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Writing it down

Suddenly, the air is full of cries for a 'British Bill of Rights' (David Cameron);[1] being 'more explicit about shared values' (Gordon Brown);[2] and even a written constitution (Lord Goldsmith).[3] Confusingly, these calls are linked to providing 'a hard-nosed defence of security and freedom' (Cameron), an emphasis on 'responsibilities' (Brown), and assaults on the interpretation of human rights by the courts (Tony Blair and John Reid). A political debate is opening up here. JUSTICE professes its purpose as advancing 'access to justice, human rights and the rule of law'. In the light of these principles, what is the proper response?

Two initial positions seem clear. First, almost every commentator, except the most virulent of opponents (such as Melanie Phillips in the *Daily Mail*), agrees that it is politically unthinkable that the United Kingdom should seek to pull out of the Council of Europe or the Council's European Convention on Human Rights. This would be a foreign policy disaster. We would join Belarus as the only two countries between Portugal's Atlantic coast and Russia's Pacific shore outside the Council of Europe. Our credibility within the United Nations and organisations such as NATO and the Organisation for Security and Co-operation in Europe would be blown. We would probably be required to leave the European Union.

Notably, David Cameron has been very clear on a policy of continuing adherence to the European Convention. He points to the 'logical consistency' of repealing the Human Rights Act and leaving the European Convention. However, he accepts three 'significant disadvantages' of such a course: common law protections of human rights are relatively weak; governments can 'abrogate or repeal' protections even as fundamental as habeas corpus; UK departure from the European Convention would be a kick in the teeth to all the countries of the former Soviet Union that we have spent the last two decades encouraging to join it.

Thus, there is a clear initial conclusion to be drawn. The content of any British bill of rights must, at the least, reflect that of the European Convention, whatever additional protection is given for jury trial or other rights missing from the Convention. Anything else would be a nonsense, the effect of which is rather well explained by Lord Falconer in the Department for Constitutional Affairs *Review of the Implementation of the Human Rights Act*:[4]

> *On the one hand, the Government would remain obliged to comply with all the rights in the European Convention on Human Rights. And the citizen would remain able to take a case to Strasbourg. On the other hand,*

> *Government, citizens and courts would be confronted by a separate (but presumably overlapping) set of rights for the purposes of domestic law.*

This would provide, as Lord Falconer says, at best 'a prolonged period of uncertainty' in any circumstances where a British bill sought to limit or alter Convention rights. It would create a procedural nightmare. The role of domestic UK courts, legislation and Parliament would be downgraded as litigants simply got their cases to the European Court of Human Rights for decision under the Convention as fast as they possibly could. Paradoxically, the major beneficiaries would be human rights lawyers, whose incomes would rocket, and the major loser the UK government, whose reputation would plummet.

There is, however, a twist. This takes us to the second fundamental point: that the UK has been deprived of any debate about the content of the rights by which it is bound. The Convention was drafted during Attlee's administration; signed and ratified during Churchill's; the right of individual petition to the European Court agreed during Wilson's; the *Chahal*[5] case, with its binding effect on surrender to other countries, decided during Thatcher's; incorporated into UK law under Blair. The Human Rights Act 1998 was largely presented as a way of dealing with a procedural anomaly. The Convention bound the UK but had no force in domestic law: this encouraged excessive litigation and uncertainty. So, the Human Rights Act was a necessary tidying up exercise. The position in the UK can be contrasted with that in Canada where its Charter of Rights was agreed after widespread public debate and, consequently, appears to have entered public consciousness and come to be regarded as something of which the Canadian public can be proud.

So, there are advantages to be gained in starting a debate about the content of a British bill of rights or the distinctively British values that it should embody. However, there must be honesty about the impact of our membership of the Council of Europe. There may be room for different feelings about our European commitments but, practically, any debate about British rights must begin with an acceptance of the Convention. This is, admittedly, a significant restriction on debate which the Canadians did not face. However, the situation is not as limiting as it might seem. The Convention was largely drafted by UK lawyers and arguably reflects British sensibilities rather well.

So, let us proceed to the issues that are up for discussion and could be added to the content of the Convention. This, of course, immediately opens up a minefield. David Cameron gives us little guidance save that: 'it should enshrine and protect fundamental liberties such as jury trial, equality before the law and civil rights'. Imagine the drafting issues. There is a deep feeling among the UK public that the right to jury trial is so strong as to be almost constitutional in force. However, the government has waged a long (so far unsuccessful) campaign to restrict it for

serious or complex fraud cases. The right to jury trial is, in any event, clearly not absolute. The Criminal Justice Act 2003 proposed to extend the jurisdiction of the magistrates' courts, and has allowed trial by judge alone where jury tampering is likely. It is therefore likely that there would be considerable debate about the level of seriousness of offence at which the right to jury trial would be engaged, and the extent to which the interests of the efficient administration of justice could impinge upon it.

As to 'equality before the law', it is completely unclear how this might extend the fair trial rights and 'equality of arms' existing commitment in Article 6 of the Convention. It could extend the coverage of Article 6 to a range of currently excluded civil hearings. This might be desirable but it could be expensive. The proposal might also mean that the free-standing equality provision in Protocol 12 to the Convention should be signed and ratified by the UK, but again the UK government has been worried about cost. As to his third example – protecting 'civil rights' – the meaning of this is completely obscure. An immediate issue will be access to justice and legal aid. Indeed, in the context of current controversies, there will clearly be pressure to incorporate some better protection of legal aid than is provided by the general provisions of Article 6. Let us recognise the sad fact that this will appeal to political parties in inverse proportion to their likelihood actually to be in government. In other words, the Conservative party is likely, if ever in power, to feel as negatively about any extension of constitutional entitlement to access to justice as any other party. This argument relates only, it should be added, to practicality, not desirability.

As well as considering the content of a bill of rights, it is necessary – as David Cameron does – to consider its Parliamentary entrenchment. How are its provisions to be given any protection? This is another minefield. Paradoxically, the Convention has a degree of legislative protection precisely because it is an international agreement. The Human Rights Act provides a delicate way of recognising this. It preserves Parliamentary sovereignty by giving the courts only a power to make a declaration of incompatibility and leaving it to the government to respond. It is difficult to see any way of improving this balance. What is more, it is logically difficult to consider entrenching one measure on the basis that it is a major constitutional issue rather than entrenching measures on all constitutional issues. The logical case for a written constitution is overwhelming; the practicality enormously difficult. Just look at the lack of progress on reform of the House of Lords.

How, therefore, should we respond to these siren calls for a bill of rights and a written constitution? The best response seems to welcome them as opening up a debate that, realistically, might last for decades. In the meantime, let us get on with making the Human Rights Act work and encourage greater acceptance of the European Convention – which has, after all, successfully set common human rights standards for Europe in the aftermath of two cataclysmic challenges: the Second World War

and the collapse of the domination of the Soviet Union over a swathe of central and Eastern European countries whose stability and commitment to the rule of law is indisputably in our best interests.

Notes

1 Speech to the Centre for Policy Studies, 26 June 2006.
2 Speech to Labour Party Conference, 25 September 2006.
3 Interview with Sky News Sunday Live, 8 October 2006.
4 Published 25 July 2006, p6.
5 [1996] EHRR 54.

Five years on from 9/11 – time to reassert the rule of law

Mary Robinson

This article takes its text from the first in the JUSTICE International Rule of Law Lecture series of 2006, given by Mary Robinson on 20 March 2006 at Middle Temple Hall, London. The lecture was chaired by Lord Steyn.

The International Commission of Jurists (ICJ), of which JUSTICE is the UK affiliate, was born in Berlin, then a divided city, and into a world of deep division between two political blocs. Its first Secretary General, Norman Marsh, was an English barrister, Law Commissioner and academic. He was also one of the group of 'founding fathers' of Amnesty International, and his wife created the card index – of course, manual in those days – on which the names of the early prisoners of conscience were recorded. When he was appointed to head the ICJ in 1956, Marsh sought to develop a clear and universal definition of the rule of law, encompassing the world's different legal traditions.

Fifty years later, I think Norman Marsh would find some of the issues which JUSTICE is today addressing familiar – eg the criminal law reform topics of hearsay, jury trial or double jeopardy. Others would surprise him, because they demonstrate the sea change which has taken place in this, and other, jurisdictions – for example, the vast body of European law, a Supreme Court for the United Kingdom, or UK adherence to the human rights treaties which now implement the Universal Declaration of Human Rights. I hope he would feel that these treaties, in particular, go a long way towards providing a universal definition of the rule of law by stating clear rules and barring arbitrary decisions.

Other issues would seem new, but they would also raise old and familiar questions about the rule of law: the balance to be struck between liberty and security, and the role of the courts in checking the excesses of the executive in the name of security – specifically, counter-terrorism, restrictions on political demonstration and the introduction of ID cards.

Today JUSTICE works in a world which is again one of division, and confusion. The need to emphasise the vital necessity to respect the rule of law and promote its values is as great as it was when the ICJ was formed.

In her book entitled The War on Terror and the Framework of International Law, Helen Duffy writes: [1]

> *The atrocities committed on 9/11 … highlight the critical importance of the international rule of law and the terrible consequences of its disregard. Ultimately, however, the impact of such attacks on the international rule of law depends on the responses to them and in turn on the reaction to those responses. To the extent that lawlessness is met with unlawfulness, unlawfulness with impunity, the long term implications for the rule of law, and the peace, stability and justice it serves, will be grave. Undermining the authority of law can only lay the foundations for future violations, whether by terrorists or by states committing abuses in the name of counter terrorism.*

I fear that the authority of law has already been undermined in many important ways. The question facing us today is how are we to respond to this situation and what steps can we – and must we – take to restore and protect the international rule of law?

The security argument today is that the terrible terrorist attacks in New York, Madrid, Sharm al-Sheikh, Bali, London and elsewhere were so heinous, so unprecedented, that the only possible response is a global 'war on terrorism'.

The point is made that the enemy is not a nation state and is not willing to respect fundamental standards of international law which protect civilians. Fighting terrorism, it is said, therefore requires new strategies and sometimes 'exceptional measures'. This implies that human rights are somehow to be curtailed, that the security imperative outweighs all other considerations. I do not believe that, not least because if we follow that course we will lose the moral high ground – the capacity to influence the minds and hearts.

I recall flying to New York in the aftermath of 9/11, and sitting with my colleagues in the Office of the High Commissioner for Human Rights to determine what our response to those attacks should be. Language is vital in shaping our reactions: the words we use to characterise an event may determine the nature of the response. It is worth recalling that the attacks were mainly aimed at civilians. They were ruthlessly planned and their execution timed to achieve the greatest loss of life. It was important to clarify that the scale and systematic nature of the attacks on New York and Washington qualified these acts as crimes against humanity under international jurisprudence. I stressed the duty on all states to find and punish those who planned and facilitated these crimes.

Despite efforts to frame the response to terrorism within the framework of crimes under national and international law, an alternative language dominated. That language, which has shaped to a much larger extent the response at all levels, has spoken of a war on terrorism. As such, it has brought a subtle change in emphasis in many parts of the world; order and security have become the overriding priorities. As in the past, the world has learned that emphasis on national order and security often involved curtailment of democracy and human rights. Misuse of language has also led to Orwellian euphemisms, so that 'coercive interrogation' is used instead of torture, or cruel and inhuman treatment; kidnapping becomes 'extraordinary rendition'.

Unfortunately, what I then saw and heard was undemocratic regimes using the tragedy in the United States of 9/11 to pursue their own repressive policies, secure in the belief that their excesses would be ignored. New laws and detention practices were introduced in a significant number of countries, all broadly justified by the new international war on terrorism. The extension of security policies in many countries has been used to suppress political dissent and to stifle expression of opinion of many who have no link to terrorism and are not associated with political violence. I will never forget how one Ambassador put it to me bluntly in 2002: 'Don't you see High Commissioner? The standards have changed'.

The challenge now is to overcome this view, sometimes characterised as 'the new normal', while recognising – as it is all too easy to do in London since the bombings of July 2005 – that governments and societies face real and serious security threats.

Almost five years after 9/11, I think we must be honest in recognising how far international commitment to human rights standards has slipped in such a short time. In the US in particular, the ambivalence about torture, the use of extraordinary rendition and the extension of presidential powers have all had a powerful 'knock on' effect around the world, often in countries that lack the checks and balances of independent courts, a free press and vigorous NGO and academic communities. The establishment of an offshore prison in Guantanamo, its retention in the face of the most principled and sustained criticism, including a joint recommendation by five United Nations human rights experts that the facility should be closed 'without further delay',[2] are all aspects of this situation.

Other prisons exist, in other places, which are even less subject to scrutiny; indeed detainees are sometimes referred to as 'ghost prisoners', because neither their names nor in some cases their location are known.[3] At the same time, to take another example, the international community has failed to establish any

effective oversight mechanism for the human rights abuses of the Chechnya conflict, which is within the territory of a permanent member of the Security Council, or any mechanism for Chechnya which would compare with the UN's human rights monitoring operations for the civil conflicts in countries such as Colombia and Nepal.

What is being done to reassert the values of the rule of law? I will say something of international efforts including the work of the ICJ. I will then reflect on the changed role of the US in terms of human rights, and of the important contribution to be made by the decisions of national courts, notably in the UK.

