

## What has the European Convention on Human Rights ever done for the UK?

Opinion piece for the *European Human Rights Law Review*

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**Abstract:** The UK Government has, in recent years, repeatedly pushed for replacing the Human Rights Act (HRA) with a British Bill of Rights and even, possibly, to withdrawing from the European Convention on Human Rights (ECHR). Its anti-Convention narrative gives rise, however, to a striking oxymoron, particularly vis-à-vis the Convention's all-embracing effect on human rights in the UK. This is reinforced by the fact that the UK is one of the founding members of the Council of Europe, has a very good implementation record of ECHR jurisprudence and takes particular pride in its role in the development of universal human rights. With the twentieth anniversary of the Royal Assent to the HRA – and seventieth anniversary of the Universal Declaration of Human Rights – just behind us (and with Brexit just ahead), it is timely to draw attention to this oxymoron and shed light on the continued uncertainty surrounding the future of the HRA and ECHR in the UK post-Brexit.

*“They took our sovereignty, our dignity, the very essence of our Britishness, and what has the European Convention of Human Rights ever done for us in return? [...] Apart from the right to a fair trial, the right to privacy, freedom of religion, freedom of expression, freedom from discrimination, freedom from slavery, and freedom from torture [...] and degrading treatment, and protecting victims of domestic violence [...] Apart from these, what has the European Convention on Human Rights ever done for us?”*

Patrick Stewart, Guardian sketch<sup>1</sup>

Patrick Stewart's, Adrian Scarborough's and Sarah Solemani's powerful, sarcastic, Monty Python-inspired take on the “British Bill of Rights” debate vividly captures the perplexing oxymoron that underpins the Conservative Government's chronic antipathy towards the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA), and the continued ambivalence regarding their future. This oxymoron can be summed up as follows. ECHR jurisprudence has helped inject into UK law invaluable human rights guarantees, creating the conditions for embedding into UK legal process a human rights culture, all the more so since the HRA has incorporated the rights set out in the ECHR into domestic law.<sup>2</sup>

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<sup>1</sup> “Patrick Stewart Sketch: What has the ECHR ever done for the UK” (April 25, 2016), *The Guardian*, <https://www.youtube.com/watch?v=ptfmAY6M6aA> [Accessed January 4, 2019].

<sup>2</sup> Reflecting on the difference that the HRA had made since it was passed, Harriet Harman MP, the Chair of the Joint Committee on Human Rights, commented, in this respect, that “[n]ow public service providers, such as the police, prisons or health service, all think about human rights”; “[b]efore the Human Rights Act [...] [m]ost people could not enforce their rights. Now you can go to court in the UK and get your rights enforced and protected”.

The UK is one of the founding members of the Council of Europe,<sup>3</sup> has played a crucial role in giving birth to the Convention,<sup>4</sup> generally has a very good record on the implementation of European Court of Human Rights judgments<sup>5</sup> and takes special pride in its human rights tradition more generally.<sup>6</sup> And yet the UK government has, in recent years, politically committed to, and repeatedly pushed for, replacing the HRA with a British Bill of Rights and even, possibly, to withdrawing from the ECHR. With the twentieth anniversary of the Royal Assent to the HRA just behind us<sup>7</sup> and as we are approaching crunch time on Brexit – and with it, the strong likelihood that agreement on any “future relationship” with the European Union (EU) will have to “incorporate the United Kingdom’s continued commitment to respect the framework of the European Convention on Human Rights”<sup>8</sup> – it could not be more timely to repeat the question, emphasise the oxymoron inherent in it: “what has the ECHR ever done for the UK”. But first, we need to look more closely at how the debate on the Conservative Government’s plans to repeal the HRA and potentially leave the ECHR has evolved, and assess whether the HRA and ECHR continue to be under threat in the UK.

## **I. The Human Rights Act and the European Convention on Human Rights in the UK: continued ambivalence and an uncertain future?**

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Joint Committee on Human Rights, “20 years of the Human Rights Act: JCHR marks anniversary” (November 9, 2018) <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/20-years-hra-memo-published-17-19/> [Accessed January 4, 2019].

<sup>3</sup> In defending the UK human rights’ record in a recent case before the Court of Justice of the European Union, the UK representative “took care to remind the Court that the UK is a founding member of the Council of Europe and was one of the first states to ratify the ECHR”. See Case C-327/18 PPU *Minister for Justice and Equality v RO*, EU:C:2018:733, Opinion of AG Szpunar, fn 54.

<sup>4</sup> See G. Marston, “The United Kingdom’s Part in the Preparation of the European Convention on Human Rights, 1950” (1993) 42 I.C.L.Q. 796.

<sup>5</sup> Joint Committee on Human Rights, “Human Rights Judgments” (March 4, 2015) 7,

<https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf> [Accessed January 4, 2019].

<sup>6</sup> See, e.g., 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” (Cm 9728, November 2018) 6,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/756346/responding-human-rights-judgments-2017-18.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756346/responding-human-rights-judgments-2017-18.pdf) [Accessed January 4, 2019], presented to Parliament by the Lord Chancellor and Secretary of State for Justice. On the ‘current Government policy on human rights’, the report observes that ‘[t]he UK has a longstanding tradition of ensuring our rights and liberties are protected domestically and of fulfilling our international human rights obligations’, and ‘[t]he Government is committed to furthering the United Kingdom’s status as a global, outward-looking nation, playing an active, leading role in the world’. See also Conservative Party, “Protecting Human Rights in the UK” (October 2014) 5 <https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>, [Accessed January 4, 2019], 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”.

