A Common Law of Human Rights: History, Humanity and Dignity[1]

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Abstract

Whatever the fate of the direct incorporation of European rights treaties in the United Kingdom, this article takes as its starting point that the common law method will become more relevant. Some judges have called for this in any event, whereas others have cautioned against the dangers of using law to fix politics. The common law was once a formidable thing: the legal reasoning of the English-speaking peoples reflected through their judges. However, it could often distort historical understanding, deny the humanity of others and favour a set of political and economic rights over human ones. In defence of the Human Rights Act, the article begins by identifying how the legal culture surrounding the Act has served to limit common law thinking. It then asks whether this is therefore a moment to reinvigorate the common law by particularly focusing on history, humanity and dignity. The effect of the exercise is to strip the common law of its original context of nation-building and empire, and to update it as a means of doing justice in a democratic pluralist society. That revelation is important in the present political climate, because it shows that sovereignty is not singular and democracy is not simply majoritarian. The Human Rights Act has been important in protecting marginalised people; a journey into the wider landscape of the common law is now required to protect the Act itself from being marginialised.

The contest over the future of the United Kingdom's membership of the European Union has overlapped with the earnest beginning of another dispute as to whether the binding sources of the law for protecting human rights in this country should be exclusively British. There is talk of not only repealing the Human Rights Act 1998, but of withdrawing from the European Convention of Human Rights and starting again. The challenge here has been to take the implications of the discussion seriously. It focuses on the common law, which is the constitutionally distinct method of the English-speaking people to declare law beyond what is positively required by statute. The first part of the article engages with some of the constructive criticisms of the Human Rights Act. They have led judges to call for a renaissance of the common law. The following parts describe three approaches to how that could happen under the headings of history, humanity and dignity. History is important because the common law, like all of law, is a history of ideas. The common law should know its evolving place within that history. Humanity reminds us there are certain areas where it is perfectly proper to assume that the protection of individuals is sovereign over

[1] The following is based on the text of the Seventh Annual Baha Mousa Lecture, delivered 23 March 2016, *https://www.matrixlaw.co.uk/wp-content/uploads/2016/04/A-COMMON-LAW-OF-HUMAN-RIGHTS_23-3-16_Ultra.pdf* [Accessed 1 August 2016], but was ultimately animated by the run-up to the EU referendum in June 2016 (without knowing the final result), as well as statements by the then Home Secretary advocating renunciation of the European Convention on Human Rights (e.g. "UK must leave European convention on human rights, says Theresa May", *The Guardian*, 25 April 2016, *http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum* [Accessed 1 August 2016] (without knowing that she would become Prime Minister). The original lecture expressed this country's debt to Colonel Daoud Mousa, Baha Mousa's father, who died in 2015, as well as the law firms Public Interest Lawyers and Leigh Day who sought justice for the family. I repeat the debt here, together with thanks as regards the present text to Jonathan Cooper, Zac Douglas, Michael Fordham, Mick Gordon, Raza Husain, John Halford, Charlotte Kilroy, Gerard Kilroy, David Leonard, John Lipkin, Sajida Malik, Beth Shiner, Phil Shiner, Jessica Simor and Dan Squires.

state. These areas are narrow, but if one accepts that they exist, then the common law should identify and conserve them. Finally the promotion of human dignity ought to be the aim of all law. That is especially the case in the modern world given the continuation of vast categories of suffering despite the means to end them, and the ever-growing diversity of our differences.[2] What follows is not a theory, but a search for additional terms of how our common life can be worked out, recalling that the law is not just about law, and the common law was always an eclectic and multi-disciplinary endeavour.

The common law zeitgeist?

A story may be the best way into the subject. A prominent colleague who practised at the immigration Bar used to tell me, "The first rule of doing a public law case is that whatever you do, try not to mention the Human Rights Act. Certainly do not start by mentioning it". In 2005—when the European Court of Human Rights had not yet declared that the admission of evidence obtained by torture would automatically render any proceedings unfair—it was necessary for the appellant team in *A & Ors (No.2) v Secretary of State for the Home Department*[3] to go back to John Fortescue in 1460. It was 500 years of English and Scottish legal writing that enabled the appellants to argue that the common law could never countenance the admission of torture evidence in any circumstances. As one of the junior counsel on that team I proudly sent both the judgment and our submissions to the law tutor at my old university, who wrote back to say, "Having now seen the pleadings I am startled to see which side you were on. I had thought from the Home Sec's press release this morning that you must have been working for him …"

The tale serves to introduce three constructive criticisms that are made of the Human Rights Act.

Formalism

The first criticism lies in its limiting of (legal) imagination. We have moved away from unincorporated parochialism to being over-dependent on one particular international source of human rights philosophy: and so we have run a new risk of limiting our research and encouraged a new form of parochialism grounded in European regionalism. This might be regarded as unduly harsh by claimants who need those mantra paragraphs in Strasbourg judgments to have any rights at all. However, just as a cure for cancer will never be found by consulting scientists in one country,[4] it will also not be found by consulting a set of European scientists who operate in one institute in another country; especially when the scientists wait for research questions rather than seeking them out.

The answer would seem to lie in Lord Bingham's fusion of common law, Strasbourg and broader sources of international law in his judgment in *A (No.2)*.[5] It has since come to represent standard domestic method.[6] Strasbourg has always approached the interpretation of the Convention by reference to reasoning based on a combination of domestic, Conventional and broader international law.[7] It did so in the years after *A (No.2)* was decided in order to find that the exclusionary rule concerning torture constitutes an essential requirement of justice.[8] In recent years it has used the same method to identify a commitment to the

[2] See previously in this publication, D. Friedman, "Torture and the Common Law" [2006] 2 E.H.R.LR. 180 and D. Friedman, "Torture and Modernity" [2013] 5 E.H.R.L.R. 494. In a broad sense, this is the third of a trilogy, grappling with the complex relationship between human rights and security, which periodically since 1945 has called into question the extent to which democracy and the rule of law are unfinished projects in the modern world.

[3] *A (No.2) v Secretary of State for the Home Department* [2006] 2 A.C. 221, HL.

[4] Jeremy Waldron, "Foreign Law and the Modern Ius Gentium" (2005) 119(1) *Harvard Law Review* 129–147, highlighting the virtues of "a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems".

[5] *A (No.2) v Secretary of State for the Home Department* [2006] 2 A.C. 221 at [29]–[52], HL.

[6] The United States Supreme Court notably, and hitherto unusually, emulated the practice in *Lawrence v Texas* (2003) 539 US 558 at 573 and 576–577 in citing the Strasbourg judgment on decriminalising homosexual acts. See also *Roper v Simmons* (2005) 543 US 551.

[7] The approach of the Court dates back to the its earliest case-law, e.g. *Golder v United Kingdom* (1975) 1 E.H.H.R. 524 at [35], but finds its contemporary commitment to an integrated approach in *Al Adsani v United Kingdom* (2002) 34 E.H.R.R. 11 at [55], as discussed on the section on Humanity below.

[8] *Othman (Abu Qatada) v United Kingdom* (2012) 55 E.H.R.R. 1 at [268]–[287]. See also *Jalloh v Germany* (2007) 44 E.H.R.R. 3 and *Gäfgen v Germany* (2011) 52 E.H.R.R. 1.

protection as human dignity as essential to the Convention, even though the right in those terms appears nowhere in its text.[9] The lesson might be that there is no longer a centre, in the sense of a metropole that imposes upon the periphery; rather there is a process of fusion borne out of dialogue between the local and the global. Human rights law (including the near instant access to it on the internet) is a supra-jurisdictional source of learning where the local answers to common problems can be drawn upon.

Legitimacy deficit

The second criticism of the Human Rights Act involves a legitimacy deficit. This is different to the alleged democratic deficit arising from the Act, which I do not recognise as a constructive criticism, because (1) the Act was passed by Parliament; and (2) democracy is more than just majoritarian politics. For law to enjoy empathy and legitimacy it should be rooted in local culture and history. Faced with the threat of Al Qaeda and the popular seduction of ticking bomb arguments, each of the judgments of the House of Lords in *A (No.2)* was keen to articulate an exclusively common law answer, above anything else.[10] On this there was generally too much complacency after the Act came into force that people would automatically esteem human rights as both part of our national traditions as well as being "elementary considerations of humanity".[11] Not everyone can be like Rene Cassin, who concluded his speech accepting the Nobel Peace Prize in 1968 with the words, "I adore my country with a heart that transcends its borders. The more I am French, the more I feel a part of humanity".[12] People's sense of the destiny of a unique identity, particularly their nation, religion or economics, always has the capacity to dominate.[13] Ideally, law should speak to these identities without being overwhelmed by them.

Adam Smith provided an important answer to this problem as long ago as 1759 in his *Theory of Moral Sentiments* to "examine our conduct as we imagine any other fair and impartial spectator would examine it". [14] His reason was that, "In solitude we are apt to feel too strongly whatever relates to ourselves … The conversation of a friend brings us to a better, that of a stranger to a still better temper".[15] The function of the spectator is "to remove ourselves from our actual station and endeavour to view [our own sentiments and motives] at a certain distance from us". This he believed "we can do … in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them".[16] While the common law does not need international human rights law to enshrine a commitment to judicial impartiality as a constitutional absolute, Amartya Sen has updated the Smithian project by emphasising that "the exercise of impartiality must be open (rather than locally closed)".[17] Sen links the "relevance of distant perspectives" not just to a means of avoiding vested interests, but to sufficiently scrutinising the

[9] See *Bouyid v Belgium* (2016) 62 E.H.R.R. 32 (the art.3 slapping case) in which the positive duty to protect human dignity—especially for those who are detained—gets its most emphatic endorsement yet by the Grand Chamber with extensive reference to the coverage of human dignity in international Treaty law since 1945: from the Preamble to the United Nations Charter and Universal Declaration of Human Rights to art.1 of the EU Charter of Fundamental Rights (at [45]–[47]). This gives further foundation to the Strasbourg case-law principle that, despite not being mentioned anywhere in its text, "respect for human dignity forms part of the very essence of the Convention" (at [89]). See also *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 at [65].