The Club of Madrid, a group of former heads of state and government from countries in all regions, on which I serve as Vice President, came together last year – on the first anniversary of Spain's 3/11 – to organise an International Summit on Democracy, Terrorism and Security. Its purpose was to build a common agenda on how the community of democratic nations could most effectively confront terrorism while maintaining commitments to civil liberties and fundamental rights.

The summit brought together leading experts who examined the underlying factors of terrorism, the effective use of the police, the military, the intelligence services and other national and international agencies to prevent and fight terrorism. Our aim was to construct a strategy against terrorism based on the principles of democracy and international co-operation and on strengthening civil society against extremists and violent ideologies. The resulting Madrid Agenda makes a compelling case not only for more effective joint action against terrorist organisations but also the need to increase resources aimed at tackling the humiliation, anger and frustration felt by many that can be manipulated to draw recruits for terrorist action.

Meanwhile, the International Commission of Jurists returned to its roots in Berlin in August 2004 and adopted a Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.[4] That Declaration acknowledges that terrorism poses a serious threat to human rights, and affirms that all states have an obligation to take effective measures against acts of terrorism. But it sets out boundaries as follows:

> *In adopting measures aimed at suppressing acts of terrorism, states must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the*

> *boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.*
>
> *A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state. Both contemporary human rights and humanitarian law allow states a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.*

The Declaration affirms 11 principles which states must give full effect to in the suppression of terrorism and calls on all jurists to act to uphold the rule of law and human rights while countering terrorism. This Berlin Declaration restores the balance which was lost in the aftermath of 9/11. It is a declaration which should hang in law offices and judges' chambers throughout the world. It is the rule of law charter to counter the imbalances of what has been called today's 'new normal'.

Arising out of this initiative, the ICJ has recently established an Eminent Jurists' Panel, on which I am proud to serve, composed of eight jurists from all regions and legal traditions.[5] The Panel is chaired by Arthur Chaskalson, Former Chief Justice of South Africa and the first President of South Africa's new Constitutional Court. It has been mandated to consider the nature of today's human rights threats and the impact of new and old counter-terrorism measures on human rights. Another member, Professor Vitit Mutarbhorn, set out its approach, saying:

> *No one can doubt that States have a duty to protect people from terrorist acts. It is important to understand the justifications for new laws and policies to counter terrorism. At the same time any measure to counter terrorism must be proportionate to the exigencies of the situation and respect in law and practice the rights of people under international human rights and humanitarian law.*

The Panel is holding hearings around the world this year to explore how considered counter-terrorism measures and policies can produce effective results while also assuring the necessary respect for human rights and the rule

of law. Earlier this month, the Panel held a public hearing in Nairobi for the East Africa region. The aim was to study the impact of special laws, policies and practices adopted to fight terrorism in Tanzania, Uganda and Kenya. Hearings have also been held in Colombia, where political violence has a long history, and in Australia where counter-terrorism measures have been enacted since the Bali bombing. In early September we conduct a hearing in the US, which, as it happens, will be on the eve of the fifth anniversary of 9/11.

These initiatives seek to re-establish the primacy of the rule of law and to create an accurate record of the steps – whether positive or negative – being taken in different countries. But some of the most fundamental restoration work must take place in national courts and legislatures.

In this context, we must recognise – and regret – the degree to which the US has surrendered its moral authority. We must also acknowledge that it is not good for the world that the largest, most powerful country is seen to be out of line on human rights, and that this leaves an uncomfortable void. Although China, for example, is becoming a global economic giant and US competitor, there is no way in which it can replace the US as a human rights leader. The leadership role of the US began with Eleanor Roosevelt's work in the drafting of the Universal Declaration of Human Rights in 1947, and developed with the powerful body of Supreme Court jurisprudence generated by the US Bill of Rights, and with Jimmy Carter's policy – later adopted by the UK, the EU, and others – of integrating human rights into foreign policy. I can speak from personal experience of the profound impact which the US civil rights case law I studied at Harvard Law School in the late 1960s had on my own thinking. Let us recall that in the UK, the first race relations legislation took direct inspiration from the US.

How sad then that last week in the General Assembly, the US voted, almost alone, against the new UN Human Rights Council. Fracturing a political consensus, which had been painstakingly built between those favouring and those resisting more effective oversight, to create a radically improved body, the US rejected the improvements as 'insufficient'. I have been given this account:

> *… the General Assembly adopted the resolution … and then – what never happens in the General Assembly – there was a spontaneous and roaring applause that simply would not die down. Like an opera audience after a splendid aria. It was an expression of relief for delegates that had battled to create this Council for nearly a year and perhaps also of frustration with the US which had made everyone's life in recent weeks so exceedingly difficult.*

We should remember that these delegates were diplomats representing governments, not activists. This situation goes beyond even the isolation in

which the US found itself when it voted in principle against the International Criminal Court statute in Rome in 1998. It illustrates the seismic shift which has taken place in the relation of the US to global rule of law issues. Today, the US no longer leads, but is too often seen merely to march out of step with the rest of the world.

This is, I hope, a temporary loss of moral compass. Certainly it is one which is recognised and strenuously resisted by many individual Americans I meet when I travel around the US and by NGOs such as Human Rights First and Human Rights Watch. Notably, the American Bar Association has already held high level sessions on the rule of law during its annual meetings. Now it plans to hold a special session together with the International Bar Association in Chicago in mid-September, which will be a good opportunity to take stock of the serious undermining of core standards in just five years, and to plan a more effective response.

Against this backdrop, I believe national courts in all democratic countries, and particularly those in the UK, have a crucial role to play, by applying international legal principles in cases which deal with broad questions of human rights and security. In 1984, Anthony Lester published an article entitled 'Fundamental Rights: the UK isolated'.[6] He argued for incorporation of the European Convention, saying that it was 'wrong' and 'unhealthy that our judges are denied the power and responsibility of safeguarding the fundamental rights and freedoms of the Convention'. He noted that:

> *[O]ne practical effect of the absence of fundamental rights in this country is that courts of other Commonwealth countries increasingly refer to Commonwealth case law when interpreting their own code of fundamental rights.*

Since then the tables have turned, and it is UK rather than US courts which are taking a lead as interpreters of fundamental human rights, on the basis of the European Convention and – by extension – the body of international human rights treaty law.

This new situation is well illustrated by recent House of Lords decisions, most notably their ruling that evidence obtained through torture is inadmissible in any proceedings before UK courts.[7] The Lords unanimously rejected the notion that courts can condemn torture while using evidence obtained through torture, noting that such use encourages these abhorrent practices.

The judgment sends a clear signal that the use of torture is universally forbidden under all circumstances, and that states have positive duties to give effect to

that prohibition. The case represents an important reassertion of the rule of law, and highlights the critical role of the judiciary in ensuring that states meet the challenge of countering terrorism within the boundaries of law, including fundamental principles of international law prohibiting torture and ill-treatment.

The importance of the judgment in these terms is the compass course it offers to other societies, including stable democracies in which the 'war on terrorism' has revived discussion of the legitimacy of state torture, a topic which many had thought was of no more than historical interest. It is important also because the judgment does not rest on English law alone. In Lord Bingham's words: [8]

> *[T]he principles of the common law, standing alone … compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention.*

Today, and especially since the Human Rights Act 1998, international law is an increasingly important source of English law. The laws which UK courts apply protect rights whose source is to be found in international as well as in English laws. As such these laws and these rights are shared in common with other countries, many of whom are outside the institutions of Europe – 141 states in the case of the Convention Against Torture (CAT). And international human rights law has become a common source of law for almost all states.

But unlike the European Convention on Human Rights, international human rights law has no higher court in Strasbourg to develop its jurisprudence. This means that the decisions of the highest English courts will inevitably have an influence which runs far beyond this jurisdiction. Indeed, it is difficult to exaggerate the international impact of the Pinochet case. When the House of Lords applied the Convention against Torture – in the words of one NGO – '(s)uddenly and dramatically, world attention focused on an obscure and little-used provision of international law … universal jurisdiction'.[9] Since then, the Lords' decision has had the effect of opening the way to the use of the CAT by courts in other jurisdictions.

Similarly, now that the International Criminal Court Act 2002 has made the commission of crimes against humanity an offence in English criminal law, the decisions of English courts – in the unhappy event that these cases arise – will be followed with close attention by courts around the world. Environmental

law, with its strong relationship to human rights, is another area in which the decisions of UK courts will influence courts in other countries – and other continents – when they come to apply the same law. This is not a new experience for English judges: there are longstanding legal links between the UK and other Commonwealth countries. But today international judicial exchange on human rights concerns international law, with its universal reach.

There is of course another, and more negative, side to globalised norms. Political decisions which are taken by the UK – about pre-trial detention, or restrictions on demonstrations under the Serious Organised Crime and Police Act 2005 – will be scrutinised in other, and perhaps less democratic countries, for their adherence to international law, and where they fail, they will become authority and precedent for the laws of those other states. This means that where the UK intervenes – as it has done in a case now before the European Court of Human Rights – to challenge the absolute nature of the European Convention prohibition against return where there is a risk of torture, it sends a powerful and negative signal to other states.

I believe the challenge for all countries is to ensure that action to protect the security of citizens and the state is taken in a way that restores, rather than further undermines, the rule of law:[10]

> *Promoting respect for international law is essential to ensuring that the 'war on terror' does not score a devastating own goal by eroding permanently the rule of law and the international standards that protect us all.*

Otherwise, as Kofi Annan has noted, 'we deliver a victory to terrorists that no act of theirs could achieve'.

Mary Robinson was the first female President of Ireland (1990-1997) and United Nations High Commissioner for Human Rights (1997-2002). In 2002 she founded Realizing Rights: The Ethical Globalization Initiative. For more information see www.realizingrights.org.

Notes

1 Cambridge University Press, 2005, p1.
2 E/CN.4/2006/120.
3 Human Rights Watch list, http://hrw.org/english/docs/2005/11/30/usdom12109.htm.
4 http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf.
5 http://ejp.icj.org/.
6 *Public Law*, Spring 1984, pp46-72.
7 *A & others v Secretary of State for the Home Department* [2005] UKHL 71.
8 Ibid, at para 51.
9 *Hard Cases: bringing human rights violators to justice abroad - A guide to universal jurisdiction*, International Council on Human Rights Policy, 1999, ISBN: 2-940259-01-1, p1.
10 See n1 above, p451.

Politics and the law: constitutional balance or institutional confusion?

Jeffrey Jowell QC

This is the text of the JUSTICE / Tom Sargant annual memorial lecture given by Professor Jeffrey Jowell QC at the Law Society on 17 October 2006. The lecture was chaired by Lord Steyn.

In the recent film, *The Queen*, the newly elected Prime Minister refers to the British constitution and his wife ripostes: '[w]e don't have a constitution'. The real Cherie Booth QC would of course not say that in real life as she knows, as do we all, and as we have been reminded by our Chair in important judgments, that it is not true that our unwritten constitution is not worth the paper it is not written on. It contains implied principles that are rooted in the fact that our system of government is democratic. Its unwritten status may have disadvantages (such as incoherence and inaccessibility), but at least it allows relationships within our democracy to evolve and respond flexibly to new conditions, expectations and moral claims.

One set of relationships in our democracy that has been subject to the most dramatic alteration in recent years is between politics and the law; the appropriate balance between those decisions which are the province of politicians and those which belong to the law is one of the most fundamental questions in all constitutional theory and has great practical importance. It is that balance which I want to consider this evening.

I shall start with a brief account of the principal controversies surrounding politics and the law over the past few decades, then consider the current balance between Parliament and the judiciary, including some of the misunderstandings surrounding the Human Rights Act 1998, then end with some of the administrative arrangements which underpin the relationship between the different branches of government, focussing in particular upon the government office situated at the precise junction of politics and the law, namely that of the Attorney General.

