further research and analysis. A complete reading brings to the surface two general issues that might otherwise lay hidden in the deeper strata of law and policy. First, what is the role of higher-order rules in the development of unconventional gas? The book's narrow focus on operational regulations invites consideration of non-operational measures, such as host government agreements, rules on foreign investment, royalty and tax regimes, regulations governing greenhouse gas emissions and agreements with local communities and indigenous peoples. Such higher-order measures have at least as much to say as operational regulations about whether and how "unconventional" gas reserves could be developed.

Second, the book also raises (by the vacuum of omission) the most interesting and important question in natural resources law today: to what degree are governments and institutions victims of "regulatory capture"? Are public agencies giving priority to the private interests of energy companies? There is some evidence that energy companies wield disproportionate influence over regulation and policy. A recent study showed that the top 10 energy companies operating in British Columbia accounted for 78% of all political donations made between 2008 and 2015, and that the same companies reported 19,517 lobbying contacts with public office holders between 2010 and 2016 – an average of 14 lobby contacts per day over that period: Graham, Daub and Carroll, *Mapping Political Influence: Political Donations and Lobbying by the Fossil Fuel Industry in BC* (2017).

Is the full development of "unconventional" gas the right policy choice for our global energy future? The editors and contributors to *Risks, Rewards and Regulation* seem convinced. The vigour of the ongoing debate, however, indicates that the industry has yet to obtain the "social licence" it needs to fully develop. Whether that licence is granted will depend on the willingness of policy-makers to ask and answer some of the difficult but fundamental questions underlying the regulation of the unconventional gas industry: what other policy options are feasible, who should decide what is in the public interest and on what criteria, how prescriptive should be the rules and regulations governing operations and reclamation, when is it appropriate for the powers of the executive branch of government to be delegated to an administrative agency, and, how will decision-makers be insulated from regulatory capture and be made accountable to the public?

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*Liberty Intact: Human Rights in English Law*. By MICHAEL TUGENDHAT. [Oxford University Press, 2017. xx + 252 pp. Hardback £50.00. ISBN 978-0-19-879099-0.]

During a turbulent time for constitutional law in general, and human rights law in particular, it is refreshing to read a book which radiates with optimism. Works by former judges are often fascinating insights into the judicial mind. This book, by former High Court judge Michael Tugendhat, is therefore to be doubly welcomed.

Tugendhat sets out three main, related arguments. First, he argues that the first modern human rights declarations which appeared in the eighteenth century – the Virginia Declaration of Rights (1776) and the French Declaration of the Rights of Man and of the Citizen (1789) – reflected rights which already existed in English law. Thus human rights are British rights. Secondly, he argues that human rights did not originate in those eighteenth-century declarations, but existed since at

least the fifteenth century in England. And, thirdly, Tugendhat argues that administrators (ministers, public officials, judges and lawyers) should make more use of domestic law than the European Convention on Human Rights (ECHR) in relation to rights protection. This third argument is less controversial than the rest of the author's thesis, and indeed echoes recent statements of the senior judiciary, both in judgments and extra-curially (e.g. *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] A.C. 455 and R. Reed, "Comparative Public Law in the UK Supreme Court" in Elliott, Varuhas and Stark (eds.), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspective*s (2018)) ch. 12. The rest of Tugendhat's argument is more likely to provoke controversy. He claims that *all* of the rights initially protected by the ECHR already had force of law domestically and that British law "in all but a few instances, either meets or exceeds human rights standards". Thus the enactment of the Human Rights Act 1998 (HRA) to "bring rights home" was a fallacy which has resulted in those rights no longer being seen as British. At the same time, he recognises that the ECHR has had greater impact in certain areas, such as privacy and expression.

The book has 15 short chapters grouped in three sections. The first gives the introduction and some historical context. The second (and main) section works through various individual rights. Each chapter begins with the relevant provisions of the Virginia and French Declarations, followed by the English history, and concludes with the corresponding ECHR provisions. The third and final section concludes with a discussion of the function of rights.

