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# Rights and Opinion: Or, The Progress of Sentiments

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**Abstract:** What is the relationship between minorities and majorities within the liberal constitutional order, and what role ought courts play in defining that relationship? This paper approaches the question first by establishing a framework of analysis which, drawing on work of David Hume, isolates three often undervalued features of constitutional order: the idea of the constitution as a going concern; the idea of the constitution as a complex whole; and the idea of the constitution as a framework of moral sentiment. These themes are explored in a study of contemporary British constitutional politics, an example of a stable constitution in flux. Britain continues to struggle with the Human Rights Act and the new prominence it accords to rights in constitutional debate. Reflecting on this case study, the paper argues that, when it comes to thinking about constitutional change, we should pay more attention to the imaginations of our fellow citizens, and their limits, aiming to enlarge our moral horizons in a way that aligns them with what is best within existing practices.

**Keywords:** constitutional order, moral sentiment, David Hume, human rights, opinion

## Introduction

The theme of minority accommodation and litigation calls for reflection on two topics of central importance. The first is the relationship between minorities and majorities within the liberal constitutional order, and thus the dynamics of integration within a pre-existing and ongoing structure of self-rule. The second is the role that courts play in such a relationship, and more broadly the place of law within the organizational structure of the state. These two topics are important to political and constitutional theorists but they are also germane to everyday political discourse, lying at the heart of debates over multiculturalism, immigration, and security politics, to name but a few.

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This paper approaches these questions skeptically. While it does suggest some general conclusions, these are made tentatively. One reason for this reluctance is that the conclusions draw largely upon an analysis of developments within British constitutional politics. There are limitations with an approach that confines itself to a single jurisdiction. But it does mean that the analysis can dig more deeply into the empirical data, which is important to an enquiry that requires a sensitive reading of not just court cases but also to the relationship between those cases and the political constitution. While Britain is in some ways anomalous, in that it lacks a clear sense of the constitution as higher-order law,<sup>1</sup> in other respects it is quite ordinary. It is well-established – new constitutions pose specific problems – and adopts both the principle of self-rule and respect for law and fundamental rights.

The first section develops a framework for the analysis that follows. Drawing on David Hume, it isolates three important but often undervalued features of constitutional order. From Hume's argument about the central role of conventions in underpinning authority it draws, first, the idea of the constitution as a *going concern*, something that predates us and is in the process of being continually made and remade through the practices of constitutional politics. Second, it derives from the same source the idea of the constitution as *complex whole*, whose institutions and structures interact reflexively in complicated and even unpredictable ways. Third, it extracts from Hume's claim that authority rests ultimately in the opinion of the people the idea of the constitution as a framework of *moral sentiment*. A constitution, that is to say, goes beyond providing the ground rules of political order. It operates also as a dynamic framework in which the opinions and sentiments of the people – what we often call public reason – are channeled, structured, and brought to bear in arguments over authority and liberty. It is through this process, theoretically speaking, that authority is constituted and a diverse people makes itself a public.

## Constituting Authority

We often talk as though constitutions were static, institutional, and simple things. A constitution, on this account, is something that exists mainly in and for the present and has recognizable shape in terms of the institutional structure it prescribes and the rules it is said to contain. By extension, a constitution is

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<sup>1</sup> *But see, e.g.,* T.R.S. ALLAN, *THE SOVEREIGNTY OF LAW: FREEDOM, CONSTITUTION, AND COMMON LAW* (2013).

seen as something we can and, when occasion arises, do fabricate. We see this way of thinking not just in the obvious context of constitutional design,<sup>2</sup> but also in the more strongly analytical accounts of constitutional law<sup>3</sup> and in a style of comparative constitutional law that measures one jurisdiction's institutional apparatus and structure of rules against another's.<sup>4</sup> There may sometimes be pedagogical or expository reasons for devising conceptual and juridical maps of this sort. But we should be careful not to equate such exercises with constitutional reality.

Another way of looking at constitutions is to see them as diachronic, moral, and complex structures. This perspective starts with what is arguably the central feature of constitutional order: that it operates across time. A constitution is the projection into a possible future of present sensibilities refracted through past experience. Constitutions almost invariably preexist us. And so whether we like it or not we enter a conversation that predates us and whose more important terms and conditions are usually already well set. The conversation fundamentally concerns who we are and how we got here. Or rather, the fact that we are having *this* conversation in *this* way is a major part of what determines the character of our association as citizens.

Arguments about identity naturally intersect with arguments about ruling – about the way things are and ought to be run. Within a reasonably functional constitution, these arguments will take the form of structured processes of dialogue and exchange that tend to be channeled through established institutional pathways. What might be called ‘nodal points’ occur at recognizable places within this structure, where the actions of certain institutions, and those of certain participants within them, typically carry additional force. But debate is not restricted to such pathways and institutions. These are essential to the conduct of government, no doubt, but not sufficient to the moral exchange that surrounds and underpins government and which in principle includes at least all those who are members of the political association in question.

Constitutional rules and conventions emerge from this structure often in complicated and unpredictable ways since the relationship between the various institutions do not operate in strictly hierarchical terms. It is rarely the case that

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<sup>2</sup> For criticism of the application of this way of thinking even in that context, see Nehal Bhuta, *Against State-Building*, 15 *CONSTELLATIONS* 517 (2008).

<sup>3</sup> For a classic criticism of the canonical writings of the British jurist A.V. Dicey, see, e.g., MARTIN LOUGHLIN, *PUBLIC LAW AND POLITICAL THEORY* 146–49 (1992).

<sup>4</sup> See, e.g., *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* (Tom Ginsburg & Rosalind Dixon eds., 2014).

one body speaks and the others fall into line. The communication between institutions is usually more complicated. Multiplied, this patterned communication develops into a relatively dense network of reflexive relations. The sum of these institutions, and the relevant sorts of interactions between them, may be said to equate to the complex whole that is the constitution. The sum of the more stable outputs of the relevant interactions may be said to equate to the rules, principles, and conventions of the constitution. This process of internal refraction takes place against a background of a wider and potentially community-wide discourse that draws on and is responsive to what occurs within the institutional structure of the polity. The contours of the conventions that emerge are clarified or reinforced often by working against the image of another constitutional structure, understood as different or even alien (just as the English jurist Dicey articulated the British constitution *against* the example of the French).<sup>5</sup>

This second model – of the constitution as a complex whole that has as its heart an institutionally patterned moral conversation that takes place across the domain of time – is not just sociologically more sophisticated. Its rival, juridical and static, tends to depend on an authority derived from the idea of the social contract – or its nearest practical equivalent, the foundational written constitutional document. But the difficulties in this way of thinking about legitimacy are familiar, having been pointed out at the philosophical level by Hume and at the political level by Jefferson. Hume's position is worth quoting because it lays much of the basis for what follows later in the section:

Did one generation of men go off the state at once, and another succeed, as is the case with silk-worms and butterflies, the new race, if they had sense enough to choose their government, which surely is never the case with men, might voluntarily, and by general consent, establish their own form of civil polity, without any regard to the laws or precedents, which prevailed among their ancestors. But as human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary, in order to preserve stability in government, that the new brood should conform themselves to the established constitution, and nearly follow the path which their fathers, treading in the footsteps of theirs, had marked out to them.<sup>6</sup>

Consent cannot just be about an initial compact or founding moment. Either you were a citizen at the time when the people were asked to consent to the new constitution or you effectively cannot consent. If we want our constitution to be a vehicle for self-rule, then that needs to be reflected in an ongoing and

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<sup>5</sup> A.V. DICEY, *THE LAW OF THE CONSTITUTION* chs. 4 & 7 (J.W.F. Allison ed., 3d. ed. 2013).

