

Rights under Pressure*

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Abstract

Human rights law faces a crisis of legitimacy, both in the UK and across much of the wider democratic world. A drumbeat of media criticism focusing on the alleged incompatibility of human rights norms with both ‘common sense’ and the principle of democratic self-government has grown louder, while sceptical voices can increasingly be heard in academia and elsewhere questioning whether the legal protection of human rights has ‘gone too far’. In response, rights enthusiasts have clung to old verities - proclaiming the importance of human rights law as a tool for maintaining the rule of law and reinforcing democracy, while treating rights sceptics with a stiff dose of dismissive disdain. However, they would be wise not to underestimate the scale of the legitimacy crisis now facing human rights, or fail to recognise the strength of some of the critiques coming their way. Defenders of existing human rights law need to be prepared to roll up their sleeves and make a serious case for the legitimacy of existing human rights law, if it is to survive the current crisis more or less intact.

Setting the Scene

The idea that human rights law is currently facing a legitimacy crisis may appear to some readers to be an exaggeration. Most democratic states remain committed to respecting human rights norms, at least at the level of formal compliance with the requirements of national and international law. Politicians may talk tough, but the day-to-day functioning of human rights law goes on: for example, the UK government’s manifesto commitment to replace the HRA with a ‘British Bill of Rights’ appears to be as far from being realised as ever, and the UK remains a party to the ECHR notwithstanding media and political grandstanding about the alleged judicial over-reach of the European Court of Human Rights. In general, the idea that national legal systems could include human rights guarantees enforceable by courts still attracts widespread academic, legal and popular support – even in a state such as the UK, where ‘human rights’ broadly defined have been in the media firing-line for a while now.

However, if one steps back and takes a look at the wider historical and political context, it is apparent that human rights law has entered stormy waters. Its scope and content is increasingly contested, in a way that calls into question its fundamental legitimacy. This impending crisis may be contained, and ultimately pass. But rights enthusiasts would be wise to avoid complacency. The legitimacy challenges that human rights law is facing are far-reaching, and risk becoming an existential threat.

A quick comparison with the prevailing legal and political climate in 2000, the year before the events of 9/11, helps to demonstrate the scale and nature of the current crisis. In that year, the coming into effect of the HRA in UK law could be viewed as marking the moment when human rights law became

* This paper is a precis of my inaugural lecture as Professor of Law at UCL which took place on 18 November 2016.

a settled feature of the legal landscape of virtually all liberal democratic states: before then, the UK had been the single most prominent example of a democracy which did not make provision for an agreed charter of fundamental rights to be enforceable through its domestic courts system, but the HRA changed all that. By incorporating ECHR rights into UK law, it also affirmed that ECHR compliance had become 'normalised' across Europe: in effect, the European Court of Human Rights had become established as the ultimate guarantor of respect for rights, democracy and rule of law throughout the Council of Europe zone. In Latin America, the Inter-American system of rights protection had come to play a similar role. Across most of the Commonwealth, domestic systems of rights protection, substantially influenced by international standards, had begun to put down deep roots. At the UN level, the International Criminal Court was in the process of being established, moves were afoot to establish what subsequently became the UN Human Rights Council, and the special rapporteur system was coming into full bloom.

This is not to say that states necessarily complied with their human rights commitments, or that the expansion of human rights law at national and international level was uncontroversial. For example, sharp differences of view existed about how exactly to balance rights protection with respect for the principle of democratic self-governance, and in particular whether courts or elected legislatures should enjoy the 'final say' over contested issues of rights interpretation. However, in general, it was possible to speak of an emerging consensus across most of the liberal democratic world that the legal protection of human rights should form a core element of national constitutional law and also receive substantial protection at international level.¹

But, if we flash forward to 2016, things look very different. Human rights law is now on the back foot, and its growth and expansion over the last few decades is now attracting serious backlash. This manifests itself in different ways, which taken together add up to the makings of a full-blown legitimacy crisis.

The Nature of the Threat

To start with, the influence exerted by regional/international human rights standards over national law and policy is increasingly being challenged. International adjudicatory bodies are now regularly accused of over-extending their mandate, with their critics accusing them in particular of (i) failing to respect the rule of law by adopting an unduly expansionist interpretation of the scope and substance of human rights guarantees, and (ii) of failing to respect the constraints on their authority that should flow from their lack of a clear democratic mandate derived from a specific national *demos*.²

The UK debate over prisoner voting rights following the *Hirst v UK* judgment³ is an example of this trend, which is also reflected in the desire of the UK government to reduce the influence of Strasbourg jurisprudence over national law via the replacement of the HRA with a new Bill of Rights. Originally confined to the UK, this scepticism about Strasbourg has spread rapidly to other European jurisdictions. Russia has enacted legislation requiring its courts to set aside Strasbourg judgments

¹ Writing in 2000, McCrudden questioned whether a 'common law of human rights' was coming into existence, in the context of a discussion of judicial 'borrowing' and comparative approaches to the enforcement of rights guarantees: C. McCrudden, 'A Common Law of Human Rights?' (2000) 20(4) *Oxford J Legal Studies* 499-532.