<sup>7</sup> The Human Rights Act was given Royal Assent on 9 November 1998.

<sup>8</sup> Council of the European Union, “Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom”, XT 21095/18 (22 November 2018) [7].

The relationship of the UK with the European Court of Human Rights has become highly contentious in recent years, with Strasbourg decisions on prisoners' rights, whole life tariffs, deportation of foreign suspected terrorists and the action of UK military forces abroad generating fierce criticism from the tabloid press and even from (the Conservative-minded part of) broadsheet press.<sup>9</sup> In response to these concerns, and seeking, arguably, to appease Conservative voters that might otherwise be lured by the UK Independence Party's (UKIP) strong anti-European rhetoric, the Conservative party published in October 2014 proposals that were seeking to eradicate the effect of the Convention in the UK. The main ambition was to ensure that the European Court of Human Rights would "no longer [be] binding over the UK Supreme Court" and would "no longer [be] able to order a change in UK law", and that "a proper balance between rights and responsibilities in UK law" would be restored.<sup>10</sup> The April 2015 Conservative Party Manifesto then contained the pledge to "scrap the Human Rights Act and introduce a British Bill of Rights".<sup>11</sup> Triumphant describing how the Government had been successful in "stopping prisoners from having the vote" and "deport[ing] suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws", the manifesto was promising to "break the formal link between British courts and the European Court of Human Rights, and make [the UK] Supreme Court the ultimate arbiter of human rights".<sup>12</sup>

Following the Conservatives' unexpected win of an outright majority in the May 2015 election, the radical plan for the repeal of the HRA was set in motion, with a new Bill of Rights included in the Prime Minister's plans for the first 100 days in government.<sup>13</sup> But the 100 days

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<sup>9</sup> Reporting on the Grand Chamber's judgment on *Vinter v United Kingdom*, which had found that the imposition of irreducible, whole life, tariffs, was in violation of article 3 of the Convention, The Telegraph has characteristically called Strasbourg "the 'toxic' human rights court". See *Vinter v United Kingdom* (2016) 63 EHRR 1 and D. Barrett, "Calls grow to boycott 'toxic' human rights court", *The Telegraph* (9 July 2013) <https://www.telegraph.co.uk/news/uknews/law-and-order/10170325/Calls-grow-to-boycott-toxic-human-rights-court.html> [Accessed January 4, 2019]. Dominic Raab, whose recent role as Brexit secretary provides interesting context for the above, was described in the article as "campaigning for human rights reform". He was quoted as stating that this case was "another nail in the coffin of the Strasbourg's court's reputation" and "highlight[ed] the need to overhaul our human rights laws, and insulate Britain from such perverse and arbitrary European rulings".

<sup>10</sup> Conservative Party, "Protecting Human Rights in the UK" (October 2014) 5 <https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document> [Accessed January 4, 2019].

<sup>11</sup> Conservative party manifesto 2015, 60, <https://www.conservatives.com/manifesto2015> [Accessed January 4, 2019].

<sup>12</sup> *ibid.* For detailed analysis on the potential methods for "breaking the link" with the Convention see F. Fenwick and R. Masterman, "The Conservative Project to 'Break the Link between British Courts and Strasbourg': Rhetoric or Reality?" (2017) 80(6) MLR 1111, 1122.

<sup>13</sup> See O. Wright, "Unshackled from Coalition partners Tories get ready to push radical agenda", *The Independent* (May 9, 2015), <https://www.independent.co.uk/news/uk/politics/generalelection/unshackled-from-coalition->

have come and gone, and a consultation into the long-anticipated Bill was never announced. In this period, the Government revealed very little about what shape a potential Bill of Rights would take, leading commentators to suggest that “there [was] no hint of any developed thinking about how the perceived shortcomings of the HRA ought to be addressed, or of how reform in this area would be reconciled with the UK’s remaining a party to the ECHR”.<sup>14</sup> The delay was “in itself a rather telling indication of the curious ambivalence that exists between the United Kingdom and Bills of Rights or, for that matter, the European Convention on Human Rights”, commented the former Attorney General, Dominic Grieve.<sup>15</sup>

We may, however, look back to the report published in December 2012 by the Commission on a Bill of Rights – which had been established by the then Coalition Government – to get a taste of what a future UK Bill of Rights might look like. Though the report formally recognised the need for such a Bill to incorporate and build on all of the UK’s obligations under the ECHR, in accordance with the Commission’s terms of reference, in reality, its language and specific conclusions called into question the Convention’s legitimate operation in the UK. In setting out its conclusions, the Commission took as its point of departure, for instance, that some members “regret[ted]” that they were restricted by the terms of reference, and would have wished to have been free to consider the merits of a UK Bill of Rights without the constraint of continuing adherence to the ECHR.<sup>16</sup> The Bill of Rights could, in any case, “usefully define more clearly the scope of some rights and adjust the balance between different rights”, it was added.<sup>17</sup> Echoing the insular, ethnocentric, rhetoric of the years that preceded, and arguably led to, Brexit, the Commission also noted that, in the view of many of its members, “many people [were] feel[ing] alienated from a system that they regard[ed] as ‘European’ rather than British”, and that, according to these members, this provided “the most powerful argument for a new constitutional instrument”.<sup>18</sup> The Commission was similarly of the view that the Bill should be “written in language which

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partners-tories-get-ready-to-push-radical-agenda-10237611.html?\_ga=1.240132357.728633863.1464337837 [Accessed January 4, 2019].

