

# Undignified Rights: The Importance of a basis in Human Dignity for the Possession of Rights in the United Kingdom

**Benedict Douglas\***

[2015] *Public Law* 241

## **Abstract**

The question of the basis on which human rights are possessed is of fundamental importance in determining the nature of the rights. The leading UN rights treaties and the European Court of Human Rights (ECtHR) have prominently recognised human rights as deriving from the possession of dignity. In contrast, the Human Rights Act 1998 is silent upon this question, and the domestic courts have overwhelmingly failed to recognise the incorporated Convention rights as having a fundamental basis grounding their possession, going beyond the ordinary authority of proper statutory enactment. This position is a manifestation and continuation of the historical positivist conception of rights in the UK, dating back to the rights critiques of Bentham and Burke. I argue that this lack of understanding of the moral basis on which human rights are possessed, as well as being inconstant with the UN and ECtHR approaches to rights, has contributed to the lack of rights ownership recognised by the Commission on a Bill of Rights. I argue that one means which can help to redress this is for the domestic courts or a new bill of rights to recognise rights, their possession, interpretation and application, as universally and inalienably justified by human dignity.

**Keywords:** Bill of Rights – Human Rights Act 1998 – Preambular Statements – Judicial Interpretation – Dignity – Rights Metaphysics

## **Introduction**

The importance of the fundamental basis justifying the possession and protection of human rights, is indicated by the prominent position given to it in the preambles of rights documents. This basis is recognised by the most influential UN rights documents as the dignity of the individual.

In marked contrast to this, the protection of human rights in the UK lacks such a fundamental justificatory basis, and its importance in establishing a non-positivist foundation for rights ownership is unrecognised. Domestic human rights possession is grounded in 17<sup>th</sup> century ideas of legal personhood. There is no mention of dignity or other foundational principles in the Human Rights Act 1998 (HRA), and recognition of the universal and inalienable possession of the Convention rights such a basis brings is very rare in domestic case law. This absence is at least partially rooted in the historical context of rights protection in the UK and the related scepticism of Edmund Burke and Jeremy Bentham, whose ideas continue to shape the UK legal system's conception of rights. This lack of a fundamental justification for rights possession creates a positivist space, where the absence of the recognition of the universal and inalienable possession of rights strengthens the position of

other criticism of the HRA, contributing to the poor public ownership and acceptance of rights identified by the Commission on a Bill of Rights.<sup>1</sup>

I argue here that a means by which the true nature of human rights as distinct from other laws can be recognised, and the increased ownership of rights furthered, is for the domestic courts and any future bill of rights to acknowledge the fundamental justificatory basis for the Convention rights, as universally and inalienably attaching to human dignity. This change in justification is supported by the recognition of this basis within the foremost rights documents of which the UK is a signatory and the constitutional experiences of other states, and show to be possible by the judgments of Baroness Hale and Lord Justice Munby. This approach does not involve the substantive interpretive use of a conception of dignity nor affect the substance of judgments under the HRA, and thus circumvents the many past cogent criticisms of the judicial application of the principle of dignity.

We have a rights document, but without recognising dignity as the justificatory foundation for the rights, the domestic legal understanding of rights remains positivist and cannot coherently address and justify the acceptance and ownership of human rights. The HRA is a rights document without a proper foundation and, if the importance of the basis of rights is not recognised, the position of those rights will remain precarious.

## **Importance of the Question of the Basis of Rights**

The question of the basis for the possession of human rights is of pivotal importance because it defines the nature of the rights, by stating the basis on which they are held and therefore who can claim their protection. These foundation defining issues, of who has human rights and why they have those rights, are the legal and practical manifestations of the authoritative and distributive questions which any basis of rights must answer.<sup>2</sup> A statement of who has rights, their distribution, presupposes and thus includes a statement of why persons have rights, the authority that requires they be respected. For a coherently morally justified conception and application of human rights, it is necessary to go beyond the question of their legal origins and engage with the question of the basis of rights at a moral level. Without such a deeper basis human rights laws can only be positivist norms, claiming to be no different morally from any other law, gaining all their authority through the procedural legality of their enactment.

The foremost rights treaties openly accept the necessity of recognising and addressing the question of the basis and beneficiaries of rights possession, if the rights are to be more than positivist norms upon stilts. The major United Nations (UN) rights documents thus claim rights universally and inalienably attach to those possessing the characteristic of dignity. The most influential modern human rights document, the Universal Declaration of Human Rights 1948 (UDHR) therefore states as its preambular premise that the

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

The universality of rights stated in their possession by “all members of the human family,” encapsulates the recognition that all human rights are possessed by all humans who have the fundamental characteristics which give rise to the rights, regardless of what other

---

\* I am very grateful for the guiding comments of the anonymous reviewer and the help and advice of Chris Castell, Ian Leigh, Roger Masterman, Aoife O’Donoghue and James Sweeney, any errors are my own.

<sup>1</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (London: Ministry of Justice, 2012), [32] and [80].

<sup>2</sup> D. Beyleveld, *The Dialectical Necessity of Morality* (Chicago: Chicago University Press, 1991), p.17.

characteristics they possess, and that they are not merely legal rights given by national or international law, but rather attach to persons regardless of laws. This is similarly emphasised in the European Convention on Human Rights 1950 (ECHR) commitment to “securing the universal and effective recognition and observance of the Rights”.<sup>3</sup>

The inherent characteristic of worth by virtue of which rights are universally possessed is labelled “dignity.”<sup>4</sup> To this the possession of human rights is stated to be “inalienable.”<sup>5</sup> This basis in dignity thus performs a “founding function,” conceptualising the recognition that there is a characteristic which unites mankind and the existence of which is not dependant on its recognition by states.<sup>6</sup> It is this base in dignity which justifies and demands the recognition of and respect for their rights irrespective of national laws,<sup>7</sup> answering the authoritative and distributive questions.

Although the UDHR and other UN rights documents prominently invoke the possession of dignity as the moral basis to which human rights attach, their drafters deliberately refrained from giving it a definition. The UDHR’s creators did so to ensure the agreement to the document amongst states with different ideologies, who attribute the existence of rights to different foundations.<sup>8</sup> The necessity and success of this strategy is apparent from discrepancies in the ratifications of the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). Both contain an identical preambular reference to dignity, yet the USA ratified only the ICCPR and China only the ICESCR. Although each state has a different conception of rights possession and, therefore, the rights that should be recognised,<sup>9</sup> both agreed to the same statement of rights as based in dignity.

