Citizens, Foreigners or Humans? Problems with Human Rights in the United Kingdom

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Abstract

This paper will highlight the disarray of human rights in the United Kingdom. It will argue that such problems are due to an attempt to defend state sovereignty, resulting in a restrictive construction of national identity through the boundary-security nexus, *jus meritum*. *Jus meritum* defines citizenship that is reliant on the sharing of national values. It then illustrated how *jus meritum* poses a threat to human rights when analysing the measures to deport foreign criminals under the UKBA 2007. Foreigners are not included in citizenship definitions, so the protection of their rights may not be a priority to the state, which will prioritise citizens.

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> "It is a different game – a game of majorities and minorities – and the moral issues it gives rise to are much more serious"
>
> (Waldron 2010:13)

There seems to be a problem with human rights in the United Kingdom. Or at least the government and sections of the population think there is. Surprisingly, the problem appears to be that there is too much human rights in the United Kingdom. This centres on the belief that human rights, as enshrined in the European Convention of Human Rights (ECHR) stops the United Kingdom from being able to protect itself. For example, the Home Secretary, Theresa May, just recently claimed that British judges were misinterpreting the convention rights, and in doing so were stopping the deportation of rapists and murderers and making British streets more dangerous (May 2013). The Prime Minister, David Cameron, has provided a link between the Summer riots of 2011 and the "the twisting and misrepresenting of human rights in a way that has undermined personal responsibility" (Cameron 2011).

This distaste for human rights legislation on based on two interlinked beliefs. Firstly, this is part of a wider tension between the exclusivist impulses of the nation-state and the pull of the transnational commitments of the modern world. In this situation, sovereignty becomes about more than territorial integrity, but about justice, where the biggest prize is a state's ability to control the distribution of rights and punishment. This is one of the reasons behind the hostility certain sections of Parliament direct towards the ECHR. This view is summed up by Jacob Reeds-Mogg MP, who argued in the House of Commons:

> "Does the Lord Chancellor recall that in the reign of Henry VIII it was made high treason to take an appeal outside this kingdom? Has not the time come for this Parliament once more to legislate to prohibit *appeals to foreign courts and to prohibit the judgments of foreign courts* leading our judiciary."
>
> (13 November 2012, House of Commons, emphasis added)

Likewise, the Prime Minister has supported this view, arguing that "what's required is to write a British bill of rights so we can have it set out in our own law, in our own way, so that we don't have strange decisions handed down by Strasbourg" (Guardian 2011). The words 'foreign' and 'strange' emphasise a suspicion that the ECHR is not, and should not be, universal, because it is somewhat not reflective of British values.

This is linked with the belief that human rights, in the United Kingdom, should not be applied to everyone, especially not for prisoners and terrorist suspects. For example, Both the Prime Minister and the Justice Secretary, Chris Grayling, have made it clear that Parliament will not obey the Strasbourg decision to extend certain voting rights to prisoners (Guardian 2012). The recent Special Immigration Appeals Commission decision to grant Abu Qatada's appeal against deportation to Jordan was greeted with uproar. David Cameron said that he is "completely fed up with the fact that this man is still at large in our country. He has no right to be there, we believe he is a threat to our country" (Telegraph 2012) and Chris Grayling argued that

> "I do not believe it was ever the intention of those who created the human rights framework that we are currently subject to, that people who have an avowed intent to damage this country should be able to use human rights laws to prevent their deportation back to their country of origin."
>
> (Telegraph 2012)

These are all examples of a democracy holding on to the conviction that it should have the final say when it comes to deciding the application and distribution of human rights in their jurisdiction. This paper argues that the above disarray is the result of a tension between the human rights paradigm, which holds that every human being is of equal value, and an exclusivist construction of national identity, which prioritises the citizen over the mere human.

The placing of the citizen over the human may be fairly harmless, such as limited voting rights and prohibitions over running for office. These are certain privileges which only citizens may enjoy (Dworkin 2008). However, prioritising the citizen over the human may also have more serious consequences, when the privileges reserved for citizens are those related to justice, that is, equal access to rights.

This paper argues that such privileging happens through a conception of citizenship based on the principle of *jus meritum*. Unlike *jus soli* (right of soil) and *jus sanguini* (right of blood), *just meritum* regards citizenship as acquired through a right of merit. The right of merit is organised around a belief in core national values, and ensures that – through the sharing of these values – all citizens are of the same worth to the state, earning the protection of their rights.

