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Brexit, Human Rights and the Role of Constitutional Culture

Brexit, direitos humanos e o papel da cultura constitucional

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Abstract

In order to fully explore this territory, it is essential to appreciate how both Brexit and Human Rights fit within the wider “Constitutional Culture” of the State. The article starts this discussion with an examination of what the concept of Constitutional Culture signifies, both generally, and also within the specific and idiosyncratic context of the United Kingdom. Then, it explores how human rights fit within British Constitutional Culture and assesses how the Brexit saga relates to both British Constitutional Culture and human rights as they exist within this paradigm. Having addressed the nature of British Constitutional Culture, the place of human rights within it and the impact of the Brexit process, the role of referenda in our democratic processes will be discussed, alongside the function of human rights, in sense of identifiable freedoms which can be named and asserted, within whatever form of new Constitutional Culture and settlement ultimately emerges.

Keywords: Brexit; human rights; Constitutional Culture; United Kingdom; referenda.

Resumo

Para explorar completamente esse território, é essencial apreciar como o Brexit e os Direitos Humanos se encaixam na “Cultura Constitucional” mais ampla do Estado. O artigo inicia esta discussão examinando o que significa o conceito de cultura constitucional, tanto em geral como também dentro do contexto específico e idiossincrático do Reino Unido. Em seguida, explora como os direitos humanos se encaixam na Cultura Constitucional Britânica e avalia como a saga do Brexit se relaciona à Cultura Constitucional Britânica e aos direitos humanos conforme a sua existência nesse paradigma. Tendo abordado a natureza da cultura constitucional britânica, o lugar dos direitos humanos nela e o impacto do processo Brexit, o papel dos referendos em nossos processos democráticos será discutido, juntamente com a função dos direitos humanos, no sentido de liberdades identificáveis que podem ser nomeadas e afirmadas, sob qualquer forma de nova cultura e assentamento constitucional que surja.

Palavras-chave: Brexit; direitos humanos; Cultura Constitucional; Reino Unido; referendo.

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1. INTRODUCTION

At the time of writing, both the United Kingdom and the European Union are standing with their toes over the edge of the Brexit cliff, uncertain what awaits when they leap from the precipice.¹ Whilst there are innumerable unanswered questions, this article focuses on one particular aspect of the situation: namely the future of human rights in a post-Brexit United Kingdom. In order to fully explore this territory, it is essential to appreciate how both Brexit and Human Rights fit within the wider “Constitutional Culture” of the State. As we shall in due course argue, the notion of Constitutional Culture has not been in the forefront of either juridical or political thought, in the stumbling and contested journey towards a break with the European Union, and this oversight has been extremely damaging.

In light of this, we are going to begin our discussion with an examination of what the concept of Constitutional Culture signifies, both generally, and also within the specific and idiosyncratic context of the United Kingdom. Once this groundwork is established, we shall be in a position to build upwards in layers: firstly, exploring how human rights fit within British Constitutional Culture; and secondly, assessing how the Brexit saga relates to both British Constitutional Culture and human rights as they exist within this paradigm. Having thus constructed our analytical tower, we shall have a good vantage point of the territory we are surveying, and shall be able to draw some general conclusions.

¹ ROS, Taylor. Is Boris Johnson's Brexit posturing just a power play? **LSE Brexit**, London, 31 jul. 2019. Available at: <<https://blogs.lse.ac.uk/brexit/2019/07/31/is-boris-johnsons-brexit-posturing-just-a-power-play/>>. Last accessed: 9 dec. 2019; SZUCKO, Angélica. The EU's institutional response to the Brexit vote. **LSE Brexit**, London, 22 jul. 2019. Available at: <<https://blogs.lse.ac.uk/brexit/2019/07/22/eus-institutional-response-to-the-brexit-vote/>>. Last accessed: 9 dec. 2019.

2. CONSTITUTIONAL CULTURE

2.1. Constitutional Culture as a Concept

It should surprise nobody that the concept of Constitutional Culture has been widely discussed by academic commentators within the United States,² given the place which the Constitution has in the popular imagination and discourse, and indeed, in forging the collective sense of national identity.³ Nevertheless, it is by no means confined to that setting, it is a concept of universal applicability, and authors from various jurisdictions have fruitfully applied it to their work.⁴ There is no single authoritative definition of the term, however Llewellyn's observation from the first half of the twentieth century goes a long way towards capturing its essence.⁵ He described the Constitution as "an institution" which provided a "*set of ways of living and doing*".

For current purposes, my own proposed definition would be as follows: "the collective set of norms which are *freely and widely embraced* to govern common life and decision making within the State".

Crucially, it must be understood that for a precept to be truly part of Constitutional Culture, it does not suffice to be able to point to an official instrument or declaration in which exists, nor some awareness of it in theory. For instance, although the 1936 Constitution of the USSR guaranteed freedom of religion,⁶ speech and assembly,⁷ these did not form part of the Constitutional Culture of the USSR, as they were not present in the "living and doing" of that society. There was no widespread expectation that such rights were guaranteed, nor even a consensus that in practical terms they should have been. Conversely, it could justly be said that the social and medical provision for the sick and elderly, also assured in the Constitution,⁸ did truly form part of the Constitutional Culture, given that this was both implemented and widely accepted as a correct and legitimate principle.⁹ It should be stressed that Constitutional Culture is comprised

² See for example GOLDSWORTHY, Jeffrey. *Constitutional Cultures, Democracy, and Unwritten Principles*. **University of Illinois Law Review**, Champaign, v. 18, n. 2, p. 683-710, apr. 2012.

³ KASPER, Eric T.; VIeregge, Quentin D. **The United States Constitution in Film: Part of Our National Culture**. New York: Lexington Books, 2018.

⁴ UTIZ, Renáta. The Constitutional Text in the Light of History. In: UITZ, Renáta. **Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication**. Budapest: Central European University Press, 2005.