Whilst the HRA seeks to give effect to the ECHR,<sup>10</sup> the Convention preamble states the intention of enabling the enforcement of the UDHR, but makes no explicit reference to dignity or other deeper principled bases. The reason for this absence is not explained in the preparatory materials.<sup>11</sup> Jochen Frowein attributes it to the view that dignity was too wide a concept.<sup>12</sup> Although this breadth of scope was precisely the reason for its use in other treaties, the desire to create the first judicially enforceable legally binding human rights treaty could indeed have led the drafters to prefer more specific language. Alternately, it may have been deemed unnecessary, given the claim to ancestry in the UDHR which gives dignity a prominent position. However, in spite of this textual absence, the ECtHR found it necessary

---

<sup>3</sup> ECHR preamble paragraph 2.

<sup>4</sup> Beyleveld, *The Dialectical Necessity of Morality* (1991), p.2.

<sup>5</sup> UDHR preamble paragraph 1.

<sup>6</sup> K. Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’, in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (London: Kluwer Law International, 2002), p.114.

<sup>7</sup> M. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), p.146.

<sup>8</sup> C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *E.J.I.L.* 655, p.677-678; D. Shultziner, ‘Human Dignity- Functions and Meanings’ (2003) 3(3) *Global Jurist Topics* Article 3, p.5; and O. Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *A.J.I.L.* 848, p.849.

<sup>9</sup> J. Carter, ‘U.S. Finally Ratifies Human Rights Covenant’ (1992)

<http://www.cartercenter.org/news/documents/doc1369.html> [Accessed 1 November 2013]; and F. Zakaria, *The Post-American World: And the Rise of the Rest* (London: Penguin, 2009), pp.108 and 112.

<sup>10</sup> HRA long title.

<sup>11</sup> Council of Europe, *Collected Edition of the “Travaux Préparatoires”* (Council of Europe 1964).

<sup>12</sup> J. Frowein, ‘Human Dignity in International Law’, in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (London: Kluwer Law International, 2002), p.123.

to recognise the basis in dignity of the possession of Convention rights, stating in *Pretty v United Kingdom* that the protection of dignity as the “very essence” of the Convention.<sup>13</sup>

Engagement with and recognition of a deeper basis of rights is thus key for their justification as distinct from that of ordinary positivist legal norms. The importance of the basis on which rights are held has been recognised within the leading rights documents to which the UK is a member, although they have not given a single clear definition of the basis. However, the argument I will make here is not for a particular substantive basis of rights or conception of dignity to be applied interpretively by the courts to give substance to the Convention rights. Rather, it is that British rights protection must recognise and invoke a fundamental basis underpinning rights as the UDHR and ECtHR have done, if their very existence, interpretation and application are to be coherently justified in a non-positivist manner, and the universal and inalienable possession of the Convention rights in the UK is to be understood and accepted.

The Commission on a Bill of Rights’ main reason for calling for a new UK rights document to replace the HRA was that lack of ownership of rights in the UK. The Commission’s report argued that there was a lack of “public understanding” of, and acceptance of the legitimacy of, human rights in Britain.<sup>14</sup> Mark Elliot describes this as a lack of understanding of the universally applicable nature of human rights.<sup>15</sup> The failure of the HRA, and the judicial application of it, to acknowledge and engage with the authoritative and distributive questions of the grounds on which rights are possessed, contribute to this lack of ownership at a fundamental level. With a lack of a statements to create an understanding of the basis on which we possess rights, a lack of ownership naturally follows.

## **The British Basis of Rights: The Lack of Principled Justification for Rights in the UK**

Unlike the UN rights documents, the HRA contains no preambular statement or claim that its rights are grounded in underlying principles such as dignity. Likewise, neither of the documents in which the Labour party proposed the Act invoke the universal and inherent nature of human rights as a justifying basis for their incorporation or protection.<sup>16</sup> The motivations stated in these documents, and at the second readings in the Houses of Commons and Lords, were the more practical aims of speeding redress for breeches of rights, bypassing Strasbourg, and enabling domestic courts to contribute to the Convention jurisprudence.<sup>17</sup> The Labour party saw the Act as a part of their wider constitutional changes,<sup>18</sup> which would create a “culture of rights”<sup>19</sup> and achieve a protection for citizens which went beyond that of civil liberties.<sup>20</sup> However, in all these statements there was no recognition that incorporation,

---

<sup>13</sup> *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 at [65]; and McCrudden, ‘Human Dignity’ (2008) 19(4) *E.J.I.L.* 655, p.683.

<sup>14</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [80].

<sup>15</sup> M. Elliott, ‘A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights’ [2013] *E.H.R.L.R.* 137, pp.141 and 147.

<sup>16</sup> P. Boateng and J. Straw, ‘*Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law*’ [1997] 1 *E.H.R.L.R.* 71, p.73-75; and Home Office, *Rights Brought Home: The Human Rights Bill*, Cm 3782, 1997, [1.5] and [1.14].

<sup>17</sup> Boateng and Straw, ‘*Bringing Rights Home*’ [1997] 1 *E.H.R.L.R.* 71, p.71; Home Office, *Rights Brought Home*, [1.14] and [1.18]; Home Secretary, 306 H.C. 767-768 (February 16, 1998); and Lord Chancellor, 582 H.L. 1227 (November 3, 1997).

<sup>18</sup> Home Office, *Rights Brought Home*, preamble; and Lord Chancellor, 582 H.L. 1234.

<sup>19</sup> Lord Chancellor, 582 H.L. 1228; and F. Klug, ‘The Human Rights Act 1998, *Pepper v. Hart* and all that’ [1999] *P.L.* 246, p.247; and Boateng and Straw, ‘*Bringing Rights Home*’ [1997] 1 *E.H.R.L.R.* 71, p.80.

<sup>20</sup> Home Office, *Rights Brought Home*, [1.4]; and Lord Chancellor, 582 H.L. 1228.

that a shift from liberties to rights, which would meet “the democratic need of individuals and minorities to have their human rights secured,”<sup>21</sup> was at a deeper level justified by the universal and inalienable attachment of human rights to the dignity of the individual. The discussion of “British citizen’s” rights<sup>22</sup> rather than humans’ rights is a stark synthesis of this.

Given the absence of dignity or other principled foundations for rights in the ECHR, and as the HRA sought only to give “further effect to rights and freedoms guaranteed under the European Convention,”<sup>23</sup> it is unsurprising the Act contains no principled preamble. However, this absence of dignity, or any other principled statement of the basis of the substantive rights, puts the HRA in marked contrast with the UN scheme of rights protection, ECtHR recognition of a dignity basis and some other countries’ rights documents. It leaves the HRA without a statement of a non-positivist answer to the distributive and authoritative questions, without a more fundamental basis for the rights than the ordinary rules of parliamentary sovereignty.

