

THE RIGHT RIGHTS MODEL

WHY THE UK HUMAN RIGHTS ACT WORKS – AND NEEDS TO BE DEFENDED

What is the right way to defend and promote human rights via law?

In earlier tracks on this project I have argued that human rights are essentially a [political concept](#) and that their success depends on [activism](#) and [the challenging of vested interests](#). My tenth [manifesto pledge](#) declares that ‘Lawyers are wonderful for human rights – but as supporting actors, not the main act’. What do I mean by this?

FIRST, A BIT OF BIO

I grew up in Ireland and my first exposure to rights was as a student of constitutional law in Dublin. We were all taught – and all automatically accepted – that judicial review of rights was a *good thing*. The results of cases, or where the true public interest might lie, did not concern us: we were just sure that it was bound to be right for the judges to be able to oversee the decisions of the legislature on rights’ grounds.

It never occurred (to me anyway) that we were a bunch of future lawyers being taught by lawyers about the work of lawyers – *naturally we assumed that the more power lawyers had the better!*

When I came to teach in England I carried my prejudice in my backpack, mistaking it for truth. I held forth to my undergraduate English students about how superior the Irish system was, how defective the ‘unwritten, right-less’ UK constitution. (This was all long before the UK Human Rights Act of course, on which more in a moment.)

Then along came the [miners’ strike](#), [Wapping](#), the [miscarriage of justice cases](#), [Spycatcher](#) and all the rest. I was invited to be one of a small group of academics to spend the day with the then Lord Chief Justice, [Lord Lane](#), and saw first-hand the kind of person that would enjoy the power as a senior judge I was arguing for in class. Whatever about textbook theories about the rule of law and the protection of civil liberties, British judges were in fact little more than reactionary partisans in the series of highly politicised battles which were fought through the 1980s and which spilled over now and again into the judicial arena.

But if all the decisions of the English judges were illiberal and anti-progressive even within the system the UK already had, how could the answer to Britain’s constitutional problems (and of course there were a few) be to give them more rather than less power?

My inability to answer that question turned me into a judicial sceptic, first writing a [book](#) on the 1980s with my colleague Keith Ewing and then expanding our critique to cover the whole interwar period, in [The Struggle for Civil Liberties](#). We worked together to point out how illiberal the judges always were in the UK and (by implication in the second; explicitly in the first) how foolish it would be to entrust them with a new bill of rights to interpret.

RIGHT ANSWERS VARY WITH THE TIMES

One of the main criticisms I make of human rights absolutists is their inflexibility, their inability to spot circumstances changing around them. But antagonists of human rights need to be alive to the possibility that they are at fault in exactly the same way.

A chief purpose of social democratic politics is to secure a culture in which all are esteemed equally and given the chance to flourish as individuals: see [track one](#) again. Historically this has been best achieved by committing to parliamentary sovereignty rather than to a bill of rights, in other words a constitutional system in which a democratically legitimised government has the power (via a disciplined party committed to social democratic values) to transform for the better the society in which it finds itself. This describes 20th century Britain, indeed much of what has been positive and beneficial about post war Europe. (I discuss this further on [common track four](#).)

But it is an approach that no longer seems to work.

There has been a catastrophic loss of confidence in social democracy and in the political parties that seem no longer believe in what they were set up to achieve.

The dehumanising force of the market is everywhere to be seen, demanding, dictating, imposing its will in a way that, were it not happening, we would dismiss as Marxist scaremongering.

Okay, let us accept that the old model of parliamentary sovereignty can no longer be relied upon to funnel social democratic benefits to the people. But surely the response to this new reality cannot suddenly be that it is now right to hand everything over to the judges and just hope for the best? If this was wrong twenty years ago, how can it have become suddenly right today?

That ancient cliché, about throwing the baby out with the bathwater comes to mind.

THE MARRIAGE OF NEW AND OLD LABOUR

Tony Blair's first government, elected in 1997, was well aware of this problem. The 'new' bit of Labour was impatient with the inability of old forms to deliver the outcomes to which it was committed. But 'old' Labour hung back, nostalgic for a parliamentary-inspired social democracy that it was reluctant to give up.

One of the main results of this tension was the [Human Rights Act 1998](#), an early offspring of this marriage. It has turned out to be a frail child frequently attacked and in constant need of nurturing.

But frail or not, it is a child upon which – at such a bleak time for [true](#) human rights – a very great deal depends.

WHY DOES THE ACT WORK?

It is the fate of successful innovation that it is very quickly taken for granted.

The beauty of the Human Rights Act is that it reconciles the demands of parliamentary government (and therefore democracy) with the moral imperative of human rights. It does this by brilliantly dropping the usual superiority of the human rights advocate, losing the inflexibility that the term so often connotes and accepting that...

human rights are part of not above politics.