⁵ LLEWELLYN, K. N. The Constitution as an Institution. **Columbia Law Review**. New York, v. 34, n. 1, p. 1-40, jan. 1934.

⁶ UNITED SOCIALIST SOVIET REPUBLICS. **Constitution of 1936**, article 124.

⁷ UNITED SOCIALIST SOVIET REPUBLICS. **Constitution of 1936**, article 125.

⁸ UNITED SOCIALIST SOVIET REPUBLICS. **Constitution of 1936**, article 120.

⁹ MILLAR, James R. **Politics, Work, and Daily Life in the USSR: A Survey of Former Soviet Citizens**. Cambridge: Cambridge University Press, 1987. p. 49.

of both legal and extra-legal sources, it is made up of both legal instruments and principles, as well as social and cultural expectations which exist in society, outside of the confines of the juridical framework.

It must also be understood that Constitutional Culture entails more than the passive approval of a critical mass of citizens, even if this support is enthusiastic. As Mazzone argued in relation to the emergence of the United States as a nation State, the successful establishment of constitutional Government was only possible because the majority of ordinary Americans were prepared to accept that their collective life would be ordered by the constitutional document.¹⁰ His highly persuasive thesis is that there could have been no USA as we currently know it, with the Constitutional Culture which we now take for granted, had countless men and women whose lives did not make the history books, not chosen to come on board with the vision of the Founding Fathers.

Constitutional Culture does not describe abstract norms, but ones which lawyers, politicians and citizens in general accept and expect to be implemented. Giving them form and substance, assuring their continuity whilst imagining them afresh in each new generation is a project which can only really function at a societal level. As Heller expressed it, Constitutional Culture is formed: “not just by text, judges or legislators, but by the citizens who are its addressees and observe its norms”¹¹

Having established this though, we are left with some interesting questions about contexts in which there is no codified constitutional document for citizens to affirm or reject, no bounded body of words to “address” the nation in Heller’s terminology. Clearly, we need to resolve this riddle when looking at the United Kingdom

2.2. Constitutional Culture and the United Kingdom

A provocative way of beginning this section would be to demand how a State can have a Constitutional Culture without having a Constitution, as many citizens, due to the idiosyncratic nature of our legal arrangements, consider that the United Kingdom does not have a Constitution as such. Nevertheless, the United Kingdom has a Constitution, which is uncodified, and in part unwritten, and as a result it is especially well placed to absorb some of the implications of Constitutional Culture.¹² Significantly, even States with a codified Constitution tend to have important streams of Constitutional Culture which spring from sources outside of their textual canon.

¹⁰ MAZZONE, Jason. The Creation of a Constitutional Culture. *Tulsa Law Review*, Tulsa, v. 40, n. 4, p. 961-683, oct./dec. 2004.

¹¹ HELLER, Hermann. The Nature and Structure of the State. *Cardozo Law Review*, New York, v. 18, n. 3, p. 1139-1216, dec. 1996.

¹² ALLAN, Trevor. *The Sovereignty of Law: Freedom, Constitution and Common Law*. Oxford: Oxford University Press, 2013. p. 17-54.

For instance, as Waldman¹³ has demonstrated, the place which the right to bear arms has within the American legal framework is one forged by judicial decisions, albeit in cases related to the Second Amendment. The evolution of this right and its place within modern law, and just as significantly, in contemporary American society well beyond courtrooms and universities, does not come from the codified corpus of the Constitution. Indeed Cornell observes, there is a respected body of academic opinion arguing that what is now often trumpeted as an individual liberty, was in reality originally intended to guarantee only a collective freedom to bear arms in organised military groups.¹⁴ Yet the Second Amendment has become bound up with numerous narratives and identities aside from that revolutionaries resisting the oppression of the British Crown: inter alia, the rugged, hardworking and self-reliant pioneer, as well as honest citizens defending their life and property against lawlessness, and a whole spectrum of cultural tropes around race and gender.¹⁵

Undoubtedly, American debates on gun-control raise extremely complex and thought-provoking debates, and I have no desire to allow our current ship of discussion to get sucked in by weighing up the validity of such contentions. Nonetheless, I would like to simply observe that even in a paradigm with the archetypal codified constitutional document, there are key elements of Constitutional Culture formed by factors independent of the text. In other words, the Constitution as an *institution* for living and doing, and the expectations built upon it, are partially unwritten, even in the USA.

Therefore, given that Constitutional Culture does not flow from the gravitation pull of a single, sacred text, it is in no way problematic to suggest that it is also present in contexts without such a document. All States will indeed have some form of Constitutional Culture, because in all contexts there will be a set of collective expectations about the operation of the legal and political framework. In Britain, part and parcel of this is the expectation that the Constitution is not a sacrosanct entity which should be self-contained or walled off, whilst constitutional principles are woven into the fabric of the juridical system as a whole. The lack of any rigid divide means that in both academia and practice, public lawyers must be familiar with private law principles and vice versa, and also the absence of any designated Constitutional Court means that there is no perception of the judiciary as the primary guardians of the constitutional order. In this framework, the judges are simply one of the bodies with a role to play in this.¹⁶ Conse-

¹³ WALDMAN, Michael. **The Second Amendment: A Biography**. New York: Simon and Schuster, 2014. p. 161.

¹⁴ CORNELL, Saul. **A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America**. Oxford: Oxford University Press, 2008. p. 167-210.

¹⁵ For a variety of perspectives see YUILL, Kevin; STREET, Joe (Eds.). **The Second Amendment and Gun Control: Freedom, Fear and the American Constitution**. Abingdon: Routledge, 2017.

¹⁶ MASTERMAN, Roger. **The Separation of Powers in the Contemporary Constitution**. Oxford: Oxford University Press, 2010.

quently, it is natural that there is a sense of collective responsibility for the Constitution, as it is embodied in, not merely carried out, by political processes in which everybody has a stake.

