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**The Magna Carta's Tainted Legacy: Historic Justifications for a British Bill of Rights and the case against the Human Rights Act.**

***In:* Cowell, F, ed. *Critically Examining the Case Against the 1998 Human Rights Act*. Oxford: Routledge, 2018, pp.35-51.**

# Magna Carta's Tainted Legacy: Historic Justifications for a British Bill of Rights and the case against the Human Rights Act

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**Key Words**

Magna Carta – Human Rights – UK Exceptionalism – British Bill of Rights

**Abstract**

Close scrutiny rarely flatters the foundation myths of political orders, but this has not stopped such myths being co-opted for political ends. The near-mythical place of Magna Carta within the UK's constitutional history allowed the Conservative Government to hitch its proposals for repeal of the Human Rights Act to celebrations of its 800-year anniversary. Celebrating a Charter which supposedly embodies the genesis of legal limitations on previously absolute power would seemingly sit uneasily with the Conservative Party's commitment to parliamentary sovereignty in the face of the constraints imposed by the European Convention on Human Rights. Moreover, even if the attribution of trial by jury, freedom of expression and habeas corpus to Magna Carta's overburdened Clauses 39 and 40 is anachronistic, a celebration of the Charter's place in the popular conscience as a bulwark protecting "ancient rights" and liberties is difficult to reconcile with the Government's commitment to scrapping the Human Rights Act. The terms of the 2015 celebrations were, however, closely managed by Conservative ministers to emphasise the indigenous character of Magna Carta within the UK's "ancient constitution" as a counterpoint to European elements within the UK's governance arrangements. As such, Magna Carta has proven as useful to the Conservatives as a means of legitimating their policy of repealing the Human Rights Act as it is as a rallying point for opposing abuses of power.

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## Introduction: Weaponising Magna Carta

Events styled as celebrations often take place, as Lord Neuberger pointed out in the context of the 800th anniversary of Magna Carta, in a "mutually self-congratulatory bubble".[1] The 2015 events proceeded on the basis of Lord Denning's oft-quoted claim that Magna Carta is "the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot".[2] His sentiment was affirmed by Boris Johnson; "[t]he liberal spirit of Magna Carta is alive … in those magnificent Clauses 39 and 40 that have come to incarnate the freedoms of the individual that we uphold".[3] And who could object to a celebration on such terms? In this chapter I argue that the 2015 anniversary celebrations instrumentalised Magna Carta for the Conservative Government's specific political ends. Events were closely managed by ministers to emphasise the Magna Carta's place within the UK's ancient constitution as a counterpoint to the incorporation of the European Convention of Human Rights (ECHR) into UK law.[4] The celebrations therefore advanced the Conservative Party's agenda that the Human Rights Act (HRA) needs to be replaced by a "British" Bill of Rights.[5]

Having examined the significance of the 2015 celebrations I evaluate three facets of the Conservatives' efforts to employ Magna Carta as a weapon against the HRA. First, Magna Carta's indigenous character has been used as a rallying cry against the incorporation of the ECHR's "foreign" legal values through the HRA. Second, because the HRA has been characterised as alien to the UK's constitutional landscape, Magna Carta supports claim that the UK has a unique history of constitutional liberty. This lays the groundwork for a Bill of Rights which reduces substantive rights protections and side-lines the Strasbourg Court. Third, the Conservatives' claims that the UK's constitutional history makes it a particularly trustworthy country when it comes to upholding human rights challenges the underlying ethos of international human rights protections. The ultimate aim of Magna Carta rhetoric is

[1] Lord Neuberger, 'Speech to the Dublin University Law Society, Trinity College Dublin' (6 Mar 2015) para.12. Available at: https://www.supremecourt.uk/docs/speech-150306.pdf. Accessed 27 September 2016 as are all subsequent notes.
[2] Magna Carta 800th Anniversary Commemoration Committee, *Why Commemorate the 800th Anniversary?* (London, 2014).
[3] B. Johnson, 'The Mayor of London's Keynote Speech to the Global Law Summit marking 800 years since Magna Carta' (2015). Available at: http://www.lawgazette.co.uk/news/summit-boris-johnson-leaves-them-wanting-more/5047067.fullarticle.
[4] European Convention of Human Rights and Fundamental Freedoms 213 UNTS 222 (3 Sep 1953).
[5] This chapter uses the term British Bill of Rights in line with the rest of the book, even though UK Bill of Rights better reflects the geographical scope and cultural sensitivities involved in a measure which would likely extend to cover Northern Ireland.

to persuade the UK electorate that there is little role for international human rights within the UK's governance order and, as a consequence, to ease the UK out of the ECHR.