<sup>14</sup> M. Elliott, “The 2016 Queen’s Speech and the constitution”, *The Constitution Unit* (May 23, 2016) <https://constitution-unit.com/2016/05/23/the-2016-queens-speech-and-the-constitution/#more-5011> [Accessed January 4, 2019].

<sup>15</sup> “Former Attorney General warns of ramifications from leaving the ECHR”, *Britain in Europe thinktank* (March 21, 2016) <https://www.brineurope.com/single-post/2016/03/21/Former-Attorney-General-warns-of-ramifications-from-leaving-the-ECHR> [Accessed January 4, 2019].

<sup>16</sup> Commission on a Bill of Rights, “A UK Bill of Rights? The Choice before Us” (December 2012) [64] <https://webarchive.nationalarchives.gov.uk/20130206021312/http://www.justice.gov.uk/about/cbr/> [Accessed January 4, 2019].

<sup>17</sup> *ibid* [84].

<sup>18</sup> *ibid* [80].

reflected the distinctive history and heritage of the countries within the United Kingdom”.<sup>19</sup> This is a curious, and distorting, view, one might argue, to have the desire to conceive as purely British what, in reality, is not even a strictly European project, but rather the European incarnation of a universal project, which takes its origins in the Universal Declaration of Human Rights, as explicitly stated in the ECHR preamble. It is also a view that begs the question how universal values can be commendable as a benchmark by which to judge the rest of the world, but unacceptable when applied at home, as Francesca Klug provocatively asks.<sup>20</sup>

In light of the above, Helena Kennedy and Philippe Sands, who expressed the minority view in the Commission’s report, were rightfully alarmed about “the real possibility that some people [in the Commission] support[ed] a UK Bill of Rights as a path towards withdrawal from the European Convention” and that this “open[ed] up the possibility that their conclusions, however tentative, [would] be used to decouple the United Kingdom from the European Convention on Human Rights”.<sup>21</sup> The Conservative members of the Commission, Lord Faulks QC and Jonathan Fisher QC, were, in fact, making no excuses about a future UK Bill of Rights sitting outside the Convention system. “[T]he cause of human rights, both in the UK and internationally, would be better served by withdrawal from the Convention [...] or at the very least a renegotiation of the UK’s terms of membership so as to free it from the strictures of the Court”, they pointed out,<sup>22</sup> attacking the Court for “judicial creativity and activism”<sup>23</sup> and “an unwarranted interference with the democratically expressed will of Parliament”,<sup>24</sup> as illustrated on the issue of prisoners’ right to vote. It was already the time of “take back control”, we had just not discovered the slogan.

Jump ahead to 2016 now, and the period leading up to the EU referendum. With the Bill of Rights debate hardly in the limelight, the then Home Secretary, and future Prime Minister, Theresa May, launches a scathing attack upon Strasbourg. The Convention “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”, she noted, with conviction, concluding that “it [wasn’t] the EU [that the UK] should leave but the ECHR and the

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<sup>19</sup> *ibid* [86]

<sup>20</sup> F. Klug, *A Magna Carta for all Humanity – Homing in on Human Rights* (Routledge, 2015).

<sup>21</sup> *ibid*, p. 32.

<sup>22</sup> *ibid*, p. 189.

<sup>23</sup> *ibid*, p. 183.

<sup>24</sup> *ibid*, p. 182.

jurisdiction of its court”.<sup>25</sup> Jump ahead again, to the 2017 Conservative Party Manifesto, and Theresa May as leader of the Conservative party and Prime Minister. The tone was different, but the music was the same, with the manifesto adopting a more nuanced, but equally hostile, approach to the ECHR:

We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament.<sup>26</sup>

This elusive narrative risks reducing European human rights into commodities with a ‘use-by date’. Citizens could exercise rights deriving from the Convention for the duration of this Parliament, but it remained – it still remains – uncertain what would happen to them after that. The title of a report in the Telegraph was quite telling: “Britain to be bound by European Convention on Human Rights until 2022”.<sup>27</sup> A Cabinet minister was quoted as stating that “it would project the wrong sort of ‘values’ if Britain was trying to leave the European Convention at the same time as pulling out of the EU”, and this would “ ‘screw up’ [Brexit] negotiations with the European Union”.<sup>28</sup> Being cynical about this, one could read it as: let us lead the EU into believing that the UK still subscribes to European values, and we can leave the ECHR later, once Brexit is out of the way.<sup>29</sup>

But the EU has taken notice, as first illustrated in the European Parliament’s resolution of March 2018, which linked the successful and timely conclusion of the negotiations on the future EU-UK relationship with “continued adherence to democratic principles”, including, crucially, the ECHR.<sup>30</sup> In the context of post-Brexit security negotiations, the European Commission then required that a ‘guillotine clause’ be inserted in the future security agreement, if the UK leaves the Convention or is condemned by the European Court of Human Rights for

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<sup>25</sup> A. Asthana and R. Mason, “UK must leave European convention on human rights, says Theresa May”, *The Guardian* (April 25, 2016) <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> [Accessed January 4, 2019].

