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The Rise and Fall of the UK Human Rights Act

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I read my law in Cambridge from 1963 to 1966 and in our first year we had an introduction to public international law. It was all about the law of war and the law of the sea. I do not remember a single reference to International Human Rights Law. It was solely concerned with the relationship between states, so I gave it up as soon as I could.

This is of course not at all surprising. The modern International Human Rights Law project was kicked off in the Charter of the United Nations in 1945. The Preamble declares that the people of the United Nations are determined 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small'. Among the Purposes of the United Nations listed in article 1 are 'to achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'. Note the emphasis on international co-operation which chimes with the UN's emphasis on the sovereignty of the nation state. Then came the Universal Declaration of Human Rights in 1948, with its ringing declaration 'that all human beings are born free and equal in dignity and rights' and its ambitious list of rights, which has formed the basis of many later human rights instruments, whether from the United Nations itself, or from regional bodies, or indeed in national constitutions. But the UN's enthusiasm for binding human rights instruments quickly waned and did not revive until the 1960s.

In the meantime, the Council of Europe, then only the twelve democracies in western Europe and Turkey, decided to go it alone and produced the European Convention on Human Rights in 1950. The Preamble reaffirmed 'their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights on which they depend'. Whether the notions of 'political

democracy' and 'fundamental human rights' can be reconciled with one another is open to debate. Conor Gearty, for example, has argued that there is an inherent tension between the human rights project and political democracy.[1] Democracy means that the will of the majority, as expressed through their democratically elected representatives, must prevail. The human rights project means that there are certain rights which are protected against violation even if the majority wills it.

The Convention came into force in 1953, but until 1998 member states could choose whether or not to accept the jurisdiction of the European Court of Human Rights. The United Kingdom did not do so until 1966. The Convention gives the Court jurisdiction, not only over complaints brought by one member state against another, but also over complaints brought by 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation' by a member state. There have been cases between member states – most notably, for us, the case brought by Ireland against the United Kingdom complaining that the 'five techniques' used by the British in interrogations in Northern Ireland violated the article 3 prohibition of 'torture' or 'inhuman or degrading treatment or punishment'. In 1978, the Court held that the techniques did amount to inhuman or degrading treatment but not to torture.[2] The British judge[3] dissented, save in respect of the specific violations which the United Kingdom did not dispute, and voiced his 'emphatic opinion that if a commendable zeal for the observance and implementation of the Convention is allowed to drive out common sense then the whole system will end by becoming discredited'. His particular concern was enlarging the terms of the Convention 'so as to include concepts and notions that lie outside their just and normal scope'. That is a complaint which is frequently heard today.

More numerous than complaints by states, however, have been complaints by individuals, and it is in these cases that the Court's doctrines have been most clearly established. Principal amongst these is the notion, established in *Tyrer v. United Kingdom*,[4] that the Convention is a 'living instrument' which must develop to keep pace with changing social

[1] C. Gearty, 'Spoils for Which Victor? Human Rights within the Democratic State' in C. Gearty and C. Douzinas (eds.), *The Cambridge Companion to Human Rights Law* (Cambridge, 2012), 214 at 215.

[2] *Ireland v. United Kingdom* (1979–80) 2 EHRR 25. The Irish asked the Court to revise its judgment after new evidence came to light in 2014, but the Court declined to do so.

[3] Sir Gerald Fitzmaurice.

[4] (1979–80) 2 EHRR 1.

attitudes and conditions. There is nothing new in this to UK eyes. In *Edwards v. Attorney General of Canada*,[5] the Judicial Committee of the Privy Council held that, while the word 'persons' in the British North America Act of 1867 might not have included women at the time, by 1929 it did include them: the British North America Act had 'planted in Canada a living tree capable of growth and expansion within its natural limits' and their Lordships did not wish 'to cut down its provisions by a narrow and technical construction but rather to give it a large and liberal interpretation'.