The particular consequences of *jus meritum* are two-fold. Firstly, foreigners, by definition, will be outside the citizenship framework, and as such may be of a different value to the state. Secondly, citizens who are considered as having different values than the majority will be given the condition of the foreigner, with their rights also becoming vulnerable. Due to space constraints, this paper will focus on the first consequence of human rights, illustrating it with a brief exploration of a specific human right problem in the United Kingdom, the provision to deport foreign prisoners under the United Kingdom Border Act 2007. The second consequence of *jus meritum* will be briefly considered in the conclusion, together with a

discussion of the general implications of *jus meritum* for democracy and human rights in the United Kingdom.

The Boundary-security nexus

In order to understand *jus meritum* and how it may poses a threat to human rights in democracies, it is first necessary to explore what I call the boundary-security nexus and how it explains the construction of identities and assignment of values to these identities. As much as there is a belief that nationalism is an antiquated framework for discussing problems of identity in this transnational era, the reality is that the imperatives of national identity still exercise a strong pull. As John Breuilly argues, "power, in the modern world, is principally about control of the state" (Breuilly 1993:1). In other words, power is directly linked with sovereignty. In the struggle for power in light of competing sovereign claims, national identity may still be used as a tool used to both secure and legitimise the state.

Nevertheless, sovereignty is not just about the control of resources and territorial boundaries. Increasingly, sovereignty is also about the control of justice, that is the power to control the distribution of rights and punishment. As argued above, this is the suggestion of claims that the ECHR is a foreign court and unfit to judge matters relating to the United Kingdom.

This conception of sovereignty is still anchored on Gellner's definition of nationalism "as primarily a political principle which holds that political and national unit should be congruent" (Gellner 1983:1). Gellner's definition highlights the importance of homogeneity for legitimizing political rule. At the most basic, the need for congruency means that the government apparatus needs to reflect those governed and is at the heart of the belief that government by alien societies is a form of violence (Breuilly 1993). Under this paradigm, both legislation and the government must be reflective of national identity.

However, national identity is not a primordial given, but socially constructed. As such, they are always changing and may be constructed as more or less exclusive of transnational impulses. National identities are constructed through the use of boundary mechanisms. Boundaries are the conceptual, symbolic, institutional and social lines separating people. They are the process of separating 'us' from 'them' (Tilly 2004). Boundaries may be symbolic, social or institutional. Symbolic boundaries are basic distinctions between people whilst social boundaries are objective forms of social differences (Lamont and Molnar 2002). Institutional boundaries are official representations of social boundaries.

The construction of nation-states and their equivalent national identity is then reliant on this boundary process, where national myths about identity and belonging are constantly reproduced in the social realm and solidified in the institution of citizenship. Billig calls this banal nationalism, that is, the ideological habits which enable established nation-states to be reproduced (Billig 1995).

This boundary process, the first aspect of the boundary-security nexus, carries with it the potential for small and large scale exclusion. As Tilly argues:

> "[Boundaries] happen at the small scale of interpersonal dialogue, at the medium scale of rivalry within organizations, and at the large scale of genocide. Us-them boundaries matter"
>
> (Tilly 2004:213)

That is because the construction of the other is an automatic byproduct of national identity construction. As Billig (1995) argues, nationality is as much about the construction of 'us' and it is about the construction of 'them'. In other words, the nationalist impulse to prioritise the national may result in a construction of identity that devalues the outsider, framing them as an unwanted presence.

The other is highly normative distinction. Because the other is not us, he is unknown. The possibility of hidden traits is endless, and as such, the other *cannot* be trusted. Most importantly, its loyalty to the nation state cannot be certain. This is what causes the other to be usually constructed as a threat. The label of the other is not restricted to foreigners, but he is the elementary other, constructed outside citizenship and identity. If national identity is constructed in an exclusive way, it may lead to the securitisation of identity, leaving the door open to a restriction on the rights of the foreigner (and those considered as outsiders).