This lack of claim to foundational principles of the universal and inalienable possession of rights, similar to those found in the pivotal UDHR is not a mere textual omission, it is a product of the environment of the HRA’s creation. It is both symptomatic of, and now contributes to, the lack of a wide recognition of a fundamental basis for the possession of human rights within the UK. The origin of the international recognition of the non-positivist basis of rights, as universally and inalienably possessed, is revealed by a comparative analysis of both modern and earlier history of rights recognition to be a response designed to protect against the repetition of past state tyranny. The basis of rights in dignity in the UDHR, and the Declaration as a whole, is an attempt to avert a repetition of the violations of the WWII by creating a universal standard against which all states’ actions can be judged, regardless of their national laws. This is a continuation of a conception of rights which can be seen in the earliest modern rights documents. When contrasted with the context of rights statements in the United States and France, their constitutional history offers a persuasive explanation for the HRA’s lack of principle based recognition of the universality and inalienability of rights.

The early great statements of rights were created in response to oppressive laws and regimes, and the drafters sought in their constitutions to state the rights they claimed and recognised as distinct from other law. This they did by giving them a basis in deeper principles which in turn justified the special position of the rights as constitutional norms safeguarded from easy amendment. The United States’ Declaration of Independence 1776 lists the grievances against the British Crown which led the colonies to revolt. To justify their revolution they relied upon principles of “the laws of nature and of nature’s God,” stating that these entailed “certain *unalienable* rights, [including] life, liberty and the pursuit of happiness,” elaborated subsequently in the Constitution.<sup>24</sup> The French Declaration of the Rights of Man and the Citizen 1789 similarly stated the protection of “*inalienable* and sacred rights of man” based on “simple and incontrovertible principles...under the auspices of the Supreme Being.” In these first documents of the modern rights movement, rights were perceived and claimed from the outset to be possessed on a basis distinct from and more fundamental than that of ordinary law and governance.

The HRA thankfully did not emerge out of a mass rights violation. However, the consequence of this lack of a revolutionary basis, or accompanying statement of underlying principles, is that HRA has become the unintended victim of the historical rights critiques of Edmund Burke and Jeremy Bentham, which have inoculated Britain against the acceptance of

---

<sup>21</sup> Lord Chancellor, 582 H.L. 1234; See also Home Secretary, 306 H.C. 767.

<sup>22</sup> Boateng and Straw, *Bringing Rights Home* [1997] 1 *E.H.R.L.R.* 71, p.80.

<sup>23</sup> HRA long title.

<sup>24</sup> L. Levy, *Origins of the Bill of Rights* (London: Yale University Press, 1999), pp.250-255.

non-positivist rights. Crucially, however, the aspects of the 18<sup>th</sup> century French and American rights documents they criticised, their derivation of rights from the distinct and deeper fundamental principled basis, are the aspects that give those rights their special status and force, and their absence within UK rights protection contributes to the domestic lack of acceptance and ownership of human rights.

Bentham rejected the view that rights derive from moral principles, arguing they are norms like any other, created and granted by the state to the individual.<sup>25</sup> This conception of rights can be seen to have been adopted within the drafting of the HRA, giving a truth to his views that they do not have not have when applied to other rights documents which invoke a deeper moral basis such as dignity. As a consequence of the absence of such a basis the “Act” element has predominated over the nature of the substantive “Human Rights” in their characterisation, allowing a perception that it and the rights are no different from other domestic laws.

Similarly, Burke’s criticisms in his *Reflections on the Revolution in France* have been proved true by the lack of a deeper basis within the HRA. Where Bentham criticised moral rights as vapid nonsense, Burke feared their power. He claimed that in the Declaration of the Rights of Man the French had “wrought under-ground a mine that will blow up...all examples of antiquity, all precedents, charters, and acts of parliament.”<sup>26</sup> Rights based in metaphysics which broke with the continuity of the previous law, Burke argued, would destroy the structure of society and established rights.<sup>27</sup> By depriving the Convention rights of a deeper basis, the HRA has thus curtailed their power to effect a change within the law, to be “metaphysic rights entering into common life, like rays of light which pierce into a dense medium.”<sup>28</sup> The statements by some members of the judiciary, that that the same decision would have been reached under the Common Law as under the HRA,<sup>29</sup> are echoes of the fears that haunted Burke. These statements can also be depicted as desiring to create a narrative of continuity and coherence between the Convention rights and common law.<sup>30</sup> However, this downplays the fundamental shift in legal norms the incorporation of the universal and inalienable Convention rights constituted, continuing the pre-HRA reluctance of some members of the judiciary to allow the Convention rights to change the Common Law.<sup>31</sup>

In consequence of this lack of a deeper basis, individuals and judges have been allowed to perceive the HRA incorporated rights to be what Bentham thought all statements of rights to be, norms like any other created and granted by the state to the individual. Although there has been a perception by the courts that the HRA is a special constitutional statute by virtue of its statement of “fundamental constitutional rights,”<sup>32</sup> the fundamental basis of human

---

<sup>25</sup> J. Bentham, *The Works of Jeremy Bentham*, Bowring (ed) (Edinburgh: William Tait 1843), Vol. III, pp.160 and 185.

<sup>26</sup> E. Burke, *Reflection on the Revolution in France* (London: Penguin, 2004), p.148.

<sup>27</sup> Burke, *Reflection on the Revolution in France* (2004), pp.149 and 151.

<sup>28</sup> Burke, *Reflection on the Revolution in France* (2004), p.152.

<sup>29</sup> *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [30]; *R (on the application of ProLife Alliance) v BBC* [2002] EWCA Civ 297, Laws L.J. esp at [35]-[36] and [44], Cf. Simon Brown L.J. at [50]; *Attorney-General’s Reference (No. 1 of 2004)* [2004] EWCA Crim 1025 at [14], H. Fenwick and others, *Judicial Reasoning Under the UK Human Rights Act* (Cambridge: Cambridge University Press 2007), p.2.

<sup>30</sup> *Derbyshire CC v Times Newspapers* [1993] AC 534 at 551; *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115 at 131; and *ProLife Alliance* at [33].