When I joined the University of London in the 1970s a lively debate was taking place on the question whether recipients of discretionary welfare payments (known as supplementary benefit) should have entitlements (they were called

'welfare rights'). At that time decisions were given on the basis of a secret code, the A Code, with few opportunities for appeal or review of the caseworker's decision. Professor Titmuss of the London School of Economics was strongly of the opinion that the administration of welfare benefits should be carried out under the benevolent and expert discretion of civil servants and he warned of a 'pathology of legalism' that would occur if the advocates of 'welfare rights' had their way.[1] Titmuss' view was widely shared at that time by politicians, lawyers and even judges, all of whom agreed that Parliament's power to drive public policy, and the executive's power to implement it, should be largely unconstrained, and certainly not limited by the law. During the development of the welfare state discretionary power was increasingly conferred upon ministers and other public officials, but was relatively untroubled by any judicial oversight or review. Aneurin Bevan, architect of the National Health Service, was explicit that he wished to avoid what he called 'judicial sabotage of socialist legislation'.[2]

The judges did not dissent from this view. As Professor John Griffith said, judges had been 'leaning over backwards almost to the point of falling off the Bench to avoid the appearance of hostility [to the government]'.[3] Chief Justice Parker said that law should be the mere 'handmaiden' of administration, rather than its 'governor'.[4]

It is often said that Dicey set the course for constitutional arrangements in this country and it is true that his primary constitutional principle, the sovereignty of Parliament, has obstinately held sway. However, his secondary principle, the rule of law, which sought to place some restraint upon the arbitrary or unfettered use or exercise of Parliament's powers, was by no means as enthusiastically accepted. From the mid-twentieth century powerful voices, such as those of Professors Jennings[5] and even John Maynard Keynes,[6] felt that Dicey's rule of law was a device to stand in the way of government intervention for the purpose of rectifying social injustice. Insofar as the rule of law was accepted, it was transmuted into an obligation, on the part of the courts and all officials, to secure the smooth implementation of Parliament's designs. That obligation was reinforced by a trusting faith in the career civil service to get things as right as they could be, coupled, it must also be recognised, with a longstanding suspicion of legal techniques of dispute resolution which went back to Jeremy Bentham who opposed not only a bill of rights, but also 'the licentiousness of interpretation' of legislation by judges.[7] Bentham's disciple, Chadwick, sought to exclude judicial review of immigration and customs officers on the ground that it would lead to legal proceedings 'upon such simple questions as whether a cask of biscuits was good or bad'.[8]

Today that situation has been virtually reversed. Judges have increasingly required discretionary power to be in conformity with standards of legality, procedural fairness and rationality – the so called 'grounds' of judicial review. In so doing, they have been chipping away at an essentially 'political constitution' and have confounded allegations of their inherent conservativism by managing, with majestic equality, to provoke the ire of politicians of all political persuasions whose decisions they have overturned. Procedural rights have been ceded to welfare recipients, and in all corners of public administration. In 1998 the Human Rights Act required every public official to accord to all the procedural and substantive protections of the European Convention on Human Rights. Under European Community law, and under the Human Rights Act, Parliament has conceded that judges can review acts of the UK Parliament. Under European Community law such legislation can be disapplied (a polite term for struck down). Under the Human Rights Act, the courts may merely declare the legislation incompatible with the European Convention on Human Rights, but the government will normally accept that ruling.

This is all a remarkable turnaround. Is democracy diluted as a result? Is our hard-won representative democracy seriously threatened by legal hegemony, the over-reaching of unelected judges and an indulgent and selfish human rights culture?

The answer in my view is clearly no, but myths to that effect abound. Let me dispose of a few of them. The first is that these changes – the limitation of government and the extension of law and legal techniques – were driven by the bench, by activist individual judges, beginning with Lords Denning and Reid and followed by a flock of judicial sheep in the clothing of Woolf et al – not to mention Lord Steyn, Lord Tom Bingham and all.

We need to recollect, however, that the first nudge in the direction of the need for procedural justice came from Parliament, readily implementing the proposals of the Franks Committee[9] which recommended that the tribunals and inquiries of the welfare state should no longer be seen to be located in the realm of policy, but in the realm of justice. Aneurin Bevan would not have been pleased. Yet in the 1960s it was Parliament that enacted the Tribunals Act to judicialise Bevan's and other schemes. Laws promoting equality in matters of race and gender in this country all have their origin not in activist judicial decisions but in Parliament's laws.

The Human Rights Act 1998 is similarly awash in myth and misrepresentation. The Lord Chancellor in a speech a fortnight ago rightly debunked some of the myths about that Act in the popular press (such as rumours that it would prevent the filming of school nativity plays).[10] Even today we see a minister seeking to

lay the errors of public administration upon the 'licentiousness' (to employ Bentham's phrase)[11] of the judicial interpretation of the Act. The greatest myth, however, and one initially perpetrated by some academic lawyers, is that the principal effect of the Human Rights Act is to transfer power from our elected Parliament to unelected judges. This too is rhetoric calculated to mislead. The Act seeks first and foremost to ensure that the rights and respect for the individual, procedural and substantive, which are enshrined in the European Convention permeate all our public decisions. Although the judiciary are the ultimate arbiters of whether or not Convention rights have been respected by public officials, cases that reach the courts are the tip of the iceberg and the real impact of the Act can be assessed not through the decisions of judges alone, but by looking at the wide variety of our institutions, from regulatory bodies through to universities, where past practices have been systematically audited and adjusted in order to ensure conformity with Convention rights. It may be that some of those rights have been too broadly or defensively interpreted, but the overall result has been to ensure that the core values reflected in the Convention – core British values – permeate all our decision-making institutions.

If we look at Parliament's record alone over the past few years we again see that there has been no wholesale reallocation of power from the elected legislature to the unelected judiciary. The majority of Parliament's statutes scarcely impinge on any Convention right. Of those that do, only a fraction end up in litigation, of which only a small percentage again are declared incompatible with Convention rights. Any empirical investigation will show that there is still a considerable area of socio-economic choice untouched by the Convention. When the courts do review legislation for conformity to the Convention they are fast developing a sensible modesty about the limits of their own institutional capacity to decide certain matters – displaying due deference (some would say undue) on questions in which they have no expertise, or matters which are essentially managerial or involve the allocation of resources. Of course there are issues on which the judges rightly declare Convention rights to have been infringed, and which will not please everyone, but what has been so notable is the fact that increasingly the initiative for Convention-compatible legislation has come not from the courts – these so-called usurping judges – but from Parliament itself. Three examples of this are the introduction of civil partnerships, the outlawing of age discrimination and the Constitutional Reform Act 2005 which reinforced the separation of powers and independence of the judiciary in this country by removing the judicial powers of the Lord Chancellor, transferring the House of Lords appellate committee to a new Supreme Court and establishing the Judicial Appointments Committee. There has not been any conscious 'partnership' between the courts and Parliament. Some say that there is or should be. I say there should not be, in the separation of powers. But there has been an identity of aim.

What is the aim, and what has been going on? How do we explain this rapid conversion to regulation and limitation of power and the notion of rights against the state?

The answer lies not in some developing subjective notion of fairness or justice or reasonableness – the answer is surely that we have over the past forty or so years steadily been redefining and reshaping the necessary content of democracy. The likes of Jennings and Titmuss were not venting their subconscious antagonism against lawyers but were rejoicing in the triumph of representative democracy. Parliament was finally elected by all the people, men and women, landowners and workers, whose will should be respected. The representatives of those people should therefore be free to decide what was in the people's interest. This was the democracy of that time.

The moment when that conception of democracy was questioned is well described by Isaiah Berlin in his book of essays, The Crooked Timber of Humanity.[12] He refers to the 'ideological storms' of the twentieth century, which not one among the most perceptive thinkers of the nineteenth century had ever predicted. He was recalling the aftermath of the Russian revolution and the tyrannies of the right and left in Germany and elsewhere. He felt that those tyrannies, created with clear popular support had, as he put it, 'altered the lives and viewpoints of virtually all mankind'. They showed simply that democracy and majority rule could no longer be regarded as synonymous.

It was surely the lessons of that period that convinced even the most ardent majoritarian or utilitarian that democracy goes beyond representative government. Popular will is important, but should not invade certain fundamental rights and liberties. Seen in that context, the claim for our attention of administrative justice is, similarly, not based upon ungrounded and well-meaning notions of 'good' or 'fair' administration but upon an insistence that all decision-makers acting on behalf of the state respect a person's sense of individual worth and dignity and not close their ears to legitimate claims. It was the lessons of that period of history that persuaded Parliament to begin to protect minorities from discrimination, and to abolish capital punishment, even in the face of strong popular opinion to the contrary.

This new dispensation is still often misunderstood by those who insist upon viewing democracy as exclusively confined to majority rule and berate the 'culture of human rights' (as did the Lord Chancellor, Lord Falconer, some months ago). However, he appears to have changed his mind; in a talk two weeks ago to the Human Rights Lawyers Association he said, rightly: [13]

Democracy is not just a process for intermittently selecting a government. It is an acceptance of the values of equality, tolerance and freedom. We can only safeguard our democracy and our freedoms by the rule of law.

Now that we seem to have reached an acceptance of the fact that human rights are inherent in democracy and not an optional accessory, is the balance between the branches of government perfectly calibrated?

In two respects it seems unstable and in need of correction. First, Convention rights are not entrenched. They can be amended by any simple statute without any special majority. The expectations of the Convention's entitlements may therefore be too easily disappointed in response to a perceived threat of the moment and populist opportunism. Governments should have the freedom to respond to public pressure in order to change most social policy, but by definition the opportunity should not easily be available to subvert what Lord Steyn has called the 'new constitutional hypothesis'[14] – an hypothesis which, *by definition*, seeks to protect unpopular causes or minorities from the dominance of the majority. A written constitution, with a higher status than ordinary law, has the advantage of preventing such easy amendment. Some countries achieve this short of a written constitution by a set of entrenched 'basic laws' with express or implied prior constitutional status.

The second imbalance in the Human Rights Act is that it only permits the courts to declare a statute incompatible with Convention rights, but not to disapply or strike down such legislation. The reason for this is well known as a political compromise based upon an earlier bill drafted by Lord Lester of Herne Hill QC – a compromise which probably made the enactment of the Act possible. But now that we have realised that the Act embodies not a mere set of entitlements but the basis of a new constitutional order, is it not time for express authority to be conferred on the courts to disapply the offending legislation? Such a power would both firmly endorse the significance of the new order and also dispel common confusion on the matter.

The confusion, I am afraid, exists not only on the part of the public. The confusion was demonstrated graphically in a fascinating correspondence in the *Observer* in April 2006 on the question of the Human Rights Act between Henry Porter and the Prime Minister. The Prime Minister stated in week one of the correspondence that courts now have the power to 'strike down' as he put it, Parliament's laws, under the Human Rights Act. In week two Henry Porter pointed out the error. But in week three the Prime Minister still insisted that the strike down power existed and Henry Porter was wrong.

Perhaps the Prime Minister was alluding to the fact that the government routinely do accede to the courts' declarations of incompatibility. And, to their credit, they have done so. But the confusion is deeper than that because the courts can disapply legislation which offends European Union law. If Parliament permits the courts to have the last word over an area dominated by commerce and the objective of free trade, surely the courts are even better equipped to adjudicate whether there has been a trespass on the necessary elements of our domestic democratic order?

These proposals may seem unduly provocative at a time when some of the media seem to have convinced the public that the goals of the rule of law and the maintenance of national security are inherently contradictory. This is of course another myth and indeed a false dichotomy. There is scope in the Convention to adjust our rights in a case of stress and where necessary in a democratic society. But an independent arbiter should be in place to ensure that the rule of law, if it is indeed to bend, does not break, for this would in turn cause the collapse of a central pillar of our democracy and make a mockery of our claims to liberty. As a matter of principle, Parliament should not be permitted to make that judgment in its own cause.

Be that as it may, the issue may well be out of Parliament's hands, because the courts are beginning to realise that they in any event possess the authority to disapply legislation. Now this claim was almost unthinkable even at the end of the twentieth century, when no judge and hardly any academics questioned Dicey's sovereignty of Parliament (although Lord Woolf and Lord Justice Laws had, extra-judicially, reminded us that the sovereignty of Parliament is a judicial construct, and therefore would be open to revision by the courts in extreme circumstances, such as if judicial review were to be abolished).[15]

The issue raised itself in a most unlikely case, decided by the House of Lords in late 2005, and brought by Mr Jackson, the Chair of the Countryside Alliance, to challenge the Hunting Act 2004 which banned the hunting of most wild mammals with dogs.[16] The case questioned the validity of the Parliament Acts, which were invoked to ensure the bill's passage in the absence of the approval of the House of Lords. The Parliament Acts were upheld, and thus the Hunting Act survives, and the fact that huntsmen with red jackets still populate the English landscape has to do with the loopholes in the Act, or its lack of enforcement, rather than its legal validity.

The *Jackson* case is famous for the fact that at least three of the judges in that case, albeit obiter, suggested that in certain circumstances judges might have the authority to disapply legislation, even outside of the Parliament Acts and

Human Rights Act.[17] It is true that the senior Law Lord, Lord Bingham firmly endorsed the sovereignty of Parliament.[18] But Lord Steyn said that:[19]

> *In exceptional circumstances involving an attempt to abolish judicial review or the ordinary courts [the courts] may have to consider whether this is a constitutional fundamental which even a complaisant House of Commons cannot abolish.*

Lady Hale said:[20]

> *The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers.*

And Lord Hope, even more forthrightly, said that:[21]

> *It is no longer right to say that [Parliament's] freedom to legislate admits of no qualification.*

And:[22]

> *The rule of law enforced by the courts is the controlling principle upon which our constitution is based.*

It may be that it will take some time and considerable political courage for the courts to strike down Parliamentary legislation outside of European law (as is commonplace in other democracies, whose skies do not fall as a result). However, the intellectual route to that position has been sketched, albeit lightly, in *Jackson* and it is by no means as revolutionary as it may have appeared even just a few years ago. In fact, it is based on simple first principles which are as follows.

First, as Lord Steyn said in *Jackson*, the sovereignty of Parliament is a construct of the common law. If that is the case, it can be revised or abolished by the common law. Or, to put that another way, the common law would have no difficulty in theory reversing Dicey's priorities by elevating his second principle, rule of law, to a status above his first (the sovereignty of Parliament). Lord Hope said that this is already the case.

Secondly, the sovereignty of Parliament is predicated not upon mere assertion, nor even upon longstanding practice, but upon principle. The principle is clear: Parliament prevails because it most perfectly represents the will of the people. If therefore Parliament were to postpone elections for five or ten years, or create a

one-party state, or prohibit criticism of the government's record, it forfeits the condition upon which its sovereignty is based. The legitimacy of Parliament's claim to absolute sovereignty collapses because it is seeking to undermine its representative nature – to cut off the bough on which Parliamentary sovereignty sits.