<sup>6</sup> David Hume, *Of the Original Contract*, in *ESSAYS MORAL, POLITICAL AND LITERARY* 466–67 (Eugene F. Miller ed., 1985).

constantly updating process of reflection, criticism, and reaffirmation of constitutional rules and conventions. On this model institutions have to appeal to each other – and through them to us – to something other than, or in addition to, their conventional legal authority sourced in either a written constitutional document or in historical practice. It cannot just be a matter of command and control, or else allegiance threatens to degenerate into servitude. If a constitution is to guarantee political equality, it must contain mechanisms in which the rights and duties of citizens are subject to constant adjustment. This perspective changes the dynamics of consent, presenting the issue more in terms of an ongoing conversation designed to test rules and conventions not just in the abstract but, also in their application to particular contexts, individuals, and groups. This in turn opens up possible answers to the problem of self-rule, since it makes it possible to get closer to the ideal articulated for instance by contemporary republican writers who insist that any context in which a citizen is subject to public power must be open to contestation.<sup>7</sup> As this process of public justification takes place along different pathways and forums, it opens up a scenario in which every case decided by the courts, every legislative debate, and every administrative act are in principle miniature constitutional moments, the cumulative effect of which is to remake and refine the constitution on a daily basis.

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I turn to David Hume to help flesh out this schematic outline. Hume provides the most insightful reading of the diachronic, moral, and complex constitution within the British constitutional tradition.<sup>8</sup> He wrote at a time of immense change, both within a Europe turning away from the old gods and towards the new world of commercial modernity, and also within a freshly minted Britain – Scotland and England having formed Great Britain in 1707. Hume was born in Edinburgh four years later, dying there in 1776, the year of the American Declaration of Independence and Adam Smith's *Wealth of Nations*. While he saw the modern world as a vast improvement on previous eras, Hume's overriding message is one of continuity in social and political life: "that almost *all of what we enjoy in this world is an inheritance from others who went before*. Certainly most of the government that rules in any decent

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<sup>7</sup> PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

<sup>8</sup> Others within the tradition of British constitutional theory have written in a broadly similar way, including Sir Mathew Hale, Adam Smith, Edmund Burke and John Stuart Mill as well as Frederick Hayek and Michael Oakeshott. See THOMAS POOLE, *REASON OF STATE: LAW, PREROGATIVE AND EMPIRE* ch. 8 (2015).

nation is something handed down to us, and most of us must be well served – even best served – if we keep it working well.”<sup>9</sup>

This insight grounds his theory of authority, which he saw as always existing in an internal relation to liberty. In all governments “there is a perpetual intestine struggle, open or secret, between AUTHORITY and LIBERTY; and neither of them can ever absolutely prevail in the contest.”<sup>10</sup> Government exists to bring individuals’ short-term interests into line with everyone’s long-term interest in an orderly society. But authority is not something legislated into existence but rather something established over time, gradually cemented into a people’s habits and customs. Hume deploys a narrative to explain how structures of authority develop out of initially unpromising material. This is his answer to Hobbes and Locke on the social contract. Political communities usually begin in violence (usurpation or conquest) but rulers over time come to appreciate the need for stability and continuity. This leads them into a relationship with the people that goes beyond straightforward subjugation and which engenders over time the constitution of political authority.<sup>11</sup> This is constitutional development patterned on the model of a sentimental education – or *Bildung* – but it is an education that goes both ways, connecting rulers and ruled in a process of mutual reflection through which they come to realize what is valid and important within the claims of the other.

The arrival of constitutional authority is, thus, understood as a process of civilization through which calm passions and deliberation gradually replace violent passions and conflict.<sup>12</sup> A central feature of that story is the move away from a scenario dominated by our primary instincts to indulge ourselves in unlimited freedom or to seek equally unlimited dominion over others to one mediated by laws and customs that aim to ensure that a balance exists between both. The development of law, and the rule of law as an organizing principle, is vital. Law is the slow product of order and of liberty. But once established it had a peculiar and independent staying power – a “hardy plant,” Hume thought, “which will scarcely ever perish through the ill culture of men, or the rigour of the season”<sup>13</sup> – and as such exerts a stabilizing force which helps to ‘lock in’ previous developmental gains.

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<sup>9</sup> RUSSELL HARDIN, *DAVID HUME: MORAL AND POLITICAL THEORIST* 99 (2007). (italics in the original).

<sup>10</sup> David Hume, *Origin of Government*, in *ESSAYS MORAL, POLITICAL AND LITERARY*, *supra* note 6, at 40.

<sup>11</sup> *Id.*

<sup>12</sup> Compare STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

<sup>13</sup> David Hume, *Of the Rise and Progress of the Arts and Sciences*, in *ESSAYS MORAL, POLITICAL AND LITERARY*, *supra* note 6, at 124.

I want to draw three themes from Hume. The first is the constitution as ‘going concern’, the idea that we inherit the constitutions we inhabit and the conventions, traditions, practices, and mores collected within them. Political actors work within a framework that is the result of the accumulation of past *materiel* (institutions, processes, ideas). We walk onto a stage that is already set and choose from a set of masks worn by our predecessors. Hume sees this as inevitable but also on balance a good thing, since he thinks there is nothing worse than the total dissolution of government. The legal and political gaps opened by revolutions give space for elites or demagogues to make themselves master of the people.<sup>14</sup> Locke’s social contract theory is problematic, then, not just because it misrepresents reality but also because it opens itself up to this revolutionary logic, the most likely end of which is oppression. Hume illuminates a less glamorous path. Constitutional politics is centrally and inescapably a matter of competing claims of authority and liberty and takes place within a process of institutional discourse that is largely endogenous or preset in that it builds out a common stock of principles, practices, and assumptions.

Another way of approaching this idea of the constitution as going concern is to think about it as a trust network. Trust materializes among people, Philip Pettit has argued, to the extent that they have beliefs about one another that make trust a sensible attitude to adopt. Trust survives among people to the extent that those beliefs prove to be correct. “Trustors identify reasons to trust others and trustees show that those reasons are good reasons: the trust which they support is generally not disappointed.”<sup>15</sup> This is precisely the sort of scenario Hume identifies. Authority cannot be ascribed to supposedly natural sources or to historical ‘moments.’ Rather it rests on a record of at least relative success and the implicit promise of being able to keep delivering social goods in future. This is a thoroughly modern account of politics not just in its absence of a theological or transcendental dimension but also in the way it puts center-stage the interests of individuals, and by extension the interests of groups (including the entire nation), in its account of the foundation of political authority and of the way in which government ought rightly to be evaluated.

The idea of the trust network can also illuminate the second theme – the constitution as a *complex whole*. Hume emphasized the centrality of social interrelationships even at the level of the formation of the individual.<sup>16</sup> In relation to morals and politics, Hume’s ultimate goal is for us to enlarge our

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<sup>14</sup> Hume, *supra* note 6, at 472.

<sup>15</sup> Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202 (1995).