This approach was adopted in *Ministry of Home Affairs v. Fisher*,[6] where the Judicial Committee held that the word 'child' in the Constitution of Bermuda included a child born to unmarried parents, although at that time it would not have done so if contained in an ordinary Act of Parliament. But a Constitution was different:

> A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given rise to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

This was a firm rejection – by UK judges not noted for their radical ideas – of the American doctrine of originalism – that the text must read in accordance with the original intention of the drafters or as the original readers would have understood it. So we should not have been surprised or dismayed when the European Court of Human Rights adopted a similar approach.

The drafters of the European Convention were of course influenced by the content of the Universal Declaration. But they also had in mind the fundamental freedoms which the British had fondly assumed to be their birthright since at least the days of Sir Edward Coke in the seventeenth century and Sir William Blackstone in the eighteenth century. So it came as something of a shock when the United Kingdom began to lose cases in Strasbourg: early examples were *Golder*,[7] holding that it made no sense to

[5] [1930] AC 124, 136.
[6] [1980] AC 319, 329.
[7] (1979–80) 1 EHRR 524.

require a fair trial in the determination of civil and criminal cases if there was no right to go to court in the first place, so one was implied into article 6; *Tyrer*,[8] holding that judicially ordered corporal punishment of juveniles violated the prohibition of degrading punishment in article 3; *Sunday Times*,[9] holding that an injunction prohibiting publication of articles about the thalidomide scandal because of the risk of contempt of court violated the freedom of expression protected by article 10 (prompting another dissent for the British judge, who argued that the aim of protecting the authority and independence of the judiciary had been added at British insistence because of our law of contempt of court, unknown to the other members); *Dudgeon*,[10] holding that Northern Ireland's continued criminalisation of homosexual acts between adult men violated the right to respect for private life in article 8; *Young*,[11] holding that dismissal for refusing to join the British rail closed shop unions violated the freedom of association protected by article 11 (thus establishing that the right to do something might also imply the right not to do it – a feature which helped us to decide the so-called 'gay cake' case in Northern Ireland[12]); *Campbell and Cosans*,[13] holding that insisting on corporal punishment in school violated the parents' right to have their children educated in accordance with their religious or philosophical beliefs under article 2 of the First Protocol; *Silver*,[14] holding that censoring prisoners' letters to MPs and solicitors (but not to others) violated the right to respect for correspondence in article 8; and *Malone*,[15] holding that the unregulated common law allowing the police to tap private phones violated the respect for home and private life in article 8. I could go on – and note that by no means all of these were the result of primary legislation about which the UK courts could do nothing; some stemmed from the common law which might perhaps have been developed to meet the situation. Added to these shock defeats were several friendly settlements reached after the Commission had found a violation.

[8] (1979–80) 2 EHRR 1.
[9] (1979–80) 2 EHRR 245.
[10] (1980) 3 EHRR 40.
[11] (1981) 4 EHRR 38.
[12] *Lee v. Ashers Baking Co. Ltd* [2018] UKSC 49, [2020] AC 143.
[13] (1982) 4 EHRR 293.
[14] (1983) 5 EHRR.
[15] (1985) 7 EHRR 14.

Calls to incorporate the Convention into UK law began even before these shocks. Anthony Lester argued for this in a Fabian Tract, *Democracy and Individual Rights*, in 1968. Sir Leslie Scarman advocated it in his 1974 Hamlyn Lectures, *English Law – The New Dimension*. In 1978, a House of Lords Select Committee voted in favour of a Bill of Rights by six to five. Between 1969 and 1997, no fewer than eleven Bills were introduced in the House of Lords, mostly by Lord Wade and Lord Lester, six of which passed all their stages in the Lords and were sent to the House of Commons. In 1987, a Conservative MP, Sir Edward Gardner, introduced a private member's Bill to incorporate the Convention into the House of Commons. In 1996, the newly appointed Lord Chief Justice, Lord Bingham, used his maiden speech in the House of Lords to argue for incorporation.