Securitisation is the second arm of the boundary-security nexus, and was developed responding to a need, after the Cold War, to widen the security studies spectrum in order to include non-military issues. This approach was spearheaded by the Copenhagen School, a term encompassing the work of Barry Buzan, Waevar and others working at the Centre for Peace and Conflict Research (now the Conflict and Peace Research Institute) in Copenhagen. Securitisation outlines the

> "move that takes politics beyond established rules of the game and frames it as a special kind of politics, or above politics"
>
> (Buzan, et al 1998:23)

When securitisation occurs, national security trumps the usual norms of politics, and extreme measures may be deployed to deal with this threat. The boundary-security nexus then explains the process of securitising an issue based on identity and how the justification for the potential removal of rights of a particular group is created. When an identity is securitised, it is constructed in as singular, discrete and fixed. Moreover, the impulse to prioritise national identity due to sovereignty concerns may lead to securitisation, where foreign identities are framed as threatening and harsh measures may be deployed against those people and things considered to be foreign. And nowhere is this effect of the boundary-security nexus more evident than in the institution of citizenship.

Citizenship & *Jus Meritum*

Citizenship is national identity given solid, institutional form through the apparatus of the state. It is the institutional reflection of the symbolic and social boundaries as they move through the boundary process. Symbolic boundary such as common myths and history are used as resources to form generally agreed conceptions of national identity in the form of social boundaries. National identity is given official form through the apparatus of the state, solidified in an official way through the existence of birth certificates, passports, etc. As Valverde (2010) argues, citizenship is best understood as a banner under which processes of political and social exclusion are played out.

There are two main theoretical principles describing the process of citizenship: *jus soli* and *jus sanguini*. *Jus sanguini*, the right of blood, is refers to nationality acquired by birth. *Jus soli*, the right of land, refers to citizenship acquired by someone being born in a particular country. Germany is often cited as an example of nationality and citizenship defined in a jus sanguine basis, but most countries use a mixture of *jus soli* and *jus sanguini* in citizenship policy (Wong and Cho 2009). Both *jus soli* and *jus sanguini* are examples of national identity constructed through the boundary-security nexus. If citizenship is granted by blood, it suggests a national identity narrative based on the literal myth of common descent and primordial ethnic ties. These symbolic boundary resources will be reinforced and reproduced in the social realm before becoming institutionalized in citizenship policies emphasizing real or imagined blood ties. Similarly, when social boundaries are constructed with territorial resources, national identity is then based on the belief that national identity is achieved by living in a particular imagined community.

I propose a third principle underpinning citizenship, which better explains modern citizenship: *jus meritum*, the right of merit. *Jus meritum* was first proposed by Wong and Cho (2009) regarding citizenship that is earned through service, usually of a military aspect. This adds a dimension of merit to citizenship, as something awarded to those that have proved deserving of the privileges associated with it. I add that *jus meritum* is organised around a belief in core national values, and ensures that – through the sharing of these values – citizens are seen as deserving in the eyes of the state.

Jus meritum is the dominant citizenship principle in the United Kingdom and has its roots in the community cohesion policy enacted after the 2001 Northern Riots. The community cohesion policy has been extensively researched and critiqued, with a consensus on the problematizing effect it has had on identity in the United Kingdom. (Kalra & Kapoor 2009, Kassimeris and Jackson 2012, Alexander 2004, Burnett 2004, McGhee 2005, Wetherel, Lafleche and Berkeley 2007, Flint and Robinson 2008 amongst many others).

In both the reports released in the aftermath of the disturbances (The Cantle Report and The Denham Report), the discourse is one of a divided Britain. This division however, is not of socioeconomic inequality, but of a cultural nature. A failure of identity and belonging is officially regarded as a central cause not just of the riots, but general social disorder. The solution is then the promotion of a concept of citizenship based on shared values:

> "We recognise that in many areas affected by disorder or community tensions, there is little interchange between members of different racial, cultural and religious communities and that proactive measures will have to be taken to promote dialogue and understanding. We also take on board the need to generate a widespread and open debate about identity, shared values, and common citizenship as part of the process of building cohesive communities."
>
> (Denham Report 2001)

Significantly, the Denham Report also places the policy of community cohesion at the core of general government policy:

> "Our central recommendation is the need to make community cohesion *a central aim of Government*, and to ensure that the design and delivery of *all Government policy reflects this*."
>
> (Denham Report 2001, emphasis added)

And this has happened. You will be hard pressed to read any sort of government policy, be it on terrorism, poverty, education or immigration without a mention to community cohesion and shared values. For example, both the Denham and Cantle reports, recommended the inclusion of citizenship education based on shared values into the national curriculum, which has happened. *The Secure Borders, Safe Havens* White Paper brought shared values to immigration policy, resulting in the Nationality, Immigration and Asylum Act of 2002. Moreover, the Immigration, Asylum and Nationality Act 2006 further developed *the jus meritum* aspect of British national identity when it set out a requirement of good character for achieving British citizenship. Contest, the government's official counterterrorism strategy has an entire section dedicated to the importance of shared values in the fight against terrorism (CONTEST 2009).With these ripples, the policy of *jus meritum*, of citizenship being based on shared values, spread.

