**Magna Carta and the Invention of ‘British Rights’**

**Michelle Farrell and Edel Hughes[[1]](#footnote-1)**

**Abstract**

In this chapter we argue that the antipathy towards human rights, and the Human Rights Act in particular, that is evident in certain sections of the media and political establishment, lies partly in its relationship with the European, and, therefore, foreign or ‘alien’, system of human rights protection. Somewhat paradoxically though, those who are most trenchant in their criticisms of the Human Rights Act nevertheless stress that Britain is a nation founded upon human rights. Through the lens of the Magna Carta we examine the invention of the tradition of British rights and how the Charter has been co-opted by those who seek to foment opposition to the Human Rights Act and, albeit to a lesser extent, by those who seek to defend the Act by demarcating a clear line of history between the Charter and the Act. Both approaches, we suggest, serve to crowd out the space required for a rational critique of rights.

**Introduction**

Antipathy towards human rights, so evident in media coverage in the United Kingdom, revolves around the Human Rights Act 1998. As contributors to this volume have pointed out,[[2]](#footnote-2) the Human Rights Act is ‘hated’ and described as, amongst other things, ‘insidious’,[[3]](#footnote-3) a ‘criminal’s charter’,[[4]](#footnote-4) and, delightfully, the ‘human wrongs act’.[[5]](#footnote-5) Yet it is also commended, even fetishized as a ‘direct descendant of that great Charter’,[[6]](#footnote-6) as inaugurating ‘a human rights culture’,[[7]](#footnote-7) and as the root and branch of a ‘human rights revolution’.[[8]](#footnote-8) That the Act and the broader human rights ‘project’ is the subject of so much media commentary, both derisory and celebratory, perhaps arises in part from the UK’s curious constitutional arrangements, which meant that, until the enactment of the Act, ‘rights’ were conceived of as residual liberties protected, for the most part, through the common law.[[9]](#footnote-9) The UK has never had a constitutional ‘bill of rights’. It did play a leading role, though, in the drafting of the European Convention on Human Rights.[[10]](#footnote-10) And, of course, the UK, under the post-war Labour government, ratified the Convention in 1951.[[11]](#footnote-11) Having accepted the jurisdiction of the Court on ratification and the attendant right of individual petition in 1966,[[12]](#footnote-12) the UK embraced the system as a whole and has since been subject to hundreds of rights claims litigated before the European Court of Human Rights. The European human rights system, then, was well known in the UK when Tony Blair’s New Labour government set about ‘bringing rights home’.[[13]](#footnote-13) The coming into force of the Human Rights Act in 2000, did mean, however, that rights claims could be articulated domestically. It was arguably this development, along with huge changes in media communication and consumption, that captured media attention and, consequently, served to heighten public awareness of human rights. The decision to enact the Act was controversial from the outset.

Whilst debate, derisory and celebratory, tends to coalesce around the Human Rights Act, the real fault line of the Act is its relationship to the European system of human rights. The Human Rights Act gives further effect, in domestic law, to most of the provisions of the European Convention on Human Rights. As such, it, more or less, domesticates the European Convention. The Act is both clever and effective in its structural and substantive negotiation of the sovereignty of parliament in sections 3 and 4. However, whilst obviously constructed so as to meet the constitutional requirements of a sovereign parliament, by requiring that a ‘court or tribunal determining a question which has arisen in connection with a Convention right … take into account any judgment, decision, declaration or advisory opinion’, the Act also anchors, to a considerable extent, the judgements and interpretations of the European Court of Human Rights in domestic law. It also, unquestionably, tethers the domestic system to the European one by effectively ‘transplanting’ the ‘exact wording of each provision’.[[14]](#footnote-14) This European character of the Human Rights Act seems to be the sore point.

Evidence abounds to demonstrate discomfort with the European, non-British, or apparently partisan, character of the Human Rights Act. This is illustrated, at times, in descriptions of the Act: Labour’s Human Rights Act[[15]](#footnote-15) and the European Human Rights Act.[[16]](#footnote-16) The discomfort is most obvious, however, in the calls for a ‘British Bill of Rights’, the propounding of ‘British values’ and the demarcation of ‘British rights’. These proposals are offered as a distinct contrast to the ‘foreign’, ‘European’, imposed character of the Human Rights Act. The underpinning rationale of the proposals is the innate existence of a British tradition of liberties and rights that renders European versions redundant or superfluous, ill-fitting or even unworthy. The British indigeneity of rights is not, however, only claimed by those who are anti-Human Rights Act or anti-European rights. With an apparently different intention, proponents of the Act also make these claims to ownership of the idea of rights: Paul Boateng and Jack Straw made this clear in their Labour vision for ‘bringing rights *home’*: ‘it is time to *repatriate* British rights to British courts’, they proclaimed.[[17]](#footnote-17)

Magna Carta has become the underpinning touchstone for these claims to British exceptionalism. In this chapter, we examine how the tradition of British rights is invented, at least in part, via Magna Carta, in order to inculcate distaste for the European system and the Human Rights Act, in particular.Of course, Magna Carta is also used to ground support for the Act.[[18]](#footnote-18) We make a number of interrelated observations on the role of Magna Carta in the repeal of the Human Rights Act debates. First, Magna Carta is central to the invention of the ‘British rights’ tradition. The idea of the ‘invention of tradition’,[[19]](#footnote-19) as conceptualised by Eric Hobsbawn, provides a foil through which we can begin to understand how the Human Rights Act has been construed as anti-British, by many, and the very essence of British, by others. Samuel Moyn’s concern for the ‘myth of deep roots’[[20]](#footnote-20) in human rights thinking dovetails neatly with Hobsbawm’s ‘invention of tradition’ allowing us to think through the objective and the consequences of this turn to Magna Carta. Second, Magna Carta serves to suggest a glorious past and a more British future, whilst turning attention away from the present, the real. Yet, as a figment of an imagined rights past, Magna Carta cannot be the basis for an explanation of rights in the present nor can it explain the Human Rights Act.[[21]](#footnote-21) The disdain for the Act and, equally, the fetishisation of the Act, filtered through an imagined history, crowd out the space for critical engagement with history and with rights. The media is central to the absorption, entrenchment and spread of the invented tradition of British rights and it is quite obvious that it is not the internationalists, who themselves argue that Britain is the natural home of rights, who have captured the media and public imagination.

Human rights, particularly as protected by the 1998 Act, are, arguably, neither the destructive force that some commentary would have us believe, nor a panacea for society’s ills. Both poles actually aggrandize rights, personifying them whilst blurring our view of the state. There are many ways to think through rights in the United Kingdom’s legal, political and social landscape. It is, as one example, possible to think critically or sceptically about rights, clearing the landscape and paving the way for alternative languages and strategies. Criticism and scepticism about rights is mainstream in contemporary academic research. And since the days of its initial promulgation,[[22]](#footnote-22) the Human Rights Act has been regarded with scepticism within academic circles, particularly by political constitutionalists. However, the substantive grounds upon which such doubtful, sceptical, critical or dissenting approaches to rights rest rarely make media coverage.[[23]](#footnote-23) It is also possible to think pragmatically or instrumentally about rights. In this vein, David Kennedy, a rights critic, invokes pragmatism as a remedy for what he terms the ‘tendency towards idolatry’ when we talk about human rights and human rights work.[[24]](#footnote-24) Like criticism and scepticism, pragmaticism on rights is, though, entirely absent from media discussions of the Act. Polarity is the order of the day. Attention has been sucked so ideologically in to the form and the identity of human rights in the UK that substance and meaning are almost ignored. Getting to grips with how and why this polarity has come to dominate is instructive. The Human Rights Act is merely a surface over which internationalists, institutionalised rights ‘favouring’ New Labour and ‘Runnymede Tories’[[25]](#footnote-25) and ‘little Britainers’ are battling their respective ideologies. We argue that a key element in the production of these ideologies and the ensuing polarities has been the invented tradition of the Magna Carta. In order to demonstrate our claims, we examine, first, some of the key features of the repeal debate. We then examine the role of Magna Carta in these debates and we show how media engagement with Magna Carta compares – ever so favourably – to engagement with the Human Rights Act. Third, we show how Magna Carta is invented as a tradition with the effect of erasing the possibility of real attention to contemporary rights in the UK.

