

A TALE OF TWO STATUTES

HUMAN RIGHTS AND EQUALITY
A LEGAL ESSAY

AUSTEN MORGAN

A TALE OF TWO STATUTES

HUMAN RIGHTS AND EQUALITY

A LEGAL ESSAY

AUSTEN MORGAN¹

THE BELFAST PRESS

2023

¹. 33 Bedford Row, Holborn, London WC1R 4JH. Phone: 020 7242 6476. Email: clerks@33br.co.uk.

First published by The Belfast Press Limited, 1 Parkshot, Richmond, Surrey TW9 2RD, 2023.

Austen Morgan © 2023

ISBN 978-1-9160194-2-3

All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of the author, nor be otherwise circulated in any form of binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

Cover image of the European Court of Human Rights in Strasbourg, courtesy of 'Alfredovic', Creative Commons Licence 3.0.

CONTENTS

Introduction	4
The 1950 Strasbourg Convention	6
Incorporation?	8
A UK Bill of Rights...	10
Conclusion on Human Rights	12
Anti-discrimination Law	13
Equality Act 2010	15
Conclusion on Equality...	19
Future Policy	20

Introduction

Two Statutes

The first statute is the Human Rights Act 1998, which received royal assent on 9 November 1998. It came into force generally on 2 October 2000. Human rights had figured in the 1997 Labour manifesto, and Lord Irvine of Lairg – the last Lord Chancellor with significant powers – was its principal sponsor. Tony Blair was then unseated in 2007, by Gordon Brown. The second statute is the Equality Act 2010, which received royal assent on 8 April 2010. Entry into force was to be more intermittent, under the Cameron/Clegg coalition. Anti-discrimination law had not been included in the New Labour project. However, Harriet Harman was elected deputy leader of the party following the stepping down of Tony Blair. Gordon Brown – distracted not least by the 2008 financial crisis – permitted her to run a sectional parliamentary project (as an alternative to being Deputy Prime Minister), which became comprehensive equality legislation based upon a new legal concept of a protected characteristic; she delegated the legislative work to Vera Baird QC, the solicitor general and the lawyer most identified with the Equality Act 2010.

Now the subtitle: human rights and equality. We are in the realm of radical politics. It is incontrovertible that the enactment of the first statute has reinforced an enthusiastic human rights community. Think of the human rights professors across the country. They are fixated upon the Council of Europe, and Strasbourg. The second statute has generated – through employment law and practice – a more expansive equality industry, peopling human resources or simply HR in the public and private sectors. Think of all those policy documents referred to in employment contracts. The equality industry is fixated also, upon the European Union and Brussels.

It is my thesis that the human rights community and the equality industry, rather than dealing with the two statutes legally, have tipped – to a greater or lesser extent – into woke religion (of which more below)². Thus, human rights, equality and a new non-deist religion interweave culturally and ideologically. I adopt, in contrast, a constitutional approach to both human rights and equality, as legal areas ripe for reform. Above all, we need foundational human dignity and equality principles underpinning these statutes in our constitutional law, preventing the abuse of human rights and widespread reverse discrimination against identified groups, including increasingly young men.

When discussing wokery, one must distinguish the United States³ from Europe (especially the United Kingdom). The starting point also varies, depending upon how one is analyzing the phenomenon: the year 1968 and the student movement (or alternatively, second-wave feminism from shortly afterwards); Michel Foucault and the philosophy of power in the 1970s (reacting to the failures of Marxism); or – more recently – the killing of George Floyd in Minneapolis in May 2020, and the revival of black lives matter

² I first used this religious characterization in 2010, drawing upon Baroness Deech, an academic lawyer, formerly of Oxford university. It is now express in: John McWhorter, *Woke Racism: how a new religion has betrayed black America*, London 2021. There are implications from treating woke as a religion, as opposed to a branch of knowledge.

³ The leading work on the US is Christopher F. Rufo, *America's Cultural Revolution: how the radical left conquered everything*, New York 2023.

through social media. Anti-racism became critical race theory in the United States in the 2010s, with the racialization of everything.⁴ Greg Lukianoff and Johnathan Haidt's *The Coddling of the American Mind*⁵, London 2018, suggested the following factors explain woke culture: helicopter parenting; generation Z or zoomers (1995 –); the iPhone in 2007 and social media; and university administrators buying peace.⁶

Essentially, we are talking about identity politics, and the rapid march of cohorts of graduates through the institutions of civil society and the state. There is a sense of entitlement by radicals, which permits them to act ideologically when they secure public and private-sector jobs – with or without encouragement from their bosses. And here, there is probably now a decisive contradiction between male-to-female trans activists, the latest group seeking sexual freedom after gays and lesbians, and feminists defending hard-won safe spaces (for which they have been labelled trans-exclusionary radical feminists or TERFs). These are the gender critical feminists of the 2020s (symbolically led by J.K. Rowling), who prefer – as do most men – the idea of two sexes. Is there a basis for rational political cooperation between reasonable men and women? Increasingly, the self-styled social justice warriors – using a right-wing concept in a left-wing wrap – are coming under serious intellectual attack for their cancel culture (no platforming), their extravagant gesture politics and infantile moralizing.

Intellectual Biography

In 1980, I edited, with the late Bob Purdie, *Ireland: Divided Nation Divided Class*.⁷ This was a collections of essays. There followed books (mainly biographies) on: Ramsay MacDonald⁸, James Connolly⁹, Belfast¹⁰ and Harold Wilson¹¹. The 1980s were, of course, the age of Margaret Thatcher, and the rising political culture under which I wrote. It was the collapse of the Berlin wall in 1989-90, followed by the implosion of the communist states, which led me to abandon academic Marxism. In 1992, I started to train to become a barrister. I intended, and succeeded, in breaking from the class of '68. I have been successful in my second career, shifting down a generation or two. As a lawyer, I have also published books on constitutional law: *The Belfast Agreement: a practical legal analysis*, London 2000; *Tony Blair and the IRA: the 'on the runs' scandal*, London 2016; and *Pre-tence: why the UK needs a written constitution*, London 2023. These grew out of legal instructions I had received. Other legal writing is available on my professional website: www.austenmorgan.com/legalwriting.

Three books on Labour prime ministers over two careers is probably unique, but my concerns – historical, political and legal – are now based upon a small state/big society liberal democratic perspective, with serious scepticism about unaccountable quangos regulating much of life; above all, I fear what will emerge from the Parliamentary Labour Party, if it gets into office. It comprises very many members who are accustomed to the rules being rigged in their favour. Who will protect us from the woke on the backbenches, and even in Sir Keir Starmer's anticipated government?

4 Helen Pluckrose & James Lindsay, *Cynical Theories: how universities made everything about race, gender, and identity – and why this harms everybody*, London 2020.

5 Subtitle: *How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure*.

6 See also Greg Lukianoff & Rikki Schlott, *The Canceling of the American Mind: how cancel culture undermines trust, destroys institutions, and threatens us all*, New York 2023.