Perhaps ironically, the American Revolution provides us with one of the most convincing proofs of this aspect of the British Constitution, and its Constitutional Culture. John Adams, one of the intellectual powerhouses behind the revolt, repeatedly stressed that the behaviour of the Parliament in Westminster was in flagrant breach of the British Constitution.¹⁷ Given that Britain did not provide for the colonies to send any representatives to that assembly, Adams and others regarded its demands for revenue as unconstitutional, and said so in those terms. Their basis for doing so was rooted in collective expectations which had gradually coalesced over time, as the concept of no taxation without representation was at the very least foreshadowed by the Magna Carta.¹⁸ Without a doubt the great XVII century Sir Edward Coke found within the then already ancient text a justification for asserting English liberties, much to the ire of Stuart Monarchs and the ultimate benefit of the parliamentary cause.¹⁹ One of the greatest sparks which set alight the conflagration of the Civil Wars, and eventually a period of Republican government, was Charles I's effort to use ship money as a backdoor means of levying tax without recalling Parliament.²⁰ This point was certainly not lost on the American Colonies when they found themselves subjected to the payment of duty without their consent, and as far as the rebels/patriots were concerned, long held liberties were being infringed.

Yet it is true that, as Baker demonstrates with great erudition, the Magna Carta had been interpreted for centuries in ways which would have astounded its original signatories,²¹ and the vindication for Adams' position did not really come from the words on the medieval parchment. Nevertheless, the notion that the Crown could not levy taxation without obtaining the agreement of its subjects, had smashed its way into British Constitutional Culture with the legitimating power of the Great Charter, and

¹⁷ ADAMS, John. **Instructions Adopted by the Braintree Town Meeting**. Available at: <<http://www.masshist.org/publications/adams-papers/index.php/view/PJA01d073>>. Last accessed: 9 dec. 2019.

¹⁸ ENGLAND. **Magna Carta of 1215**, clause 14: "To obtain the general consent of the realm for the assessment of an 'aid' - except in the three cases specified above - or a 'scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared." Available at: <<https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>>. Last accessed: 9 dec. 2019.

¹⁹ BAKER, John. **The Reinvention of the Magna Carta**. Cambridge: Cambridge University Press, 2017. chapter 9.

²⁰ PURKISS, Diane. **The English Civil War**. London: Harper Perennial, 2006. p. 22-23.

²¹ BAKER, John. **The Reinvention of the Magna Carta**. Cambridge: Cambridge University Press, 2017.

regardless of what the document said or was intended to say, it spawned a collective understanding that taxation without consent was not part of the English, and later British, mode of conducting civil affairs.

As we have already stressed, extra-textual sources of Constitutional Culture are by no means a unique feature of non-codified Constitutions. Notwithstanding this, it would be disingenuous to pretend that the lack of codification is not a complicating factor in some contexts. Obviously, there is a link between Constitutional Culture and the content of the State Constitution, and as we shall see in relation to Brexit, there is scope for confusion and anger when the legal content of the Constitution itself is not clear, and therefore the assumptions and expectations around it are not clear either.

Generally speaking, there is a risk of differing groups believing that their understanding of the rules is the correct one, and feeling aggrieved when these are not applied, especially by those wielding judicial or political power. It is not that different from the situation in which a classic board game, such as Monopoly or Scrabble, is being played by a group of friends. It is indeed common for families to develop their own slight variations on the rules, yet for everyone to assume that their way of playing is the normative one. Despite the fact that trouble ensues when there is a clash of expectations, at least in that instance there is the possibility of reading the rule-book (or codified Constitution) provided in the box.

Of course, in the case of an uncodified Constitution, there is no safety valve of an agreed “rule-book” to which participants in disputes may have recourse, and rather than arguing about the meaning of certain rules, the discussion actually relates to their very existence. Passionate disagreements are likely to take place as a result. A recent example of this arose in relation to parliamentary procedure, when the Speaker applied a principle from the Erskine May handbook to prevent the then Prime Minister Theresa May from bringing forward a further vote on the proposed Brexit deal.²² The move was controversial, because he was known to personally oppose the agreement presented, and arguably he had not chosen to invoke the rule in relation to debates towards which he was personally sympathetic. In the United Kingdom, although a member of one of the political parties, there is an uncompromising expectation that the Speaker remains a neutral figure, and it is rare for the holder of the office to even arouse suspicion of failing in this commitment, and controversy over the currency, and therefore validity, of a rule dating from the English Civil War did nothing to quell the political storm which blew up. Nevertheless, it is also important to observe that even had the rule been included within a codified Constitution, there would still have been ample scope for accusations of the Speaker having applied it in a partisan manner. It would be

²² CHAPLAIN, Chloe. What is Erskine May? The £400 handbook that guides Parliament and John Bercow's decisions? *Inews Briefing*, [s.l.], 19 mar. 2019. Available at: <<https://inews.co.uk/news/politics/what-is-erskine-may-parliamentary-rulebook/>>. Last accessed: 9 dec. 2019.

helpful to stress that the wording in dispute was as follows: *“a question being once made, and carried in the affirmative or negative, cannot be questioned again, but must stand as a judgement of the House”*.²³ And thus gives plenty of scope for debate as to whether a question may be put before the House of Commons in the same session of Parliament, because if circumstances in the outside world change, then the “question” being raised is no longer the same, even if the wording of a Bill is unchanged. How different must the wording of the issue, or the external context be, in order to provide a “fresh” question and avoid infringing the precept? Obviously, there is no hard and fast answer, as human judgement must always be applied, giving rise to potential controversy. In light of this, codification is not a panacea against uncertainty, nor will alter the reality that constitutional matters occupy the borderland between law and politics.