[10] Contrary to its comparative law perspective in *Lawrence v Texas* (2003) 539 US 558, the majority decision in the US Supreme Court in the gay-marriage case of *Obergefell v Hodges* 135 S.Ct. 2071 (2015) was particularly to root its justification purely in American constitutionalism.

[11] *Nicaragua v United States (Military and Paramilitary activities in and against Nicaragua)* [1986] I.C.J. 114 at [218].

[12] Mary Ann Glendon, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001), p. 210.

[13] Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin, 2006).

[14] Adam Smith, *Theory of Moral Sentiments*, first published in 1759, extended version, 1790 (Penguin 250th anniversary, 2009), Pt III, Chs 1, 2, p.135. The forgotten status of Adam Smith's book on moral philosophy, exploring how and why people act with decency and virtue even when it conflicts with their self-interest, is striking in the sense that it leaves Smith's exploration of self-interest in the "Wealth of Nations", only partly understood in popular thought. On this, see Amartya Sen's preface to the Penguin 250th anniversary edition of the book at pp.vii-xi and Russ Roberts, *How Adam Smith Can Change Your Life: An unexpected guide to human nature and happiness* (Penguin, 2014),

[15] Smith, *Theory of Moral Sentiments*, first published in 1759, extended version, 1790 (Penguin 250th anniversary, 2009), Pt III, Chs 3, 28, p.177. See further, "The man within the breast, the abstract and ideal spectator of our sentiments and conduct, requires often to be awakened and put in mind of his duty, by the presence of the real spectator: and it is always from that spectator, from whom we can expect the least sympathy and indulgence, that we are likely to learn the most complete lesson of self-command".

[16] Smith, *Theory of Moral Sentiments*, first published in 1759, extended version, 1790 (Penguin 250th anniversary, 2009), Pt III, Chs 1, 2, p.135.

[17] Amartya Sen, *The Idea of Justice* (Penguin, 2010), p.128.

improper hold of entrenched traditions and customs within a given locality, and making as sure as possible that lack of agreement is never to do with lack of understanding.[18] Listening to internal voices is valid and inescapable, but the determination to be open to outside voices is an essential condition for testing the correctness of any view. It forms a moral dimension to the process of reasoning. Sen therefore identifies "non-parochialism as a requirement of justice".[19]

Common law ossification

The third criticism of the Human Rights Act is that the common law of human rights stopped being the evolving source of law that it should be. That was not meant to be the case. The preamble to the Act envisaged direct incorporation as providing "further effect to rights and freedoms guaranteed under the European Convention on Human Rights", because several of them, including those concerning killing, ill-treatment, fairness, speech and protest, were already available in this country. Section 11(a) of the Act under the heading "Safeguard for existing human rights" provides that "A person's reliance on a Convention right does not restrict any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom". Lord Cooke (surely the embodiment of the common law human rights jurist) wanted the common law to remain a source for recognising that some rights "are inherent and fundamental to democratic civilised society", such that "Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them".[20]

So how might the common law of human rights gain deeper roots in domestic culture, but also reflect an appreciation of global rights values? The question is not only posed by current politics, but also by the UK Supreme Court that in the cases of *Osborn*[21] and *Kennedy*[22] have declared that the common law is not dependent upon, or superseded by, the Human Rights Act. The issue is not without its present contributors, as the theme of this edition of the *European Human Rights Law Review* attests to. Three senior jurists in particular, Sir John Laws,[23] Lord Judge[24] and Lord Sumption [25] have all focused on the extent to which democracy in this country will be undermined if its Supreme Court is required to follow Strasbourg judgments, even when it disagrees with them. Most observers, probably even those judges, do not think this happens often. However, it will quickly become apparent that the common law I have in mind is animated by an idea that certain matters of law should be without borders; that on those matters the establishment of a global consensus should be seen as both a moral and a political virtue. This is as much a theory of democracy, as it is of law. My three ways into discussing the subject fall under the headings of "history", "humanity" and "dignity".

[18] Sen, *The Idea of Justice* (2010), pp.124–152 and pp.402–407.
[19] Sen, *The Idea of Justice* (2010), p.403.
[20] *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532 at [30].
[21] *Osborn v Parole Board* [2014] A.C. 1115 at [63].
[22] *Kennedy v Charity Commission* [2015] A.C. 455 at [46] and [133]. A number of Supreme Court Justices have also called for the same discipline extra-judicially: Lady Hale, "UK Constitutionalism on the March", ALBA Lecture 12 July 2014; Lord Reed, "Is the Supreme Court Supreme?" 28 February 2014; and Lord Toulson, "International Influence on the Common Law", COMBAR, 11 November 2014.
[23] Sir John Laws, 65th Hamlyn Lectures, "The Common Law Constitution" (Cambridge, 2013).
[24] Lord Judge, "Constitutional Change: Unfinished Business", University College London, 4 December 2013, *https://www.nottingham.ac.uk/hrlc/documents/specialevents/lordjudgelecture041213.pdf* [Accessed 1 August 2016].
[25] Lord Sumption, 27th Sultan Azlan Shah Lecture, Kuala Lumpur, "The Limits of Law", 20 November 2013, *https://www.supremecourt.uk/docs/speech-131120.pdf* [Accessed 1 August 2016]. See also N.W. Barber, Richard Elkins and Paul Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016).

History

Invented traditions

There is an industry amongst lawyers and judges to excavate common law writing to justify a contemporary human rights position. Historians define this as the Whig interpretation of history.[26] It overlooks that many of the so-called Constitutional statutes expressly take away rights from serfs, women, Jews and (after the Reformation) Catholics. Our celebration of these things amount to invented traditions.[27] They are part of the broader landscape of how nations are imagined;[28] and the common law is a particularly imaginative discourse. Magna Carta was being feted for its 800th anniversary last year notwithstanding that it provides that Jews cannot enforce interest payments on their loans to Barons, and women are restricted in standing witness against men before courts.[29] We have already acknowledged that finding roots in local culture is important for the legitimacy of law, but we should not forget that common law panegyrists, like Coke and Blackstone, were mythmakers, and in Lord Hoffmann's sense,[30] alchemists. Hoffmann's alchemists are those that delve into the distant past to find philosophers' stones undetected by generations of judges to convert the base metal of executive power into the gold of common law right.

Amidst the celebration of the Magna Carta in 2015 Lord Sumption as the historian-judge, with a particular expertise in medieval history, could hardly have held back. In his lecture to the Friends of the British Library he reminded us that:

> "Magna Carta as we know it was reinvented in the early seventeenth century, largely by one man, the judge and politician Sir Edward Coke … Coke transformed Magna Carta from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution, a status which it has enjoyed ever since among the large community of commentators who have never actually read it."[31]

For Sumption, "one's attitude to political myths of this kind depends on where one situates one's golden age". The creation of the Magna Carta myth in the constitutional history of seventeenth-century England was designed by common lawyers consciously involved in the politics of their day to conjure an "imagined paradise lost" of antiquity.

Necessary mythologies

If we need to be aware of the invention of tradition, we should also acknowledge the necessity of myth. This has already been touched upon. There was a reason why the House of Lords in *A (No.2)*[32] relied on Coke and Blackstone to presuppose that James I had actually asked his Privy Council in 1628 to give him an advisory opinion on whether torturing the man suspected of murdering the King's favourite, Lord Buckingham, would violate the law of England. The reason for citing *Felton*'s case (named after the

[26] The label describes a style of historical narrative that was dominant in Victorian England's imperial sense of its own greatness (see Hebert Butterfield, *The Whig Interpretation of History* (1931)). For common lawyers, it has particular resonance, because the foundation for the myth was that all progress in the world derived from Parliament's defeat of the Stuart monarchy.

[27] Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Canto Classics reissue, 2012).

[28] Benedict Anderson, *Imagined Communities, Reflections on the Origins and Spread of Nationalism*, rev edn (Virso, 2006).

[29] Aidan O'Neal QC, "Not waving but drowning—EU Law, Common Law Fundamental Rights and the UK Supreme Court", in Daniel Clarry and Christopher Sargeant (eds), *UK Supreme Court Annual Review—2013/2014 Legal Year* (University of Cambridge, 2015), vol.5, pp.176–187.

[30] *Lewis v Attorney General of Jamaica* [2001] 2 A.C. 50 at 88, PC, "… the majority have found in the ancient concept of due process of law a philosopher's stone undetected by generations of judges which can convert the base metal of executive action into the gold of legislative power".

[31] Lord Sumption, "Magna Carta then and now", Address to the Friends of the British Library, 9 March 2015, *https://www.supremecourt.uk/docs/speech-150309.pdf* [Accessed 22 July 2016].

[32] *A (No.2) v Secretary of State for the Home Department* [2006] 2 A.C. 221, HL.

assassin),[33] was not in order to discover historical truth. Neither was it a reference to binding law in the sense of precedent. Rather it was to highlight the relationship between symbols and justice.

Lord Hoffmann in particular understood this aspect of the prohibition on torture, when he described it as carrying "a symbolic significance as a touchstone of English liberty which influences the rest of our law". As Hoffmann immediately put it in the same sentence, "the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system". [34] This is judicial myth-creation. Even if the formulae are shared, it is alchemy at its finest. It functions not to tell us about an event that actually once occurred, but to underscore the status of what Jeremy Waldron calls a "legal archetype" by which he means

> "a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law."[35]

Waldron's writing was expressly cited by Hoffmann in *A (No.2)*.[36] The judicial lesson—society needs touchstones.

