A New Human Rights Culture and Deliberate Constitutionalisation

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The aim of this article is to contribute to the discussion on the nature, scope and meaning of the concept of human rights by suggesting that the "rights" approach is not the best way to develop a positive and modern human rights culture. Consequently, emphasis on the meaning of rights is not even instrumental in discovering the very essence of the concept of human rights as it is being invoked and applied in almost all areas of legal regulation. Instead, a deliberate constitutionalisation in which the scope for human rights violations would be reduced it is argued here is the only way to protect human dignity.

Introduction

The argument is generally structured to answer the question: "are rights the best way of protecting human dignity" in the contemporary world? The starting point is the recognised deficiencies in the rhetorical "rights" approach in promoting a more humane treatment of individuals by governments and consequential reliance by the individual on having a right rather than establishing a more participative and responsible relationship with a state's institutions. As long as this antagonistic relationship between individuals and their state is maintained there will be no progress in defining the scope and the meaning of the concept of human rights.

The attitude is not based on an over-enthusiasm or some kind of idealism; it does not suggest a revolutionary approach to the issue; it is motivated by the obvious incongruity of the invocation and applicability of the "rights" approach to dealing with modern-day issues. A different type of constitutionalisation is obviously needed to create a relationship between individuals and their state in which there would not necessarily be the need for the enumeration of individuals' entitlements in order to protect their "human" rights. This may take the form of a more active involvement of individuals in determining the structures and appearance of their entitlements and interests in partnership with the government rather than through a conflict. The change would not have to be implemented only through a bill of rights or a proper, written constitution, but by a redefined concept of participatory citizenship for instance. The approach may be termed a deliberative constitutionalisation as opposed to a wait and see constitutionalism in which judges are given the unenviable task of transforming international legal principles into concrete rules. It will suggest that a constitutive process should not be seen as exclusively a struggle for promoting citizens' (and other individuals') interests but a less

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confrontational and more scrupulous relationship. With the growing complexity and sophistication of life, and with increasing government intervention in it, there is little alternative to a more accurate but different type of demarcation of what the participants can do. Perceiving a constitutive process essentially as a struggle contributes to maintaining the relationship between individuals and their state as inherently patronising and unequal because the state is routinely faring better in that struggle. The problem is aggrandized by the current weakening of parliament, traditionally seen as the ultimate guardian of legitimacy and "human rights".4

Deficiencies of rights language

Writing in 1995 Sunstein identified six particular criticisms of rights as developed through the functioning of judicial institutions and academic argument.5 Firstly, rights have a social foundation and they are collective in character rather than being individualistic as the rights rhetoric tends to suggest. This rhetoric deliberately obscures the main characteristic of rights according to the critics. This is surely the starting point in the attack on the rights rhetoric. The natural law school implies that human rights are individual in the sense that they belong to individuals as human beings and not as the basis of their interaction with society.

Secondly, rights are rigid in the sense that they have an absolutist and exclusive character that prevents a more desirable and appropriate political discourse as an alternative. Rarely do rights allow room for competing considerations, which in turn precludes a deliberative process of arriving at a fair solution. The main point is that a right automatically prevails over other kinds of claims because of its authoritative and exclusive character. Examples such as abortion and environment first come to mind, but also norms of international criminal and humanitarian law as they are implemented and pursued today. For instance, it is becoming quite obvious that the work of the international criminal tribunals is not instrumental in achieving reconciliation among the former warring factions.6 Exclusive and uncompromising reliance and invocation of rights, as prescribed by international humanitarian law, prevents effectuating other forms of reconciliation such as establishment of truth and reconciliation commissions.

The rules of immigration law tell us that there is no right to asylum and this point is repeatedly made in order to defer to the state's right to exclude foreigners.7

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7 In T v Secretary of State for the Home Department [1996] AC 742, 754, Lord Mustill said: "although it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries." See also Felice Morgenstern, "The Right of Asylum" BYIL, 1949, 26, 327.
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trumps over a less hierarchical\textsuperscript{8} right to apply for asylum. The European Convention on Human Rights and Fundamental Freedoms (ECHR) prohibits inhuman and degrading treatment\textsuperscript{9} and the courts have to balance this right with the right of states to protect themselves against terrorism.\textsuperscript{10} In all the situations above there is a tendency to unscrupulously put forward a right over all other considerations. This is clearly inappropriate in the modern world. Rights' rigidity is also detectable in the argument that the so-called right to development is not a human right. Explaining the character of the Universal Declaration of Human Rights Donnelly suggested: "[h]uman rights are clearly and unambiguously conceptualized as being inherent to humans and not as the product of social cooperation. These rights are conceptualized as being universal and held equally by all; that is, as natural rights."\textsuperscript{11}

