

Little Englanders vs Human Rights?

by Anne Cousson

Why has the Human Rights Act of 1998 become such a politically charged issue in the United Kingdom? In a militant book, Conor Gearty debunks the myths surrounding the British human rights regime and calls for more comprehensive legislation.

Reviewed : Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights*, Oxford: Oxford University Press, 2016.

No man might be an island, but can an island ever be truly isolated? Conor Gearty's *On Fantasy Island* is a strong indictment of the United Kingdom's human rights regime and the political discourse surrounding it. A militant book, it depicts an island of Little Englanders who entertain mostly fanciful ideas of the way human rights are protected on the continent, while ignoring the very real changes they have brought home. A charge against naysayers of the Human Rights Act and the European Convention on Human Rights, the book is a welcome addition to available analysis of present day situation in the UK as well as a very clear introduction to the topic for any reader who is new to the debate.

Eurosceptic human rights?

The legal protection of human rights has been a contested issue in the United Kingdom ever since the country was involved in the drafting of the European

Convention on Human Rights (ECHR) in 1950. The Human Rights Act, which integrated the ECHR into national law, was itself heavily criticised even when it was just a project first floated by Tony Blair's Labour Party. After it was passed in 1998, it immediately drew the ire of both the media and politicians, a lot of them from the Conservative party although they were far from being the only ones to resent the act. Its implementation, two years later, did not help alleviate its perceived evils. Furthermore, because of the avowed European roots of the act, it has been the target of Eurosceptics who were showing their distrust of all things continental through this rejection. They strongly believed that the United Kingdom can and should operate an independent human rights regime, unhindered by international organisations. However, human rights are protected by a complex system of interdependence between the common law, the Human Rights Act of 1998 and international treaties, the European Convention on Human Rights foremost among them. Thus, the interaction is a source of much disagreement and numerous misunderstandings: when a judicial decision is unpopular, it is often presented by the tabloid press as a direct result of European interference into national affairs or as political correctness gone mad because of human rights imported from Europe.

Though the book itself was written before the results of the Brexit referendum were known, the preface does include the European context to show how it fits in with human rights issues. Indeed, they are no small matter to debate in the context of leaving the European Union. The ECHR, which depends on the Council of Europe, not the EU, is very unlikely to be affected by Brexit. However, it is not the only source of human rights legislation the UK has to implement. Numerous rights have been enshrined in law under the influence of the EU, whether direct or indirect. Questions are also bound to arise about the rights of EU nationals living in the UK or, where Northern Ireland is concerned, about the human rights protections included in the Good Friday Agreement. Indeed, the peace agreement that put an end to the period of the Troubles in Northern Ireland includes measures to guarantee equality and fight discrimination. While those issues may prove hard to deal with, Gearty shows that the disagreements between Europe and the UK have been largely exaggerated by the opponents to human rights legislation. Very few topics are actually bones of contention: the UK has an excellent compliance record both with the decisions of the European Court of Human Rights and the Court of Justice of the European Union with very few exceptions.

Why, then, has the protection of human rights become such a political issue? Gearty, himself a Professor of Human Rights law and a practicing barrister in this area,

argues that a lack of knowledge about the act as well as wilful disinformation from some politicians have created a series of myths that hide the true nature of human rights legislation. The criticism of the human rights system as it stands in the UK today goes hand in hand with Gearty's rebuttal of those myths and, together, they constitute the heart of the book. All of this is supported by a thorough analysis of the case law.

Myths and misinformation

Gearty identifies different types of myths around human rights legislation. They can have a historical nature (is British parliamentary democracy truly the source of all liberties?), a constitutional nature (is the Human Rights Act the end of parliamentary sovereignty?) or a moral nature (are human rights laws a "Charter for the bad"?). Each time, the author gives a brief description of the criticism leveled at human rights before showing how some claims have been widely exaggerated, when they were not outright lies. For example, chapter 7 questions the accusation of overreach of the European Court of Human Rights. Whereas some of its adversaries accuse it of forcibly imposing laws on the UK, the evidence points to a very different story: the country actually has an excellent compliance record with the Convention, with British courts developing their own way of solving potential issues.

Gearty also highlights the positive effects human rights law has had on protecting the weakest members of society. Rather than being a protection for hardened criminals, its direct effects were most strongly felt by such marginalized groups as the disabled or the Travelers. Furthermore, while courts had traditionally been accused of favouring the powerful, Gearty finds that recent developments have shown a shift in focus. Even economic and social rights begin to find a place in the British legal system where they had none before.

