

THE HUMAN RIGHTS ACT IN A CULTURE OF CONTROL

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INTRODUCTION

The UK is currently in the midst of a robust backlash against human rights. The election of a Conservative majority to Government in the 2015 general election with the express pledge of repealing the Human Rights Act 1998 (HRA) in its manifesto has placed both its future and the UK's continued accession to the European Convention on Human Rights (ECHR) high on the political agenda. That stated, the HRA was always on politically contentious ground with calls for its repeal being voiced since its enactment and this enactment itself delayed due to concerns regarding its impact.¹ Such 'rights hostility' in the UK may be explained by political scepticism towards all things 'European'— a hostility that still persists even after the UK's vote to leave the European Union (EU)— and the UK's constitutional order that has always had an, at best, ambivalent attitude towards the judicial vindication of human rights. This chapter, however, argues that these explanations are not the entire picture.

This chapter commences with a brief over-view of these standard rights critiques in public law discourse: namely, from the conception of rights by political constitutionalists as inherently political constructs, the scope of which should be left to the political branches; and Euro-scepticism which views human rights as a foreign imposition on the UK. Both of these critiques ultimately evoke an image of state sovereignty similar to Hobbes' famous Leviathan, with preservation of this all-powerful state from being weakened by human rights the primary motivation.² However, the death of Leviathan cannot be understood only through these two narrow lenses. A fuller understanding of this Leviathanic death, and by extension, the backlash against human rights in the UK, would entail looking at the complex sociological and political changes that the UK has gone under since the end of World War II. These changes have posed a profound challenge to the myth of the sovereign state, particularly in the area of criminal justice. Criminal justice has always been a key theatre for the performance of state sovereignty and the changes and challenges faced by the sovereign state in what David Garland calls a '*culture of control*' need to be confronted.³ By illustrating and contextualising the changes that this field and society has undergone, a broader and more critical understanding of rights hostility in the UK can be attained.

One must be careful, however, when constructing grandiose narratives concerning the general condition of modernity, particularly in a short chapter like this. The ambitiousness of such a project is daunting and whatever the result, it will invariably fall short of this stated goal. Outliers may be misidentified as the end-point of a trend, subjective preferences may distort the narrative by exaggerating certain aspects and downplaying others; certain trends may be ignored altogether.⁴ The purpose of this chapter therefore is not to provide such a comprehensive description of the condition of modernity, or even of Garland's account of modernity; rather, it is to stimulate and provoke debate in the existing literature, in particular in the field of law. It is to challenge

¹ Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) 3.

² See Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985).

³ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001).

⁴ Lucia Zedner, 'Dangers of Dystopia in Legal Theory' (2002) 22(2) Oxford Journal of Legal Studies 341, 343.

lawyers to expand beyond their discipline to look at arguments from other fields such as criminology, sociology and politics, thus bridging the gap between theory and practice.

I. EXPLAINING RIGHTS HOSTILITY IN THE UK: PARLIAMENTARY SOVEREIGNTY AND EURO-SCEPTICISM

The UK has always had, at best, an ambivalent attitude towards the judicial protection of human rights, in particular regarding their enforcement against the sovereign will of Parliament. JAG Griffith's famous conception of the UK's political constitution as being 'no more and no less than what happens,' eschewed any notion of judicial rights protection against a legislature.⁵ Rights are instead conceptualised as inherently political contestations, the resolution of which should be for the more democratically legitimate Parliament to decide rather than in courts. To illustrate this point, Griffith highlights the right to freedom of expression in Article 10 of the ECHR, arguing that it 'sounds like the statement of a political conflict pretending to be a resolution of it'.⁶

The HRA and Political Constitutionalism

Against this constitutional backdrop, the enactment of the HRA in 1998 saw the UK incorporate the ECHR into domestic law while at the same time seeking to maintain the supremacy of Parliament. Inspired by the New Zealand Bill of rights, the HRA took a 'third way' approach to human rights, allowing courts to review, and invalidate administrative decisions if they were incompatible with human rights norms.⁷ It also sought to foster a 'dialogue' between Parliament and the courts if the rights violation is traceable back to primary legislation and the legislation cannot be interpreted in a way compatible with these human rights obligations.⁸ Thus a section 4 declaration of incompatibility under the HRA does not affect validity of the legislation in question, meaning that the HRA avoids the degree of judicial protection of rights as seen, for example, in states like the USA or Ireland where the judiciary can strike down legislation as unconstitutional.

Within this culture of constitutional ambivalence towards the judicial protection of rights, it is of no surprise that the HRA, notwithstanding its copious genuflections towards the supremacy of Parliament, has become a target for political debate when particularly contentious judgements are reached. Benedict Douglas argues that this is further compounded by the lack of a fundamental justification for the HRA, such as the concept of dignity which has hampered the 'ownership' of rights in the UK and provided no bulwark against the criticisms of rights levied by Griffith and his predecessors, Jeremy Bentham and Edmund Burke.⁹ The balance struck by the pyrrhic remedy of section 4 has also been criticised from a political constitutionalist perspective. While Section 4 declarations of incompatibility do not affect the validity of the law in question, some commentators argue that this 'weak-form' judicial review eventually evolves into strong form judicial review given that such declarations

⁵ JAG Griffith 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 19.

⁶ *ibid* 14.

⁷ See Francesca Klug, 'The Human Rights Act— a "Third Way" or "Third Wave" Bill of Rights' [2001] *European Human Rights Law Review* 361-372; Section 6 of the HRA requires public authorities to act compatibly with Convention rights.

⁸ Section 3 of the HRA requires courts to interpret legislation compatibly with Convention rights 'so far as it is possible to do so while section 4 of the HRA empowers a court to make a declaration of incompatibility. See Roger Masterman, 'Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' [2009] *PL* 112, 114-115.