Thirdly, rights are indeterminate as they take the form of general propositions. In order to be effectively applied rights must be specified rather than contained in routine and most general statements and principles. For example Article 3 of the ECHR laconically prohibits inhuman or degrading treatment leaving nuances of this general statement to domestic courts to deal with. And in a recent asylum case\textsuperscript{12} the Court of Appeal was faced with the difficult task of delineating what the state's actions constitute inhuman or degrading treatment. The Court ruled that the Secretary of State violated destitute asylum seekers' human rights by refusing to provide accommodation to them. The reasoning and guidance given in the decision, although positive for the respondents in the case, may not be sufficient to prevent a future transgression of the Article 3 threshold. This is because of the very nature of the concept of human rights, which is becoming increasingly sophisticated by expanding the areas of "illegal" interference and therefore making it more likely for a state's authorities to violate the law. Consequently, it is not possible to predict a response by the European Court of Human Rights, who clearly indicated that the Convention is a "living instrument" capable of adapting to new societal developments, the main consequence being that the Court is not bound by its own case law. Rights' indeterminacy is even more detectable in relation to other balancing and qualified human rights such as Articles 8 and 10 of the ECHR.

\textsuperscript{8} Martti Koskenniemi, "Hierarchy in International Law: A Sketch" E.J.I.L., 1997, 8, 566. The author argues that making legal argument establishing the relationship of inferiority and superiority between units and levels of legal discourse. The phenomenon is inherent not only in the natural law approach on which the concept of human rights is based but equally in positivist legal thinking according to the author.

\textsuperscript{9} Article 3 of the European Convention on Human Rights and Fundamental Freedoms.

\textsuperscript{10} \textit{Gaoua v Secretary of State for the Home Department} (CA) 2004 [2004] All ER (D) 136 (Nov). In this case an Algerian national claimed that he would be tortured by the Algerian authorities if returned home after his application for asylum failed and who was previously arrested for plotting to commit an act of terrorism.


\textsuperscript{12} \textit{Secretary of State for the Home Department v Limbuela and Others} [2004] EWCA Civ 540.
Fourthly, rights lead to excessive individualism. Rulings on human rights are political in character because they imply judging governmental policy and as such they may lead to conflict situations, not only between the state's institutions but also between individuals and their state. Individualism is conducive to deepening the dichotomy between "us and them" by positioning the individual against the state. Rights language is more assertive than the liberty approach in protecting human dignity; it implies that the individual defeats the state. In *DPP v Jones* the House of Lords created a new right, rather than more pragmatically and (less conflictually) simply saying that the demonstrations were peaceful and hence legal. Individualism is therefore confronted with communitarianism, which in itself is conducive to conflict situations and inevitable violation of "human rights".

Fifthly, indeterminacy of rights allows the rights rhetoric to be used for pernicious ends. As suggested already, rights prevail over any other considerations and in conjunction with indeterminacy using the rights language can indeed be seen as preventing any democratic oversight over the claims. For instance some academics argue that new rights emerged at the international plane. According to the argument there is the right of humanitarian intervention, outside the UN Charter, to use force against a state ostensibly to protect a threatened population from some kind of "internal specialist in violence" (the Iraqi treatment of Kurds in 1991), which essentially trumps over the state's right to defend itself; and the right to democratic governance allowing military intervention to support a population's democratically expressed will (restoring a democratically elected president of Haiti marked the apparent emergence of this right). The rights are being invoked by the most powerful states in order to circumvent the United Nations Security Council in authorising the use of force and in this sense it can be argued that their invocation has pernicious ends; that it has more to do with buttressing political argument than protecting human dignity.