² See for example the arguments set out in M. Pinto-Duschinsky, *Bring Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*, (London: Policy Exchange, 2011).

³ *Hirst v UK (No 2)* (2006) 42 EHRR 41.

when they conflict with national norms,⁴ while prominent politicians in the Netherlands, France and other states have disparaged the ECHR and advocated measures to restrict the influence of the Strasbourg Court over national law.⁵ Nor is this trend confined to the ECHR. In recent years, the views of UN human rights bodies have been subject to severe criticism by ministers in supposedly rights-leading states like Canada and the UK.⁶ There are signs that Latin American countries are beginning to push back against the authority of the Inter-American Court of Human Rights.⁷

In general, it is becoming commonplace for the legitimacy of international human rights standards to be called into question, with both the interpretative approaches of supranational adjudicatory bodies and concerns about national/popular sovereignty being invoked as a basis for departing from international norms. However, these lines of attack are also beginning to be directed against domestic courts charged with enforcing compliance with national rights standards. The UK again presents an interesting case-study in this regard, with harsh media and political criticism of the legitimacy of the rights jurisprudence of the European courts setting the scene for later assaults on the integrity of the case-law of the English courts.⁸ Human rights commissions, rights-focused NGOs and even national and supranational governmental institutions charged with promoting respect for rights are all vulnerable to similar accusations of mandate-stretch and/or disregarding the democratic will – which in the eyes of some critics also constitute an inherent design flaw in legally enforceable human rights instruments in general.⁹

There is nothing new in these criticisms. But, significantly, they go beyond the time-worn argument that elected politicians should enjoy the ‘final say’ over contested issues relating to the interpretation and application of human rights.¹⁰ Instead, they call into question the legitimacy of much of existing human rights law, even when it forms part of a constitutional system like that of the UK where Parliament has the ultimate authority to decide what qualifies as a breach of such a right. It is generally acknowledged, even by its harshest critics, that human rights law may have some residual value. However, the expansion of the scope and substance of human rights law over the last

⁴ See *BBC News*, ‘Russia Passes Law to Overrule European Human Rights Court’, 4 December 2015, available at www.bbc.co.uk/news/world-europe-35007059; for context, see P. Leach and A. Donald, ‘Russia Defies Strasbourg: Is Contagion Spreading?’, *EJIL Talk*, 19 December 2015, available at <http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/>.

⁵ See for example the views expressed by François Fillon: *Le Figaro*, ‘Lui président, Fillon pourrait quitter la Cour européenne des droits de l’homme’, *Le Figaro*, 26 October 2016, available at www.lefigaro.fr. For a flavour of the criticism that the Strasbourg Court can attract in the Netherlands, see T. Baudet, ‘The Anti-democratic Impulses of the ECHR’, *Spiked Online*, 19th January 2011, available at <http://www.spiked-online.com/index.php/site/printable/10087/>.

⁶ See for example *The Guardian*, ‘Damian Green Dismisses “Offensive” UN Report on UK Disability Rights’, 8 November 2016; *CBC News*, ‘UN Official Sparks Debate over Canadian Food Security’, 16 May 2012, available at www.cbc.ca/.

⁷ See e.g. Venezuela’s denunciation of the jurisdiction of the Inter-American Court of Human Rights, analysed by J. Harrington, ‘Venezuela Denounces American Convention on Human Rights’, *EJIL Talk*, 12 September 2012, available at <http://www.ejiltalk.org/venezuela-denounces-american-convention-on-human-rights/>.

⁸ See in particular the *Daily Mail*’s headline on 4th November 2016, which described the judges responsible for the High Court judgment in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) as ‘Enemies of the People’.

⁹ See R. Ekins, ‘Human Rights and the Separation of Powers’ (2015) 34(2) *University of Queensland Law Journal* 217-238.

¹⁰ For a useful discussion of this distinction, see D. Dyzenhaus, ‘Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought’ (2015) 16(2) *Theoretical Inquiries in Law* 337-366, 340.

few decades is increasingly framed as an example of ‘mission creep’: the claim is now repeatedly made that national and international human rights guarantees have been stretched beyond their original minimalist function as a last-ditch bastion against blatant rights abuses, and turned instead into a Trojan Horse for particular liberal-legalist conceptions of what constitutes ‘just’ law. Furthermore, this ‘mission creep’ is alleged to place excessive constraints on political freedom of choice, in a manner that undermines popular self-government.