There are different approaches to this idea of legal history as myth. Sir Stephen Sedley (citing Geoffrey Wilson) has emphasised that:

> "The courts do not operate on the basis of real history, the kind of history that is vulnerable to or determined by historical research. They operate on the basis of an assumed, conventional, one might say consensual, history in which events and institutions often have a symbolic value."[37]

Conversely, Lord Sumption (again on Magna Carta) has observed:

> "There are obvious reasons why lawyers should have taken the lead in extolling Magna Carta. There have been periods in our history when law has acquired an intensely ideological flavour. One of them was the first half of the seventeenth century, when lawyers provided much of the leadership of the Parliamentary opposition to Charles I, and the law courts themselves became an important political battleground between absolute and limited monarchy."

For Sumption, another one of these intensely ideological eras "is our own age, in which government is once again held in low regard and law is invoked as a source of nobler, more liberal and more principled values than mere politics".[38]

Living history

So how should contemporary common law writing engage with history? The common law is a story, prompted by lawyers, and told by judges. There are golden ages, tragic ones, and reckonings over time. In the telling of that story there is a role for both the deconstruction of myth and the (candid) deployment of it. History—as the passage of time and the professional study of the past—is not the same as memorialisation.[39] Still there is also a folklore of law, in which evil practices are outlawed, but never people.[40] The common law found its original identity in nation building (in the interests of its elites) and

[33] *Felton*'s case (1628) 3 How. State Tr. 371.
[34] *A (No.2) v Secretary of State for the Home Department* [2006] 2 A.C. 221 at [83], HL.
[35] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 *Columbia Law Review* 1681–1750, reprinted *Torture, Terror, and Tradeoffs: Philosophy for the White House* (Oxford University Press, 2012), p.228.
[36] *A (No.2) v Secretary of State for the Home Department* [2006] 2 A.C. 221 at [82], HL.
[37] Stephen Sedley, *Lions Under the Throne, Essays on the History of English Public Law* (Cambridge University Press, 2015), p.2.
[38] See fn.31 above.
[39] For an extraordinary examination of the difference between memorialisation and history, see the epilogue chapter of Tony Judt, *Postwar, A History of Europe since 1945* (Vintage, 2010), subtitled "An Essay in honour of modern European Memory", pp.803–831.
[40] For a first draft attempt at grappling with these issues, see D. Friedman, "Torture and the Common Law" [2006] 2 E.H.R.LR. 180.

empire (in the form of domination). Yet that is not what it has remained, for it now has the capacity to tell different types of stories, ones in which we move from a singular white, male, Christian, heterosexual hegemony to a plurality.

It helps to see the common law as a form of living history.[41] This combines the common law conceit that it is "always speaking"[42] with Benedetto Croce's truism that "all history is contemporary history". The function of the common law today can include reminding us of the extraordinary (and shameful) variation in its own standards: not just over time, but between the metropolitan and peripheral parts of empire, just as between race, class, religion, gender and sexuality. That standards change over time is not difficult to fathom. For instance fairness is not what it used to be. In *R v H*,[43] Lord Bingham cited the case of a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: "Gentlemen, I suppose you have no doubt? I have none." Other dimensions of change are less reflected upon. So while it was well understood that the unreasonable use of force in purported self-defence in security operations would constitute a murder—at least by 1911—people were being murdered in that respect across Palestine, Malaya and Ireland, throughout the late colonial period. The *Lee Clegg* case,[44] which concerned the shooting at a vehicle driving away from a Northern Ireland checkpoint in the 1990s, was the product of the common law remembering itself in this fashion. Recent review by the English courts of the responsibility of the United Kingdom for the Batang Kali massacre in Malaya 1948 represents a decolonisation of the common law still taking place a generation after actual decolonisation of the empire.[45]

Rule of law as an unqualified human good

The paradigm example for seeing the common law as living history is the utter transformation of Dicey's highly contested concept of the rule of law, designed by him to justify the unfettered Parliamentary supremacy and Anglo-centric complacency about the end of history in the 1880s. Despite its unpromising start, the rule of law is now an idea worth struggling for *everywhere* for *everyone*. Nevertheless, it is worth recalling that for Dicey the rule of law meant the "omnipotence or undisputed supremacy", not only of Parliament, but of central government, by which he meant the Crown both in and outside Parliament.[46] The same strain of thought that today objects to the European Union and the ECHR, tends to also object to the growth of judicial review. It rails against the idea that (nobler) lawyers can fix (broken) politics.[47] It fears that the judges pulling at a spider's web will not understand the polymorphic consequences of their interventions, and slowly, in a mundane and subtle fashion, the lifeblood of democracy will drain away "like the republican constitutions of Athens or Rome or the Italian city-states of the Renaissance".[48] The difficulty with this approach is that it has no meaningful answer (at least, not one based on principle) to the limits of electoral majoritarian politics. Not only are the partisan structures and techniques of that form of politics compromised, but through a sequestered balloting version of democracy and the politics that it generates, we cannot readily prevent the repetition of the Nuremberg laws enacted by a freely elected

[41] Adam Gearey, Wayne Morrison and Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes and Institutions* (2nd edn, Routledge, 2013), p.59.

[42] Although the principle is ordinarily applied to statutory interpretation over time (see *R. v Ireland*; *R. v Burstow* [1998] A.C. 147 at 158–159; *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 A.C. 27 at 49–50), it has been applied to the common law itself, for example *R. v R* [1992] 1 A.C. 599 (removing the common law presumption that a wife was deemed to consent to all sexual intercourse with her husband).

[43] *R. v H* [2004] 2 A.C. 134 at [11].

[44] *R. v Lee Clegg* [1995] 1 A.C. 482 at 493.

[45] *R. (on the application of Chong Keyu) v Secretary of State for Defence* [2015] 3 W.L.R. 1665.

[46] Sedley, *Lions Under the Throne, Essays on the History of English Public Law* (2015), pp.269–271.

[47] Again see the extra-judicial speeches of Lord Sumption (see fn.31 above) and the quotation cited at fn.38 above. In "The Limits of Law" (see fn.25 above) Lord Sumption referred to "the contempt felt by many intelligent commentators for what they regard as the illogicality, intellectual dishonesty and the irrational prejudice characteristic of party politics". John Rawls and Ronald Dworkin were then cited as "perhaps the most articulate modern spokesmen for this point of view".

[48] Lord Sumption, "The Limits of Law" (see fn.25 above). Sumption's critique is loosely based on Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92(2) *Harvard Law Review* 353.

Reichstag in Nazi Germany. Unless a hypothetical Bill of Rights would entrench a right to vote, there would be no constitutional basis to prevent the enactment of Apartheid, just as right now prisoners are being denied the right to vote, even though the omission to do so is at odds with contemporary international human rights standards.[49] The impasse on prisoner-voting lacks the open impartiality identified by Amartya Sen in his reading of Adam Smith as above.[50] It clings too much to "our natural station", for it lacks a willingness to open impartiality so that we can view our sentiments from a "certain distance from us".

There is a democratic answer to this in the rule of law as an archetype, which is beyond merely a law of rules, and which as an idea has not stopped with the supremacy of the Crown in and outside Parliament. It features in the preamble to the United Nations Charter and the ECHR and is now enshrined in ss.1 and 17 of the Constitutional Reform Act 2005. It clusters together a range of common law protections, including access to court, equality before the law, fairness, rationality, human rights and compliance with international law in the absence of express legislative choice. The last gift of Lord Bingham to the rule of law was to write about its salient precepts, and he did so in a way that was culturally rooted in English traditions, but also cosmopolitan in outlook.[51]

It is a central feature of democracy in this country that the Government as the embodiment of the Crown in Parliament is subject to review by the courts. The sky has not fallen in on our heads for insisting on those types of limits on Parliament, which can change both its executive, its law and (in theory) its judges. All of that navigates around the sun of a discrete feature of law that is limitless: something identified by the Marxist Historian E.P. Thompson in 1975, when others on the left in Western Europe were still dubious. There can be "shams and inequities" beneath a particular enacted law he wrote, but, "The rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."[52] Effective realisation of the rule of law cannot be partitioned into a parochial understanding of what it involves that is based on distinct nations; neither is it exclusively European. That leads to the second of my three contemporary common law headings, 'humanity'.

Humanity

The ultimate unit of all law

While the legislature of any sovereign state remains free to choose, and sometimes will choose to the contrary, it is important never to forgo the voice of the impartial spectator that tells us that humanity can be sovereign over state. This is the function of law—both national and international. The modern version of this idea was best expressed in Sir Hersch Lauterpacht in his *General Theory of International Law*:

> "The principle that the rights and duties of States are but the rights and duties of man is of importance in that it lends emphasis to the idea … that the individual human being is the ultimate unit and end of all law, national and international, and that the effective recognition of the dignity and worth of the human person and the development of human personality is the final object of law."[53]

[49] *R. (on the application of Chester) v Secretary of State for Justice* [2014] A.C. 271, SC but declined to grant the remedy sought in circumstances where Parliament was already aware of it.

[50] See fnn.14 et seq. above.

[51] Tom Bingham, *The Rule of Law* (Allen Lane, 2010).

[52] *Whigs and Hunters: The Origins of the Black Act* (Parthenon, 1975 reissued by Breviary Stuff Publications, 2013), p.266. See also Daniel H. Cole, "An Unqualified Human Good: E.P Thompson and the Rule of Law" (2001) 28 *Journal of Law and Society* 177–203.