⁹ Benedict Douglas, 'Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom' [2015] *Public Law* 241, 246.

of incompatibility are rarely, if ever, ignored.¹⁰ Indeed, a number of political reactions to such section 4 declarations would corroborate this.¹¹ However, the subsequent political pushback regarding prisoner enfranchisement following a declaration of incompatibility from a British court and subsequent finding of a violation of the ECHR would suggest that this is not necessarily the case in the UK.¹²

Political constitutionalism does, to an extent, explain why there is political and media hostility towards certain aspects of the HRA and human rights norms more generally in the UK; however, what political constitutionalism does not tell us is *which* judgments may be the ones that are electorally salient. For although Griffith highlights Article 10 of the ECHR to illustrate the inherently political nature of rights, it is not the cases pertaining freedom of expression that are the subject of tabloid or political indignation. Indeed, the very same newspapers that support a repeal or reform of the HRA are eager to invoke Article 10 when it is their rights that are at stake.¹³ Instead, it is those cases involving the rights of individuals who society perceives as ‘others’ that provoke the most hostile reactions towards the HRA.¹⁴

Euro-scepticism

This ‘otherness’ of human rights norms is not just limited to the individuals invoking rights claims but may also affect the norms themselves. In this regard, human rights norms the UK are often framed as a foreign imposition from Europe. The Conservative Party’s 2015 manifesto, for example, pledged to:

...scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK’.¹⁵

This representation of human rights law as a foreign imposition on the UK is a politically potent one in a climate where Euro-scepticism is widespread and has not abated— but arguably accelerated— following the referendum to leave the EU in 2016.¹⁶ Press coverage on human rights often conflates the Council of Europe and the ECHR with the European Union (EU).¹⁷ To counter this European narrative, defenders of the HRA and ECHR may attempt to repatriate human rights, pleading to British input into the drafting of the ECHR or emphasising the

¹⁰See Mark Tushnet, ‘Alternative Forms of Judicial Review’ (2003) 101(8) Michigan Law Review 2781.

¹¹ See, for example, the enactment of the Sexual Offences Act (Remedial) Order 2013 in response to a declaration of incompatibility made in *R(F) v SSHD* [2011] 1 AC 331 regarding the proportionality of a lifelong requirement, without review, for registered sex offenders to keep the police informed of their whereabouts. For a discussion of the political debate surrounding this decision, see Gearty (n1) Ch 5.

¹²*Smith v Scott* [2007] SC 345; *Hirst v UK* App no 74025/01 (ECHR 6 October 2005); *Greens and MT v UK* App nos 60041/08 and 60054/08 (ECHR 23 November 2010). See text to n below for a further discussion of this issue.

¹³ *Miller v Associated Newspapers* [2016] EWHC 397 (QB).

¹⁴ text to n 55 below.

¹⁵ ‘The Conservative Party Manifesto 2015’ (May 2015) <<https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>> accessed 8 January 2017, 60..

¹⁶ See, for example, Christopher Hope, ‘Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed’ *The Telegraph* (28 December 2016) <<http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/>> accessed 7 January 2017.

¹⁷ See David Mead, “‘They offer you a feature on stockings and suspenders next to a call for stiffer penalties for sex offenders’: do we learn more about the media than about human rights from tabloid coverage of human rights stories?’ in Michelle Farrell (ed), *Human Rights in the Media: Representation, Rhetoric, Reality* (Routledge, forthcoming).

link between the ECHR and traditional British civil liberties.¹⁸ From its inception, the Labour Party famously embraced this patriotic narrative by naming the policy document that gave birth to the HRA ‘Rights Brought Home’. Winston Churchill is often mentioned at this point of the debate and Magna Carta may also be referenced too in this narrative— both by those in favour and against the HRA.¹⁹ These counter-narratives to Euro-scepticism may also downplay the legal relation between the HRA and the ECHR, by stressing that UK courts only have to ‘take into account’ judgments of the European Court of Human Rights (ECtHR), rather than being absolutely bound by them.²⁰

Hostility therefore may not be towards the rights themselves per se but to their source as emanating from Europe and a fear of a loss of sovereignty to an external entity beyond the state. Again, however, not every case before the ECtHR attracts the same level of media and political interest.²¹ Euro-scepticism, while explaining to a certain extent why judgments of the ECtHR are considered to be unpopular, also does not help to identify which judgments will be the most contentious.

There is an additional element to the ‘other’ dimension of human rights norms that is hinted at by the Conservative Party’s 2015 manifesto:

We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour’s human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.²²

This is contained in a section labelled, ‘Fighting crime and standing up for victims’. Related arguments are made in a section regarding the ‘Real change in our relationship with the European Union’, pledging that a newly enacted British Bill of Rights ‘will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation’.²³ The United Kingdom Independence Party’s (UKIP’s) 2015 General Election manifesto also explicitly makes the link between human rights and criminal justice with discussion of repealing the HRA and withdrawal from the ECHR placed in the ‘crime and justice’ section of its manifesto. It elaborated as follows:

¹⁸ This is a common theme stressed by human rights campaigning project RightsInfo. See, for example, ‘Human Rights’ What could be more British than that?’ (*RightsInfo* 30 September 2016) < <http://rightsinfo.org/what-could-be-more-british-than-that/>> accessed 7 January 2017.

¹⁹ Terry Kirby, ‘The Human Rights Act: 800 Years in the Making’ *The Guardian*, (2 June 2009); Jon Stone, ‘Scrapping the Human Rights Act will ‘restore’ Magna Carta’s Legacy, says David Cameron’ *The Independent* (15 June 2015) < <http://www.independent.co.uk/news/uk/politics/david-cameron-says-his-plan-to-scrap-the-human-rights-act-will-restore-magna-cartas-legacy-10320232.html>> accessed 7 January 2017; Philip Johnston, ‘In the land of Magna Carta, individual liberties already exist – Human Rights Act or no’ *The Telegraph* (2 June 2015).

²⁰ HRA section 2. For how section 2 has operated in practice see Roger Masterman, ‘Aspiration or Foundation? The Status of the Strasbourg jurisprudence and the ‘Convention rights’ in domestic law’ in Helen Fenwick, Roger Masterman and Gavin Phillipson (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 57; Aileen Kavanagh, ‘Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after *Re P?*’ (2009) 72(5) MLR 828; Roger Masterman, ‘Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court of Human Rights’_ (The Constitution Unit, School of Public Policy, UCL 2015) < <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/166.pdf>> accessed 10 January 2017.

²¹ Mead (n 17).

²² Conservative Manifesto (n15) 58.

²³ *ibid* 73.

