceptics, who now find themselves at the centre of government, with a unique opportunity to finish off those old enemies of theirs, the HRA and the ECHR.

Dominic Cummings

Dominic Cummings first of all – Boris Johnson's "eccentric" and "controversial" senior adviser, for some, who is a "massively bright", "brilliant" and "charismatic" individual, for others,[34] the campaign mastermind behind "take back control" and "get Brexit done" – does not care much about hiding his feelings on the topic. In an angry reaction to Channel 4 and the "Cambridge Analytica" story, Cummings used his personal blog to go into "threat mode", warning "Osborne, Blair, Cameron" and others on the "Remain" side, to "start saving for lawyers" (as a consequence of the "illegal conduct of the Remain campaign", he intimated), then announcing that "meanwhile, we [those on the "Leave" side] will also be starting our campaign for a second referendum – on the ECHR…".[35] In Cummings' mind, Brexit and leaving the European Court of Human Rights went hand in hand, the one following from the other, the two in unison signifying ultimate Brexiteer victory over a crumbling pro-European side. "We're leaving the EU next March. Then we'll be coming for the ECHR referendum and

[33] W. Davies, "How to Be Prime Minister", 26 September 2019, *London Review of Books*, https://www.lrb.co.uk/the-paper/v41/n18/william-davies/how-to-be-prime-minister [Accessed 14 May 2020].
[34] George Parker, in the Financial Times, provides insightful analysis of Cummings' career, personality and future ambition in his current position of influence within Government. G. Parker, "Dominic Cummings has 'done' Brexit. Now he plans to reinvent politics", 16 January 2020, *Financial Times,* https://www.ft.com/content/0bf8a910-372e-11ea-a6d3-9a26f8c3cba4 [Accessed 14 May 2020].
[35] *D. Cummings, "On the referendum #24C: Whistleblowers and C4/Observer accusations – they promised Watergate and delivered Zoolander",* https://dominiccummings.com/2018/03/24/on-the-referendum-24c-the-whistleblowers-and-channel-4-observer-accusations/ [Accessed 14 May 2020].

we'll win that by more than 52-48…", Cummings declared.[36] So if the No. 10 technocrats are coming for our human rights, how far will they go? Another blog post provides the answer. To repeal the Human Rights Act and "replace it with its own new version", will not be enough, Cummings proclaimed, as

> then the current situation [will be] simply tweaked. The courts may or may not make some small changes to how they interpret the ECHR but the fundamentals would be completely unaffected. Provided we are still committed under international law to the Strasbourg court, then we will continue to suffer from the often abysmal judgements made there. The Supreme Court will not be 'supreme'.[37]

Repeal and withdraw is what Cummings is aiming for.

Dominic Raab

Cummings' anti-Strasbourg views are hidden in a quite obscure, fittingly idiosyncratic, personal blog carrying his name. Dominic Raab, on the other hand, is one of the Convention's most vociferous critics, well-known amongst human rights scholars and activists for his efforts over many years to bring to fruition the "repeal" of the HRA. "Raab has been a (relatively) ineffective bête noire of [the] Human Rights Act and [the] European Convention on Human Rights", human rights barrister Adam Wagner has written,[38] in reaction to news of Raab's appointment as Brexit secretary in 2018; his appointment did not bode well for the HRA.[39] He has "a fervent dislike" of both the ECHR and the HRA, "which he has unsuccessfully sought to dismantle through the introduction of [the] British bill of rights", wrote the Chairwoman of the Bar Human Rights Committee, Schona Jolly QC.[40] Strong words, and yet they will read as an understatement when one delves into Raab's scholarship in the subject area. The main point of reference, his 2009 book on "The Assault on Liberty", is mischievously presented as a defence of individual rights, when, in reality, it is the protection of individual rights – under

---

[36] *D. Cummings, "On the referendum #24C: Whistleblowers and C4/Observer accusations – they promised Watergate and delivered Zoolander",* https://dominiccummings.com/2018/03/24/on-the-referendum-24c-the-whistleblowers-and-channel-4-observer-accusations/ [Accessed 14 May 2020].

[37] *D. Cummings, "On the referendum #1: Gove and the Human Rights Act",* https://dominiccummings.com/2015/05/11/on-the-referendum-1-gove-and-the-human-rights-act/ [Accessed 14 May 2020].

[38] *@adamwagner1, 9 July 2018, 10.49 am.*

[39] D. Sabbagh and J. Elgot, "Dominic Raab named Brexit secretary in cabinet reshuffle", 9 July 2018, *The Guardian,* https://www.theguardian.com/politics/2018/jul/09/dominic-raab-appointed-new-brexit-secretary-in-uk-cabinet-reshuffle [Accessed 14 May 2020].

[40] S. Jolly, "Dominic Raab is a dangerous, anti-feminist ideologue", 1 July 2018, *The Guardian, https://www.theguardian.com/commentisfree/2018/jul/11/dominic-raab-ideologue-rights-eu-brexit* [Accessed 14 May 2020].

the HRA and the ECHR – that the book is absolutely intent on assaulting. The book does take, quite rightly, as its point of departure the erosion of individual liberties and rise of a surveillance society under New Labour, especially in the aftermath of 9/11.[41] But not before long, the focus turns to "rights contagion",[42] "the risks of rights"[43] and "constitutional reform, including a Bill of Rights",[44] and, instead of legal analysis, we are treated to a Eurosceptic critique that stresses British exceptionalism and feeds into a populist narrative that opposes human rights-driven judicial activism.

Labour signed Britain up to the ECHR in 1950 "to anchor [the country] to Europe, and its socialist tradition", and has passed the HRA "to promote its vision of social justice through the spread of human rights", Raab writes.[45] Since the introduction of the HRA, "[t]he spread of rights has become contagious" and the door has opened "to vast new categories of [human rights] claims", he adds,[46] and proceeds to give short shrift to positive duties to act to protect the right to life in particular (under Art 2 ECHR), be that in relation to duties that might apply to the police, the military or the NHS.[47] On the NHS more specifically, Raab expresses concern about the idea of "patients' rights" and "deploy[ing] the language of human rights as an answer to tough questions about priorities in healthcare".[48] How timely a reminder this is then, of Raab's human rights-free philosophy on the matter, when we are confronted with unprecedented loss of life in the UK, arguably, partly, as a result of shortages of the personal protective equipment (PPE) required to protect against infection from Covid-19.[49] How ironic too that the acting prime minister was invested with the main responsibility to inform – to