Furthermore, it is fair to highlight that not all aspects of the British Constitution are fluid or debatable, and a number of its fundamental characteristics are beyond doubt. It is a monarchical, representative parliamentary democracy, with established/quasi-established national Churches, and is supported by the key principles of the Rule of Law, Checks and Balances (sometimes designated a weak form of Separation of Powers) and Parliamentary Sovereignty.²⁴ Many modern commentators would also treat human rights as a constitutional pillar, a discussion to which we shall shortly return.²⁵

Nevertheless, the vast swathes of grey around the edges Constitution are perhaps another feature of British Constitutional Culture. Opinion polls continue to show widespread support for an “unwritten” Constitution, and many are proud of this national distinctiveness and regard the adaptability which it lends as an asset.²⁶ Although Tomkins is correct in noting the danger of binary distinctions between written and unwritten Constitutions, including the casual assumption that the latter are more rigid than the former;²⁷ from the point of Constitutional Culture, this is a secondary issue. The key consideration is that people believe it to be flexible and actively embrace this dimension, and whether they are intellectually misguided to do so is a secondary point. In other words, the lack of codification does not leech away at legitimacy or willingness to participate.

²³ GARCÍA OLIVA, Javier; HALL, Helen. Parliament, the Executive and the Speaker. **Balancing Beliefs Blog**. 20 mar. 2019. Available at: <<http://www.projects.law.manchester.ac.uk/religion-law-and-the-constitution/parliament-and-executive-brexiteer-and-the-speaker/>>. Last accessed: 9 dec. 2019.

²⁴ GARCÍA OLIVA, Javier; HALL, Helen. **Religion, Law and the Constitution**: Balancing Beliefs in Britain. Abingdon: Routledge, 2017. chapters 1 and 2.

²⁵ ELLIOTT, Mark; THOMAS, Robert. **Public Law**. 3. ed. Oxford: Oxford University Press, 2017. p. 759-815.

²⁶ UNITED KINGDOM. Parliament of the United Kingdom. **UK Parliament, A New Magna Carta?** Political and Constitutional Reform. Available at: <<https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/46308.htm>>. Last accessed: 9 dec. 2019.

²⁷ TOMKINS, Adam. **Public Law**. Oxford: Oxford University Press, 2003. p. 7-10.

Drawing these threads together, we can see that the United Kingdom not only has a rich and interesting constitutional framework, it also has a lively Constitutional Culture, a consideration which naturally brings us to our next question: how do human rights fit into this culture?

3. HUMAN RIGHTS AND BRITISH CONSTITUTIONAL CULTURE

Anyone familiar with the present British context will be aware that to investigate this topic is to open a can, or possible several cans, of rather aggrieved worms. Taking a step backwards to begin with, it is important to appreciate some of the political build up to the Brexit vote and ensuing crisis. For decades there has been a simmering resentment in some quarters over what was perceived as “European interference” in British affairs and a humiliating loss of autonomy,²⁸ and this discontent extended to the jurisdiction of European Court of Human Rights in Strasbourg, as well as membership of the European Union. David Cameron promised repeal of the Human Rights Act as a manifesto pledge at the 2016 election, and replace it with a “British Bill of Rights”, a policy of which his successor Theresa May was also supportive.²⁹ In the event, Cameron’s premiership ended with resignation after the Brexit referendum, and Theresa May put dealing with the Human Rights Act “on ice” until Brexit was resolved.³⁰

In contrast, the position of the present Prime Minister Boris Johnson is more difficult to tease out, making it rather tricky to read the runes. He has spoken favourably about the Human Rights Act and even the Strasbourg Court, but at the same time stressed British sovereignty in deciding how to apply its rulings.³¹ Without doubt, it seems unlikely that there could be any attempt to tackle another political leviathan whilst battling Brexit, so it appears probable that the Human Rights Act is secure in the short term at least. Furthermore, the indication that even if it was repealed, the statute would be replaced by another guarantee of rights, affirms the proposition that human rights are now part of British Constitutional Culture. Even those most hostile towards

²⁸ FARRELL, Michelle; DRYWOOD, Eleanor; REYNOLDS, Stephanie; GREY, Harriet. Brexit and the Conservative Party Plans for the Human Rights Act. **Liverpool University Law Blog**, Liverpool, 1 feb. 2019. Available at: <<https://www.liverpool.ac.uk/law/news/articles/brexit-and-the-conservatives-plans-for-the-human-rights-act>>. Last accessed: 9 dec. 2019.

²⁹ WILDING, Jo. The Business of Asylum Justice and the Future of Human Rights. In: SMYTH, Claire-Michelle; LANG, Richard (Eds.). **The Future of Human Rights in the UK**. Newcastle: Cambridge Scholars Publishing, 2017. p. 111-130, 102.

³⁰ MERRICK, Rob. Theresa May to Consider Axeing Human Rights Act After Brexit. **The Independent**, [s.l.], 18 jan. 2019. Available at: <<https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html>>. Last accessed: 9 dec. 2019.

³¹ WALAWALKAR, Aaron. Boris Johnson: What is the next Prime Minister’s Human Rights Record? **Each Other blog**, 23 jul. 2019. Available at: <<https://rightsinfo.org/boris-johnsons-human-rights-record/>>. Last accessed: 9 dec. 2019.

the Human Rights Act are not rejecting the concept or desirability of human rights per se, which suggests that this approach no longer has political traction.