<sup>26</sup> “The Conservative and Unionist party manifesto 2017”, 37, <https://s3.eu-west-2.amazonaws.com/conservative-party-manifestos/Forward+Together+--+Our+Plan+for+a+Stronger+Britain+and+a+More+Prosperous....pdf> [Accessed January 4, 2019].

<sup>27</sup> C. Hope, “Britain to be bound by European Convention on Human Rights until 2022”, *The Daily Telegraph* (April 26, 2017) <https://www.telegraph.co.uk/news/2017/04/26/britain-likely-bound-european-convention-human-rights-2022/> [Accessed January 4, 2019].

<sup>28</sup> *ibid.*

<sup>29</sup> D. Giannouloupolos, “Brexit’s long shadow on the ECHR”, *The UK in a Changing Europe* (8 May 2017) <http://ukandeu.ac.uk/brexit-long-shadow-on-the-echr/> [Accessed January 4, 2019].

<sup>30</sup> “European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship” (2018/2573 RSP) (March 14, 2018) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0069+0+DOC+XML+V0//EN> [Accessed January 4, 2019].

non-execution of a European Court of Human Rights judgment in the relevant area.<sup>31</sup> This sent a strong message to the UK Government about the disruptive approach it had taken on the Convention in recent years. The message was quickly received. In its July 2018 white paper, the UK Government declared that its vision for the future security relationship was underpinned by “respect for human rights”, adding that the “UK [was] committed to membership of the European Convention on Human Rights”.<sup>32</sup> The paper containing a commitment, finally, to remain in the ECHR was signed, ironically, by two politicians with a long-standing aversion for the ECHR, the then Brexit Secretary, Dominic Raab and the Prime Minister herself.<sup>33</sup> The commitment has now been included in the “political declaration” that sets out the “framework for the future relationship” between the EU and the UK. The section on “law enforcement and judicial cooperation in criminal matters” describes how the scale and scope of future arrangements should be “underpinned by long-standing commitments to the fundamental rights of individuals, including continued adherence and giving effect to the ECHR”.<sup>34</sup> The “political declaration” goes so far as define the “United Kingdom’s continued commitment to respect the framework of the European Convention on Human Rights” as a “basis for cooperation”, and embeds it in the initial provisions of the declaration, as a core, shared, value.<sup>35</sup> The withdrawal agreement itself, in the Protocol on Northern Ireland, provides that no diminution of rights set out in the Good Friday agreement should result from withdrawal;<sup>36</sup> these rights principally stem from the ECHR.

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<sup>31</sup> European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, “Police and judicial cooperation in criminal matters” (slides) (June 18, 2018) [https://ec.europa.eu/commission/sites/beta-political/files/slides\\_on\\_police\\_and\\_judicial\\_cooperation\\_in\\_criminal\\_matters.pdf](https://ec.europa.eu/commission/sites/beta-political/files/slides_on_police_and_judicial_cooperation_in_criminal_matters.pdf) [Accessed January 4, 2019].

<sup>32</sup> HM Government, “The Future Relationship between the United Kingdom and the European Union” (Cm 9593, July 2018) 52, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725288/The\\_future\\_relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf) [Accessed January 4, 2019].

<sup>33</sup> The Prime Minister’s personal antipathy towards the Convention seems to stem from her time as Home Secretary. See Director of Liberty, Martha Spurrier, on this point: Knowing Our Rights, “Martha Spurrier, on Brexit, EU citizens’ rights, and the Human Rights Act” (March 22, 2017) <https://www.youtube.com/watch?v=uR2evejD9ss&feature=youtu.be&t=323> [Accessed January 4, 2019].

<sup>34</sup> Council of the European Union, “Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom”, XT 21095/18 (November 22, 2018) [83], <https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf> [Accessed January 4, 2019].

<sup>35</sup> *ibid* [6] [7].

<sup>36</sup> “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018”, 308, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759019/25\\_November\\_Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf) [Accessed January 4, 2019].