---

[41] D. Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*, Chapters 2 and 4 respectively.*
[42] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*,* Chapter 5.
[43] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*,* Chapter 6.
[44] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*,* Chapter 7.
[45] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*, pp. 123-24.*
[46] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*, p. 124.*
[47] *Osman v United Kingdom* (2000) 29 E.H.R.L.R. 245, takes centre stage in his analysis, as Raab criticises "the courts in this country [which] have not resisted the Strasbourg case law, but sought to match it – and sometimes extend it – under UK law … sidestep[ping] the carefully calibrated rules on police liability, overruling the UK law of negligence". Raab, "The Assault on Liberty: What Went Wrong with Rights" (Fourth Estate, 2009), p. 149.
[48] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009)*,* pp. 166-68.
[49] On the potential applicability of Article 2 ECHR's positive obligations to Covid-19 related deaths, see, generally, E. *Stubbins-Bates, Covid-19 Symposium: Article 2 ECHR's Positive Obligations – How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the Covid-19 Pandemic?, Opinio Juris,* 1 April 2020, http://opiniojuris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/ [Accessed 14 May 2020]; *P. Bowen QC, "Learning lessons the hard way – Article 2 duties to investigate the Government's response to the Covid-19 pandemic, UK Constitutional Law Blog, 29 April 2020*, https://ukconstitutionallaw.org/2020/04/29/paul-bowen-qc-learning-lessons-the-hard-way-article-2-duties-to-investigate-the-governments-response-to-the-covid-19-pandemic/ [Accessed 14 May 2020].

reassure and empathise with – the UK public, about all the measures the government has been and should be adopting to protect individual citizens' fundamental right to life in the face of this devastating pandemic. It is equally depressing to discover that such a narrow understanding of human rights[50] goes hand in hand with nationalistic illusions of grandeur, if not sheer xenophobia, with the right to life again at the epicentre; "[t]he ongoing metamorphosis of the right to life will attract the desperate and destitute from all over the world to Britain", writes Raab, "not just as a historic safe haven from persecution, but increasingly as an international oasis of healthcare and social support".[51] We are still "waiting for the barbarians", one might respond, speaking like J.M. Coetzee;[52] the "desperate and destitute from all over the world" that Art 2 ECHR would allegedly allow into our NHS, causing it to be flooded.[53] We all saw how the NHS was used as a tool that would eventually allow the Leave campaign to drill through the national psyche the obsession to "take back control" from Brussels; Raab was applying the same logic to European human rights back in 2010.

Still, the true extent of Raab's assault on the HRA and the ECHR is not fully revealed until he discusses "putting [things] right", entering "the next chapter of British liberty", with the creation of a "British Bill of Rights", that would "entrench our fundamental liberties,

[50] Raab seems unable to even theoretically entertain the idea of human rights as "positive rights", pay any importance to equality as a means to achieve better protection of "negative rights", let alone consider equality as a value that is so important in itself as to generate positive duties for the state to act. On these distinctions, see, generally, M. Elliott and R. Thomas, *Public Law,* 3rd edn (Oxford: Oxford University Press, 2017), pp. 762-64. In fact, Raab's self-professed support for human rights does not go any further than encompass a short list of narrowly interpreted negative rights. Even with regards to these, he seems to have little sympathy for interpretative approaches that might be consistent with a "living instrument" thesis.

[51] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 206.

[52] "Of this unrest I myself saw nothing", notes the Magistrate, the main character in Coetzee's powerful allegory of othering and empire. "In private I observed that once in every generation, without fail, there is an episode of hysteria about the barbarians", the Magistrate adds. J.M. Coetzee, *Waiting for the Barbarians* (Vintage books, 2004), p. 9 (originally published in 1980).

[53] Britain's inadequate reaction to Covid-19 will have sufficiently exposed, of course, the fallacy of Raab's statements. Years of Conservative government-driven austerity have left the NHS drying up of resources. Faced with the deadly pandemic, Britain proved to be no "international oasis of healthcare and social support". See, e.g., C. Wenham, "The UK was a global leader in preparing for pandemics. What went wrong with coronavirus?", 1 May 2020, *The Guardian,* https://www.theguardian.com/commentisfree/2020/may/01/uk-global-leader-pandemics-coronavirus-covid-19-crisis-britain [Accessed 14 May 2020]. It is painfully ironic too that it is immigrants, and their descendants, who seem to be suffering the most from the lack of equipment, and who provided a solid foundation to (rather than "flood") the NHS when fighting the pandemic. As the New York Times have written, "in a country where anti-immigration sentiment gave rise to the Brexit movement, Britain's health care system depends heavily on foreign doctors, who are now on the front lines fighting the epidemic". B. Mueller, "Eight UK Doctors Died from Coronavirus. All Were Immigrants", 8 April 2020, *The New York Times,* https://www.nytimes.com/2020/04/08/world/europe/coronavirus-doctors-immigrants.html [Accessed 14 May 2020].

establishing an autonomous regime of British human rights law".[54] Conceptualising a dividing wall, to insulate British law from its European counterparts, somehow empowering and liberating Britain in the process, is Raab's key proposition here. "A Bill of Rights would, by definition, root our conception of rights in British law and restore a sense of national ownership, rather than unnecessarily importing wholesale the Strasbourg model", he argues.[55] "A British Bill of Rights", Raab thinks, would allow us to "tailor the text to our own national traditions, priorities and customs",[56] and would "focus our judiciary on its main primary task, which is to give effect to British rights instead of trying to divine and decipher the murky case law emanating from Strasbourg".[57] Creating a "home-grown Bill of Rights"[58] would also mean that the relationship with Strasbourg would be "refined", "recalibrated"; "the UK courts would not need to follow or even be guided by the unwieldy and inconsistent Strasbourg case law",[59] and they "should be responsible for enforcing UK rights".[60] "UK rights", "British rights", "home-grown", rooted in "British law" and our "own national traditions", conceived as "an autonomous regime of British human rights law", enforced by "UK courts", restoring "a sense of national ownership"; this is legal and cultural nationalism and Euroscepticism, inextricably bound together, in their purest form, and not concerning a type of law that might be more susceptible to development through domestic interpretations – let us take land law or trusts as an example – but legal nationalism that is crudely and brutally applied to *universal* human rights. Raab's "British rights" narrative is seemingly oblivious to the fact that people speak of, and fight for, the protection of *human* rights, not the protection of French or Greek or Indian or Australian and Chinese human rights or British rights for that matter.