In order to understand the significance of this, it is important to appreciate what the Human Rights Act did and did not do. The legislation in the late twentieth century brought the European Convention on Human Rights into domestic law for the first time (the United Kingdom is a dualist State, and therefore ratifying the treaty had not had this effect in the first place).³² This meant that for the first time, citizens had identifiable human rights which they could actively draw out and positively assert, but it is crucial to stress that this did *not* mean that prior to its passage, fundamental freedoms did not form part of the British Constitutional framework. As Feldman explained it, before the new legislation came into force, citizens enjoyed an “*undifferentiated mass of liberty*”,³³ or in other words, individuals and groups had a right to express religious beliefs or exercise free speech etc, unless prevented by lawful means. After the passage of the statute, this general concept of liberty was augmented by specific guarantees of particular freedoms, and it was possible to demand that the legal framework protected a positive and concrete right to freedom of religion, for example, by wearing a cross or a hijab at work.³⁴

There can be no denying that the Human Rights Act 1998 was a watershed moment in the United Kingdom’s legal history, and one which has gradually had a profound effect on British Constitutional Culture, at both a popular and practitioner level. Whilst judges are not permitted to “strike down” primary legislation, they are empowered to issue declarations of incompatibility, which are usually followed by the other branches of government.³⁵ Furthermore, the task of interpreting even primary legislation must be carried out through with cognisance of human rights, according to established principles. It is also true that although Parliament is free to ignore the Human Rights Act should it so chooses,³⁶ there are express mechanisms to ensure that the legislature must at least take into account of the implications of proposed new law on Convention rights, and if it brushes them aside must be doing so publically and consciously.³⁷

Profound as this step change has been, the shift in thought-processes has not been confined to those who are tasked with crafting and interpreting laws. The implications of the cultural revolution can be observed at a popular level, in the reluctance

³² AUST, Anthony. **Handbook on International Law**. 2. ed. Cambridge: Cambridge University Press, 2010. p. 25.

³³ FELDMAN, David. **Civil Liberties and Human Rights in England and Wales**. Oxford: Oxford University Press, 2000. p. 68.

³⁴ EUROPEAN COURT OF HUMAN RIGHTS. *Eweida vs. United Kingdom*, 2013.

³⁵ UNITED KINGDOM. **Human Rights Act**, s4.

³⁶ UNITED KINGDOM. **Human Rights Act**, ss3-4.

³⁷ UNITED KINGDOM. **Human Rights Act**, s19.

of those who oppose the Human Rights Act to be seen to attack human rights per se, as this stance is unlikely to lead to gains at the ballot-box with the contemporary electorate. Anti-European rhetoric may be employed to attack a “non-British” embodiment of rights, and more subtly, to oppose external intervention in questions of balancing rights,³⁸ but it is now extremely difficult for politicians who wish to present themselves as caring, moderate and socially responsible, to reject the human rights project altogether, because this has become a position of fringe and extremist parties.

Although the importance of the societal move to embrace the language and ideology of human rights should not be underestimated, the seismic shift in judicial thinking is perhaps the biggest of the three developments so far outlined (cultural change for judges, Parliament and citizens in general). In addition to applying the statutory principles of the Human Rights Act, this can be seen plainly and dramatically observed in the resurgence of the concept of “Common Law Rights”. The theoretical underpinning of this lies in the notion that within the bundle of liberty described by Feldman, there have *always* been identifiable elements, which at times have been highlighted as the values which the legal system recognises and protects. For example, in the seminal XVIII century judgment in *Somerset v Stewart* Lord Mansfield had found that:

*The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.*³⁹

In other words, chattel slavery was fundamentally incompatible with Common Law, and consequently, there was a right to freedom from slavery long before Article 4 of the ECHR was incorporated into the British juridical framework.⁴⁰ If slavery had ever been approved by “positive law” or statute, the courts would have had no choice, but to yield. However, given that this was not the case, it would not support an institution which was contrary to core legal rights and principles.

³⁸ GIANNOULOPOULOS, Dimitrios. Britain must hold fast to the European Convention on Human Rights as it leaves the EU. **LSE Brexit Blog**, London, 24 nov. 2016. Available at: <<https://blogs.lse.ac.uk/brexit/2016/11/24/britain-must-hold-fast-to-the-european-convention-on-human-rights-as-it-leaves-the-eu/>>. Last accessed: 9 dec. 2019.

³⁹ UNITED KINGDOM. Court of King's Bench. *Somerset vs. Stewart*, 1772.

⁴⁰ The nature of the dispute in *Somerset v Stewart*, and the way in which it was argued, make it appropriate to speak of “English law”.

It must be acknowledged that *Somerset's Case* was special and very well-known in its day,⁴¹ and the clarity with which rights and overarching principles were discussed is not necessarily typical. The truth is that retracing the evolution of legal thinking on fundamental rights is ordinarily more complicated, taking into consideration that in reading pre-Human Rights Act case law it is often difficult to discern when the *underlying* values woven into the legal framework were being applied, as there was no need to articulate them, nor strong tradition of doing so.

Significantly, almost by definition, common assumptions about moral principles and liberty operated below the surface of judicial reasoning. For example, the "right" to corporal integrity is unquestionably at the heart of the ancient law of trespass, which encompasses a civil wrong as well as a crime, but in allowing an action in tort for trespass, historically speaking, courts would not announce that they were vindicating such a right.⁴² Nevertheless, when lawyers stepped back to write books, discuss matters extra-judicially or to engage in legal education, they were likely to spell out matters more clearly, and for instance, William Blackstone described trespass in the following terms: "Trespass, in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property"⁴³

Therefore, there is no question that these rights were present in the tradition of Common Law, although they were not always part of the everyday, bread and butter arguments which appeared in law reports. Yet after the passage of the Human Rights Act, when judges naturally became more conscious of rights, there was a much greater tendency to overtly state that human rights considerations were shaping their development of Common Law.⁴⁴ It must be remembered, of course, that Common Law evolves incrementally, and human rights arguments could never provide a bridge where there was an obvious chasm in legal principles,⁴⁵ but as commentators like Hunt⁴⁶ and Phillipson⁴⁷ have argued, there is the possibility for what they have termed "*weak*

⁴¹ HORNE, Gerald; HERRON, Larry. **The Counter Revolution of 1776: Slave Resistance and the Origins of the United States of America**. New York: New York University Press, 2014, p. 209.