**The Human Rights Act: Why the Controversy?**

Absent an entrenched constitution in the UK context, the Human Rights Act has been viewed by some commentators as a ‘bill of rights’, albeit a ‘bill of rights with a difference’.[[26]](#footnote-26) Its arrival though, has not been universally welcomed: writing some seven years after the Act came into force, Lord Justice Stephen Sedley noted:

Instead of a comfortable bedding into our domestic law and culture of the elementary rights which we and the rest of Europe had signed up to in the aftermath of the Second World War, the Human Rights Act has become the scapegoat for half the things that go wrong in the state and civil society.[[27]](#footnote-27)

The scapegoating of the Act that Sedley refers to, often revolves around the contention that the Act is a ‘villains’ charter’[[28]](#footnote-28) but more considered criticism generally centres on three issues; that of deference (the Act gives far too much power to the unelected and, therefore, undemocratic judiciary); the question of parliamentary sovereignty (which the Act purportedly usurps, in particular, as considered in its traditional Diceyan rendering); and that of supremacy (the Act requires British courts to punctiliously follow the judgments of the European Court).[[29]](#footnote-29) Each of these criticisms are based to a certain extent on the way in which the Human Rights Act is constructed; the Act, for example, instructs the courts to interpret legislation in a way which is compatible with Convention rights (section 3) and leaves it open to the courts to issue declarations of incompatibility where they are unable to do so (section 4). Section 2, which states that domestic courts ‘must take into account’ judgments and decisions of the European Court, is frequently the source of greatest angst amongst those who claim that this constitutes a supranational court’s unwarranted, and unwanted, interference in domestic affairs.[[30]](#footnote-30) Section 2 is also an unwelcome reminder that the parentage of the Act lies in the European Convention, giving vent to the considerable ire currently directed towards all things ‘European’, as outlined particularly by both Stephanie Reynolds and Lieve Gies in this volume.[[31]](#footnote-31) This is also perhaps reflective of a broader aversion to international law in the modern era.[[32]](#footnote-32)

In a sense then, many of the criticisms of the Act tend to centre on the idea that Act has somehow undermined or contradicts the supremacy of Parliament. These criticisms largely disregard or seem ignorant of the fact that the ‘fundamental premise of the Act is that Parliament is sovereign’.[[33]](#footnote-33) Lord Hoffmann’s oft-quoted passage from *ex parte Simms* confirms this contention by noting that the premise of parliamentary sovereignty means that ‘Parliament can, if it chooses, legislate contrary to fundamental principles of human rights’[[34]](#footnote-34) and the Human Rights Act does not change this. But, he continues:

[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost…the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[[35]](#footnote-35)

Although Lord Bingham described Lord Hoffmann’s contribution to *ex parte Simms* as simply illustrative of a ‘heightened sense of the judges’ duty to respect and defend fundamental principles,’[[36]](#footnote-36) it is perhaps not difficult to see how this may cause a certain degree of disquiet amongst those who claim that the Human Rights Act paves the way for judicial overreach. This was illustrated at the time of its coming into force by the argument that the Act would enable judges to ‘make’ rather than simply interpret the law,[[37]](#footnote-37) a view with which some members of the judiciary at least would seem to concur.[[38]](#footnote-38) At any rate, it is simply naïve to argue that the Human Rights Act only has impact at Parliament’s command.

**Magna Carta and the Human Rights Act: Idolised and Pilloried**

The 800th anniversary of the signing of the Magna Carta in 2015 witnessed a resurgence of interest in the Charter in political rhetoric, judicial speech-making, media attention and academic commentary. The Charter, as Robert Melton and James Hazell, writing in one of the scholarly outputs published to mark its anniversary, tell us, ‘is revered by citizens and human rights activists all over the world. It has become a symbol for limited government and constitutionalism used by political theorists, constitutional drafters, political elites and even ordinary citizens to justify constraining political power.’[[39]](#footnote-39) Despite all the fanfare surrounding its anniversary, however, the extent of its influence remains widely contested. Lawyers, it is asserted, tend to overstate its significance, whereas historians point to its numerous misreadings.[[40]](#footnote-40) There is, as Christopher Greenwood has pointed out, ‘real doubt about whether Magna Carta can properly be described as having had any serious impact on English law’.[[41]](#footnote-41) Articles 39 and 40 of the Charter, frequently lauded as the earliest guarantors of rights such as habeas corpus and due process of law[[42]](#footnote-42) did not in fact provide any such rights. As Greenwood notes in relation to Article 39:

It is not about trial byjury, at least not as we know the jury today, which did not come into being in England until much later; nor did habeas corpus. The concept of 'lawful judgment of his peers' was a great deal more elastic then than we imagine hundreds of years later. Nor is it quite the bulwark against arbitrary arrest that it might appear. It says that no 'free man' (it did not apply to the serfs any more than the USConstitution originally applied to slaves) shall be penalised 'except bythe law of the land'. It does not place limits on what laws might be enacted or for what forms of detention or punishment they might provide. Moreover, the king never had any intention of complying with the promises he made in Magna Carta.[[43]](#footnote-43)

This has not, of course, prevented the judiciary, notably in the United States,[[44]](#footnote-44) from invoking the Charter in discussions concerning trial by jury and due process rights.[[45]](#footnote-45) Nor has it prevented the celebration of Magna Carta as the foundation of British liberty and even parliamentary democracy.

Leaving aside, for the moment, the debate as to the Charter’s actual impact on the restraint of arbitrary power and on liberty, or, at an even further stretch, on rights protection, its main contribution may be seen to lie in the numerous misconceptions about this impact – the fact that it was ‘as influential for what it was widely *believed* to have said as for what it actually did’,[[46]](#footnote-46) with this perhaps being even truer in the US context than the UK one.[[47]](#footnote-47) Lord Bingham, for example, discussing the remedy of habeas corpus, remarked that although the Charter:

…did not enshrine or establish a right for the unlawfully detained subject to apply for the issue of a writ of habeas corpus[…] however unhistorically, the judges appealed to the Charter when developing the remedy and it is doubtful whether, without this all but sacrosanct instrument to rely on, they could have acted as boldly as they did.[[48]](#footnote-48)

Former Supreme Court President, Lord Neuberger, in a commemorative speech during the anniversary period, aired his agreement with Bingham that the myth might best be embraced:

There can be little doubt that the ‘lawyer’s view’ of Magna Carta is partly mythical. Of course, there is nothing wrong with myth. As the late Tom Bingham put it: ‘The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important that the actuality’.[[49]](#footnote-49)

This ‘unhistorical’ approach adopted by the judiciary is arguably also reflected in the media engagement and in the understanding of the general public, who show a high level of awareness of the existence of the Magna Carta but a low level of knowledge regarding its actual content or significance.[[50]](#footnote-50)

*Commemorating the Charter; Condemning the Human Rights Act*

A ceremony held at Runnymede, the site of the signing of the Magna Carta by King John, on 12 June 2015 commemorated its 800th anniversary. David Cameron, then Prime Minister, asserting the continuing relevance of the Charter, stated: ‘[w]hy do people set such store by Magna Carta? Because they look to history. They see how the great charter shaped the world, for the best part of a millennium, helping to promote arguments for justice and for freedom’.[[51]](#footnote-51) In the same speech, however, he goes on to essentially make the case for the Conservative Party proposals to repeal the Human Rights Act, arguing that the good name of rights have been ‘distorted’ and ‘devalued’: ‘[i]t falls to us in this generation to restore the reputation of those rights and their critical underpinning of our legal system. It is our duty to safeguard the legacy, the idea, the momentous achievement of those barons. And there couldn’t be a better time to reaffirm that commitment than an anniversary like this.’[[52]](#footnote-52) This begs the question as to why the Charter is venerated to the point of overstating its impact and significance, yet the main modern legislation codifying rights and freedoms that are argued, questionably, to originate in this ancestral Charter are castigated in numerous quarters. The answer may lie in what Colin Murray has referred to as the ‘weaponising’ of the Magna Carta whereby its ‘place within the UK’s ancient constitution’ is established as ‘a counterpoint to the incorporation’ of the European Convention into UK law.[[53]](#footnote-53) As Gies and Reynolds have both discussed in this volume, there is a certain hostility reserved for instructions seen to be emanating from Europe, the Brexit vote being an obvious illustration of this enmity.[[54]](#footnote-54) Thus, for Cameron and others, whilst the Charter may not be perfect, it has the advantage of being *British*. As Jill Lepore points out in her interesting analysis of the significance of the Magna Carta in the US context, ‘[i]t would not be quite right to say that Magna Carta has withstood the ravages of time. It would be fairer to say that, like much else that is very old, it is on occasion taken out of the closet, dusted off, and put on display to answer a need. Such needs are generally political’.[[55]](#footnote-55) What could be more political than pitting it against the ‘hated’ Human Rights Act to suit the stated agenda of one section of the political establishment?