In light of all this, it may be possible to argue that we are now witnessing a historic paradox, the “strange irony” that, instead of precipitating a UK exit from the much-despised (by the Brexiteers) Strasbourg Court, as had been widely anticipated,<sup>37</sup> Brexit (the EU withdrawal agreement, to be precise) may – just may, and just for now – have “ended up saving the Human Rights Act”<sup>38</sup> and guaranteed the Convention’s continued effect in the UK (assuming, of course, that the act of national self-harm that Brexit is likely to become will not culminate in a catastrophic “no deal”). But many will be sceptical of a breakthrough here. Conor Gearty’s powerful, nearly post-apocalyptic, account of human rights in the UK after Brexit (where human rights, he argues, will be withdrawn from unpopular groups) immediately springs to mind. The Europhobic powers at play will not recede after we will have left the EU, he alludes. The search “for the scapegoats necessary to blind the electorate” of the new, tough, post-Brexit, reality – geopolitical, social or simply economic – will continue apace.<sup>39</sup> In this context, no clause in the EU withdrawal agreement will be able “to save the Human Rights Act of course and will also certainly not stop obsessive Brexiteers arguing that such commitments should, post-Brexit, be ignored”.<sup>40</sup> “The opponents of human rights are feeling emboldened by Brexit”, adds Keir Starmer, echoing Gearty’s concerns; “[t]here are those that want Britain to retreat further from the obligations of the internationalism, including from the Council of Europe and the European Convention on Human Rights”.<sup>41</sup> It also hardly needs saying, but the political declaration in the withdrawal agreement has no legal effect. Much also depends on what we mean precisely in the declaration, by a requirement to “respect the *framework* of the Convention” (rather than the Convention itself). Emphasis on linguistics is not without significance here. Jonathan Cooper finds the text of the declaration “hardly a reassuring commitment”, for instance. His contextual analysis – starting with David Cameron’s “anti-

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<sup>37</sup> See, e.g., C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford: Oxford University Press, 2016); C. Harvey, “Brexit, Human Rights and the Constitutional Future of these Islands” [2018] E.H.R.L.R. 10.

<sup>38</sup> F Cowell, “A strange irony: How the EU withdrawal process ended up saving the Human Rights Act”, *LSE Brexit blog* (December 3, 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 January 4, 2019]. See also Merris Amos, in conversation with Joseph Weiler, arguing that “Brexit has saved the Convention, because it would have been one or the other [the ECHR or EU membership] after the 23<sup>rd</sup> of June [referendum] [...] something had to be sacrificed to the Eurosceptic ‘monster’”. “EJIL: Live! Professor Merris Amos” (December 4, 2017) <https://www.youtube.com/watch?v=ie20BDZ4fqY> [Accessed January 4, 2019].

<sup>39</sup> 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.

<sup>40</sup> *ibid*, 421. We should not forget, on the other hand, that, as things stand, there does not seem to exist a majority in the Commons that would repeal the HRA, let alone take the UK away from the ECHR, and that liberal-minded Conservatives have already put up a strong defence of European human rights. See, e.g., Bright Blue, “Britain should remain a proud signatory of the European Convention on Human Rights”, <https://humanrights.brightblue.org.uk/petition/> [Accessed January 4, 2019].

<sup>41</sup> K. Starmer QC MP, “Roosevelt’s Legacy: Human Rights after Brexit” [2017] E.H.R.L.R. 103, 107.

European dogma” and ending with Theresa May’s “entrenched [...] anti-convention credentials” – lead him to the striking conclusion that “[a] British Bill of Rights is written in invisible ink into this provision [of the political declaration]”.<sup>42</sup>

We also cannot pretend that the Government’s current (temporary?) U-turn on the UK Bill of Rights promise – from the 2015 pledge to taking a more nuanced approach in the 2017 manifesto and then to committing, in the context of the Brexit negotiations, to membership of the ECHR – was anything else than a pragmatic, externally imposed, choice; a near miss, at least for now. At an ideological level, nothing seems to have changed. And yet, it is precisely a change at the ideological level that we urgently need to endorse. We need a new political culture embracing the universality of the human rights standards that we collectively shape in our European human rights court (assuming our Government is honest about its commitment to remain aligned with European human rights of course). David Isaac, the Chair of the Equality and Human Rights Commission, makes an important point in this regard, focusing on equality protections after Brexit. Welcoming the Government’s (seemingly ephemeral, post 2017 election manifesto) commitment to remain a signatory to the Convention, he quickly argues it “should be made permanent”.<sup>43</sup> But his concerns go far beyond saving the Convention, and he points to “big constitutional questions about what our future relationship might be with European Courts”, and how we will be able to “keep pace with [human rights] advances in other jurisdictions”.<sup>44</sup> The short answer is “we won’t”, unless the Government goes beyond an impressionistic commitment to the ECHR and European human rights values – a “footnote” to securing other interests with the EU withdrawal agreement – to fully embrace the Convention and reverse the anti-European human rights status quo. We should note, in that respect, that the UK’s approach to the ECHR seems to have already caused significant damage, not least in relation to implementation of ECHR jurisprudence in the UK. In areas where judgments are seen as controversial for the UK, commentators have already detected a tendency in Strasbourg for judicial restraint.<sup>45</sup> To repair the damage, we therefore need much more than an unenthusiastic, externally forced, business-as-usual, commitment to respecting the framework of the European Convention on Human Rights.

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<sup>42</sup> J. Cooper, “Bashing human rights is a good way to bash Europe”, *The Times* (December 10, 2018) <https://www.thetimes.co.uk/article/bashing-human-rights-is-a-good-way-to-bash-europe-mtr9615p0> [Accessed January 4, 2019].

<sup>43</sup> D. Isaac, “Remaining a Global Leader on Equality and Human Rights” (2017) E.H.R.L.R. 535, 536.

<sup>44</sup> *ibid.*

<sup>45</sup> M. Wheeler, “No call for revolution”, *UK Human Rights Blog* (June 4, 2015) <https://ukhumanrightsblog.com/2015/06/04/no-call-for-revolution-marina-wheeler/> [Accessed January 4, 2019].