Finally, the emphasis on rights is not instrumental in developing a sense of responsibility. Rights and entitlements lead to the culture of dependency because of heavy reliance on

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13 See Richard McIntyre, "Globalism, Human Rights and the Problem of Individualism" Human Rights and Human Welfare, 2003, 3, 1. According to the author: "[T]he individualism of the Universal Declaration was an understandable and admirable reaction to the barbarism of authoritarian states. But this has not always, and is not now, the only basis for human rights work", p. 9.
institutional support for their realisation and the lack of any active role in searching for what is the right thing to do. Examples such as women rights and minority protection first come to mind. Consciously putting oneself in an inferior situation either by placing oneself in a minority or insisting that certain rights should be enjoyed by one sex only, necessarily leads to discrimination against the category, which prevents a quest for a more appropriate method of asserting oneself. The International Labour Organisation in the early 1950s indirectly contributed to a greater discrimination against women by emphasising their rights as mothers at the expense of their equal rights to work, for instance. The minority protection in the region of the former Yugoslavia during its violent dissolution emphasised vulnerability of the threatened groups, not their equality, and this prevented the groups' own search for asserting their position and conceiving of themselves in more effective ways.

**Haphazard Constitutionalism**

In a recent high profile case the Court of Appeal had the difficult task of distinguishing supposedly legitimate actions of the state from those that may constitute a breach of the Convention rights; in this instance Article 3 – prohibition of torture, inhuman or degrading treatment. The case was about challenging the Secretary of State's decision to strip a failed asylum seeker of social benefit. The Court of Appeal dismissed the appeal by the Secretary of State against the High Court's decision that the treatment constituted violation of Article 3 of the ECHR and ruled that the Secretary of State is under duty under the 2002 Act to provide support for asylum seekers verging on destitution who had not made a claim as soon as reasonably practicable after arriving in the United Kingdom and had no access to any other form of support, to prevent their being subject to inhuman or degrading treatment in breach of their Convention rights. The main sticking point in the case was whether sending a person out on the streets without any means of survival constituted inhuman or degrading treatment in itself or only the consequences of such an act violated Article 3. The Court relied on common sense rather than on any distinctive legal argumentation in coming to the conclusion that to adopt a "wait and see" policy would amount to the violation. Arguably, the rigidity of the so-called right against inhuman or degrading treatment allowed such hard bargaining and balancing, which in this author's view is a vulgarisation of humanity and a mockery of the Convention principles. Obviously an effective guarantor of both side's interests is needed; a process of positive constitutionalisation in which constitutional arrangements would be used for establishing what the main institutions can do and also the ways in which they can carry out their tasks. This would surely lower the risk of developing potential human rights violations and increase legitimacy of the state's action to protect its interests.

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24 Ibid., para. 138.
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Other examples of the haphazard constitutionalism in the UK can often be found in the field of immigration law, the area of legal regulations that is inherently reactive and restrictive in character. The dichotomy between "us and them" is more visible in immigration law than in any other area of legal regulation, which results in the immigration states being often sued for violation of human rights. Human rights are universal, the concept says, and therefore apply to all individuals living in a country not only to its citizens. This is confirmed by both European human rights case law and domestic legislation.26 Another reason for greater potential for human rights violation in exercising immigration control is the large number of bodies involved in decision-making,27 making them public authorities for the purpose of the Human Rights Act 1998. Rigidity and indeterminacy of rights are quite prominent in immigration law. As mentioned above there is no "right" to asylum either under domestic or international law.28 The right of states to exclude aliens from their territory seems to be superimposed on other considerations including human rights. Our courts have, sometimes quite dramatically29 reminded government on the need to act humanly when exercising immigration control. In other cases they showed reluctance to interfere and demonstrated preference towards government policy instead. In one of the most prominent cases30 the House of Lords, rejecting the human rights appeal of asylum seekers against their detention in the Oakington Centre, implicitly confirmed that "the principle of sovereignty prevailed over human rights".31 The uncompromising character of the competing rights prevented a solution protecting both the state's interests in pursuing its immigration policies and the claimants' right not to be detained unnecessarily and made our government liable for potential violation of the ECHR.32 Resolving the permanent clash is not obviously possible by the "rights" approach because of exclusiveness and lack of compromise.

Another aspect of the haphazard, wait and see, constitutionalism can be detected in our traditional belief articulated by Lord Hoffmann in 1999 that Parliament is made up of