But perhaps nothing more clearly reveals that Euroscepticism is the driving force for Raab's opposition to the HRA than the fact that the current Foreign Secretary is otherwise perceived as someone who is pro-international human rights. The Financial Times' David Allen Green, for instance, has written that "it cannot be doubted that [Raab's] interest in civil liberties is genuine and well-informed", though he then also points out that Raab has "a dislike of the legal instruments such as the Human Rights Act and the European Convention on Human Rights

[54] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 202 and chapter 7.
[55] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 215.
[56] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 222.
[57] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 223.
[58] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 216.
[59] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 226.
[60] Raab, *The Assault on Liberty: What Went Wrong with Rights* (London: Fourth Estate, 2009), p. 227.

that can check government abuse in any systemic way". Allen Green's critique brings into sharp focus the inherent flaws in Raab's approach to the HRA and ECHR, particularly by pointing out that the "Tory civil libertarianism" that he and other (Brexiteer) Conservatives represent (David Davis is the other example taken) "wants the benefits of a libertarian approach to policy in certain (usually populist) cases without the means of placing such libertarianism on a sustainable basis", by subscribing to the HRA's and ECHR's systemic checks for instance.[61] The controversies and oxymora that this "'pick-and-mix' stance" creates also vividly manifest themselves if one compares and contrasts the important human rights work that the Foreign Office or the UK delegation to the Council of Europe undertake,[62] on the one hand, with the position that the current Foreign Secretary personally and the Conservative government, more generally, have adopted on the HRA and the ECHR.

Suella Braverman

What is so wrong with the HRA and ECHR, one will be tempted to ask at this point.[63] I've previously tried to answer the question in this journal, by demonstrating the substantive impact that the Convention and the European Court of Human Rights have had on UK law (leading to the conclusion that there is nothing wrong with the two human rights instruments; how they can be even more effectively applied is a different matter).[64] But the Foreign Secretary would beg to differ, blaming the HRA and the Convention for all sorts of things (thus dismissing or distorting the transformative effect of the Convention for UK law and society): an alleged proliferation of rights, sparking judicial activism in the UK, weakening parliamentary sovereignty and shifting British gravity towards European variants of socialism. We could say that Raab is opposed to "Convention rights as supra-political norms" and concerned about their impact on "sovereignty and the Separation of Powers", two sources of criticism that are often levelled at the Court, as the new president of the European Court of Human Rights, Judge

[61] D. Allen Green, "Tories and civil liberties: the fascinating appointment of Dominic Raab", 13 May 2015, *The Financial Times,* https://www.ft.com/content/8cad6075-f0f8-3fc8-9fa8-3574f50f1128 [Accessed 14 May 2020].
[62] See, generally, *Foreign & Commonwealth Office, Human Rights and Democracy Reports,* https://www.gov.uk/government/collections/human-rights-and-democracy-reports [Accessed 14 May 2020]; *UK and the Council of Europe,* https://www.gov.uk/world/uk-delegation-to-council-of-europe [Accessed 14 May 2020].
[63] This is a question that sixth formers often pose at the end of workshops I have the pleasure to deliver as part of the "Knowing Our Rights" project, after being confronted with Conservative government plans to "repeal" or, more recently, "update" the HRA, if not to withdraw from the ECHR. See *Knowing Our Rights, Schools,* https://www.knowing-our-rights.com/category/schools/ [Accessed 14 May 2020].
[64] D. Giannoulopoulos, "What has the European Convention on Human Rights Ever Done for the UK? [2019] E.H.R.L.R. 1.

Robert Spano, has observed.[65] Such criticism of the Court has achieved new prominence since the Brexiteer Conservative government under Boris Johnson has come to power, with the prorogation case[66] – and the *Miller* case before that –[67] sparking an angry, multi-level, attack from the part of the Conservatives, that now conflates longstanding threats to European human rights with threats to judicial independence and the rule of law,[68] with the ultimate aim of "taking back control" – not just from Brussels, but also from Strasbourg, and from the Supreme Court and the UK judiciary more broadly – to bestow it solely on the executive. The appointment of Suella Braverman – a former chair of the European Research Group, a junior minister at the former Department for Exiting the EU and an MP with a consistent record on voting against laws to promote human rights –[69] as the new Attorney General in Boris Johnson's government has brought these issues into the spotlight, as I have argued in detail elsewhere (with Julian Petley).[70] A few weeks prior to her appointment, Braverman wrote an article for the Conservative Home website in which she argued that:

> Restoring sovereignty to Parliament after Brexit is one of the greatest prizes that awaits us. But not just from the EU. As we start this new chapter of our democratic story, our Parliament must retrieve power ceded to another place – the courts. For too long, the Diceyan notion of parliamentary supremacy has come under threat. The political has been captured by the legal. Decisions of an executive, legislative and democratic nature have been assumed by our courts. Prorogation and the triggering of Article 50 were merely the latest examples of a chronic and steady encroachment by the judges. For in reality, repatriated powers from the EU will mean precious little if our courts continue to act as political decision-maker, pronouncing on what the law ought to be and supplanting Parliament. To empower our people we need to stop this disenfranchisement of Parliament.[71]

---

[65] R. Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 *Human Rights Law Review* 473, 478-79.

[66] *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

[67] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[68] Anthony Lester has put it succinctly: "[t]he phrase 'human rights' is used in the United Kingdom to attack judges and the rule of law". A. Lester, "Five Ideas to Fight for" [2016] E.H.R.L.R. 231, 233.

[69] *They work for you*, *Suella Braverman,* https://www.theyworkforyou.com/mp/25272/suella_braverman/fareham/votes [Accessed 14 May 2020].

[70] *J. Petley and D. Giannoulopoulos, "The Conservative Government, the Press and the Judiciary, Unfinished Business?, Inforrm's Blog, 28 February 2020*, *https://inforrm.org/2020/02/28/the-conservative-government-the-press-and-the-judiciary-unfinished-business-julian-petley-and-dimitrios-giannoulopoulos/* [Accessed 14 May 2020].

[71] *S. Braverman: People we elect must take back control from people we don't. Who include the judges*, *27 January 2020*, https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html [Accessed 14 May 2020].