<sup>31</sup> G. Phillipson, ‘Clarity Postponed Horizontal Effect After Campbell’ in H. Fenwick and others (eds) *Judicial Reasoning Under the UK Human Rights Act* (Cambridge: Cambridge University Press 2007), pp.144-145; e.g. *Attorney-General v Guardian Newspapers (No2)* [1990] 1 AC 109 at 283.

<sup>32</sup> *Thoburn v Sunderland CC* [2002] EWHC 195 (Admin) at [62]; and *Brown v Stott* [2003] 1 AC 681, 703; Cf. *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 at [15].

rights remains unrecognised. Without a principled basis there is no deeper justification for regarding the rights to be unlike any other statute granted entitlement. A 2011 YouGov poll shows that 64 per cent of those questioned did not recognise the inalienability of rights, agreeing that not everyone should have their human rights protected when they have broken the law.<sup>33</sup> Within this context domestic hostility to human rights is understandable; without this deeper non-positivist basis for rights possession, when unpopular minorities such as prisoners or immigrants have their rights vindicated the question is asked “why are we *giving* rights to them?”

The lack of ownership of rights identified by the Bill of Rights Commission may have several sources, political manoeuvring and Euroscepticism have led to focus on their Britishness. But the lack of recognition of the Convention rights as having distinct and non-positivist basis, not answering the foremost authoritative and distributive questions of rights in the manner of the UDHR and the ECtHR, left the positivist space for other political arguments to grow. The lack of ownership of rights recognised by Bill of Rights Commission, is not only ownership at a nationalistic level for lack of “Britishness”, there is a lack of the recognition of the ownership of rights at a more fundamental level. In not stating a universal and inalienable basis, the courts and wider society lack a foundation from which to build an understanding of the possession of human rights as different from rights conferred simply by law. A recognition of a deeper basis of rights, in accordance with the UN rights document’s recognition of dignity as the basis to which rights universally and inalienably attach, to answer the question of who has rights and why, is thus essential. Such a recognition is necessary to help change the understanding of rights at a fundamental level, to combat the current domestic conception of rights, by showing that the rights are not given or granted but are and were always possessed by individuals, and are now recognised and protected under the HRA.

## **The Current Domestic Judicial Approach to the Basis of Rights**

In the absence of a revolutionary context or principled statement of the basis of rights, the majority of the UK’s judiciary have instead grounded the possession of rights in a positivist manner in an old common law conception of legal personhood. The universal and inalienable attachment of rights to the possession of human dignity, justifying their protection within UN rights documents, is almost universally unrecognised within the domestic application of the Convention rights.

The British courts’ approach to the question of the essential characteristic for rights possession derives from the 17<sup>th</sup> century definition of legal personhood.<sup>34</sup> As in other courts, the legal status of the foetus has been a touchstone for this question.<sup>35</sup> However, whereas other courts recognised the pivotal importance of this question as concerning the basis of rights possession, the ECtHR extending a margin of appreciation to it,<sup>36</sup> the UK courts have not recognised its special importance in the application of human rights. The domestic courts have with few exceptions applied the historic approach, that a human has legal rights as a legal person once born alive,<sup>37</sup> using this as the only justification for the possession of the Convention rights.

---

<sup>33</sup> YouGov/ITV Poll, 23-24 March 2011, [http://cdn.yougov.com/today\\_uk\\_import/yougov-pol-yougovitv-humanrights-240311.pdf](http://cdn.yougov.com/today_uk_import/yougov-pol-yougovitv-humanrights-240311.pdf) [Accessed 1st November 2013].

<sup>34</sup> E. Coke, *Institutes of the Laws of England: Part 3* (London, 1648), p.50.

<sup>35</sup> *Vo v France* (2005) 40 E.H.R.R. 12 at [74]; and *Roe v Wade* 410 U.S. 113 at 156-159 (1973).

<sup>36</sup> *Vo* at [82] and [85]; and *Roe* at 159.

<sup>37</sup> *Attorney-General’s Reference (No. 3 of 1994)* [1998] AC 245 (HL) at 254 and 256; *Vo* at [71]; and J. Mason, ‘Case Commentary: What’s in a Name? : The Vagaries of *Vo v France*’ [2005] *C.F.L.Q.* 97, p.101.

This focus on having been born and alive, as the basis of human rights possession, can be seen in judgments both before and under the HRA. Prior to the Act, it was present in the courts' approach to the status of those in a persistent vegetative state (PVS) who are medically alive - having a functioning brain stem - but without consciousness or personality. In *Airedale NHS Trust v Bland* the House of Lords thus held that, separate from the moral question of what is meant by "life," such an individual is a legal person.<sup>38</sup> On this basis, they held that the common law principle of the sanctity of life backed by the internationally recognised right to life was applicable to Bland.<sup>39</sup> Since the enactment of the HRA, this case law on the possession of legal rights has been reflected in the courts' decisions on personhood for the purposes of the Convention rights. Relying on the common law, in relation to the status of life before birth, the courts have held human foetuses to be incapable of possessing a right to life under Article 2 because they could not be deemed to be "persons."<sup>40</sup> Similarly, in a case concerning the continued treatment of a PVS patient, the High Court applied *Bland* and held that as the patient was medically alive she was a person possessing Convention rights.<sup>41</sup> Thus the courts have stuck closely to the previous common law, declining to distinguish the grounds of the possession of Convention rights from that of other legal rights.

A reluctance on the part of the courts to engage with such a substantively contentious moral question is understandable, both the ECtHR and US Supreme Court took pains to avoid making an independent substantive moral decision. However, what makes the continued legalistic approach of the UK courts to the question of possession of rights distinct, is that it is not accompanied by non-positivist statements that human rights possession by legal persons fundamentally derives, universally and inalienably, from a more fundamental basis such as the possession of dignity. Although, like the HRA, the ECHR contains no explicit reference to dignity or other fundamental basis, the domestic courts unlike the ECtHR in *Pretty* have not transcended this to recognise rights possession as having a non-positivist fundamental basis.

## Domestic Dignity

Prior to the HRA coming into force, there was little explicit mention of the concept of dignity in statute or case law.<sup>42</sup> Since the Act's enactment, references have increased with "judges, advocates and legislators...increasingly confident in referring to dignity."<sup>43</sup> However, in contrast to its foundational role within the UN rights treaties, very few members of the judiciary have made use of it as a foundational justification for their interpretations of Convention rights. In some of the most pivotal and controversial human rights cases of recent years dignity has not been mentioned at all; the decision in *A v Secretary of State for the Home Department* was reached without invoking the vindication of the fundamental dignity of the individual, infringed by indefinite detention without trial.<sup>44</sup>

---

<sup>38</sup> *Airedale NHS Trust v Bland* [1993] AC 789 (HL), p.878-881.