[53] *International Law: Collected Papers of Hersch Lauterpacht*, published posthumously and edited by Elihu Lauterpacht, Vol. I General Works (Cambridge University Press, 1970), p.149. As early as 1925, Lautepacht had begun to identify dissolving lines between national and international law in Hersch Lauterpacht, "Westlake and Present Day International Law" (1925) 15 *Economica* 312–315 ("The society of states … is the most comprehensive form of society amongst men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of men who compose it"). By 1935, in his preface as the newly appointed editor to the 5th edition of *Oppenheim's International Law*, Lauterpacht wrote that: "The well-being of the individual is the ultimate object of all law" (the preface to this edition

This gives rise to the principle that there are certain matters that we can never view solely from a sequestered position of the nation. The transnational discipline of human rights describes those matters.

Combining law that morally matters

A process of dialogue and systemic integration between constitutional, conventional and customary law is long underway, and has already established a foothold in domestic public law. There is a presumption of human rights compliance in statutory construction.[54] It can be incorporated into the exercise of discretion.[55] Human rights form the moral assumptions that underpin the assessment of reasonable decision making.[56] Government policies can incorporate international human rights and humanitarian law into a duty of governance because the executive has chosen to do so.[57] The effect of the Human Rights Act is to give greater organisation to this common law evolution, but also mandate a certain type of dialogue between domestic and international law.

The approach is part of a wider discipline in international law itself, especially in the field of human rights protection. The aim is to combine various sources of law that morally matter in a single system. Article 38(1)(c) of the Statute of the International Court of Justice, cited and adopted by the European Court of Human Rights in the 1975 in *Golder v United Kingdom*,[58] requires the Court to apply "the general principles of law recognized by civilized nations". Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969, cited and adopted in *Al Adsani v United Kingdom*,[59] provides: "There shall be taken into account, together with the context: … (c) any relevant rules of international law applicable to the relations between the parties".[60] This is the way that the international court looks beyond its station, again at a distance from itself, testing its own parochialism.

The same discipline then takes place at the local court level. If there is an arguable error in the international court judgement, dialogue ensues.[61] The duty under the Human Rights Act is to "take account"[62] of the international court in Strasbourg (and by extension the broader sources it relies upon). Taking account does not preclude difference. By their nature, certain human rights are imperfect obligations (in trade parlance "qualified") and in that respect the possibility of (serious) disagreement over their application is part of the discipline of human rights. The extent to which international court judgments actually bind UK Supreme Court jurisprudence against its own better judgment is minimal.[63]

is published in Sir Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht* (Cambridge University Press, 2012), pp.75–76). Lauterpacht added, "whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness". In his paper to the Grotius Society delivered in 1942, Lauterpacht formulated the principle that underpinned his then embryonic work on human rights (see below), "the individual human being—his welfare and the freedom of his personality in its manifold manifestations—is the ultimate unit of all law" (Lauterpacht, *The Life of Sir Hersch Lauterpacht* (2012), p.252).

[54] *R. (on the application of Simms) v Secretary of State for Home Department* [2000] 2 A.C. 115 at 131E per Lord Hoffmann.

[55] *R. v Lyons* [2003] 1 A.C. 976 at [27] per Lord Hoffmann.

[56] *Kennedy* [2015] A.C. 455 at [51]–[55]; *Pham v Secretary of State for the Home Department* [2015] 1 W.L.R. 1591 at [59]–[60], [94]–[100], [103]–[110] and [112]–[121]; and *Chong Keyu* [2015] 3 W.L.R. 1665 at [133]–[134], [271]–[283], [304] and [308]–[311].

[57] *Hussein v Secretary of State for Defence* [2013] EWHC 95 (Admin) at [20] and [39] (upheld [2014] EWCA Civ 1087 at [28]); *Maya Evans v Secretary of State for Defence* [2010] EWHC 1445 (Admin) at [236]–[238]; and *R. (on the application of Rahmatullah) v Secretary of State for Foreign and Commonwealth Affairs* [2013] 1 A.C. 614.

[58] *Golder v United Kingdom* (1975) 1 E.H.H.R. 524 at [35].

[59] *Al Adsani v United Kingdom* (2002) 34 E.H.R.R. 11 at [55].

[60] As the classic article on the subject by Professor Campbell McLachlan has put it in "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279, 280, "… Article 31(3)(c) expresses a more general principle of Treaty interpretation, namely that of systemic integration within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law.".

[61] A good example of dialogue in this country would be the Supreme Court judgment (judicially characterised as "a rare occasion") in *R. v Horncastle* [2010] 2 A.C. 373, SC thereafter reflected in the Grand Chamber's reversal of the Chamber's judgement in *Al-Khawaja v United Kingdom* (2012) 54 E.H.R.R. 23.

[62] Human Rights Act 1998 s.2.

[63] The case sometimes cited concerns Othman Mohamed Othman (Abu Qatada), where the Chamber judgment of the European Court of Human Rights ((2012) 55 E.H.R.R. 1) disagreed with the reasoning of the House of Lords ([2010] 2 A.C. 110). However, the UK government in that case voluntarily waived two opportunities to assert "sovereignty". It did not seek a referral to the Grand Chamber in accordance with art. 43 of the ECHR, which surely would have been acceded to, and when the case was litigated again in the United Kingdom it did not insist on invoking the House of

There are, in effect, minimum mandatory absolutes that must apply equally to all. They are the limitations on killing, the prohibitions on torture, inhuman and degrading treatment, forced labour and arbitrary detention and essential features of fairness. Where absolute prohibitions exist, their arguable violation must be rendered transparent, not just as a vindication of the rule of law, but as a vindication of human dignity.[64] Added to this are the two implied readings of the ECHR text that have, exceptionally, required duties to strangers. The first is not to remove them beyond our physical jurisdiction if they face a real prospect of ill-treatment somewhere else.[65] The other is to treat them as entitled to human rights protections if they are subject to the implications of our control wherever that may be in the world.[66]

This minimum list is no longer conducive to local custom and, with some dispute from certain powerful states over the ambit of extra-territoriality (including the United States, Israel and the United Kingdom), is reflected in customary international law. Comparative law in this context is not just an essential ingredient of good judgment. It is dictated by the continuing recognition dating from Blackstone in 1769,[67] but retrieved by Lord Denning in *Trendtex* in 1977,[68] that customary international law must enjoy authority in common law interpretation, unless displaced by some other overriding constitutional principle.[69]

In that respect a UK Bill of Rights (even if the non-English parts of the country would accept it) would almost invariably lead us to the same place as the Human Rights Act. Of course, in the process there would be uncertainty, expense and some cases would fall though the gaps.[70] Those who wish to abolish the Human Rights Act have in their sights the capacity to deport terrorist suspects who could be tortured elsewhere, because they believe that would make for a safer world. They also want the United Kingdom to be able to conduct warfare where it wishes, but not to be subject to civilian independent investigation where there are credible allegations that local people have been unlawfully killed or ill-treated (or indeed that UK soldiers themselves have been unlawfully killed or ill-treated by their own command). These are debates to be had, notwithstanding that Parliament would be invited to depart from a fundamental global consensus between law and politics that those revisions are neither good nor smart. The debate boils down to whether it is sensible to live in a system of human rights in one country (or on one part of this island)? What that would mean is that we exclusively settle for what Amartya Sen designates as "positional sequestering" and "closed impartiality".[71] Justice would be based on the parochial views of our own Supreme Court and its exclusive dialogue with our own political process.

Lords precedent under the doctrine in *Kay v Lambeth LBC* [2006] 2 A.C. 465 as it absolutely could have done, thereby seeking further dialogue between the national and international courts.

[64] See fnn.131–134 below.

[65] *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413; *Saadi v Italy* (2009) 49 E.H.R.R. 30; and *Othman v United Kingdom* (2012) 55 E.H.R.R. 1.

[66] See the cases cited in fn.137 below.

[67] Blackstone found it proper to invoke "the law of nations" to inform the common law, "without which it must cease to be part of the civilised world" (Sir William Blackstone, *Commentaries on the Laws of England* (1765–79), vol.4, pp.66–67).

[68] *Trendtex Trading v Central Bank of Nigeria* [1977] Q.B. 529, 553 ("the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament").

[69] As Lord Mance has recently put it in the *Chong Keyu* case, "Common law judges on any view retain the power and *duty* to consider how far customary international law on any point fits with domestic constitutional principles and understandings … CIL, once established, can and *should* shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration (emphasis added)" ([2015] 3 W.L.R. 1665 at [146], [150]). Although Lord Mance said he was speaking only for himself, that part of his judgment was also expressly adopted by Lord Neuberger and Lord Hughes at [122].

[70] I realise that there can be considerable dispute within and between nations as to what is required for the enjoyment of family life, the development of human personality and the freedom of religion. Equally, what any society can tolerate as "safe" speech may change across time and locality: e.g. holocaust denial is not the same problem today in Rwanda as it is in Sweden. On this my point is that the best method for navigating these differences, not least the freedom of speech to discuss them, properly requires international standards, and judicial dialogue about the content of those standards.

[71] Sen, *The Idea of Justice* (Penguin, 2010): "The need to transcend the limitations of our positional perspectives is important in moral and political philosophy, and in jurisprudence. Liberation from positional sequestering is the challenge that ethical, political and legal thinking has to take on board" (p.155) see also pp.402–407.