There are two specific consequences of adopting a *jus meritum* model of citizenship. Firstly, foreigners are automatically outside constitutions of citizenship, and as such, they may be regarded as automatically being less deserving of the privileges associated with citizenship. Secondly, citizens who are considered as having a different value to the state may be given the condition of the foreigner, and be regarded as having a different value than regular citizens. This paper will focus on the first consequence of *jus meritum*, as it neatly shows what happens when the equal distribution of rights and punishment is framed as a privilege of citizenship.

Jus Meritum in Practice

Citizenship is a deliberately exclusive system, legally defining the foreigner and the national. This boundary is not necessarily a pernicious one. However, once national identity becomes securitized, that is, when social ills are blamed on identity issues, then citizenship may be deployed in the name of security. Under *jus meritum*, if citizens are those with 'our' national values, and thus deserving of privileges, foreigners will be framed outside of these national values, and may be deemed as less deserving of protection not because of any objective criteria, but because they may be a threat and do not belong to the national community.

Let me illustrate the above argument with the provision to deport foreign criminals in the United Kingdom Border Act 2007 (UKBA 2007). The ability to deport foreign criminals is not new to the UKBA 2007. It was originally part of the Immigration Act 1971, where under section 3 (5) (a), the Home Secretary had to weigh a large number of factors to decide if the public interest required their deportation. The ground for deportation was made much narrower in the UKBA 2007, which made deportation compulsory for foreign criminals sentenced to prison for at least 12 months, unless it was a breach of the ECHR or Refugee Convention:

> "Automatic deportation
>
> (1)In this section "foreign criminal" means a person—
>
> (a)who is not a British citizen,
>
> (b)who is convicted in the United Kingdom of an offence, and
>
> (c)to whom Condition 1 or 2 applies.
>
> (2)Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3)Condition 2 is that—
>
> (a)the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
>
> (b)the person is sentenced to a period of imprisonment."
>
> (UKBA 2007 Section 32)

Whilst before the Home Secretary had to decide whether or not the public good would be served by a deportation order, under the UKBA 2007, the presumption that the public interest *always* requires deportation. The policy of deporting foreign criminals then rests on the belief that these criminals are a danger to the public. An immigrant committing a crime is understood to be an affront to the British people and more heinous than British citizens committing crimes. As the Immigration Minister Damien Green says:

> "We will not accept foreign nationals …. breaking our laws. We will do all we can to protect the public from them."
>
> (Green cited in Roche 2011)

But foreign criminals are only free to walk British streets after they served their prison sentence. If they were still a threat, they should not have been released in the first place. They are regarded as posing such a threat just by virtue of being a foreigner, not because of the crime they committed. This is part of a wider aspect of the boundary-security nexus, where immigrants are linked to a host of social ills, referred to as invading hordes, accused of stealing jobs and benefits and committing crimes (Legrain 2006). These symbolic boundaries then inform the social boundary of xenophobia, which in turn will be reflected in policies which regard foreigners as being less deserving of privileges enjoyed by citizens.

For example, in 2011-12, 1,888 appeals were lodged against deportation under the UKBA 2007 of which 409 were allowed. Out of the 409, only 185, were allowed on the basis of Article 8 of the European Convention of Human Rights, the right to privacy and a family life (House of Commons 2012). In 2010, only between 2 and 8% of appeals on Article 8 grounds were accepted. (Free Movement 2012). You would not know this from the attention from the government and the press. For example, the Home Secretary, Theresa May, just recently claimed that British judges were misinterpreting the Human Rights Act 1998 (HRA 1998), and in doing so were stopping the deportation of rapists and murderers and making British streets more dangerous (May 2013) It is also not uncommon to come across headlines demanding to "End the Human Rights farce: Amy died. He got a slapped wrist" (Gilligan and Howie 2011).

This suggests that foreign criminals are not worthy of certain human rights. Every criminal is denied their right to a family life to an extent, after all article 8 has always been a qualified right. However, Article 8 is qualified to a larger extent in respect to immigrants. This will be even more so under new Immigrations Rules supported by parliament in 2012. Under these new rules, affecting family visits, deportation of foreign criminals and general immigration, it is presumed that immigration decisions will automatically comply with Article 8, except in genuinely exceptional circumstances. This is a selective, extreme qualification of a ECHR right and will will severely affect the rights of immigrants in the United Kingdom.