On the grounds that "traditionally, Parliament made the law and judges applied it", Braverman complained that "today, our courts exercise a form of political power […] Judicial review has exploded since the 1960s so that even the most intricate relations between the state and individual can be questioned by judges". Entirely predictably, the culprit for this "encroachment" is identified as the Human Rights Act and the "prolific human rights industry which it has spawned", by means of which "the concept of 'fundamental' human rights has been stretched beyond recognition". This is the Raab rhetoric revisited, reinvigorated and ready for the Brexit era. She concluded:

> I am pleased that the Government has promised to update the Human Rights Act to restore the proper balance between the rights of individuals, national security and effective government and to set up a Constitution, Democracy and Rights Commission to ensure that the boundaries of judicial review are appropriately drawn.[72]

The newly appointed Attorney General's narrative moves at a dizzying speed, from the point about regaining sovereignty from the EU to that of reclaiming power from the courts, passing through a destructive exercise of dismantling protections central to the HRA. What a striking difference to another Conservative politician, Dominic Grieve, who lost his Attorney General portfolio in July 2014 for being a firm supporter of the ECHR and HRA at a time when his party had firmly set its face against them (and against 'Europe' more generally).[73] Braverman's "wish list" for uncontested executive power, free from the checks and balances that have been so long taken for granted in western democracies, has strong echoes of a simplistic, seductive and therefore extremely dangerous, ultra-populist narrative. This puts the executive at the centre, "freed" from the mechanisms of democratic accountability that the technocrats and post-democrats in No.10 clearly see as anachronistic, including the HRA and ECHR, leaving the other institutions normally included in the separation of powers characteristic of democratic societies – and us, individual citizens, especially if part of a minority – in an outer sphere, weakened, vulnerable, unable to hold government to account.[74] As Adam Wagner rightly

---

[72] *S. Braverman: People we elect must take back control from people we don't. Who include the judges*, *27 January 2020*, https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html [Accessed 14 May 2020].

[73] *J. Petley and D. Giannoulopoulos, "Attacks on Grieve and Bercow stem from flawed, feudal ideas of 'sovereignty'", open Democracy, 10 June 2019, https://www.opendemocracy.net/en/opendemocracyuk/attacks-on-grieve-and-bercow-stem-from-flawed-feudal-ideas-of-sovereignty/* [Accessed 14 May 2020].

[74] *J. Petley and D. Giannoulopoulos, "The Conservative Government, the Press and the Judiciary, Unfinished Business?, Inforrm's Blog, 28 February 2020, https://inforrm.org/2020/02/28/the-conservative-government-the-press-and-the-judiciary-unfinished-business-julian-petley-and-dimitrios-giannoulopoulos/* [Accessed 14 May 2020].

points out, Braverman's appointment represents "the opening salvo" from the illiberal, anti-Human Rights ideologues in the Conservative Party and signals all too clearly the government's future direction in this area.[75]

The Conservative government's future plans for the HRA and ECHR

The magnitude of the risk that the HRA and ECHR are facing in the UK post Brexit cannot be fully grasped absent an analysis – such as that undertaken above – of how deep a Eurosceptic, anti-human rights, executive sovereignty-centred ideology now runs within the governing party. In fact, a fuller account would have seen analysis also extend to centres of influence and intellectual activity that reside outside of the party, but are very much in tune with its political rhetoric on human rights and Europe; the "Judicial Power" project[76] or Lord Sumption's writings on judicial activism and human rights[77] – that Suella Braverman seems to have got part of her inspiration from in her recent article – are two illustrations that spring to mind, but there is no space here to elaborate further on them. For the remainder of this article, I will rather engage with formal Conservative government policy on the HRA and ECHR, against the backdrop of the negotiations on the future relationship with the EU.

Put briefly, the Conservatives' policy on the HRA and ECHR has, in recent years, mutated from direct political aggression (with the pledge to repeal the Act in the 2015 manifesto)[78] to a strategy of creating ambiguity and chipping away at its democratic legitimacy. The 2017 manifesto contained a more nuanced commitment, to stay *temporarily* in the Convention *until*

---

[75] A. Wagner, "Suella Braverman's appointment as attorney general spells danger for human rights", 14 February 2020, *New Statesman*, https://www.newstatesman.com/politics/uk/2020/02/suella-braverman-s-appointment-attorney-general-spells-danger-human-rights [Accessed 14 May 2020].

[76] The "Policy Exchange" ran "Judicial Power Project" takes as its starting point that "judicial overreach increasingly threatens the rule of law and effective, democratic government", and seeks to address it by "restoring balance to the Westminster constitution – by articulating the good sense of separating judicial and political authority". See https://judicialpowerproject.org.uk/about/ [Accessed 14 May 2020]. See also *N. Malcolm, Human Rights and Political Wrongs: a new approach to Human Rights Law, Policy Exchange, 2017*, https://policyexchange.org.uk/wp-content/uploads/2017/12/Human-Rights-and-Political-Wrongs.pdf [Accessed 14 May 2020], and discussion in P. O'Connor QC, "Neo-liberalism and human rights" [2018] E.H.R.L.R. 541, 551 s.

[77] J. Sumption, *Trials of the State – Law and the Decline of Politics* (London: Profile books, 2019).

[78] *Conservative party manifesto 2015, p. 73*, http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf [Accessed 14 May 2020]. One of the key missions was to "reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society"; a perfect fit with Suella Braverman's renewed attack on the HRA examined above.

Brexit was concluded.[79] The 2019 manifesto then promised to "update" the Act and reform judicial review at the same time, to ensure "it is not abused to conduct politics by another means or to create needless delays",[80] whilst also committing the Conservative government to "set[ting] up a Constitution, Democracy & Rights Commission that will […] restore trust in our institutions and in how our democracy operates".[81] Human rights and the power of the judiciary to hold government to account – most notably through the HRA and judicial review – were conflated there into a common threat to the power of the executive and parliamentary sovereignty that is to all intents and purposes reduced to "the sovereignty of the executive".[82]

So, what is the current state of play? Conservative threats to the HRA were always lurking in the Brexit waters of course, which means not many will have been surprised to hear that Britain has now refused to commit to the ECHR as an essential element in any future partnership with the EU. But this important development highlights the fact that the government may be ready to take the next, potentially final step, now that "Brexit is done." A Conservative source, quoted in the Sunday Telegraph article I have mentioned at the beginning of this article, reinforces these fears: the EU demands are "inappropriate," and "we will uphold human rights in our way," the source said.[83] These latest moves in the negotiations chessboard play into the worst fears of human rights scholars and organisations that have been tirelessly warning of a Brexit domino effect on human rights protections in the UK.[84] And so perhaps it should come as no surprise that the UK and the EU have reached a standoff on this point. It is worth digging into the detail here, to work out how we reached this impasse and where we might go next.