**Creating the Magna Carta Myth**

Even if a direct line cannot be drawn between Magna Carta and the UK's current human rights protections, lawyers have historically been in the forefront of advancing this national foundation myth. Whereas the 'historian's view' of 1215 "has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter's constitutional significance", according to Lord Sumption the 'lawyer's view' treats the charter as "a major constitutional document, the foundation of the rule of law and the liberty of the subject in England".[6] The divergence between the popularised Magna Carta myth and the historical reality owes much to the efforts of lawyers, from Lord Coke in the seventeenth century onwards, to instrumentalise the Charter in the service of contemporary political causes.[7] Magna Carta's usefulness lies the generality of its supposed challenge to unaccountable authority, making the detail of its terms and context of its drafting irrelevant. The Pope's swift annulment, rendering the 1215 settlement ineffective, matters little to the celebrations of its significance for the rule of law. That the security clause, a mechanism for constraining absolute monarchical authority, was stricken from the subsequent 1216 version need not hamper claims that the Magna Carta founded the separation of powers.[8] Trial by jury came to be read into the text retrospectively.[9] In the 2015 celebrations Conservative ministers regurgitated this Whiggish narrative, casting Magna Carta as the start of the "bending of the arc in favour of individual rights and freedoms" in the history of England and ultimately the UK.[10]

[6] Lord Sumption, 'Magna Carta Then and Now' (9 Mar 2015) p.1. Available at: https://www.supremecourt.uk/docs/speech-150309.pdf.
[7] See M. Radin, 'The Myth of Magna Carta' (1947) 60 Harvard Law Review 1060, 1088.
[8] Magna Carta 1215, Cl.61.
[9] On the range of rights read into Magna Carta by later writers, see C. Breay, *Magna Carta: Manuscripts and Myths* (British Library, 2002) 7 and Lord Neuberger, 'Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?' para.23. Available at: https://www.supremecourt.uk/docs/speech-150618.pdf.
[10] J. Greening, 'How DFID is promoting the rule of law, property rights, access to justice and good governance in the countries we work in' (2015). Available at: https://www.gov.uk/government/speeches/justine-greening-global-law-summit.

The Global Law Summit of 2015 was not intended to reflect upon Magna Carta's place in history, but to refresh its "iconic, even mythical value".[11] Cass Sunstein has described this process as the creation of a "usable past" which underpins national political self-consciousness.[12] As the following extract from a *Guardian* editorial indicates, the resulting constitutional foundational myth has been generally accepted:

> David Cameron has called it the 'foundation of all our laws and liberties'. Historically speaking, this is bunk. But in so far as it supports the idea that individual freedom is precious and must be defended and passed on, it is genuinely ennobling. Myth it may be, but a virtuous national myth that speaks to the belief that the timeless and magisterial law stands above the flawed ruler, whether medieval or modern.[13]

Nevertheless, because the principles said to be at work in Magna Carta are so underdeveloped they can easily be overlooked or even entirely hollowed out. In 1878, in opposition to the deployment of Indian troops in Malta, Gladstone directly invoked Clause 51 of the original 1215 Charter (calling for foreign knights and mercenaries to leave the kingdom), even though the provision had not been included in the later statutory versions of the Charter. By grounding his opposition in the 'ancient constitution' Gladstone evidently "still thought of Magna Charta as something modern".[14] As little as fifty years later, however, such claims would have marked him out as a crank. As a sovereign Parliament overlaid the ancient constitution with modern statute the legal force of Magna Carta was lost. In Peter Linebaugh's scathing assessment "[Magna Carta] ceased to be an active constitutional force and became a symbol characterized by ambiguity, mystery, and nonsense ... it became an idol of the ruling class".[15] Today the Charter has become more useful as a means to legitimate UK human-rights exceptionalism rather as a rallying cry for individual liberties.[16]

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[11] J. Wright, 'The Attorney General's Keynote Speech to the Global Law Summit marking 800 years since Magna Carta' (2015). Available at: https://www.gov.uk/government/speeches/global-law-summit-keynote-address.

[12] C. Sunstein, 'The Idea of a Usable Past' (1995) 95 Columbia Law Review 601, 603.

[13] Editorial, 'The Guardian View on Magna Carta: The Magic of Myth' *The Guardian* (12 Jun 2015). Available at: http://www.theguardian.com/commentisfree/2015/jun/12/guardian-view-on-magna-carta-magic-of-myth.

[14] P. Blass, *Continuity and Anachronism: Parliamentary and Constitutional Development in Whig Historiography and in the Anti-Whig Reaction Between 1890 and 1930* (Martinus Nijhoff, 1978) p.194.

[15] P. Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press, 2008) p.192.

[16] See N. Riendeau, 'Michael Oakeshott, the Legendary Past and Magna Carta' in R. Hazell and J. Melton (eds.), *Magna Carta and its Modern Legacy* (CUP, 2015) 212, pp.230-231.

**Human Rights as an Invasive Species**

The supposedly exceptional nature of the UK's constitutional order was, in the decades before the HRA's eventual enactment, employed by the opponents of the ECHR to limit its role within the UK's constitutional order.[17] Although he was a leading human rights advocate Lord Scarman had to acknowledge that "the legislative sovereignty of Parliament … makes it difficult for the legal system to accommodate the concept of fundamental and inviolable human rights".[18] In drafting the HRA the New Labour Government focused upon overcoming the narrative that domestic human rights legislation could not be compatible with the notion of parliamentary sovereignty as the keystone principle of the UK's constitution.[19] For Jack Straw, this difficulty in mapping the HRA to the requirements of parliamentary sovereignty was, above all others, the "elephant in the room" during the drafting process.[20] The drafters tackled this conundrum by favouring a reinterpretation clause and declarations of incompatibility over any judicial strike-down power.[21] As a result most constitutional commentators have joined Lord Steyn in accepting that "[i]t is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of parliamentary sovereignty".[22] The HRA's requirement that domestic courts "take into account" Strasbourg jurisprudence was also intended to walk a fine line.[23] On the one hand it restricted the UK courts from developing novel and activist approaches to human rights, and on the other did not impose an obligation upon domestic judges to slavishly adhere to Strasbourg's position.[24]