How does it do this?

- By reaffirming parliamentary sovereignty: see sections 3(2) and 6(2). Far from undermining legislative supremacy the Human Rights Act requires it.
- By also insisting that while Parliament can breach legalised human rights if it likes, the courts should be allowed to say so albeit in a way that does not trump politics – this is the effect of section 4's cleverly designed Declarations of Incompatibility, loud statements of disgust by the judges which however carry no instant legal effect.
- By demanding that politicians think about human rights compatibility before they take a new Bill to parliament (section 19) and that they also reflect on every declaration of incompatibility that gets made, not necessarily having to implement but certainly having to think about whether to implement (section 10).
- By requiring all public authorities to act consistently with the rights in the Human Rights Act (section 6) and then giving people who think they are victims of violations of the rights that are protected in the Act the chance to take cases in court to secure proper legal protections: section 7 through to 9.
- By empowering the judges to really be creative when they are interpreting laws so as to ensure so far as possible that those laws are consistent with the human rights in the Human Rights Act: they can bend the meaning of words but they must not break them – if these words are unbendable, a declaration of incompatibility is the thing to issue.

I think this is such a clever compromise between law and politics. It certainly meets my objection from the 1980s to the kind of judicial supremacy for which (I nearly said as a kid!) I used to argue when I first started teaching.

In this post-Cold War capitalist climate it gives those who desire some kind of critical ethic (in this case a human rights ethic) a decent toehold in the law.

BUT WHAT ABOUT THOSE ROTTEN JUDGES?

Of course the judges are not evacuated by this scheme: it is a legal one after all and the judges are the inevitable referees.

A malevolent or even merely antagonistic judicial branch could be doing a lot of damage.

But it hasn't and (so far) it isn't.

This is where the human rights sceptic of law needs to display the pragmatism which he or she argues for in others.

The fact of the matter is that for whatever reason (and I think its part generational, part a reaction to the public opprobrium in which the judges were held at the end of the Thatcher era), the senior judiciary have changed. True it's still mainly old white men – but they have been liberal old white

men. Led for years by the [late Lord Bingham](#) and the estimable [Lord Woolf of Barnes](#) (with other key figures being the late [Lord Taylor](#), [Lord Nicholls](#) and the former radical barrister and human rights sceptic [Lord Justice Stephen Sedley](#)) the atmosphere in the courts has changed. There has even been one woman at the very top, [Baroness Hale of Richmond](#), whose influence has been very significant. (It remains a real pity and cause for concern that there are not more women.)

Judgments have largely stayed within the spirit of the Human Rights Act, being expansive when the judges have been able to 'go with the grain' of the legislation they are analysing, but holding back where it is essential that they do not override Parliament, as in the famous [Belmarsh ruling](#). For its part Parliament has taken the court cases seriously and though the executive has grumbled, its annoyance has never spilled over into mutiny.

In a common track soon to come I reflect on the last ten years of the Act and it will be there that you will be able to read further details of my take on this valuable piece of legislation.

My 'big picture' point is that without the Act we would have had a meaner, less caring society over the past ten years and one in which, moreover, a substantial number of injustices would have gone uncorrected. And we have managed to do this *without* turning our constitution into an American-style one with unelected judges presiding over what we can and cannot do as a people.

AND THE COALITION GOVERNMENT?

It seems pretty clear that, left to their own devices, the Tory leadership would have smashed the Human Rights Act. They have never liked it without really ever explaining why – it is quite a conservative measure (certainly from a socialist point of view), a fact that thoughtful Tories like [Peter Osborne and Jesse Norman](#) have picked up on.

But they are not on their own: the Lib Dems have always been keen on the Act and are likely to stand up for it in any squabble that might arise in government – it has already survived a scare about stopping the removal of suspected terrorists without its opponents having been able to muster much hostile rhetoric, and the Justice Secretary [Ken Clarke](#) is known to be broadly supportive.

But the joint programme for government does not unequivocally commit to the Human Rights Act so it is potentially vulnerable to the tyranny of events. Who knows what might happen some Summer week when the media decides that a killer is at large only on account of the Act or they suddenly declare that an immigrant has been able to thief and pillage on account of it?

Believers in the Act also need to be very careful about the judges. Is their current liberalism a mere passing phase? Will normal reactionary services be resumed at some point in the future?

All supporters of the Human Rights Act need to be perpetually vigilant against being overtaken by changes in the judicial atmosphere or by events launched at them by hostile forces.

And all progressives and social democrats should be supportive of the Human Rights Act at least until such time as they find a better and more persuasive way of articulating the ethic that drives both they and those committed more absolutely to the language of rights: respect for the equality and dignity of all.