All this, interestingly, brings us back to the twentieth anniversary of the HRA. The occasion was providing a fine opportunity to publicly express (newly-found?) support for the Act, one would have thought. Not one that the relevant governmental departments and ministers were prepared to take, as it turned out, in stark contrast to human rights NGOs, academic scholars, legal professionals and members of relevant parliamentary committees, who sent out messages of support and appreciation, marking twenty years of European human rights in action, as a force for good and change.<sup>46</sup>

## II. ECHR as a force for good and change in the UK

Colm O’Cinneide’s recent call to (intellectual) arms for all rights enthusiasts, in view of the legitimacy crisis facing UK human rights law today, asked of them to “start engaging seriously with the different lines of attack coming their way, and start building a detailed and comprehensive defence of existing human rights law”.<sup>47</sup> Tracing the ECHR’s impact in the UK – asking what has the Convention ever done for this country – responds to this call; we asked the overarching question at a symposium I had the privilege to coordinate on 27 November 2018 at the British Academy.<sup>48</sup> A brief answer can be given here, by reflecting on some of the contributions made at this symposium.

Taking Article 2 of the Convention as a starting point, it can be observed that the European Court of Human Rights’ development of the positive duty to protect life has done an “enormous amount for UK victims and families”.<sup>49</sup> *Osman v the United Kingdom* has triggered substantial reform. The Government was emphasising in this case that the duty to protect life could only arise in exceptional circumstances, and the failure to take preventive action amounted to gross dereliction or wilful disregard of the authorities’ duty to protect life. But in finding that it was “sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they

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<sup>46</sup> On November 9, no messages relating to the twentieth year anniversary were posted on the usually active social media accounts of the Ministry of Justice, the Lord Chancellor and Secretary of Justice, David Gauke MP, or the Minister of State, Rory Stewart OBE MP. A video message by the Chair of the Joint Committee on Human Rights, Harriet Harman MP, on the other hand, celebrating the difference the HRA had made in protecting human rights in the UK, was posted and widely viewed and shared on the Committee’s twitter account: <https://twitter.com/HumanRightsCtte/status/1060792857563324417> [Accessed January 4, 2019].

<sup>47</sup> C. O’Cinneide, “Rights under Pressure” [2017] E.H.R.L.R. 43, 46.

<sup>48</sup> “Goldsmiths-Knowing Our Rights symposium: What has the ECHR ever done for the UK”, British Academy (November 27, 2018) (hereinafter mentioned as Knowing Our Rights symposium). The “Knowing Our Rights” research project aims to raise awareness about the ECHR’s impact in the UK: [www.Knowing-Our-Rights.com](http://www.Knowing-Our-Rights.com)

<sup>49</sup> M. Amos, “What has the ECHR ever done for the UK: The Positive Duty to Protect Life”, Knowing Our Rights symposium (November 27, 2018) (on file with author).

have or ought to have knowledge”, the European Court of Human Rights opened the way for the UK to provide applicants with an effective remedy for violations of this aspect of the right to life.<sup>50</sup> The so-called “Osman warnings”, which require police to notify individuals, where they become aware of a real and immediate threat to somebody’s life, crystallise the enduring effect the case has had upon UK law.<sup>51</sup>

Taking a few examples from the Court’s vast jurisprudence on Article 3 of the Convention can likewise help us methodically describe how the prohibition of torture has offered “invaluable protection”, particularly to those “who have been on the margins of society’s regard, those who are unpopular, disenfranchised or otherwise politically powerless”.<sup>52</sup> In light of Conor Gearty’s earlier warning of how unpopular groups in the UK stand to suffer a significant reduction of their rights after withdrawal from the EU,<sup>53</sup> this would provide a timely reminder of the importance of continued adherence to Article 3 in post-Brexit Britain.

Moving to the right to liberty, we can more closely observe the interaction between Strasbourg and UK law from the reverse angle, of domestic human rights influencing the development of the ECHR. The habeas corpus is a case in point, with common law jurisprudence infused into European human rights law.<sup>54</sup> The European Court of Human Rights has still injected “doses of common sense” into the common law,<sup>55</sup> such as in relation to providing a review of the lawfulness of detention at reasonable intervals (for example where the applicant was detained on mental health grounds),<sup>56</sup> challenging the inappropriate influence of the British Home Secretary in the criminal justice system<sup>57</sup> or the detention without trial of foreign suspected terrorists post 9/11.<sup>58</sup>

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<sup>50</sup> *ibid.* *Osman v United Kingdom* (2000) 29 E.H.R.R. 245, 306.

<sup>51</sup> Parliamentary Assembly, “Impact of the European Convention on Human Rights in State Parties: Selected Examples” (January 8, 2016) <http://website-pace.net/documents/19838/2008330/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895> [Accessed January 4, 2019].

<sup>52</sup> N. Mavronicola, “The Unpopular (and) Article 3 ECHR”, Knowing Our Rights symposium (November 27, 2018) (on file with author). Mavronicola’s analysis touched upon key jurisprudential points of reference such as *Ireland v United Kingdom* (1979-80) 2 E.H.R.R. 25; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439; *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413; *MS v United Kingdom* (2012) 55 E.H.R.R. 23 and *Commissioner of the Police of the Metropolis v DSD and another* [2018] UKSC 11.