We will remove ourselves from the jurisdiction of the European Court of Human Rights: the Strasbourg Court whose interpretation of the European Convention of Human Rights has been known to put the rights of criminals above those of victims. Our own Supreme Court will act as the final authority on matters of Human Rights.

We will also repeal Labour's Human Rights legislation. It has given European judges far too much power over British law making and law enforcement and prevented us deporting terrorists and career criminals and from implementing whole-life sentences.²⁴

There is therefore a clear link drawn between human rights, crime, and other 'others' such as terrorists and immigrants. Conor Gearty terms this representation of the HRA and ECHR as 'a charter for the bad'²⁵ while Adam Wagner calls it the 'monsterring' of rights.²⁶ Wagner's interesting account of this monsterring of rights begins in 2005; however, this chapter argues that one must go back further than this.

II. HUMAN RIGHTS IN A CULTURE OF CONTROL

Since the mid-twentieth century, the UK has, without a doubt, experienced a marked increase in judicial power. While the HRA was a significant contributor to this increase, it certainly was not the starting point. Thus while many have heralded the death of Leviathan;²⁷ this death, however, if it has occurred, was not so much a slaying by a single blow as it was a death by a thousand cuts. According to the Judicial Power Project, a project founded and supported by the right-wing Think Tank Policy Exchange, 'No single political or legal decision, including the human Rights Act 1998, alone explains the rise of judicial power within the United Kingdom.'²⁸ Nevertheless, this project, as its name suggests, is focused almost exclusively on changes in judicial power, rather than on changes to public power and the function of the state as a whole. Certainly, the rise in judicial power has affected the 'Leviathanic' image of the state as an all-powerful entity, with the executive—and the legislature to an extent—checked by judicial scrutiny in both domestic and international courts.²⁹ However, a key question remains as to whether this growth in judicial power is a pro-active one on the part of the judiciary or reactive to the changing nature of society and, by extension, the function and expression of state power. A fuller exploration of the changing nature of judicial power would involve looking these changes in this broader sociological and political context.

Such an approach would not look at judicial power alone but would require analysing how the role of Parliament itself has changed. While Parliament has endorsed international human rights norms and the institutional checks that these norms entail, state power has been ceded in other policy areas, not least to the EU. Lamentations decrying the 'decline of parliaments,' and the rise of experts and technocracy were heard, long

²⁴ 'United Kingdom Independence Party Manifesto 2015' < <https://d3n8a8pro7vhmx.cloudfront.net/ukipdev/pages/1103/attachments/original/1429295050/UKIPManifesto2015.pdf?1429295050>> accessed 7 January 2016, 53.

²⁵ Gearty (n 1) ch 8.

²⁶ Adam Wagner, 'The Monsterring of Rights' (19 September 2014) < <https://adam1cor.files.wordpress.com/2014/09/the-monsterring-of-human-rights-adam-wagner-2014.pdf>> accessed 8 January 2017.

²⁷ Eoin Carolan, 'Democratic Accountability and the Non-Delegation Doctrine' (2011) 33 *Dublin University Law Journal* 220, 220.

²⁸ 'About the Judicial Power Project' (*Judicial Power Project*) < <https://judicialpowerproject.org.uk/about/>> accessed 8 January 2017.

²⁹ Carolan (n 27).

before the HRA, the EU and, indeed were not limited to the UK.³⁰ This advance of technocracy and expertise could also be seen internally with the advance— and rollback— of the welfare state and the administrative institutions designed to deliver its goals. For example, while the welfare state did lead to a growth in state power, it differed from the classic Leviathanic image of power expressed from a unitary source. Instead, Parliament often conferred broad decision-making and norm-making powers on administrative bodies who, in turn, exercised such power according to their ‘expertise’ and best practice accumulated. In turn, the subsequent rollback of the welfare state and the rise of privatisation of public services must also present a profound challenge for this Leviathanic image of the state and, relatedly, attempts to check these new developments through judicial review. Consequently, whether the growth in judicial power is a proactive or reactive phenomenon must be interrogated further.

The ‘Culture of Control’

A further key area of state authority which has seen ‘dramatic changes’ around the same time as this concerns regarding the ‘decline of parliaments’ were heard is that of criminal justice policy. Up until the mid-twentieth century, criminal justice policy in the UK was dominated by the ‘rehabilitative ideal’ or ‘penal welfarism’ — that crime was essentially a social malaise that could be ‘cured’.³¹ Central to the idea of rehabilitation was a conceptualisation of deviant behaviour as something that could be cured. Under this understanding, criminal justice and penal policy should be directed towards ‘rehabilitating’ and reforming prisoners; making them model citizens and incorporating them back into society. Criminal justice policy, as a result, was left to unelected experts to manage and was of low electoral salience. This view of criminal justice policy was closely linked to the welfare state, tackling the underlying social causes of crime such as poverty through education or other programmes, with the prison central in delivering this. This, however, began to change in the 1970s with the increased politicisation of crime, described by Ian Loader as ‘the Fall of the Platonic Guardians’.³² These platonic guardians sought to:

...secure a better understanding of the ways in which crime and its control have become a key site for struggles over the meanings and import of such ideas as order, authority, legitimacy, freedom, rights and justice; a battleground for contests over the nature of political responsibility; a means of thrashing out debates about the relationship between state and citizens – in short, a conduit for championing and pursuing competing visions of the ‘good society’.³³

There are a number of reasons as to why this occurred. From a rise in the belief that ‘nothing works,’ and the related shift to ‘popular punitiveness’ to the rise of neo-liberalism and the increasing emphasis on individual responsibility, a comprehensive exploration of the causes of this change are beyond the scope of this chapter.³⁴ What is key, however, is that criminal justice policy thus shifted from being shaped by ‘experts’ insulated from

³⁰ ‘The Decline of Parliament’ (1963) 34(3) *The Political Quarterly* 233,233; A Moravcsik, ‘In Defence of the Democratic Deficit’ (2002) 40(4) *Journal of Common Market Studies* 603, 613.

³¹ Garland (n 3) 8.

³² Ian Loader, ‘Fall of the “Platonic Guardians”’: Liberalism, Criminology and Political Responses to Crime in England and Wales’ (2006) 46(4) *British Journal of Criminology* 561.