It then became Labour Party policy. Jack Straw and Paul Boateng published a Consultation Paper in December 1996, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law*. The arguments were simple and some of them have resonances today. Because their rights were not protected in the UK courts, British people had to undergo the lengthy and costly process of applying to Strasbourg. British judges were denied the opportunity of building a body of case law which was properly sensitive to British legal and constitutional traditions. The European Court of Human Rights had not been able to benefit from experience of the UK legal system and was neither sufficiently familiar with, or sensitive to, British legal and constitutional traditions. Incorporation would reduce the degree of recourse to Strasbourg. It was implicit, if not spelt out, that it would reduce the proportion of cases which the United Kingdom lost there.

I well remember the excitement amongst the judges sitting on the woolsack to hear the Queen's Speech after Labour had won the General Election in May 1997. Her Majesty announced that 'A Bill will be introduced to incorporate in United Kingdom law the main provisions of the European Convention on Human Rights'. The Bill was introduced in December, along with a white paper, *Rights Brought Home: The Human Rights Bill*.[16] This pointed out that it had been thought when we ratified the Convention that the Convention rights and freedoms were already protected in British law. But it turned out that they were not. The

[16] 1997, Cm 3782.

rights originally developed with major help from the UK government were no longer actually seen as British rights. UK judges had a very high reputation internationally, 'but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed'. With incorporation, we would be speaking the same language.

So the Human Rights Act 1998 was passed and came into force in 2000 after a massive training programme for all the judges. It did three basic things. First, it turned the rights contained in the Convention into rights in UK law: it became unlawful for a public authority to act incompatibly with a Convention right and any victim could bring proceedings for a remedy or rely upon the right in existing proceedings.[17] Second, the courts – and indeed everyone else – had a duty to read and give effect to all UK legislation in a way which was compatible with the Convention rights, so far as it was possible to do so.[18] Experience of a similar duty in EU law had taught us a number of techniques for doing this. Third, in deciding questions relating to the Convention rights, courts and tribunals had a duty to take into account the case law and decisions of the European Court of Human Rights and other Council of Europe institutions.[19] However, unlike EU law, if a provision in an Act of the UK Parliament could not be read and given effect compatibly, the courts had no power to ignore it or strike it down. The most they could do was to make a declaration of incompatibility,[20] a clear warning to Government and Parliament that the United Kingdom would lose if the matter went to Strasbourg, but leaving it to them to decide what, if anything, to do about it.

The Government White Paper did consider whether the courts should be given power to strike down incompatible provisions in Acts of the UK Parliament. After all, the European Communities Act had given them this power, so a Human Rights Act could also do so – unless and until it was repealed. Various compromise models were considered, in particular the one adopted in Canada when it decided to repatriate its Constitution and adopt a Charter of Fundamental Rights, which would allow the Supreme Court to strike down inconsistent laws. But the Canadian Parliament was allowed to pass laws 'notwithstanding' their

[17] HRA, ss. 6–9.
[18] HRA, s. 3.
[19] HRA, s. 2.
[20] HRA, s. 4.

incompatibility with the Charter rights, which the court could not strike down. In practice, very little use has been made of this power, but it is a safety valve which enables the will of the elected to prevail.

The government decided not to adopt either the EU or the Canadian solution, pointing out that the EU solution was a requirement of EU membership, whereas there was no such requirement in the European Convention. Parliamentary sovereignty should prevail. The authority of Parliament to make decisions about important matters of public policy was derived from the democratic mandate of its members, who were elected, accountable and representative. Allowing the courts to strike down Acts of Parliament would be likely on occasions to draw the judges into serious conflict with Parliament. The judges did not want this and the government had no mandate for such a change.

Quite right. The judges did not and do not want this. But that has not prevented their being drawn into conflict, if not with Parliament, then with more recent governments. By and large, the government's record of acting upon declarations of incompatibility has been impressive. There has always been intense frustration that the Convention does not allow foreign national criminals to be deported if there is a risk that they will suffer torture in the only country which will take them. Soon after the atrocities of 11 September 2001, there was legislation allowing the indefinite executive detention of suspected foreign national terrorists who could not be deported. In one of the earliest cases under the Act,[21] the House of Lords declared that this was incompatible, because it discriminated between foreign and home-grown suspected terrorists: how could detaining the foreigners be justified if it was not necessary to lock up the home-grown? To its credit, the then government allowed the legislation to lapse under its sunset clause and replaced it with something less draconian which applied to British and foreign nationals alike.