That the HRA simply incorporated some of the UK's commitments under the ECHR into domestic law was not a mainstay of the Conservative Party's criticism at the time of the HRA's enactment. Their 1997 manifesto described the introduction of any enumerated list of human rights in domestic law as a "radical" change which "could unravel what generations of our predecessors have created".[25] The legacy of successive high-profile defeats for the UK before Strasbourg's institutions, however, blunted claims that fundamental rights were

[17] See J. Griffith, 'The Political Constitution' (1979) 42 MLR 1, 16.
[18] L. Scarman, *English Law – The New Dimension* (Steven & Sons, 1974) 15.
[19] HM Government, *Rights Brought Home: The Human Rights Bill* (HMSO, 1997) para 2.13.
[20] J. Straw, *Aspects of Law Reform: An Insider's Perspective* (CUP, 2012) p.28.
[21] HRA 1998, s.3(1) and s.4(2).
[22] *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 367.
[23] HRA 1998, s.2(1).
[24] Lord Irvine, 'The Development of Human Rights in Britain under an incorporated Convention on Human Rights' [1998] PL 221, 232.
[25] Conservative Party, *The Conservative Manifesto* (1997) Pt 10. Available at: http://www.politicsresources.net/area/uk/man/con97.htm.

already adequately protected in UK law.[26] The incorporation approach was, nonetheless, a visible effort by Tony Blair's Government to emphasise the limited ambitions of this legislation in an effort to smooth its integration into the UK's Constitution. Some human rights advocates, such as Sydney Kentridge QC, complained that the HRA was too timid, and that "a new, home-grown, British Bill of Rights would have looked rather different".[27] To justify incorporation, the Government's narrative was that the HRA was 'bringing home' "rights, originally developed with major help from the United Kingdom Government, [which] are no longer actually seen as British rights".[28] In an unfortunate turn of phrase, given the nature of the criticisms which would follow, Lord Irvine went so far as to describe the HRA as the "domestication of freedom".[29] Crucially he appreciated that the HRA would need to be accepted as compatible with the UK's constitutional traditions.[30] The Conservatives, for their part, were not concerned that the HRA would leave the UK courts constrained to follow Strasbourg, but that the new law would give too much freedom of action to UK judges.[31]

David Cameron played a personal role in shifting the critique of the HRA onto its 'foreign' character. From his earliest contributions in Parliament, he sought to advance an indigenous account of rights and liberties stretching back to Magna Carta. In 2001 he challenged New Labour's legislative response to the 9/11 attacks as attempting to conform to the ECHR, but neglecting ancient protections of liberties in domestic law; "In many ways the Government had a choice between this country's ancient rights of habeas corpus and the right not be detained without trial; between Magna Carta and the ECHR".[32] In the summer of 2006 the idea of replacing the HRA with a "British Bill of Rights" was one of David Cameron's first major policy initiatives as leader of the Conservative Party. In a speech to the Centre for Policy Studies he cast this proposal as responding to the HRA being both too foreign, arguing for a Bill of Rights which is "home-grown and sensitive to Britain's legal inheritance", and too restrictive upon government policy, criticising the HRA for failing to "strike a common-sense balance between civil liberties and the protection of public security".[33]

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[26] See, for example, Lord Donaldson, HL Deb, vol.560, col.1154 (25 Jan 1995).
[27] S. Kentridge QC, 'The Incorporation of the European Convention on Human Rights' in University of Cambridge Centre for Public Law (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart, 1998) 69, p.69.
[28] HM Government, *Rights Brought Home: The Human Rights Bill* (HMSO, 1997) para 1.14.
[29] Irvine, 'The Development of Human Rights in Britain' (above n.24) 225.
[30] Ibid., 235.
[31] See F. Klug, 'A Bill of Rights: Do we need one or do we already have one?' [2007] PL 701, 706-707.
[32] D. Cameron, HC Deb, vol.375, col.145 (19 Nov 2001).
[33] D. Cameron, 'Balancing Freedom and Security – A modern British Bill of Rights' (26 Jun 2006). Available at: http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution.

This critique of the HRA's restrictiveness should have gained little traction. A 2006 review noted that the HRA had "not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration and has not led to the public being exposed to additional or unnecessary risks".[34] Because the HRA remained, according to the Joint Committee on Human Rights (JCHR), "a convenient scapegoat for unrelated administrative failings within Government", the legislation nonetheless continued to take 'friendly-fire' from the very administration which had enacted it.[35] As a result Cameron's assault upon the European basis of the HRA's rights protections met with little resistance. The Conservatives offered a Bill of Rights "designed and drafted with reference exclusively to British values and priorities".[36] Lord Falconer, Labour's then Lord Chancellor, responded with technocratic concerns as to the potential for confusion between the terms of such legislation and the scope of the UK's international human rights commitments.[37] Although Labour insisted that the ECHR was a UK inspired treaty this focused too heavily on Strasbourg institutions and did little to deflect Cameron's claims that the HRA "obliges British courts to base their judgements (sic) on the ECHR and the case law … that goes with it".[38] When the UK's most senior judges accepted in *Ullah* that "[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less",[39] the intention seems to have been to emphasise that the HRA would not lead to judicial activism. The effect, however, was to promote an image of the UK courts as subservient to Strasbourg.[40] Even as the UK Supreme Court moved away from any notion of strict adherence to the interpretation of the ECHR rights adopted by Strasbourg,[41] Conservative politicians did not allow the judges to shed the perception of subservience generated by *Ullah*. "[W]hat ebbs may flow" the then Lord Chancellor Michael Gove tartly remarked in late 2016, maintaining that "[w]e cannot necessarily rely on a future court or future judges to