Humanity's law

The reason why that would obviously be a bad idea, is not just because enlightened decision-making comes from comparative reasoning, but because we now live under what Ruti Teitel calls "humanity's law", by which she means "the law of persons and people".[72] Let me give you the archetype and then say something about the history. Humanity's law is the (just) legacy of modernity gone wrong; the apologetic answer for totalitarianism and imperialism. In the aftermath of total war, the world chose human rights as a discipline to ensure fundamental limits on human and social behaviour. Human rights constitute the ultimate (re)commitment to modernity and enlightenment, made at a moment where there was every reason to doubt both. If the rule of law is an unqualified human good then this moment recognises a starting point for appreciating how a democratic state *subject to* the rule of law might not be an unqualified human bad.[73]

Humanity's law as the law of persons and people expresses a corpus of law, custom and judgments that combine in a common world vision of justice. This law provides gravity in the orbit of democratic politics grounding sovereign states in values higher than themselves. It reflects Lauterpacht's Kantian formulation that the value of the state system is only as good as an international system of rights and values that guides it. "Democracy", he wrote in 1945, "although an essential condition of freedom, is not an absolute safeguard of it. The safeguard must lie outside and above the state". [74] For Lauterpacht, the holocaust (even if not yet named as such) and crimes against humanity were an undeniable context for his writing.[75] His answer was to develop the common law of all mankind. For that he could go to Blackstone's *Commentaries on the Laws and Customs of England*, which notwithstanding their commitment to the hard-won supremacy of Parliament, were equally convinced that "the principal aim of society is to protect individuals in the enjoyment of their absolute rights which were vested in them by the immutable laws of nature". [76]

Human rights as a last utopia

There is actually a complex and multi-layered history being written about what lies beneath these articles of faith, and that history is particularly associated with the writing of Samuel Moyn.[77] His thesis, briefly stated, is that the obsession with finding the origins of human rights at the earliest juncture is misguided. The Greek concern for humanity was profoundly elitist. The eighteenth-century concern for the rights of man did not concern women, slaves and various others, and was principally grounded in the rights of citizens and the creation of nation states. The post-1945 Declarations were about managing the peace; and especially about reinventing conservatism after the debacle of the extreme right. Holocaust prevention was hardly discussed.[78] Barring some notable exceptions it was not even a primary unspoken context.[79]

[72] Ruti G. Teitel, *Humanity's Law* (Oxford, 2011), Preface (p.x).

[73] I tried to capture some of the value of this archetype in honour of Edward Fitzgerald QC, in Friedman, "Torture and the Common Law" [2006] 2 E.H.R.LR. 180.

[74] Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford 1945 reissue 2013), p. 50.

[75] Sir Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht* (Cambridge University Press, 2012), on the extent to which murder of his relatives during German occupation of Poland overlapped with his ground-breaking work on human rights (pp.208–211, 220, 277 and 242). See also Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Wedenfield & Nicholson, 2016), pp.59–114 and 277–330. Lauterpacht personally suggested to Robert Jackson the introduction of a crime of crimes against humanity, and then wrote the key section of Sir Harvey Shawcross' opening and closing speeches at Nuremberg in support of the charge. In the interim between the two speeches he discovered the fate of his family (*The Life of Sir Hersch Lauterpacht* (Cambridge University Press, 2012), pp.110–114 and 277–293, 299–301 and 329–330).

[76] Lauterpacht, *An International Bill of the Rights of Man* (Oxford 1945, reissue 2013), p.61 and Sir William Blackstone, *Commentaries on the Laws and Customs of England* (1765–79), vol.1, p.3.

[77] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010). See also Samuel Moyn, *Human Rights and the Abuse of History* (Verso, 2014); Samuel Moyn, "The Secret History of Constitutional Dignity" (2014) 1 *Yale Human Rights and Development Journal* 39–73; and Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015).

[78] Marco Duranti, "The Holocaust, the Legacy and 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth" (2012) 14(2) *Journal of Genocide Research* 159–186.

[79] For the important role played by Jewish international lawyers in developing human rights who were animated by that context in the post-war period, including Rafael Lemkin and Hersch Lauterpacht, see Philippe Sands, "The Memory of Justice: The Unexpected Place of Lviv in International Law—A personal history" (2011) 43 *Case Western Reserve Journal of International Law* 739–758; Philippe Sands, *East West Street: On the Origins*

Socialists and communists focused on social and economic redistribution, not atrocity prevention. The anti-colonialists prioritised the struggle for the collective right of self-determination, not individual rights. Some of the proof of that is in the human rights failings of post-independence. Only the collapse of other utopian visions in the 1970s caused human rights to come to the fore as a new idealism. Before that, human rights, especially in Europe, were a particular expression of post-war (reinvented) Christian conservative values.[80] Hence the obvious irony that some political conservatives now want to reassert sovereignty in the United Kingdom, whereas they once championed international civil and political rights as a means of protecting against democratic socialism.[81]

What this work helps to reveal is that if 1945 acted as an initial discursive point for reinvesting in democracy and the rule of law, then the jurisprudence of the international courts was to play a fundamental role in reshaping that vision from the 1970s onwards. Invariably, the realisation of human rights and their embodiment in institutions lagged behind their declarations. Hersch Lauterpacht, who had published his own draft Bill of Rights in 1945, immediately recognised that the rights could be almost retrogressive promises without means of enforcement.[82] It was during the 1970s, through its witnessing of disenchantment with nationalism, communism and unfettered capitalism, that there first arrived the jurisprudence of the Human Rights Courts that Lauterpacht had identified as lacking in 1945. By developing individual rights of petition, especially to the European Court of Human Rights and the Inter-American tribunals, the principles of humanity's law were built. *Lawless v Ireland* was the first individual petition case to be decided in Strasbourg, but that was not until 1961. By the end of the 1970s the Court had decided only 17 cases. Some of the absolute fundamentals of contemporary human rights did not emerge until the 1990s. This was the moment when genocide was reborn in South-East Europe and Africa, and thus ad hoc Courts and ultimately an International Criminal Court Treaty were needed to add to the coverage of post-war international law. In that same period the jurisprudence of the Inter-American Commission and Court of Human Rights also came to fruition, as did the greater development of the General Comments of the United Nations Human Rights Committee. Although not binding on the International Court of Justice, that Court has indicated that it must ascribe "great weight" to these sources.[83]

This is the moment that the people who wanted to change the world but did not know how to do it started to go to law school. Matthew Ryder has labelled them "1989ers" or "Niners", by reference to their birth between 1960 and 1975. As young adults they witnessed both the end of the dominant twentieth-century ideologies, but also the extraordinary possibilities of idealism in those heady months in 1989 and 1990: the Berlin wall came down and Nelson Mandela walked free.[84] The Niners' sense of history is important to the extant subject matter, because they are about to become the common law judges that will reinvent its terrain; or not. Their challenge is that they operate in an era that has become profoundly insecure, not simply because of state and non-state actor violence, but as a result of the greatest inequalities of all time, the decline in traditional authority structures, mass migration to the North-West, the sometimes treacherous left-right continuum and moral relativism combined with market absolutism. All of this is going on in circumstances where we can access more written knowledge in a day than Aristotle could have had access to in a lifetime, but we spend our days in virtual communities of elected affinity, where

of Genocide and Crimes Against Humanity (Wedenfield & Nicholson, 2016); and Ana Filipa Vrdoljak, "Human Rights and the Work of Lauterpacht and Lemkin in Modern International Law" (2009) 20(4) E.J.I.L. 1163–1194.

[80] Moyn, *Christian Human Rights* (2015), pp.24, 67–68.

[81] Duranti, "The Holocaust, the Legacy and 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth" (2012) 14(2) *Journal of Genocide Research*; Marco Duranti, "Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politics" (2012) 3(3) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 361–383.

[82] Lauterpacht, *An International Bill of the Rights of Man* (Oxford 1945, reissue 2013), p.9.

[83] Case concerning *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* [2010] I.C.J. 639, 663 at [66]–[67]. (In so holding the Court emphasised, "The point … is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.")

[84] Matthew Ryder QC, "The 1989 generation has the power—but can it handle it?", *The Guardian*, 15 November 2009, *http://www.theguardian.com /commentisfree/2009/nov/15/1989-berlin-wall-matthew-ryder* [Accessed 22 July 2016].

we look at the subject matter that confirms our own world view. Those world views are increasingly built on the mentality of narrow identities: of "religion/non-religion", "Human Rights Lawyers", "Eurosceptics", "suffering from bad things happening to good people", all of which may bear value, but do not define exclusively who anyone is.

It is against this backdrop of insecurity that the relationship between human dignity and solidarity has become pertinent as a means of comprehending our common life together. The "immutable laws of nature" and "inalienable rights" that have been "endowed by [our] Creator" that were originally used to describe humanity's law are not epistemic phrases that we can automatically share in today. The language that invokes divinity or nature is a way of underscoring that there is a limited collection of moral absolutes that should be beyond the capacity of ordinary majoritarian politics to reinvent. Opinions can differ as to the singular root of those absolutes, but respect for human dignity certainly acts as the "'portal' through which the egalitarian and universalistic substance of morality is imported into law".[85] If one asks why any given established human right is of fundamental importance, the answer would ultimately come down to that we will only achieve respect for the dignity of ourselves if we are able to show respect for the dignity of others. That leads to my final heading for an updating of the common law.

Dignity

The movement of the common law tradition from its memories of the past to a plural, egalitarian and universalistic identity must take the idea of human dignity seriously. In common law writing it is underdeveloped, so one starts with the account of the former Archbishop of Canterbury, Dr Rowan Williams:

> "The rule of law is thus [the establishment] of a space accessible to everyone in which it is possible to affirm and defend a commitment to human dignity as such, [we have to be aware that all communities] have to come to terms with the actuality of human diversity—and that the only way of doing this is to acknowledge the category of 'human dignity *as such*'—a non-negotiable assumption that each agent … could be expected to have a voice in the shaping of some common project for the well-being and order of a human group."[86]

Complex emergence

Dignity has its shortcomings. It may be that it features so prominently in the international human rights instruments because it is wide enough to mean nothing. When mixed up with concepts of honour and virtue it has aided patriarchy. When deployed by the Catholic Church in the nineteenth and early twentieth century it was designed to inspire acceptance of social position in order to differentiate from the demands of both socialism and communism.[87] Despite Kant's approach to dignity, to treat the value of the human person as a means in itself and not a means to some other end, dignity does not feature in any of the eighteenth-century revolutionary constitutions. Romantics like Schiller, no less than theologians, saw dignity as "tranquillity in suffering".[88] The connection of dignity to Christian democratic conservatism is reflected in its first ever use of the phrase "the dignity and freedom of the individual" in the preamble to

[85] Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41(4) *Metaphilosophy* 464, 469.