This book is explicitly not aimed primarily at lawyers. It is, like Tom Bingham's *The Rule of Law* (2010), on which it seeks to build, aimed at a general readership. Tugendhat has taken care to make the book accessible – an admirable feat for such complex subject matter. He has explained difficult concepts in clear language and presented his thoughts in short, snappy chapters. In making the law accessible, there is some loss of nuance and detail. Lawyers may not find this as pleasing as will the layperson. Although the short chapters are easily digestible, this reader would have preferred to sink her teeth into longer, more integrated chapters. It is a shame that the book, being designed for a general readership, is not priced as such. In particular, the budding law student may find the book inaccessible because of its pricing (£50.00). That is unfortunate given the popularity of Bingham's book with that group.

It is easy for a reviewer to list what she would have liked to have seen more or less of in a book, and perhaps too easy to do so when the reviewer is not one of the main target audience. What follows is therefore offered with circumspection and with that target audience in mind.

The author's main thesis might have been a little clearer. Tugendhat sets out the long history of human rights culture in England to show "how deep are the roots of human rights in our history and in our law". Is this done in order to argue that the ECHR reflects domestic law such that it should not be rejected as a foreign body lodged in the domestic system? Or is it to argue that the domestic law is so healthy that the HRA could safely be repealed? Those familiar with the author's other work will know that the author has argued the former (e.g. *Fighting for Freedom? The Historic and Future Relationship Between Conservatism and Human Rights* (2017) (a report for Bright Blue, "an independent think tank and pressure group for liberal conservatism")), but some more explicit thoughts would have been appreciated, especially given the HRA's precarious position in our Constitution.

As to his three interrelated arguments, Tugendhat mentions that English law both influenced the eighteenth-century declarations and showed merely coincidental similarities with them. But it would have been helpful to read more about this

and England's inspirational pull. As Tugendhat notes, certain rights, such as the right to life, are possessed "simply by virtue of . . . being human"; it seems unlikely that England set any novel example in such areas. As Tugendhat further notes, England played a "key role" in drafting the Universal Declaration of Human Rights (UDHR) and the ECHR. The ECHR was influenced by the UDHR, and the UDHR was influenced by the Virginia and French Declarations. If those declarations were influenced by English law, then the transplant has gone full circle and the ECHR's place in domestic law could be all the stronger.

The author might also have treated us to more insights from cases in which he was directly involved. For example, this reader was disappointed to see no discussion of the police containment ("kettling") case which Tugendhat heard at first instance (*Austin and Saxby v Commissioner of Police of the Metropolis* [2005] EWHC 480 (QB), [2005] H.R.L.R. 20). That case, which involved the relationship between Article 5 of the ECHR and the tort of false imprisonment, would have been an interesting and relevant point of discussion. Lawyers may long for Tugendhat to expand on statements such as "[a] degree of judicial activism is a constitutional duty". Alas, his main role in this book is not to regale us with such insights.

Engagement with opposing views, which have highlighted the more limited breadth and depth of domestic rights protection, would have been welcome. Mark Elliott's recent work in the area is cited ("Beyond the European Convention: Human Rights and the Common Law" (2015) 68 C.L.P. 85), but not really engaged with. Elliott's argument that although the ECHR might reflect the common law's *values*, no corresponding enforceable common law *right* is necessarily available, differs from the more optimistic account presented here. One might have expected to read Tugendhat's views on Elliott's account of the more limited normative reach, protective rigour and constitutional resilience of common law rights. The author does acknowledge that common law rights are not inviolable. He further notes that the enforcement of certain rights prior to the HRA was lacking. Exploration of these distinctions would have been of interest to the specialist reader.