<sup>16</sup> DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 80 (Stephen Buckle ed., 2007): “The mutual dependence of men is so great in all societies,” he wrote, “that scarce



capacity for mutually adjusted agreement grounded in a socialized and sympathetic reason.<sup>17</sup> Friedrich Hayek, drawing on Hume, described the ideal society as resulting from ‘spontaneous order’. By this, he meant a society not unregulated so much as unguided, or at least not too heavily directed. Political communities are best seen not as something made but as something grown. A good society is typically one that works with the grain of a conventional patterning of relations (*nomos*) and that resists the temptation to control it through too many regulatory laws (legislation) or reengineer it through constitutional design.<sup>18</sup> This is broadly consistent with Hume’s science of politics. To govern a society through general laws, Hume wrote, “is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it.” It is only the united “judgments of many,” a science of prudence, that is capable of doing so. “Experience must guide their labour: Time must bring it to perfection” through a process of “trials and experiments.”<sup>19</sup>

This vision of constitutional politics is anything but static. It assumes the constant evolution of community norms and so presupposes a process of continual adjustment and readjusting of rights and duties, powers, and obligations. The process operates on two planes: vertically between government and citizens, understood as both individuals and groups, and horizontally across those citizens and groups. Change on the vertical axis is likely to affect horizontal relations, and vice versa. My trust in government may vary according to the strategy it adopts in respect of other citizens or groups. Contemporary counterterrorism debates offer a good example. Consider the situation in France after the Charlie Hedbo attack. The French are revisiting not just their security strategy but also the nature of the right to give offence. The debate shows that the regulatory question faced by the state goes beyond the question of what legal relation the state ought to stand in relation to its citizenry. Or rather, it involves a consideration of the effect a suggested change in the law might plausibly have on relations between different groups within French society, and even relations *within* certain groups. The post-Charlie Hedbo debate, like similar debates since 9/11 that have constitutive and integrative dimensions, thus reflects the model suggested in this paper that understands constitutional

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any human action is entirely complete in itself, or is performed without some reference to the actions of others, which are requisite to make it answer fully the intention of the agent.”

17 ANNETTE C. BAIER, *A PROGRESS OF SENTIMENTS: REFLECTIONS ON HUME’S TREATISE* 278 (1991).

18 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY*, VOL. I RULES AND ORDER (1982).

19 Hume, *supra* note 13.

order ultimately as a dense and complex skein of humanity. Constitutional political actions are typically polycentric or “many centered.” Like a spider’s web, each crossing of strands within a constitutional order represents a distinct center for distributing tensions.<sup>20</sup> A change in the law can result in more weight being placed on one or more of those crossing points and this can have wide-ranging and not necessarily predictable impact elsewhere.

This leads to the third theme – the constitution as a framework of moral sentiment. Hume thought that while a polity might originate in power it is public opinion that guarantees whether a constitution stands or falls: “as FORCE is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded.”<sup>21</sup> Hume echoes here that well-known softie Thomas Hobbes, who wrote in *Behemoth* that “the power of the mighty hath no foundation but in the opinion and belief of the people.”<sup>22</sup> One might object that such a view is outdated. The modern state has a vast capacity for force at its disposal – resources beyond the dreams of its early-modern predecessor, incredible surveillance and intelligence powers, access to powerful and diverse weapons. And yet, there remains a kernel of truth to Hume’s position. Recall that his position is one that works over time. *In the end*, he suggests, governments will tend to move from force towards opinion as they look to stabilize themselves. This seems plausible, not least because it is hard to sustain a regime based on force for a long period, especially through changes of leadership. In any case, it appears generally easier to reap the rewards of power from a more pliant population; and people who are willing to accept commands as authoritative tend to be more pliant than those who are forced. And the very size and complexity of the modern state apparatus may make it *harder* to run things through force for the simple reason that a ruling group has to win over and keep the loyalty of more people and more institutions.

The idea of the constitution as a framework of moral sentiment can also be translated into the language of the trust network, a feature of which is its transitive quality. If things are going well, we expect trust to build on examples of trustworthy behavior, likely geared towards some goal or common good. Where things are going badly, where we no longer believe in an institution or person’s trustworthiness, trust erodes and with it goes our faith in their capacity to deliver on expectations. Being an interactive relationship that builds on past

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<sup>20</sup> Lon L. Fuller, *The Form and Limits of Adjudication*, 92 HARVARD L. REV. 353 (1978).

<sup>21</sup> David Hume, *Of the First Principles of Government*, in *ESSAYS MORAL, POLITICAL AND LITERARY*, *supra* note 6, at 32.

<sup>22</sup> THOMAS HOBBS, *BEHEMOTH, OR THE LONG PARLIAMENT* 16 (Stephen Holmes ed., 1990).

practice and current beliefs in order to project into the future, trust tends to grow or diminish with use.<sup>23</sup> Building trust is, as such, a dynamic process, not least because past practice ('tradition') can be re-evaluated in light of changes in present behavior or future concerns. Traditions are invented, made and remade continually in the interests of the present.<sup>24</sup> This process can help make a constitutional order strong despite a multiplicity of voices and interests, as roots are dug into the community's half-imagined past. But it also explains a constitution's peculiar fragility. A constitution can be destabilized, not just through sudden explosions of violence, but more gradually and subtly by inclining too strongly towards either liberty or authority. The first path can lead to anarchy and eventual autocracy – Hume had in mind the fate of England's 'republican moment' after the Civil War<sup>25</sup> – the second to absolutism and the prerogative state.<sup>26</sup> This negative dimension of the constitution as a framework of moral sentiment – specifically the idea of a *regression* of moral sentiments – was exploited by Edmund Burke, who developed an account of the contagious feedback loops and destructive possibilities inherent first in relation to Britain's proto-imperial involvement in India and later in reflecting on the Revolution in France.<sup>27</sup>

## Change, Convention, and the Human Rights Act

The themes identified so far – *conventions*, *complex whole*, *opinion* – provide the structure for the rest of the paper. The focus of enquiry is the constitutional politics surrounding the United Kingdom Human Rights Act 1998 (HRA),<sup>28</sup> a major addition to British law – a leading commentator calls it the "cornerstone of the new British constitution."<sup>29</sup> It incorporated the European Convention on

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23 Pettit, *supra* note 15, at 210.

24 THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., 1992).

25 DAVID HUME, VI HISTORY OF ENGLAND (1983) available at <http://oll.libertyfund.org/titles/793>.

26 David Hume, *Whether the British Government Inclines More to Absolute Monarchy, or to a Republic*, in ESSAYS MORAL, POLITICAL AND LITERARY, *supra* note 6, ch. 7.

27 Edmund Burke, *Speech on Fox's India Bill Dec 1, 1783*, in REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., 2004); EDMUND BURKE, LETTERS OF A REGICIDE PEACE (1999).

28 Human Rights Act, 1988, c. 42 (U.K.).

29 VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION ch. 3 (2009).

Human Rights (ECHR)<sup>30</sup> into domestic law, allowing litigants to make claims on the basis of Convention rights to a much greater extent than had previously been possible in British courts.

We examine the reception of the HRA by concentrating on a seminal case and exploring its implications for British constitutional politics. The case is *A v. Home Secretary* (2004), or the *Belmarsh* case, where the Law Lords ruled that a key part of the government's post-9/11 terrorism strategy contravened the ECHR.<sup>31</sup> The choice is an obvious one, especially given present concerns. *Belmarsh* is the most important case decided under the HRA and now acts as a *locus classicus* of British public law. In mediating the demands of public reason and reason of state through a determination of what government can do to bend and reshape law in the interests of public safety, the case helped to define more than any other the contours of the new relationship between public law and sovereign authority. But in addition the case also directly addressed questions of legal exclusion and inclusion and fed directly into broader constitutional political debates on human rights and security, radical Islam, and nationhood.

## The Case

The case was brought by a number of foreign nationals who were detained without charge or trial as suspected terrorists under provisions of the Anti-Terrorism, Crime and Security Act 2001. The case addressed two issues. The first was whether the government's derogation from the European Convention in respect of the detention measures was lawful. Article 15 of the Convention provides for a state to derogate from certain obligations in time of "war or other public emergency threatening the life of the nation." The government invoked this power in order to derogate from Article 5 (the right to liberty) in respect of the power to detain within the Act. The second issue was whether the statutory provisions under which the claimants had been detained were strictly necessary in order to deal with the emergency, as prescribed by Article 15.