---

[79] See *D. Giannoulopoulos, Human rights with a (Brexit) use-by date, The UK in a Changing Europe, 1 February 2019*, https://ukandeu.ac.uk/human-rights-with-a-brexit-use-by-date/# [Accessed 14 May 2020].
[80] *Conservative party manifesto 2019*, *p. 48*, https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf [Accessed 14 May 2020].
[81] *Conservative party manifesto 2019*, *p. 48*, https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf [Accessed 14 May 2020].
[82] *J. Petley and D. Giannoulopoulos, "Attacks on Grieve and Bercow stem from flawed, feudal ideas of 'sovereignty'", open Democracy, 10 June 2019, https://www.opendemocracy.net/en/opendemocracyuk/attacks-on-grieve-and-bercow-stem-from-flawed-feudal-ideas-of-sovereignty/* [Accessed 14 May 2020].
[83] E. Malnick, "PM will not let independent UK be bound by 'abusive' European human rights laws", 1 March 2020, *The Sunday Telegraph.*
[84] See, generally, C. Gearty, "States of Denial. What the Search for a UK Bill of Rights Tells Us about Human Rights Protections Today" [2018] E.H.R.L.R. 415, 420. See also *Better Human Podcast, The European Convention on Human Rights is working, https://podcasts.apple.com/gb/podcast/13-the-european-convention-on-human-rights-is-working/id1481010283?i=1000465790103* [Accessed 14 May 2020].

The new EU negotiating directives provide for the United Kingdom's "continued commitment to respect the European Convention on Human Rights," as "a basis for cooperation" and as part of the "core values and rights" that should inform any future relationship.[85] The directives make further reference to this continued commitment in the section that relates to law enforcement and judicial cooperation in criminal matters. In envisaging close cooperation, the directives stress as a necessary condition "adequate protection of personal data," then go so far as provide for what has become known, in the context of the negotiations on the withdrawal agreement (WA), as a "guillotine clause," a trigger for the automatic termination of law enforcement cooperation and judicial cooperation in criminal matters, if the United Kingdom were to denounce the ECHR or were to "abrogate domestic law giving effect to the ECHR".[86] In other words, if it were to repeal the HRA, which is exactly what the Conservative Party has been threatening to do for many years.

The UK document setting out the country's approach to the future relationship, published two days after the EU decision (and evidently reacting to it), counter-intuitively describes what the agreement should *not* specify, rather than taking a positive approach and identifying concrete mechanisms for human rights protection. "The agreement should not specify how the UK or the EU Member States should protect and enforce human rights and the rule of law within their own autonomous legal systems," the document noted, and it "should not specify the reasons for invoking any suspension or termination mechanism" either; an obvious rejection of continued commitment to the ECHR as a requirement for cooperation.[87]

Two observations quickly follow from the above. First of all, the UK rejection of a commitment to continue to abide by the Convention, supposedly to protect its post-Brexit status as an independent nation, is not only devoid of logic (some would say absurd, given the number of perfectly independent, modern European countries that subscribe to – and, in many cases, make a success of – the Convention), but it is hypocritical too. The UK government fully accepted these clauses as part of the negotiations on the Withdrawal Agreement. A "continued

[85] Council of the European Union, Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, para. 12, 25 February 2020 (5870/20), https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf [Accessed 14 May 2020] (hereinafter mentioned as EU negotiating directives).
[86] EU negotiating directives, para. 118.
[87] HM Government, The Future Relationship with the EU – The UK's Approach to Negotiations, paras. 31 and 33, February 2020 (CP 211), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf (Accessed 14 May 2020).

commitment to respect the framework of the European Convention on Human Rights" and to "continued adherence and giving effect to the ECHR", was included in the Political Declaration (both in the section on law enforcement and judicial cooperation and in the initial provisions of the Declaration, as a core, shared, value)[88] as well as in the Withdrawal Agreement itself. It is also included in the Northern Ireland protocol, which provides that no diminution of rights set out in the Good Friday Agreement should result from withdrawal; these rights principally stem from the ECHR.[89] Boris Johnson's government signed up to these foundational documents. The prime minister led on this process, celebrating the culmination of the negotiations as a historic success for his party and him personally, a "fantastic moment" that "deliver[ed] the result of the 2016 referendum and [brought] to an end far too many years of argument and division".[90] Michel Barnier drove this point home when noting, at the end of the second round of the negotiations on the future relationship, that the "the United Kingdom [had] refused to engage seriously on a number of fundamental issues" (including continued adherence to the ECHR). "[W]e did not pull [these issues] out of our hat", he explained; "they can be found quite precisely in the Political Declaration that we agreed with Boris Johnson".[91] The UK government's willingness to go back on the commitments that it had made on the ECHR (in the Political Declaration and the Withdrawal Agreement) also proves that the House of Lords' EU Justice Sub-Committee was, unfortunately, right to question how serious the UK government was about these commitments, which is why it went so far as to conclude that "it would be incumbent on any new Government to give 'a clear and unambiguous undertaking that it intends to retain the UK's commitment to both the Convention and the European Court on Human Rights' as part of its negotiations for a future relationship with the EU".[92] Jonathan

---

[88] European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019, 17 October 2019, TF50 (2019) 65, paras 7 and 81. See also Slides – Internal EU27 preparatory discussions on the future relationship: "Law enforcement and judicial cooperation in criminal matters" (slides 8 and 34), https://ec.europa.eu/commission/publications/slides-internal-eu27-preparatory-discussions-future-relationship-law-enforcement-and-judicial-cooperation-criminal-matters_en [Accessed 14 May 2020].

[89] Revised Protocol to the Withdrawal Agreement, Article 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf [Accessed 14 May 2020].

[90] *D. Sheridan and T. Diver,* "Boris Johnson signs Withdrawal Agreement in historic moment for UK and EU", 24 January 2020, *The Telegraph*, https://www.telegraph.co.uk/politics/2020/01/24/brexit-latest-news-withdrawal-agreement-bill-boris-johnson-labour/ [Accessed 14 May 2020].

[91] European Commission, Press statement by Michel Barnier following the second round of future relationship negotiations with the United Kingdom, 24 April 2020, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_739 [Accessed 14 May 2020].