7 London 1980.

8 *J. Ramsay MacDonald*, Manchester 1987.

9 *James Connolly: a political biography*, Manchester 1988.

10 *Labour and Partition: the Belfast working class, 1905-23*, London 1991. This was based upon my doctoral dissertation of 1978.

11 *Harold Wilson*, London 1992.

Abbreviations

I refer to: the Human Rights Act ('HRA') 1998; and to the Equality Act ('EA') 2010. I also refer to: the European court of human rights ('ECtHR'); and the European Convention on Human Rights ('ECHR'). I refer to the Equality Act ('EA') 2006, and to the Commission for Equality and Human Rights as the CEHR¹². I also refer to the Court of Justice of the European Union ('CJEU'). I refer to the state, the United Kingdom of Great Britain and Northern Ireland, as the UK, and to the neighbouring state as the Republic of Ireland ('ROI').

The 1950 Strasbourg Convention

The Council of Europe – now 46 strong – was established under the 1949 Treaty of London¹³. There was to be a Committee of Ministers and a Parliamentary Assembly (as it was later called), in Strasbourg. The context was the end of the Second World War, and the establishment of the United Nations in 1945 as a global organization (followed by the 1948 universal declaration of human rights). While the United Nations focussed on international peace and security, the Council of Europe's concerns became human rights, democracy and the rule of law in a regional context.

Winston Churchill's advocacy as opposition leader of a united Europe in the Attlee years, was more international high politics, than the promotion of economic integration to federalize nation-states. Nevertheless, the wartime leader may be associated rhetorically with the 1950 ECHR (without the ECtHR), which had two additional UK influences; first, Sir David Maxwell Fyfe, a Conservative MP and former law officer, who was *rapporteur* of the Convention drafting committee; and Sir Oscar Dowson, a retired legal advisor to the Home Office, who did much of the drafting. There was thus a strong common law influence on the work of the mostly civil law member states of the embryonic Council of Europe.

The UK ratified the ECHR first, in March 1951. But it was not keen on the ECtHR, and did not join in 1959, when the court opened. In late 1965, Harold Wilson – without going to cabinet – accepted the right of individual petition (to the commission, a body later superseded) and the compulsory jurisdiction of the court. Since 1966, the UK has influenced the court through its succession of judges, trained in the common law. Over the long term, the UK has acquired a relatively good human rights record with its cases. However, it suffered defeats over the Northern Ireland troubles (1968-98), including the investigation of historical cases from 2001. It was even on the receiving end of a rare interstate case initiated by the ROI in 1971 (the so-called hooded men case)¹⁴; in 1978, the UK was found liable for inhuman or degrading treatment or punishment, during internment, but not torture. In 2018, the ROI – wanting a finding of torture (as if the existing finding was not bad enough) – failed to have the case reopened at Strasbourg.

¹² Now referred to as the Equality and Human Rights Commission.

¹³ Now known as the statute of the Council of Europe, ETS 1.

¹⁴ *Ireland (Republic of) v United Kingdom* [1978] 2 EHRR 25; also, *Ireland v United Kingdom*, ECtHR (third section), 20 March 2018 (unsuccessful request for revision of the earlier judgment).

The ECHR lists rights and freedoms in Articles 2 to 18. Articles 9 to 11 are freedoms¹⁵. All the rest are rights, though the distinction may be of diminishing value. The provisions have remained the same since 1950. However, there has been effective amendment, by protocols to the convention, particularly of Article 2 (the right to life). Each right was named in 1994, when a decision was made to make the ECtHR permanent. There is no general limitation clause¹⁶, particular rights have specific and varying limitations. The ECtHR, however, has purported to amend the convention, by effectively adding an Article 2 procedural right (requiring the investigation of historic state killings).¹⁷ This is the case which added to the temporal scope of the ECHR, under international law, and the so-called push back by a ten years' rule.¹⁸ The court has also added to the territorial scope of the convention (Articles 1 and 56), by finding that UK armed forces impliedly carry a copy of the HRA 1998 in their kit, when they are deployed overseas.¹⁹

The original Article 19 had provided for a European Commission on Human Rights, as well as a part-time ECtHR. The Commission had the responsibility of fact finding, and advising the court – but it was wound up in 1998. Since then, the ECtHR has dealt with floods of applications, mainly through inadmissibility decisions or, effectively, summary judgments on largely assumed facts.

The biggest failure of the Convention lies in the attribution of responsibility: some of the Articles create negative obligations on member states (not to do something or other), with positive obligations later implied by the ECtHR. The preamble refers to governments. Article 33 (inter-state cases) refers to an alleged breach of the Convention by another government. Article 34 (individual applications) refers to a victim of a violation by his/her government. But Article 17 is entitled: prohibition of abuse of rights. It reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein ...”.

Consider domestic terrorism, whether Irish or now Islamic. Strasbourg has been reluctant to characterize non-state actors as abusers of human rights, when they are obviously anti-state.²⁰ However, it used to deny remedies to a smattering of left- and right-wing extremists, because they were anti-democratic. Formally, a killing in say Northern Ireland, carried out by republicans and loyalists (and 90 per cent were), is attributed to the UK as a violation of Article 2 substantive (and procedural?). Sounds like the state loses either way; not enough prevention of terrorism and too much repression!

This point may be expressed differently, using an idea from the CJEU. The ECHR provides for vertical effect only, between a victim under Article 34 and his/her government. But what about a horizontal effect, particularly under Article 8 (private and family life), between a domestic abuser and his/her partner? Can that really be the fault of the UK state, because it is not enforcing counter-measures adequately in general (through legislation) or in particular (through police protection)?²¹

Protocol no. 15 is important, not least because it was promoted by Ken

15 Freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association.

16 Confer Art. 18.

17 *Silih v Slovenia* (2009) 49 EHRR 37.

18 Furthered in: *Janowiec v Russia* (2014) 58 EHRR 30. The ten-year rule is accessed in the UK through the HRA 1998. In *In re Dalton* [2023] UKSC 36 [2023] 3 WLR 671, the supreme court confirmed that it was a twelve-year rule in the UK.

19 *Al-Skeini v UK* (2011) 53 EHRR 18. Here, the UK House of Lords helped develop this position: *R (Al-Skeini) v SOS for Defence* [2007] UKHL 26 [2008] 1 AC 153. This latter case is notable for Lord Bingham's lone dissent. Later, Lord Brown of Eaton-under-Heywood agreed extra-judicially with the then senior law lord.

20 *McCann v UK* (1995) 21 EHRR 97 (the Gibraltar case).