<sup>39</sup> *Bland* at 858-859 and 864.

<sup>40</sup> *Evans v Amicus Healthcare Ltd and Others* [2003] EWHC 2161 (Fam) at [175], [178] and [181]; *Evans v Amicus Healthcare Ltd and Others* [2004] EWCA Civ 727 at [106]-[107]; and Mason, 'Case Commentary: What's in a Name?' [2005] *C.F.L.Q.* 97, p.101.

<sup>41</sup> *NHS Trust A v M* [2001] Fam 348 (HC) at 356.

<sup>42</sup> D. Feldman 'Human Dignity as a Legal Value: Part II' [2000] *P.L.* 61, p.62; and G. Moon and R. Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality' (2006) 6 *E.H.R.L.R.* 610, p.625.

<sup>43</sup> Moon and Allen, 'Dignity Discourse in Discrimination Law' (2006) 6 *E.H.R.L.R.* 610 report that there have been 48 judicial mentions of dignity in the 5 years following the coming into force of the HRA compared to only 19 in the previous 5 (p.626).

<sup>44</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56.



Where dignity has been mentioned, the predominant domestic judicial use of it has been as a description of an element of the substantive protection given by a Convention rights, rather than as a justification recognising the universal and inalienable possession of Convention rights generally. Gay Moon and Robin Allen summarise this substantive application of dignity as requiring that a person not be “humiliated or treated without respect for his value as a person,”<sup>45</sup> and Feldman describes it as concerned with protecting the inherent worth of being human and how people see themselves as humans (their sense of self-worth).<sup>46</sup> In *Bland*, in the context of interpreting the right to life, dignity was held by Hoffmann L.J. (as he then was) to be concerned with the prevention of demeaning or embarrassing treatment of another.<sup>47</sup> As a member of the House of Lords in *Campbell*, he reaffirmed this view of dignity under the HRA in interpreting Article 8, stating that dignity is concerned with the “right to the esteem and respect of other people.”<sup>48</sup> In his explorations of the concept of dignity, Munby L.J. has recognised this substantive conception of dignity, stating the protection of the human person against humiliation and debasement is the concern of “human dignity,”<sup>49</sup> explicitly agreeing with Lord Hoffmann.<sup>50</sup>

However, Munby L.J. and Baroness Hale are the domestic judges who alone have consistently gone beyond this limited substantive interpretive use of dignity, and recognised its importance as the basis justifying the general possession and protection of human rights.<sup>51</sup> Baroness Hale has applied the ECtHR’s statement in *Pretty* to this effect,<sup>52</sup> and Munby L.J. has argued that, although dignity was not mentioned explicitly in the ECHR, it is implicit “in almost every one of the Convention’s provisions.”<sup>53</sup> Consistent with the use of dignity in the international rights context, they have held it to be concerned with the value or worth of the individual. In *Ghaidan v Godin-Mendoza* Baroness Hale held that to treat someone as of lesser value than another person by discriminating against them was to fail to respect their dignity;<sup>54</sup> she recognised that human rights are held by all persons because they are all of equal value, they all possess dignity, and thus discrimination in the respect accorded to them is a violation of the basis on which the rights are held.<sup>55</sup> Although Munby L.J. has acknowledged the substantive conception of dignity,<sup>56</sup> he has himself conceptualised dignity in a way consistent with a position as the wider justificatory basis of rights, by arguing that respect for dignity requires the recognition that a human being is more than a machine, that their greater intangible humanity must be respected.<sup>57</sup>

The uses of both conceptions of dignity, the substantive and justificatory, and the distinctions between them, can be clearly seen in the House of Lords judgement in *Limbuela*. Here, Lords Brown and Hope both invoked dignity in the substantive sense as part of defining “degrading treatment” for the purposes of Article 3: treatment of individuals which humiliates or debases a particular group would be an “affront to human dignity” violation of

---

<sup>45</sup> Moon and Allen, 'Dignity Discourse in Discrimination Law' (2006) 6 *E.H.R.L.R.* 610, pp.627 and 645.

<sup>46</sup> D. Feldman, 'Human Dignity as a Legal Value: Part I' [1999] *P.L.* 682, pp.685-686.

<sup>47</sup> *Bland* at 826.

<sup>48</sup> *Campbell v MGN* [2004] UKHL 22 at [51]; and Moon and Allen, 'Dignity Discourse in Discrimination Law' (2006) 6 *E.H.R.L.R.* 610, p.627.

<sup>49</sup> *R (on the application of Burke) v GMC* [2004] EWHC 1879 (Admin) at [178]; and *R (on the application of A, B, X and Y) v East Sussex CC (No.2)* [2003] EWHC 167 (Admin) at [121] and [149].

<sup>50</sup> *Burke* at [58].

<sup>51</sup> C. Dupre 'Unlocking Human Dignity: Towards a Theory for the 21<sup>st</sup> Century' [2009] *E.H.R.L.R.* 190, p.191 (note 5).

<sup>52</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [132], quoting *Pretty* at [65].

<sup>53</sup> *East Sussex CC* at [86].

<sup>54</sup> *Ghaidan* at [132]. See also Moon and Allen, 'Dignity Discourse in Discrimination Law', p.629.

<sup>55</sup> *Ghaidan* at [132].

<sup>56</sup> *Burke* at [58] & [178]; and *East Sussex CC* at [121] and [149].

<sup>57</sup> *East Sussex CC* at [120].

Article 3.<sup>58</sup> However, Baroness Hale recognised dignity as of deeper and more fundamental significance. She argued that both Articles 2 and 3 in a more general sense, reflecting and protecting “the dignity of each individual human being, no matter how unpopular or unworthy she may be,”<sup>59</sup> recognising the universality and inalienability of the dignity to which rights possession attaches. The approach of Lords Brown and Hope is not without support within ECtHR jurisprudence.<sup>60</sup> However, only Baroness Hale invoked the wider recognition that the ECtHR has given to dignity, as the “very essence of the Convention,”<sup>61</sup> repeating her justificatory approach in *Godin-Mendoza*.

Although the HRA does not recognise a basis in dignity for rights, the statutory instruction to the Commission for Equality and Human Rights, gives it the task of fostering a society which respects “the dignity and worth of each individual.”<sup>62</sup> Thus there is some parliamentary support for recognising the connection between the worth of the individual, their possession of dignity, and their possession of rights.