[92] Baroness Kennedy of the Shaws QC and A. Horne, "Rights after Brexit: some challenges ahead?" [2019] E.H.R.L.R. 457, 461; EU Lords Justice Sub-Committee, Inquiry on Rights after Brexit,

Cooper has made this point more bluntly, finding that the relevant text in the Political Declaration was "hardly a reassuring commitment" and a "British Bill of Rights [was] written in invisible ink into [the relevant] provision".[93]

Secondly, taking the EU's approach at face value, one might perhaps argue that, in prescribing adherence specifically to the Convention, let alone in providing for a "guillotine clause," the EU is adopting a rigid approach, that may be atypical of the approach it would normally take when negotiating similar trade agreements with third countries; the EU-Canada trade agreement, for instance, contains an important human rights clause, but no specific reference to the ECHR.[94] But, on the other hand, the practice of linking trade agreements with respect of human rights has gained significant ground in recent years,[95] and in the case of the UK it simply makes sense, from a pragmatic point of view, to concentrate specifically on the ECHR. This is so for the simple reason that the EU is not oblivious to the Conservative threats to repeal the Human Rights Act and, potentially, even to withdraw from the ECHR. The ECHR has been absolutely central to the protection of human rights in the UK – including in relation to the protection of the right to privacy (personal data) and procedural rights (areas which the "guillotine clause" singles out as in particular need of ECHR protection) – in a country that does not even have a charter of constitutional rights, a modern Bill of Rights so to speak, as a fall-back position. Professor Francesca Klug's reminder of the pre-HRA state of play – particularly during the Thatcherite years – is of particular relevance here: "if you had a government with a sufficient majority, there was nothing to stop it riding roughshod of what people thought" – mistakenly of course – "were invincible civil liberties".[96] In other words, because of all the above, the EU sees as realistic – and seeks, with its negotiating principles, to provide protection against – the prospect of individuals in the UK not being able to invoke fundamental human rights (of ECHR standard) before UK courts in the future; rights that it

---

https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2017/rights-after-brexit/ [Accessed 14 May 2020].

[93] J. Cooper, "Bashing human rights is a good way to bash Europe", 10 December 2018, The Times, https://www.thetimes.co.uk/article/bashing-human-rights-is-a-good-way-to-bash-europe-mtr96l5p0 [Accessed 14 May 2020].

[94] See art. 28 para. 7 of Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, 5 August 2016, 5368/216, http://data.consilium.europa.eu/doc/document/ST-5368-2016-REV-2/en/pdf [Accessed 14 May 2020].

[95] I. Zamfir, European Parliamentary Research Service, Human rights in EU trade agreements – The human rights clause and its application, 8 July 2019, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf [Accessed 14 May 2020].

[96] *Better Human Podcast, The fascinating inside story of the Human Rights Act's birth*, https://podcasts.apple.com/gb/podcast/7-fascinating-inside-story-human-rights-acts-birth/id1481010283?i=1000459036391 [Accessed 14 May 2020].

may be key for individuals in the UK to exercise in the context of the post-Brexit relationship with the EU.

EU criminal law also increasingly requires security and judicial cooperation to be premised upon adherence to common human rights standards, with the ECHR a major point of reference. Future adherence to the ECHR makes perfect sense in that respect,[97] if the UK genuinely envisages close cooperation in this area (which is what one would be right to assume, given how high up on the government's agenda criminal justice has supposedly been, if we take the 2019 general election campaign as a point of reference).[98]

It is important to note here that, at the time of writing, after the completion of the first two rounds of the future relationship negotiations, the EU has held its ground on the need to ensure that the UK continues to adhere to the ECHR. Not only this, but Michel Barnier has gone on to make the ECHR a central component of the negotiations. In his press conference following the end of the first round of negotiations, he noted, amongst a number of significant areas of divergence, the fact that the UK had informed the EU that it "does not want to formally commit to continuing to apply the ECHR". This was a "grave concern" for the EU, "immediately affecting" the ambition of the future relationship, specifically in relation to security and judicial cooperation.[99] Then, when the EU took the important step of publishing a draft of the agreement on the future new partnership, it included in the document a "continued commitment to respect the European Convention on Human Rights" as a "basis for cooperation" and as one of the "essential elements" of the partnership established by the agreement.[100] Finally, following the end of the second round of negotiations, Barnier observed that there were "four areas" on which progress was "disappointing"; the ECHR was central to two of them. The first concerned the "overall governance of the future partnership". Barnier stressed the importance of adherence to the ECHR in that respect, then highlighted, for the first time in the negotiations, that the ECHR "should be given effect in domestic law so that individuals can rely on it"; a specific

---

[97] *D. Giannoulopoulos, A minimalist approach? Why the EU-UK security negotiations should be prioritising human rights protections, Fair Trials, 20 September 2018*, https://www.fairtrials.org/news/minimalist-approach-why-eu-uk-security-negotiations-should-be-prioritising-human-rights [Accessed 14 May 2020].

[98] See G. Reyner, "Boris Johnson pledges to get tough on serious criminals", 11 December 2019, The Telegraph, https://www.telegraph.co.uk/politics/2019/12/10/boris-johnson-pledges-get-tough-serious-criminals/ [Accessed 14 May 2020].

[99] Press conference by Michel Barnier following the first round of negotiations with the UK, 5 March 2020, https://audiovisual.ec.europa.eu/en/video/I-185570 [Accessed 14 May 2020].

[100] European Commission, Draft text of the agreement on the New Partnership with the United Kingdom, 18 March 2020, UKTF (2020) 14, articles 4 and 12, https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf [Accessed 14 May 2020].

reference to the debate in the UK about potentially remaining in the ECHR but repealing the HRA, and the EU seems to have shut the door to that. The second area of "disappointing progress" and discordance concerned future police and judicial cooperation in criminal matters, where "the UK refuse[d] to provide firm guarantees – rather than vague principles – on fundamental rights and individual freedoms".[101] To sum it up, it is unfathomable to realise that the UK is resisting so strongly subscribing to fundamental human rights that it should itself be seeking to put to the centre of the future relationship with the EU.