27 Under the UK immigration law there are several bodies that can participate in the decision-making procedures. Immigration control may start with the clearance officer abroad; then the immigration officer at the port of entry may get involved in the process. There has been a tendency in the domestic immigration control to confer powers on other bodies that had never before exercised any immigration control such as passenger carriers for example (see the 1999 Act). The Secretary of State decides on asylum applications; appeal goes to the special adjudicator; and finally other appeal bodies may get involved in the exercise of immigration control. For a detailed elaboration on the issue see: Ian Macdonald, Immigration Law and Practice, (Butterworths, 2001) Chapter 8; Nicholas Blake and Raza Husain, Immigration Asylum and Human Rights, (Oxford University Press, 2003), pp. 18-63; 211-310.
28 See n 7 above.
29 R v Hammersmith and Fulham LBC ex p M, The Times Law Reports, October 10, 1996. Collins J. said that "it was impossible to believe that an asylum seeker who was lawfully here and could not lawfully be removed from the country should be left destitute, starving and at grave risk of illness and even death".
30 R v Secretary of State for the Home Department ex p Saadi, Maged, Osman and Mohammed [2002] 1 WLR 3131, HL.
32 Note that the claimants filed an application to the ECtHR (Communicated Application: Saadi v United Kingdom, App no 13229/03).
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responsible people who would never violate human rights. Interestingly the author, five years later, expressing his view on the legality of the recent anti-terrorism legislation, said that: "[T]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these." Again, the exercise of immigration control provided a fertile ground for tension among the main institutions of our constitutional arrangements. In introducing frequent legislative changes in the area the government (successfully) developed the "practice of deferring the detail of a number of provisions to secondary legislation, thereby avoiding unwelcome parliamentary scrutiny." A recent comment by Lord Butler of Brockwell, who was the Cabinet Secretary to three prime ministers, that the Prime Minister "was sidelining Cabinet government by taking decisions among small groups of people" is quite indicative of the phenomenon.

Clearly some kind of statutory determination of government competences in relation to issues that are most closely related to humanity is needed. Secondly, it is becoming increasingly evident that a statutory regulation of the relationship between the executive and parliament and executive/parliament and the judiciary is desirable in order to avoid the tension and potential for violation of human rights. The suggestion that the representative democracy is the ultimate guardian of human rights is obviously misleading and totally misplaced in the current political climate. This would involve a juridification of politics rather than a further institutionalisation of human rights and it should not be confused with the suggestion that the rights approach is not effective in protecting human dignity. In other words the enumeration of competencies of the main institutions rather than the enumeration of individuals’ entitlements is needed. In fact some argue that this process is, since the introduction of the HRA 1998 to a certain extent is taking place.

**Tentative proposals**

The following proposals are only tentative in character and it is hoped that they will be discussed and developed further. They are aimed at reducing the potential for human rights violations. The restatement of natural law by Finnis can serve as the theoretical framework for the proposals. The proposals can therefore be seen as forming a part of "the set of principles of practical reasonableness in ordering human life and human community."

Firstly, a specialised constitutional court should be established. Insistence on preserving parliamentary supremacy, carefully translated in legislation (Section 6,4 HRA 1998)

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34 Section 23 of the Anti-Terrorism, Crime and Security Act, 2001 allows indefinite detention of a person certified as a suspected terrorist and it applies to foreign nationals only.
36 Dallal Stevens, UK Asylum Law and Policy, (Sweet and Maxwell, 2004), p. 196.
37 The Daily Telegraph, 10 December 2004.
38 Dawn Oliver, Constitutional Reform in the UK, (Oxford University Press, 2003), p. 16.
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represents the main potential for human rights violations. A constitutional court would be able to rule not only on prudence but on legality (constitutionality) of acts of Parliament by which the scope for offending legislation would dramatically be reduced. On the other hand the European judicial institutions would surely adopt a different approach when examining whether a particular action violated human rights. The fact that there is an ultimate guardian of constitutionality would in itself demonstrate that there is a more serious approach to human rights as opposed to the argument that parliamentary supremacy prevents the courts from challenging parliament.\(^{40}\) Issuing a declaration of incompatibility under Section 4 of the HRA 1998 implies, to a certain degree, a politicisation of the courts anyway, but it is half-hearted and there are also signs that the courts have started to adopt a more deferential approach towards parliament going back to the pre-HRA era.\(^{41}\)

Secondly, a more deliberate and detailed determination of the ECHR rights' content is desirable, which would defeat the argument that human rights law is mainly made of vague principles rather than substantive rules.\(^{42}\) This would effectively mean getting closer to the European Court's principle of seeing the ECHR as a living instrument.\(^{43}\) The approach would require familiarisation not only with European human rights law, which Section 2 of the HRA 1998 already imposes,\(^{44}\) but with other states' practices and case law, especially those with a bill of rights in their legal systems.

Thirdly, in order to increase the effectiveness of legislative scrutiny a team of independent legal advisers should be appointed implementing Section 19 of the HRA 1998\(^{45}\) rather than assigning this important responsibility to a minister. Surely an

\(^{40}\) The point was clearly illustrated in relation to EC law in *R v Secretary of State for Transport ex parte Factortame Ltd* (No 4) Case C-48/93 [1996] 2 WLR 506, ECJ.