After 2010, the government became more openly critical of the Act. The only example of prolonged resistance to a declaration of incompatibility has been the blanket ban on sentenced prisoners voting, where the government held out for so long that the Council of Europe eventually gave in and accepted that some minor administrative changes would suffice. The Prime Minister declared that the idea of prisoners voting made him feel physically sick. On another occasion, when the Supreme Court declared that the inability ever to have one's name removed from

[21] *A (and Others) v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

the sex offenders' register was incompatible with the right to respect for private life,[22] the same Prime Minister introduced a remedial order to provide some machinery for doing so,[23] while questioning the sanity of our ruling and suggesting that we had forced him to do this. We had done no such thing. It was always up to Government and Parliament to decide what, if anything, to do about a declaration of incompatibility.

By then criticism of both the Strasbourg and the UK courts had been mounting. Certain sections of the media were, of course, upset that the courts were developing a tort of misuse of private information. The courts were public authorities. They had to act compatibly with the Convention rights, even in cases between private persons. So they had to balance a newspaper's right to freedom of expression against an individual's right to respect for their private life. *The Daily Mirror* was not entitled to publish photographs and details of supermodel Naomi Campbell's treatment for drug addiction.[24] But the newspapers had got used to being able to publish all sorts of private information, whether about celebrities or about ordinary people, and did not like their activities being restrained. They began to refer to the 'hated Human Rights Act'.

They were not alone. In a lecture in 2011,[25] Michael Howard, the former leader of the Conservative party, attacked the Strasbourg court for descending into the minutiae of the Convention rights and denying member states their proper margin of appreciation to interpret and apply the Convention in the light of local conditions. But he also attacked the UK courts for going beyond the Strasbourg case law in interpreting the Convention. In another lecture that same month, Jonathan Sumption QC,[26] soon to be a Justice of the Supreme Court of the United Kingdom, attacked the Strasbourg court for its detailed development of the general principles in the Convention, for deciding not only whether the member states had proper institutional safeguards for those rights but also whether it agreed with the findings of those institutions, and for attempting to apply the rights in a uniform manner throughout the

[22] *R (F (A Child)) v. Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331.

[23] Sexual Offences Act 2003 (Remedial) Order (SI 2012 No. 1883).

[24] *Campbell v. MGN Ltd* [2002] UKHL 22, [2004] 2 AC 457.

[25] Kingsland Memorial Lecture 2011, *The Human Rights Act: Bastion of Freedom or Bane of Good Government*?, https://policyexchange.org.uk/publication/the-human-rights-act-bastion-of-freedom-or-bane-of-good-government

[26] FA Mann Lecture 2011, *Judicial and Political Decision-Making: The Uncertain Boundary*, https://doi.org/10.5235/108546811799320844

forty-seven member states, despite the fact that 'the consensus necessary to support it at this level of detail does not exist'. After retiring from the Court, he expanded upon those views in his 2019 Reith Lectures.[27]

Fixing the Human Rights Act became a recurring theme of Conservative party manifestoes, although the proposals were subtly different each time. The 2010 Manifesto announced that 'to protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights'. But from 2010 until 2015 the Conservatives were in coalition with the Liberal Democrats, so this didn't happen. In 2015, they promised to 'scrap the Human Rights Act and curtail the role of the European Court of Human Rights so that foreign criminals can be more easily deported from Britain' – a more radical proposal but for a more limited purpose. Somewhat to their surprise, they won the election. Active steps were taken within the Ministry of Justice, particularly while Dominic Raab was Minister for Human Rights from 2015 to 2016. By 2017, however, not only had little progress been made on the project, but it had been overtaken by the all-consuming demands of Brexit. Thus, Theresa May's manifesto declared that

> we will not repeal or replace the Human Rights Act while the process of Brexit is under way but we will consider our human rights legal framework when the process of leaving the European Union concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next Parliament.