Concluding thoughts

The Eurosceptic right's reaction to the EU pressing the ECHR issue is perfectly encapsulated by the Sunday Telegraph editorial that, quite bluntly, accuses Brussels of "deluded overreach," warning the EU that it "must back off." "The suggestion that the UK can't be trusted to uphold human rights on its own is insulting and historically illiterate," the editorial proclaims, in obvious anger.[102]

But that is the sad reality. The UK government *cannot* be trusted to uphold European human rights on its own, for the very simple reason that it has aggressively been seeking, for many years now, to undermine the core system for the protection of human rights in the UK, the Human Rights Act, incorporating the European Convention. In that context, it has offered no viable alternative, just vague promises about an elusive UK Bill of Rights, backed up by statements steeped in a type of legal chauvinism that one would hope had become obsolete, such as the UK being the country that "invented charters of rights with Magna Carta and the Bill of Rights 1688".[103] However, it is precisely because the UK has a rich and long human rights law tradition that it must avoid the catastrophic, self-harming error of repealing the HRA and withdrawing from the ECHR; an "act of epic historic selfishness",[104] that would

[101] European Commission, Press statement by Michel Barnier following the second round of future relationship negotiations with the United Kingdom, 24 April 2020, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_739 [Accessed 14 May 2020].
[102] E. Malnick, "PM will not let independent UK be bound by 'abusive' European human rights laws", 1 March 2020*, The Sunday Telegraph.*
[103] E. Malnick, "PM will not let independent UK be bound by 'abusive' European human rights laws", 1 March 2020*, The Sunday Telegraph.*
[104] A. Wagner, "After Brexit they will come for human rights – and this time the public debate must be won", 9 June 2019, *Prospect magazine,* https://www.prospectmagazine.co.uk/politics/after-brexit-they-will-come-for-human-rights-and-this-time-the-public-debate-must-be-won [Accessed 14 May 2020].

permanently blight the country's international reputation and make its citizens vulnerable to governmental overreach, and the loss of individual rights we are currently taking for granted.

A Bill recently introduced in Parliament, to "protect" current and former members of the armed forces from "vexatious" human rights litigation, also gives cause for reflection, providing a practical example of the government's ideology that aims to restrict the reach of the ECHR (if not withdraw from it altogether). The Bill contains a "triple lock" of measures to protect current or former personnel against prosecutions five years after an alleged crime, including a presumption against prosecution, the requirement for prosecutors to give particular weight to the fact that no new compelling evidence has emerged as well as the requirement to obtain the consent of the Attorney General before a prosecution can proceed. The Bill will also introduce a six-year "long stop" on civil claims for personal injury and death, and for bringing HRA claims in connection with overseas operations, while also seeking to ensure that all future governments are compelled to consider derogating from the ECHR in relation to significant overseas military operations.[105] The Bill was published on the same day that the government announced a plan to close the vast majority of almost 2,000 unsolved cases relating to the "Troubles" in Northern Ireland.[106]

Two final thoughts bring the argument to a conclusion.

Covid-19 and the HRA

The shattering effect of the pandemic on the right to life, the right to health, human dignity more generally,[107] for thousands of citizens in the UK, will have inevitably already exposed the many gaps in our human rights infrastructure, hopefully bringing home to the British public

---

[105] *Ministry of Defence, Guidance – Overseas Operations (service personnel and Veterans) Bill*, 18 March 2020, https://www.gov.uk/government/publications/overseas-operations-service-personnel-and-veterans-bill [Accessed 14 May 2020]. The Sun hailed the Bill a "victory" for the paper, that "fulfil[led] a promise made by PM Boris Johnson to The Sun during December's general election campaign to end witch hunts against troops within 100 days". T. Newton Dun, "Witch Hunt Win – Long-suffering troops freed from historical witch hunts thanks to new prosecution time limit in victory for the Sun", 17 March 2020, The Sun, https://www.thesun.co.uk/news/11195540/troops-historical-witch-hunts-prosecution-limit/ [Accessed 14 May 2020].

[106] R. Carroll, "Dismay over UK plan to close unsolved Troubles cases", 18 March 2020, *The Guardian,* https://www.theguardian.com/uk-news/2020/mar/18/dismay-over-uk-plan-to-close-unsolved-troubles-cases [Accessed 14 May 2020].

[107] See J. Cooper, "Between Covid-19 and Windrush it's clear this government lacks a heart", 26 March 2020, *The Times,* https://www.thetimes.co.uk/article/between-covid-19-and-windrush-its-clear-this-government-lacks-a-heart-vttzrrmdp [Accessed 14 May 2020].

– to our Parliamentarians too – the need for the government to go much further in protecting human rights in the future; securing the future of the HRA and the ECHR should become a non-negotiable in that context, the starting point in the more ambitious pursuit of conceiving and giving effect to a wider spectrum of rights.

From the reverse angle, of course, Covid-19 risks changing our democratic way of life as we know it. It is not inconceivable that, in this new environment of fear and mass loss of life, human rights will be quickly dismissed as legal niceties incompatible with the need for effective state responses in a public emergency. Liora Lazarus demonstrates this with finesse, in the Bonavero Institute's preliminary assessment of Covid-19 legislation across the world: "compounded by a global rise in autocratic populism, in which the foundations of human rights and liberal democracy are increasingly questioned, the Covid 19 emergency measures risk becoming a foundation for greater consolidation of executive power", she argues.[108] But in this scenario too, the case for protecting our rights could not be stronger, if we are to avoid a dystopian future where authoritarian state power goes unchecked. The debate, in other words, can no longer be about protecting the status quo (the ECHR and HRA), let alone about replacing our current human rights infrastructure with an "ECHR minus" (which is what many scholars fear a British Bill of Rights would effectively be). Covid-19 rather requires more holistic approaches to protecting rights, including reinforcing positive duties and expanding the reach of socio-economic rights.[109]

Pausing in this narrative, that removes the locus of analysis from Euroscepticism and places it on our society post Covid-19, to hypothesise on the future of the HRA and ECHR in the UK,

---

[108] *L. Lazarus, "Introduction" in Bonavero Institute of Human Rights, "A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions", 6 May 2020, Bonavero Report No. 3/2020*, https://www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf [Accessed 14 May 2020].

[109] See, generally, *European Network of National Human Rights Institutions, The EU must put economic and social rights at the heart of its economic response to Covid-19, 6 May 2020*, http://ennhri.org/wp-content/uploads/2020/05/Statement-The-EU-must-put-economic-and-social-rights-at-the-heart-of-its-economic-response-to-COVID-19-6-May-2020.pdf*; United Nations, Covid-19 and Human Rights: we are all in this together, April 2020*, https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf [Accessed 14 May 2020]. Francesca Klug's perceptive articulation of the importance of socio-economic rights for individual freedom applies a fortiori to our societies after Covid-19: "On the basis that freedom without the social and economic web of rights to live a dignified life is no freedom at all, certain basic social and economic outcomes, as laid down in the UDCHR, […] need to be protected". *Prospect magazine, Can there ever be any progress in politics? With David Runciman and Francesca Klug*, 31 October 2019, https://soundcloud.com/prospect-magazine/can-there-ever-be-any-progress-in-politics-david-runciman-francesca-klug [Accessed 14 May 2020].