[34] Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (HMSO, 2006) p.4.
[35] Joint Committee on Human Rights, *The Human Rights Act: The DCA and Home Office Reviews* (2006) HL 278/HC 1716, para.40.
[36] DCA, *Review of the Implementation of the Human Rights Act* (above n.34) p.5.
[37] Ibid., p.6.
[38] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323.
[39] Ibid., [20] (Lord Bingham).
[40] See Lord Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237, 252.
[41] *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

take this approach".[42] The Conservative mantra remained that a British Bill of Rights would restore the supremacy of the UK Supreme Court.[43]

For David Cameron, the Magna Carta was the standard under which this indigenous approach to human rights marched; "Human rights is a cause that runs deep in the British heart … Magna Carta set down specific rights for citizens, including the right to freedom from unlawful detention".[44] The alignment of the anniversary of Magna Carta with his 2015 election victory, which freed him from the constraints of a governing coalition with the pro-HRA Liberal Democrats, therefore became an opportunity to advance this view:

> For centuries, Magna Carta has been quoted to help promote human rights and alleviate suffering all around the world. But here in Britain ironically, the place where those ideas were first set out, the good name of human rights has sometimes been distorted and devalued. It falls to us in this generation to restore the reputation of those rights – and their critical underpinning of our legal system.[45]

For the Conservative leadership, a British Bill of Rights would realise this aim by limiting the direct influence of the ECHR rights. As the 2015 Conservative manifesto made clear, the HRA's repeal was primarily intended to "break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK".[46]

Claims that the HRA is somehow alien to the UK's legal traditions have spearheaded efforts to undermine this legislation. In this cause, Magna Carta has been invoked as a particularly potent weapon. The Charter remains a point of pride which judges, even without the impetus of the anniversary, repeatedly reference.[47] Perhaps the clearest sign of the effectiveness of this approach was Lord Neuberger's acceptance that:

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[42] European Union Committee, *The UK, the EU and a British Bill of Rights* (2016) HL 139, Q79.
[43] See, for example, J. Forsyth, 'Chris Grayling: I want to see our Supreme Court supreme again' *The Spectator* (28 Sep 2013).
[44] D. Cameron, 'Speech on the European Court of Human Rights' (25 Jan 2012). Available at: https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights.
[45] D. Cameron, 'Magna Carta 800th Anniversary' (15 Jun 2015). Available at: https://www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech.
[46] Conservative Party, *The Conservative Party Manifesto* (2015) p.60. Available at: https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf.
[47] See, for example, Lord Irvine of Lairg, 'The Spirit of Magna Carta continues to resonate in Modern Law' (2003) 119 LQR 227, T. Bingham, *Lives of the Law: Selected Essays and Speeches: 2000-2010* (OUP, 2011) pp.3-12, and M. Arden, 'Magna Carta and the Judges – Realising the Vision' (2011), available at: https://www.royalholloway.ac.uk/aboutus/documents/pdf/magnacarta/magnacarta8711.pdf.

> [I]t is important that any change in the way in which we are governed, whether in the legislature, the executive or the judiciary, is conceived and developed in a way which harmonises with our present established arrangements. For instance, one can't simply graft on an aspect of a foreign system which seems to work abroad: like a perfectly sound stranger's organ transplanted into another's body, the foreign aspect may simply be rejected by our home grown system.[48]

Although the reference was in the abstract, he followed it up by declaring that "[w]ith the bringing into UK law of the Human Rights Convention in 1998, we have gone some way down the road towards having a sort of crypto-constitution".[49] It is small wonder, therefore that the majority of the Coalition Government's Commission on a UK Bill of Rights accepted that "many people feel alienated from a system that they regard as 'European' rather than British" and that "this lack of 'ownership' by the public … [provides] the most powerful argument for a new constitutional instrument".[50] Persistent complaints over the HRA's foreignness, spearheaded by the Conservative Party under David Cameron's leadership, have therefore created a pretext for its repeal with far more traction within public opinion, in England at least, than any substantive critique of the HRA's operation.

**Hollowing Out Human Rights Protections**

David Cameron resigned in the late summer of 2016, there is every sign that rhetorical allusions to the Magna Carta will continue to play a role in the Bill of Rights debate even after his unceremonious resignation. Theresa May's animus towards the HRA, on grounds of its inhibiting effective government action against terrorism, has been long standing.[51] In the course of the Brexit campaign, however, she adapted her critique to incorporate Cameron's Magna Carta narrative:

> [H]uman rights were not invented in 1950 when the convention was drafted, or in 1998 when the convention was incorporated into our law through the Human Rights Act. This is Great Britain, the country of Magna Carta, parliamentary democracy and the

[48] Neuberger, 'Speech to the Dublin University Law Society' (above n.1) para.5.
[49] Ibid., para.16. See also M. Amos, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 35 Human Rights Quarterly 386.
[50] Commission on a UK Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012) vol.1, para.80.
[51] See P. Hennessy, 'Home Secretary: Scrap the Human Rights Act' *The Telegraph* (1 Oct 2011).

> fairest courts in the world. And we can protect human rights ourselves in a way that doesn't jeopardise national security or bind the hands of parliament.[52]

The myth of the UK's "liberty-drenched ancient past" is sufficiently obscure to enable May to invoke it in the cause of rebalancing rights protections in favour of Parliament's supremacy.[53] Invocations of Magna Carta often serve, as a crypto-heritage by which to justify weakening domestic human rights arrangements and minimising the role of pan-European protections.