⁴² UNITED KINGDOM. Court of King's Bench. *Scott vs. Shepherd*, 1773.

⁴³ BLACKSTONE, William. **Commentaries on the Laws of England**. Book 3. Clarendon Press at Oxford, 1765-1770. chapter 12.

⁴⁴ UNITED KINGDOM. England and Wales Court of Appeal. *Parkinson vs. St. James NHS Trust*, 2001; HERRING, Jonathan; WALL, Jesse. The nature and significance of the right to bodily integrity. **Cambridge Law Journal**, Cambridge, v. 76, n. 3, p. 566-588, nov. 2017.

⁴⁵ HARTSHORNE, John. The Need for an Intrusion upon Seclusion Privacy Tort within English Law. **Common Law World Review**, [s.l.], v. 46, n. 4, p. 287-305, nov. 2017.

⁴⁶ HUNT, Murray. The Horizontal Effect of the Human Rights Act. **Public Law**, London, n. 3, p. 423-443, sept./nov. 1998.

⁴⁷ PHILLIPSON, Gavin. The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper? **The Modern Law Review**, London, v. 62, n. 6, p. 824-849, nov. 1999.

horizontal direct effect” of the Convention, which meant that the ECHR might provide Common Law with the impetus needed to jump from one stepping stone to another.

In an era when the Human Right Act appeared secure, there was no need to pay too much attention to this phenomenon. As Moreham has observed, Common Law rights frequently march in step with those of the Convention: where both would take the court to the same conclusion, it was of little consequence which one was placed in the foreground.⁴⁸ For example, as we have seen, both Article 4 ECHR and Common Law prohibit slavery and forced labour, and the underlying principles of both support the long established rule that a court will never grant the equitable remedy of “specific performance” in the case of an employment contract.⁴⁹ It has long been axiomatic this form of relief was not available, and it was no surprise that neither Common Law nor the ECHR would countenance compelling an individual to do a particular job on pain of punitive sanction. It goes without saying, ink is not spilt by lawyers where there is no debate to be had, and there was no need to labour trite points.

Yet this position has changed once the Human Rights Act appeared to be in real jeopardy, and significantly, when faced with its possible demise, British courts are rediscovering the language of Common Law rights. A clear and dramatic example of this is provided by the *UNISON* case,⁵⁰ which concerned a dispute over policy on legal aid, making the concept of a right to a fair trial central to the arguments. Remarkably, the Supreme Court chose to make its ruling entirely on the basis of the ancient and unquestioned Common Law right to a fair trial, and observed almost as a footnote that they could have reached the same conclusion via the application of Article 6.

In opting to apply Common Law rather than the Convention right here, the court was marking its territory with the determination (and indeed subtlety) of a dog at a lamppost, and whether or not Parliament might choose to repeal the Human Right Act, the application of human rights-based principles is now an established and non-negotiable mode of judicial interpretation. In other words, it has become part of British Constitutional culture.

Having made that statement, however, it must be emphasised that I am not implying that the Supreme Court adopted any artifice, nor invented a non-existent Common Law right. Quite the contrary, such a right does indeed have ancient pedigree and recognition, once again being rooted in the Magna Carta. It was also another concept cherished by John Adams, to whom I have already referred, who despite being

⁴⁸ MOREHAM, Nicole. Douglas and Others v Hello—the Protection of Privacy in English Private Law. **Modern Law Review**, London, v. 64, n. 5, p. 767-774, nov. 2001.

⁴⁹ De Francesco v Barnum [1886-90]. In: **All England Law Reports Reprint**. London: Butterworths Law, 1996. p. 414, 418 per Fry LJ “I think that courts are bound to be jealous in case they should turn contracts of service into contracts of slavery”.

⁵⁰ UNITED KINGDOM. Supreme Court of the United Kingdom. R (UNISON) vs. Lord Chancellor, 2017.

a leading light of the patriot cause, bravely (and successfully) acted as a defence counsel for British soldiers accused of American murdering civilians in the “Boston massacre”.⁵¹ Even in the XVIII century and the midst of a gathering political storm, the idea of denying individuals a fair trial was repugnant to lawyers steeped in the British Common Law tradition, and therefore, I am certainly not presenting the Supreme Court as having somehow stealthily introduced the concept by sleight of hand in 2017.

My point really does not relate to *what* was done, but the chosen mode of doing it. In preferring to base their analysis on Common Law, rather than the obvious Convention right, which would have served equally well and without disadvantage, the court was trumpeting a loud message that independently of the Human Rights Act, *identifiable and enumerated* human rights are part of British Constitutional Culture, and will withstand the repeal of that statute. This is a very powerful statement.

Nevertheless, reassuring as this might be, the abolition of the Human Rights Act is not what is immediately on the cards. Rather we are staring down the barrel of Brexit, so we shall now address what this might mean for both British Constitutional culture and human rights.

4. BREXIT, CONSTITUTIONAL CULTURE AND HUMAN RIGHTS

The impact of Brexit on British Constitutional Culture is worthy of many books and articles, and I do not pretend to have the capacity to cover it in detail here. Some commentators like Gearty are even suggesting that the whole debacle has killed the Constitution as we know it.⁵² Not only do I lack the space within the current discourse, it is also without doubt too early to fully assess the influence of Brexit in this regard, as cultural change is a slow process and the story is still unfolding. Only when the dust settles, and a new form or normality is established, either post-Brexit, or (now far less likely) in the aftermath of a firm decision to recant and remain, we shall be able to start examining the new position. Consequently, I will confine myself to the two ways in which the Brexit saga has interacted with the pre-existing Constitutional Culture, in so far as both are directly pertinent to human rights: referenda and Parliament and the People.