³³ *ibid* 562.

³⁴ Garland (n 3) ch 1.

the slings and arrows of politics, to becoming an electorally salient issue where being ‘tough on crime’ became a legitimate electoral position to take.³⁵

This decline of the Platonic Guardians is one aspect of broader changes in criminal justice policy and, indeed society as a whole at that time— what David Garland terms a ‘culture of control’. In Garland’s own words:

The Culture of Control develops a sociological description of the contemporary field [of crime control], a genealogical account of its emergence, an analysis of its central discourses and strategies, and an interpretation of its social functions and significance.³⁶

The ‘*Culture of Control*’ is Garland’s attempt to catalogue the changes in penal and social policy in the late Twentieth Century. Through this historical account of the recent past (or a ‘history of the present’ as he terms it), Garland explains how we have arrived at the state of the world as it exists today, or, at least, how it existed when *The Culture of Control* was published in 2001.³⁷ *The Culture of Control* is aimed at explaining contemporary crime control but also has the more ambitious task of tracing the ‘breakdown of modernist conceptions of the state and new ways of organising security’.³⁸ In *The Culture of Control*, David Garland identifies 12 ‘indices of change’ which he suggests reveals a major transformation to the way in which Anglo-Saxon societies in modernity (specifically the US and UK) respond to crime. These are:

the decline of the rehabilitative ideal; the re-emergence of punitive sanctions and expressive justice, changes in the emotional tone of crime policy; the return of the victim; the protection of the public as paramount; the politicisation of crime, and populist rhetoric and policies; the reinvention of the prison; the transformation of criminological thought; the expanding infrastructure of crime prevention and community safety; the commercialisation of crime control; new management styles and working practices; and a perpetual sense of crisis.³⁹

As a result of this ‘punitive turn’, criminal justice policy came to be dominated by populist policies such as harsher sentencing and increased use of imprisonment, ‘three strikes’ and mandatory minimum sentencing laws; ‘community notification laws and paedophile registers zero tolerance policies and Anti-Social Behaviour Orders, and the rise in victims’ rights.⁴⁰ A key driver behind these measures was a more proactive legislature, one that in other areas of public policy was experiencing a decline.

Schizoid Criminology and Human Rights

According to Garland, this culture of control has given birth to new criminologies that attempt to explain this new reality.⁴¹ Lucia Zedner describes this aspect of Garland’s thesis as ‘schizoid criminology’— oscillating between two, apparently contradicting schools of criminological thought: criminologies of the ‘self’ and criminologies of the ‘other’.⁴² Garland describes the ‘criminologies of the ‘other’ as the representation of a

³⁵ *ibid* 8-9.

³⁶ Garland ‘Beyond the Culture of Control’ (2004) 7(2) *Review of International Social and Political Philosophy* 160,161.

³⁷ Garland (n 3) Ch 1.

³⁸ Garland (n 36) 163.

³⁹ Garland (n 3) 8-20.

⁴⁰ *ibid* 142

⁴¹ *ibid* 137-138.

⁴² Zedner (n 4) 351-353.

criminal as: a threatening outcast, a ‘superpredator’, some of whom are ‘barely human, their conduct being essentialised as “evil” or “wicked” and “beyond all human understanding”.’⁴³ This ‘criminology of the other’ ‘demonises the criminal, arouses popular fears and hostilities and strives to enlist support for drastic measures of control.’⁴⁴ This criminology of the other results in a rise in ‘punitiveness’ where a fearful public seeks both security from and retribution against this criminal other. Criminal justice thus becomes one of the last bastions whereby the Leviathan could assert its sovereignty, realising Hobbes’ classical justification for the existence of a state as a necessary sacrifice of liberty to increase individuals’ security that cannot be achieved in a state of nature. Indeed, law enforcement has always been a key feature of sovereign power; the meting out of punishment, in particular.⁴⁵ Judgments of the ECtHR therefore pertaining to forms of punishment that breach Convention obligations – e.g. the Article 3 prohibition on torture and inhuman and degrading treatment and punishment, or Article 5 and the deprivation of liberty – are therefore stepping on particularly sovereign toes.⁴⁶

With the increased electoral salience of crime, the legislative branch has reclaimed criminal justice policy from the ‘experts’ or ‘platonic guardians’ who were entrusted with it for most of the Twentieth Century. This more ‘hands on’ approach manifests itself, according to Garland, with legislators becoming:

...more directive, more concerned to subject penal decision-making to the discipline of party politics and short term political calculation... One sees this reverse transfer of power in a series of measures (fixed sentence law reforms, mandatory sentences, national standards, truth in sentencing, restrictions on early release, etc.) that have shifted detailed decision-making tasks back to the centre – first to the courts and later to the legislature itself.⁴⁷

In *The Culture of Control*, Garland emphasises the role of the decline of faith in rehabilitation as the primary catalyst for the introduction of sentencing guidelines. With the reduction in use of indeterminate sentences, mandatory minima and maxima terms were introduced. Garland also suggests that the curtailment of judicial discretion by mandatory sentencing regimes results in a more streamlined system of pain delivery from the legislature and executive to the prisoner.⁴⁸ Judicial discretion is therefore portrayed by Garland as an obstruction to the delivery of pain, chaining the Leviathan by checking legislative and executive power. Such an argument implies that judges act like Loader’s ‘platonic guardians,’ constructing a bulwark against a punitive public. It is in this indicator of the culture of control where the clash between sovereignty and human rights is most sharply actualised. For example, in *Vinter v UK*, the Grand Chamber of the ECtHR ruled that ‘whole life tariffs’ under the Criminal Justice Act 2003 were incompatible with Article 3 of the ECHR and the prohibition on torture or inhuman and degrading treatment or punishment. In this regard, we can see how the majority of politically contentious human rights cases stem from individuals that are labelled as ‘others’— prisoners, terrorists or even asylum seekers. Attempts to counter these narratives can be seen for example in Liberty’s ‘What have Human

⁴³ Garland (n 3)135

⁴⁴ David Garland, ‘The commonplace and the catastrophic: Interpretations of crime in late modernity’ (1999) 3(3) *Theoretical Criminology* 353, 354.