An examination of the portrayal of both the Magna Carta and the Human Rights Act in UK national newspapers during the first six months of 2015– a period covering the run-up to the commemoration of the 800th anniversary of the signing of the Magna Carta in June 2015 – and also the general election of June 2015, where Conservative Party proposals to repeal the Human Rights Act 1998 featured as a manifesto commitment – is highly revealing.[[56]](#footnote-56) A search for the phrase ‘Magna Carta’ returns 588 results, a search for ‘Human Rights Act’ 343 results, and a search for articles featuring both phrases 28 results. Articles concerning the Magna Carta range from stories about commemorative two-pound coins,[[57]](#footnote-57) to explainers of the Charter,[[58]](#footnote-58) to its role in the creation of standard measures,[[59]](#footnote-59) to more substantive pieces on its significance. What is striking about the coverage of the Charter is the overwhelmingly positive assessment it receives; it is variously described as the ‘great document’[[60]](#footnote-60); the ‘key to democracy’[[61]](#footnote-61); the ‘British blueprint for a fairer world’[[62]](#footnote-62); ‘the most well-known and iconic legal document in existence’;[[63]](#footnote-63) and as being ‘emblematic of a liberal tradition in English law-making that has influenced countries around the world’.[[64]](#footnote-64) The only treatment of the Charter that could be considered as approaching critical comes from the *Telegraph’s* reporting of Lord Sumption’s description of the Magna Carta as a ‘turgid’ document, much less significant in the development of rights than the French Revolution.[[65]](#footnote-65)

Numerous pieces stress the continuing relevance of the Charter in an effort to demarcate a clear line of history between the Magna Carta and our current rights protections. Dan Jones writes that Clauses 39 and 40 ‘have been interpreted in the centuries that followed 1215 as setting out the basic liberties of an English subject… These ideas are present in the Universal Declaration of Human Rights - described in 1946 by its champion Eleanor Roosevelt as "a Magna Carta for all mankind"’.[[66]](#footnote-66) There are also some cautionary articles on the dangers of disregarding or disrespecting the principles espoused in the Charter. In that regard, the 800th anniversary of the Charter is an ‘occasion to look back with pride at how our legal system has tried to control abuse of power, usually with great success. But it is also a reminder of the continuing need to protect the rule of law from politicians who do not understand its significance’.[[67]](#footnote-67)

Despite the lauding, in some quarters, of the Charter and the notion that its value lies partly in the fact that it is ‘still relevant to everything from control orders to European integration’,[[68]](#footnote-68) many joined David Cameron in using the opportunity of the Magna Carta anniversary to contrast its provisions with the unsatisfactory nature of current rights guarantees.[[69]](#footnote-69) *The Sun*, for example, claiming that the Charter ‘came about because the people rose up and said they would not allow their rights to be crushed by a faceless body beyond their control’ draws a parallel between the situation of 1215 with the contemporary one and calls for the Human Rights Act to be repealed: ‘[t]hat messy Act, alongside fudged rulings coming from Europe, stops Britain from making the best rules for Britons ... IN Britain. It has to go.’[[70]](#footnote-70) The *Daily Mail* goes a step further and compares the judges of the European Court to King John (!): ‘Like King John, the judges of the European Court of Human Rights are unelected. Like him, most are intellectually third-rate. But like him, too, they make up the law as they go along, seeking to exercise arbitrary power over peoples and parliaments.’[[71]](#footnote-71) This, the broadside concludes, is a denial of the most basic democratic right to the rule of law that can only be remedied by repealing the Human Rights Act and enacting a British Bill of Rights.

In contrast to national newspapers’ treatment of the Magna Carta, the majority of the articles published during this period that feature discussion of some aspect of the Human Rights Act are negative in tone. These include a large number of articles about convicted terrorists who cannot be deported because of the Human Rights Act,[[72]](#footnote-72) a seeming favourite topic of Human Rights Act detractors; as well as numerous articles on plans to scrap the Act, the vast majority of which are approving of the plan.[[73]](#footnote-73) In fact, the only articles that could be deemed as portraying the 1998 Act in a positive light during this time period include an editorial in *The Guardian* on the right to protest,[[74]](#footnote-74) an article on the launch of RightsInfo in *The Times*,[[75]](#footnote-75)a small number of articles warning against the plans to repeal the Act,[[76]](#footnote-76) and some dealing specifically with SNP opposition to the repeal of the Act.[[77]](#footnote-77)

**The Invention of “British Rights”**

First and foremost, for the repeal side, Magna Carta underpins the claims that European rights and the Human Rights Act are invasive and unsuitable to an environment with an existing rich tradition of home-grown liberties and rights. Murray writes wonderfully about the ways in which the 800th anniversary of Magna Carta was instrumentalised by the Conservative Government for its ‘specific political ends’.[[78]](#footnote-78) He remarks that ‘the ultimate aim of Magna Carta rhetoric is to persuade the UK electorate that there is little role for international human rights law within the UK’s governance order and, as a consequence to ease the UK out of the ECHR’.[[79]](#footnote-79) The aim is also to invent, propagate and entrench a *British* rights tradition.

Recent invocation of Magna Carta for political ends is reminiscent of its instrumentalisation from the 17th Century onwards.[[80]](#footnote-80) Cameron has not underpinned his policy of repeal and replace in reference to the Charter through happenstance. The 800th anniversary was timely but Cameron had, prior to 2015, already invoked Magna Carta. In 2001, in the context of the debates on the Anti-Terrorism, Crime and Security Bill which would require derogation from Article 5 of the European Convention, he had made his stance on the impact of European Court case law and judicial overreach clear. Commenting on the need to derogate from article 5, to facilitate the indefinite detention of foreign nationals who could not otherwise be deported because of the principle of *non-refoulement*, Cameron stated:

Surely we have to ask why we are in this mess in the first place…because of article 3 and the jurisprudence under article 3, the Home Secretary cannot deport those who are potentially a danger to this country. The limitation, however, is not caused by article 3 itself… Nowhere does article 3 mention deportation. What has happened is that, over many years, jurisprudence has been developed that has prevented deportation. The problem, therefore, is jurisprudence under article 3, whereas the solution that we are being offered is derogation under article 5. It is a bit like having mumps but taking a treatment for measles. We are not treating the long-term problem. I profoundly believe that the long-term problem will get worse.[[81]](#footnote-81)

In order to emphasise his disapproval at having to comply with the European Convention (by not returning people to a country where they would risk torture), he cited Magna Carta: ‘The option of opting out and suspending habeas corpus is the wrong answer to the question. In many ways the Government had a choice between this country’s ancient rights of habeas corpus and the right not be detained without trial; between Magna Carta and the ECHR.’[[82]](#footnote-82) Cameron invokes Magna Carta, first, to decry the development of the principle of *non-refoulement*, and, in doing so, to argue that, absent this Convention requirement, the UK could get on with deporting non-nationals who pose a security threat. He invokes it, second, to lambast the evolutive interpretation of the European Convention, and, in so-doing, to distinguish it as alien and foreign. He does this whilst emphasising the great tradition of British rights.

The British Bill of Rights, proposed by Cameron when he took over the Conservative party leadership in 2006, can be understood in the light of his established angst at the Human Rights Act and the European Convention. Repeating the word British over and over again, Cameron made it absolutely clear that the solution to the long-term ‘foreign’ problem was repeal. This use of Magna Carta recurred right through Cameron’s leadership of the Conservative party:

This is the country that wrote Magna Carta. The country that time and again has stood up for human rights, whether liberating Europe from fascism or leading the charge today against sexual violence in war…We do not require instruction on this from judges in Strasbourg. So at long last…this country will have a new British Bill of Rights to be passed in our Parliament rooted in our values and as for Labour’s Human Rights Act? We will scrap it, once and for all.[[83]](#footnote-83)

Theresa May, with her longstanding distaste for the Human Rights Act, and armed with the 2015 manifesto promise to ‘scrap the Act’, assumed the Magna Carta rhetoric as Home Secretary and later with the party (and Government) leadership: ‘[H]uman rights were not invented in 1950 when the convention was drafted, or in 1998 when the convention was incorporated into our law…This is Great Britain, the country of Magna Carta’.[[84]](#footnote-84)

With Magna Carta and this invented tradition of rights, the past provides the model for reconstructing the unsatisfactory present with a return to British values and rights.[[85]](#footnote-85) The rhetorical engagement of Magna Carta whilst inventing the tradition of rights and emphasising the foreignness of all things European also attempts to cement British identity in a time of insecurity about what exactly that means.[[86]](#footnote-86) A top-down policy, essentially of rights-curtailing law reform, is sold to the ‘British’ public as a revolutionary endeavour – that ‘momentous achievement’[[87]](#footnote-87) where the ‘people rose up’.[[88]](#footnote-88)

*But human rights* are *British!*

On the other side of the debate, Magna Carta is also used to convince sceptics that European and international ideas of rights – contained in the Human Rights Act - are not alien, but British after all. In this vein, the Human Rights Act copper-fastens and enhances the nascent liberties of that Great Charter. It does so via the European Convention, which, after all, was ‘British’ in inspiration. This conception of the Human Rights Act manifests most obviously in Boateng and Straw’s proposal to ‘bring rights home’.[[89]](#footnote-89) Discussing how the Labour government of the day came to accept the right of individual petition, Anthony Lester, a firm proponent of the Human Rights Act,[[90]](#footnote-90) remarks that ‘by virtue of the decision, Convention rights had crossed the English Channel to begin their entry in to our legal system. It would take a further 22 years for Parliament to bring those rights home’.[[91]](#footnote-91) From Lester’s perspective then, in line with the Baoteng and Straw approach, it was quite an organic process, albeit slow, from ratification of the Convention to the enactment of the Human Rights Act. The sense that this is organic is underscored by the suggestion that the rights were merely brought back where they had originated.[[92]](#footnote-92)

Magna Carta provides a foundation at times for a history that is difficult to locate and for an idea that is otherwise slippery. The histories of human rights are contested; when historians, lawyers, journalists, human rights advocates and so on speak of rights as though they have an obvious established history, they are embracing what Moyn calls ‘the myth of deep roots’. This serves to distract us from how we really got here, that is, the historical conditions that have led to and explain our present. It follows: ‘If human rights are treated as inborn, or long in preparation, people will not confront the true reasons they have become so powerful today and examine whether those reasons are still pervasive.’[[93]](#footnote-93) This uncritical acceptance of a deep history distracts from examination of the present or what is really going on, and it also legitimates that present as part of an evolutionary progression. It is no surprise then that Roosevelt could declare the Universal Declaration an ‘international Magna Carta’[[94]](#footnote-94) or that the British representative also compared the two documents.[[95]](#footnote-95) In attempts to locate human rights historically, Magna Carta is invariably referenced.