<sup>53</sup> 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.

<sup>54</sup> E. Bates, “The right to liberty: human rights common sense for the common law?”, Knowing Our Rights symposium (November 27, 2018) (on file with author).

<sup>55</sup> *ibid.*

<sup>56</sup> *X v UK A 46* (1981) 4 E.H.R.R. 188.

<sup>57</sup> See, e.g., *Hussain v United Kingdom* (1996) 22 E.H.R.R. 1.

<sup>58</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

A similar theme can be observed with regards to the right to a fair trial. To fundamental rights protected under the common law, such as the right to an independent and impartial tribunal, a public hearing and the presumption of innocence, “the European Convention has attached a series of minimum additional rights, none of them in any way unfamiliar in the UK before the Convention, although elaborated since”.<sup>59</sup> ECHR case law has contributed to a substantial strengthening of the right against compelled self-incrimination, for instance, by protecting defendants against the disclosure of information under the threat of criminal prosecution<sup>60</sup> or by providing them with a right to access to a lawyer prior to, and during, being questioned by the police, including in terrorism related cases; the UK Government’s line of defence in such cases was rather that even incommunicado detention could not advance a claim to a free-standing right to legal assistance under Article 6 of the Convention.<sup>61</sup> In another extraordinary example of European Court of Human Rights jurisprudence triggering dynamic reform of domestic legislation and legal practice, the UK Supreme Court drew on the Grand Chamber’s seminal *Salduz* jurisprudence<sup>62</sup> to force, with *Cadder v HM Advocate*,<sup>63</sup> a break with a thirty-year history of legislation, case law and domestic practice allowing the questioning of suspects in Scotland, for a period of up to six hours, with no access to legal advice, including advice about whether or not the suspect should answer the questions of the police. ECHR jurisprudence has also helped regulate the activity of undercover police officers<sup>64</sup> and worked harmonically with the common law in compelling “the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice”.<sup>65</sup>

To turn to Article 8 and the interception of private communications, the seminal *Malone v UK* case – where Strasbourg found that the UK procedural framework was “somewhat obscure and open to differing interpretations”, and therefore not “in accordance with the law”<sup>66</sup> – proved to be a turning point in the regulation of the powers of the UK’s security apparatus to interfere with individuals’ right to privacy. In response to its findings, the UK Government adopted the Interception of Communications Act 1985, which established a clear framework

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<sup>59</sup> T. Bingham, *The Rule of Law* (Penguin, 2010), p. 97.

<sup>60</sup> *Saunders v United Kingdom* (1997) 23 E.H.R.R. 313.

<sup>61</sup> *Magee v United Kingdom* (2001) 31 E.H.R.R. 35.

<sup>62</sup> See *Salduz v Turkey* (2008) E.H.R.R. 421.

<sup>63</sup> *Cadder v HM Advocate* [2010] UKSC 43; 2010 S.L.T. 1125.

<sup>64</sup> See, generally, *Teixeira de Castro v Portugal* (1999) 28 E.H.R.R. 101; *Attorney General’s Reference (No. 3 of 2000)*, *R v Looseley (Grant Spencer) (No. 2)* [2001] UKHL 53.

<sup>65</sup> *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 [52].

<sup>66</sup> *Malone v United Kingdom* (1985) 7 E.H.R.R. 14 [44] [45].

for authorised interception, the Security Services Act 1989, the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000.<sup>67</sup> The vital role that the European Court of Human Rights is now playing in the protection of individuals against ever increasing capabilities for state surveillance has recently come to the fore with the major *Big Brother Watch* case, which followed Edward Snowden’s dramatic revelations about the US and UK intelligence services operating a system that was allowing them to tap into and store huge volumes of internet communications data. The Court found a violation of Articles 8 and 10 of the Convention, but also accepted that the bulk interception of private communications can be a “valuable means” to fight against global terrorism and serious crime.<sup>68</sup> Human rights organisations in the UK hailed the judgment as a landmark win in the battle against UK mass surveillance, even if they recognised that it was not going far enough in condemning bulk interceptions of communications.<sup>69</sup> ECHR jurisprudence seemingly remained of immense value to these organisations in their joint effort to hold the UK Government to account, notwithstanding that the Court had come short of delivering them the clear-cut victory they had been hoping for.

It is also fitting to focus on how ECHR jurisprudence has helped transform sexual orientation equality in the UK. As Paul Johnson puts it, the Convention has, quite simply, been “the instrument which has enabled gay men and lesbians to challenge and eliminate UK laws that discriminate against them on the basis of their sexual orientation, and the instrument which protects them from future legal discrimination”.<sup>70</sup> It provides the basis for many of the legal protections enjoyed by gay men and lesbians in the UK, and ensures they can complete the journey to full equality.<sup>71</sup> From the partial decriminalisation of male homosexual acts<sup>72</sup> to equality of treatment in respect of the age of consent<sup>73</sup> and allowing homosexuals to serve in the armed forces,<sup>74</sup> ECHR jurisprudence has marked a sea change in sexual orientation equality in the UK.