21 See *R (Maguire) v Blackpool & Fylde Senior Coroner* [2023] UKSC 20 [2023] 3 WLR 103 paras 8-24.

Clarke as Lord Chancellor in 2012. It was agreed in 2013, but did not enter into force until August 2021. It added a new recital to the preamble: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”. There you have it: a more hands-off supervisory jurisdiction to Strasbourg (in contrast to the micro-managing of nearly fifty justice systems of which Strasbourg has been accused); subsidiarity as a general doctrine of the ECtHR, now included in the preamble of the ECHR; and margin of appreciation to the UK, and each other member state, on a case by case basis.

The problem with Strasbourg is not the ECHR as such, but the ECtHR. In 1978, in, ironically, a UK case, it proclaimed that the ECHR was “a living instrument”²². There was no judicial discussion of this radical, and anti-legal, idea. The case concerned the corporal punishment of a minor in the Isle of Man. Strasbourg – without dissent from Sir Gerald Fitzmaurice, the judge from the UK (a former public school boy, who argued that corporal punishment was not degrading for minors) – opined: “In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”²³

A number of points may be made about the ECHR in conclusion: one, it addressed the Second World War, and the desire never to permit the causes to reappear; two, the UK thought that other members of the Council of Europe needed its Convention standards; three, the UK complied with its international obligations before joining the ECtHR (though others subsequently lost that right to keep out of the ECtHR²⁴); four, the UK is bound by Strasbourg as a dualist state, where domestic law is separate from international law; five, the ECHR was to some extent updated by the 2000 Charter of Fundamental Rights, of the European Union; six, it is not anti-human rights to suggest that the 1950 Convention requires considerable updating in the twenty-first century; seven, withdrawal from the Council of Europe²⁵ is an alternative to denunciation of the convention²⁶; eight, domestic human rights – however created – could be administered exclusively by UK judges, following a common law system of precedent (and therefore providing better legal certainty), whether the UK chooses to remain in the Council of Europe and/or ECtHR or not.

22 *Tyrer v UK* (1978) 2 EHRR 1 para 31.

23 Para 31. See also, Registry of the ECHR, *The European Convention on Human Rights: a living instrument*, 24 pp, September 2022.

24 Protocol No. 11 of 11 May 1994, entering into force on 1 November 1998 (ETS No. 5).

25 Under art 7 of the statute.

26 Art 58 of the ECHR, in particular para (3).

27 In 1996, the Labour opposition published a consultation paper: *Bringing Rights Home*. In 1997, and in government, Labour (in the form of home secretary Jack Straw) published a command paper, *Rights Brought Home: the human rights bill*, CM 3782, October 1997.

Incorporation?

Human rights were discussed in the UK from the early 1990s. There was some knowledge of the ECHR. But little understanding of how human rights might be brought home.²⁷ Those in and around the Labour Party envisaged two stages: first, the ‘incorporation’ of the ECHR; and second, a domestic bill of rights for the UK. In 1999, Robert Blackburn, a legal

academic, published a book: *Towards a Constitutional Bill of Rights for the United Kingdom*²⁸. The introduction dealt with: “The Human Rights Act: The first step towards a constitutional Bill of Rights for the UK”.

The idea was articulated erroneously – even by judges – that the Labour government wanted to incorporate the ECHR. Strangely, the idea of two stages was simply forgotten – or suppressed?

International law comprises: customary international law; and treaty law. In the UK, we start with domestic law. Two systems of law make us a dualist state, as opposed to a monist one (where all law flows together). Customary international law historically is incorporated in domestic law, through UK courts recognizing rules. Not so treaty law. Here, the doctrine of parliamentary sovereignty pre-empts the executive effectively legislating through its conduct of international relations on behalf of the UK state. Thus, parliament has to transform treaty law into domestic legal rules, through often scheduling a multilateral international agreement to a domestic statute.

At some point, the term incorporation substituted for transformation with regard to the ECHR.²⁹ But incorporation is not what happened with the HRA 1998.

Section 1 defines Convention rights as comprising, in subsection (1): Articles 2 to 12 and 14 of the ECHR; plus parts of the first protocol; plus parts of the sixth protocol; “as read with Articles 16 to 18 of the Convention.” These are set out in schedule 1 as ‘The Articles’. Human rights remain those of the ECHR, less Article 13 (right to an effective remedy), the HRA 1998 being the domestic alternative to enforcement at Strasbourg. The long title of the HRA 1998 begins: “An Act to give further effect to rights and freedoms guaranteed under the [ECHR]”. The original effect was arguably through statutory interpretation, where judges assumed that parliament would not legislate, without making it express, against human rights in the ECHR. Further effect defines how human rights make it into domestic law. It is most certainly not through incorporation.³⁰

Section 2 (interpretation of Convention rights) made clear that domestic courts were not bound by Strasbourg jurisprudence: “(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the [ECtHR] ... whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.” “Take into account” is well-understood statutory language. And the domestic court is given express discretion: “in the opinion of the court or tribunal”.³¹

The Belfast Agreement: a distraction

The Belfast Agreement of 10 April 1998 is in fact two agreements: a bilateral UK/ROI international agreement; and a multilateral agreement of “the participants in the multi-party negotiations” – which included the two governments! The relationship between the two agreements is articulated in Article 2 of the bilateral agreement: “The two Governments affirm their

²⁸ London.

²⁹ I suspect: Anthony Lester, author of *Democracy and Individual Rights*, Fabian Tract 390, February 1969.

³⁰ As explained firmly by Kerr J, in *R (on the application of Minto Morrill Solicitors) v Lord Chancellor* [2017] EWHC 612 (Admin).

³¹ I am the author of an updating article for Thomson Reuters, entitled ‘Interpretation of Convention rights: Human Rights Act 1998 s2’: <https://austenmorgan.com/wp-content/uploads/2023/06/Interpretation-of-Convention-rights-Human-Rights-Act-1998-s2.pdf>.

solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement.” The latter is a political agreement. A provision only takes legal effect through the bilateral agreement, based upon its interpretation. The words “and where appropriate implement” contain an important meaning in the bilateral treaty.

In the rights, safeguards and equality of opportunity section of the multi-party agreement, there is the following provision: “The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”³²

The discussion above shows that the UK did not incorporate the ECHR into UK law. It cannot, therefore, have incorporated anything into Northern Ireland law. Is it therefore in breach? On 10 April 1998, the position regarding the government’s Human Rights bill was as follows: November 1997 to February 1998 in the House of Lords; 16 February 1998, second reading in the House of Commons; remaining stages, May to October 1998. The Belfast Agreement does not mention the Human Rights bill, with second reading in the House of Commons completed. Aside from any explanation based upon the participants being unaware of the parliamentary proceedings, there is an important constitutional reason: the executive could not, in a bilateral international agreement, promise enactment of the Human Rights bill, when the legislation was before parliament. To that extent there is a separation of powers in domestic law. The literal reference to the ECHR is not to its form as a multilateral treaty, but to a content of legislated human rights domestic protection.