⁴⁵ See David Garland, ‘The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society’ (1996) 36(4) *British Journal of Criminology* 445; Paul Kahn, ‘Torture and Democratic Violence’ (2009) 22(2) *Ratio Juris* 244.

⁴⁶ See, for example where the ECtHR found that the UK system of whole life sentences without review constituted a breach of Article 3 in *Vinter and Others v UK* App No 6609/09 (ECHR 9 July 2013).

⁴⁷ Garland (n 3) 13.

⁴⁸ *ibid*

Rights Ever Done for You?’ campaign.⁴⁹ Consequently, what the culture of control tells us is that this ‘monstering’ of rights, is nothing new. It also suggests that its causes and explanations lie deeper than legal or philosophical disagreements regarding the nature of rights and their role in the constitutional order.

At the same time as the criminology of the other was revived, an almost paradoxical ‘criminology of the self’ appeared and co-existed alongside this criminology of the other. Complementing the rise in neo-liberal thinking in power structures, these criminologies emphasised crime as a rational choice, an everyday, permanent phenomenon and something everybody was capable of.⁵⁰ Rather than attempting to rehabilitate individuals by curing their propensity for deviant behaviour, criminal justice strategies instead focused on reducing the opportunities for individuals to commit crime.⁵¹ This ‘supply side criminology’ consisted of measures such as ‘target-hardening’ and increased securitisation of spaces.⁵² By stressing crime as a rational choice to an opportunity that presents itself, the criminology of the self, at first instance, obliterates the distinction between the criminal and the ordinary citizen; between the self and the other. On this narrow reading, the criminology of the self would reduce the Leviathanic role of the state in the area of criminal justice policy at the same time as the emphasis on the ‘otherness’ of the criminal sought to revive it.

This shift towards the ‘supply side’, however, also entails a more macro perspective on crime. While the criminal law and criminal justice is invariably focused on individual responsibility for their given actions, viewing crime as a rational choice and the requisite attempts to reduce these opportunities led also to what Malcolm Feeley and Jonathan Simon describe as conceptualising crime as an ‘actuarial congregation of aggregates’.⁵³ These ‘new criminologies’ replaced the language of morality with the language of risk management, the responsibility of which lay on the individual, rather than the state.⁵⁴ Thus while prima facie a simultaneous rise in the ‘criminology of the other’ with the ‘criminology of the self’ may seem paradoxical, ‘moralising and managerialism need each other badly’.⁵⁵ By operating on a macro level, risk assessment and management makes broad assumptions about environments and about individuals. It is in this actuarial assessment of the individual that the stereotypes created by the criminology of the other can, in turn, feed into the criminology of the self. Thus although we are all potential criminals, some have more potential than others. Garland does not, however, delve too deeply into the various factors such as race, sex, religion or social class that go into constructing this other.⁵⁶ There is therefore a link between the apparently contradictory actuarial risk-management criminology and the expressive, retributive criminology of the other.

Garland places much of the explanation for this demand for security on ‘high crime rates’ and feelings of increased insecurity that has produced a ‘crime complex of late modernity’.⁵⁷ Zedner, however, is critical of this

⁴⁹Liberty, ‘What Have Human Rights Ever Done for You?’ <<https://www.liberty-human-rights.org.uk/human-rights-what-have-they-ever-done-you>> accessed 9 January 2017.

⁵⁰ Garland (n 3) 131-132.

⁵¹ See e.g. Ronald V Clarke and Pat Mayhew, ‘Crime as Opportunity: A Note on Domestic Gas Suicide in Britain and the Netherlands’ (1989) 29(1) *British Journal of Criminology* 35; David Lester, ‘Crime as opportunity: A test of the hypothesis with European homicide rates’ (1991)31(2) *British Journal of Criminology* 186; Paul Cozens and Terence Love, ‘A review and current status of crime prevention through environmental design’ 30(4) *Journal of Planning Literature* 393.

⁵² Garland (n 3) 131-132;

⁵³ Malcolm M Feeley and Jonathan Simon, ‘The New Penology: Note on the Emerging Strategy of Corrections and its Implications’ (1992) 30 *Criminology* 449, 457-458.

⁵⁴ *ibid*

⁵⁵ Zedner (n 4) 358.

⁵⁶ *ibid* 351.

⁵⁷ Garland (n 3)163; Zedner *ibid* 352.

explanation, arguing that Garland assumes that media representation of the popular will be synonymous with the public opinion.⁵⁸ Instead, Zedner suggests that the risk-management model fails to satisfy the basic urges that can only be done by the more expressive retributive approach, an approach that harkens back to the Leviathanic state.⁵⁹ Individuals do not conceptualise risk as an actuarial exercise. Humans are susceptible to a wide array of mental short cuts, heuristics, prejudices, and base fears which can be shaped or 'framed' by politicians, the media, and others with the capacity to set the agenda of public discourse.⁶⁰ A key feature of this culture of control is thus the manner in which political rhetoric shifted from absolving the state from responsibility for the causes of crime or the welfare of its citizens, while correspondingly making greater use of rhetoric that demonised sections of society that were helped by this welfare state.⁶¹ Relatedly, it may be the case that this risk-management itself creates conditions of unease and fear of crime. Thus the pursuit of security becomes an end in itself.⁶² Indeed, one may go further and interrogate how the influence of neo-liberal economic policy in creating job insecurity has led to a further demand for security in other areas of peoples' lives.⁶³

No more so is this schizoid criminology evident than in the area of counter-terrorism. *A Culture of Control* was published prior to the events of 11 September 2001; nevertheless, many of the dramatic changes that occurred in the area of criminal justice since then can be mapped on to Garland's thesis. The shift in emphasis from Irish terrorism to Islamic extremist terrorism made othering this new threat much easier, with the archetypal terrorist threat now possessing a much more racially and religiously distinct identity from the rest of the population.⁶⁴ At the same time, the conceptualisation of this threat as omnipresent and an every-day occurrence meant that securitisation and risk-assessment became the natural response.⁶⁵

The HRA a Culture of Control

The HRA was passed therefore passed at a time when the electoral salience of crime was at an all-time high. This, in turn, placed the judiciary firmly in the spotlight. A key event in this was the moral panic that surrounded the murder of three year old James Bulger by two ten year-old boys.⁶⁶ When the Court of Appeal subsequently found that the Home Secretary acted unlawfully by taking into account a petition signed by over 250,000 members of the public when increasing the sentence imposed on the defendants, a huge media outcry

⁵⁸ *ibid.*

⁵⁹ Zedner (n 4) 358; Feeley and Simon (n 53) 464.