But what if Parliament were to abolish judicial review? Or introduce torture for terrorist suspects? Or indefinite detention without trial in solitary confinement for foreigners? Here the issue is more complex. It cannot be said that such legislation questions Parliament's representative status – the status on which its sovereignty is predicated. But the legislation would be regarded as undermining those values and 'fundamentals' of the new, rights-based democratic order that we now inhabit and which require respect for human dignity, equality and the rule of law. By disapplying such legislation the courts would be acting as guardians of that new order.

Let me turn now from these heady issues which have so recently burst into life to the more prosaic matter of institutional arrangements to achieve the new constitutional balance. We here enter matters of public administration, the inner workings of government, questions about powers of ministers and ministries, how most rationally to achieve policy objectives and so on. The detail of public administration does not excite everyone, although in her newly-published wonderful biography of Leonard Woolf, Victoria Glendinning writes about Woolf that 'anything to do with administration fascinated him'.[23] (Leonard Woolf, husband of Virginia, was also the close friend of Professor William Robson of the London School of Economics, one of the fathers of administrative law and one of the few voices in the mid-twentieth century who did espouse the control of official discretion). Glendinning writes of Woolf that:

> *... He wrote, with startling lyricism: 'Administration must be regarded as the most precious flower and fruit, the essential mark and prerogative of the independent, sovereign state'. He enjoyed, in the course of the tribunals [on which he sat] learning about different worlds of work – from prison officers and the women who clean out the government offices in Whitehall, foresters in the north of Scotland, the men to talk down aeroplanes in fog, and a small and peculiar class of men in the secret service.*

One area that has been the subject of much recent attention and which involves a 'small' but not necessarily 'peculiar' class of men is the office of the Lord Chancellor. The story of the demise of the fulsome powers of the previous Lord Chancellors is well known to this audience. His simultaneous roles of head of the judiciary, cabinet minister, appointer of judges and speaker of the

House of Lords in its legislative capacity broke all the rules about the separation of powers. Professor Eric Jurgens of the Council of Europe came on a mission to this country to tell us that the new states of the former Soviet Union often sought in their new constitutions to have their justice ministers sit as judges and to appoint other judges. When told by the Council of Europe or Venice Commission that this violated the spirit of democracy, they would say that the model was inspired by our Lord High Chancellor. Shortly after Jurgens' visit (although I am not sure it was directly caused by it) the Constitutional Reform Act was passed, removing the Lord Chancellor's judicial status, creating an independent Judicial Appointments Commission and arranging to have our highest court separated from the House of Lords and called the Supreme Court of the United Kingdom.

Meanwhile, there is another ministerial post which on its face may also offend the separation of powers, namely, that of the Attorney General, described by Francis Bacon, who was one of them, as 'the painfullest task in the realm'.[24] He has multifarious roles. He is of course legal adviser to the government. Yet he is also a politician who takes the party whip and a minister who nowadays attends all cabinet meetings. He superintends various offices, such as the Crown Prosecution Service and a number of judicial and quasi-judicial proceedings where he must decide in the public interest. He may decide himself to bring civil actions and prosecutions or refuse to prosecute and whether or not to bring relator actions (on behalf of members of the public). He is also head of the English Bar.

If the Lord Chancellor's office offended the separation of powers, surely the Attorney's does as well? This point has been made a number of times, by Lord Woolf in his Hamlyn lectures,[25] by Lord Steyn in a lecture to the Administrative Law Bar Association,[26] by Joshua Rozenberg in his book Trial of Strength,[27] and indeed by former Attorney General Hartley Shawcross following a number of incidents in the late 1970s, where the then Attorney, Sam Silkin, failed to prosecute the Clay Cross Councillors or the Post Office Union for its unlawful boycott of mail to South Africa during the apartheid era.[28] No doubt then, as nowadays, the allegations of actual bias were false but the issue is not the reality of bias but its appearance: does the Attorney's action or inaction leave a doubt in the public mind about whether his opinion was driven by law or political convenience?

In an article in the *Guardian* last year, I argued, in relation to the Attorney's advice on the legality of the war in Iraq, the substance of which I did not then join – nor will I now – that his office contains an inherent tension and that the dual political and legal role of the Attorney inevitably lends itself to charges of political bias in legal decisions and that the time had come to appoint an

independent Attorney, as in other countries.[29] Some few Commonwealth countries do have Attorneys who combine the legal and political roles but others (such as Ireland, South Africa and India) do not.

This question may resolve itself in the end due to lack of qualified lawyers in Parliament. As Lord Rodgers of Quarry Bank pointed out when he initiated a debate on this question in the House of Lords on 15 December 2005, in 1964 there were 100 barristers elected to the House of Commons, in 2005 there were only 34. During that time the profession increased its numbers five fold. Attorneys may perforce have in the future to be outsourced, or recruited to the House of Lords (if it continues to exist in its present form).

On further reflection, however, I do believe that the matter is more complex than I had realised – or has become more complex in the light of recent events. I have mentioned the advantages of an unwritten constitution, but one of its defects is that one cannot at a glance view the constitutional map. Successive statutes and other laws alter the constitutional equilibrium so that the interacting points of influence may so easily be lost and the bigger picture missed. In this case the constitutional balance has been radically altered by the Constitutional Reform Act and the new role of the Lord Chancellor. The Lord Chancellor remains in name, but he is no longer the head of the judiciary and the constraints associated with that role therefore disappear. His other title describes him more accurately – Secretary of State for Constitutional Affairs. In that capacity he heads a massive department of over 23,000 which spends more than £3 billion of public money. Most important for the purposes of this discussion, he need not even be a lawyer and could therefore be unfamiliar with the disciplines of that vocation.

The result may be therefore that if the Attorney General is an employed practitioner, worthy as he or she may be, there may not be a lawyer at the heart of government. Does that matter? We do not necessarily want an economist to be Chancellor of the Exchequer or a doctor to head up the Department of Health. Such advice that is given to the health ministers is provided by an independent civil servant known as the Chief Medical Officer who is not a political appointment and does not change with a change in government.

On the other hand, the judiciary is a branch of government and the law permeates *all* government departments. And would the appointment of an outsider necessarily ensure that that person were less 'political'? In those countries which do appoint outsiders, they are often still seen as predisposed to the aims of the government – in-house lawyers of the familiar kind. They may be appointed from those outside of the legislature but, like most special advisers, when in post will be assumed to be facilitating government policy.

One question we would have to ask is: if we had a skilled 'objective' non-political lawyer, are we sure that he or she could assess the 'public interest' as well as a political attorney? I refer here to the role of the Attorney in bringing prosecutions, entering a plea of nolle prosequi to prevent a prosecution, or bringing or refusing to bring a relator action. In the *Gouriet* case[30] Lord Wilberforce pointed out the political delicacy which was required of the Attorney's judgment in these matters. In that case, the House of Lords preserved the Attorney's absolute discretion to refuse a relator action on the ground that the Attorney has to be free to take into account matters of 'policy', such as whether the prosecution would exacerbate an already sensitive industrial situation. Would it be effective or futile? Would it lead to political martyrdom? Would it provoke a national strike? These were said to be questions not best answered by non-political legal outsiders.

Above all, is there not an advantage in having at the heart of government an Attorney of high quality, who embodies the traditions of an independent profession and who embraces the values of legality and the rule of law? I have in mind Lord Goldsmith's clear criticism of Guantanamo Bay and his advocacy in favour of human rights. When he expresses these values as a Minister of the Crown, rather than a mere detached outside adviser, they are articulated not as mere expressions of the law but of government policy. Surely ministers are more likely to accept such advice because it comes from 'one of them', someone essentially on their side, rather than from some externally contracted technocrat?

There is much to be said on both sides of this argument, but is there a way we could ensure the best of both models of Attorney General? A force for the rule of law at the centre of government while reducing or removing any appearance of political bias?

The Constitutional Reform Act (CRA) may provide an interesting way forward. Section 2 of the Act provides the qualifications of the Lord Chancellor. These qualifications include senior political or legal experience but the Lord Chancellor does not have to have had either. A similar statute setting out the Attorney's experience could however specify qualifications that ensure a lawyer of competence, seeped in the highest legal traditions.

Section 3 of the Constitutional Reform Act then imposes a duty to respect the independence of the judiciary. This duty is imposed upon the Lord Chancellor, and all other ministers of the Crown with responsibility for the judiciary or the administration of justice. And the Lord Chancellor must 'have regard to' matters such as 'the need for the judiciary to have the support necessary to enable them to exercise their functions'.

What about the duty to protect and promote the rule of law? Part I of the CRA does take us closer to the rule of law, albeit in obtuse fashion. It says that: '[t]his Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle'.

That provision is encouraging in two respects: it reminds us that, although our constitution is unwritten, there is an existing principle called the rule of law. And it reminds us that the Lord Chancellor has had a constitutional role in relation to the constitutional principle of the rule of law. But it does not spell out the precise nature of what that role is and how it should be fulfilled (contrary to some of the defeated amendments to the bill in the Lords that sought to do that with greater clarity). A duty upon the Attorney General could be more specific in that regard.

The Lord Chancellor's duty in respect of the rule of law is however endorsed by another device, the oath of office. Section 17 of the Constitutional Reform Act amends the former oath of office of the Lord Chancellor and provides an oath as follows:

> *I swear that in the office of the Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.*

Compare that spanking modern oath with that of the Attorney, which is presently as follows:

> *I do declare that well and truly I will serve the Queen as Her (Attorney/ Solicitor) General in all Her Courts of Record within Great Britain, and truly counsel The Queen in Her Matters, when I shall be called, and duly and truly minister the Queen's matters and sue The Queen's process after the course of the Law, and after my cunning. For any matter against The Queen where The Queen is party I will take no wages or fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the Law against the Queen, as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant to The Queen's matters when I shall be called thereto.*

Not exactly an oath for our millennium, you may think. Contrast the duties set out in that oath of the Attorney General to the Queen with the statement

of Professor Zamir [the famous public law scholar and later an Israeli Supreme Court Judge, writing about his experience as Attorney General of Israel]:[31]

> *The real client of the Attorney General is not the government but the public. He owes it to the public, on trust, to see to it that the law is observed by the government.*

Zamir then points out that the Attorney as a watchdog must be ready not only when necessary to bark, but also to bite. His teeth are provided by the fact that not only is the Israeli government required to follow his opinion (which in practice is what happens in the UK) but (and this is different from the UK) if the government does not do so the Attorney may institute criminal proceedings against the government, or refuse to provide them with a legal defence to any challenge in court.

By looking at examples such as these it may be possible to get the best of all worlds: a highly qualified lawyer (with specified qualifications that ensure that he is seeped in the independent values of the legal profession) at the heart of government, yet with duties to serve the public interest above party political interest, and to promote and enforce the rule of law and other values of a constitutional democracy – such duties set out clearly in a statute or constitutional form, and backed up by a revised oath of office. In those circumstances, in the words of Sir Hartley Shawcross:[32]

> *The rule of law would then be given not only the reality (which … it has) but also the appearance (which … it lacks) of complete detachment from party politics.*

At the same time other grey areas of the Attorney's role could be sorted out. We know that he has the responsibility of advising government, but his role in advising Parliament is much less clear.[33] The Attorney now does advise in respect to Parliamentary discipline and conduct (although the Speaker of the House of Commons has his own counsel) and occasionally advises on certain bills. Select committees such as the Joint Committee on Human Rights provide advice as well, but to be a well-informed legislature Parliament does require clearer access to independent legal advice than is now available.

Further reforms might also be provided to strengthen the rule of law on the part of members of the government generally. We have seen that, despite the reference in the Constitutional Reform Act to the 'existing constitutional principle of the Rule of Law', and the reference to the rule of law in the Lord Chancellor's oath, there is no specific statutory duty upon any minister to protect or promote the rule of law in any specific way. The Ministerial Code of

Ethics (which does not have statutory force) sails quite close, but without really reaching the rule of law in any meaningful way. Section 1.1 states that

> *Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct in the performance of their duties.*

The notion of 'constitutional conduct' is not defined although section 1.5 states that

> *The Code should be read against the background of the overarching duty on Ministers to comply with the law, including international law and treaty obligations.*

Section 6.22 of the Code then requires ministers to consult the Law Officers in good time where the law is in doubt or disagreement within or between departments and before the government is committed to 'critical decisions involving legal considerations'.

The Code also requires ministers to 'uphold the administration of justice' and to 'protect the integrity of public life' and observe the seven Principles of Public Life set out in the first report of Lord Nolan's Committee on Standards in Public Life. These principles are selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Surprisingly, the core principle of 'legality' is not included in that list.

There is much talk these days of human capital and social capital. But what of democratic capital? This country has in the recent past not neglected its democratic capital, which has been significantly maintained and renewed. We have moved with rapid speed to a constitution which now supplements the values of representative democracy with a high concern for the rule of law, and which limits the opportunity for political intrusion on fundamental rights and liberties. Alterations to some of the structures of government seek to support and supplement these trends and more are needed.