Understandably, most of the 2019 Manifesto was devoted to getting Brexit done, but the promise was to 'update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government'. The plan was to 'set up a Constitution, Democracy and Rights Commission' in their first year.

In fact, that didn't happen. Instead, the government first set up the Independent Review of Administrative Law under Lord Faulks.[28] This found very little wrong with administrative law, but recommended some small changes. The government then consulted on some much more

[27] *Law and the Decline of Politics*, BBC, published as *Trials of the State: Law and the Decline of Politics* (London, 2019). For my riposte, see 'Dame Frances Patterson Memorial Lecture 2019: Law and Politics – A Reply to Reith', *Judicial Review*, 24(3) (2019), 205–216.

[28] *The Independent Review of Administrative Law*, 2021 CP 407.

radical changes but retreated when these were widely condemned. The resulting Bill contained the small changes.[29] Then the government set up the Independent Human Rights Act Review under Sir Peter Gross.[30] Its remit was not to look at the particular Convention rights but at the relationships, between the UK courts and the Strasbourg court and between the various branches of government in the United Kingdom. It too concluded that nothing much was wrong. Meanwhile the House of Commons and House of Lords Joint Committee on Human Rights produced its own report on the subject.[31] This noted that the Human Rights Act had had a wide impact outside the courtroom, Whitehall and Westminster. The duty of public authorities to act compatibly with the Convention right had embedded human rights amongst public authorities and reduced the need for litigation to enforce people's rights. Far from curtailing the scope of the Act, where rights did need enforcement in the courts, this should be accessible to all. So among other things the Equality and Human Rights Commission should be given the same powers to enforce human rights as it has to enforce equality rights.

Then the government produced its own Consultation Paper, ignoring most of the careful work of the Joint Committee and the Independent Review and proposing to replace with Human Rights Act with a 'modern Bill of Rights'.[32] On the plus side, the government was still committed to remaining a party to the Convention, to retaining all the substantive rights protected under the Human Rights Act, and to fulfilling its international obligations. Two of these are vital. One is the obligation in article 13 to provide an effective remedy before a national authority for everyone whose rights and freedoms set forth in the Convention are violated. The other is to retain the right of individuals to apply to the European Court of Human Rights and to abide by any final decision of that Court. Many of those who responded to the government's consultation judged its proposals against those obligations and found them wanting. But the government went ahead and introduced the Bill of Rights Bill.

The Bill had its first reading in the House of Commons on 22 June 2022 but there was no enthusiasm for it after Dominic Raab resigned as Lord Chancellor in April 2023 and it was withdrawn on

[29] It would become the Judicial Review and Courts Act 2022.
[30] *The Independent Human Rights Act Review*, 2021 CP 586.
[31] 2021 HC 89, HL Paper 31.
[32] *Human Rights Act Reform: A Modern Bill of Rights*, 2021 CP 588.

23 June. But it is worth remembering its main features to give us some idea of the threats it posed.

First, it began with some political sloganising – unnecessary statements of the blindingly obvious designed to appeal to the most vocal critics of the Human Rights Act. Thus, 'it is the Supreme Court (and not the European Court of Human Rights) that determines the meaning and effect of Convention rights for the purpose of domestic law'. But this has always been the case. The Supreme Court, and indeed any court which finally decides a case concerning the Convention rights, already determines their meaning and effect in domestic law. Taking the case to Strasbourg is not an appeal from the decision of the domestic court. That still stands. Even if Strasbourg finds that the United Kingdom has violated the Convention rights, the interpretation arrived at by the UK court is still binding on the lower courts unless and until the higher court decides to change it. Equally obvious are the statements that judgments, decisions and interim measures of the European Court of Human Rights are not part of UK domestic law and do not affect the right of Parliament to legislate.