By an eight-to-one majority, the Law Lords quashed the derogation order<sup>32</sup> and issued a declaration under the Human Rights Act 1998 to the effect that the

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<sup>30</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, amended by Protocol 3, Sept. 21, 1970, Eur. T.S. No. 45, Protocol 5, Dec. 20, 1971, Eur. T.S. No. 55 and Protocol 8, Jan. 1, 1990, Eur. T.S. No. 118.

<sup>31</sup> *A v. Home Secretary*, [2004] UKHL 56 [hereinafter *Belmarsh*].

<sup>32</sup> Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).

2001 Act was incompatible with the Convention. The majority held that, while the question whether there existed a public emergency was one only the government could take, the detention provision was not ‘strictly required’ by the emergency the government understood the country to be facing when the Act was passed: it was disproportionate and discriminatory and so unlawful. One majority judge, Lord Hoffmann, would have gone further in holding the derogation order unlawful on the basis that there was no “war or other public emergency threatening the life of the nation” within the meaning of Article 15.

The judgment in the *Belmarsh* case was in line with what the text of the HRA might be said to require, especially in light of the relevant ECHR jurisprudence.<sup>33</sup> The European Court of Human Rights later approved it on that basis.<sup>34</sup> To that extent, the case can be understood as a reflection of the Strasbourg Court’s typical “cocktail of robustness and timidity” when it comes to hearing challenges to measures justified on the ground of public emergency.<sup>35</sup> The orthodoxy of the case in terms of the paradigm of European human rights law removes a potential complicating factor, allowing us to concentrate on the reaction of other institutions and within the body politic as a whole. For the *Belmarsh* case was, like a stone thrown into water, to have a sustained ripple effect. As the story is quite involved, it is present in somewhat schematic form.

## The Aftermath

1. The *Belmarsh* decision was handed down (December 2004) and had an immediate impact on public debate.<sup>36</sup> It was a big news story.<sup>37</sup> Media coverage was largely supportive of the decision.

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<sup>33</sup> See, e.g., *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1960–61); *Brogan v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) (1988); *Brannigan & McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993); *Aksoy v. Turkey* 23 Eur. H.R. Rep. 553 (1996); *Sakik v. Turkey*, 26 Eur. Ct. H.R. 662 (1998); *Demir v. Turkey*, Eur. Ct. H.R. 88 (2009). HRA, sect. 2 (*supra* note 32) requires the court to “take into account” such decisions.

<sup>34</sup> *A v. United Kingdom*, Eur. Ct. H.R. 301 (2009).

<sup>35</sup> OREN GROSS & FIONNUALA NÍ AOLAIN, *LAW IN TIMES OF CRISIS* 272 (2006).

<sup>36</sup> The narrative really starts earlier, either with the ATCSA itself or with the Strasbourg Court’s *Chahal* ruling (see *infra* note 52), which established the legal framework in which ATCSA was designed to operate.

<sup>37</sup> See, e.g., *Terror Detainees Win Lords Appeal*, BBC NEWS, Dec. 16, 2004, available at <http://news.bbc.co.uk/1/hi/uk/4100481.stm>; *Terror Suspects Win Lords Appeal Against Detention*, THE TELEGRAPH, Dec. 16, 2004, available at <http://www.telegraph.co.uk/news/1479156/Terror-suspects-win-Lords-appeal-against-detention.html>.

2. The government thought about it.<sup>38</sup> Legally, it might in principle have elected not to change much in response to the ruling.<sup>39</sup> Under the Human Rights Act, a declaration of incompatibility imposes no legal duty on the government to repair a breach of the Convention and does not change the legal status of the parties to the case.<sup>40</sup> But it chose to obey. The Prevention of Terrorism Act 2005, which brought in the control orders regime to replace detention provisions, was passed in March 2005.
3. Beneath this surface obedience, it is possible to detect a mixture of strategic calculation and determination on the government's. Strategic in that it increasingly packaged counter-terrorism measures in the language used by the courts: proportionate response, non-discrimination and so on. It also co-opted judges into the new mechanisms of control. Determined in that the new anti-terrorism measures were in a different way as intrusive as the measures they replaced.<sup>41</sup> *Belmarsh* did not directly lead, then, to a substantially more liberal counter-terrorism policy – although that which it did produce tended to be subject to greater legal control.<sup>42</sup>
4. The government began to argue that the court was obstructing the policy necessary to protect the nation from terrorist attack.<sup>43</sup> After all, the argument went, the courts were in no position to know the danger and did not have the capacity to assess it. The government did have the relevant intelligence, much of which could not be publicly released, and the

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**38** Indeed, the Home Secretary was under pressure from MPs to make the government's position clear: MPs David Hencke & Clare Dyer, *Round on Clarke Over Belmarsh Ruling*, Dec. 21, 2004, available at <http://www.guardian.co.uk/politics/2004/dec/21/humanrights.terrorism>.

**39** Although to do so would have run the risk of an adverse ruling from the European Court of Human Rights. For the Eur. Ct. H.R.'s position on the HRA, see *Burden and Burden v. UK*, Eur. Ct. H.R. 1064 (2006). It would in any case have had to repair the damage caused to the derogation order struck down by in *Belmarsh* (*supra* note 31).

**40** For critical analysis, see Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, PUB. L. 306 (2005).

**41** For analysis, see Clive Walker, *Keeping Control of Terrorists without Losing Control of Constitutionalism*, 59 STANFORD L. REV. 1395 (2007).

**42** For analysis, paying particular attention to the rulings of the lower courts, see Adam Tomkins, *National Security and the Role of the Court: A Changed Landscape?* 126 L. Q. REV. 534 (2010).

**43** Most notably in Tony Blair PM's "rules of the game are changing" speech on Aug. 5, 2005, delivered one month after the 7/7 London bombings. See, e.g., Patrick Wintour, *Blair Vows to Root Out Extremism*, THE GUARDIAN, Aug. 6, 2005, available at <http://www.guardian.co.uk/politics/2005/aug/06/terrorism.july7>.

expertise to make sense of it.<sup>44</sup> The court itself is sometimes receptive to this argument.<sup>45</sup> Its first national security decision after 9/11 had explicitly accepted its force.<sup>46</sup>

5. The next series of terrorism cases produced equivocal results. A judgment delivered by the House of Lords a year after *A v. Home Secretary* included a forthright declaration of the repugnance of torture to the common law – and a rebuke to the Court of Appeal’s rather different, even diffident, response to the question. Still, the majority took a more pro-government position on defining the test to be used to decide on the admissibility of evidence that may have been obtained through torture.<sup>47</sup> Further, the Law Lords were unable to mount a united front when the first challenges to the application of control orders reached them.<sup>48</sup> Clearly, many of the judges did not like the new policy. But they felt unable (or unwilling) to dismantle it.<sup>49</sup> Control orders were potentially legitimate, they ruled, subject to certain limits and conditions.<sup>50</sup> However, the crucial question of what procedural protections were necessary for the application of control orders received no clear response, a lack of clarity that the Law Lords only managed to correct<sup>51</sup> under direction from the European Court of Human Rights.<sup>52</sup>

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**44** For largely unconvincing criticism of this position, see David Feldman, *Human Rights, Terrorism and Risk: the Roles of Politicians and Judges*, PUB. L. 364 (2006).