These developments will never please those who mistrust legality or who regret the demise of a merely political constitution. Overall, however, they do not impair democracy, but constitute its fuller realisation.

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Notes

1 'Welfare "Rights" Law and Discretion', 42 *Polit.Quarterly* (1971), p113.
2 *Hansard,* House of Commons Debates, 23 July 1946, col 1983.
3 In JAG Ginsberg (ed), Law and Opinion in England in the Twentieth Century, Steven and Sons Ltd, 1959.
4 See DGT Williams, 'The Donoughmore Report in Retrospect', *Public Administration*, 1982, p29.
5 The Law and the Constitution, 1933, pp309-10.
6 The End of Laissez Faire, 1926.
7 LJ Hume, Bentham and Bureaucracy, Cambridge University Press, 1981, p82.
8 Henry Parris, Constitutional Bureaucracy: The Development of British Central Administration Since the Eighteenth Century, 1969, p82. For a more detailed account of the attitude to Dicey's rule of law and the influence of law and legal techniques on government see Jeffrey Jowell, 'Administrative Law' in Vernon Bognador (ed), The British Constitution in the Twentieth Century, pp373-400.
9 *The Report of the Committee on Tribunals and Inquiries*, Cmnd 218, 1957.
10 Speech to Human Rights Lawyers Association, London School of Economics, 29 September 2006.
11 See n7 above.
12 The Crooked Timber of Humanity: Chapters in the History of Ideas, John Murray, 1990.
13 See n10 above.
14 *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56 at para 102.
15 See Lord Woolf, 'Droit Public – English Style', [1995] *Public Law*, p57; Sir John Laws, 'Law and Democracy', [1995] *Public Law*, p72.
16 *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56.
17 I have discussed this case at greater length in Jeffrey Jowell QC, 'Parliamentary Sovereignty under the New Constitutional Hypothesis' [2006] *Public Law*, pp562 -79.
18 At para 9.
19 At para 102.
20 At para 159.
21 At para 104.
22 At para 107.
23 Leonard Woolf, Simon & Schuster, 2006.
24 For a full account of the office of Attorney General see the two works by John Ll. J Edwards, The Law Officers of the Crown, 1964 and The Attorney General, Politics and the Public Interest, 1984.
25 Protection of the Public – A New Challenge, 1990, pp103-13.
26 Published as 'The Weakest and Least Dangerous Department of Government', in Johan Steyn, Democracy Through Law, Ashgate, 2004, p99.
27 Richard Cohen Books Ltd, 1997 p28-33.
28 In a letter to *The Times* on 3 August 1977. Another former Attorney General, and subsequent Lord Chancellor, Lord Rawlinson, also came to that view. See Edwards, The Attorney General, n24 above, ch3.
29 The *Guardian*, 29 April 2005
30 *Gouriet v Union of Post Office Workers* [1978] AC 435
31 'The Role of the Attorney General in Times of Crisis: The Israeli Shin Bet Affair ' in S Shetreet (ed) The Role of Courts in Society, 1986, p271, at pp272-73.
32 *The Times*, Letters to the Editor, 3 August 1977.
33 See Edwards, The Attorney General (n24 above), ch8.

Best evidence: the case for using intercept material in UK courts

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This is an edited version of Part 2 of the JUSTICE report, ***Intercept Evidence: Lifting the ban*** *(October 2006). The full report contains a comparative law survey of seven common law countries: Australia, Canada, Hong Kong, New Zealand, Ireland, South Africa and the United States. The report was researched by Gabrielle Guillemin, JUSTICE policy intern, with assistance on comparative law from Freshfields Bruckhaus Deringer, Bell Gully and Oxford Pro Bono Publico.*

In October 1586, Mary, Queen of Scots was convicted of treason for plotting to kill Elizabeth I. Among the evidence at her trial were enciphered letters, detailing her knowledge of Babington's plot, which had been intercepted by Walsingham, Elizabeth's Secretary of State and chief spy master. It is one of the earliest – and most notorious – examples of intercept evidence being successfully used in English courts.

In October 2006, communications technology has advanced – and continues to advance – considerably beyond the sending of coded, hand-delivered letters. There are now, for instance, over 33 million landlines and over 65 million active mobile phone subscriptions in the UK.[1] As the technology has developed, so too has the interception capability of law enforcement and intelligence services. As is the case in many other countries, UK law currently permits police and other government agencies covertly to intercept telephone calls and other kinds of communication – including emails, faxes, text messages, VoIP[2] and ordinary post – in order to detect and prevent serious crime and acts of terrorism. In 2004, the Home Secretary issued 1849 warrants authorising the interception of communications, and a further 674 warrants continued in force from previous years.[3] (By way of comparison, the total number of federal and state wiretap authorisations in the entire United States in 2005 was 1773).[4]

However, although both communications technology and interception capability may have advanced far beyond that of Walsingham's day, the rules governing the admissibility of intercept material in UK courts are more conservative than they were in the sixteenth century. Although the UK – like nearly every other country in the world – allows the use of intercepted communications for law

enforcement purposes, it is virtually the only country to prohibit the use of intercepted material as evidence to help convict criminals and terrorists.[5]

By contrast, intercept evidence has been used in other countries to help convict many of those involved in serious organised crime and terrorism, including Al Qaeda cells operating in the United States following 9/11, the Five Godfathers of the New York Mafia,[6] and war criminals in the Hague.[7] Indeed, despite the current UK ban, various loopholes allow the successful use of intercept evidence in UK courts in a limited number of cases. For instance, Ian Huntley was convicted of the Soham murders in December 2003 partly on the basis of intercepted telephone calls made between Huntley, his girlfriend Maxine Carr, and Huntley's mother. Yet even the evidence of intercepted letters that convicted Mary Queen of Scots in 1586 would not now be admissible under the current law.[8]

The wisdom of barring potentially probative evidence of guilt from criminal proceedings would seem debatable enough, save that – since the 9/11 attacks – evidential difficulties in terrorism cases have been used by the government to justify various exceptional counter-terrorism measures, including the indefinite detention of foreign nationals without trial,[9] the use of control orders to impose 18 hour curfews on suspects without a criminal charge,[10] and extending the maximum period of pre-charge detention in terrorism cases to 28 days.[11]

In light of these measures and the evidential difficulties in terrorism cases that have been used to justify them, the issue of intercept evidence has become the subject of keen public debate. A significant number of senior police officers, prosecutors, judges and politicians have now called for intercept evidence to be used in criminal trials. Indeed, the Home Affairs Committee of the House of Commons noted in July 2006 that 'outside the Government there is universal support for the use of intercept evidence in the courts'.[12] Despite a succession of reviews, however, the government has yet to announce a shift in its position.

The use of intercept evidence raises a number of human rights issues, chiefly the right to a fair trial and the right to privacy, protected under the Human Rights Act 1998 by Articles 6 and 8 of the European Convention on Human Rights (ECHR) respectively. The way in which interceptions are regulated, and the extent to which any unused intercept material is disclosable to defendants, both impact on fundamental rights. But the failure to allow intercept evidence also raises human rights issues, especially when exceptional counter-terrorism measures are being justified by reference to the difficulty of obtaining sufficient admissible evidence to prosecute terrorist offences in the criminal courts.

The debate over intercept evidence engages other interests as well. There is the public interest in ensuring that interception capabilities are not compromised, so that intercepted communications continue to be of value in detecting and preventing serious crime and acts of terrorism. Most of all, there is the public interest in the fair administration of justice: ensuring that the adversarial criminal process works effectively to protect fundamental rights, convict the guilty and acquit the innocent.[13]

JUSTICE has long been concerned with these issues. In 1998, as part of a broader study on the human rights aspects of covert surveillance by police,[14] JUSTICE observed that there was a 'growing consensus' that the ban on intercept evidence was 'now unsatisfactory'[15] and recommended the ban should be lifted in order to bring UK law into line with the position in a number of other countries including the United States, Canada and Australia.[16] This article analyses the arguments for and against the current ban and sets out the comparative law under which intercept evidence is used in other common law countries.

What is intercept evidence?

An 'intercept' is the term used to describe the covert interception of a private communication by intelligence services or law enforcement agencies. The interception of telephone calls – eg by use of wiretaps, etc – is perhaps the best-known example. However, under the Regulation of Investigatory Powers Act 2000 (RIPA), 'intercepted communications' also covers other kinds of communications, including mobile phones, email, fax and ordinary post.[17] 'Intercept evidence' refers to the use of information gained from intercepted communications as evidence in civil or criminal proceedings. However, UK law currently prohibits the use of any evidence in legal proceedings in the UK which discloses or tends to disclose either the fact that a given communication has been intercepted (eg the fact that the police had been listening in on a particular person's phone calls) or the contents of that call (ie what was actually said in the phone calls).

Why is there a ban on intercept evidence? Government justifications for the ban

The policy of banning intercepted communications as evidence in criminal proceedings is a long-standing one. It has not, however, existed since time immemorial. The 1953 Privy Council report on interceptions listed several celebrated cases from the eighteenth century in which intercepted letters were used in evidence:[18]

> *In the year 1758, Dr. Hensey, a physician, was tried on a charge of high treason, being accused of treasonable correspondence with the enemy. The principal evidence on which he was convicted was that of a letter carrier*

> *and a Post Office clerk, the latter of whom had opened Dr. Hensey's letters and delivered them to the Secretary of State.*

By contrast, although it appears that 'the power to intercept telephone messages has been exercised in England and Wales from time to time since the introduction of the telephone',[19] there is no historical reference to telephone intercepts ever being put forward as evidence in criminal proceedings and by 1953 it had become 'the settled policy of the Home Office' that:[20]

> *save in the most exceptional cases, information obtained by the interception of communications should be used only for the purposes of detection, and not as evidence in a Court or in any other Inquiry.*

Despite this long-established practice against admitting intercept evidence, the current statutory ban dates only from 1985 when the Interception of Communications Act was passed following an adverse judgment by the European Court of Human Rights.[21] A consultation paper on intercepted communications was issued in 1999[22] following another adverse judgment from Strasbourg.[23] Nonetheless, the ban on intercept evidence was maintained in the Regulation of Investigatory Powers Act 2000.

Since the 9/11 attacks, the issue of intercept evidence has become increasingly prominent in Parliamentary and public debate. Various amendments have been put forward to allow its use, including in debates during the passage of the Serious Organised Crime and Police Act 2005[24] and the Terrorism Act 2006.[25] In addition, the Interception of Communications (Admissibility of Evidence) Bill was put forward by Lord Lloyd as a private members bill in October 2005.[26] All have been unsuccessful.

Despite what has been described as 'universal support' for the use of intercept evidence,[27] the government has so far refused to lift the ban.[28] It has instead limited itself to a promise to keep the matter under review and an undertaking from the Home Secretary to:[29]

> *find, if possible, a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence.*

In the absence of positive government proposals to allow its use, the government has continued to muster a wide range of arguments against lifting the ban on intercept evidence. The primary argument is that allowing such evidence would compromise interception capabilities. However, a variety of secondary arguments have also been put forward, including the claim that intercept evidence would be unlikely to show the guilt of suspects; that its use would

harm the close relationship between the security and intelligence services and law enforcement bodies in the UK; that it would led to an intolerable burden being placed on courts and prosecutors; and so forth. This section critically examines the main arguments that have been deployed by the government and others against allowing the use of intercept evidence in court. The subsequent section will present positive arguments in favour of lifting the ban.

Intercept evidence would 'compromise methods of interception'

The primary argument advanced by opponents of intercept evidence is that disclosure of intercept material would reveal to suspected criminals and terrorists the *methods* by which their communications have been intercepted. Even if the methods themselves were not disclosed, it is argued, the use of intercept evidence would present an unacceptable risk that defendants might infer the methods used from the particular instances in which their communications were intercepted. The consequent harm would be a weakening of interception capabilities, as suspects develop new measures to avoid interception, and lessen the value of interceptions in general as a tool in the fight against serious crime and terrorism. The 1999 consultation paper on interceptions summarised the concern as follows:[30]

> *exposure of interception capabilities will educate criminals and terrorists who will then use greater counter interception measures than they presently do. This would mean that any advantage gained by repeal would be short lived and would make interception operations more difficult in the longer term.*

Concern over compromising interception capabilities was one of the main justifications advanced by government for retaining the ban on intercept evidence during debates on the Regulation of Investigatory Powers Bill in 2000. As one government whip argued:[31]

> *[I]t is vital that the existing capability is protected. Exposure of interception capabilities would or might educate criminals and terrorists who might then use greater counter-interception measures than they presently do. We believe that it is vital that the existing capability is protected and that the exposure of interception capabilities, which would result, as night follows day, from a repeal of the prohibition, would educate criminals and terrorists. They would certainly use greater counter-interception measures than they presently do and the value of interception as an investigative tool – it is a valuable investigative tool, particularly against the most serious criminals and terrorists – would be seriously damaged. For those reasons, we are not convinced that a change to an evidential regime would involve a*

> *rise in criminal convictions in any more than the short term. Criminals and terrorists would become 'wise' to it.*

Indeed, it seems likely that the concern over revealing too much about the practice of interceptions is at the root of the long-standing policy against using intercepts as evidence. As Lord Mustill observed in 1994:[32]

> *Those who perform the interceptions wish to minimise the dissemination of the fact that they have been performed, since it is believed that this would diminish the value of activities which are by their nature clandestine.* ***We need not consider to what extent this preoccupation with secrecy at all costs is soundly based for it has been treated as axiomatic for decades, if not longer.***

However, the argument that intercept evidence would reveal too much about interception capabilities seems profoundly misplaced for at least three reasons:

- suspected criminals and terrorists are already generally aware of interception capabilities;
- interception capabilities can be protected by public interest immunity (PII) principles; and
- there is no evidence that PII principles have failed to protect interception capabilities in other common law jurisdictions.