After that came a series of provisions designed to uncouple the United Kingdom's interpretation and application of the Convention rights from Strasbourg. The duty to take into account Strasbourg and other Council of Europe jurisprudence was to be repealed. The duty to read and give effect to legislation compatibly with the Convention rights was to be repealed. The courts were to be told they should pay particular attention to the text of the Convention and could look at the *travaux preparatoires* – a nudge towards American style originalism which Strasbourg rejected long ago. (A nice little early example is *Campbell and Cosans*,[33] where the United Kingdom argued that the *travaux preparatoires* indicated that 'philosophical' had been added to the 'religious' opinions of the parents to cater for agnostics – the Commission countered that 'philosophical' clearly had a wider meaning.) The courts could only develop the Convention rights further than Strasbourg if they had no reasonable doubt that that was what Strasbourg would do with the case. The Supreme Court predicted correctly in *Rabone*,[34] but could we have had no reasonable doubt of this? And what good would the – again unnecessary – power to have regard to the development under the

[33] (1980) 3 EHRR 531.

[34] *Rabone v. Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72; see *Reynolds v. United Kingdom* (2012) 55 EHRR 35.

common law of any right which is similar to the Convention right do if the common law had developed the right further than Strasbourg had done? Tellingly, the one exception to no expansion was freedom of speech.

The one new right was a completely empty right to trial by jury. More striking was the cutting down of the existing Convention rights. There were to be no new positive obligations – that is, a duty on a public authority to do something. Worse still, the courts would be given a discretion whether or not to apply even those positive obligations already established – they would have to consider the burden it placed on the public authority concerned. So the victims of the police failure to catch John Worboys, the black cab rapist, much earlier might be left without a remedy.[35] And people alleging breaches of their fundamental rights would have to get permission to bring a claim when people alleging breaches of their ordinary everyday rights do not.

All in all, therefore, the Bill was likely to mean that more claimants would be denied an effective remedy here for the breach of their Convention rights, more would have to go to Strasbourg to vindicate their rights, and the United Kingdom would lose more cases in Strasbourg than it had been doing since the Human Rights Act came into force.

So should we breathe a sigh of relief that the Bill has been abandoned? I think not.

Once again there were dire mutterings about withdrawing from the Convention altogether, both before and after the UK Supreme Court ruled unlawful the government's plan to send some of the people entering the United Kingdom without permission to Rwanda.[36] But perhaps more realistically, and more troublingly, the government has shown itself willing to procure legislation in this context which restricts both the obligations of ministers to act compatibly with the Convention rights and the right of individuals to bring human rights claims before the UK courts. This began with the Illegal Migration Act 2023 and has continued with the Safety of Rwanda (Asylum and Immigration) Bill, which was given its second reading in the House of Commons on 12 December 2023. The Home Secretary, James Cleverly, stated on the

[35] *Commissioner of Police for the Metropolis v. DSD* [2018] UKSC 11, [2019] AC 196.
[36] *R (AAA (Syria)) and others v. Secretary of State for the Home Department* [2023] UKSC 42.

face of the Bill[37] that he was 'unable to make a statement that, in my view, the provisions of [the Bill] are compatible with the Convention rights'. This is scarcely surprising, as the Bill disapplies the operative provisions[38] of the Human Rights Act.

To return to Conor Gearty, in 2012, he posited two scenarios: in one, a radical socialist government is elected which 'legislates for the confiscation of much private property, the nationalisation of some profitable industry, and a vast increase in the power of the bureaucratic state in the fields of planning and environmental regulation'; in the other, a right-wing nationalist government is elected, which 'goes after immigrants and asylum seekers in a dramatically aggressive way'.[39] Under the British model, the law would be able to do next to nothing in reply. But Gearty believed that 'the culture of human rights, rooted in legal practice but also in society's common sense of basic standards, serves to support the ethical status quo against such plunges into extremism'.[40]

So whose view of common sense is to prevail?

[37] As required by the HRA, s. 19.
[38] Clause 3 disapplies ss. 2, 3 and 6 to 9 in defined circumstances.
[39] Gearty, 'Spoils for Which Victor?', 227–228.
[40] Ibid., 228.