**45** Adam Tomkins, *National Security and the Due Process of Law*, 64 CURR. LEGAL PROB. 215, 240–43 (2011).

**46** *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, where Lord Hoffmann said: “the recent events in New York and Washington ... are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown.” See also, e.g., *R (Corner House Research) v. Director of the Serious Fraud Office*, [2008] UKHL 60.

**47** *A v. Secretary of State for the Home Department*, [2005] UKHL 71.

**48** *Secretary of State for the Home Department v. JJ*, [2007] UKHL 45; *Secretary of State for the Home Department v. MB*, [2007] UKHL 46; *Secretary of State for the Home Department v. E*, [2007] UKHL 47. For analysis, see Thomas Poole, *Courts and Conditions of Uncertainty in Times of Crisis*, PUB. L. 234 (2008).

**49** The lack of consistency – most dramatic in relation to Lord Hoffmann – was noted by commentators at the time: see, e.g., *Law Lords Show Who’s in Control*, THE TELEGRAPH, Apr. 12, 2008, available at <http://www.telegraph.co.uk/news/1567905/Law-lords-show-whos-in-control.html>.

**50** For detailed analysis, see Gavin Phillipson & Helen Fenwick, *Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond*, 56 MCGILL L. J. 863 (2011).

**51** See *Secretary of State for the Home Department v. AF (No.3)* [2009] UKHL 28.

**52** See *A v UK*, 27 Eur. H.R. Rep. 611 (1999).

6. In a parallel development, the government sought to revive a strategy of deporting foreign terrorist suspects. The difficulty it faced was the *Chahal* case in which the European Court of Human Rights ruled that deportation violates the Convention where there is a real risk that the deportee will suffer torture or inhuman and degrading treatment as a result.<sup>53</sup> In this context, the ruling in practice prevents deportation of a small number of well-watched individuals. It is unlikely that the direct threat they pose is considerable. The point seems to be as much one of principle and constitutional politics (who gets to decide?) as genuine policy. The government often ties this strategy to the general argument noted in point 4, claiming that the courts are getting in the way of the government's fundamental duty to ensure the people's safety. The game continues, with regular press reports of frontline skirmishes involving multiple and overlapping appeals and stratagems to deport.<sup>54</sup> Whatever the precise motives of the various players, it has perhaps done more than anything else to make the HRA culture in Britain look ridiculous in the eyes of many, a perception that the three top-selling newspapers in their respective categories of tabloid, middle-market, and broadsheet – the *Sun*, the *Daily Mail* and the *Daily Telegraph* – have only been too keen to foster.<sup>55</sup>
7. A common feature of the post-*Belmarsh* cases is secrecy. In a sense, this is nothing new. Secrecy has always been a defining feature of national security politics. But the specific argument about the role of special advocates in control order cases – who are not allowed to interact with those subject to control orders on whose part they argue in court – spilt over into a wider debate about the suitability of secret justice (“closed material proceedings”) in cases where national security is at stake.<sup>56</sup> Particular exceptions to normal practice justified on grounds of emergency have been expanded into more general (and so apparently more ‘normal’) exceptional practices. The Justice and Security Act 2013 now requires courts to consider using

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<sup>53</sup> *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1996).

<sup>54</sup> Most notably, involving Abu Qatada. The BBC has produced a useful timeline detailing the labyrinthine legal process to date, available at <http://www.bbc.co.uk/news/uk-17769990>. The timeline needs updating to include important events, including Abu Qatada's eventual deportation to Jordan in July 2013, his trial, and acquittal in the summer of 2014 on terrorism charges.

<sup>55</sup> See, e.g., Ian Loader, *The Cultural Lives of Security and Rights*, in SECURITY AND HUMAN RIGHTS (Benjamin Goold & Liora Lazarus eds., 2007).

<sup>56</sup> See, e.g., *Binyam Mohamed* case (*R. v. Secretary of State for Foreign Commonwealth Affairs*, [2008] EWHC 2048; *Al Rawi v. The Security Service*, [2011] UKSC 34; see also *Tariq v. Home Office*, [2011] UKSC 35; *Bank Mellat v. Her Majesty's Treasury*, (No.1) [2013] UKSC 38; *Bank Mellat v. Her Majesty's Treasury*, (No.2) [2013] UKSC 39.



closed material proceedings where there is a risk that sensitive material would be disclosed in the course of the proceedings.<sup>57</sup> The effect of using a CMP is to allow the court to consider any sensitive material without it being disclosed to the other party in the case, and so constitutes a significant incursion on principles of equality of arms and open justice that underpin the adjudicatory process.

8. More generally – a further ripple – the *Belmarsh* case in particular, but also the events that it helped set in train, caused great concern among political actors inside and outside Parliament, not only for the specific reasons noted in point 4 but on wider constitutional grounds. The key principle of the British constitution at least used to be parliamentary sovereignty, understood as meaning that Parliament legally had the right to make a final decision on any matter. The HRA was not intended to lead to the demise of that principle. But its effect might be said to have significantly eroded parliamentary sovereignty – at least this is what *Belmarsh* is often taken to show. Senior judges have said in other cases that they understand parliamentary sovereignty to operate now in a different way, subordinate at least *in extremis* to fundamental constitutional values connected with a substantive conception of the rule of law.<sup>58</sup>
9. A related point. The constitutional narrative surrounding *Belmarsh* fed into another. This saw the Human Rights Act as an alien (“European”) imposition on a perfectly healthy native (“British”) system. The constitutional point noted in the previous point here seeps into questions of identity and destiny that form part of a “debate on Europe” in which the central concern is the UK’s membership of the EU. This narrative means putting HRA on the wrong side of the line, as something to do with ‘them’ rather than ‘us’.<sup>59</sup> This sentiment may prove fatal to the HRA – at least in its current form – unless it is checked or reversed.
10. Point 4 (the claim that ‘the courts are compromising security’) combines with other single-issue narratives (e.g. that the HRA is a ‘charter for

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<sup>57</sup> Justice and Security Act 2013, Part II, s.6.

<sup>58</sup> *Jackson v. Attorney-General*, [2005] UKHL 56; *AXA General Insurance Ltd v. Lord Advocate*, [2011] UKSC 46; *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, [2014] UKSC 3. See also Bogdanor, *supra* note 29.

<sup>59</sup> See, e.g., the parliamentary and public debate on prisoners’ voting rights in the wake of the ECtHR decisions in *Hirst v. United Kingdom* ((No.2) Eur. Ct. H.R. 681 (2005)) and *Scoppola v. Italy*, ((No.3) Eur. Ct. H.R. 868 (2012)). See Peter Ramsay, *Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy*, 16 CRIT. REV. INT’L SOC. & POL. PHIL. (2013); Danny Nicol, *Legitimacy of the Commons Debate on Prisoner Voting*, PUBLIC L. 681 (2011).

criminals, prisoners, terrorists and immigrants<sup>60</sup>) and all of them with general constitutional points in the last two paragraphs to put very serious pressure on the HRA.

## Analysis

Many observations could be made on the basis of this account of the *Belmarsh* plotline. Comments are limited to those that relate to the framework of analysis developed earlier, specifically to the three themes of convention, complex whole, and opinion. *A v. Home Secretary* is an illustration of the conventional patterning of constitutional change. This is clear from the judgments themselves, which tend to emphasize more familiar elements by noting their consonance either with a growing transnational set of norms governing emergency action, most developed in the framework of European human rights law (e.g., Lord Bingham), or with deeper strata of British constitutional practice (e.g., Lord Hoffmann). The after-effects of the case illustrate clearly how major judgments such as *Belmarsh* are made sense of in light of existing legal and constitutional structures – and that it is precisely the process of making such changes fit (and stick) that truly generates constitutional change.