it is also instructive to reflect on the potential impact that Covid-19 related legal claims – based on the HRA, notably relating to Art 2 ECHR duties to protect the right to life – will have on the government's ability to continue to pursue a policy of repealing or updating the Act or withdrawing from the Convention. As Jonathan Cooper has insightfully noted, in a recent virtual visit to Goldsmiths:

> One of the potential curious good things to come out of [the Covid-19 crisis] is that, as the government is inevitably challenged around the HRA, and the rights contained in the HRA, that may mean, or should mean, that the government is then less likely to dismantle the HRA and the ECHR. It will be a very brazen government that would say, 'these are the laws that are holding us to account, and we have been found to have violated various rights, therefore we are going to remove the legal framework that holds us to account'.[110]

It is very hard to disagree with this logic. A less optimistic view might nonetheless offer a reminder that we found ourselves in exactly the same position in the debate, only a few months prior to this point in time, when commentators were similarly noting the "strange irony" that, instead, of precipitating a UK exit from the Strasbourg Court, Brexit might have "ended up saving the Human Rights Act", as a result of the ECHR "guillotine clause" being included in the Withdrawal Agreement.[111] The UK government is now appearing prepared to renege on that promise in the Withdrawal Agreement to continue to commit to the ECHR, and it is very difficult to predict how it may react to the HRA being used as a key mechanism to hold it to account in the near future.

Sir Keir Starmer's Labour as a bulwark against attacks on the HRA?

The Conservative government clearly has not the slightest appetite for affording citizens the wider spectrum of rights that might be required as a response to the Covid-19 crisis. But Sir Keir Starmer's election as Labour leader – the second important development with the capacity to influence the future of the HRA and the ECHR in the UK – creates the conditions for filling

---

[110] [I will provide a YouTube video link that we can insert when proofs arrive; I have not uploaded the video yet]

[111] See F *Cowell, "A strange irony: How the EU withdrawal process ended up saving the Human Rights Act", LSE Brexit blog (3 December 2018)*, http://blogs.lse.ac.uk/brexit/2018/12/03/a-strange-irony-how-the-eu- withdrawal-process-ended-up-saving-the-human-rights-act/ [Accessed 14 May 2020]. See also Merris Amos, in conversation with Joseph Weiler, expressing the view that "Brexit has saved the Convention, because it would have been one or the other [the ECHR or EU membership] after the 23rd of June [referendum] [...] something had to be sacrificed to the Eurosceptic 'monster'". *EJIL: Live! Professor Merris Amos* (4 December 2017), https://www.youtube.com/watch?v=ie20BDZ4fqY [Accessed 14 May 2020].

that void, starting with an effective protection of the ECHR and HRA. Writing in 2014 in this journal, the new leader of the opposition, and emblematic human rights lawyer, noted that against the background of the impact, history and experiences that had shaped the ECHR, it was "perhaps surprising that calls to repeal or replace the Human Rights Act persist[ed]". He then went on to observe:

> The stance of those who want to repeal or replace the Human Rights Act is, to say the least, counter-intuitive. Around the world, citizens have fought for years for basic rights from their governments. In the United Kingdom, having now got them, some want to hand them back![112]

Writing in this journal again, in 2017, he spelled out what those driven by Brexit had in store for the HRA and ECHR: a retreat from our international human rights obligations, which "would be a terrible mistake", he insisted.[113] The ECHR was "the reflection by those who drafted it of what they thought we had fought for in the Second World War". [114] It was "the most successful international human rights framework in the world".[115] It had made it "easier for all of us to realise our rights";[116] its opponents "want[ed] it to be repealed because it work[ed]".[117] It provided "meaningful constraint on state power", and "power to the *individual person* to live life with dignity and without having to endure discrimination".[118] The Convention mattered to all of us; "[w]e can and we must defend human rights against these threats and we are well prepared to defend what we have", he concluded.[119]

There could not be a more opportune time for Keir Starmer to lead the opposition in the fight against the Eurosceptic right's populist and isolationist agenda, which continues to pose an existential threat to our human rights. As Francesca Klug points out, "the current row over human rights protection in the UK […] is essentially a political and ethical debate over who we are and what kind of society we want to live in".[120] Starmer's Labour must ask these difficult questions, on behalf of our society, as we find ourselves violently pushed to a critical

---

[112] K. Starmer QC, "Human Rights and Victims: the Untold Story of the Human Rights Act" [2014] E.H.R.L.R. 215.
[113] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 106.
[114] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 106.
[115] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 107.
[116] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 106.
[117] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 108.
[118] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 108.
[119] K. Starmer QC MP, "Roosevelt's Legacy: Human Rights after Brexit" [2017] E.H.R.L.R. 103, 108.
[120] F. Klug, "A Magna Carta for all Humanity: Homing in on Human Rights" (2015) 60 *Soundings* 130, 131.

crossroads, by phenomena whose significance we did not fully grasp nor were in any way prepared for, first Brexit, now this devastating global pandemic. A "bold, radical and ambitious [Labour] project, speaking to the 2020s and 30s […] needs to be anchored, and Labour could do a lot worse than anchoring it in the notion of human rights […] universal human rights grounded in humanity, equality and dignity", Starmer has previously argued.[121] He now has a unique opportunity to give effect to this project and save the HRA and ECHR in the process.

We, on the other hand, must battle against the illusion that law can, in itself, secure our human rights: "no law can save human rights […] [t]hey can only ultimately be protected by political struggle and a passionate belief in our common humanity", notes Francesca Klug, to sum up her call to action.[122] It's a call to action that we must heed, as individual human beings, regardless of where we position ourselves on the political spectrum, with our common humanity as our compass, alert to the fact that "human rights are never, nowhere, a given or irreversible, but a daily fight instead".[123]

[121] K. Starmer, "A Magna Carta for all Humanity by Francesca Klug review – Labour needs to look to the 2030s, argues Keir Starmer", 17 March 2016, *The Guardian*, https://www.theguardian.com/books/2016/mar/17/magna-carta-all-humanity-fracesca-klug-review-keir-starmer [Accessed 14 May 2020].
[122] F. Klug, "A Magna Carta for all Humanity: Homing in on Human Rights" (2015) 60 *Soundings* 130, 131.
[123] Extraits du discours de transferts des cendres de René Cassin au Panthéon par François Mitterand, président de la République, le 15 octobre 1987, https://www.reseau-canope.fr/cndpfileadmin/pour-memoire/rene-cassin-et-la-declaration-universelle-des-droits-de-lhomme/rene-cassin-lengagement-dun-homme-dans-un-siecle-violent/lhomme-au-service-de-son-pays/la-france-reconnaissante/ [Accessed 14 May 2020].