\(^{43}\) The European Court of Human Rights adopted a liberal approach in interpreting the Convention. According to the principle in determining the content and substance of the Convention's rights the Court will take account of societal and technological developments. As a result the system of precedent does not even exist in the field of European human rights law; certain activity which may be legal in the opinion of the Court may in the future be capable of violating human rights.

\(^{44}\) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention.

\(^{45}\) According to Section 19: (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill - (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

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independent legal adviser's opinion on the compatibility of an impending piece of legislation with human rights would be more professional and neutral.

Fourthly, a more detailed legal\footnote{Note that the process, in the form of various codes of practices, is already taking place; see n 38 above, pp. 16-17.} enumeration of the main institutions' competences would be instrumental in reducing the scope of human rights violations. This is particularly important bearing in mind an increased number of secondary legislation and "quangocracy". Enabling individuals to make laws must be accompanied by corresponding legal limitations on what the bodies can do. Immigration control provides a fertile ground for potential of human rights violations with the tendency to increase the number of law-making bodies.\footnote{See Ian Macdonald, Immigration Law and Practice, (Butterworths, 2001), pp. 268-280; Nicholas Blake and Raza Husain, Immigration Asylum and Human Rights, (Oxford University Press, 2003),pp. 19-22.} One of the aspects of the improvement would be a more transparent determination of the relationship between ministers and civil servants; or limiting the scope of executive competences by legal means. It seems that political developments themselves sometimes lead to this demand. There have been demands in the UK recently that the traditional Royal prerogative allowing government exclusively to decide to go to a war should be replaced by parliamentary competence, inevitably introducing more certainty and transparency in the field.

Fifthly, a more robust role of the judiciary would help the process. The European judicial institutions’ involvement provides a useful comparison.\footnote{See Stephen Carruthers, “Beware of Lawyers Bearing Gifts: A Critical Evaluation of the Proposals on Fundamental Rights in the EU Constitutional Treaty” E.H.R.L.R. 2004, 4, 424-435.} It is only the judiciary that can challenge government in times of political tension and a tendency to abuse power. Instead of detailed enumeration of human “rights” the judiciary can contribute to the transformation of the rights language into a positive human rights culture by expansive interpretation of the rights’ substance, which would reduce the scope of human rights violations and encourage the development of participatory democracy.\footnote{See Rory O’Connell, ‘Towards a Stronger Concept of Democracy in the Strasbourg Convention’ E.H.R.L.R. 2006, 3, 281-293. The author argues that the European Court of Human Rights has been developing new rights such as a duty to provide information by decision makers and citizen’s right to be consulted.}

Finally, in order to make the proposed improvements work, a new type of relationship between the individual and state is needed. A full and participatory citizenship would have to be an ideological framework within which the proposed improvements should take place. Greater awareness of legal and political entitlements by citizens and meaningful participation in political life is a precondition for developing a partnership with the government and therefore contributing to a more positive human rights culture.

**Conclusion**

By drawing reader's attention to the recognised deficiencies of the rights approach in general and in relation to the concept of human rights in particular, the article tried to

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demonstrate that in modern times a further institutionalisation and determination of individuals' rights are not instrumental in reducing human rights violations. This is not a criticism of the concept of human rights; to the contrary it adopts Finnis's restatement of natural law as the starting point by emphasising that "modes of responsibilities" can and should be derived from the first principle of morality, directing persons to choose only those possibilities that are compatible with "integral human fulfilment"\(^50\). In order to implement this modern vision of the concept of human rights a modern approach is needed to more effectively protect human dignity. With increasing government intervention and interference with individuals' freedoms the dichotomy between "us and them" is deepening and clearly there must be some legal limits on government's powers but also a qualitatively new relationship between the individual and the state. There is little point in pursuing the enumeration of the so-called human rights and further institutionalisation for their protection without a legal determination of what the most likely violator can and cannot do and an independent and authoritative assessment of transgressions.

The European Court of Human Rights has developed its own principles that are being constantly updated and strictly applied in assessing the states' behaviour in the sphere of human rights. To be able to comply with the increasing sophistication of the concept of human rights the states must start participating in that process by taking equal part in protecting individuals' dignity rather than adopting an adversarial approach by having to defend government's action and inevitably positioning individuals against their state.

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