The case study shows how this process is not just a question of specifics, of fitting a particular decision within a body of pre-existing law, juridically significant though that task might be. Realizing the integrity of public law involves the reconciliation of various strands of law, principle, and practice.<sup>61</sup> The analysis indicates how political actors and other commentators tend to fold a case like *A v. Home Secretary* within a narrative to which meaning – constitutive, identity-forming, normative – can more easily be ascribed. So, *Belmarsh* becomes synonymous with – take your pick – judicial overreach, the invasion of native politics by a foreign legal culture, or the brave stand of judges against a manipulative and over-zealous government. The tendency to construct narratives may result from our need to make things manageable by turning them into stories. It serves as a heuristic. Given earlier observations about constitutions and trust, it might also be understood as a technique for making visible what is most at stake in a putative constitutional change in terms of an on-going pattern of trust relations. Narratives arguably make it easier to isolate a particular

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<sup>60</sup> On the latter, see, e.g., Lauren McLaren and Mark Johnson, *Understanding the Rising Trend of Anti-Immigrant Sentiment*, in BRITISH SOCIAL ATTITUDES SURVEY, 21<sup>ST</sup> REPORT 172 (Alison Park, John Curtice, Katarina Thomson, Catherine Bromley, & Miranda Phillips eds., 2004).

<sup>61</sup> For Ronald Dworkin's analogous idea of "law as integrity," see LAW'S EMPIRE (1986).

change and to ask whether it is likely to have a positive impact on the provision and guarantee of desired social goods.

## Public Opinion and the Human Rights Act

Constitutional narratives are formed largely outside the legal epistemic community. Once up and running, they have their own momentum and can have cascading or spiraling potential. That can be beneficial when a “good” constitutional norm or arrangement is in question, as a cascade of positive narratives can help embed that change. But narrative momentum can work the other way, working against the recognition or uptake of a norm or constitutional arrangement. This dimension of the constitutional argument is addressed in this section, which explores public opinion and the Human Rights Act, a subject that has received insufficient scholarly attention. We start by tracking the position on the HRA of the main political parties. Although arguably a declining force within European politics,<sup>62</sup> parties remain important mediators between elite and popular opinion.

The Conservative Party, the dominant party in the Coalition Government of 2010–15, and now the governing party opposes the HRA. Its opposition has ranged from the tepid – it abstained on the second reading of the Human Rights Bill – to the vocal. The Party manifesto going into the 2010 general election pledged to replace the HRA with a “British Bill of Rights.” Its position has hardened over the intervening period.<sup>63</sup> Their latest proposal is to use the text of the European Convention in a new British Bill of Rights, while attempting to reduce the influence of the European Court of Human Rights so as to produce a more restrained set of rights and a weaker enforcement mechanism. The minor party in the Coalition government, the Liberal Democrats, is committedly pro-European and pro-Convention. The Coalition Government set up a Commission on a Bill of Rights as a means of negotiating the opposed positions of the coalition parties on the HRA. The Commission’s strange report does little more than sketch the contemporary scene. Proposals are vague, although a majority of Commissioners did support a UK Bill of Rights in one form or another. The Commission did note, though, a lack of popular ownership of the HRA:

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<sup>62</sup> Although this capacity seems to be on the wane, at least within Europe: See PETER MAIR, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* (2013).

<sup>63</sup> See, e.g., *David Cameron: Scrap the Human Rights Act*, DAILY TELEGRAPH, Aug. 24, 2007; CONSERVATIVE PARTY, *PROTECTING HUMAN RIGHTS IN THE UK: THE CONSERVATIVES’ PROPOSALS FOR CHANGING BRITAIN’S HUMAN RIGHTS LAWS* (2014).

While polling on these issues is notoriously unreliable ... even the most enthusiastic advocates of the UK's present human rights structures accept that ... there is a lack of public understanding and 'ownership' of the Human Rights Act. If that is true of the Human Rights Act, these members believe that it is equally, if not even more, evident in relation to the European Convention on Human Rights and the European Court of Human Rights with the result that many people feel alienated from a system that they regard as 'European' rather than British. In the view of these members it is this lack of 'ownership' by the public which is, in their view, the most powerful argument for a new constitutional instrument.<sup>64</sup>

The *Belmarsh* case and its progeny largely reinforced long-held attitudes among Conservatives and Liberal Democrats. The position of the Labour Party has been more varied. Historically antithetical to rights, they were included in the Party's platform in the 1990s. However, having enacted the Human Rights Act in 1998, at least some party leaders became increasingly hostile to the constitutional culture the Act seemed to have produced. Tony Blair PM spoke out against it after the July 7 bombings in London, as did a number of his leading ministers.<sup>65</sup> The last Labour Prime Minister, Gordon Brown, made moves in the direction of a British Bill of Rights and Responsibilities. Presently, and despite some noises off, it is official party policy to support the Human Rights Act.<sup>66</sup>

The most notably new development in British party politics has been the rise of the UK Independence Party. UKIP supports the abolition of the HRA and withdrawal from both the European Convention and the European Union.<sup>67</sup> The party's rise has had a wider impact on the public debate, a feature of which is the hardening of the final narrative point critical of the HRA outlined in the previous section. One index of this is the coarsening of the debate on constitutional politics, a phenomenon visible in the way that many politicians, even at the highest level, have criticized the human rights judgments of British courts – even more so in the way in which many political actors, including senior judges, routinely criticize the European Court of Human Rights. This is part of a “new era of vulgarity” in British constitutional politics, Conor Gearty argues. “The

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<sup>64</sup> THE COMMISSION ON A BILL OF RIGHTS, *A UK BILL OF RIGHTS? THE CHOICE BEFORE US*, para. 80 (2012).

<sup>65</sup> See, e.g., Neil Temko & Jamie Doward, *Revealed: Blair Attack on Human Rights Law*, THE OBSERVER, May 14, 2006.

<sup>66</sup> See, e.g., Nigel Morris, *Labour Party Conference: Sadiq Kahn Vows to Put Human Rights at Heart of General Election Campaign*, THE INDEPENDENT, Sept. 24, 2014.

<sup>67</sup> UKIP garnered 27% of the votes at the 2014 European elections, returning more MEPs than any other political party. At the time of writing, opinion polls polling show UKIP at around 15% (compared with 34% for Labour, 32% Conservative and 8% Lib Dem): THE OBSERVER, Feb. 8, 2015.

extraordinary way in which our public culture has been mustered to savage the Strasbourg court is one of the dismal wonders of our politically constricted age.”<sup>68</sup>

But to what extent does the hostility to the Human Rights Act, as reflected in UKIP policy and fostered by certain influential newspapers (see above), reflect the opinions of the public more broadly? Certainly, the advocates of a Private Members’ Bill – a legislative proposal introduced by MPs who are not government ministers – in 2013 to repeal the HRA think that it does. The sponsor of the Bill, Charlie Elphicke, claimed during the parliamentary debate that human rights were “in crisis today, with a substantial majority of the British people regarding human rights as a charter for criminals and the undeserving.”<sup>69</sup> A “new settlement” was needed, he said, “to restore trust and confidence in human rights – a settlement that works for Britain.”<sup>70</sup> Elphicke and his supporters had no hesitation in naming the HRA as the cause of the current discontent, claiming that it had “without doubt, transformed human rights in the UK in ways that are wholeheartedly rejected by the British people.”<sup>71</sup>

It is difficult to say whether such claims are accurate. Little polling data is available or much by way of empirically informed analysis on the HRA and public opinion. The issue also raises more general questions about what people know about law and the constitution and what they expect from it. Let us try, though, to make something with what is available. There are a small number of opinion polls that shed light on different aspects of the question. First, there is the *YouGov/ITV* poll of 2456 British adults conducted in March 2011.<sup>72</sup> The survey asked three questions. To the question ‘do you think that human rights laws are good for British justice?’ 22% said good, 51% bad, 18% neither good nor bad, and 9% didn’t know. To the question ‘do you agree that everyone should have their rights protected, even if they have broken the law?’ 31% said yes and 64% no. To the last question asking whether respondents thought the HRA was being overused, 75% thought that it was being overused, 4% underused, 12% said it was being used about right, and 9% didn’t know. Taken in isolation, the survey would seem to indicate that public opinion has gone the same direction as much

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<sup>68</sup> Conor Gearty, *On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights*, The Corbishley Lecture (Nov. 7, 2014).