When David Cameron first mooted the idea of a British Bill of Rights the Labour Government scoffed that human rights could not be better reconciled with the UK's principle of parliamentary sovereignty than under the HRA's mechanisms.[54] What Labour ministers did not appreciate is that the Conservative leadership would quietly abandon Cameron's early suggestions of "entrenching the Bill", in favour of legislation which would sustain the doctrine of parliamentary sovereignty.[55] By the time the Conservative Party came to develop its ideas for a Bill of Rights ahead of the 2015 General Election, it was adamant that "[i]n all matters related to our international commitments, Parliament is sovereign".[56] As Lord Chancellor Michael Gove was even magnanimous enough to recognise that in legislating "[w]e need to ensure that we uphold parliamentary sovereignty, which, to be fair, the Human Rights Act affirms, and make Parliament's view clear on these issues".[57] Far from enhancing the limited powers the HRA gave the courts with regard to primary legislation the Conservatives' British Bill of Rights would "[p]revent our laws from being effectively re-written through 'interpretation'".[58] The Magna Carta is therefore the ideal avatar for the Conservatives' proposals as it is the nearest thing to an "irrepealable 'fundamental statute' that England has ever had".[59] Nonetheless, as the courts have consistently affirmed, this reverence has not made it immune "from development or improvement", to the extent that

[52] T. May, 'The United Kingdom, the European Union, and Our Place in the World' (25 Apr 2016). Available at: https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world.
[53] L. Colley, *Acts of Union and Disunion* (Profile, 2014) p.35.
[54] Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (HMSO, 2006) p.5.
[55] Cameron, 'Balancing Freedom and Security' (above n.33).
[56] Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014) p.5. Available at: https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf.
[57] EU Committee, *The UK, the EU and a British Bill of Rights* (above n.42) Q82.
[58] Conservative Party, *Protecting Human Rights in the UK* (above n.56) p.6.
[59] F. Pollock and F. Maitland, *The History of English Law before the Time of Edward I* (2nd ed, CUP: 1923) vol. 1, p.173.

very little of the Charter remains on the statute book.[60] The Conservatives' proposals envisage removing the teeth from existing HRA protections, all the while wrapping their reforms under a title of Bill of Rights which implies strike down powers.[61]

So seductive was the pull of the Conservatives' Magna Carta rhetoric that Gordon Brown's administration even tried to steal its clothes by mooting the possibility that, although the HRA incorporated "rights which build on British values as old as Magna Carta", it could be built upon by a new Bill of Rights and Duties.[62] However, the Conservative Party's 2014 Policy Paper on Human Rights seeks to hollow-out rights protections; claiming that "over the centuries through our Common Law tradition, the UK's protection of human rights has always been grounded in real circumstance".[63] This claim reheats Dicey's Victorian hyperbole that the Habeas Corpus Acts have "done for the liberty of Englishmen more than could have been achieved by any declaration of rights".[64] David Cameron, moreover, has maintained that fair hearing rights, habeas corpus and protections against torture are "sewn into the fabric of our nation, so deep we barely even question it", suggesting that adherence to the ECHR is distorting this understanding of rights.[65] In claiming that "this country has always been a beacon for liberty and democracy", government ministers have reached back centuries to the "tradition embodied in Magna Carta, the Petition of Right, the Bill of Rights, the Claim of Right and other statutes".[66] Such statements, in sum, amount to an 'Enlightenment' approach to human rights, which treats the protection of a limited range of negative liberties as the only "legitimate purpose of a Bill of Rights".[67]

The Conservatives' reliance upon Magna Carta is to some extent mirrored in judicial pronouncements. Some senior judges have responded to the threat to the HRA by reasserting the common law's utility as a tool for dealing with human rights abuses. In *Osbourn*, the Supreme Court maintained that the HRA did not necessarily "supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon judgments of the European court".[68] In *HS2*, Lord Neuberger and Lord Mance insisted that fundamental constitutional principles, such as those contained in Magna Carta, were

[60] *Chester v Bateson* [1920] 1 KB 829, 834 (Darling J).
[61] Baroness Hale, for one, regards strike down powers as inherent in a "proper" Bill of Rights; Baroness Hale, 'Magna Carta: Our Shared Heritage' (2015) p.11. Available at: https://www.supremecourt.uk/docs/speech-150601.pdf.
[62] HM Government, *The Governance of Britain* (2007) Cm 7170, para.207 and para.209-210.
[63] Conservative Party, *Protecting Human Rights in the UK* (above n.56) p.2.
[64] A. Dicey, *An Introduction to the Study of the Constitution* (Liberty Classics, 8th Ed., 1915) p.134.
[65] Cameron, 'Magna Carta 800th Anniversary' (above n.45).
[66] Lord Faulks, HL Deb, vol.773, col.281 (24 May 2016).
[67] Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008) HL 165-I/HC 150-I, para.15.
[68] *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, [57] (Lord Reed).