The key question is: what did the UK government agree with the ROI government, as regards human rights protection in Northern Ireland? It promised – in keeping with *Rights Brought Home* (Cm 3782, October 1997) – domestic judicial remedies: in other words, the ability to go into the Northern Ireland courts, in addition to the previous option of only going to Strasbourg. The Belfast agreement did not commit the UK to remaining a state party to the ECHR forever. Nor did the UK agree with the ROI, that the human rights bill – later the 1998 Act – would be the only way of creating domestic judicial remedies. It would have been an extraordinary sacrifice of state sovereignty, if the UK had promised the ROI (through the Belfast agreement) to: one, never reconsider its membership of the Council of Europe; and two, never to go beyond the forthcoming HRA 1998 – in a context where there was a two-stages concept, in and around the Labour Party, of human rights protection for the UK.³³

³² Human rights, para 2.

³³ The following case is relevant for the analogy of the EU, as understood by nationalists and unionists: *R (Miller) v SoS for Exiting the EU* [2017] UKSC 5 [2017] 2 WLR 583 paras 126-152; this case was followed in: *In the Matter of an Application by James Hugh Allister and Others for Judicial Review (Northern Ireland)* [2023] UKSC 5 [2023] 2 WLR 457 paras 16, 17, 36, 60, 81, 83, 84.

A UK Bill of Rights

A UK bill of rights, first conceived in the 1990s in Labour circles, was taken up by David Cameron, shortly after winning the leadership of the Conservative Party in December 2005. Its progress may be noted:

- (1) David Cameron's speech to the centre for policy studies, on 26 June 2006;
- (2) a bill of rights commission of lawyers (including non-party members), in 2007-10;³⁴
- (3) Westminster's joint committee on human rights published an outline of a UK bill of rights and freedoms in 2008;
- (4) – and after the formation of the Cameron/Clegg coalition in May 2010 – a Conservative/Liberal Democrat government commission chaired by Sir Leigh Lewis, March 2011 to December 2012;
- (5) the report of the coalition commission, *A UK Bill of Rights?: the choice before us*, 2 vols London December 2012. A majority, including the chair, endorsed the idea. Lord Lester QC was part of the majority. Baroness Kennedy KC and Philippe Sands KC dissented, raising the question about some Conservative commissioners being anti-human rights;
- (6) a Conservative Party manifesto commitment in May 2015 to replace the HRA 1998 with a domestic bill of rights;
- (7) the appointment of Michael Gove as Lord Chancellor (with Lord Faulks KC and Dominic Raab as junior ministers) and preliminary work on a UK bill of rights – overtaken by work on the Brexit referendum;
- (8) a manifesto commitment in November 2019, to appoint a constitution, democracy and rights commission³⁵ – rights after the Brexit referendum assuming a constitutional character;
- (9) Robert Buckland KC served as Lord Chancellor, July 2019 to September 2021 (until replaced by Dominic Raab as Deputy Prime Minister) – he frustrated any serious constitutional reform, wittingly or unwittingly;
- (10) the publication on 14 December 2021 of: *The Independent Human Rights Act Review*, CP 586 (at an extraordinary 580 pp), chaired by Sir Peter Gross, a retired court of appeal judge turned full-time commercial arbitrator;
- (11) and on the same day, a Ministry of Justice consultation document, *Human Rights Act Reform: a modern bill of rights*, CP 588 (at a more modest 123 pp);
- (12) the first reading of Dominic Raab's Bill of Rights bill on 22 June 2022. The HRA 1998 was to be repealed. The bill awaited a legislative slot; ... and (finally or not)
- (13) Dominic Raab's resignation on 21 April 2023, following Adam Tolley's report of the previous day on bullying (at a skeletal 48 pp because his detractors were not identified³⁶).

A number of points may be taken about the years 2006-23, with the Conservatives in opposition and then government. First, there is no evidence

³⁴ I was a member of this commission.

³⁵ This led me to write the book mentioned on the title page.

³⁶ See further, Austen Morgan, 'Unseating Lord Chancellors', *Counsel Magazine*, June 2023, pp 31-33.

of an anti-human rights campaign (alleged by the minority in December 2012). Second, the mood of Conservatives was reflected in the senior courts of the UK, with the opening in 2009 of the judicial dialogue with Strasbourg – whereby the UK Supreme Court stood up to Strasbourg and the ECtHR retreated. Third, Boris Johnson deserves to be criticized over the role of Robert Buckland KC in 2019-21³⁷. His first Lord Chancellor foregrounded lawyers reforming the law, ignoring Conservative political criticisms of judicial review and human rights activism. Fourth, Dominic Raab was destroyed unfairly, by *inter alia* Ministry of Justice officials who had worked seemingly with the human rights community on the Gross report.

Conclusion on Human Rights

There is a view that Dominic Raab should have sought simply to repeal the HRA 1998, thereby restoring the so-called old constitution.³⁸ I disagree with this. It still leaves the ECHR in place. More importantly, it would have returned us to the position in 1966 to 2000, when the ECtHR determined our human rights.

Ideally, I favour the updating of the ECHR, domestically and not through the Council of Europe. That remains my preferred position.

However, the ECHR has been in place since 1950, and it has provided our human rights, through the HRA 1998 since 2 October 2000. There is a legal view that that produces legal certainty. I am not, of course, referring to the ECtHR's doctrine of a living instrument, meaning Strasbourg could decide anything at any time without prior discussion.

There is a strong argument for going back to the Raab Bill of Rights bill of 22 June 2022, because it was an achievement to get that far, and it could be progressed with renewed political energy. If that is not to be the starting point, then I do favour a *de novo* bill of rights drafted domestically.

If the ECHR is to continue, as under Raab's bill, then a priority must be the re-engineering of a person-to-person horizontal effect, complementing the current anti-state vertical effect.

However parliamentarians discuss the topic – with more time for legal reflection in the House of Lords – the real problem remains the human rights community. The Gross report of December 2021 is no basis for proceeding. And the lesson should be learned from Robert Buckland's unsuccessful implementation of the 2019 manifesto commitment, which he frankly undermined, intentionally or not.

The death knell of Strasbourg may have begun to sound in London on 14 June 2022, with an important legal event.

In April 2022, Boris Johnson and Priti Patel had agreed the Rwanda plan, to deter small boats continuing to cross the channel. A legal challenge began in September 2022, reaching the Supreme Court in October 2023.³⁹ The government lost its appeal on 15 November 2023, but, following the sacking of Suella Braverman, the prime minister bounced back with an amended plan, involving a proposed treaty with Rwanda and further domestic legislation.

37 A biography quotes him as saying of his second Lord Chancellor: "what's all his crap about a Bill of Rights?": Anthony Seldon & Raymond Newell, *Johnson at 10: the inside story*, London 2023, p 495.

38 Richard Ekins, 'We had rights before the Human Rights Act', *Unherd*, 15 December 2021; "Under Lord Reed, the Supreme Court itself is pushing back against judicial activism", *ConservativeHome*, 17 December 2021.