RightsInfo, an online initiative, which aims to build knowledge and support for human rights in the UK, puts forward, quite baldly, this conception of history as a trajectory from Magna Carta to the present. Magna Carta is pinpointed as the origin of human rights, narratively,[[96]](#footnote-96) and in an illustrated human rights timeline.[[97]](#footnote-97) Klug discusses the history and the myths surrounding Magna Carta and presents the complexity of an historical analysis of the Charter in the light of the contemporary human rights movement. She engages Magna Carta, nevertheless, as a reference point for human rights today and as part of a process which has led us to the present. She remarks:

Whilst it would…be wildly historically inaccurate to bestow universal intentions on the multiple authors of the Charter, the principles established in the few clauses that remain on the statute book were nevertheless loosely enough phrased to allow for increasingly generous interpretations in the centuries that followed… The drafters ‘did not themselves envisage this continuous process of re-interpretation’.[[98]](#footnote-98) Yet if they had been taken at their word and a narrow, literal meaning had been maintained throughout the centuries, the Magna Carta would never have become the inclusive, iconic document that still has resonance today. It would probably have had no more shelf life than any other medieval manuscript, let alone become the source of a major national celebration in 2015 to commemorate its 800th birthday.[[99]](#footnote-99)

Dovetailing neatly with her sense of the Magna Carta as ‘living instrument’, Klug’s investigation of the usages of Magna Carta is also teleological. Klug wants to defend the ethic of international human rights law as well as the Human Rights Act, instruments that she sees as the present manifestation of a process that has at least some of its roots in Magna Carta, and she does so by reading in to the past moves and evolutions that ally to the narrative. This rendering of Magna Carta is distinguishable in objective from that of Cameron with his “British rights’ or even the libertarian ‘Runnymede Tories’. Klug harnesses Magna Carta to defend human rights and the Human Rights Act, not to destroy them in favour of ‘British rights’. Tactically, however, defending human rights and the UK’s rights identity with reference to a long rights tradition is only convincing if the alternative is not. In both cases, what we end up with is a distorted past and a distorted present. As Peter Coss writes: ‘Validating the present by reference to the past inevitably risks distorting both the present and the past.’[[100]](#footnote-100)

*Inventing the Newsworthy Tradition*

What we can see is that Magna Carta, in political rhetoric,[[101]](#footnote-101) in the media, in academic work, and, particularly during the recent commemorations, in the judicial imagination,[[102]](#footnote-102) is one of the key points of reference for the British tradition of liberty. The myth and the myth-makers have, of course, been exposed:[[103]](#footnote-103) ‘Over the centuries, pride in England’s unique liberty resulted in much myth about Magna Carta, and myth-makers could trace to it both bulwarks of English freedom, the common law and Parliament’.[[104]](#footnote-104) Hobsbawm, writing about the duty of the historian ‘to deconstruct political and or social myths dressed up as history’, makes the point explicit:

Every British child was once taught at school that the Magna Carta was the foundation of British liberties, but since McKechnie’s monograph of 1914[[105]](#footnote-105) every university student of British history has had to learn that the document extorted from King John by the Barons in 1215 was not intended to be a declaration of parliamentary supremacy and equal rights for free-born Englishmen, even though it came to be regarded as such in British political rhetoric much later.[[106]](#footnote-106)

The 800th anniversary provided an opportunity for myth-making anew: as one example, at the behest of the Magna Carta Trust, there would be a ‘Copy of Magna Carta for every UK primary school’,[[107]](#footnote-107) ‘to teach children about freedom’.[[108]](#footnote-108) Unable to fathom undoing the myth, or, more likely, just unwilling, some took the Commemoration as an opportunity to embrace it.[[109]](#footnote-109)

Beyond the tradition of liberty, as we have seen, Magna Carta has become a reference point for the ‘British rights’ tradition. This is the *invention* of a tradition of rights, rights that are constructed as innate, and which have developed or evolved to reach, and explain, the present. ‘Invented tradition', according to Hobsbawm, means:

[A] set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.[[110]](#footnote-110)

Invented traditions, Hobsbawm explains, occur more frequently in response to rapid social transformation when old social patterns can no longer be addressed the ‘old way’. Hobsbawm sees a surge in this invention of tradition, explicable by the rapid transformation which spans the past 200 years. In both the ‘British Bill of Rights’ proposals[[111]](#footnote-111) and indeed in arguments in defence of human rights and the Human Rights Act, we can observe practices which seek to establish a continuity to Magna Carta, of course with different objectives. Hobsbawm provides some explanation for the use of the past in this way. He remarks:

…the past remains the most useful analytical tool for coping with constant change, but in a novel form. It turns in to the discovery of history as a process of directional change, of development or evolution. Change thus becomes its own legitimation, but it is thereby anchored to a transformed ‘sense of the past’… In brief, what legitimates the present and explains it is not now the past as a set of reference points… or even as duration… but the past as a process of becoming the present.[[112]](#footnote-112)

Traditions cannot be ‘invented’ if there is no way of propagating them and entrenching them. This, of course, is where the media is at its most powerful. It is hardly radical to remark that what we know about the world around us is ‘largely attributable’ to the media in its myriad forms.[[113]](#footnote-113) The media, not exclusively of course, is crucial in the success of invented traditions. Eugenia Siapera summarises the mediation of invented traditions succinctly: ‘Invented traditions must be replayed and disseminated regularly across the nation if they are to take hold. The media can become an important means by which such invented traditions are disseminated and replayed, eventually forming part of the nation’s consciousness’.[[114]](#footnote-114)

Cameron roots his call to a ‘modern British Bill of Rights’ in a tradition of British values that asserts itself historically all the way back to Magna Carta. Repealing the 1998 Act is of no consequence because, even if copies of the Charter ‘have faded…its principles shine as brightly as ever’.[[115]](#footnote-115) So the past becomes a process of explaining the present and of legitimising new directions. The challenges of contemporary society – the threat of terrorism, crime rates and insecurity – are, according to the Conservative narrative, all compounded in difficulty by the existence of the Human Rights Act; and it is not *even* British. British traditions, then, provide the answers. But something is needed to fill the gap once the Act is repealed. For one thing, rights-regarding Conservatives, the so-called ‘Runnymede Tories’, need to be placated. Thus, a ‘British Bill of Rights’. The 800th anniversary of Magna Carta provided the legitimating reference point for inventing this new tradition and for commandeering this new direction.

On the other side of the debates, a similar instrumentalism of Magna Carta is at work. In an age where human rights are under attack and, at least in academic circles, under sustained critique, the past is engaged to convince. Human rights are the result of a progressive historical trajectory that began in Runnymede, evolved in London, was developed later in Rome, Geneva, New York and Strasbourg and returned home as the Human Rights Act. This entrenching of rights right through history seeks to legitimate the present. Human rights today has a simple story to tell, of progress, of inevitability. What is the value though in usurping the past as ‘a vast preparation for the way things are, and the way people think, right now?’.[[116]](#footnote-116) Amongst other chasms of knowledge, this narration loses the sense of the past, elides power struggles and histories of struggles of all forms, it obfuscates how the powerful have instrumentalised rights language through the ages and it disguises the power-preserving nature of rights whether in supranational or domestic institutions. Defending rights by rooting them in history comes with risks. Moyn observes: ‘…if historians miss how different rights were in the past, they will fail even to recognize what it would take to explain rights in the present’.[[117]](#footnote-117) Beyond the crudeness of reaching in to history to establish abstract roots for abstract entities, for those defending the Act, there are shortfalls in the ‘human rights are not in fact alien’ approach. First, success might depend on who can invent the more appealing or credible tradition. And our examination of Magna Carta in the media has not provided much evidence to suggest that the Act defenders are winning. Second, they miss the chance to defend the Act and rights on their own terms, that is, to explain how they actually improve our lot. Finally, they fail to engage with the very reasons for antipathy to the Act.[[118]](#footnote-118)

**Conclusion**

Gearty asks, elegantly: ‘How has the UK reached the point that it has, where invented versions of a golden past are being allowed to drive the country in an (to every sense) impoverished future.’[[119]](#footnote-119) The answer lies, in part, in the success of the repeal side’s ‘invented tradition’ of British rights rooted in Magna Carta. This version of the British rights tradition has been strategically invented in opposition to the alien, interfering and unacceptable European rights espoused in Strasbourg and domesticated through the Human Rights Act. The ruling elite, hell bent on repealing the Human Rights Act and fomenting opposition to Strasbourg, have deployed the Magna Carta, strategically, to appease the libertarians and to disguise their rights-curtailing (if not, rights-eroding) intentions. The British Bill of Rights - homegrown rights rooted in the glorious tradition of Magna Carta - is the ideological endpoint of the repeal imagination.