[86] Quoted in Gearey, Morrison and Jago, *The Politics of the Common Law: Perspectives, Rights, Processes and Institutions* (2nd edn, Routledge, 2013), p. 4; see also Dr R. Williams, "Civil and Religious Law in England: a religious Perspective" (7 February 2008), *The Guardian*, *http://www.theguardian.com/uk/2008/feb/07/religion.world3* [Accessed 1 August 2016].

[87] Michael Rosen, *Dignity: Its History and Meaning* (Harvard, 2012), pp.47–49. See especially Pope Leo XIII's encyclical on the relationship between labour and capital, Rerum Novarum, of 1891, in which he emphasised the "dignity of labour", and in his *Quod Apostolici Muneris* of 1878, in which he God "had appointed that there should be various orders in civil society, differing in dignity, rights and power, whereby the State, like the Church, should be one body, consisting of many members, some nobler that others, but all necessary to each other and solicitous of the common good".

[88] Rosen, *Dignity: Its History and Meaning* (Harvard, 2012), pp.31–32.

1937 Irish Constitution.[89] More than any other sentiment, it was anti-communist thinking that inspired its inclusion in the Preamble to the United Nations Charter.[90]

Despite its mass proliferation in human rights conventions and political constitutions after 1945,[91] the idea of dignity has been stained by overuse and misuse. This is the charge by one of this generation's foremost dignitarians, Ronald Dworkin, who refers to its repeated adoption as pseudo-argument and emotional charge. The example he gives is campaigners against prenatal genetic surgery who declare it an insult to human dignity for doctors to repair disease or deficiency in a foetus.[92] Examples closer to home right now might be the argument that human dignity of the suicide bomber (as "martyr") is achieved through his indiscriminate killing of others to defend the honour of his religion. My personal (professional) problem with dignity is that mentioning the word in my home courts is a bit like mentioning love, or God. It produces an embarrassed silence.

An evolving foundation for all human rights

The influences that sought out dignity as a foundation value of human rights were not solely Christian, and even when they were, they hardly spoke with one voice. With regard to all of the three major religions, the revolutionary thing about human rights is that it no longer takes suffering as ordained and something to be accepted without earthly remedy. In fact, of the three religions, Islam may have been the most activist. The multifaceted principle of *jihad*, or resistance, has always included the worship of Allah by not taking injustice for granted. However there is an issue linked to justice that dates back to the Book of Job: put simply *what kind of God makes his people suffer like this*? The secular version of this is *what kind of modernity and Enlightenment tolerates the same*. If, in secular terms, human rights are designed to recommit to the project of modernity and Enlightenment, then in religious terms it might be said they have been designed as a means of recommitting to God.[93] I think it is worthwhile to bear the two forms of the same development in mind. It reminds us that the manic depression of identity conflict that covers our present world can find its lithium in the recognition of the inherent human dignity of all people.

A regard for dignity is the means by which we respect ourselves and in doing so find the capacity to respect others. It enables what Adam Smith thought we all ultimately want: "not only to be loved, but to be lovely".[94] One can go back to Aristotle to find a concept of *agape*, which indicates an altruistic love, but it is more the love we show for everyone, the most selfless form of love, but which is also a love that

[89] Moyn, "The Secret History of Constitutional Dignity" (2014) 1 *Yale Human Rights and Development Journal* 49. The text was almost certainly inserted to court favour from Pius XII who had just published his encyclical letter *Divini redemptoris*, which blamed Communism, for robbing "human personality of all its dignity". The complete sentence in the preamble is "Seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations." Not surprisingly, the text has sometimes been cited to defend individual rights (*The State (Burke) v Lennon and the Attorney-General* [1940] I.R. 136 at 133–134, 158–159) and sometimes to override them in the interests of the community (*In re Art. 26 of the Constitution and the Offences Against the State (Amendment) Bill, 1940* [1940] I.R. 470 at 478–479).

[90] Moyn, "The Secret History of Constitutional Dignity" (2014) 1 *Yale Human Rights and Development Journal* 49, citing the influence of the Barnard College Dean, Virginia Gildersleeve, who spent much of the 1930s trying to bar Jews from her law school and gave speeches sympathetic to German expansionism.

[91] For legal surveys, see Christopher McCrudden, "Human Dignity and Judicial interpretation of Human Rights" (2008) 19 *European Journal of International Law* 655 and Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015). For cross-disciplinary works on the subject especially helpful to lawyers, see Catherine Dupré, *The Age of Dignity, Human Rights and Constitutionalism in Europe* (Bloomsbury, 2015), Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University 2013, reprint 2015) and David Kretzmer and Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002). For a helpful appreciation of some of the problems associated with a judge made jurisprudence of dignity in the UK, see Conor Gearty, "Social-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line" in McCrudden (ed) *Understanding Human Dignity* (Oxford University Press 2013), pp.155-171.

[92] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), p.204.

[93] D. Friedman, "Torture and Modernity" [2013] 5 E.H.R.L.R. 509.

[94] Smith, *Theory of Moral Sentiments*, first published in 1759, extended version, 1790 (Penguin 250th anniversary, 2009), Pt III, Chs 1, 2, pp.136–137 ("Man naturally desires, not only to be loved, but to be lovely; or to be that thing which is the natural and proper object of love. He naturally dreads, not only to be hated, but to be hateful; or to be that thing which is the natural and proper object of hatred. He desires, not only praise, but praiseworthiness; or to be that thing which, though it should be praised by nobody, is, however, the natural and proper object of praise. He dreads, not only blame, but blame-worthiness; or to be that thing which, though it should be blamed by nobody, is, however, the natural and proper object of blame").

embraces oneself.[95] Kant found that dignity, as a form of self-respect, could only be achieved through treating the world as one would wish to be treated. Dignity is a mandatory end in itself, because (unlike pride or power) it has no price. Dworkin has sought to build on Kant by enshrining dignity as an ethical form of self-respect (by which he means each person taking his own life seriously) and simultaneously a search for authenticity (by which he means each person discovering what counts as success in his own life).[96] That (internal) ethics forms the (external) moral foundation for how we should treat others, which is to approach each individual as if their own self-respect and search for meaning fundamentally matters. That does not require us to agree with them, but it does require us to find the means to relate to them.

This is the essentially pluralist idea in the (individual) human rights endeavour. Like Rene Cassin finding humanity in his French identity, the idea of the inherent dignity of all humankind helps navigate our differences, rather than to eradicate them. P.C. Chang, another author of the Universal Declaration, had in mind in the concept of human dignity the Chinese word of *Ren*, which in literal translation means "two-man mindedness", but which might be expressed in English as "sympathy", or consciousness with one's fellow man.[97] A similar idea finds expression in the Zulu concept of *Ubunto* that means human kindness, humanness and describes a realisation that *I am/because you are*.

These dignitarian ideas closely connect with the concept of *humane* treatment (which in dictionary terms concerns compassion[98]). *I am/because you are* might act as a summary of the Kant/Dworkin formulation above. I do not think the duty of *humane* treatment, or the positive duty to respect human dignity that one finds in both the Geneva Conventions[99] and an emerging idea in art.8 of the ECHR[100] is the same idea as the prohibition on in*human* treatment that one finds in art.3 of the ECHR, or the explicitly prohibited acts contained in Common art.3 of the Geneva Convention.[101] Humane treatment involves compassion. Inhuman treatment involves a severe infliction of pain and suffering. There is no cosmically ordained reason to insist on the humane treatment of our enemies, but in the post-1945 insistence that we must, there is an acceptance that there can be no value for ourselves in doing otherwise. *Our* dignity is linked to *their* dignity.

Jeremy Waldron describes the change that has taken place since 1945 as involving the upward equalisation of rank, so that we now try to accord to every human being something of the dignity, rank and expectation of respect that was formally accorded only to nobility.[102] Many languages use the same word for dignity, honour, glory and respect (for instance in Hebrew, *Kavod*[103]). Human rights has carved out an inalienable status for the first of the four, distinctly described as human dignity (in Hebrew *K'Vod Ha-Adam*). Waldron's approach to dignity is cited by Lord Reed in *Osborn*.[104] It is the process that Waldron describes as "a sort of levelling up" that enabled us to say in 2015 that the Magna Carta of 1215 is a key

[95] Dworkin, *Justice for Hedgehogs* (2011), p.260 citing Aristotle, *The Nicomachean Ethics*, X. viii, 6–11 (Loeb Classical Library, 1990 translation, H. Rackman, pp. 553-557). Aristotle said of this positive form of self-love that it could be equated with "moral nobility", sometimes translated as "moral dignity".

[96] Dworkin, *Justice for Hedgehogs* (2011), pp.203–204.

[97] Glendon, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001), p.67.

[98] See Oxford English Dictionary definitions (as analysed in *Taunoa v Attorney General of New Zealand* [2008] 1 N.Z.L.R. 429 at [79]–[80]). Humane: "feeling or showing of compassion. Humanity: "the character or quality of being humane". Inhumane: "a word of milder meaning than inhuman … destitute of compassion". Inhuman: "esp. destitute of natural kindness or pity, brutal, unfeeling, cruel". On this, see Smith, *Theory of Moral Sentiments*, first published in 1759, extended version, 1790 (Penguin 250th anniversary, 2009), Pt I, Ch.1, p.13 ("That we often derive sorrow from the sorrow of others, is a matter of fact too obvious to require any instances to prove it; for this sentiment, like all the other original passions of human nature, is by no means confined to the virtuous and humane, though they perhaps may feel it with the most exquisite sensibility. The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.").