39 *R (AAA [Syria]) v SoS home department* [2022] EWHC 3230 (Admin) [2023] HRLR 4; [2023] EWCA Civ 745 [2023] 1 WLR 3103; and [2023] UKSC 42.

The Home Office had sought to send a first flight to Rwanda before the litigation. On 11 June 2022 – with the flight scheduled for three days later – Swift J refused an injunction. So too did the court of appeal, and the Supreme Court. UK lawyers then turned to Strasbourg; a single judge, without a hearing, effectively stopped the flight under the rules of court (Rule 39 on interim measures).⁴⁰ The UK stopped the removal, and continued in a similar vein even after the expiry of the Strasbourg interim measure. The question is: does one prefer the reasoned, albeit negative, decisions of UK judges or the unreasoned Strasbourg one ... which one better exemplifies the rule of law?

.....

Anti-discrimination Law

Anti-discrimination law – though few will believe it – began in the UK, and continued from the EU. Also, New Labour resisted the idea of a single equality bill for Great Britain⁴¹: Tony Blair, with Peter Mandelson, stood up to pressures successfully; not so Gordon Brown, for whom the EA 2010 is his greatest unsought legislative achievement, the key decisions having been made before Mandelson's return to domestic politics⁴².

Domestic Anti-discrimination Law

The first measure was the Government of Ireland Act 1920, which affirmed religious equality in law and practice. This was inspired by the original idea of a southern parliament (with a protestant minority), which did not survive 1922. In the Northern Ireland parliament, until 1972, and with a Catholic minority, there was little recognition of this equality right in the so-called partition legislation.

There followed in Northern Ireland – mainly under direct rule – a gradual extension of protection against discrimination: on the ground of religious belief or political opinion against public authorities, in 1973 and 1998; so-called fair employment in the public and private sectors, in 1976, 1989 and 1998; sex discrimination, 1976 and 2005; disability discrimination, 1995; race relations, 1997 and 2003; sexual orientation, 2003; and age, 2006.

This pattern was inspired by primary legislation in Great Britain: on race in 1968, 1976 and 2000; on equal pay in 1970; on sex discrimination in 1975 and 1986; and on disability in 1995 – up until 2000. The rest of the UK did not reproduce the religious belief or political opinion ground.

EU Anti-discrimination Law

But the pattern in Northern Ireland above was also shaped by EU law, following the law in Great Britain. Surprisingly, this took some time to develop in Brussels. There was a 1975 directive on equal pay, and a 1976 directive on sex discrimination. That was it, for the 1970s to 1990s.

Then, in 2000, things changed. The European treaties progressively provided for the equal treatment of men and women. Sex discrimination was

⁴⁰ Richard Ekins KC (Hon), *Rule 39 and the Rule of Law*, Policy Exchange, London 2023.

⁴¹ There was a separate movement for a single equality bill in Northern Ireland. When that failed politically, proponents avoided calling for the extension of the EA 2010 to Northern Ireland.

⁴² He was a European commissioner in 2004–08.

addressed progressively by the CJEU. Article 13 EC of the 1992 Maastricht treaty (as amended by the 2001 Nice Treaty) empowered the European Council, from 1 May 1999, to enact secondary EU legislation “to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sex orientation”. This was six EU grounds, and there was an aspiration to tackle all discriminations together. There following a single directive, separating off race and ethnic origin: Council Directive 2000/43/EC. There was some special pleading by opponents of racism. The main directive – as envisaged – was: Council Directive 2000/78/EC. But it was not universal. Sex was also separated off, with the 1975 and 1976 directives above being joined by: directives in 2002, 2004 and 2006. There was more special pleading, this time by opponents of sexism.

Two points may be made. First, EU law remained focussed on anti-discrimination prohibition, and did not, in 2000, re-orientate to equality law. Second, it is difficult to avoid the leading role played by the equal treatment of men and women principle, in an otherwise largely legal desert before 2000.

Back to Great Britain

EU law was transposed into domestic law in Great Britain through principally delegated legislation (domestic regulations): race in 2003; religion or belief in 2003; sexual orientation in 2003; sex in 2005 and 2008; age in 2006; and sexual orientation again, in 2007⁴³. The 2000s was the decade of this EU law. Again, the transpositions were particular, and not integrated. And again, sex had priority. Above all, the unifying concept of the transpositions was employment equality, in Great Britain and in Northern Ireland.

In 2006, still under Tony Blair, parliament enacted the Equality Act 2006. While this tinkered with aspects of anti-discrimination law, it principally established the CEHR, the commission for equality and human rights. It replaced a number of equality bodies, and tied equality to human rights. The first chairman designate was Trevor Phillips, a journalist – with roots in Guyana though he was born in London – , who was a Labour Party member.

A Single Equality Bill?

By 1997, there was a mishmash of anti-discrimination law, with more – much more – due to arrive from the EU. Thus, the idea of consolidation, which was too often presented as simplification, was in the air. Given New Labour was cultivating business, it was asserted that there was a business case for a single equality bill (not that many companies were seen to be clamouring for it).

Among the reports generated after 1997 were:

- a Cambridge university independent review, led by Prof Bob Hepple QC in 1999-2000, with Anthony Lester QC chairing an advisory committee, which led to Bob Hepple, Mary Coussey & Tufyal Choudhury, *Equality: a new framework* (Oxford 2000), and an unsuccessful private member’s bill from Lord Lester in the House of Lords;

⁴³ As a result of the EA 2006.

- a discrimination law review in 2005-07, initiated by the department for trade and industry, which moved to communities and local government, the women and equality unit of the latter department eventually publishing *A Framework for Fairness: proposals for a single equality bill for GB* in June 2007;
- an equalities review in the cabinet office, in 2005-07, with Trevor Phillips chairing a small panel, and reporting in February 2007 under the title *Fairness and Freedom*, a report which took a much wider historical and social view of change based upon the so-called capabilities approach of Amartya Sen, the Nobel economics laureate, and others;
- the CEHR was established in October 2007, a moment when the concept of diversity entered the vocabulary of politics. A minority of five commissioners was to turn against Trevor Phillips (who was reappointed in 2009), and they would resign during the passage of the bill over the concept of fairness. The equalities review had beaten the discrimination law review to publication. And the CEHR narrowly beat the women and equality unit becoming the government equalities office ('GEO'), in the department for communities and local government in October 2007 (on the fifth floor of Eland House with over a hundred dedicated civil servants).

Gordon Brown had become Prime Minister without an election in the Labour Party. Following the election of Harriet Harman as deputy leader, she was appointed: Leader of the House of Commons; Lord Privy Seal; and Minister for Women and (later) Equality. In October 2007, she took control of the GEO. She was joined by Maria Eagle MP and Vera Baird QC MP, who remained as solicitor general, as junior ministers.