Different versions of these arguments exist – some framed in relatively crude terms, others set out with a high level of sophistication.¹¹ But they share two common and inter-related lines of attack, which have come to occupy a dominant role in the debate: namely that human rights law has overreached itself, and now functions in a way that is different to reconcile with rule of law and democratic first principles.

The Need to Respond

These arguments resonate in the current political context, which is marked by an intense backlash against ‘unaccountable elites’ and the apparent draining away of power from national governments to supranational institutional structures such as the EU. In this climate, it is easy to characterise judicial enforcement of abstract rights norms – and in particular enforcement by international human rights courts - as being anti-democratic. Given that human rights are widely understood to constitute minimal guarantees against egregious state abuses, the charge of ‘mission creep’ also strikes a chord: human rights law is vulnerable to the perception that it represents a takeover by left-leaning lawyers of matters best left to be determined by elected politicians.

The backlash against transnational modes of governance – manifested in particular by the Brexit vote, Trump’s electoral success and the emergence in general of a newly aggressive strain of nationalist populism¹² in states as distinct and far-apart as Hungary, Turkey and the Philippines – also appears to have diluted the pressure on national governments to be seen to respect their international legal commitments. The threat that states will attract international disapproval if they disregard or withdraw from their human rights commitments appears to have less force now than it might have done in the past, as evidenced by how senior politicians in a number of European states now talking openly about ECHR withdrawal. Until recently, states were expected to show at least formal respect for human rights standards, as part of signalling their commitment to the post-1989 system of global governance: however, this governance system is now beginning to crumble, and states are freer now to push against constraints upon their freedom of action than they were before.

This risks depriving rights enthusiasts of a weapon they use frequently to defend human rights law, namely references to the obligations of states under international law to protect such rights - suddenly, these obligations no longer look set in stone. Similarly, attempts to justify human rights law by reference to the need to respect democratic principles and the rule of law also risk sounding

¹¹ For a relatively sophisticated take on these arguments, see the various papers by (in particular) Richard Ekins and John Finnis available on the website of the Judicial Power Project, <http://judicialpowerproject.org.uk>.

¹² The term ‘populism’ is often thrown around in a very imprecise manner: I use it here in the sense used by Jan-Werner Müller in his piece, ‘Capitalism in One Family’ (2016) 38(23) *London Review of Books* 10-14, 14, to refer to claims by particular politicians or political movements to have a ‘monopoly on the representation of the “real people”’.

hollow, given that critics of human rights law are now invoking these self-same principles to criticise its current scope and functioning.

All this means that rights enthusiasts will have to be much smarter and more sophisticated in defending human rights law than they necessarily have been in the past. Clinging to the old verities, by repeatedly invoking the requirements of international human rights standards and reiterating over and over that rights protection is essential to secure respect for democracy and rule of law, will not be enough. Nor will it be enough to dismiss all the arguments of rights sceptics with weary disdain. Such arguments are admittedly often poor and under-developed, being based on simplistic appeals to reductionist ideas of democracy and legal certainty. But some have more substance than others – and, in general, they are attracting an audience.

Meeting the Challenge

Rights enthusiasts are thus going to have 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. This can be done, but it will require defenders of human rights law to confront some of the ambiguity that exists about its scope, substance and purpose – and in particular to respond to the charges of ‘mission creep’ and counter-democratic overreach. There is a need to provide a substantive justification of how human rights law has expanded its reach over the last few decades, to demonstrate the democratic *bona fides* of this area of law, and to show how it enhances the functioning, legitimacy and integrity of legal systems at large.

To do this, rights enthusiasts can start by pointing to how national and international human rights law has developed over time through judicial interpretation of democratically-approved texts, with courts clarifying the scope and substance of the abstract provisions of human rights instruments through standard procedures of legal reasoning. Human rights law has thus grown and evolved in a manner similar to how common law standards grow and evolve over time, i.e. through an incremental process of applying rights norms to concrete fact situations in a manner consistent with already established legal rules. In other words, the expansion of human rights law resembles the expansion of English tort law, administrative law and other core areas of the common law.

Furthermore, as Bernard Williams noted, the operation of law often helps to refine unexamined moral beliefs and challenge embedded assumptions about what qualifies as ‘just’ or ‘legitimate’ behaviour.¹³ The expansion of human rights law has often been driven in this way by the process of legal reasoning clarifying what exactly should qualify as ‘torture’, or a ‘disproportionate interference with free speech’, or a violation of the right to a fair trial.