4.1. Referenda and the British Constitution

This is good illustration of the difference between Constitutional Law and Constitutional Culture. There is no legal obstacle to the use of referenda within the British

⁵¹ HINDERAKER, Eric. **Boston’s Massacre**. Cambridge: Harvard University Press, 2017. p. 201.

⁵² GEARTY, Conor. She’s dead of course! The British Constitution and Human Rights. **LSE Brexit Blog**, London, 8 aug. 2019. Available at: <<https://blogs.lse.ac.uk/brexit/2019/07/03/shes-dead-of-course-the-british-constitution-brexit-and-human-rights/>>. Last accessed: 9 dec. 2019.

framework, and they have taken place before, the most significant being the 1975 vote on continuing membership of the (then) European Community, the 2011 vote on electoral reform and the 2014 vote on Scottish Independence.⁵³ However, the United Kingdom has no strong tradition of referenda, meaning that they do not have a clear and settled place within Constitutional Culture. Moreover, the lack of codification meant that there was scope for confused expectations around the implications of the outcome, and the fact that the previous referenda which would have been highest in the public consciousness had all affirmed the status quo did not assist matters. When a referendum came back with a victory for change, pandemonium was inevitably unleashed.

As a matter of strict Constitutional Law, there is no doubt that the result of a referendum could only ever be advisory. Parliament is sovereign, those outside Parliament can express their opinions by referenda, petitioning, swamping social media, changing themselves to railings or however else they like, but its members are not legally obliged to listen.⁵⁴ In many countries which operate referenda as a regular part of their constitutional system, there are fixed rules which require more than a simple majority to change constitutional norms,⁵⁵ and also frequent attempts to ensure that questions are clearly phrased (although it must be acknowledged that the experience of jurisdictions like Canada suggests that this can be a fount of dispute in its own right).⁵⁶

The United Kingdom was faced with a narrow majority in favour of leaving the European Union, and ample room for debate about what “leaving” meant. Some Remain supporters have argued, for instance,⁵⁷ that people did not believe that in voting for Leave they were voting for a “no deal” Brexit, and were only consenting to a negotiated departure. On the other side of the boxing-ring, many Leavers are protesting that to refuse or to stall Brexit is anti-democratic, and that whatever the technical legal position might be, an expectation was generated that the result of the referendum would be respected. Clearly, there is some truth in this assertion, and it would be laughable to suggest that the Government of David Cameron arranged a referendum out of curiosity to test the waters.

Gearty expresses a bewilderment, which many people share, in wondering what the thought-processes truly were behind the decision to hold a vote in the first place.

⁵³ UNITED KINGDOM. Parliament of the United Kingdom. **Referendums held in the UK**. Available at: <<https://www.parliament.uk/get-involved/elections/referendums-held-in-the-uk/>>. Last accessed: 9 dec. 2019.

⁵⁴ GARCÍA OLIVA, Javier; HALL, Helen. **Religion, Law and the Constitution: Balancing Beliefs in Britain**. Abingdon: Routledge, 2017. chapter 5.

⁵⁵ SVENSSON, Pale. Denmark: The Referendum as Minority Protection. In: ULERI, Pier Vincenzo; GALLAGHER, Michael (Eds.). **The Referendum Experience in Europe**. London: Macmillan, 1996. p. 33-51.

⁵⁶ RUSSEL, Peter. Constitution. COURTNEY, John C.; SMITH, David E. (Eds.). **The Oxford Handbook of Canadian Politics**. Oxford University Press: Oxford, 2010, p. 21-38.

⁵⁷ BARNES, Peter. Brexit: What Happens Now? **BBC News**, [s.l.], 31 oct. 2019. Available at: <<https://www.bbc.co.uk/news/uk-politics-46393399>>. Last accessed: 9 dec. 2019.

This commentator is undoubtedly correct in pointing out that referenda are not an established part of British Constitutional Culture, and that many of our current woes stem from disregarding our own norms and practices. We have a long-established representative democracy, and referenda are simply not really how we “do” collective decision-making. Yet at the same time, there is a discomfort in some of the words with which he expresses his ire about a vote having been presented to the people:

It is not possible to detect any underlying rationale behind the ‘people’s vote’ – it is of the essence of populism of this sort – and as we all know Britain is not unique in its exposure to this kind of political engagement – that it knows what it does not like but has no clue as to what it wants. Depending on where you are, the vacuum gets filled by appeals to emotion that are rooted in any or all of nationalism, xenophobia and/or a personality cult. In the UK, I’d say this is mainly a geographically limited version of the first – English nationalist daydreaming rooted in fantasy history – but also a fair bit of cult (Farage, with Johnson jostling him for space) and among a few a particular subset of xenophobia, the deeply unpleasant one that is rooted in traditional racism.⁵⁸

The implication of this highly articulate passage, is that “the people” should not have been given the opportunity to make a direct decision, as they were incapable of sifting the arguments and voting on the basis of something other than emotion and a heady cocktail of xenophobia and nationalism, laced with celebrity. This raises two questions: firstly, is that a just assessment of the British population and its capacities? and secondly, if it is, does it actually negate their “right” to democratically determine their own destiny? Which brings us to our second and closely related question of the relationship between Parliament and the People.