⁶⁰ RM Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (1993) 43(1) *Journal of Communication* 51; Zizi Papacharissi and Maria de Fatima Oliveira, 'News Frames Terrorism: A Comparative Analysis of Frames Employed in Terrorism Coverage in US and UK Newspapers' (2008) 13(1) *International Journal of Press/Politics* 52, 53. See also Cohen S, *Folk Devils and Moral Panic: The Creation of the Mods and Rockers* (Martin Robertson, 1980).

⁶¹ Mona Lynch, 'Review: David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*' (2002) 25 *PoLAR: Political and Legal Anthropology Review* 109,110.

⁶² *ibid.*

⁶³ Jock Young, *The Vertigo of Late Modernity* (Sage, 2007) ch5.

⁶⁴ See Javaid Rehman, 'Religion, Minority Rights and Muslims in the United Kingdom' in Javaid Rehman and Susan Breau (eds) *Religion Human Rights and International Law* (Martinus Nijhoff Publishers 2007) 521; Chris Allen, 'Fear and Loathing: The Political Discourse in relation to Muslims and Islam in the Contemporary British Setting' (2010) 4(2) *Politics and Religion* 221.

⁶⁵ See Oren Gross, 'Chaos and Rules: Should responses to violent crises always be constitutional?' (2002) 112 *Yale Law Journal* 112, 1069-1095.

⁶⁶ See generally Colin Hay, 'Mobilization through Interpellation: James Bulger, Juvenile Crime and the Construction of a Moral Panic' (1995) 4(2) *Social and Legal Studies* 197.

followed.⁶⁷ This judgment, delivered before the entry into force of the HRA and based on classic administrative law principles, would portend of future reactions to high-profile judgments made under the HRA.

Tony Blair, while in opposition, famously stated in 1993 that a Labour government would be ‘tough on crime; tough on the causes of crime’.⁶⁸ Upon entering into government in 1997, Labour lived up to this promise, with the promise of being ‘tough on crime’ interpreted as being ‘tougher than the Tories on crime’.⁶⁹ Once in power, the new Government expanded the prison population by 33%.⁷⁰ Harsher sentences for certain offences were introduced, the 800 year old double jeopardy rule was changed and Anti-Social Behaviour Orders or ASBOs heralded a new form of deviance-control.⁷¹ It was thus in this climate of largely illiberal penal policy that the HRA was enacted by the newly elected Labour Government led by Tony Blair. The result therefore is a Janus-like government, embarking on a progressive constitutional revolution, while at the same time embracing the political rhetoric of popular punitiveness that is now directed against the HRA. This was further compounded by the events of 11 September 2001 and the subsequent counter-terrorist laws enacted in light of this new normalcy.⁷²

3. THE FUTURE OF THE HUMAN RIGHTS IN A CULTURE OF CONTROL

But in light of this broader, socio-legal understanding of rights hostility in the UK, what does this mean for the future of the HRA and human rights in the UK? As stated at the outset, the aim of this chapter is not to provide a comprehensive over-view of the changing nature of society, politics and other factors that may affect rights hostility in the UK. Rather, by giving a greater contextual and sociological focus to rights hostility in the UK, renewed scrutiny to the arguments advanced by both the defenders and critics of the HRA and human rights in general can take place.

Political Constitutionalism in a Culture of Control

A key area in which this could occur would be in regard to the value of ‘disagreement’ in political constitutionalism. A key defence of judicial review is its counter-majoritarian function in protecting vulnerable minorities from the ‘tyranny of the majority’.⁷³ This role has, however, been attacked by political constitutionalists, contending that the judiciary’s record has been woeful in protecting and vindicating these rights. Keith Ewing, for example, argues that the HRA and classic civil and political conceptions of rights has resulted in an unbalanced constitution where preference is given to this libertarian construct of non-interference at the expense of socio-economic rights. Ewing emphasises that the judiciary’s hostility towards socio-economic

⁶⁷ *ibid*; *R v SSHD ex parte Venables* [1998] AC 407.

⁶⁸ David Downes, ‘Toughing it Out: From Labour Opposition to Labour Government’ (1998) 19(3/4) Policy Studies 191, 192.

⁶⁹ *ibid*

⁷⁰ See Geoff Dobson, ‘New Labour’s Prison Legacy’ (2010) 57(3) Probation Journal 322.

⁷¹ See Michael Tonry, ‘The costly consequences of populist posturing: ASBOs, victims, ‘rebalancing’ and diminution in support for civil liberties’ (2010) 12(4) Punishment and Society 387.

⁷² For a discussion on how supposedly temporary emergency powers often become permanent, see Oren Gross, ‘Chaos and Rules: Should responses to violent crises always be constitutional?’ (2002) 112 Yale Law Journal 112, 1069-1095.

⁷³ See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd Ed Yale University Press, 1962); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1981).

rights can be seen long before the enactment of the HRA in the common law and its antagonistic stance towards trade unions.⁷⁴ Another classic example of this is the constitutional crisis caused by the stand-off between US President Franklin D Roosevelt and the Lochner Era Supreme Court's frequent striking down of New Deal legislation as unconstitutional.⁷⁵

Far from being sceptical of rights or law, political constitutionalists purport to defend both. Instead, the legislature is instead seen as the most appropriate forum for seeing rights in the round and ensuring that their specification in legislation takes into account the full range of considerations necessary to promote the public interest.⁷⁶ However, the aforementioned convergence between the left and right on criminal justice policy raises challenges for this view of the value of 'disagreement'.⁷⁷ Many of these critiques of the counter-majoritarian nature of judicial review do not venture into the realm of criminal justice policy and, indeed, Richard Bellamy, a key proponent of political constitutionalism—but also a defender of the HRA— sees this as a key area of judicial competence. His focus, however, is primarily on due process rights in the course of a trial, rather than on legislation pertaining to criminal justice.⁷⁸ The result of this convergence between left and right, is that it is difficult to see how the political order can effectively vindicate the claims of the most unpopular of minorities—that of the prisoner. The 'political disagreement' that political constitutionalism lauds, in this context, is not a debate between those in favour of prisoners' rights versus those against; rather it is instead a debate about who can out-tough the other side when it comes to criminal justice policy. Moreover, in the case of implementing the *Hirst* judgment, it is a debate about the right to vote, the fundamental right necessary for democracy which, in turn, gives Parliament (or at least one chamber) and, by extension, political constitutionalism, its legitimacy..