Thus, some members of the judiciary are using and developing a conception of dignity as the basis of Convention rights. But the recognition in these statements of dignity’s foundational nature, the invocation of dignity as the basis of rights justifying decisions on their existence, application and interpretation, as opposed to giving substance to their interpretation, is very rare, not routine. This deficiency is not an insubstantial formal issue. The absence of such a fundamental basis in judicial rights decisions, one that gives the recognition of their universal and inalienable possession found within the major rights treaties, is of pivotal importance to the coherent justification and consequent acceptance of the Convention rights. The current approach is out of step with the internationally recognised nature of rights stated within the UDHR, and contributes to maintaining of a positivist conception of human rights in the UK, propagating Bentham and Burke’s rights hostility.

## **A More Dignified Approach to Rights**

There are two ways in which the UK legal order can engage with the fundamental question of the basis of rights, and contribute to redressing the mischaracterisation and misperception of the nature of the Convention rights, as positivist rather than universally and inalienably possessed. These alternate and complimentary means are: a judicial willingness to invoke dignity as a justification for their application and interpretation of Convention rights, and the inclusion of statements of a fundamental principled basis in the preamble to any future British Bill of Rights.

## **Judicial Engagement**

A broad judicial re-characterisation of the underlying basis of the Convention rights in the UK, and rights protection generally, as grounded in the protection of dignity, is a means of recognising and communicating their universal and inalienable nature that is the foundation of the UN and ECHR schemes of rights protection. This does not require an alteration of the substance of decisions reached and to be reached under the HRA, for it involves the invocation of dignity as a justification for rights interpretation generally, not as a tool of construction giving substantive content to specific rights or to determine the scope of their

---

<sup>58</sup> *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 at [54] and [93]-[94].

<sup>59</sup> *Limbuela* at [76].

<sup>60</sup> *Limbuela* at [54] and [93], citing *Pretty* at [52].

<sup>61</sup> *Pretty* at [65].

<sup>62</sup> Equality Act 2006 s.3(c).

application. Nonetheless its effect would be profound, it would explain the fundamental, universal, inherent and inalienable nature of the rights, breaking from positivist Benthamite and Burkian conception of rights that currently permeates the domestic understanding and application of rights. The practicality of this justificatory use within the UK legal order, is shown by the judgments of Baroness Hale, Munby LJ. and the judiciary of other legal systems.

This use of dignity as a justification for interpretation, rather than as a substantive tool to give rights content, circumvents the traditional but cogent criticisms of the principle of dignity and its judicial use. Chris McCrudden described dignity within rights documents as a “place holder,” a term encompassing a wide range of substantive concepts and characteristics capable of forming the basis of rights,<sup>63</sup> and argued that to attempt to define this basis by choosing amongst these concepts and characteristics involves engagement with substantive moral questions on which there is wide disagreement.<sup>64</sup> It was in recognition of the divisiveness of this question the ECtHR refused to define the basis on which the Convention rights were held, invoking the margin of appreciation.<sup>65</sup> Feldman has additionally argued that substantive judicial interpretive use of dignity risks shifting the debate from the meaning of the right to the meaning of dignity.<sup>66</sup> Following from both these concerns is that the open textured nature of dignity, creates the potential that, if used by the judiciary to interpret rights, judges will apply their own morality to give it content.<sup>67</sup> Similarly, as dignity is open to multiple possible and conflicting conceptions of the particular characteristic to which rights attach and of human worth, this creates the potential for inconsistency when it is applied and in the conclusions reached using it.<sup>68</sup> This might render the legitimacy of dignity based judgements questionable<sup>69</sup> given that certainty is an important element of the rule of law.<sup>70</sup>

However, these cogent and legitimate arguments against dignity as a tool for substantive rights interpretation are not applicable to its judicial use as an underpinning justification for rights, their interpretation and application. The use of dignity I advocate does not require the judiciary to give a meaning to dignity beyond that which states have given to it as a place holder within the UN rights treaties – what McCrudden defines as the agreed “minimum core” of dignity<sup>71</sup> – as recognising that there is some deeper non-positivist foundation for human rights in the value of the human person which makes them universal and inalienable. This approach does not involve the substantive determination of the nature of the basis of this underlying value to which rights attach. It does not involve the substantive interpretive application of dignity to give content to the Convention rights, not even to the extent that

---

<sup>63</sup> McCrudden, ‘Human Dignity’ (2008) 19(4) *E.J.I.L.* 655, p.677, 680 & 697.

<sup>64</sup> McCrudden, ‘Human Dignity’ (2008) 19(4) *E.J.I.L.* 655, 697.

<sup>65</sup> *Vo* at [82]-[85]; *A, B and C v Ireland* (2011) 53 E.H.R.R. 13 at [185] and [222]; and J. Mason, ‘Case Commentary: What’s in a Name?’ [2005] *C.F.L.Q.* 97, p.104.

<sup>66</sup> Feldman, ‘Human Dignity as a Legal Value: Part I’ [1999] *P.L.* 682, pp.688 and 699.

<sup>67</sup> Feldman, ‘Human Dignity as a Legal Value: Part I’ [1999] *P.L.* 682, p.697; and Moon and Allen, ‘Dignity Discourse in Discrimination Law’ (2006) 6 *E.H.R.L.R.* 610, pp.616-617.

<sup>68</sup> D. Beylveled and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press 2001), pp.25-26 (citing the example of dwarf tossing); B. Hale, ‘Dignity’ (2009) 31(2) *J.Soc.Wel. & Fam.L.* 101, p.106; Feldman ‘Human Dignity as a Legal Value: Part II’ [2000] *P.L.* 61, pp. 70 and 75; S. Millns, ‘Death, Dignity and Discrimination: The Case of Pretty v United Kingdom’ (2002) 3(10) *German Law Journal*, [5]; McCrudden, ‘Human Dignity’ (2008) 19(4) *E.J.I.L.* 655, pp.697 & 712; and Dupre ‘Unlocking Human Dignity’ [2009] *E.H.R.L.R.* 190, p.191.

<sup>69</sup> Feldman, ‘Human Dignity as a Legal Value: Part I’ [1999] *P.L.* 682, p.697; and Moon and Allen, ‘Dignity Discourse in Discrimination Law’ (2006) 6 *E.H.R.L.R.* 610, p.617.

<sup>70</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) at 638; and T. Bingham, *The Rule of Law* (London: Penguin, 2011), pp.38-39.