Considerations about the possible future conclude the book but offer very little in the way of certainty: whatever happens will depend on political will as well as the evolution of legal interpretation.

Therefore, though the book provides a descriptive analysis of the present-day situation, it is also a fighting talk. Gearty leaves no doubt as to the fact that this is indeed a militant book. His advocacy of a more robust defense of human rights is obvious throughout the book. His opponents are called Little Englanders and

reproached with having very little knowledge of the true nature of human rights, and almost no desire to acquire such knowledge. They tend to wield human rights discourse as a tool for political power rather than as actual policy measures that could offer a truly coherent way of protecting people. Therefore, the term “Little Englander” takes its fullest meaning here: ignorant and bigoted, the opponents to the current human rights regime appear to oppose a pointed refusal to anything that even sniffs of foreign influence. Here, Gearty tends to paint the opposition with a broad brush despite individual variations that could point towards a more measured diagnosis: can Theresa May truly be called a “Little Englander”?

Despite his reservations, Gearty finds much to celebrate in today's situation and very little to look forward to in the proposals of those who wish to change it lock, stock and barrel. He shows how the law has evolved to encompass a much broader remit, slowly taking into account social and economic rights. However, there are still tight controls over who can actually be protected, especially from the power of the State. Human rights are limited when policing is concerned where there is a legitimate aim to pursue and the criterion of proportionality of the law is widely interpreted in favour of the State. The nature of the human rights enshrined in law has also changed over the past decades, with the European Union playing an important role. Traditionally, the only rights recognized as fundamental in Britain have been those from the first wave (that is to say political and civil rights). There has been a shift in the UK towards a stronger protection of economic and social rights, though it is still tentative and will require a steady political will that is clearly threatened by Brexit and the Conservative majority in Parliament.

No future for human rights values

The book is no dry legal text but takes into account the political nature of any human rights regime. Decisions have to be taken as to what rights are to be protected, and, maybe more importantly, whose rights are to be defended: are the poor and disenfranchised really better off with the Human Rights Act? Though the book highlights some progress in that respect, it offers only a grim perspective for the future. Politicians have tended to use human rights discourse to score political points, especially on sensitive topics like the security issues surrounding terrorism, with human rights being presented as a threat against effective policing.

The reason for this pessimism is perhaps best explained out of the strictly legal or political domain. The precise legal analysis provided by Gearty never loses sight of the cultural and identity components of the human rights debate which, instead of being only the dry implementation of legal decisions and statute books, has become a defining characteristic of the United Kingdom today. Here, the symbolic nature of human rights is highlighted. Can human rights as a positive value provide a framework for a common British identity, especially after devolution and Brexit? Indeed, the former has created a dual system of protection of human rights in the UK as well as a new tier of government. The governments of Northern Ireland, Scotland and Wales have a much more robust system of human rights protection than England or the UK as a whole. The protection of human rights and the fight against discrimination were part and parcel of the Scotland Act, the Government of Wales Act and the Good Friday Agreement. The ECHR was implemented locally two years before the Human Rights Act took effect. One could argue that the culture of human rights that the Labour government of Tony Blair was hoping to create in the country actually materialised in those parts of the UK, while England remains a place of resistance, despite a discourse of ancestral defense of civil liberties through the Common Law.

The crux of the issue probably lies here, in a pseudo-historical discourse that places the common law above any other means of protecting human rights. This vision of history places Britain as the source of a system of protection that has been developed almost organically throughout the centuries in order to achieve a balance of rights. This stands in stark contrast with a continent where rights were born out of the violence of revolution. While this is factually wrong (and Gearty clearly shows how the law of human rights has reached the point it has through a combination of common law concepts, political determination and foreign influence), it is nevertheless a strong building block for a common British identity. Therefore, the political rhetoric of human rights will continue to use the defence of rights and liberties as props to embody Britishness instead of a bulwark against the abuse of the weakest.

Gearty provides a striking account of the situation, by insisting on the myths surrounding the HRA and the ECHR. He delivers a damning diagnosis of the current situation: the opponents to the current human rights regime are essentially fantasists, they might even be no more than Little Englanders with imperial delusions. The sandcastle on the cover of the book is a telling representation of this general feeling: the sea is looming in the background, ready to attack the frail structure and while the Union Jack is still floating high, it is no more than a tiny toy flag. *On Fantasy Island*

provides a highly readable account of present-day political issues around human rights. Such a summary will no doubt prove useful to anyone who tries to grasp what the future might hold for UK law.

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