In the context of criminal justice legislation, Bellamy challenges the appropriateness of conceptualising this as an example of counter-majoritarianism, arguing that what he terms the dichotomy purported to exist in 'we-they legislation' is difficult if not impossible to construct. In the context of criminal legislation, Bellamy states that one could argue that criminal legislation is not 'we-they legislation' but 'we-we' legislation in the sense that everybody is a potential criminal. 'We are potential criminals in the way a white person is not potentially black.'⁷⁹ Bellamy thus seems to conceptualise 'they' only as being factors which we cannot change about ourselves. It would follow therefore that discrimination on the grounds of class is non-existent seeing as anybody can potentially be rich or, conversely, anybody can go from being rich to losing it all. Bellamy's answer also does not take account of the 'criminology of the other' and the powerful effect that this has on constructing a 'they'. It also does not take account of different agenda setters in public discourse and the different capacities of hegemonic groups to frame and shape the dominant narrative.⁸⁰ In essence, it is an argument that is, in theory, robust; however, practically, it ignores these powerful social forces that effectively create 'others' targeted by legislatures.

⁷⁴ See Keith Ewing, 'The Unbalanced Constitution' in Tom Campbell, Keith Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, 2001) Ch 6.

⁷⁵ *Lochner v New York*, 198 US 45 (1905); Ely (n 73) 14-15; Barry Friedman, 'The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of *Lochner*' (2001) 76 *New York University Law Review* 1383, 1390.

⁷⁶ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 110.

⁷⁷ See Jeremy Waldron, *Law and Disagreement* (OUP, 1999) 15, 25; Bellamy, *ibid* 5.

⁷⁸ *ibid*. For Bellamy's defence of the HRA as striking a good balance between rights and parliamentary sovereignty, see Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9(1) *International Journal of Constitutional Law* 86.

⁷⁹ Bellamy (n 76) 115.

⁸⁰ Entman (n 60).

Bellamy further argues that given the prominence of victims in criminal law and the consideration that ought to be given to victims' rights, criminal law can also be conceptualised as 'they-they' legislation referring to two classes of minorities.⁸¹ He does, however, acknowledge that 'we' are more likely to fall into the latter category. Even on this issue of 'we' as potential 'victim', this notion of victimhood must itself be interrogated. One of Garland's indices of Change is the return of the 'Victim' to the fore of penal policy. Relegated to the role of witness by the adversarial system with its primary aim of punishing an offence against the state, the victim was often left unfulfilled and wanting after justice was deemed to be done. This is arguably compounded by the introduction of victim impact statements.⁸² As Christie notes, 'He has no alternative. He will need all the classical stereotypes around the "criminal" to get a grasp on the whole thing.' The first conclusion one could expect is that with the increasing attention paid to the voice of the victim, one could expect the shift of the justice system to reflect their conflict with the offender rather than the State's. This would result in a more personalised, individual perception of the offender, negating the need for the "classical stereotypes" of the criminal as an Other. This however is not the result of the affirmation and protection of victims as identified by Garland. Instead of a more individualised experience of the criminal justice system, the victim has been held up as a representative character whose experience is assumed to be common and collective rather than individual and atypical. The victim is portrayed by the media and politicians as possessing certain feelings of anger towards the offender. Likewise, the public are told to relate to this iconic victim and their feelings as "everyone's a victim" or potential victim. The anger therefore becomes a collective experience, a collective experience of a violation that is ultimately very personal to the victim.

However, much like the failure of constitutional theory to confront this 'othering', many of the attempts by campaigners to counter the 'monstering' of rights, also fail to address this issue of why this othering occurs, and what, if anything, can be done to counter them. Moreover, they potentially ossify this problem, implicitly accepting the notion of the deserving over the undeserving by emphasising what they consider to be the deserving cases. A more nuanced understanding of how minority groups are constructed and represented could provide fresh insight into theoretical justifications for judicial review and the problem of 'discrete and insular minorities' in a democracy.

Euro-scepticism in a culture of control

A more contextual specific understanding of rights hostility can also illuminate understandings of human rights as suffering from an image problem as a 'foreign imposition' on the UK and whether confronting this image problem is a useful strategy for rights campaigners to take. UK public law has seen a considerable shift in recent years with regards to the relation between the HRA and common law scrutiny of the exercise of public functions through judicial review. In *Osborn v the Parole Board* the UK Supreme Court held that the applicants who were challenging erred in law by basing their arguments upon the HRA and Article 5(4) of the ECHR pertaining to the right to liberty and ignoring the common law jurisprudence pertaining to the 'duty to act fairly'.⁸³ While the motivation behind this emphasis of the common law, may not necessarily be to remove the HRA from the public

⁸¹ Bellamy (n 76) 115.

⁸² Garland (n 3) 11-12.

⁸³ *Osborn v Parole Board* [2013] UKSC 61

spotlight in politically contentious issues, it nevertheless results in this. Moreover, the shift away from the HRA towards classic judicial review would have the effect of fortifying judicial review in the event of a repeal of the HRA.⁸⁴ Other recent judgments such as *Pham v SSHD* emphasise that more intrusive tests for substantive review such as proportionality acknowledges the European influence on this test but at the same time emphasising its progressive evolution through the common law.⁸⁵

Notwithstanding this development, however, these developments will not mitigate the veracity of criticisms levied at the judiciary when rights or civil liberties or ‘the duty to act fairly’ operates in a criminal justice setting. Indeed, this can be seen before the enactment of the HRA. The killing of James Bulger placed the judiciary in the spotlight, even before the coming into effect of the HRA. Taking the HRA out of the picture will still leave the judiciary in the firing line from a legislature more willing to take a ‘hands on’ approach to criminal justice. Attempts therefore of claiming the ‘Britishness’ of the ECHR will not succeed in repelling critiques of the HRA. Ultimately, this hostility will not be solved by cosmetic changes to the HRA. Nor will it be solved by a repeal of the HRA completely or withdrawal from the Council of Europe. Political ire would instead be directed towards judicial review in classic administrative law (something already occurring), through changes to access to legal aid (again already occurring) or to criminal justice procedures involving high profile acquittals or mistrials. Human rights are but one more frontier in the cross-hairs of the highly politicised area of criminal justice.