General awareness of interception capabilities among suspected criminals and terrorists

First, it appears to assume, wrongly, that those involved in terrorism or serious crime are not already highly alert to the possibility that their telephone calls and emails are vulnerable to interception. As Lord Lloyd noted in his 1996 report, 'sophisticated criminals are all well aware are that their telephones are, or may be, tapped'.[33] Nonetheless, there is no evidence that this general awareness of interception capabilities (if not their precise extent) has led criminals and terrorists to stop using telecommunications when carrying out their activities. As the government's own 1999 consultation paper makes clear:[34]

> *It is virtually impossible to organise a complex crime without communicating over public networks, and this is particularly true where there is an international dimension,* ***as is increasingly the case****.*

The concern that intercept evidence would compromise methods of interception was similarly dismissed by the Head of Specialist Operations (including the Anti-Terrorist Branch) of the Metropolitan Police, Assistant Commissioner Andy Hayman, in evidence to the Home Affairs Committee in February 2006:[35]

> *I originally started off by being fairly unsupportive of the notion of using [intercept] material, mainly on the basis that it was starting to disclose methodology to the other side. I think that is now well and truly worn-out because I think most people are aware of that. It does not stop them still talking but they are aware of the methodology so that is a lightweight argument.*

For the reasons outlined below, it seems deeply unlikely that lifting the ban on intercept evidence would compromise methods of interception. Even so, the supposition that suspected criminals and terrorists might learn about methods of interception through disclosure in UK courts is wholly undermined when one considers the international nature of modern terrorism and serious organised crime[36] and the use of intercept evidence in other jurisdictions. Since intercepted communications are admissible as evidence in the overwhelming majority of countries throughout the world, and even foreign intercepts are admissible in the UK, it is almost certainly the case that those involved in international terrorism and serious organised crime in this country are already as well-versed in counter-interception methods as they are ever likely to be and that the introduction of intercept evidence in the UK would make no difference to their methods of communication. As Andrew Mitchell MP noted in Parliamentary debates on the Serious Organised Crime and Police Bill, the belief that intercept evidence would lead to an increase in counter-interception methods:[37]

> *assumes that British serious criminals are a peculiarly insular lot whose information gathering does not penetrate far overseas.*

Interception capabilities can be protected by public interest immunity principles

Secondly, opponents of intercept evidence appear either dramatically to understate or to ignore altogether the ability of existing safeguards to protect sensitive intelligence capabilities from being revealed in court proceedings. In cases involving serious organised crime, for instance, prosecutors regularly rely on established principles of public interest immunity in order to prevent details of methods of covert surveillance, including the identity or even the existence of informants, from being disclosed to defendants. Yet, despite the regular use of surveillance evidence in such cases, there is no evidence that existing PII rules have failed adequately to protect methods, sources or informants, or that covert surveillance techniques used by law enforcement and intelligence agencies in the UK have been compromised as a result.

Although the primary rule of disclosure in criminal proceedings is that the prosecution must disclose to the accused any material 'which might reasonably be considered capable of undermining the case for the prosecution against the

accused or of assisting the case for the accused',[38] section 3(6) of the Criminal Procedure and Investigations Act 1996 prohibits the court from disclosing any material that it concludes is not in the public interest. Furthermore, the Code of Practice under Part II of the 1996 Act,[39] the Attorney General's guidelines on the disclosure of information in criminal proceedings, and the Joint Operational Instructions for the Disclosure of Unused Material[40] all provide detailed guidance on the procedures whereby the prosecution may apply to the court to prevent the disclosure of sensitive material.[41] In addition, there is no obligation at all to disclose any sensitive material which is 'either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence'.[42] As Lord Bingham noted in *R v H*, the most common justification for non-disclosure is the protection of covert surveillance techniques and capabilities:[43]

> *The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations.*

The PII procedure in criminal cases is intended to strike a balance between the defendant's right to a fair trial (and the interests of justice in general), on the one hand, and the need to prevent the disclosure of sensitive information contrary to the public interest (eg methods of surveillance; names of informants) on the other. As the European Court of Human Rights noted in *Rowe and Davis v United Kingdom*:[44]

> *the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.*

Indeed, as one MP noted during debates on the Serious Organised Crime and Police Bill:[45]

> *The withholding of sensitive information is an uncontroversial and unexceptional daily occurrence in the criminal courts. There is a clear public interest in preserving the anonymity of informers; of the identity of a person who has allowed his premises to be used for surveillance, and of anything*

> *that would reveal his identity or the location of his premises; of other police observation techniques; and of police and intelligence service reports, manuals and methods. The police order manual, for example, is protected from disclosure. Techniques relating to intercept systems, procedures, technology and methodology fall into the same category.*

Although it remains for the court to determine for itself which evidence should be disclosed to a defendant in order to secure a fair trial,[46] it is in our view inconceivable that a court would ever conclude that the interests of justice required details of surveillance or interception capabilities to be disclosed. Even were it to do so, however, it would still be open to the Crown to withdraw the prosecution and thereby prevent the sensitive material from being disclosed to the defendant.

Indeed, there is no requirement on the prosecution to introduce intercept material into evidence if it does not wish to do so, including those situations where it is feared that its use may inadvertently reveal too much about interception capabilities in the circumstances of a particular case. The decision not to introduce intercept evidence in a particular case, however, should be a matter of judgment for prosecutors. It is impossible to see how such a hypothetical case could be used to justify the existing absolute prohibition on intercept evidence in UK law.

No evidence that PII principles have failed to protect interception capabilities in other jurisdictions

Thirdly, in those common law countries where intercept evidence is used regularly in adversarial criminal proceedings, there is no evidence that PII principles have failed to protect either interception capabilities or other methods of covert surveillance. Indeed, given the strength of its concern that use of intercept evidence would lead to criminals and terrorists becoming educated about methods of interception, it is striking that the government has been unable to point to any decline in the value of intercept evidence in those jurisdictions where it is used. On the contrary, prosecutors in other jurisdictions testify to the continuing utility of intercept evidence. As the Australian federal Director of Public Prosecutions, Damian Bugg QC, noted in 2005:

> *We rarely now have a drug importation prosecution that does not have telephone intercept evidence in it. I can think of any number of prosecutions where we would have real difficulty in prosecuting without it – we just would not get the evidence.*

Again, there is no evidence that use of intercept evidence in Australia and elsewhere has led to a disclosure of interception capabilities, increased

the difficulties of interception operations, or otherwise diluted the value of interception as a tool in the fight against serious organised crime and terrorism.

Intercept evidence would harm relationship between police and intelligence services

A frequent governmental argument against the use of intercept evidence in UK courts is the concern that it would lead to a reduction of co-operation between the intelligence services and the police. In debates on the Serious Organised Crime and Police Bill, the then Home Office minister, Caroline Flint MP explained to Parliament:[47]

> *The fact is that we already use intercept evidence to convict criminals, and* ***without prejudicing the close relationship between our intelligence services and the police****. Indeed, no other country has such a close relationship …*

At first glance, it is difficult to understand why allowing the use of intercept material as evidence should have any bearing on the working relationship between different agencies. However, in debates on the Terrorism Bill, the Home Office minister Baroness Scotland QC similarly spoke of the need to protect the 'relationship between intelligence and law enforcement agencies' and ventured that allowing intercept evidence:[48]

> *would lead to a reduction in co-operation, in the options available to criminal investigation and in its effectiveness as an intelligence tool and ultimately as an evidential tool.*

At its root, therefore, the government's concern appears to be that allowing intercept evidence may lead one government agency or public body to refuse to co-operate or share vital information with another. Such an explanation is surprising, to say the least. Whatever the complexities of the working relationship, the suggestion that intercept evidence could lead to an increase in inter-agency tension seems a poor argument against allowing its use in court. Similarly, even if such tensions did arise, it does not seem credible that any government would ever permit them to compromise the fight against serious crime and terrorism.

In any event, the concerns expressed by government do not appear to be shared by several senior police officers – persons one would assume to be intimately familiar with the 'uniquely close' relationship. As Sir Ian Blair, Metropolitan Police Commissioner, told the *Daily Telegraph* in February 2005:[49]

> *I have long been in favour of intercept evidence being used in court. The court can then weigh it up. At the moment nobody can test it.*

Nor is it clear that the relationship between intelligence services and law enforcement in the UK is as unique as supposed. In a paper delivered at the JUSTICE/Sweet & Maxwell Conference on Counter-Terrorism and Human Rights in June 2005, a senior lawyer from the Crown Prosecution Service noted:[50]

> *[I]t is clear that the relationships between the National Security Agency and the US Department of Justice and between the Australia Security Intelligence Organisation and the various law enforcement agencies in Australia [two countries in which intercept evidence is admissible] are now much closer than they were.* ***A suggestion that the relationship between the intelligence agencies and law enforcement in the UK is unique in terms of the information flows between them is now more difficult to sustain****.*

Intercept evidence would hamper ability to adapt to rapid changes in communications technology

Another argument made against allowing intercept evidence is the claim that the current rapid pace of change in communications technology is likely to render obsolete any legal framework established to permit its use, and even compromise the ability of law enforcement and intelligence services to intercept new kinds of communication. The Home Secretary in 2005 supported his argument against intercept evidence by noting the 'major changes expected in communications technologies over the next few years'.[51] Similarly, Baroness Scotland argued:[52]

> *It does not make sense to change our system just as technology is changing and before we know what that means for how interception is regulated and deployed in future … Over the next few years, the world of communications technology is likely to change very significantly in lots of ways. Terms such as 'wiretap evidence' will soon be as redundant as talk of telephone operators and switchboards is today. They will be replaced by technologies such as Voice over Internet Protocol (VoIP), where the human voice is broken up into many signals transmitted across a variety of different routes before being brought together again on delivery, rather than being carried over a single line.*

That communications technology is currently undergoing a period of rapid change is an undeniable fact. It is also true that these changes pose a serious challenge to police and intelligence services carrying out lawful interceptions.[53]

As an argument against the *admissibility* of intercept material as evidence, however, the government's reasoning is seriously flawed.

The first and most obvious point is that interception of communications is *already* subject to legal regulation under Part I of RIPA. Therefore, the challenges posed by changes in communication technology are those that the current legal framework is bound to confront in any event, regardless of whether intercept evidence is made admissible or not. This is because Article 8 of the European Convention on Human Rights requires that any interference with private communications must be made 'in accordance with the law'. Any attempt to intercept a communication that did not fall within the existing framework would likely fall foul of the minimum requirements of legality. The argument that intercept evidence would require legislation giving rise to excessive rigidity is therefore a red herring: interception itself requires legislation in order to remain lawful. Any change in communications technology that fell outside the current framework would be need to be legislated for in any case.

Indeed, it is evident that the requirements of legality have been the engine behind the existing statutory framework for intercepting communications: the 1984 judgment of the European Court of Human Rights in *Malone v United Kingdom*[54] that the lack of statutory framework for interceptions breached Article 8 ECHR led to the Interception of Communications Act 1985. Similarly, the 1997 judgment of the Court in *Halford v United Kingdom*[55] that the lack of regulation over intercepting communications on internal networks under the 1985 Act breached Article 8 ECHR led to the Regulation of Investigatory Powers Act 2000.

Secondly, there is nothing in the current legal framework that stipulates the particular *method* of interception. Therefore, so long as the communication falls within the terms of Part I of RIPA, the evidential use of intercept material would make no difference to the ability of police and intelligence services to develop new and increasingly sophisticated means of interception.

Thirdly, in the event that new methods of communication fall outside the existing legal framework, they can be addressed by way of prompt amendment and flexible legislative drafting. The interception of communications is far from the only area of law that is affected by rapid technological change (see eg intellectual property; data protection; telecommunications in general). It has not been suggested that the government should avoid regulating other areas for fear of hampering the effectiveness of police and intelligence services.