Conor Gearty's searing attack on the courts for historically providing little human rights protection, and for prioritising property and contract rights over gender or racial discrimination, could also have been tackled head on. To demand engagement with his *On Fantasy Island: Britain, Europe, and Human Rights* (2016) would be unfair given its publication date. But some engagement with Gearty's 2015 article on the same theme would have been good ("On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights" [2015] E.H.R.L.R. 1).

Tugendhat advances a rather controversial argument. He argues that a power to declare legislation incompatible with human rights, as under section 4 of the HRA, is similar to the approach in cases such as *Smith v Brown and Cooper* (1705) 2 Salk. 666 and *Somerset v Stewart* (1772) Lofft 1. The argument requires some more elaboration to be convincing. As he notes elsewhere, there was no positive English law permitting slavery; it is not immediately clear how the courts' approach in those cases can be compared to a modern declaration of incompatibility under the HRA. A similar comment can be made about Tugendhat's assertion that the statutory recognition of the rule of law in section 1 of the Constitutional Reform Act 2005 relates to a substantive notion of the rule of law encompassing human rights (rather than a more formalistic definition). Given the (understandable) lack of statutory definition, a more robust defence for this conclusion is needed.

Some more detail on the ECHR would also have been welcome from a lawyer's perspective. Tugendhat notes what the ECHR does not include, for example social and economic rights or the right to trial by jury. Some mention of the European Social Charter or different styles of criminal trial within the Council of Europe's

Member States would have given a more complete picture (even the Scottish accused has no right to demand a jury trial). Tugendhat's argument that Article 6 is narrower than the common law right of access to justice could touch on the deeper protection offered by the former. It is a shame not to have discussion of how the Criminal Justice and Public Order Act 1994 has stripped away the privilege against self-incrimination in English law alongside Tugendhat's discussion of the ECHR's role in ending the executive's sentencing function. Equally, the assertion that the Strasbourg Court could have fitted a right to reputation more logically into Article 5 than Article 8 requires more elaboration. Another example is the statement that the ECHR suits originalist interpretation to a greater extent than common law rights. Discussion of the living instrument doctrine would have been helpful here, as would some discussion of the ability for common law rights to shrink, as well as grow. And more discussion might have been desirable of the difference between rights and liberties. The author touches on this when he discusses the positive obligations placed on the state by the ECHR, such as to facilitate protest. Arguably, he underplays their importance.

Tugendhat is optimistic to a fault. He suggests that no Government which proposed to abolish unemployment benefits (inter alia) would be elected because of the British public's strong belief in such a safety net. That view seems almost idealistic. Elsewhere, he notes that the legislature's power to reverse judges' decisions is generally used only when the judge was wrong. The fuller picture is less rosy. For example, the Jobseekers (Back to Work Schemes) Act 2013 was designed retrospectively to re-activate regulations struck down by the court and was subsequently declared incompatible (*R. (on the application of Reilly) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413, [2017] Q.B. 657 being the final case in the saga).

This reader does not quite share the author's optimism. Indeed, not everyone will agree with the arguments advanced in this book. Those who need convincing may be the least likely to read it. But its publication to provoke a discussion is to be welcomed. This review is designed to inform lawyers as to whether they might wish to read this book. It should not dissuade the general public (its main target audience) from doing so.

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*The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires 1948–1966*. Edited by Ben Saul. [Oxford University Press, 2016. 2 vols. cxxvi + 2,580 pp. Hardback £325. ISBN 978-0-19-875832-7 (set).]

What purpose do the *travaux préparatoires* of an international instrument serve? Formally, the codified law of treaties accords them a limited role. They are designated as a "supplementary means" of interpretation, which may be resorted to only in order to confirm a meaning already reached by application of the "general rule" of interpretation, or to establish a meaning where the general rule gives rise to a meaning that is manifestly absurd or unreasonable. Since the general rule includes examination of the "ordinary meaning" of the treaty text as a whole, in light of several other factors – its preamble and annexures, object and purpose, any related agreements, any subsequent practice and any other relevant rules of international law applicable between the parties – one might wonder when, if