CONCLUSIONS

The HRA in a culture of control becomes a perfect storm for the Leviathan and ‘the myth of the sovereign state’. Although Garland’s ‘culture of control’ is itself an incomplete picture of modernity, it should nevertheless encourage a broader, more contextually specific inquiry into the nature of rights hostility in the UK. However, while Garland’s bleak thesis is relied upon here to motivate further inquiry into rights hostility in the UK, one must be careful of falling into dystopian despondency.⁸⁶ Ultimately, the utility of dystopias, much like their antonym ‘utopia’, lies in their unattainability. Utopias act as a catalyst for change. They motivate actors, guiding their choices so that the decisions they take will lead them in the direction of the utopia.⁸⁷ However, by being unattainable, the inspiration and motivation remains constant. Dystopias too can motivate action and choice so as to avoid the world which the dystopia describes.⁸⁸ A dystopian picture of human rights in the UK therefore can motivate people to challenge the elements of the status quo that reflects the dystopia and defend those elements that the dystopian vision suggests are under attack.

⁸⁴ Roger Masterman and Se-Shauna Wheatle, ‘A common law resurgence of rights protection?’ [2015] EHRLR 57, 61.

⁸⁵ [2015] UKSC 19; Mark Elliott, ‘Proportionality and contextualism in common-law review: The Supreme Court’s judgment in *Pham*’ (*Public Law for Everyone*, 17 April 2015) <<https://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/>> accessed 10 January 2017.

⁸⁶ Zedner (n 4).

⁸⁷ Zygmunt Bauman, ‘Living in Utopia’, (London School of Economics, 27 October 2005), available at <<http://www.lse.ac.uk/website-archive/publicEvents/pdf/20051027-Bauman2.pdf>> accessed 7 January 2017, 7.

⁸⁸ Peter Young, ‘The Importance of Utopias in Criminological Thinking’ (1992) 32(4) *British Journal of Criminology* 423, 429.

However, dystopias can also paralyse rather than motivate as the enormity of the challenge at hand is revealed. Moreover, as stated at the outset, there can be a tendency in constructing ‘histories of the present’ to misidentify end-points of a trend or distorting narratives by exaggerating certain aspects and downplaying others; certain trends may be ignored altogether. In this regard, when discussing trends in the area of criminal justice and human rights, one must be cautious not to hoist penal policy prior to the emergence of a ‘culture of control’ onto a lofty pedestal. Take, for example, the rehabilitative model that long dominated penal thought up until the late 20th Century. The initial backlash against this rehabilitative model in the US was actually triggered by prisoners’ rights activists. These activists were concerned at the arbitrariness and lack of consistency in a sentencing policy that was supposedly tailored to an individual. Indeterminate sentences, whereby an individual would not be released until they were deemed to be rehabilitated were a particular source of contention. These critiques, once they gained traction, unfortunately had the opposite effect that they were designed to do. Rather than advancing prisoners’ rights, they were seized upon in the more punitive climate to introduced fixed sentences albeit at long, lengths or mandatory sentences.⁸⁹ To assume therefore that a return to the rehabilitative ideal would align with the conceptualisation of rights under the ECHR is to make a large conceptual leap into the dark. Indeterminate sentences would pose profound challenges to Article 5 – right to liberty – and would invariably come into conflict with the most European of doctrines: proportionality. Indeterminate sentences can also pose a challenge to the principle of legality or conceptions of equality under Article 14 ECHR. The dystopia must therefore not itself be a ‘*Fantasy Island*’ where negatives are exaggerated while the positives down played.⁹⁰

Relatedly, Zedner criticises Garland’s arguments pertaining to the ‘rehabilitative ideal’ as ignoring, for example, the many changes that took place regarding restorative justice.⁹¹ Moreover, Zedner stresses that often there was a marked disjuncture between this ‘tough on crime’ rhetoric and the actual reality of policies that were implemented.⁹² Thus there may be some hope that the current Government’s bark pertaining to human rights is worse than their bite. The constant postponement of the repeal of the HRA may be testament to this. That stated; if one takes a more contextual approach to human in the UK, negative changes pertaining to legal aid, and the law pertaining to standing in judicial review, thus making the practical vindication of legal rights through the courts more difficult should also be analysed. Moreover, if Brexit has taught us anything to date, it is the power of political rhetoric, regardless of its factual basis to shape public opinion. Thus while the Janus-like government may, in some areas talk tougher than it acts, in the long term, the distorted image of reality created by this rhetoric eventually creates its own realisation.

The UK, following Brexit is undergoing tumultuous constitutional changes which will, in turn, have profound impact on peoples’ lives and society as a whole. State power will wax in one area, wane in the other and, regardless of whether or not the HRA is repealed, this will propose a profound challenge for human rights and constitutional law. Whether or not the Leviathan will once again roar remains to be seen; however, a truer understanding of the changes made to human rights in the UK must be sought through greater contextual analysis and a grounding of theory in practice. The potential sociological factors that may contribute to rights hostility discussed in this paper is not exhaustive. Indeed, even those raised require further elaboration upon and

⁸⁹ Garland (n 3) 55-6.

⁹⁰ To borrow the term coined by Conor Gearty to describe the image of the UK painted by those in favour of repealing the HRA. See Gearty (n 1).

⁹¹ Zedner (n 4) 356.

⁹² *ibid.*

stress-testing. Ultimately, the point of this chapter, like the seminal work from which it takes its name, is to provoke.⁹³

⁹³ Garland (n 3).