As a consequence, the ‘mission creep’ argument can be challenged. Human rights law has expanded over time through the unfolding of legal reasoning processes that are familiar and wholly accepted elsewhere, and which we rely upon as societies to deepen our understanding of what qualifies as just treatment. However, this does not mean that the scope and content of rights guarantees can be stretched willy-nilly. The wording of their text, taken together with the standard interpretative rules that constrain the freedom of courts in applying legal norms, limit the reach of human rights

¹³ For discussion of Williams’s views in this regard as applied to discrimination law, see T. Khaitan, *A Theory of Discrimination Law* (OUP, 2015), 5-6.

law – and therefore help to ensure its legitimacy, as Paul Daly has argued in relation to administrative law.¹⁴

In making such arguments, it is important to acknowledge that human rights law can and arguably has been at times extended too far. Like other forms of law, interpretative boundaries have not always been respected. But the idea that the extended reach of current human rights law is generally excessive, on the basis that it departs from a minimal set of guarantees against grotesque abuses of state power, is an argument that is difficult to sustain. Furthermore, the claim that rights instruments were only ever intended to provide such minimalist guarantees is also highly dubious – as demonstrated by Danny Nicol’s research into the origins of the ECHR.¹⁵ It also bears noting that the scope and substance of existing human rights law has been repeatedly endorsed by many of the same governments who now cavil about its reach: for example, UK criticism of the purposive interpretative approach adopted by the European Court of Human Rights usually ignores how the outlines of the Court’s approach were clearly laid down in the 1970s and 1980s, after which the UK repeatedly renewed the jurisdiction of the Court before accepting it on a permanent basis in 1994 with its ratification of Protocol 11 to the ECHR and encouraging the post-Communist states of Central and Eastern Europe to do the same in the late 1990s and early 2000s.

Turning to the ‘democratic overreach’ argument, rights enthusiasts need to emphasise the manner in which human rights law plugs accountability gaps that would otherwise exist in national and international law and adds a valuable new dimension to the regulatory capacity of legal systems to control and steer the behaviour of public bodies. In the UK, the campaign mounted by ‘Act for the Act’ in defence of the HRA is a model of such an approach, stressing as it does the added value human rights law brings to law’s capacity to secure fair treatment for vulnerable people.¹⁶ It also needs to be emphasised that legal rights protection is not hermetically sealed off from the give-and-take of political debate: viewed in the round, human rights law may orient and constrain the functioning of the democratic process in certain limited ways – but it is lazy hyperbole to characterise it as undercutting or nullifying the principle of democratic self-government.¹⁷

Rights enthusiasts also need to make the argument that legal rights protection often operates in a way that reinforces the principle of democratic self-government, at both national and international levels. Healthy, functioning democracies balance what Habermas describes as popular ‘will-formation’ with a commitment to respecting the dignity and status of individual citizens.¹⁸ Human rights law helps societies to strike this balance, by identifying situations where the scales have been unfairly tilted against the individual.¹⁹ In addition, it also plays a part in addressing a latent tension

¹⁴ P. Daly, ‘Administrative Law: A Values-Based Approach’, in J. Bell *et al*, *Public Law Adjudication in the Common Law World: Process and Substance* (Oxford: Hart, 2016), 23-44.

¹⁵ D. Nicol, ‘Original Intent and the ECHR’ (2005) *Public Law* 152-172..

¹⁶ See the material available at <http://actfortheact.uk>.

¹⁷ This point is made powerfully by Conor Gearty in his most recent book: see C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford: OUP, 2016).

¹⁸ J. Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?* (2001) 29 *Political Theory* 766, 766–769.

¹⁹ Richard Bellamy, a leading political constitutionalist, makes this point in arguing that the ECHR makes a positive contribution to European democracy: R. Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention of Human Rights’ (2015) 25(4) *European Journal of International Law* 1019-1042.

that lies at the heart of democratic governance, namely the way in which certain groups of people – such as non-citizens – are denied an opportunity to participate in shaping the common rules that govern the society in which they live. Benhabib identifies this as an inherent ‘paradox’ that ‘can never be fully resolved in democracies’, but whose impact can be ‘mitigated through the renegotiation and reiteration of the dual commitments to human rights and sovereign self-determination’.²⁰ Human rights law thus helps to contribute to this negotiation process by protecting non-nationals and other groups who tend to be marginalised within the functioning of national democratic systems - ultimately enhancing both their stability and their legitimacy.

Conclusion

Human rights law faces a legitimacy crisis. It is being attacked at a fundamental level, perhaps best illustrated by the extraordinary claim made recently by the think-tank Policy Exchange (via its Judicial Power Project initiative) in written evidence submitted to the Joint Committee on Human Rights to the effect that ‘...much international human rights law [is] largely inimical both to the rule of law and to democratic self-government’.²¹ Rights enthusiasts need to respond to this challenge, by engaging head-on with such attacks.

²⁰ S. Benhabib, *Another Cosmopolitanism*, (Oxford: Oxford University Press, 2008), 35. See also

²¹ Written evidence from the Judicial Power Project to the JCHR inquiry into the human rights implications of Brexit, HRB0037, para. 9, available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/human-rights-brex-16-17/publications/>.