<sup>71</sup> McCrudden, ‘Human Dignity’ (2008) 19(4) *E.J.I.L.* 655, p.679.

dignity has already been used to interpret Article 3 ECHR by the ECtHR and some members of our domestic judiciary.

The effect of this justificatory invocation of dignity, in this most fundamental but open of senses, will be to contribute to a change in the domestic understanding of rights, not their substantive content. With dignity is a place holder, the place it holds within the international human rights law to which the UK is committed, is for the recognition of rights as universally and inalienably possessed, not as merely created by positivist substantive law. This recognition is largely absent within UK law but can be furthered by the judicial justificatory use of dignity. Acknowledging the Convention rights as having this fundamental basis is not inconsistent Parliamentary Sovereignty. It is a central tenant of the UDHR's statement of the universality and inalienability of rights to dignity, that their possession at a moral level is not affected by the extent to which they are respected by the substantive law of the legal system. Thus the moral authority of rights, which derives from their fundamental basis of rights, exists and justifies the rights, independent of their legal relationship with other laws within the constitutional hierarchy.<sup>72</sup>

Baroness Hale and Munby LJ. have shown that this use of dignity is possible in judgments under the HRA. Practical support for its wider justificatory use, as well as being grounded in role dignity plays within the UN rights documents and the recognition given to it by the ECtHR, can be found in the domestic common law and that of Canada. The Canadian courts, cousins of the British common law, have taken this step of recognising dignity as underlying the rights in their Charter of Rights and Freedoms (CCFR).<sup>73</sup> Significantly, as with the HRA, there is no mention of the dignity in the Charter. The HRA is thus not unique in lacking a statement of a fundamental principled basis for rights, as already noted, the ECHR contains no explicit reference to such a basis. However, in *R v Oakes* the Canadian Supreme Court, like the ECtHR in *Pretty*, felt the necessity and proved the possibility of recognising from the Charter alone, that the legal protection of human rights is nonetheless grounded in and justified by the protection of human dignity.<sup>74</sup>

In Canada some of the courts have used the reference to dignity in the preamble of the 1960 Canadian Bill of Rights to support this approach to the interpretation of the Charter rights.<sup>75</sup> However, in several cases Canadian judges have based their invocation of dignity in the common law as well as their Bill of Rights.<sup>76</sup> In *R v Stillman* Cory J., although applying dignity in the more substantive sense, stated that “[t]raditionally, the Common Law and Canadian society have recognised the fundamental importance of the innate dignity of the individual.”<sup>77</sup> Similarly, *R v S (R.J.)* recognised that dignity was a fundamental value which underlay not only the CCFR but also the common law.<sup>78</sup> The experience in Canada thus indicates that, although a principle of dignity is not explicitly stated within the HRA, this is not a bar to its judicial invocation.

An implicit respect for dignity can be found from within the domestic common law, as underlying the protections of the individual by the common law which would now fall under the protection of the Convention rights. Munby L.J. states that the recognition of inherent human value that dignity embodies “is a core value of the common law, long pre-dating the

---

<sup>72</sup> Cf. *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158 at [72].

<sup>73</sup> Constitution Act 1982 Part I.

<sup>74</sup> *R. v Oakes* [1986] 1 SCR 103 at 134-135.

<sup>75</sup> *Re Motor Vehicle Act (British Columbia) s. 94(2)* [1985] 2 SCR 486, 503. See also D. Ulrich, ‘Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany’ (2003) 3 *Global Jurist Frontiers* 1, p.17.

<sup>76</sup> Ulrich, ‘Concurring Visions’ (2003) 3 *Global Jurist Frontiers* 1, pp.16-17.

<sup>77</sup> *R. v Stillman* [1997] 1 SCR 607 at 658.

<sup>78</sup> *R. v S (R.J.)* [1995] 1 SCR 451 at 605.

Convention.”<sup>79</sup> In *Burke* he argued that concern for it underlies the pre-HRA case law on the treatment of those in a persistent vegetative state, and the substantive interpretive uses of dignity in interpretation in cases such as *Bland*.<sup>80</sup> Similarly, David Feldman argues that the pre-2000 case law requiring respect for patient control over their medical treatment protected dignity, by prohibiting people from being treated without regard for their opinions as if they were of no worth.<sup>81</sup> Consistent with this, he also argues that the decision in *R v Secretary of State for the Home Department Ex p JCWI* protected dignity, by upholding the fundamental value of the individual which underlies the protection given by the ECHR.<sup>82</sup> Thus even prior to the enactment of the HRA the worth and value of the person was already a concern underlying the Common Law, and now supports its more open protection and recognition through a judicial rights decisions justified by the principle of dignity.

Recently, and encouragingly, in the context of the Refugee Convention 1951, members of our Supreme Court invoked dignity in a justificatory manner. In *HJ (Iran) v Secretary of State for the Home Department* Lord Hope DPSC noted the importance of the UDHR preamble and its reference to the dignity of individual in “understanding” the human rights protection given by that Convention, but did not apply a specific interpretation of it.<sup>83</sup> Dyson SCJ, in giving the judgement for the court in *RT (Zimbabwe) v Secretary of State for the Home Department United Nations High Commissioner for Refugees intervening*), building on his invocation of dignity as the basis of the Refugee Convention in *HJ (Iran)*,<sup>84</sup> relied on the use of dignity in the UDHR and Council Directive 2004/83/EC, to hold that “the right to dignity is the foundation of all freedoms” protected by international human rights law.<sup>85</sup>

Thus, the justificatory use of dignity when applying the HRA by some members of our judiciary, and Canadian case law, demonstrate that the wider domestic grounding of the interpretation and application of the rights in dignity to convey their fundamental nature is possible. That there is a positivist misunderstanding of the nature of rights within British society shows it is necessary. If this use of dignity in human rights were generally adopted, it would embody and contribute to a better national understanding of the nature of human rights,<sup>86</sup> for the deeper basis of rights as universally and inalienably possessed would be explicitly described.

## A British Bill of Rights

The opportunity missed in the drafting of the HRA without a statement of basic principles, and the importance of the preambular statement, is only now becoming apparent. The lack of rights ownership by the British people that this has contributed to was recognised by the majority of the Commission on a Bill of Rights to be so significant that it forms the main justification for its call for a British Bill of Rights.<sup>87</sup>

Lacking the experiences of France and the US to give a sense of rights ownership as universally and inalienably possessed, without a similar impetus for the creation of rights protection within the UK, the need for their true nature to be acknowledged though

<sup>79</sup> *E Sussex CC* at [86]; and *Burke* at [57].