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<sup>67</sup> D. Kagiarios, “From *Malone* to *Big Brother Watch*: The ECtHR on surveillance and privacy in the UK”, Knowing Our Rights symposium (November 27, 2018) (on file with author).

<sup>68</sup> *Big Brother Watch and others v the United Kingdom* (App. No.58170/13, 62322/14 and 24960/15), judgments of 13 September 2018, [386].

<sup>69</sup> Liberty, “Human rights organisations win landmark battle against UK mass surveillance” (13 September 2018) <https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/human-rights-organisations-win-landmark-battle-against-uk-mass> [Accessed January 4, 2019].

<sup>70</sup> P. Johnson, “Sexual orientation equality in the UK - the role of the ECHR”, Knowing Our Rights symposium (November 27, 2018) (on file with author).

<sup>71</sup> *ibid.*

<sup>72</sup> *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149.

<sup>73</sup> *Sutherland v United Kingdom* (1997) 24 E.H.R.R. CD 22.

<sup>74</sup> *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493.

*But apart from all this, what has the ECHR ever done for the UK?* The Court's jurisprudence has led to a rights-focused inquest system, helping bring justice for the 96 innocent lives of Liverpool fans lost at Hillsborough.<sup>75</sup> It has prohibited corporal punishment in schools;<sup>76</sup> protected transsexuals from discrimination;<sup>77</sup> found that there could be no blanket and indefinite retention of DNA profiles and fingerprints in cases where a defendant in criminal proceedings had been acquitted or discharged;<sup>78</sup> led to changes to the law and regulations to restrict the disclosure of CCTV images to third parties and to set clear restrictions on monitoring and recording conversations in public spaces;<sup>79</sup> enhanced press freedom by providing protection against the disclosure of journalistic sources;<sup>80</sup> led to greater clarity on the display of religious and charity symbols;<sup>81</sup> extended the right to privacy to the workplace, meaning that employers could not monitor an employee's telephone calls, emails and personal email use at work, unless they had put in place a lawful policy of monitoring such activities and the employee had been made aware of its existence.<sup>82</sup>

The list of European Court of Human Rights cases that have acted as a force for good and change in the UK is endless.<sup>83</sup> Merris Amos has succinctly made the point to the Joint Committee on Human Rights: *substantively* the improvements the Convention and HRA have brought are "so great as to be almost immeasurable".<sup>84</sup> The problem is "the repeated political promises to replace the Human Rights Act by a domestic bill or charter of rights" has "little to do with its substantive content", as Stephen Sedley puts it.<sup>85</sup> For as long as the Conservative Government continues to ride the populist wave of Euroscepticism, the substantive evidence relating to the ECHR's impact will be ignored. So we must turn our attention to the people,

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<sup>75</sup> A. Riese, "The Human Rights Act's legacy is a rights-focused inquest system", *RightsInfo* (November 7, 2018) <https://rightsinfo.org/the-human-rights-acts-legacy-is-a-rights-focused-inquest-system/> [Accessed January 4, 2019].

<sup>76</sup> *Campbell and Cosans v United Kingdom* (App. No.7511/76 and 7743/76), judgments of 25 February 1982.

<sup>77</sup> *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18.

<sup>78</sup> *S and Marper v United Kingdom* (2009) 48 E.H.R.R. 50.

<sup>79</sup> *Peck v United Kingdom* (2003) 36 E.H.R.R. 41.

<sup>80</sup> *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123.

<sup>81</sup> *Eweida v United Kingdom* (2013) 57 E.H.R.R. 8.

<sup>82</sup> *Copland v United Kingdom* (2007) 45 E.H.R.R. 37.

<sup>83</sup> See, however, human rights projects such as RightsInfo (<https://rightsinfo.org>) or the Council of Europe's new webpage on the impact of the ECHR (<https://www.coe.int/en/web/impact-convention-human-rights#/>), which raise awareness on what has the ECHR done for the UK or other European countries.

<sup>84</sup> M. Amos, "Written Evidence from Professor Merris Amos", Twenty Years of the Human Rights Act Inquiry, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/20-years-of-the-human-rights-act/written/89739.html> [Accessed January 4, 2019].

<sup>85</sup> S. Sedley, "Human Rights and the Whirligig of Time" (2016) 20 *Edinburgh Law Review* 1, 5.

demonstrate to them what the Convention has done for *their* rights (and *how* it has done it),<sup>86</sup> what it has done for *our* rights, and what we *all* stand to lose if we lose the Human Rights Act.

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<sup>86</sup> Simply showing that the Convention has brought change will not necessarily persuade the human rights sceptic who will insist that change should mainly, or exclusively, come from Parliament; it should be change that Parliament approves of. To respond to this charge, we must concentrate on *how* the Convention has brought change. We must show, in other words, that human rights law “has developed over time through judicial interpretation of democratically approved texts”, not by “mission creep” and usurping the powers of the people. We must demonstrate that human rights law has developed through “the process of legal reasoning” which helps us “refine unexamined moral beliefs and challenge embedded assumptions”, and through “plug[ging] accountability gaps that would otherwise exist in national and international law”. See C. O’Cinneide, “Rights under Pressure” [2017] E.H.R.L.R. 43, 46-47.