<sup>69</sup> Human Rights Act 1998 (Repeal and Substitution) Bill, House of Commons, *Hansard*, 1 Mar. 2013: Column 574.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> YouGov/ITV (2011), available at [http://cdn.yougov.com/today\\_uk\\_import/yg-archives-pol-yougovitv-humanrights-240311.pdf](http://cdn.yougov.com/today_uk_import/yg-archives-pol-yougovitv-humanrights-240311.pdf).

of the press coverage of the HRA – a majority hostile to (or at least critical of) the Act, but a substantial minority that is broadly supportive.<sup>73</sup>

A second survey, conducted by *Ipsos/MORI* as part of their ‘Audit of Public Engagement’ in March 2007<sup>74</sup> asked a series of questions concerning public understanding of the HRA and public approval of the HRA. In response to the question ‘how well do you understand the way the HRA works in practice?’ only 29% said ‘well’ and just 5% ‘very well’. To the question ‘how well do you understand the issues relating to whether Britain needs a Bill of Rights?’ 23% said well and 5% very well. As to the question ‘are you satisfied with the way the HRA works in practice?’ 2% were very satisfied, 22% fairly satisfied, 21% fairly dissatisfied and 10% very unsatisfied. Many respondents replied to this question either ‘neither/no’ (32%) or ‘don’t know’ (13%). The way the HRA works in practice was the constitutional issue respondents thought most urgently in need of change (26%) – above, for instance, the funding of political parties (24%) and Britain’s membership of the EU (23%). In response to the question ‘are you satisfied in Britain not having a Bill of Rights?’ 4% said very satisfied, 15% fairly satisfied, 12% fairly dissatisfied and 6% very dissatisfied. (42% answered ‘neither/nor’ and 21% ‘don’t know’.) In its analysis of the Audit, the Hansard Society – a well-known political research and education charity – notes further that the HRA is an issue that has exercised parts of the press. The survey showed that “the balance of opinion is slightly more towards satisfied among quality newspaper readers, and slightly more towards dissatisfied among readers of tabloid newspapers.”<sup>75</sup> The issue scored highly as one of the most urgent issues for reform, among readers of both quality and tabloid newspapers.<sup>76</sup>

A third poll, the *ComRes Liberty Human Rights Poll*,<sup>77</sup> surveyed 1007 adults in September 2011. Unlike the other two, this poll asked respondents about their attitudes to rights and the law in Britain more generally. In reply to the question ‘how important do you think it is that there is a law protecting rights and

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<sup>73</sup> The survey also revealed a fair amount of regional and age-related diversity of opinion, with those living in London (and Scotland and Wales) and young adults being more favorable to the HRA.

<sup>74</sup> IPSOS/MORI, AUDIT OF POLITICAL ENGAGEMENT 5 (2008), available at <http://www.ipsos-mori.com/researchpublications/researcharchive/162/Audit-of-Political-Engagement-5.aspx>.

<sup>75</sup> HANSARD SOCIETY, AUDIT OF POLITICAL ENGAGEMENT 5, 31 (2008).

<sup>76</sup> *Id.* See also Mark Johnson & Conor Gearty, *Civil Liberties and the Challenge of Terrorism*, in, BRITISH SOCIAL ATTITUDES: 23RD REPORT – PERSPECTIVES ON A CHANGING SOCIETY ch. 7 (A. Park, C. Curtice, K. Thomson, M. Phillips, & M. Johnson eds., 2007).

<sup>77</sup> Available at [http://www.comres.co.uk/polls/Liberty\\_HRA\\_Tracker\\_Public\\_Poll\\_Sept\\_2011.pdf](http://www.comres.co.uk/polls/Liberty_HRA_Tracker_Public_Poll_Sept_2011.pdf).

freedoms in Britain?’ 65% said very important, 29% fairly important, 3% fairly unimportant and 4% very unimportant. Similar results were recorded for more specific questions relating to the right not to be tortured, the right not to be detained without reasons, the right to a fair trial, freedom of thought, conscience and religion, the right to privacy, family life and the home, freedom of speech, protest and association, and the right to property. In all cases, the net vital/important/useful score was in the 90s (one was 89) and the net vital/important score in the 80s. The campaign group *Liberty* was clearly pleased with the results of its poll. Its Director Shami Chakrabati said, taking aim at the Conservative Party, “Why put your party at odds with 93 per cent of people polled who value human rights protection in this country?”<sup>78</sup>

What are we to make of this material? I am reluctant to ignore it, as the Commission on a Bill of Rights did. The surveys provide rare glimpses into public attitudes on matters that we, as scholars and advocates, can sometimes be too invested in to have a clear sense of where trends of opinion are heading. Let us take the last one (*ComRes*) first. Can it be written off as a stunt organized by a pressure group asking motherhood and apple pie questions? Perhaps. But the poll has been repeated twice since 2011, producing very similar results.<sup>79</sup> And its findings are broadly supported by another study, undertaken by the *British Social Attitudes* survey, which reinforces the impression that political freedoms are, on the whole, consistently highly valued by the public. Based on a sample set of over 4,000 cases, that survey found that the right to protest against government and the right to trial by jury for serious crimes were valued as important by respondents (64% and 88% respectively).<sup>80</sup> The high percentages in both these studies seem to indicate something important about legal/political sensibilities: that people value legal guarantees of (certain) rights and expect there to be legal protection of those rights. The *British Social Attitudes* survey also indicates that these figures are fairly robust over an extended time period (in the case of the survey, a 20 year period from 1985–2005).

What, then, about the second (*Ipsos/MORI*) survey? This strikes me as perhaps the most credible of the three, in part at least because it separates out

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<sup>78</sup> “Dog whistles, bogus cats and what the public really think about human rights” (Oct. 4, 2011), available at <https://www.liberty-human-rights.org.uk/news/press-releases/dog-whistles-bogus-cats-and-what-public-really-think-about-human-rights>.

<sup>79</sup> See *Liberty Human Rights Tracker*, available at <http://www.comres.co.uk/polls/liberty-human-rights-tracker/>.

<sup>80</sup> National Centre for Social Research, *British Social Attitudes Survey 2007*. For analysis, see Johnson & Gearty, *supra* note 76. It is fair to say, however, that certain other rights appear to be less highly valued, perhaps most notably the right not to be held by police without access to a solicitor.



questions of understanding and satisfaction. The picture that comes out of it is equivocal. Levels of understanding are pretty low, but not disastrously so (some other areas of the British constitution and its politics fared worse). Satisfaction scores were fairly even – 24 % net support versus 31 % net unfavourables – but with a lot of respondents (45 %) effectively neutral. The first (*YouGov*) survey sits almost at the opposite end of the spectrum from the *ComRes/Liberty* poll. The HRA's unfavourables here are consistently high. Could it be that the dates at which the surveys were undertaken may explain some of the difference? The *Ipsos/MORI* survey dates from 2008, the *YouGov* poll from 2011. If so, the two polls in conjunction may show a hardening of public attitudes to the HRA. (The *ComRes* survey, also of 2011, did not ask directly about attitudes to the HRA.) Beyond this, the most interesting response for me is the very high percentage (75 %) of respondents who agreed that the HRA was being used too widely to create rights it was never intended to protect.