protected against implied repeal.[69] Baroness Hale has also recounted how the principles underpinning Magna Carta could continue to be relied upon even if the HRA had never entered force.[70] The message from these statements seems to be that many UK judges perceive conflicts between public policy concerns and individual interests through a human rights lens, and that repealing the HRA will not change their underlying frame of reference.[71] But these statements, in their attempt "to undercut perceptions that the Convention is a dominant 'alien' appendage which will necessarily override pre-existing domestic norms", nonetheless create the impression that the HRA's repeal would not jeopardise rights protections.[72] Reliance on the ancient constitution will all too often promise more than it delivers in terms of rights protection. This tradition, to take one prominent example, did little to curtail the flow of successful human-rights claims against perpetrated by the police, military and security agencies in Northern Ireland in the 1970s and 1980s.[73]

The ECHR's text is, however, not the Conservatives' main target. In light of a decade of lambasting the ECHR for not being "home-grown and sensitive to Britain's legal inheritance",[74] it might appear ironic that the Conservatives' 2014 Policy Paper did not propose introducing any new rights reflecting this inheritance but rather building "the text of the original Human Rights Convention into primary legislation".[75] This approach is, however, in keeping with the notion that most of the rights "originally protected under the Convention were and are … a classic exposition of the 'liberties' which successive generations of British politicians and the British public have claimed as our shared inheritance".[76] This view of the ECHR has deep-roots within Conservative thinking. In 1987 one senior Conservative MP, proposing the ECHR's incorporation into UK law, insisted that the ECHR's language "echoes right down the corridors of history … as far back as Magna Carta".[77] Although enumerated rights might have marked something of a departure from common law traditions, it was the ECHR's protection mechanisms and particularly the Strasbourg Court, which made

[69] *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, [207].
[70] Hale, 'Magna Carta' (above n.61) pp.16-18.
[71] See K. Malleson, 'The Evolving Role of the Supreme Court' [2011] PL 754, 763.
[72] See R. Masterman and S. Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] EHRLR 57, 61.
[73] For examples, see *Ireland v United Kingdom* [1978] 2 EHRR 25 (inhuman and degrading treatment of internees suspected of involvement in IRA activity); *Brogan v United Kingdom* (1989) 11 EHRR 117 (in which police pre-charge detention powers in Northern Ireland were found to breach the right to liberty); *McCann v United Kingdom* (1996) 21 EHRR 97 (breach of the right to life as a result of inadequate planning in an SAS operation in which three IRA members were shot dead).
[74] Cameron, 'Balancing Freedom and Security' (above n.33).
[75] Conservative Party, *Protecting Human Rights in the UK* (above n.56) p.5.
[76] D. Grieve, 'Can a Bill of Rights do better than the Human Rights Act?' [2016] PL 223, 223.
[77] E. Gardner, HC Deb, vol.109, col.1224 (6 Feb 1987).

the Convention a novel development.[78] And it is Strasbourg's role which the Conservatives are so eager to challenge, as David Cameron argued "when controversial rulings overshadow the good and patient long-term work that has been done … it has a corrosive effect on people's support for human rights".[79] The 2014 Policy Paper was particularly scathing about the manner in which the Strasbourg Court has interpreted rights in light of contemporary values through its "living-instrument" doctrine.[80] For the Conservatives this doctrine has generated the very human rights 'mission creep' which is responsible for a swathe of adverse judgments against the UK.[81] Similar sentiments were expressed by Jack Straw, who as Home Secretary had piloted the HRA through the House of Commons, has maintained that the ECHR provided Strasbourg with the role of protecting "basic rights", but not with developing these rights.[82] Some of this has been influence by the ECtHR's prisoner voting jurisprudence, described by David Davis as something "we emphatically did not sign up for".[83]

The Conservatives' central message is that they remain committed to truly fundamental rights, embodied in Magna Carta, but aim to closely circumscribe protections in light of what they regard as unacceptable extensions to the ambit of human rights. During her campaign for the leadership of the Conservative Party after David Cameron's resignation, Theresa May put on hold her intention to withdraw the UK from the ECHR, on the basis that "this is an issue that divides people, and the reality is there will be no parliamentary majority for pulling out".[84] Nonetheless the idea behind a British Bill of Rights remains to redefine or, euphemistically, to "clarify" the UK's relationship with Strasbourg.[85] In his one of his earliest speeches on HRA reform David Cameron insisted that a British Bill of Rights, by establishing "a clearly set out domestic constitutional doctrine", will oblige Strasbourg to grant the UK a more extensive margin of appreciation on controversial human rights questions.[86] The 2012 Brighton Declaration, however, calls into question the need for

[78] See F. Klug, 'A Magna Carta for All Humanity: Homing in on Human Rights' [2015] EHRLR 266, 267-268.
[79] Cameron, 'Speech on the European Court of Human Rights' (above n.44).
[80] *Tyrer v United Kingdom* (1978) 2 EHRR 1, [31]. See G. Letsas, 'Two concepts of the margin of appreciation' (2006) 26 OJLS 705.
[81] Conservative Party, *Protecting Human Rights in the UK* (above n.56) p.3.
[82] Straw, *Aspects of Law Reform* (above n.20) p.46.
[83] D. Davis, HC Deb, vol.523, col.496-497 (10 Feb 2011).
[84] See J. Parkinson, 'The Human Rights Act helps us hold power to account. We must defend it' *The Guardian* (26 Jul 2016). Available at: https://www.theguardian.com/commentisfree/2016/jul/26/theresa-may-repeal-human-rights-act-defend-it.
[85] Grieve, 'Can a Bill of Rights do better?' (above n.76) 224.
[86] Cameron, 'Balancing Freedom and Security' (above n.33).