[99] Common art.3 and art.13 of the Third Geneva Convention 1949 and arts 5 and 27 of the Fourth Geneva Convention 1949.

[100] *Bouyid v Belgium* (2016) 62 E.H.R.R. 32.

[101] For the acceptance of both of those propositions, see the Court of Appeal decision in *Hussein v Secretary of State for Defence* [2014] EWCA Civ 1087 at [40] and [45].

[102] Jeremy Waldron, "How the Law Protects Dignity" (2012) *Cambridge Law Journal* 200, 212; Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012), p.33.

[103] Orit Kamir, "Honour and Dignity Cultures: The case of Kavod and Kvod Ha-Adam in Israeli Society and law", in David Kretzmer and Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002), pp.231–258.

[104] *Osborn v Parole Board* [2014] A.C. 1115 at [68].

constitutional document for all, notwithstanding that its "rights" were originally to be enjoyed by only a small delegation of Barons.

In recent cases concerning the British military we still see the process of this change in motion. In traditional society, the soldier could have honour and courage, but only higher rank could have dignity. The absence of a commitment to the dignity of the ordinary soldier runs the risk of an even lesser commitment to the ordinary enemy prisoner. In *Haider Hussein* the Court of Appeal described what it termed deplorable breaches of a reformed policy of UK military interrogation that was used in Afghanistan in the post-2013 period. Based on video evidence alone, with the fate of the prisoners unknown,[105] the judgment noted how walls and desks were slammed. Families, religion, race and sexuality were insulted. There were instances of physical intimidation, including the gripping of a man's hand and invasion of his personal space so that he could not move away for more than 30 minutes. Prisoners were told that unless they cooperated they could be detained indefinitely or handed over to the Afghan authorities. Authorised measures of shouting that were supposed to last for seconds, escalated into bouts of 5 and 10 minutes of screaming abuse and foul language.[106] Lord Justice Lloyd Jones added that while it was difficult to tell what impact the use of the techniques had on the absent subjects, they involved "a considerable loss of dignity on the part of the interrogators".[107]

Why is it important for legal cases to act as the vehicle for telling these stories? They help us to recall the "moral restraints" that Jonathan Glover has identified as existing in everyday life, but which become absent in times of abuse and atrocity.[108] Those moral restraints include what he calls "the human responses" ("sympathy for other people and respect for their dignity") and "moral identity": roughly, the sense of I am not the kind of person who does such things as murder or torture. For Glover, moral restraints fail sometimes by being neutralised or anaesthetised, and sometimes being overwhelmed by other factors:

> "The human responses can be deadened by distance, or by the victims presented as having no dignity to respect, or by cognitive illusions such as killing people in war is quite different. The sense of moral identity can fail as a restraint when an atrocity is complex and responsibility is fragmented: 'I am not killing people, I just drive the train taking them to the camp'."

Moral identity extends also to countries, because through the Cold War and the post-9/11 era, an important narrative in Britain, the United States and Israel in particular has been "we are not the kind of country that does that kind of thing". Equally, none of those countries is immune from the danger that their non-state actor enemies may also lose moral restraints. One thinks of the video message of the 7/7 bomber, Mohammed Siddique Khan ("Your democratically elected governments, continuously perpetrate atrocities against my people all over the world, and your support of them makes you directly responsible …"). Glover cites this as an example of "the illusion of collective responsibility", which is very present in the fusion of religion and post-colonial resentment that underpins the moral identity of the Al Qaeda/ISIL seizures of Islam. Both state and non-state actors fall prey to such illusions: witness Dresden, Hiroshima, Gaza. The strong association between suffering and identity[109] acts to dull the human responses, to loosen moral restraints and to herd people into groups denying the dignity of the other.

[105] For reasons first revealed in *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), these types of detainees were being held incommunicado for extended periods and did not have meaningful access to either local or UK courts.

[106] *Hussein* [2014] EWCA Civ 1087 at [75]–[77].

[107] *Hussein* [2014] EWCA Civ 1087 at [75(1)]. There is an analogy here with the finding of the South African Constitutional Court that whipping degrades both the person receiving the whipping and the person administering it: *S v Williams* 1995 (3) SA 632 (CC) at [89] ("There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it").

[108] Jonathan Glover, *Humanity: A Moral History of the 20th Century*, 2nd edn (Yale, 2012), p.xix.

[109] Esther Benbassa, *Suffering as Identity: The Jewish Paradigm* (Verso, 2010); and Sen, *Identity and Violence: The Illusion of Destiny* (2006), pp.88–93.

The common law of dignity

Where does the common law come into all of this? To date, human dignity has been something of a missing link in common law thinking. A pre-HRA lexis search brings up scant results. There is a dissenting judgment of Lord Scarman in *Home Office v Harman*[110] that deals with the implied undertaking not to disclose litigation documents to third parties. In examining the right to freedom of expression, that he attributed to Milton who told Parliament in 1694 "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties, Lord Scarman designated such matters as "basic to human dignity". In the *Bland* case about the withdrawal of life support, it was Lord Justice Hoffmann who identified a principle of "respect for the dignity of the individual human being" which he described as "our belief that quite irrespective of what the person concerned may think about it, it is wrong for someone to be humiliated or treated without respect for his value as a person".[111] Human dignity can be taken as "a core value of the common law, long pre-dating the [European] Convention [on Human Rights] and the [European] Charter [of Fundamental Rights]",[112] but it has proved difficult to say why; and to identify when it should matter.

There are certain situations that are intolerable. Michael Fordham categorises them under a composite common law "right to humanity/human dignity/freedom from destitution".[113] This is where the human rights are so basic as to be unnecessary to resort to the ECHR, applying instead the "the law of humanity".[114] It would not take much more for the common law to require judicial action in the face of four extreme situations all under a principle of human dignity: (1) destitution,[115] (2) unnecessary violation of personal autonomy,[116] (3) automatic unequal treatment,[117] and (4) profound interference with psychological integrity and personal identity.[118] In Fordham's terms, here is "a coiled spring, or a site under construction".[119]

What is presently absent is an affirmation of something more positive.[120] Judges today could be expected to create in their court rooms, in Rowan Williams' words, "a space accessible to everyone in which it is possible to affirm and defend a commitment to human dignity *as such*, …" and where "we can come to terms with the actuality of human diversity".[121] A contemporary common law, informed by its history and synchronised with global human rights, could conceive of itself as a voice for Glover's concern for "human responses" and of "moral restraint". In that sense, the role of lawyers and the duty of judges is to ensure that moral restraints are not anaesthetised. The shame of the common law is that for most of its history its protections were unavailable to most of its subjects. The cases before the English courts that have just

[110] *Home Office v Harman* [1983] 1 A.C. 280 at 311H.

[111] *Airedale NHS Trust v Bland* [1993] A.C. 789 at 826F–G. He added (confessing to having personally discussed the matter with Ronal Dworkin and Bernard Williams!), "The fact that the dignity of an individual is an intrinsic value is shown by the fact that we feel embarrassed and think it wrong when someone behaves in a way which we think demeaning to himself, which does not show sufficient respect for himself as a person."

[112] *R. (on the application of A) v East Sussex CC* [2003] EWHC 167 (Admin) at [86] per Mumby J.

[113] Michael Fordham QC, *Judicial Review Handbook*, 6th edn (Hart Publishing, 2012), para.7.4.9.

[114] *R. v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275 at 292F–G.

[115] *The King v Inhabitants of Eastborne* (1803) 4 East. 103 (1803) 102 ER 769 per Lord Ellenborough CJ ("As to there being no obligation for maintaining poor foreigners [in the relevant Poor Law statutes] … the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving …"). See under the HRA, *R. (on the application of Limbuela) v Secretary of State for the Home Department* [2006] 1 A.C. 396 at [76] per Baroness Hale (the ECHR expresses "the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be").

[116] *Secretary of State for the Home Department v GG* [2010] 1 Q.B. 585, CA.

[117] *Matadeen v Pointu* [1999] 1 A.C. 98 at 109. See also *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557 at [132] ("Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being").

[118] Cf. *Wainwright v Home Office* [2004] 2 A.C. 406 which surely missed a valuable opportunity to declare a common law tort concerning an unnecessary strip search of a disabled child seeking to visit a prison.

[119] Fordham QC, *Judicial Review Handbook* (2012), Preface, p.ix.

[120] The most complete endorsement of dignity as a means to greater civility can presently be found in EU law. Article 2 of the Treaty of European Union makes human dignity the European Union's foremost "foundational value", followed by freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Part I of the EU Charter of Fundamental Rights is headed "Dignity" and its first article enshrines human dignity as "inviolable" and creates positive obligations to respect and protect it. See Dupré, *The Age of Dignity, Human Rights and Constitutionalism in Europe* (2015).

[121] Rowan Williams cited in Fn. 86 above.

now recalled Batang Kali[122] and Mau Mau[123] remind us of that shame. The function of recognising human dignity is to express a clean break with an undignified past and in so doing to envisage a more decent society of the future.[124]

If one thinks about core features of the common law—the right to be heard, the duty to give reasons, open justice, natural justice, and equality before the law—all of these rights concern the dignity of the parties under the rule of law. Conversely, if one analyses what is wrong about being denied those rights, it concerns the extent to which human dignity is *not* accorded due weight. It was that sentiment which lay behind the Supreme Court in *Osborn* superimposing due process rights onto a parole board process where art.5 of the ECHR could not do so.[125] It also caused the Court to enforce a common law right to information in *Kennedy*,[126] where art.10 of the ECHR could not do so, and when the available remedy was expressly excluded under the Freedom of Information Act 2000.[127] It seems difficult to contemplate how it would be a fair and effective disposal of justice to allow civil damages proceedings in cases concerning unlawful detention and torture to be disposed of essentially on the basis of closed evidence alone. That is an outcome that is presently being contemplated under the Justice and Security Act 2013.[128] There can be no dignity for either the state or the claimant in a process that is so stripped of open, natural and reasoned justice.