<sup>80</sup> *Burke* at [57]-[58], quoting Hoffmann LJ. in *Bland* at 833.

<sup>81</sup> Feldman, ‘Human Dignity as a Legal Value: Part II’ [2000] *P.L.* 61, pp.67-68.

<sup>82</sup> *R. v Secretary of State for the Home Department Ex p. JCWI* [1997] 1 WLR 275 (CA) at 292; and Feldman, ‘Human Dignity as a Legal Value: Part II’ [2000] *P.L.* 61, pp.61-62.

<sup>83</sup> *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31 at [14]-[15].

<sup>84</sup> *HJ (Iran)* at [113].

<sup>85</sup> *RT (Zimbabwe) v Secretary of State for the Home Department United Nations High Commissioner for Refugees intervening* [2012] UKSC 38 at [29]-[30] and [39].

<sup>86</sup> Elliott, ‘A Damp Squib in the Long Grass’ [2013] *E.H.R.L.R.* 137, p.147.

<sup>87</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [32], [80] and [84].

recognition of a basis in dignity is all the more pressing. Establishing the nature of human rights is one of the primary functions performed by the preambles of UN rights treaties and national constitutions, by including no such statements within the Human Rights Act, an opportunity was missed to describe the nature of the rights brought within UK law and to shape their public perception.

The minority report of Helena Kennedy and Philippe Sands argued that the evidence gathered showed no lack of ownership of rights in Scotland and Wales, or Northern Ireland.<sup>88</sup> However, this is consistent with, not dismissive of, a lack of general English ownership, for the creation of domestic Human Rights in these other parts of the UK coincided with significant constitutional changes. Although not on the scale of those in France and the US and, with the exception of Northern Ireland, not arising from a broader context of previous rights infringements, their acceptance of rights protection coheres with other nations' experiences of human rights protection as a significant departure from the previous laws. In England there was no such perception and without the inclusion of a principled basis for the rights there was nothing to suggest that they were a new form of law, with a deeper non-positivist justification.<sup>89</sup>

It was suggested to the Commission that the lack of ownership in a nationalistic sense could to some extent be addressed by a formulation of the rights that showed them to be based in our own constitutional history, such as the Magna Carta.<sup>90</sup> However, an understanding and acceptance of the nature of rights in line with international human rights law can only be achieved by showing them to be possessed universally and inalienably, a recognition a principled basis in dignity can help to achieve. As Elliot argues, a bill of rights which does not engage with the question of the fundamental nature of rights will be incoherent and vacuous.<sup>91</sup> A foundation in dignity answers this need for a fundamental basis for rights possession, as recognised to be in the foremost rights treaties. It would counteract that Benthamite and Burkian conception of hollow positivist rights the HRA and the courts have adopted.

This recognition of a basis in dignity would also have the advantage of addressing the public concern of rights without responsibilities noted by the Commission.<sup>92</sup> As a basis for rights it can explain that "the nature of human rights [is] that they exist for all human beings equally, without reference to whether they are 'deserving'...."<sup>93</sup> In this context the Commission did recognise, although without defining the principled basis,<sup>94</sup> that a declaratory preamble might be a means within a future Bill of Rights to attach "importance ...to the mutual ties and obligations on which societies depend and of assisting its broad acceptance."<sup>95</sup> A statement of a basis in dignity can perform this function, answering the question of the nature of rights the Commission did not.

## Conclusion

The question of the basis of rights, the answers to the authoritative and distributive questions of who has rights and why, are of fundamental importance in stating their nature and

---

<sup>88</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [88](v) and (vii).

<sup>89</sup> Cf. F. Klug and A. Williams, 'The choice before us? The report of the Commission on a Bill of Rights' [2013] *P.L.* 460, pp.462-463.

<sup>90</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [36] and [86].

<sup>91</sup> Elliott, 'A Damp Squib in the Long Grass' [2013] *E.H.R.L.R.* 137, p.147.

<sup>92</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [96] and [100].

<sup>93</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [100].

<sup>94</sup> Elliott, 'A Damp Squib in the Long Grass' [2013] *E.H.R.L.R.* 137, p.150.

<sup>95</sup> Commission on a Bill of Rights, *A UK Bill of Rights?* (2012), [101].

communicating society's conception of rights. Although courts confronted with the question of the basis of rights possession shy away from stating a detailed basis, they and national and international rights documents have recognised the importance of this question and of addressing it. Under the leading rights treaties of which the UK is a signatory, the basis that forms the foundation for rights protection is the dignity of the individual to which the rights are recognised as universally and inalienably attaching.

The lack of engagement with this question in the UK, when compared to the prominent statements of principled bases for rights in other rights documents, has had a fundamental practical impact on domestic rights protection. The absence of a clear coherent statement of a deeper theoretical foundation for rights has contributed to the lack of acceptance or ownership of the Convention rights, by leaving a positivist space where the nature of human rights is not recognised as distinct. The Bill of Rights Commission correctly identified this problem of the lack of acceptance of rights, but failed to realise a fundamental underlying factor contributing to it. A coherently justified interpretation and public acceptance of the Convention rights requires that a fundamental basis for the rights, embodying and depicting their universal and inherent nature, be recognised in the UK. If human rights are to be accepted in a manner consistent with the characterisation of their nature by in international and other national rights documents and discourse, any new Bill of Rights must state a fundamental basis.

However, a legislative solution is not essential. Case law analysis demonstrates that our judiciary have thus far almost entirely missed the opportunity their position gives them, to make clear the true nature of rights as recognised within the leading human rights treaties. Both the ECtHR and Canadian courts have acknowledged the fundamental nature of rights possession, though recognising the principle of dignity as their basis and using it to justify their interpretations. By following their example, and departing from the 17th century positivist grounding for rights generally applied so far, our courts can assist in increasing the acceptance and ownership of rights in the UK. Through greater and consistent use of the principle of dignity to justify their decisions, they can redress the missed opportunity to state a deeper basis for the rights within the HRA. The judicial use of dignity is regarded as problematic: where philosophers fear to tread in defining dignity should judges or legislative drafters rush in? Under the approach advocated here they need not do so. They need go no further than the use of dignity within rights treaties, but for our courts and for the understanding of rights in the UK this would be a fundamental step.

The absence of the statement of a fundamental basis of rights and the lack of the recognition of its importance's is an understandable consequence of the UK's constitutional history. Both the courts and Parliament can have a role in redressing this critical flaw in our rights protection. Until they do, the justification and acceptance of human rights law in the UK will continue to be fundamentally lacking.