domestic legislation in this regard.[87] The Declaration, pushed for by the Coalition Government during the UK's period chairing the Council of Europe, has arguably already expanded public authorities' room for manoeuvre by encouraging the Court "to give great prominence to" the doctrines of subsidiarity and margin of appreciation.[88] It has also been embodied in Protocol 15 ECHR, which builds margin of appreciation doctrine into the preamble of the Convention.[89] The Coalition Government experimented with accessing a wider margin of appreciation for the UK through the Immigration Act 2014, which redefines the relationship between the public interest and individual and family rights in deportation cases.[90] Proposals for a British Bill of Rights seek to extend this approach across a wider range of rights and also attempt to ring-fence certain activities, such as combat deployments of the UK Armed Forces, from human rights scrutiny.[91]

**Justifying UK Human Rights Exceptionalism**

National foundation myths supposedly provide a unique source of authority for a political order.[92] If this is the case then the process by which individual liberties 'came to be attributed, in origin, to the victory of the barons over King John' has generated a particularly potent myth.[93] In the foundation story of the United States of America (US) in the War of Independence is often recast as a struggle to recapture Magna Carta's inheritance.[94] In former-US Attorney General Eric Holder's telling of this story these liberties, lost because of the oppressive power wielded by George III's governments, were ultimately reaffirmed and 'broadened' by the US Bill of Rights.[95] These US foundation myths have been used as part of US Government efforts to promote international human rights law abroad, despite the resistance of successive administrations to "complying with human rights standards at

[87] Committee of Ministers of the Council of Europe, 'High Level Conference on the Future of the European Court of Human Rights' (2012). Available at: http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
[88] Ibid., para.12(a). See Grieve, 'Can a Bill of Rights do better?' (above n.76) 228.
[89] Protocol 15 ECHR (2013) CETS No.213, Article 1.
[90] See chapter six.
[91] Ibid., Q79.
[92] See M. Oakeshott, *The Vocabulary of a Modern European State: Essays and Reviews 1952-88* (Imprint Academic, 2008) p.194.
[93] A. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, 2001) p.24.
[94] See C. Palley, *The United Kingdom and Human Rights* (Sweet & Maxwell, 1991) pp.71-73.
[95] E. Holder, 'Remarks at the Global Law Summit to Commemorate the 800-Year Anniversary of Magna Carta' (2015). Available at: http://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-global-law-summit-commemorate-800-year.

home".[96] Magna Carta's 800th anniversary therefore gave the HRA's detractors the opportunity to take advantage of what John Alder has described as the Charter's "iconic significance" to invigorate reactionary opposition within the UK, not only to the legislative arrangements contained within HRA, but also to the international human rights project as a whole.[97] By promoting the UK's constitutional history as uniquely imbued with a spirit of liberty, Conservative ministers are in essence claiming that international human rights have little role to play in UK governance and apply instead to "less happier lands".[98]

Justine Greening, as International Development Secretary, took the opportunity of the Global Law Summit staged to mark the 800th anniversary to enthuse that "Magna Carta has been one of the UK's greatest exports: it has inspired and formed the basis of so many legal systems".[99] Less was made in her speech about how often this export of constitutional liberties was intertwined with the UK's imperial project.[100] Such contributions nonetheless establish a theme of fundamental rights protections being transmitted from the UK to the rest of the world. As David Cameron declared on Magna Carta's anniversary the concept of government under the law, "taken for granted here in Britain … is what others are crying out for, hoping for, praying for".[101] Embarrassing Strasbourg judgments may have threatened this complaisant superiority and energised the Conservative backlash against the ECHR, but the friction between the UK's governance arrangements and post-war international constitutionalism, which Cameron sought to tap into, is deep rooted.[102] Successive UK Governments have struggled to define the UK's place in a post war order in which it is a declining world power.

The senior Conservative MP Peter Lilley, long a vocal detractor of the HRA, has characterised the UK's post-war contribution to drafting the ECHR as an effort to "bring the advantage of British liberties to 'lesser breeds without the law', as Kipling had it".[103] His quotation from Kipling in part emphasises the condescending attitude of some of the UK politicians and officials involved in drafting the ECHR towards the legal systems of

[96] M. Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2009) 1, 1.
[97] J. Alder, 'The Sublime and the Beautiful: Incommensurability and Human Rights' [2006] PL 697, 699.
[98] Richard II, Act II, Scene 1.
[99] C. Grayling, 'Lord Chancellor speaks at the Global Law Summit, marking 800 years of the Magna Carta'. Available at: https://www.gov.uk/government/speeches/lord-chancellor-speech-at-the-global-law-summit-23-february-2015.
[100] See, for example, E. Burke, *The Works of the Right Honorable Edmund Burke* (Little, Brown & Company, 1865–67) vol.2, p.441.
[101] Cameron, 'Magna Carta 800th Anniversary' (above n.45).
[102] G. de Freitas, HC Deb, vol. 413, col. 692-693 (22 Aug 1945).
[103] P. Lilley, HC Deb, vol.523, col.551 (10 Feb 2011), quoting R. Kipling, *Recessional* (1897).

continental Europe and scorns their confidence that the UK conformed in all important respects to the ECHR's requirements.[104] But this should not disguise Lilley's belief that international human rights mechanisms were far removed from the UK's historic protections for civil liberties; "[o]ur liberties did not result from giving courts the right to explicate an abstract list of rights".[105]