It is the oppositional narrative at the heart of this invented tradition that invites so much media attention. The refrain of Britishness underpins this resistance to Europe and to human rights and it makes good headlines. It does not matter that this vision of the historical past is fictitious; the present condition of human rights is also irrelevant.

By locking horns with the repeal side on their own terms - the Britishness of rights and the value of the European human rights system - the Human Rights Act defenders have been tactically unconvincing and far from headline grabbing. The defenders need to up their game. At the very least, they need to expose the ideology at the heart of the repeal vision. They may also need to take a hard look at their own ideological persuasions. In this respect, the repealers and the defenders have a lot in common. The future is impoverished, not because the glorious present characterised by human rights protection is under threat, but because we are steeped in a mythical present rooted in ‘invented traditions’.

**Bibliography**

M Amos, ‘Transplanting Human Rights Norms: The Case of the United Kingdom’s Human Rights Act’ (2013) Human Rights Quarterly 386.

Judi Atkins, ‘Re-Imagining Magna Carta: Myth, Metaphor and the Rhetoric of Britishness’ (2016) 69 Parliamentary Affairs 603.

E Bates, *The Evolution of the European Convention on Human Rights and Fundamental Freedoms* (Oxford University Press, 2010).

David Berg, ‘Rhetoric, Reality and Mass Media’ (1972) 58 The Quarterly Journal of Speech 255.

T Bingham, ‘The Human Rights Act: A View from the Bench’ (2010) 6 EHRLR 568.

T Bingham, ‘Governments and Judges: Friends or Enemies?’ in T Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (OUP 2011).

P Boateng and J Straw, ‘Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights and Fundamental Freedoms in UK law’ (1997) European Human Rights Law Review 71.

B Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish: 2008).

T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001).

P Coss, ‘Presentism and the Myth of Magna Carta’ (2017) 234 Past and Present 227

M Dillon, ‘Magna Carta and the United States Constitution: An Exercise in Building Fences’ in D B Magraw, A Martinez and R E Brownell II (eds) *Magna Carta and the Rule of Law* (ABA Publishing 2014).

M Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017)

K Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 Modern Law Review 80.

J Fernández-Villaverde ‘Magna Carta, the rule of law, and the limits on government’ (2016) 47 Int’l Rev of Law and Economics 22

C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (OUP 2016)

G G George, ‘UK Supreme Court Versus US Supreme Court: Modern Use of Magna Carta’ in E Gibson-Morgan and A Chommeleux, ‘The Rights and Aspirations of the Magna Carta’ (Palgrave Macmillan 2016).

L Gies, ‘A Villains’ Charter? The Press and the Human Rights Act’ (2001) 7(2) *Crime, Media, Culture* 167.

C Greenwood, ‘Magna Carta and the Development of Modern International Law’ (2016) 49 *Israel Law Review* 435.

R H Helmholz, ‘The Myth of Magna Carta Revisited’ (2016) 94 North Carolina Law Review 1475

E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (Cambridge University Press, 2012).

E Hobsbawm, *On History* (Abacus, 1997).

J C Holt, Magna Carta (Cambridge University Press, 1992)

D Kennedy, ‘The international human rights movement: part of the problem?’ (2001) 3 HRLR 245.

F Klug, *A Magna Carta for All Humanity: Homing in on Human Rights* (Routledge: 2015).

H Lauterpacht, ‘The Universal Declaration of Human Rights’ (1948) 25 BYIL 354.

A Lester, *Five Ideas to Fight For: How Our Freedom is Under Threat and Why it Matters* (Oneworld Publications, 2016).

A Lester, ‘The Utility of the Human Rights Act: A Reply to Keith Ewing’ (2005) *Public Law* 249.

A Lester, ‘U.K. acceptance of the Strasbourg jurisdiction: what really went on in Whitehall in 1965’ (1998) Public Law 237.

WS McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (2nd ed. Glasgow, J Maclehose and Sons, 1914).

J Melton and R Hazell ‘Magna Carta…Holy Grail?’ in R Hazell and J Melton (eds), *Magna Carta and Its Modern Legacy* (CUP 2015).

R Mortimore ‘What Magna Carta Means to the Modern British Public’ in R Hazell and J Melton (eds), *Magna Carta and Its Modern Legacy* (CUP 2015).

S Moyn, *The Uses of History* (Verso, 2014).

S Moyn, *The Last Utopia: Human Rights in History* (The Belknapp Press of Harvard University Press, 2010).

C Murray, ‘The Magna Carta’s tainted legacy: historic justifications for a British Bill of Rights and the case against the Human Rights Act’ in Frederick Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2018)

S Sedley, ‘Bringing rights home: time to start a family?’ (2008) 28.3 Legal Studies 327

E Siapera, Cultural Diversity and Global Media: The Mediation of Difference (Wiley Blackwell, 2010)

AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP: 2001) 808.

R V Turner, *Magna Carta: Through the Ages* (Routledge, 2003).

SJ Wermiel, ‘Magna Carta in Supreme Court Jurisprudence’ in DB Magraw, A Martinez and RE Brownell II (eds) *Magna Carta and the Rule of Law* (ABA Publishing 2014).

1. We would like to thank Thomas Beaumont, Eleanor Drywood and Rob Knox who provided useful suggestions, feedback and comments. [↑](#footnote-ref-1)
2. See, in this volume, for example, D Mead, ‘"They offer you a feature on stockings and suspenders next to a call for stiffer penalties for sex offenders”: do we learn more about the media than about human rights from tabloid coverage of human rights stories?’ chapter 1 and L Gies, ‘British human rights scepticism through the lens of European newspapers’ chapter 3. [↑](#footnote-ref-2)
3. Mead *ibid*. [↑](#footnote-ref-3)
4. See, for example, G Wilson, ‘Blair stung in to review of human rights law’ *The Daily Telegraph* (15 May 2006) 4. [↑](#footnote-ref-4)
5. Editorial, ‘The Human Wrongs Act’ *The Express* (1 October 2013) 14. [↑](#footnote-ref-5)
6. T Farron, ‘The Magna Carta enshrined our liberties – now we must fight for them again’ *The Guardian* (15 June 2015) available at

 <https://www.theguardian.com/commentisfree/2015/jun/15/magna-carta-800-years-human-rights-act>. [↑](#footnote-ref-6)
7. M O’ Brien, HC Deb 21 October 1998 Col 1321-1322:

 https://publications.parliament.uk/pa/cm199798/cmhansrd/vo981021/debtext/81021-35.htm. [↑](#footnote-ref-7)
8. C Dyer, ‘So far so good’ *The Guardian* (16 April 2002). [↑](#footnote-ref-8)
9. With the exception of statutes such as the Bill of Rights 1689 and the Magna Carta 1215, it is not until the latter half of the 20th century that we see a proliferation of statutory protection of rights, prompted in many instances by the UK’s membership of the European Union in 1973. See, for example, statutes that prohibit various forms of discrimination, such as The Race Relations Act 1965, the Equal Pay Act 1970, and the Sex Discrimination Act 1975. [↑](#footnote-ref-9)
10. Sir David Maxwell Fyfe, a member of the Conservative party, was, according to Ed Bates, one of the ‘founding fathers’. See E Bates, *The Evolution of the European Convention on Human Rights and Fundamental Freedoms* (Oxford University Press, 2010) 5. Marco Duranti describes him as a ‘draftsman’ who ‘doggedly insist[ed] that a European human rights treaty not be modelled too strictly on the 1948 Universal Declaration of Human Rights.’ See M Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017) 4. Duranti traces the conservative origins of the European Convention, putting paid to the idea that this was some kind of left initiative. [↑](#footnote-ref-10)
11. The UK was the first to ratify. AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP: 2001) 808. [↑](#footnote-ref-11)
12. On the background to the decision to accept the right of individual petition, see A Lester, ‘U.K. acceptance of the Strasbourg jurisdiction: what really went on in Whitehall in 1965’ (1998) Public Law 237. [↑](#footnote-ref-12)
13. P Boateng and J Straw, ‘Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights and Fundamental Freedoms in UK law’ (1997) European Human Rights Law Review 71. This was initially published on 18 December 1996 as a Labour consultation document. J Straw, ‘Bringing Rights Home’ *The Guardian* (18 December 1996) 15; J Straw, ‘Let’s bring human rights home’ *The Guardian* (26 October 2010). [↑](#footnote-ref-13)
14. M Amos, ‘Transplanting Human Rights Norms: The Case of the United Kingdom’s Human Rights Act’ (2013) Human Rights Quarterly 386, 390. [↑](#footnote-ref-14)
15. This description of the Act is fairly frequent across national newspapers. Writing in *The Guardian*, Francesca Klug critiqued the attribution of the Act to Labour. F Klug, ‘Human rights don’t belong to political parties’ The Guardian (2 February 2010). It is most frequent in the *MailOnline*, *Daily Mail*, *Mail on Sunday* and *the Telegraph* with ‘Labour’s Act’ generally a description to signal dissent. [↑](#footnote-ref-15)
16. This description has been used across national newspapers of every bent; it is most frequently used by *the Sun* and *the Express*. For further discussion of the media’s approach to rights deemed European see, in this volume, S Reynolds, ‘It’s Not Me, It’s You: Examining the Print Media’s Approach to ‘Europe’ in Brexit Britain’ chapter 2 and on the ‘foreignness’ of rights see E Drywood and H Gray, ‘Demonising Immigrants: How a Human Rights Narrative Has Contributed to Negative Portrayals of Immigrants in the UK Media’ chapter 5. [↑](#footnote-ref-16)
17. P Boateng and J Straw, ‘Bringing Rights Home’ (1997) (n 13 above) 71 [↑](#footnote-ref-17)
18. See Tim Farron’s claim, for example (n 6 above). [↑](#footnote-ref-18)
19. E Hobsbawm, ‘Inventing Traditions’ in E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (Cambridge University Press, 2012) 1. [↑](#footnote-ref-19)
20. S Moyn, *The Last Utopia: Human Rights in History* (The Belknapp Press of Harvard University Press, 2010) 12. [↑](#footnote-ref-20)
21. This draws on Moyn’s articulation of the problems with focusing on the origins of rights. S Moyn, *The Uses of History* (Verso, 2014) 12. [↑](#footnote-ref-21)
22. See, for example, T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001). [↑](#footnote-ref-22)
23. See also, M Gordon, ‘Instrumentalism in Human Rights and the Media: Locking out Democratic Scepticism?’ chapter 10. [↑](#footnote-ref-23)
24. See D Kennedy, ‘The international human rights movement: part of the problem?’ (2001) 3 HRLR 245, 246. See further, D Kennedy, ‘Two Sides of the Coin: Human Rights Pragmatism and Idolatry’ Keynote Address, Interdisciplinary Conference on Human Rights, London School of Economics (24 March 2006)**.** Available at:

http://www.lse.ac.uk/humanRights/aboutUs/articlesAndTranscripts/Crossing\_the\_boundaries\_David\_Kennedy.pdf [↑](#footnote-ref-24)
25. See, M D’Ancona, ‘The Human Rights Act spells peril for Cameron’ *The Guardian* (18 May 2015) available at <https://www.theguardian.com/commentisfree/2015/may/18/human-rights-act-david-cameron-runnymede-tories-slim-majority>; P Coss, ‘Presentism and the Myth of Magna Carta’ (2017) 234 Past and Present 227, 232. [↑](#footnote-ref-25)
26. Francesca Klug maintains that the Human Rights Act qualifies for the description of a bill of rights for four main reasons: under section 3, all laws and regulations must be interpreted to comply with Convention rights ‘so far as it is possible to do so’; courts themselves are required not to act incompatibly with the Human Rights Act; under section 19 ministers are required to ‘give new legislation a human rights health check’; and because it ‘goes much further than incorporating a human rights treaty into our law’. See F Klug, *A Magna Carta for All Humanity: Homing in on Human Rights* (Routledge: 2015) 260-261. [↑](#footnote-ref-26)
27. S Sedley, ‘Bringing rights home: time to start a family?’ (2008) 28.3 Legal Studies 327, 328. See also AWB Simpson (n 11 above) 1101, noting that “[i]t took until the new millennium before the European Convention was to be incorporated into domestic law in the United Kingdom…But even after half a century there has been something slightly grudging about the process.’ [↑](#footnote-ref-27)
28. For discussion of this portrayal in the media, see L Gies, ‘A Villains’ Charter? The Press and the Human Rights Act’ (2001) 7(2) *Crime, Media, Culture* 167. [↑](#footnote-ref-28)
29. Conor Gearty refers to ‘four large-scale myths’ that abound in relation to the Act: ‘that the law enacted in 1998 subverts British parliamentary sovereignty; that it hands power to the judges; that it transfers supremacy over UK rights law to the European Court of Human Rights in Strasbourg; and that the law is a charter for villains’ and contends that each of these myths is false ‘but in combination they have destabilized the measure to such an extent that repeal is now regarded by many as a desirable policy pathway.’ C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (OUP 2016) 63. [↑](#footnote-ref-29)
30. See, for example, the comments of the then Secretary of State for Justice, Chris Grayling, in J Forsyth, ‘Chris Grayling: 'I want to see our Supreme Court supreme again' *The Spectator*, 28 September 2013. [↑](#footnote-ref-30)
31. S Reynolds, ‘It’s not me, it’s you: Examining the Print Media’s Approach to ‘Europe’ in Brexit Britain’ chapter 2; L Gies (n 2 above). [↑](#footnote-ref-31)
32. See generally B Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish: 2008). [↑](#footnote-ref-32)
33. T Bingham, ‘The Human Rights Act: A View from the Bench’ (2010) 6 EHRLR 568, 570. [↑](#footnote-ref-33)
34. *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131. [↑](#footnote-ref-34)
35. *Ibid*. [↑](#footnote-ref-35)
36. T Bingham, ‘Governments and Judges: Friends or Enemies?’ in T Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (OUP 2011) 144-157, 155. [↑](#footnote-ref-36)
37. J Rozenberg, ‘Rights Act shifts balance of power to judges’ *The Telegraph* (2October 2000). [↑](#footnote-ref-37)
38. M Bentham, ‘Human Rights Act was an invitation to make law, says Britain's most senior judge’ *Evening Standard* (30 January 2015), reporting comments made by then President of the Supreme Court, Lord Neuberger. [↑](#footnote-ref-38)
39. J Melton and R Hazell ‘Magna Carta…Holy Grail?’ in R Hazell and J Melton (eds), *Magna Carta and Its Modern Legacy* (CUP 2015) 3. [↑](#footnote-ref-39)
40. See Lord Sumption. ‘Magna Carta then and now’, Address to the Friends of the British Library, 9 March 2015, discussing the difference in how the Magna Carta is portrayed by lawyers and historians, with the former holding that the charter is a major constitutional document and the latter more likely to highlight the misconceptions surrounding the charter. Available at <https://www.supremecourt.uk/docs/speech-150309.pdf> [↑](#footnote-ref-40)
41. C Greenwood, ‘Magna Carta and the Development of Modern International Law’ (2016) 49.3 *Israel Law Review* 435, 436. [↑](#footnote-ref-41)
42. Article 39 of the Magna Carta states: ‘No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled or deprived of his standing in any other way, nor will we proceed with force against him or send others to do so except bythe lawful judgment of his peers or bythe law of the land.’ The text of Article 40 reads 'To no one will we sell, to no one deny or delay right or justice' [↑](#footnote-ref-42)
43. C Greenwood (n 41 above) 436. [↑](#footnote-ref-43)
44. Between 1790 and 2014 the US Reports of the Supreme Court’s decisions referred to the Magna Carta in more than 170 cases. See SJ Wermiel, ‘Magna Carta in Supreme Court Jurisprudence’ in DB Magraw, A Martinez and RE Brownell II (eds) *Magna Carta and the Rule of Law* (ABA Publishing 2014) 111. [↑](#footnote-ref-44)
45. See, for example, *Glasser v United States*, 315 U.S. 60, 84 (1942) where Justice Frank Murphy noted that ‘[s]ince it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression’ or, perhaps an even greater stretch, Justice John Harlan in *Thompson v Utah*, 170 U.S. 343, 349 (1898) declaring that ‘[w]hen Magna Charta declared that no freeman should be deprived of life, etc., “but by the judgment of his peers or by the law of the land,” it referred to a trial by twelve jurors.’ It is generally agreed that the Magna Carta has been more influential in the US than in the UK, at least in terms of reliance on its principles in case-law. See, for example, J Fernández-Villaverde ‘Magna Carta, the rule of law, and the limits on government’ (2016) 47 Int’l Rev of Law and Economics 22-28. [↑](#footnote-ref-45)
46. T Bingham (2011) (n 36 above) 6 (emphasis added). [↑](#footnote-ref-46)
47. G G George, ‘UK Supreme Court Versus US Supreme Court: Modern Use of Magna Carta’ in E Gibson-Morgan and A Chommeleux, ‘The Rights and Aspirations of the Magna Carta’ (Palgrave Macmillan 2016) 57-59. See, however, M Dillon, ‘Magna Carta and the United States Constitution: An Exercise in Building Fences’ in DB Magraw (n 44 above) 81, making the interesting argument that the US Constitution was influenced neither by the 1215 Magna Carta nor the 1225 Magna Carta but rather by the “mythic” Magna Carta, ‘largely created in the late 16th and early 17th century by the great common law jurist Sir Edward Coke, which was coomingled with John Locke’s social contract theory for transmission to Britain’s American colonies by William Blackstone.’ [↑](#footnote-ref-47)
48. T Bingham (2011) (n 36 above) 3-12, 6. [↑](#footnote-ref-48)
49. Lord Neuberger, ‘Magna Carta and the Holy Grail’ Lincoln’s Inn (12 May 2015) available at https://www.supremecourt.uk/docs/speech-150512.pdf [↑](#footnote-ref-49)
50. See R Mortimore ‘What Magna Carta Means to the Modern British Public’ in Hazell and Melton(n 39 above) 56-76. [↑](#footnote-ref-50)
51. ‘Magna Carta changed the world, David Cameron tells anniversary event’ *BBC News*, 12 June 2015. Available at <http://www.bbc.co.uk/news/uk-33126723> [↑](#footnote-ref-51)
52. Quoted in C Davies, ‘Magna Carta: leaders celebrate 800th anniversary of the Great Charter’ *The Guardian,* 15 June 2015. Davies also notes that Amnesty International UK’s head of policy and government affairs, Allan Hogarth, responded to the Prime Minister’s speech by asserting that Cameron’s use of the anniversary of Magna Carta to justify scrapping the Human Rights Act would “have those 13th-century barons spinning in their highly-ornate, lead-lined coffins”, noting that “Any move to scrap the Act would be a real blow for human rights in this country and around the world.” [↑](#footnote-ref-52)
53. C Murray, ‘The Magna Carta’s tainted legacy: historic justifications for a British Bill of Rights and the case against the Human Rights Act’ in Frederick Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2018) 35-51, 35. [↑](#footnote-ref-53)
54. L Gies (n 2 above) and S Reynolds (n 31 above). [↑](#footnote-ref-54)
55. J Lepore, ‘The Rule of History: Magna Carta, the Bill of Rights, and the hold of time’ *The New* Yorker 20 April 2015. Available at <https://www.newyorker.com/magazine/2015/04/20/the-rule-of-history> [↑](#footnote-ref-55)
56. This search was carried out using the Lexis Library news service, with the search terms of ‘Magna Carta’ and ‘Human Rights Act’. Articles were filtered to include only those where the search terms received ‘major mentions’ and were date limited to those appearing between 1 January 2015 and 30 June 2015. [↑](#footnote-ref-56)
57. H Perkins, ‘New 2015 coins to honour our historic glories’ *The Express* (1 January 2015) 27; ‘Coins for 2015; All change, please’ *The Daily Telegraph* (1January 2015) 8; ‘Magna Carta to feature on £2 coins’ *The Times* (1January 2015) 14. [↑](#footnote-ref-57)
58. K Maguire, ‘Carta the unstoppable checks machine: 15 facts about Magna Carta... the deal that's reined in kings for 800yrs’ *Daily Mirror* (6 February 2015) 8; W Hartston, ‘Top 10 Facts about the Magna Carta’ *The Express* (16 June 2015); M Smith, ‘What is Magna Carta? Why this 800-year-old piece of paper is still important: The Magna Carta turns 800 today - here's why it still matters in the 21st Century’ *The Mirror* (15 June 2015). [↑](#footnote-ref-58)
59. J Stone, ‘Beer Day Britain: How the Magna Carta created the humble pint: It's all to do with weights and measures’ *The Independent* (15 June 2015). [↑](#footnote-ref-59)
60. M Harris, ‘Ah, the irony of David Cameron invoking the memory of Magna Carta while dismantling our right to privacy: the challenges to our civil liberties are huge’ *The Independent* (16 June 2015). [↑](#footnote-ref-60)
61. ‘The Key to Democracy’ *The Sun* (16 June 2015) 15. [↑](#footnote-ref-61)
62. V Low, ‘800 years on and monarchy is still smiling; American lawyers pay tribute to Magna Carta**,** the British blueprint for a fairer world’ *The Times* (16 June 2015) 7. [↑](#footnote-ref-62)
63. F Gibb, ‘Lord Judge: we need vigilance over values of Magna Carta: On its 800th anniversary, the former lord chief Justice tells Frances Gibb why the great charter still resonates’ *The Times* (12 February 2015) 58. [↑](#footnote-ref-63)
64. ‘The presumption of liberty prevails: The line of history that runs from Runnymede across eight centuries has determined what we have become as a nation’ *The Telegraph* (15 June 2015). [↑](#footnote-ref-64)
65. D Barrett, ‘Magna Carta: 'Turgid' document was eclipsed by the French, says top judge’ *The Telegraph* (12 June 2015). [↑](#footnote-ref-65)
66. See D Jones, ‘At the Heart of the Legend, the Charter’ *The Sunday Telegraph* (4 January 2015) 7. The same edition also publishes a short piece linking the Magna Carta to the right to privacy, quoting the chairman of the Magna Carta 800th Committee who claimed that the document ‘plays a vital role in the debate over government surveillance.’ See ‘Magna Carta has 'vital role in privacy debate'’ *The Sunday Telegraph* (4 January 2015) 20. [↑](#footnote-ref-66)
67. D Pannick, ‘Let us celebrate and protect Magna Carta's enduring relevance’ *The Times* (19 February 2015) 56. See also, M Leftly. ‘Law chief marks Magna Carta with fierce attack on Cameron’ *The Independent on Sunday* (22 February 2015) 2, discussing the criticism of David Cameron and past governments for ‘treating public law with contempt’ by the chair of the Criminal Bar Association. [↑](#footnote-ref-67)
68. J Jones, ‘Magna Carta exhibition is an 800-year-old lesson in people power’ *The Guardian* 12 March 2015. [↑](#footnote-ref-68)
69. See D Martin, ‘Human Rights Act has devalued Magna Carta, Says Cameron’ *Daily Mail* 15 June 2015. [↑](#footnote-ref-69)
70. ‘THE Sun SAYS Do it rights now’ *The Sun* (15 June 2015) 6. [↑](#footnote-ref-70)
71. ‘Euro Judges Mock the Spirit of Magna Carta’ *Daily Mail* (16 June 2015). [↑](#footnote-ref-71)
72. See, for example, R Mendick and T Ross, ‘Convicted terror leader with link to Paris whom we cannot deport: Al-Qaeda fundraiser from Leicester connected to seiges (*sic*) in France, uses Human Rights Act to stay in Britain’ *The Telegraph* (17 January 2015); J Lawton, ‘Terrorist Mr Big we can’t deport: Human Rights Farce’ *Daily Star* (19 January 2017); ‘Man linked to Paris horror to STAY in UK’ *The Express* 19 January 2015, 8; H Gye, ‘Terror leader fighting deportation because he claims he has a right to family life 'ran off with £40,000 of his British wife's money'’ *Daily Mail* (26 January 2015); ‘Fury as ‘Human Rights’ let 28 terrorists escape deportation’ *The Express* (2 February 2015) 6; R Mendick, ‘Jihadi John's friend cannot be deported from Britain: Anger as terrorism suspect linked to Jihadi John used Human Rights Act to stay in the UK’ (28 February 2015). [↑](#footnote-ref-72)
73. See, for example, L Dearden, ‘Ukip election policies: Slash foreign aid, bring back smoking in pubs, ditch Human Rights Act; 'Britishness', the NHS and immigration is pushed to the top of the agenda’ *The Independent* (28 January 2015); L Williams, ‘Scrap the Human Rights Act and keep TTIP: Here's what you voted for and will get with a Tory government, Britain’ *The Independent* (8 May 2015); T McTague, ‘Cameron brings back Michael Gove as justice secretary: Hard-line ally will scrap human rights act in bid to make British laws supreme over Strasbourg’ *Daily Mail* (10 May 2015); J Slack and I Drury, ‘Gove’s first big job: Axe Labour’s Hated Human Rights Act’ *Daily Mail* (11 May 2015); A Pearson, ‘Human Rights Act has done nothing for us’ *The Daily Telegraph* (14 May 2015) 21. [↑](#footnote-ref-73)
74. ‘The Guardian view on the right to march: protest must be beyond price’ *The Guardian* 10 February 2015. [↑](#footnote-ref-74)
75. F Gibb, ‘Are human rights slipping down the political agenda?’ *The Times* (23 April 2015). [↑](#footnote-ref-75)
76. R Beech, ‘13 basic rights you're going to lose under the new Conservative government’ *The Mirror* 10 May 2015; ‘Hands off our rights; The Tory plan to scrap the Human Rights Act takes our precious and hard-earned freedoms for granted.’ *The Independent* 11 May 2015, 2; H McDonald, ‘Scrapping Human Rights Act 'would breach Good Friday agreement' *The Guardian* 12 May 2015; A Travis, ‘Tories' bid to scrap Human Rights Act looks simplistic and rushed’ *The Guardian* 14 May 2015. [↑](#footnote-ref-76)
77. J Stone, ‘The Scottish Government will try to stop the Tories repealing the Human Rights Act in Scotland;