4.2. Parliament and the People

This is another aspect of British Constitutional Culture raised by Brexit. Unlike the use of referenda, we are not concerned here with a decision which has gone against the grain of prevailing Constitutional Culture, but rather a saga which has revealed a long-standing, dysfunctional aspect to it. The conflicts of the XVII century resolved the balance of power between Parliament and the Crown, or the Legislature and the Executive, squarely in favour of Parliament. This position was robustly affirmed in the Brexit process, with the Supreme Court’s confirmation that the Executive could not

⁵⁸ GEARTY, Conor. She’s dead of course! The British Constitution and Human Rights. **LSE Brexit Blog**, London, 8 aug. 2019. Available at: <<https://blogs.lse.ac.uk/brexit/2019/07/03/shes-dead-of-course-the-british-constitution-brexit-and-human-rights/>>. Last accessed: 9 dec. 2019.

trigger Britain's withdrawal without parliamentary empowerment.⁵⁹ In short, the *Miller* case turned on the principle that the Government could not unilaterally take action which would remove legal rights conferred by an Act of Parliament. It should be noted that even the dissenting judgment given by Lord Reed, was predicated on the basis that a proper interpretation of the European Communities Act 1972 meant that in withdrawing from the EU, the Government would *not* be removing statutory rights (as they were conferred to subsist only during EU membership), and not a single judge in the Supreme Court doubted Parliament's sovereignty. In fact, its dominance over the Executive was affirmed time and again during the troubled premiership of Theresa May.

However, this leaves open the matter of the relationship between Parliament and the People. One of the reasons why the debates around the meaning of the Brexit vote, and indeed the *Miller* case, have been so vituperative, is that both sides have been convinced that they are the ones truly advocating for "the People". There is a long-standing school of British political thought, put forward by the Enlightenment politician and philosopher Edmund Burke, that MPs owe their constituents their judgement and integrity. In other words, they are *not* representatives in the sense of voting according to the wishes of their electors, rather they are delegated to make such decisions as they see fit to further the common good. On this basis, an MP should never vote against his or her own conscience, and endorse decisions which they believe to be wrong or damaging, purely because their constituents are clamouring for it.⁶⁰

Applying this approach, there is nothing problematic about suggesting that Parliamentarians should resist either Brexit or a "no-deal" Brexit, if they truly believe it to be destructive to the common good, but the complicating factor is that Edmund Burke was a Tory politician and has become associated with right-wing political thought, whereas the Remain/Brexit divide is not a fissure along Left/Right lines. Remarkably, many of the individuals championing the supremacy of Parliament are not from parts of the political spectrum which would ordinarily look favourably on a paternalistic approach towards governance.

The truth is that this is an aspect which British Constitutional Culture never truly came to terms with, from the Early Modern period onwards. The Civil Wars of the XVII century ended in a political meltdown and a military take-over, when the gentry in the House of Commons and the aristocracy in the House of Lords were dismissive of the views of the soldiers who had fought an ideological war.⁶¹ The English Republic,

⁵⁹ UNITED KINGDOM. United Kingdom Supreme Court. *R (Miller) vs. Secretary of State for Exiting the European Union*, 2017.

⁶⁰ UNITED KINGDOM. United Kingdom Supreme Court. *R (Miller) vs. Secretary of State for Exiting the European Union*, 2017.

⁶¹ HILL, Christopher. *The World Turned Upside Down: Radical ideas during the English Revolution*. London: Penguin, 2019.

however, ended with the Restoration of Charles II in 1660, and from this time onwards Parliament was firmly in control once more, as the “Glorious Revolution” demonstrated (a bloodless coup orchestrated by Parliament in which James II was deposed and his son-in-law/nephew William of Orange and daughter Mary came to the throne).⁶²

Yet as is well known, unlike most other European nations, Britain did not see revolution in the XVIII, XIX or XX centuries. It slowly and incrementally transitioned from government by a propertied male elite, to a liberal, representative democracy in which all adult members had the expectation of participation. This meant that there was never a decisive moment when the relationship between the Legislature and the people of the State was ever hammered out, either through political conflict, or debate following a crisis, and this also goes a long way towards explaining the somewhat alien nature of referenda in the British context, there was never a moment when circumstances necessitated identifying fundamental constitutional values which *required* a popular, democratic decision to overturn, and therefore, also set out the parameters and mechanisms within which they could be set.

Nevertheless, the issue is wider than referenda alone (discussed in the previous section), and it may be that Brexit is the crisis which finally forces the United Kingdom to think through how our sovereign Parliament should relate to the electorate as a whole in the modern era. In confronting this aspect of our Constitutional Culture, which has often been swept under the carpet, we would be not only strengthening the realisation of the fundamental right to participate in democratic government, but we would also be embracing all other rights guaranteed by a liberal democratic State. In light of this finding, we have arrived at an apt point to take stock of journey.

5. CONCLUSIONS

Having addressed the nature of British Constitutional Culture, the place of human rights within it and the impact which the Brexit process is starting to have, what conclusions can we draw? It is very much a tale of two halves, although the future of both are, of course, entwined.

On the one hand, it is impossible to deny the fault lines which have opened up in terms of our democratic processes. It is difficult to see how anyone, from any side of the political spectrum or Brexit debate, could assert that chaos caused by a referendum has been satisfactory, and that we need to collectively make an overall assessment of how we do democracy and why. Should referenda play a part in our democratic processes, and if so, when and how? This is not a question simply about Constitutional Law

⁶² GARCÍA OLIVA, Javier; HALL, Helen. **Religion, Law and the Constitution: Balancing Beliefs in Britain**. Abingdon: Routledge, 2017. chapter 1.

and procedure, it goes directly to the heart of human rights, because such rights need a functional, liberal democratic context in which to live and flourish.

More optimistically, perhaps, we have seen how robust the concept of human rights has become in British Constitutional Culture, and there is now no suggestion that they are a recent, destructive import. Their place within the legal framework is secure, and the judiciary have indicated their commitment to applying them in their adjudication, regardless of the repeal of the Human Rights Act or the ultimate trajectory of the Brexit process. It is also reassuring that human rights are now embedded in popular Constitutional Culture, and that politicians of all stripes (save for the extreme fringes) accept that conceptually they must remain part of our common values.

Whatever form of new Constitutional Culture and settlement we ultimately emerge with, it is at least clear that human rights, in sense of identifiable freedoms which can be named and asserted, will have a prized place within its framework.

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