Even if the ECHR drew upon civil liberties which were part of the UK's constitutional history, the ancient constitution's proponents maintain that the human rights project diverged unacceptably from the UK's constitution in allowing an international tribunal to act as the ultimate interpretative authority on the scope of these rights. The UK is above such scrutiny; "[i]t is only because this country was prepared to take on the might of Nazi Germany that there is a European Court".[106] This is not a novel argument, but rather reprise of A.V. Dicey's nineteenth-century claims that parliamentary sovereignty should prevail over particular civil liberties and that liberty would be secured by "the manners of the nation".[107] In other words, Dicey was confident that the UK electorate would not support despotic governments and juries would not convict suspects tried under oppressive criminal offences but this provides little meaningful constraint on UK Government action.[108] Nonetheless, such concerns are irrelevant to an account which treats "real" human rights abuses as impossible in the UK because, as Giovanni Sartori satirised, "the British people are clever and fine people who know how to go about in politics".[109] In light of the underlying premise of the UK being exceptional as a font of liberty, a British Bill of Rights becomes a means by which to decouple the UK from international human rights projects.

Magna Carta exceptionalism, by confirming the UK as a uniquely long-standing 'rights-respecting' democracy, transforms human rights into values which are not directly relevant to government policy making, except in relation to foreign policy. Even as he issued veiled threats against the UK's ongoing commitment to the ECHR system, David Cameron continued to invoke human rights abuses as a basis for justifying military interventions, declaring that "[w]e are not and never will be a country that walks on by while human rights are trampled into the dust".[110] He was however employing the term to cover the use of

[104] See G. Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42 ICLQ 796, 811.
[105] P. Lilley, HC Deb, vol.523, col.552 (10 Feb 2011).
[106] P. Hollobone, HC Deb, vol.523, col.538 (10 Feb 2011).
[107] Dicey, *Law of the Constitution* (above n.64) p.120.
[108] Simpson, *Human Rights and the End of Empire* (above n.93) p.37.
[109] G. Sartori 'Constitutionalism: A Preliminary Discussion' (1962) 56 American Political Science Review 853, 854.
[110] Cameron, 'Speech on the European Court of Human Rights' (above n.44).

massive force by Colonel Gaddafi's military against a near-defenceless civilian population in Benghazi. In explaining the UK's intervention in Libya in these terms, David Cameron was treating 'real' human rights abuses as being synonymous with crimes against humanity. As one former minister reiterated when military action was proposed against President Assad's regime in Syria in 2013, "failure by the international community to act would be far more dangerous than taking evidence-based, proportionate and legal military action as a clear lesson to human rights abusers and dictators who murder and terrorise innocent civilian populations".[111] The implication is that the ambit of human rights should extend to only to cover rights abuses which cause "extreme humanitarian distress on a large scale".[112] The UK Government maintains that such circumstances are capable of justifying humanitarian intervention, but is implying that domestic legal systems should be left to tackle lesser infringements.

**Conclusion: Magna Carta as a Trojan Horse**

In 1915, at the height of the First World War, the pressure to trumpet the heritage of Magna Carta was acute, with commemorative events intended to provide a not-too-subtle affirmation of the ongoing 'democratic' struggle against the 'authoritarian' central powers.[113] One hundred years later it should perhaps be more surprising to find that Magna Carta is still being co-opted into struggles over how to define the UK polity, with Elizabeth Truss claiming, soon after her appointment as Lord Chancellor in Theresa May's Government in July 2016, that "[w]e have a strong record, as a country, of human rights, dating back to Magna Carta, and the British Bill of Rights is going to be the next step in enshrining those rights in our laws".[114] This contribution has exposed the connection between the Conservatives' oft-avowed commitment to the spirit of Magna Carta and their efforts to undermine the HRA. Magna Carta rhetoric has proven useful because it camouflages the Government's ultimate aim of weakening rights protections.

Magna Carta is therefore a device used by the Conservatives to critique the HRA as being too foreign to the UK's legal traditions and too threatening to parliamentary

[111] A. Mitchell, HC Deb, vol.566, col.1474 (29 Aug 2013).
[112] D. Grieve, *Guidance: Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (29 Aug 2013) para.4. Available at: https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.
[113] See H. Malden (ed.), *Magna Carta Commemoration Essays* (Royal Historical Society, 1917).
[114] E. Truss, HC Deb, vol.614, col.186 (6 Sep 2016).

sovereignty to warrant its place within the UK Constitution. In asserting an indigenous rights tradition stretching back to 1215, the Conservative Government is in the first instance justifying at least the rebranding of the HRA, to prevent human rights from being "seen as something that are done to British courts and the British people as a result of foreign intervention".[115] Having unleashed such powerful nationalistic arguments against the ECHR system the Government might well, in political climate prevailing in the wake of the EU referendum result, see little additional cost in hollowing out the HRA's protections. This does not necessarily mean returning to a diaphanous web of civil liberties in place of a system of enumerated rights, but proposals for a Bill of Rights are moving towards limiting the scope of some existing rights, carving out exceptions to others, and restricting the remedies available to the courts. Magna Carta rhetoric is even being advanced as a basis for abandoning the UK's international human rights commitments as an unnecessary encumbrance on the UK's unique governance order. Too often Magna Carta has been invoked in the Bill of Rights debate as a Trojan Horse, burnishing the Conservative Party's supposed commitment to fundamental freedoms even as it tries to unpick the ECHR from the UK Constitution.

[115] See EU Committee, *The UK, the EU and a British Bill of Rights* (above n.42) para.36.