By virtue of this selective qualification, foreigners are then potentially subject to a harsher punishment that is not available to British citizens, criminals or not. This is *jus meritum* and the boundary-security nexus at work, where foreigners are devalued in the eyes of the state, and equal distribution of human rights becomes a privilege reserved only for deserving citizens.

Jus meritum privileges the citizen over the human, and as such clashes with the universality of human rights. The problems of human rights in the United Kingdom are centred on an exclusive construction of national identity, driven to retain control of the distribution of rights and punishment. This leads to a situation where human rights become a privilege, not a universal concept. Ronal Dworkin argued that the fundamental human right of all human beings is the right to be treated with a certain attitude in recognition of the universality of human dignity and worth (Dworkin 2009). That is why torture and slavery are absolute rights, because they infringe on the very basic idea of human dignity and worth. Torture and slavery dehumanise people, denying them their humanity.

Dehumanisation is the denial of full humanness to others (Moller and Deci 2009) and is better understood as a spectrum. At the most extreme, dehumanisation leads to torture and genocide. At the least extreme, dehumanisation happens in everyday life when we insult, disregard, or punish someone by using swearwords liking them to animals or particular body parts. Somewhere in the spectrum, is dehumanisation achieved through placing fundamental rights into a hierarchy, with 'our' rights taking precedence over 'their' rights. This selective qualifying of human rights, affecting only a specific group, then carries with it the potential to belong the dehumanisation spectrum.

Conclusion: Trapped Between Liberty and Security?

This paper started by pointing different ways that human rights were in disarray in the United Kingdom. It then argued that the reason this is the case is due to an attempt to defend state sovereignty, resulting in a restrictive construction of national identity through the boundary-security nexus, *jus meritum*. *Jus meritum* defines citizenship that is reliant on the sharing of national values. It then illustrated how *jus meritum* poses a threat to human rights when analysing the measures to deport foreign criminals under the UKBA 2007. Foreigners are not included in citizenship definitions, so the protection of their rights may not be a priority to the state, which will prioritise citizens.

Being a citizen however, should not be considered as a guarantee of human rights protection. The second consequence of *jus meritum* is that, when citizenship is constructed as based on shared values, those citizens who are not deemed to share these values may be denied the privileges reserved to the general population. Zedner (2005) refers to this group as irregular citizens, and acknowledges that they are often vulnerable to excessive restrictions. When citizenship is constructed around shared values, often just general liberal values, there is a chance that a considerable group of people may fall foul of this construction. These irregular citizens may be symbolically denationalised, and given the condition of the foreigner. If protection of human rights is only reserved to those the state consider deserving, then irregular citizens may also be vulnerable.

This is especially so when there are calls for the balancing of liberty and security in a securitised state of emergency. Politicians adopt this discourse when justifying new repressive powers, hinting at a noble sacrifice we all must partake for the safety of the nation. But, as Jeremy Waldron argues, the discourse on liberty and security has a treacherous logic (Waldron 2010). As Dworkin says, the real question is the balance between the majority's security and *other* people's rights"(Dworkin 2003). When other people are not seen as deserving in the eyes of the state, then their rights may be sacrificed in the name of national

security. There is then a difference between interpersonal and intrapersonal trade-offs in matters of liberty and security (Waldron 2010). The latter consists of everyone bearing the costs and everyone reaping the benefits whilst the former consists of the sacrificing of the liberties of a few people so the rest of us will be safer (Waldron 2010). When the protection of human rights becomes a privilege, then the trade-off is likely to be interpersonal. This is evident by the selective qualifying of human rights in terms of the deportation measures discussed above.

The interpersonal trade-off may also then apply to national minorities, citizens who may be, securitised and regarded as less deserving of rights. To quote Jeremy Waldron, "this is a different game – a game of majorities and minorities – and the moral issues it gives rise to are much more serious" (Waldron 2010:13). This game is essentially one about the relationship between identity and security. There is no doubt that when faced with national security issues such as terrorism, democracies will have hard choices to make. But the sacrificing of rights should only be considered as a last resort and only when it affects the population as a whole, not a specific minority. But as long as national identity is constructed in an exclusive way, democracies will be trapped between security, identity and justice, and there will be a tension between the universality of human rights, and the exclusivity of citizenship.

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