The EA 2010 was developed in the GEO. While Gordon Brown had other crises to deal with, he left equality to Harriet Harman. In June 2008, there was a white paper, *Framework for a Fairer Future*, Cm 7431. In July 2008, she responded to the discrimination law review, which had effectively absorbed the equalities review. The star of Trevor Phillips was waning, under ideological challenge. A bill was included in the Queen's Speech in December 2008. In April 2009, it was introduced in the Commons. It ran out of time in the 2008-09 parliamentary session. Carried over, it went to the Lords in December 2009. It did not finish until 6 April 2010, the day the general election was called.

Equality Act 2010

The EA 2010, as is clear, went beyond EU anti-discrimination law, into one, not many, equalities. Recently, Kemi Badenoch – who has been Minister for Women and Equalities since October 2022 – has been using the legal distinction, shield versus sword. I understand her to mean, the EA

2010 is a shield against discrimination to be used by a victim in court; it is not a sword to fight for equality, nationally and even internationally. Here, she is effectively distinguishing black-letter law, from left-wing political views of the EA 2010 as the manifesto which has replaced socialism, whether revolutionary or social democratic.

The fall of the Berlin Wall was briefly seen as the end of history, as the triumph of liberalism and the failure of socialism: Francis Fukuyama, *The End of History and the Last Man*, London 1992⁴⁴. As a United States national, he was more concerned with the former than the latter. Fukuyama was an admirer of the EU, where social democracy coexists with Christian Democracy. Little did Fukuyama appreciate, in the early 1990s that, while Marxism would be destroyed along with international communism, a new form of radicalism in the United States and in Europe – swimming in identity politics – would emerge under the rubric equality, operationalized as EDI, standing for Equality, Diversity and Inclusion. As a writer, and only briefly an academic in the 1990s, Fukuyama may not have been in touch with intellectual currents fomenting in the academy, to emerge in the 2000s but especially the 2010s.

The EA 2010, though business probably did not realize it during enactment, involved harmonization up (and never down) – not consolidation much less simplification – in accord with an express principle of non-regression, whereby an actor would only gain and never lose in comparison with others.

The EA 2010 harmonized the law on sex, race and disability, dating from the 1970s to 1990s, but also the newer – post-2000 – protected characteristics, as they were now called, of age, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief and sexual orientation, a total of nine strands of discrimination. I should interpolate that: sex and gender are different⁴⁵; and the legislation refers only to gender reassignment discrimination⁴⁶, not simply gender. The Act covers: public and private employment; the supply of goods, facilities and services; and a great deal more (distinguished between work and non-work). The EA 2010 also included a strengthened public-sector duty to promote equality (of opportunity), and private and public voluntary positive action, permitting, say, the recruitment of a woman over an equally (or more) qualified man.

The law, hitherto, had prevented victims of discrimination and their champions from discriminating in turn. The EA 2010 crossed a line into conscious social engineering, with a sociological concept of equality (and women in the lead), which risked – in 2010 – falling foul of domestic and/or EU law.

Though few if any noticed it during enactment, the principal criticism of the bill came from the government's own national equality panel. In 2008, ministers had appointed a ten-strong panel of independent academic economists. It was led by Prof John Hills, at the centre for analysis of social exclusion at the London School of Economics. It reported: *An Anatomy of Economic Inequality in the UK*. "How does who you are", it asked, "affect the resources and opportunities available to you?" It is not clear when the report

⁴⁴ An expansion of his essay, 'The End of History', published in the summer of 1989.

⁴⁵ Unfortunately, there is a legal error in section 7 (gender reassignment). Subsection (1) refers to reassigning 'sex' "by changing physiological or other attributes of sex". The two uses of sex cannot be the same. This has not been addressed properly by the courts. There are only two related Scottish cases, dealing with devolved legislation: Gender Representation on Public Bodies (Scotland) Act 2018: For Women Scotland Ltd v Lord Advocate [2021] CSOH 31; [2022] CSIH 4; For Women Scotland Ltd v Scottish Ministers [2022] CSOH 90; [2023] CSIH 37. Lady Haldane, in the latter case in the outer house (upheld recently in the inner house), held that sex follows gender where there is a full gender recognition certificate. This case, decided on 13 December 2022 by Lady Haldane, may have raised the question of biological man or woman and therefore biological sex – which was referred to the CEHR by Kemi Badenoch – and lead to another internal challenge to a chair, Baroness Falkner, a former Liberal Democrat; fortunately, the hue and cry against the chair was called off in October 2023 following Kemi Badenoch establishing a legal inquiry into the internal dispute.

⁴⁶ Query whether with or without a full gender recognition certificate?

was submitted to government. Ministers, however, did not publish it until January 2010, towards the end of parliamentary scrutiny, with a simultaneous response re-presenting the findings in a light favourable to the bill.⁴⁷

The findings of the report included: “the large inequality growth between the late 1970s and early 1990s [when Labour was not in office] has not been reversed [despite Labour being in office from 1997 to 2010]”. Further, “differences in outcomes between the more and less advantaged *within* each social group ... are much greater than differences between groups”. Perhaps most damningly: “the inequality growth of the last forty years is mostly attributable to growing gaps within social groups”. And finally: “A fundamental aim of people with widely differing political perspectives is to achieve “equality of opportunity”, but doing so is very hard when there are such wide differences between the resources which people and their families have to help them fulfil their diverse potentials.”

Parliamentarians could have, but did not, use the national equality panel’s report to seriously challenge the basis for legislating. The academics had looked at socio-economic inequalities, and found differences within groups to be greater than between groups. But anti-discrimination law, valid in itself to combat unfairness, was being pushed towards equality, for, say, elite women, pushing through the glass ceiling, in the name of poorer women, who would not be following them simply because of equality law.

The term positive discrimination is used erroneously to refer to the advancement of groups, often women, usually at the expense of men, based upon alleged under-representation in a section of the labour market. The correct scientific term is reverse discrimination, where the disadvantaged are permitted to do to their ‘oppressors’ what they alleged they have suffered. Such social engineering is, of course, unlawful, and falls foul of equality law. The protected characteristic of sex in the EA 2010 applies to men and women – equally! There is a term positive action, which purports to be action in favour of a disadvantaged group which does not breach anti-discrimination law. The practice has often included reverse discrimination, much favoured by lay members of professional bodies – including those which now appoint our judges.

Labour market economics is outside the remit of this paper, but there is one statistic of tremendous importance. Entry to higher education – the route to elite employment including the professions – is 57 per cent female.⁴⁸ This has been the figure since 2016-17. The absolute numbers in 2020-21 (the last available) were: 1,568,795 women to 1,177,525 men. No doubt many reasons can be given for this disparity. My legal point is simply: if it were the other way round, there would be a great outcry of pro-women agitation for parity; when young men are the apparent losers, this is justified as reparative, and not treated as a problem to be solved. My solution would not be more social engineering, but genuine equal opportunities through the law.