Indeed, the continuing failure of government to develop techniques for using intercept material as evidence in the modern digital age may prove more

deleterious to police and intelligence efforts than legislating for its use. As the Foundation for Information Policy Research noted in 1999, the very fast pace of technical developments in the field of digital intercepts was a positive argument in favour of allowing intercept evidence, rather than continuing to prohibit its use:[56]

> *Unless law-enforcement takes the plunge, and begins to develop techniques for forensic acquisition and competent presentation of intercept evidence, it will be left hopelessly far behind.*

Intercept evidence would increase burden on intelligence services, police and prosecutors

Opponents of intercept evidence argue that allowing its use would inevitably lead to the police and intelligence services having to devote resources to transcribing and retaining intercept material for use at trial, as well as putting pressure on prosecutors and courts dealing with requests for disclosure from defendants.[57] As the Parliamentary Joint Committee on Human Rights noted in its August 2006 report:[58]

> *The CPS's perception was that the main objection of the security services [to allowing intercept evidence] was the purely practical one of resources, given the large volume of material to be recorded, transcribed and kept in case it was ordered to be disclosed. This was seen as potentially very time consuming and expensive. The security services would prefer to devote those resources to ensuring that technological developments, such as the advent of internet telephony, did not diminish their capacity to capture information.*

Other opponents of intercept evidence similarly paint a lurid picture:[59]

> *[Intercept evidence would impose] enormous burdens of transcribing and preserving all related interception material if it is to be available for court evidence. That would certainly mean a considerable diminution of product from the services concerned, because of the sheer volume of what would have to be processed and kept.*

At the outset, it is sensible to concede that allowing intercept evidence will result in an increased burden on police, prosecutors and the intelligence services in terms of transcribing and retaining intercept material with a view to future criminal proceedings.[60] However, the estimates above – including the suggestion that *all* intercept material would have to be transcribed – appear to be highly exaggerated. To the extent that using intercept material as evidence would pose challenges to the police and the intelligence services, these are hardly

insurmountable – indeed, they have been met in every common law jurisdiction in which intercept is used – and the benefits considerably outweigh the costs.

In particular, fears of defence lawyers mounting extensive fishing expeditions in search of undisclosed material are unfounded, so long as prosecutors and courts perform their respective roles with diligence:[61]

> *The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good.* ***Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court****. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.*

Lastly, concerns about the logistical burden were also dismissed by Assistant Commissioner Andy Hayman in his evidence to the Home Affairs Committee:[62]

> *The next point which I had reservations about was the true logistics about transcribing [intercept] material, where you could go into reams of material. Again, that is a fairly moot point now, given that you can be very selective about the things you are going to transcribe if you are very precise on your investigation and focused. I think I am moving, as I know ACPO is, to a conclusion that in a selected number of cases, not just for terrorism but also for serious crime, it would be useful. I think also it does make us look a little bit foolish that everywhere else in the world is using it to good effect.*

Intercept evidence is unsuited to adversarial criminal proceedings

Perhaps the most inaccurate argument against intercept evidence has been the widely-repeated claim that intercept evidence is used primarily in inquisitorial legal systems and is therefore ill-suited to adversarial legal systems such as the UK. As the following exchange between the Home Affairs Committee and the then Home Secretary shows:[63]

> ***Mrs Curtis-Thomas****: Home Secretary, if intercept evidence is accepted in other countries where there are robust court systems and democratic accountability then why not here?*
>
> ***Mr Clarke****: Essentially because our legal system is entirely different. The fact is the whole nature of the judicial system, for example in France or Spain or wherever, is entirely different from our regime first and foremost,*

> *so the role of judges, and in particular juge d'instruction, in their systems is different from ours.*

A member of the Intelligence and Security Committee, Baroness Ramsay of Cartvale, similarly informed Parliament:[64]

> *our adversarial legal system, where defence counsel can roam widely at the discretion of the judge, produces in the case of intercept material an unacceptable risk of exposure … Countries whose legal systems have investigative judges or magistrates can manage to handle sensitive material without the risks that would be involved in using such material in a British court.*

Nor are these beliefs confined to Parliament and the executive branch. In his 2003 review of criminal investigations and prosecutions conducted by HM Customs & Excise, Mr Justice Butterfield referred to the use of intercept material as evidence in criminal proceedings in the Netherlands but noted that 'the inquisitorial investigation and trial process in Holland is however very different to accusatorial system operating in the United Kingdom'[65] and gave his view that:[66]

> *For so long as our criminal system remains accusatorial I am of the view that there is no realistic scope for the use of intercept material for evidential purposes in criminal proceedings.*

Such official explanations no doubt contribute to such popular accounts such as that given by one former Cabinet minister:[67]

> *I was sternly told the British system of justice is quite different from that which guides the courts in countries where phone-tap evidence is allowed. Our trials are adversarial. The barrister defending the terrorist suspect would demand to know how the intercepts had been obtained, who had obtained them and by whom they had been sent. The result, it was claimed, would be the exposure of dangerous details about the activities of MI5 and MI6. Foreign governments might be offended. Brave men's lives would be at risk.*

However, intercept evidence has been long been admissible in criminal proceedings in Australia, Canada, New Zealand, South Africa and the United States. These are all jurisdictions that operate adversarial criminal proceedings, and have inherited principles of evidence and criminal procedure from the English common law. As we have already noted, there is no evidence that these jurisdictions have experienced any of the difficulties alleged above due

to their lack of inquisitorial proceedings. It is difficult to understand why the inquisitorial claim should have been so widely repeated by government sources and we find it disturbing that public debate over such an important issue can be confounded by such misinformation.

Intercept evidence unlikely to show guilt

In the run-up to the Prevention of Terrorism Bill 2005, the government produced background briefing papers for MPs and peers. One of the background papers claimed:[68]

> *The usefulness of intercept as an evidential resource, as opposed to an intelligence one – showing who is talking to whom, where they are located, and sometimes clues to what they are discussing – is … severely limited by the sophistication of the terrorists who rarely incriminate themselves over the telephone or fax.*

It is sensible to concede that intercept evidence is not a silver bullet: no doubt the intercepted conversations of suspected criminals and terrorists often fails to yield useful material. But the problem of suspects communicating using code words or other guarded language is hardly a problem unique to intercept evidence. The same challenge is presented by evidence gained from other forms of covert surveillance – such as bugs or concealed microphones worn by informants – all of which are admissible in criminal proceedings. Indeed, a similar challenge exists in relation to *any* evidence in criminal proceedings which requires some form of interpretation in order to explain it to a jury. Just as juries are able to consider DNA evidence without being geneticists or forensic evidence without being scientists, it seems implausible that intercept material is only useful in the hands of an intelligence expert.

More generally, it is naïve to suppose that intercept evidence could only be useful where it records suspects openly admitting their guilt: just as interceptions may be useful for intelligence purposes, they may also present compelling *circumstantial* evidence that a crime has been, or is about to be, committed. As the Australian federal Director of Public Prosecutions explained to the *Guardian* newspaper:[69]

> *You can have what you might call a circumstantial case where three people are seen having coffee together three times a day and that activity has intensified over a couple of weeks leading up to the arrival of a package or container in Australia. And then they undertake connected activities. You might, on behalf of one of those people, argue that it was an innocent association and you can't quite link them to the transaction. You just have to have these identifiable and suspicious acts of association …. When you*

> *fill in the gaps with telephone intercepts, this gets the police inside the network. When you show a jury these isolated physical acts which you say are, on the surface, suspicious and then fill in the landscape, it strengthens your case substantially.*

FBI Director Louis Freeh similarly cited the importance of intercept evidence in building a case:[70]

> *Because national and international drug chieftains and local drug 'kingpins' do not generally participate directly in drug buys or shipments,* ***electronic surveillance frequently supplies the only direct and persuasive evidence that will support a criminal conviction of these drug 'kingpins'****.*

Arguments for lifting the ban

Intercept evidence would increase likelihood of convictions for terrorism offences

The best-known argument in favour of allowing intercepted communications as evidence in criminal proceedings is that they are likely to contain material which is both relevant and highly probative to the issue of whether the accused committed the offence in question. Given the complexity of serious organised crime and terrorism, they are particularly likely to be useful in prosecuting those offences.

This argument is often resisted by government, however. Reporting on the conclusion of an internal government review in February 2005, the Home Secretary said that 'evidential use of intercept would be likely to help secure a modest increase in convictions of some serious criminals but not terrorists'.[71] Since the review is itself classified, however, it is not possible to analyse its evidence or reasoning. More generally, because the great majority of intercept material remains classified, the argument in favour of using intercept relies heavily on the views of those involved in the detection, investigation and prosecution of serious crime and terrorism in the UK, as well as the publicly available evidence concerning the use of intercept evidence in other jurisdictions.

First, the government's claim that intercept evidence is unlikely to assist in prosecuting terrorism cases in the UK seems difficult to reconcile with the use of intercept evidence in other jurisdictions. In his 1996 report, for instance, Lord Lloyd reported that, in France, 'some 80% of the evidence against those suspected in the 1995 bombings is derived from intercept' and that 'intercept evidence has proved very valuable in terrorist cases' there.[72] Similarly, in respect of US prosecutions, FBI Director Louis Freeh stated in 1999:[73]

> *Law enforcement agencies at all levels of government have uniformly found electronic surveillance to be one of the most important – if not the most important – sophisticated investigative tools available to them in the prevention, investigation and prosecution of many serious types of crime. This tool has been critical in fighting terrorism, organized crime, kidnapping, public corruption, fraud and violent crime, and in saving numerous innocent lives. In many of these cases, the criminal activity under investigation could never have been detected, prevented, investigated or successfully prosecuted without the use of evidence derived from court-authorised electronic surveillance.*

Similarly, the annual report of the Canadian federal government on the use of electronic surveillance released in September 2006 noted that:[74]

> ***The use of electronic surveillance often provides strong evidence against those accused of being involved in illegal activities, increasing the likelihood of conviction.*** *The prosecution of such offenders increases public confidence in the criminal justice system and contributes to public safety by holding such persons responsible for their actions.*

In an amicus brief lodged in 2005, former US Attorney General Janet Reno gave the following examples of terrorism cases prosecuted in the US since 9/11 involving intercept evidence:[75]

> *Iyman Faris pleaded guilty to providing material support for terrorism. Faris visited an al Qaeda training camp in Afghanistan and investigated the destruction of bridges in the United States by severing their suspension cables. The government* ***secured evidence through physical and electronic surveillance*** *and a search of his residence. After his arrest Faris cooperated with investigators, leading to the indictment of Nuradin Abdi for plotting to blow up a Columbus, Ohio shopping mall.*
>
> *Several members of a terrorist cell in Portland, Oregon were indicted on conspiracy, material support, and firearms charges. One of the defendants pleaded guilty and testified against the others, securing guilty pleas from them. Six of the men had attempted to travel to Afghanistan to assist the Taliban. The government used* ***electronic surveillance*** *and the authorities of the USA PATRIOT Act* ***to gather evidence in the case****.*
>
> *Six residents of Lackawanna, New York pleaded guilty to charges arising from their travel to Afghanistan and attendance at al Qaeda training camps.* ***The evidence against them was gathered from electronic***

> ***surveillance.*** *They agreed to cooperate with government investigations of terrorist activities.*
>
> *Sami Al-Arian, a university professor, and seven others were indicted for conspiring to finance terrorist attacks. The Justice Department reports that the evidence against Al-Arian was* ***gleaned from extensive FISA wiretaps, which could be used in the criminal case because of the new procedures enacted by the USA PATRIOT Act****.*

Given the significant use of intercept evidence in terrorism prosecutions in other common law countries, the strong links between terrorist activity and serious organised crime,[76] and the international nature of terrorism itself, it would seem suprising that intercepted communications of suspected terrorists in the UK are somehow alone in failing to provide relevant material for prosecutors.

Secondly, the claim that intercept evidence is unlikely to assist in prosecuting terrorism cases in the UK seems difficult to reconcile with the statements of senior police and prosecutors, judges and others familiar with the classified material. In his 1996 review of terrorism legislation, Lord Lloyd reported that:[77]

> *It is always difficult to look backwards and point to specific cases in which interception material would have enabled a person to be charged or a conviction obtained. But I have been shown a list of some twenty cases, including four recent cases in which the intercept material would have been of assistance to the prosecution; and I was told of at least one terrorist investigation in which the interception evidence would have provided 'the missing pieces in the jigsaw' and thus enabled a prosecution to be brought.*

Lord Carlile of Berriew QC, the current statutory reviewer of terrorism legislation, has similarly argued:[78]

> *the potential to use intercept evidence should be available. This would not mean that it would have to be used. In a small number of terrorism cases, and probably a larger number of drug-smuggling and money-laundering cases, and possibly in other categories of crime especially with an international dimension, it would help to secure convictions.*

Lastly, as a matter of simple logic, it seems difficult to reconcile the government's doubts about the utility of intercept material as evidence in terrorism cases with its self-same faith in intercept material to produce reliable intelligence on terror networks.[79] The experience of other jurisdictions shows that intercept material

may be made readily intelligible to juries and provide evidence that is highly probative despite being circumstantial.

Intercept evidence would reduce pressure for extended pre-charge detention in terrorism cases

As noted above, evidential difficulties in terrorism cases were widely cited as the reason for the extension of the maximum period of pre-charge detention to 28 days under the Terrorism Act 2006.[80] Although intercept material is often used as the grounds for arrest under s41 Terrorism Act 2000, it cannot be used as the basis for preferring criminal charges for terrorist offences because it is inadmissible as evidence in legal proceedings. It therefore stands to reason that, were intercept material admissible as evidence, it could be used to charge those suspected of terrorist offences within the original 14 day maximum detention period.[81] However, then Home Secretary Charles Clarke rejected this argument in his memorandum to the Home Affairs Committee:[82]

> *Even if such a change could be made it would not apply in every case and could not therefore, of itself, remove the need for an extended pre-charge detention period.*

Although intercept evidence is not a silver bullet, the Home Secretary's reply appears wholly to miss the point. Regardless of whether intercept evidence would by itself obviate the need for extended pre-charge detention in *all* terrorism cases, it is clear that it would make a significant difference in *every* case where intercept material was the basis of reasonable suspicion of involvement in terrorism in the first place. Indeed, in the scenario posed by the Chief Constable of Greater Manchester,[83] it would allow the suspect to be arrested and charged without the need for extended pre-charge detention:

> *If you have information from an informer, if you have technical surveillance evidence, if you have intercept evidence, there is a whole series of things which actually says, 'This group of people or this individual are involved in the preparation for some form of act of terrorism', then we will arrest.*

Intercept evidence would increase fairness of trials

Earlier it was argued that intercept evidence would increase the likelihood of convictions in terrorism cases. However, there is a separate reason for favouring the use of intercept evidence and that is that it would increase the fairness of criminal proceedings as a whole: to both the prosecution and the defence. This is not as contradictory as it might appear because, as a matter of logic, the more relevant evidence that is admissible, the more likely it is that the jury will arrive at the correct conclusion. By contrast, under the current statutory

framework, intercept material is inadmissible as evidence, regardless of whether it is favourable to the prosecution or the defence.