We can make some tentative observations. First, there may be a disjunction between elite (legal) opinion and that of the populace at large. Even the HRA's supporters recognize this. 'Despite its general popularity among lawyers, the HRA did not in its first decade succeed in achieving broad political appeal and its future remains uncertain.'<sup>81</sup> Second, while there may well be near consensus support for the values embedded in the European Convention, people remain unconvinced (to put it mildly) that the HRA is the right vehicle for articulating those values. The Act has "distinctly failed to build up any intellectual or political head of steam."<sup>82</sup> Third, one of the reasons why this might be so is a level of general satisfaction (or, more accurately, lack of dissatisfaction) with existing constitutional arrangements.<sup>83</sup> As two leading American commentators put it, "it is a land in which self-satisfaction about the rights of Englishmen under common law has dampened ideological concerns for independent guarantees of private rights."<sup>84</sup> Stripped of the pejorative language, we might say that the public, by and large, are unconvinced about the need to change a

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**81** STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 156 (2013).

**82** CONOR GEARTY, *Beyond the Human Rights Act*, in 2 *THE LEGAL PROTECTION OF HUMAN RIGHTS* 472 (Tom Campbell, K D Ewing, & Adam Tomkins eds., 2011).

**83** Although not, at least in some quarters, with the existing British *state*: the independence referendum in Scotland resulted in a 55–45 'no' vote. A poll of 2,047 voters (by Lord Ashcroft Polls) revealed that 71 % of those age 16–17 and 59 % of those age 25–34 voted yes. Available at <http://www.theguardian.com/politics/2014/sep/20/scottish-independence-lord-ashcroft-poll>.

**84** MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* 156 (2002).



system that they regard as basically fit for the purpose.<sup>85</sup> Finally, we might add that a sense of uncertainty and disagreement about a new and significant constitutional innovation is probably to be expected, and is not necessarily a bad thing. Examples abound, but staying with Britain we might recall the intense disagreement surrounding the Reform Acts that widened the franchise both at the time they were passed and in the years that followed.<sup>86</sup> Constitutional change necessitates periods of adjustment, perhaps all the more so in the absence of genuine crisis moments (the end of civil war, revolution) where the need for constitutional change is likely to present itself as a necessity.

Stepping back a little, we can present three alternative models of what is going on. The first, the ‘Catch Up’ or ‘Delayed Reaction’ model, would suggest that what we are seeing is a straightforward and relatively common occurrence of popular opinion taking time to catch up with elite opinion.<sup>87</sup> In time, enough people will adjust their normative horizons to include the new phenomenon. I suspect that many British public lawyers intuitively subscribe to something like this view. It is not implausible. The longer the HRA survives the more likely that it will prove correct. It does, though, tend to view the populace as passive agents. There is not too much support for this model in the data – but the model can explain this away. (‘They will get there in the end. You will see!’) It would be problematic for the model if the 2008 and 2011 surveys really do reveal a rise in hostility to the HRA. The trend should be going the other way.<sup>88</sup> It also does not assist this model that elite opinion is itself divided on the HRA.

The second, or ‘Creative Tension’, model starts by acknowledging the disagreement that still surrounds the HRA. Such a polarized reaction is to be expected in response to a major constitutional innovation. After all, the demos is not a flock of sheep to be led wherever elites decide but represent an active force in constitutional politics. The model predicts that this tension will likely be resolved on the side of the constitutional innovation – not least because it swims with general and international trends – but perhaps also that that innovation will have to adjust first to the expectations of the people, or of powerful interests

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**85** A similar argument is made, with significant success, in Australia, another common law country without a national Bill of Rights.

**86** Walter Bagehot’s famous account of the British political system, *THE ENGLISH CONSTITUTION* (first serialized in *The Fortnightly Review* and later published in book form in 1867), needs to be read in light of the debates over – and fears concerning – the Reform Act of 1867.

**87** This model has at least something in common with Schumpeterian democratic theory, see JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (2010).

**88** Security concerns might arguably have receded a little over the period; but other concerns seem to have risen – e. g. immigration and border control – which complicates things from the pro-HRA position.

within them. In respect of the opinion data, the model can account for both the strong general sentiments expressed in favor of legal rights guarantees (*ComRes*) and the negative views of the HRA expressed in the *YouGov* and *Ipsos/MORI* polls – and to a certain extent also the large percentages of neutrals and ‘don’t knows’ in the *Ipsos/MORI* poll and the British Social Attitudes Survey. It can also accommodate the evidence of polarized opinions not just in the data but also in the media debate. A harder fit is the downward trend (if that is what we are seeing) in positive approval of the HRA.

The third model, “Constitutional Failure,” reads the data as indicating a fairly simple story of failure. An attempt by an elite to introduce a significant measure of reform has been rejected by the public at large (and/or by sub-groups within the elite). This model can account for the variation between the *ComRes* on one hand and the two other polls on the other. The former expresses support for the constitutional status quo (minus the HRA); the latter hostility to the constitutional innovation (the HRA). It would also highlight the trend reflected in the 2008 *Ipsos/MORI* and 2011 *YouGov* polls. What we are seeing, this model suggests, is a story of decline. The HRA is the constitutional equivalent of a dead man walking.<sup>89</sup>

## Conclusion: A Progress of Sentiments?

This paper is not a study in constitutional failure. It is, though, a study of a stable constitution in flux. Drawing on Hume, the paper suggested that there is value in looking at constitutions politics through three core ideas: conventions, complex whole, and opinion. Constitutional modifications work well once folded into the conventional structure of norms and practices – when they become themselves like conventions. The analysis cautions against having too high expectations that even a major legal change like the introduction of the Human Rights Act will produce immediate benefits in terms of minority accommodation, at least in an established and functional constitutional order. The *Belmarsh* case study indicates how hard it can be to make sustained progress in

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<sup>89</sup> Although the demise of the Human Rights Act would represent, in a sense, the beginning rather than the end of the story as the question would become what next? What would be the role for a common law unquestionably “beefed up” normatively after 15 years of direct exposure to the European Convention? See, e.g., *Kennedy v. The Charity Commission*, [2014] UKSC 20. What, if anything, would replace the HRA – a British Bill of Rights? And, if so, how different would such an Act be in practice? And what about the UK’s involvement in the European Convention system?

building a legal framework capable of protecting minority groups in an unpropitious political climate. Yet, it also shows how even apparent gains accrued through litigation begin to look shallow or even counterproductive if they do not also lead to a change at the level of popular opinion.

Extrapolating a little, my sense is that change may be slower in relation to attitudes to the constitution than on more general political matters. It may also be the case that constitutional changes are harder to make stick in our age of fluidity and instability, as people's need for stability increases. Perhaps we need to moderate the way we tend to think about change. We often appeal to three sources of authority: legislation (authority), natural law (reason), and enlightened self-interest (sentiment). All these elements must, I suppose, form part of the equation. But if Bagehot was right in thinking that men are governed by the weakness of their imaginations, then we should pay more attention to the imaginations of our fellow citizens, and their limits, aiming to enlarge our moral horizons in a way that aligns them with what is best within existing structures of practice and belief. It may be time to recapture the idea of constitutional change as being connected to the progress of sentiments.

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