The solicitor general, Vera Baird QC, revealingly wound up second reading of the bill in the House of Commons, on 11 May 2009: “For poorer people, black, white, old, young, straight, gay, women or men, disabled or

⁴⁷ Including: “Public policy introduced by this government since 1997 has played a major role in halting the trend of rising inequality observed during the 80s and has made Britain a fairer country.” The report said the exact opposite!

⁴⁸ Higher Education Statistics Agency (Cheltenham), *Higher Education Student Statistics: 2020/21*, 25 January 2022, table 5.

able bodied, this Bill will enlist public authorities to come to your aid and alleviate your socio-economic disadvantage. For believers and non-believers struggling with bias, this Bill will help you. For our gay, lesbian and transgender fellow citizens, we honour your struggle and we are legislating to see it fulfilled: you may think that this Bill is for you. To disabled and older people: this Bill is undoubtedly yours ... To black and minority ethnic people we say: here is your future. Heightened opportunities and fair treatment are in sight: this Bill is for you. To women – half the population, hamstrung by low pay and historic discrimination – here at last is a great lever to change culture. This Bill is undoubted for us.”⁴⁹

Rarely has a parliamentary bill been so oversold, and by a government law officer to boot. Here was the epitome of identity politics, with the listing of just about every group that could be mobilized evangelically. Logically, a government might have provided all those results, across the totality of government policies. But not with the EA 2010, consolidating – and expanding at every opportunity – existing anti-discrimination law. Missing was: the economy and serious growth; international and domestic security and defence; the full range of domestic policies including extensive social spending; fiscal and monetary policy etc. etc. And ultimately, a government determined upon equality at any cost and regardless of all other circumstances.

The baby boomers of 1945 and after had benefited, under the Attlee governments of 1945-51, followed by Butskellist⁵⁰ Conservative administrations, by access to higher education; the effect of anti-discrimination law was minor on this social mobility.

The rhetoric of the bill, despite enactment, became the reality, with the EA 2010 as the manifesto for radical politics. Find a protected characteristic. Embellish it, drawing on others. Add in a generalized harassment, and, for good measure, an overblown victimization not really related to a legal claim.

Entry into Force

Royal assent was 8 April 2010. The general election was on 6 May 2010. It took some days for the Cameron/Clegg coalition to be formed. Theresa May was appointed Home Secretary. She also became Women and Equalities Minister.⁵¹ The coalition government, if it had chosen by agreement, could have left Labour's EA 2010 on the parliamentary shelf. It would still be there!

There was to be a series of at least twelve commencement orders, between 5 July 2010 and 7 February 2017. Much of the Act was brought into force, on 1 October 2010. But the process would continue for years.

It is important to appreciate that not all the Act is yet in force. The following positions apply:

- **not yet in force:** sections 14, 106, 160, 163, 164, 198-201;
- **only partially in force:** sections 1, 2, 3, 36, 38, 161, 191, 196, 211;

⁴⁹ House of Commons, *Hansard*, Vol. 492, cols 646-7.

⁵⁰ A merger of the names Rab Butler (1951-55) and Hugh Gaitskell (1950-51), a labour chancellor who was succeeded by a conservative, seemingly seamlessly.

⁵¹ May 2010 to September 2012. She was followed by: Maria Miller (September 2012 to April 2014); Nicky Morgan (April 2015 to May 2015); and Sajid Javid for equalities only (April to July 2014).

- **amendments pending:** sections 64, 66, 67, 104, 120, 162, 183;
- **and already repealed:** sections 125, 138, 140A, 184, 186, 203, 204.

Among the provisions held back (in whole or in part) are: public sector duty regarding socio-economic inequalities (ss 1-3); combined discrimination (s 14); information about diversity of candidates (s 106); taxi accessibility regulations (s 160); family property law (ss 198-201).

Conclusion on Equality

The HRA 1998 was one thing; the EA 2010 is very different. While it is possible to think about the EU's role, it is not so easy to formulate a domestic strategy.

It is possible to affirm domestic anti-discrimination protection, in the 1970s to 1990s, before the EU became involved belatedly in 2000. However, it is not so easy to dismiss the EA 2010.

One has, I think, to accept the nine protected characteristics, as parliamentary counsel chose to conceptualize protected groups but really individuals. Most evolved from men and women in EU law: sex; sexual orientation; marriage and civil partnership; pregnancy and maternity; gender reassignment – that is five of the nine. Other immutables were: race; (arguably) disability; and age. Religion or belief (hitherto only applicable in Northern Ireland before 2000) is cultural.

The key objective should be the avoidance of social engineering, and the preservation of anti-discrimination protection – to allow individuals to bring cases in employment tribunals and the county court.

The elements of the EA 2010 are more debateable: direct discrimination, in sections 13 to 18, is conduct which deserves to be prohibited; indirect discrimination (section 19), with a defence of justification, is more debateable, given it turns upon an alleged “provision, criterion or practice”, abbreviated to PCP; the add on of harassment (section 26) draws in a great deal of other conduct; while victimisation (section 27) can be more clearly justified by its employment relations origins.

There remains a legal problem with the theory of discrimination. This is whether there is a mental element or not. UK case law in the 1990s discounted such an aspect of legal analysis.⁵² A person, untroubled by prejudice or negative feelings, could be found liable for, not just indirect discrimination, but even direct discrimination. That is perplexing, but not to an ideologue who believes something simply exists. The emphasis in equality law is upon treatment, and the idea of more or less favourably. However, the nine protected characteristics are very different. And it is not possible to theorize the idea of a comparator for every direct discrimination case. The problem for tribunals and courts is causation: what caused what? Originally, the term was “on the ground of”. It is now: “because of a protected characteristic”.

⁵² *James v Eastleigh BC* [1990] 2 AC 751 HL; *Nagarajan v London Regional Transport* [1999] 4 All ER 65.

A great number of people attributes their disadvantage, or perceived unfavourable treatment, to sex, race or age (to name just three), but fails to convince judges of this on a daily basis; other benign (non-discriminatory) reasons may be found from the evidence – meaning the employer succeeds in his/her defence. There is, of course, a defence to alleged indirect discrimination (inspired by EU law): namely, proportionate means to a legitimate aim, both of which have to be specified and accepted by a tribunal or court.

Future Policy

It is possible to present ideas, with short- , medium – , and long-term perspectives within one, or maybe two, parliaments.

In general

- short term: include the 2019 commitment to a constitution, democracy and rights commission (probably inspired by Sir Geoffrey Cox) in the next manifesto;
- short term: include a UK bill of rights in the next manifesto, to again replace the HRA 1998;
- short term: include a revision of the EA 2010 in the next manifesto, to abolish reverse discrimination etc.