The features just described are sometimes categorised as procedural justice, in terms of the rules applied by just institutions, regardless of the outcome they produce. Simply describing procedures as just, does not explain why that is so. The essential elements of a just process are themselves founded upon a belief in the dignity and worth of people.[129] However, justice is not just about institutions; it is also about outcomes, or at least the realisation of just experience. Amartya Sen expresses the point in a technical sense by the distinction between the Sanskrit terms of *niti* (focusing on arrangements and institutions) and *nyaya* (concentrating on "comprehensive outcomes", which denotes something broader than just "culmination outcomes").[130]

Indeed, if one is trying to understand how human rights itself evolved especially in the late twentieth century, it was probably at the point in time in Latin America, when lawyers, activists, politicians and psychiatrists came together to formulate a set of principles for the field of transitional justice, in which human rights abuse was to be the subject of independent and effective inquiry, in which the victims had a right to participate, both to secure their right to the truth, and as a proxy for the broader public interest in democracy and the rule of law. We know that those principles that were first discussed in the 1980s[131]

[122] *Chong Keyu* [2015] 3 W.L.R. 1665.

[123] *Matua v Foreign and Commonwealth Office (No.1)* [2011] EWHC 1913 Admin; and *Matua v Foreign and Commonwealth Office (No.2)* [2012] EWHC 2678 Admin.

[124] That is one of the main functions of the use of human dignity in national and transnational constitutions: Catherine Dupré, "Dignity, Democracy, Civilisation" (2012) 33 *Liverpool Law Review* 263 ("human dignity captures the memory of the time of indignity"). See, e.g. the Constitutions of South Africa (s.10) and Germany (art.1 of the Basic Law). On decency as a means of constructing a society that does not humiliate its members, see Avishai Margalit, *The Decent Society* (Harvard University, 1996 reprint 1998).

[125] *Osborn* [2014] A.C. 1115.

[126] *Kennedy* [2015] A.C. 455.

[127] See the absolute exception of the Charity Commission from the duty of disclosure provided for under ss.2(2) and 32(2) of the 2000 Act.

[128] First instance decisions in England to date have determined that mandatory minimum levels of disclosure in a private law damages case would not be required under art.6 or the common law, when it would achieve no useful forensic purpose: *Kamoka v Security Service* [2015] EWHC 3307 (QB) and *CF v Security Service* [2014] EWHC 3171 (QB), and *Khaled v Security Service* [2016] EWHC 1727 (QB). This overlooks the dignitarian function of public reasons shared in by the parties and the broader community. Cf. the Court of Appeal's approach to quashing a judgment in an abuse of process application that contained no public reasons: *Mohammed v SSHD* [2014] 1 W.L.R. 4240 at [19]–[21]. For a particularly extreme example of the problem, see *Kamoka v Security Service* [2016] EWHC 769 (QB). A private law claim was struck out allegedly to prevent a collateral attack on previous deportation proceedings based on subsequently discovered evidence to suggest that MI6 was involved in kidnap and torture. On the issue at stake, both the original proceedings and the present ones were essentially decided on the basis of closed material, such that there are no public reasons in either judgment that identify what findings are under impermissible collateral attack.

[129] *Carter v Att. General of Canada* [2015] 1 S.C.R. 331 at [81] citing previous case law ("the principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person"). See also *The State (Healy) v Donoghue* [1976] I.R. 325 at 348 per Higgins CJ identifying that justice requires "not only fairness, and fair procedures, but also regard to the dignity of the individual [on trial]. No court under the Constitution has jurisdiction to act contrary to justice."

[130] Sen, *The Idea of Justice* (2010), pp.xv and 20.

[131] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (2009) 31 *Human Rights Quarterly* 321, Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000).

travelled into the case law of the Inter-American Court,[132] then to Strasbourg[133] and can now be regarded as part of customary international law.[134] They operate in this country both through inquests,[135] but also the Iraq Human Rights inquiries[136] mandated as a result of the *Al Skeini* litigation.[137] The development is a crucial exemplar of the common law of dignity: *niti* and *nyaya* in tandem. Influenced by humanity's law, these judge led procedures are making history.

Conclusion

Whatever the decision as to the fate of the direct incorporation of European rights treaties, the common law method is going to become more relevant. That must be the case, because the present debates about the future of binding international law have stimulated an imagination exercise based on what type of local law one would wish for either in its absence, or as a dialogue partner of its Treaties. Such an exercise must confront the reality that the contemporary common law could never revert to what it was prior to the impact of modern conventional and customary international law. Equally, although the Human Rights Act has been invaluable for the progress of individual rights protection in this country, it cannot be the limit of what ought to be possible in enabling individuals and groups to prosper in terms of respect, well-being and happiness.

These debates in the United Kingdom have their similar versions elsewhere. People have retreated to identity politics, such that the identity of the nation and its closed partiality is being championed as the better unit for politics, and within that unit we increasingly have plural monoculturalism, rather than multiculturalism.[138] If the nation cannot deliver justice, then other singular identities—religion, race and economics—are well poised to take its place. Present discontents confirm that in our generation the function of the intellectual, and in this respect the human rights lawyer as well, has become to conserve the world informed by the rule of law, not necessarily to change it. As Tony Judt put it, "Not to imagine better worlds, but rather to think how to prevent worse ones".[139] The point is sometimes lost on those from both sides of the left-right divide who seek radical change to meet radical insecurity. There is much in human rights activism that now chimes with the prudence of the common law, and which in turn helps to inform us about how democracy can remain social.

The irony of the exercise prompted by present politics is that once you strip the common law of its original context of nation building and empire, it has an undeniable transnational dimension: the oldest social science, the earliest of the humanities and a practical vision of a globalised legal order.[140] In place

[132] *Velásquez Rodríguez v Republic of Honduras* , judgment of 29 July 1988, IACtHR (Ser. C) No.4 (1988) at [172] and *Bámaca-Velásquez v Guatemala* , judgment of 22 February 2002, IACtHR (Ser. C) No.91 (2002) at [75] and [77].

[133] *McCann v United Kingdom* (1996) 21 E.H.R.R. 97 at [161]; *Jordan v United Kingdom* (2001) 38 E.H.R.R. 1 at [109]–[118]; *El-Masri v Former Republic of Macedonia* (2013) 57 E.H.R.R. 25 at [191]–[192]; and *Al-Nashiri v Poland* (2015) 60 E.H.R.R 16 at 565 ([479]–[485]) and 571 ([494]–[497]).

[134] Article 3(b) of UN General Assembly Res. 60/147 of 16 December 2005 on "The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of Humanitarian Law": "The obligation to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: …. (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law …". The Basic Principles at art.22 also embody criteria for the discharge of the duty, including (b) "verification of facts and full and public disclosure of the truth …"; (d) "an official declaration or a judicial decision restoring the dignity, the reputation and persons closely connected with the victim"; (e) "public apology, including acknowledgement of the facts and acceptance of responsibility"; and (g) "commemoration and tributes to victims".

[135] *R. (on the application of Middleton) v West Somerset Coroner* [2004] 2 A.C. 182.

[136] *R. (on the application of Ali Zaki Mousa) v Secretary of State for the Home Department (No.2)* [2013] EWHC 1412 (Admin).

[137] *R. (on the application of Al Skeini) v Secretary of State for Defence* [2008] 1 A.C. 153 and *Al Skeini v United Kingdom* (2011) 53 E.H.R.R. 18. For the development of that story, see further, *Hassan v United Kingdom* (2014) 38 B.H.R.C 358 at [79]–[80]; *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [152]–[153]; *Smith v Ministry of Defence* [2014] A.C. 52 at [49]; and *Chong Keyu* [2015] 3 W.L.R. 1665 at [180], [187], [189] and [198]–[201].

[138] Sen, *Identity and Violence: The Illusion of Destiny* (2006), pp.156–157.

[139] Tony Judt, with Timothy Sneider, *Thinking the Twentieth Century* (Vintage, 2013), p.304. See also Tony Judt, *Ill Fares the Land, A Treatise on Our Present Discontents* (Penguin, 2010).

[140] A. Gearey, W. Morrison and R. Jago, *The Politics of the Common Law: Perspectives, Rights, Processes and Institutions* (2nd edn, Routledge, 2013), pp.4, 219 and 220.

of the English-speaking people whose spirit is manifested in their law, we find the plural and the polyglot.[141] If the common law has left behind some of its negative limitations, it has also lost much of its potency. So if pushed to envisage a common law of human rights, one therefore responds with a method that particularly values history, humanity and dignity. It is a vision of law distinct from politics and culture, but divorced from neither of them. It distinguishes the discipline of history from the memorialisation of the past. It prefers humanity as sovereign over state. It commits more steadfastly to the concrete realisation of human dignity, knowing that we all bear the choice of many identities, not just one. The result might be a greater generational openness to irrevocable progress beyond positive law and beyond the nation state in matters of justice and equality within each and every state. Not just to fare forward, but to fare well: democracy can do better socially; within itself and with others. Yet the common law would surely remain the Argonauts' ship as Sir Matthew Hale described it in 1713, "the same as when it returned home, as when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials".[142] The aim of the journey now is to create a law of plural-speaking peoples, and not just English ones.

[141] A. Gearey, W. Morrison and R. Jago, *The Politics of the Common Law: Perspectives, Rights, Processes and Institutions* (2nd edn, Routledge, 2013), p.339.
[142] Sir Matthew Hale, *History of the Common Law of England* (1713 reprinted University of Chicago 1971), p.40.