Nicola Sturgeon says the proposal is 'appalling'’ *The Independent* 12 May 2015; M Chorley, ‘Sturgeon picks her first fight: SNP leader tells PM he can't scrap Human Rights Act in Scotland’ *Daily Mail* 12 May 2015; B Riley-Smith, ‘SNP planning to kill off Snoopers' Charter: Scottish Nationalists are hoping to use newfound parliamentary influence to block key Tory manifesto pledges’ *The Telegraph* 12 May 2015; P Gilbride, ‘Nicola Sturgeon will fight Tory bid to scrap the Human Rights Act’ *Express* 13 May 2015; L Brooks, ‘Scotland 'will not consent' to Tory plans to scrap Human Rights Act’ *The Guardian* 13 May 2015. [↑](#footnote-ref-77)
78. C Murray (n 53 above) 35. [↑](#footnote-ref-78)
79. *Ibid.* 36. [↑](#footnote-ref-79)
80. *Ibid*. [↑](#footnote-ref-80)
81. *Ibid.* 39. Colin Murray’s chapter drew our attention to this passage; for the Hansard discussion, see David Cameron, HC Debate, Vol 375 Col 145 (19 November 2001). [↑](#footnote-ref-81)
82. Murray *ibid* 39. [↑](#footnote-ref-82)
83. D Cameron, ‘Speech to the Conservative Party Conference’ (1 October 2014) available at <http://press.conservatives.com/post/98882674910/david-cameron-speech-to-conservative-party> discussed in Judi Atkins, ‘Re-Imagining Magna Carta: Myth, Metaphor and the Rhetoric of Britishness’ (2016) 69 Parliamentary Affairs 603, 614. [↑](#footnote-ref-83)
84. T May, ‘The United Kingdom, the European Union and our place in the World’ (25 April 2016) cited in C Murray (n 53 above) 42. [↑](#footnote-ref-84)
85. See, E Hobsbawm, *On History* (Abacus, 1997) 34. [↑](#footnote-ref-85)
86. Atkin (n 83 above) 603 and 604. [↑](#footnote-ref-86)
87. See n 52 above and accompanying text. [↑](#footnote-ref-87)
88. See n 70 above and accompanying text. [↑](#footnote-ref-88)
89. See Boateng and Straw (1997) (above n 13). [↑](#footnote-ref-89)
90. See, for example, A Lester, *Five Ideas to Fight For: How Our Freedom is Under Threat and Why it Matters* (Oneworld Publications, 2016); A Lester, ‘Human Rights must be protected against the abuse of power’ *The Guardian* (16 May 2016); A Lester, ‘The Utility of the Human Rights Act: A Reply to Keith Ewing’ (2005) *Public Law* 249. [↑](#footnote-ref-90)
91. See Lester ‘UK Acceptance’ (above n 12) 253. [↑](#footnote-ref-91)
92. Keith Ewing describes some of the tensions within the Labour party as regards proposals to incorporate the Convention. In contrast to Lester, he conveys the point that ‘bringing rights home’ was not the obvious next step for the Labour party even if it had been responsible for ratification and accepting the right of individual petition. Ewing remarks that giving effect to the Convention represented ‘a fundamental shift in the position of the Labour Party which less than ten years [before] was still deeply suspicious about the contribution of the judges to civil liberties, and suspicious also of the idea that the courts should be in the driving seat on controversial political issues.’ See, K Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 Modern Law Review 80 and 98. [↑](#footnote-ref-92)
93. S Moyn, *The Last Utopia* (n 20 above) 12. [↑](#footnote-ref-93)
94. See note x above. See also, H Lauterpacht, ‘The Universal Declaration of Human Rights’ (1948) 25 BYIL 354 and F Klug (n 26 above) 9. [↑](#footnote-ref-94)
95. Lauterpacht *ibid* 371. [↑](#footnote-ref-95)
96. K Weller, ‘Magna Carta: the Origin of Modern Human Rights’ RightsInfo (3 April 2017) available at <https://rightsinfo.org/magna-carta-rights-today/>. [↑](#footnote-ref-96)
97. A Wagner, ‘A brief history of how human Rights changed the world’ RightsInfo (19 May 2015) available at <https://rightsinfo.org/a-brief-history-of-how-human-rights-changed-the-world/>. [↑](#footnote-ref-97)
98. J C Holt, Magna Carta (Cambridge University Press, 1992) 14. [↑](#footnote-ref-98)
99. Klug (n 26 above) 260-261 [↑](#footnote-ref-99)
100. Coss (n 25 above) 233. [↑](#footnote-ref-100)
101. The Conservative party is not alone in its use of Magna Carta. Judi Atkin’s discussion of the political rhetoric around the Charter shows how it has been engaged also by the Labour party to justify constitutional reform and particularly by Gordon Brown to emphasise ‘the British way’. Importantly, however, Atkin points out that Brown does not engage Magna Carta *against* European rights. Atkin (n 83 above) 607. [↑](#footnote-ref-101)
102. We refer here to involvement in, and speeches delivered at, various Magna Carta commemorative initiatives and events. Conor Gearty comments wryly upon this ‘overflow of state organized joy’ in his work examining the myths and fantasies of British exceptionalism. See Gearty (n 29 above) 34-36. See also Murray (n 53 above) 35-51 who discusses some of the judges’ speeches. [↑](#footnote-ref-102)
103. Of course, there are counter arguments to the portrayal of Magna Carta as mythic by those who defend the use of Magna Carta through the ages. Richard Helmholz, for example, argues: ‘In their commentaries on Magna Carta, Coke and Blackstone were performing a common legal task-interpreting an authoritative precedent to address a current issue.’ See R H Helmholz, ‘The Myth of Magna Carta Revisited’ (2016) 94 North Carolina Law Review 1475, 1492. [↑](#footnote-ref-103)
104. R V Turner, *Magna Carta: Through the Ages* (Routledge, 2003) 3: [↑](#footnote-ref-104)
105. WS McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (2nd ed. Glasgow, J Maclehose and Sons, 1914). [↑](#footnote-ref-105)
106. E Hobsbawm, *On History* (no 85 above) 361. [↑](#footnote-ref-106)
107. J Burns, ‘Copy of Magna Carta for every primary school’ *BBC News* (21 April 2015). [↑](#footnote-ref-107)
108. A Singh, ‘Magna Carta for every school to teach children about freedom’ *The Daily Telegraph* (21 April 2015). [↑](#footnote-ref-108)
109. For an explicit example, see (above n 49) Neuberger’s endorsement of the Bingham approach. [↑](#footnote-ref-109)
110. E Hobsbawm, ‘Inventing Traditions’ (n 19 above) 1. [↑](#footnote-ref-110)
111. D Cameron, ‘Balancing Freedom and Security: A Modern British Bill of Rights’ (26 June 2006) available at https://conservative-speeches.sayit.mysociety.org/speech/600031. [↑](#footnote-ref-111)
112. E Hobsbawm, *On History* (n 85 above) 23. [↑](#footnote-ref-112)
113. David Berg, ‘Rhetoric, Reality and Mass Media’ (1972) 58 The Quarterly Journal of Speech 255. [↑](#footnote-ref-113)
114. E Siapera, Cultural Diversity and Global Media: The Mediation of Difference (Wiley Blackwell, 2010) 21. [↑](#footnote-ref-114)
115. D Cameron, ‘British Values’ Mail on Sunday (15 June 2014) available at:

<http://www.dailymail.co.uk/debate/article-2658171/DAVID-CAMERON-British-values-arent-optional-theyre-vital-Thats-I-promote-EVERY-school-As-row-rages-Trojan-Horse-takeover-classrooms-Prime-Minister-delivers-uncompromising-pledge.html>. [↑](#footnote-ref-115)
116. Moyn, *The Uses of History* (n 21 above) xii. [↑](#footnote-ref-116)
117. *Ibid* 8. [↑](#footnote-ref-117)
118. For more on this, see Colm O’ Cinnéide’s chapter in this volume. C O’ Cinnéide, ‘Arguing the Case for Human Rights in Brexit Britain’ chapter 9. [↑](#footnote-ref-118)
119. C Gearty, p xiii. [↑](#footnote-ref-119)