HRA 1998

- all terms: ignore the December 2021 report of Sir Peter Gross, marginally reforming the HRA 1998;
- all terms: ignore the idea of simply repealing the HRA 1998, briefly mentioned by some constitutionalists;
- short term: return to Dominic Raab's Bill of Rights bill of June 2022, based upon the ECHR;
- medium term: decide between updating the ECHR for a modern UK, or relying upon the 1950 text severed from the ECtHR;
- medium term: decide between withdrawing from the Council of Europe, or denouncing the ECHR and risking effective expulsion (under Article 8 of the statute);
- long term: enact a UK bill of rights in the next Conservative parliament, to be administered by UK judges only, with Strasbourg jurisprudence relegated by inclusion in (all) international human rights law;

- long term: the replacement of Strasbourg jurisprudence – by challenging woke values – with a principle of individual dignity, whereby all are treated constitutionally the same.

EA 2010

- short term: the sex/gender confusion in the EA 2010 sections 7 and 16 needs amending;
- short term: reform of the EA 2010 – repeal of sections 104 to 106 on political parties; repeal of sections 158 to 159 on positive action; repeal of sections 149 to 157 on public sector equality duty;
- medium term (with a Labour government): be alert to further entry into force of sections discussed earlier in the text;
- medium term: accepting the idea of protected characteristics, go for stripping back to direct discrimination;
- medium term: be alert to social engineering, and the effects of reverse discrimination on, in particular, young men;
- long term: the replacement of statutory equality law – by challenging woke values – with a principle of genuine equality, whereby all are treated constitutionally the same (perhaps based upon emerging US Supreme Court’s jurisprudence).

Afterword

My title is taken from Charles Dickens’ novel, *A Tale of Two Cities*, first published in 1859, which is set in London and Paris before and during the French revolution. The English view of France mid-nineteenth century abounds.⁵³ *A Tale* opens with the Manichean line: “It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going the other way”.

⁵³ Including Edmund Burke, a whig MP of Irish background, *Reflections on the Revolution in France*, London 1790. Burke was criticized by: Mary Wollstonecraft, *A Vindication of the Rights of Men* (London 1790); and Thomas Paine, *Rights of Man* (London 1791 & 1792).

Other publications by Austen Morgan

THE NORTHERN IRELAND TROUBLES

STRASBOURG'S ARTICLE 2 IN LEGACY CASES

A LEGAL ESSAY | Austen Morgan

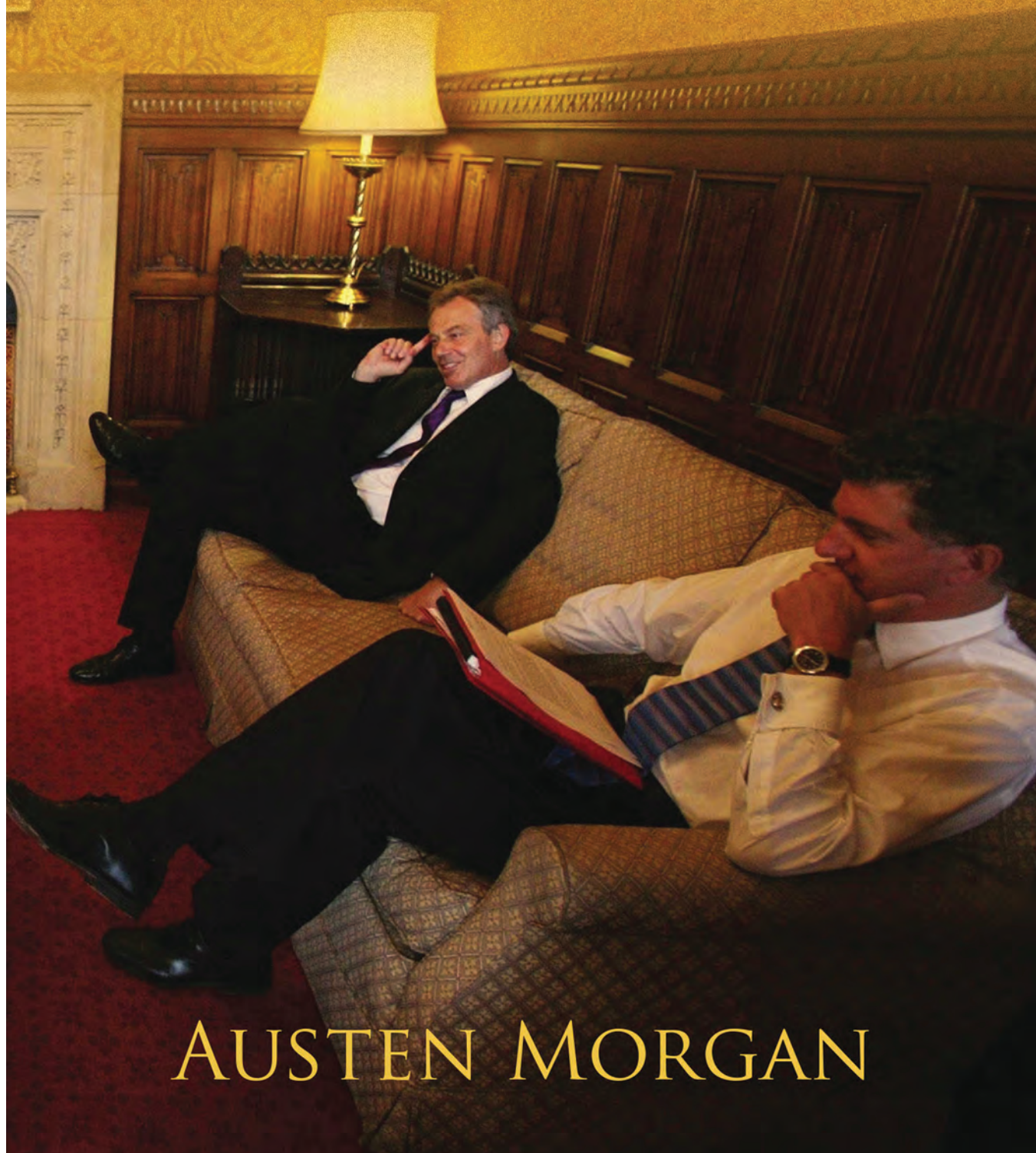


**MALONE HOUSE
GROUP**

Finding a way forward on Legacy
in Northern Ireland



TONY BLAIR *and the IRA*



AUSTEN MORGAN

Dr Austen Morgan is a barrister in London and Belfast: he practises from 33 Bedford Row in Holborn. His most recent book, *Pretence: why the UK needs a written constitution*, was published by The Black Spring Press Group on 30 May 2023.

New labour left us the legal legacies of the Human Rights Act 1998 (Tony Blair) and the Equality Act 2010 (Gordon Brown). In 13 years, the conservatives failed to deal with the former – they never even considered the latter.

In this legal essay, Austen Morgan, adopting a constitutional approach, challenges the human rights community and the equality industry, for tipping variously into woke religion. He reaffirms the commitment to a UK bill of rights, distanced from Strasbourg, and to anti-discrimination law, shorn of special pleading and reverse discrimination.



ISBN 978-1-9160194-1-6 9 00000>
9 781916 019416