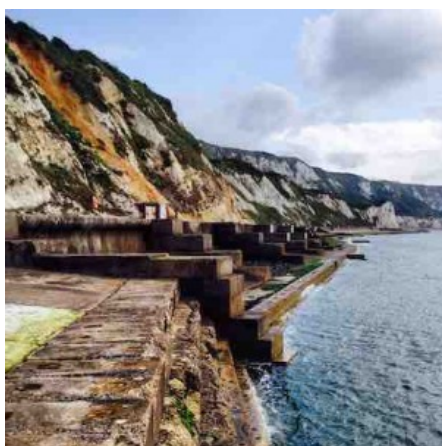


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On fantasy island: the seven myths undermining human rights in the UK today

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When myth, fantasy and human rights collide

A number of dangerous fantasies currently pervade discussion of human rights law in the UK; worryingly, some of them come from judges themselves. So said Professor [Conor Gearty](#), former Director of the Centre for the Study of Human Rights at LSE and currently Director of the Institute for Public Affairs, at the Wyndham Place Trust Corbishley lecture, held last week at LSE. ([Podcast](#)).

The seven myths that Gearty warns of highlight how easy it is to forget the political and historical struggles that underpin the legal status of human rights. The fantasies are as follows:

1. The myth of liberal historical progress. It is easy to kid ourselves that history is one big rationalising march towards progressively higher states of enlightenment. Such views always implicitly take the present moment as a destination, a vantage point to survey and simplify the past. But this view means obscuring or ignoring the struggles, compromises, and contingencies that produced the present situation, forgetting injustices even of the very recent past. The result is the fantasy that we now live in an age of [human rights enlightenment](#), which cannot be reversed. But politics hasn't gone away, and

this over-confidence is dangerous.

2. The common law as the origin and protector of civil liberties. In recent months and years, the UK Supreme Court has encouraged [common law revivalism](#), seeking to base arguments and decisions on English law as opposed to European Convention rights. This is based on the myth that the common law is the best protection for rights in the UK. This rosy revisionism ignores the fact that common law rights were historically derived from property ownership, and fundamentally concerned with protecting it. Common law rights have nothing to do with a concept of human dignity or universality. For instance, the common law said nothing about racial discrimination, the suppression of women, privacy, or the right to free association. Historically, common law rights were more frequently invoked to block progressive change in British society – change that only came about through political struggle translated into positive law by Parliament.

What is more, this recent common law revivalism must be understood in the context of controversial judgments over the past 15 years or so, most notably the case of [Jackson](#), in which courts have suggested that Parliamentary sovereignty – the fundamental principle of English political arrangements – is merely a common law invention. The scene is now set for a situation in which judges may even refuse to recognise the validity of an Act of Parliament, should they deem it to be contrary to the common law notion of the British constitution. Democracy in England, it seems, is now limited to whatever the judges decide it requires; a truly remarkable and constitutionally dangerous situation.

3. The delusion that the Human Rights Act overrides Parliamentary sovereignty. While the judges construct a jurisprudence of legal supremacy over political supremacy, a different fantasy is promoted in the UK public imagination – a myth [dishonestly encouraged by David Cameron's government](#) – that the Human Rights Act forces the British government to obey the decisions of a bunch of foreign judges in the European Court of Human Rights over in Strasbourg, and so we need to take the power back. This is simply wrong. As it stands, the [Human Rights Act 1998](#) makes clear that if an Act of Parliament conflicts with ECHR human rights law, the Act of Parliament prevails. Yet it takes political courage for government to be honest about this, courage that Cameron's coalition apparently doesn't have.

The irony is that this myth is being peddled in order to gain support for a move to [repeal the Human Rights Act](#). Yet if Parliament repealed the Human Rights Act, which upholds Parliamentary sovereignty, it would open the door to the form of common law judicial activism mentioned above. Judges have already stated in terms that they will not acknowledge Parliamentary sovereignty if they aren't happy with the legislation's impact on rights. Repealing the Human Rights Act would create uncertainty, exacerbating the potential for an acute constitutional crisis. Repeal will lead directly to the problem it pretends to solve.

4. *The myth that Strasbourg is supreme.* Strasbourg judgments are not directly implemented in the UK, but as we saw above, the government seems to want to pretend that they have no choice but to implement the decisions. This is untrue. If the government wants to implement a judgment from Strasbourg, the [relevant minister](#) can make the amendments. If it does not, it simply does nothing. Either way, the architecture of the Human Rights Act leaves the ultimate decision to HM Government, and accountability lies with Parliament.

5. *The fantasy of the neutral judge.* Recently, some senior judges have made supposedly neutral calls for the Strasbourg court to [row back on developments](#) it has made to the meaning and substance of human rights in the ECHR. They say this should stop and instead the court must go 'back to basics', limiting decisions to the 'plain' meaning of the written list of rights. But this kind of call for 'originalist' approaches to jurisprudence is not neutral at all. It is fundamentally political; specifically conservative, seeking to limit the application of human rights law to fewer situations than it currently does. We should recognise such disguised rhetoric for what it is.

6. *The myth that Strasbourg decisions must be followed by the UK courts.* Section 2 of the Human Rights Act 1998 upholds the ultimate authority of the UK Supreme Court in interpreting the law of the land. Section 2 requires English judges to ['take into account'](#) Strasbourg decisions, but they are legally empowered to reach different conclusions to the Strasbourg court on all human rights issues. The proof is the case of prisoner's voting rights, in which the Supreme Court ruled [contrary to Strasbourg's decision](#), and yet that is precisely the case used by the government and press to dishonestly agitate for repeal of the Human Rights Act. The Human Rights Act already contains the answer to the problem it is accused of creating.

7. *The fantasy of English exceptionalism.* The assumptions behind the political distrust of human rights law and the fantasies detailed above rest on an [outmoded view of England's role in the world](#), and on what really matters to the people living here. It reflects an elitist, exceptional vision of Britain, rooted in nostalgia for the lost Imperial dream. Indulging this dream, amplifying these fantasies, only takes us further down a dangerous road.

It may seem counter-intuitive to argue for the protection of human rights law by way of a strong defence of Parliamentary supremacy. But Professor Gearty's intervention is a political one. It is underpinned by his commitment to republican values, in the classic sense of [res-publica](#): that society is fundamentally a political community and that politics is of fundamental importance. This leads to a conception of rights not as something metaphysical good or universally self-evident, but as legal instruments that we, as a public, have democratically agreed on as being a common political good. We must therefore preserve the possibility of repealing the Human Rights Act, should we decide to do so. And this political freedom is reflected in the structure of the Human Rights Act itself.

The danger comes from those who would peddle fantasies about the status of rights in our society for other disguised political ends. Historically, people struggled and died for political recognition of rights. Rights are rooted in politics. Today, we must guard against both cynical political attempts by press and politicians to mislead about the reality of the situation and conservative interventions by judges that, however well intentioned, will do more harm than good.

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