The fairness of allowing intercept evidence was considered by the House of Lords in the case of *R v P*,[84] in which the defendants appealed against their conviction on the basis that the prosecution's use of foreign intercept evidence was contrary to their right to a fair trial under both English law and Article 6 of the European Convention on Human Rights. The Law Lords unanimously rejected the appeal, holding that the evidence was not unfair and that there was no basis in public policy for excluding foreign intercept evidence.[85] On the contrary, Lord Hobhouse noted, the right to a fair trial *positively required* the most relevant evidence to be used:[86]

> *The tape recordings and transcripts (about the accuracy of which, be it said, there is no dispute) will be the best evidence of what was said.* ***The fairness of the trial of these defendants requires that the evidence be admissible.***

Intercept evidence already used in criminal proceedings

The various arguments mounted against intercept evidence in criminal trials are significantly undermined by the fact that (i) intercept evidence is already admissible in a number of circumstances; [87] and (ii) all other kinds of covert surveillance evidence are admissible.[88] For instance, an intercept of a telephone conversation is admissible if:

- it has been recorded by one party;[89]
- it has been recorded by a covert listening device, rather than a direct intercept of the telecommunication network;[90]
- it is made to or from a prison (see eg Ian Huntley) or a secure mental health facility;[91] or
- it is recorded outside the UK.[92]

The jury in the trial of Ian Huntley and Maxine Carr heard recordings and read transcripts of taped conversations of calls made by Huntley from Woodhill Prison, and calls by Carr from Holloway prison.[93] The intercepts were admissible because they took place under one of the exceptions under s4(4) RIPA where an intercept warrant is not required. In many other cases, intercept evidence admissible under one of the above exceptions has been used to convict suspects accused of serious crimes. Evidence from other forms of covert surveillance has similarly been widely used in securing convictions. Again, there is no bar to the admissibility of evidence gained from:

- a covert listening device (ie a bug) in someone's home, office or vehicle;[94]
- a concealed microphone worn by an informant;[95] or
- external surveillance of a home or office, including via video camera.[96]

If the arguments concerning fear over disclosure of intercept evidence capacity or the inability of PII to protect against disclosure were credible, one would expect to find the same arguments mounted against the use of evidence from other kinds of covert surveillance, such as bugging, informant evidence or evidence from covert video surveillance. As the Hong Kong Law Reform Commission observed in March 2006, 'there is no basis for the assertion that surveillance capability is more, or less, well-known than that in respect of interception'.[97]

Were it the case that UK courts were ill-equipped to handle intercept evidence, therefore, one would expect the government to be able to demonstrate this by reference to the existing UK cases in which intercept evidence or other covert surveillance evidence has already been used. The failure of the government to point to such cases suggests that the arguments against the general use of intercept evidence have been significantly overplayed.

Conclusion

Having examined the arguments for and against the use of intercept evidence, the conclusion that the UK government's ban is archaic, unnecessary and counter-productive is compelling. For too long, it has been taken as axiomatic that using intercept material in courts would lay bare methods of interception and allow criminals and terrorists to evade detection in their activities. At the same time, UK courts have developed common law principles of public interest immunity to protect a wide range of sensitive information from being unnecessarily disclosed in criminal proceedings.

While UK authorities have been unwilling to allow PII principles to protect interception capabilities in the UK, PII principles have been used by the great majority of common law countries – Australia, Canada, New Zealand, South Africa and the United States – in order to facilitate the use of intercept evidence in adversarial criminal proceedings. Nor has the UK government been able to point to any evidence to show that the regular use of intercept evidence in these countries has led to a degradation of interception capabilities.

It may seem strange to mount a human rights argument in favour of the evidential use of intercept material in criminal cases. As explained at the outset, however, the UK prohibition on the use of intercept evidence is maintained at a time when evidential difficulties in terrorism cases have been used to justify

surprising and significant departures from fundamental rights and the rule of law. As the President of the Supreme Court of Israel, Aharon Barak, said in 2002:[98]

> *While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our Court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts.*
>
> *This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security.*

The self-evident corollary of Barak's statement is surely that democracies should not deny themselves the legitimate and effective means that *are* available to them, of which the evidence gained from lawful interceptions of communications is surely one. Intercept evidence may not be a silver bullet but it is a bullet nonetheless. The time has come for the UK to join the ranks of common law countries that allow such ammunition in the fight against terrorism.

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Notes

1 *The Communications Market* (Ofcom, August 2006), para 3.3.6 and fig 3.19.
2 Voice over Internet Protocol: the routing of telephone conversations (including videophone) over the internet or any IP network.
3 Annex, *Report of the Interception of Communications Commissioner for 2004* (HC 549; SE/2005/203). A further 124 warrants were issued by the Scottish Executive in the same period. Note that the number of warrants may not itself disclose the true extent of interceptions: the 2004 report notes that 3101 modifications to warrants were made in the same period.
4 *2005 Wiretap Report* (Administrative Office of the United States Courts, April 2006), p5. Note that the total UK figure for 2004 includes both telecommunications and postal intercepts (no further breakdown is publicly available), whereas the US figures only cover telecommunications intercepts.
5 The only common law jurisdiction with a comparable prohibition is Hong Kong. However, even Hong Kong allows the use of postal intercepts as evidence. Intercept evidence is technically admissible in the Republic of Ireland. However, as a matter of practice, it is not used by prosecutors in criminal proceedings.
6 See eg Jacobs and Gouldin, 'Cosa Nostra: The Final Chapter?', *Crime and Justice* (1999), vol 25, pp129-189; 'Networks and Counter-Networks: The Criminal Prosecutions of the Sicilian and Neapolitan Mafia in the United States', *Mentis Vita* (2005).

7 See judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Radoslav Brdjanin*, 1 September 2004, Case No IT-99-36-T. Brdjanin, a former Bosnian Serb political leader, was sentenced to 32 years imprisonment for torture, wilful killing and other crimes. In his trial, an objection was raised to the introduction of evidence obtained from intercepted communications on the basis that the interceptions had not been made lawfully. The trial chamber concluded that the intercept evidence was nonetheless admissible: see Decision on the Defence 'Objection to Intercept Evidence', 3 October 2003.
8 Intercepted communications under Part I of RIPA includes interceptions of communications sent via the postal network.
9 Part IV of the Anti-Terrorism Crime and Security Act 2001, now repealed by s16 Prevention of Terrorism Act 2005. See below paras 28-30.
10 See eg *JJ and others v Secretary of State for the Home Department* [2006] EWCA Civ 1141, in which the Court of Appeal ruled that the Secretary of State had no power to make orders against six individuals imposing 18 hour curfews under the Prevention of Terrorism Act 2006.
11 S23 Terrorism Act 2006.
12 House of Commons Home Affairs Committee, *Terrorism Detention Powers* (HC 910, 3 July 2006), para 116.
13 See eg Lord Hobhouse of Woodborough, *Arthur JS Hall and Co. v. Simons* (2000) 3 All ER 673: 'even though the criminal process is formally adversarial, it is of a fundamentally different character to the civil process. Its purpose and function are different. It is to enforce the criminal law. The criminal law and the criminal justice system exists in the interests of society as a whole. It has a directly social function. It is concerned to see that the guilty are convicted and punished and those not proved to be guilty are acquitted. Anyone not proved to be guilty is to be presumed to be not guilty. It is of fundamental importance that the process by which the defendant is proved guilty shall have been fair and it is the public duty of all those concerned in the criminal justice system to see that this is the case. This is the public interest in the system'.
14 *Under Surveillance: Covert policing and human rights standards* (JUSTICE, 1998).
15 Ibid, p76.
16 Ibid, recommendation 15.
17 See s2 Regulation of Investigatory Powers Act 2000.
18 *Report of the Privy Councillors appointed to inquire into the interception of communications* – known as the Birkett Report (Cmnd 283, October 1957), para 149.
19 *Malone v United Kingdom* (1984) 7 EHRR 14 at para 28.
20 Birkett report, n19 above, para 92.
21 See *Malone,* above. See also *Malone v Metropolitan Police Commissioner* [1979] 2 All ER 629 at 649 where Sir Robert Megarry VC observed that 'telephone tapping is a subject which cries out for legislation'.
22 *Interception of Communications in the United Kingdom: a Consultation Paper* (Home Office: June 1999, Cmnd 4368).
23 *Halford v United Kingdom* (1997) 24 EHRR 523, para 51.
24 See eg *Hansard*, Standing Committee D, 18 January 2005, col 205.
25 See *Hansard*, HL Debates, 13 December 2005, col 1217.
26 *Hansard*, HL Debates, 10 October 2005, col 12.
27 House of Commons Home Affairs Committee,*Terrorism Detention Powers* (HC 910, 3 July 2006), para 116.
28 See eg written ministerial statement on intercept evidence, Hansard, 26 Jan 2005, col 18WS.
29 Rt Hon Charles Clarke MP, *Hansard*, HC Debates, 2 February 2006, col 479.
30 1999 consultation paper, n22 above, para 8.3.
31 Lord Bach, *Hansard*, HL Debates, 19 June 2000, col 111. See also eg Sir Stephen Lander, chair of the Serious Organised Crime Agency and former director of MI5: 'the risk … is that by opening [intercept material] up to due process and proper examination by the courts you will expose what we can do and what we cannot do', quoted in 'Turn the tap on' by Clare Dyer, *Guardian*, 22 February 2005; see also the former Secretary of State for Defence, Lord Robertson, in debates on the Terrorism Bill, *Hansard*, HL Debates, 13 December 2005, col 1219: 'the fact is that communications of all sorts are becoming ever

more sophisticated, complex, concealed and surmountable. The criminal classes present a constant challenge in their efforts to stay ahead of those who stand for an ordered rather than a disordered society. If we were to expose the methods by which information is gathered, as inevitably we would have to do if the law was changed in the form being suggested, we would suffer more and be in much greater danger'.
32 *R v Preston* (1994) AC 130, p163. Emphasis added.
33 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism, Vol 1* (October 1996: Cm 3420), para 7.17.
34 1999 consultation paper, n22 above, para 1.3, emphasis added. See also Lloyd report, ibid, para 7.17: 'If intercept evidence were to be used in court in one or two terrorist cases a year, I cannot believe that drug dealers would learn anything that they do not already know. As for the fear that criminals would cease to use the telephone altogether, I regard this as fanciful. Drug dealers planning an importation, or terrorists planning to plant a bomb, must communicate with each other and with those who are directing the operation by some means. It cannot be done by pigeon post'.
35 Evidence to the Home Affairs Committee, Q224, 28 February 2006.
36 See eg Deputy Assistant Commissioner of the Metropolitan Police and National Coordinator of Terrorism Investigations Peter Clarke: 'Far from being domestic, [the current terrorist threat] is global in origin, global in ambition and global in reach', S O'Neill, 'Special Branch absorbed into counter-terror unit', *Times*, 3 October 2006.
37 *Hansard*, HC Debates, 7 Feb 2005, col 1238.
38 S3(1)(a) of the 1996 Act as amended by s32 Criminal Justice Act 2003.
39 See Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2005 (SI 2005/985).
40 See www.cps.gov.uk/legal/section20/JOPI.pdf.
41 In exceptional cases, the prosecution can make an application to withhold disclosure of evidence to a defendant on public interest immunity grounds on an ex parte basis, ie without the knowledge of the defendant or his lawyers. A special advocate can be appointed to represent the interests of the defendant in relation to disclosure, in order to ensure their right to a fair trial. See *R v H* [2004] UKHL 3 at para 36: 'in appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected'. See also *Edwards & Lewis v United Kingdom* [2004] ECHR 560.
42 *R v H* [2004] UKHL 3 per Lord Bingham at para 17.
43 Ibid, para 18.
44 (2000) 30 EHRR 1, para 61.
45 Andrew Mitchell MP, *Hansard*, HC Debates, 7 Feb 2005, col 1241.
46 *R v H*, para 37: 'there will be very few cases indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an ex parte application is to be made. If even that information is withheld and if the material to be withheld is of significant help to the defendant, there must be a very serious question whether the prosecution should proceed, since special counsel, even if appointed, cannot then receive any instructions from the defence at all'.
47 *Hansard*, HC Debates, 7 Feb 2005, col 1241, emphasis added: see also then Home Office Minister Hazel Blears MP, *Hansard*, HC Debates, 8 Feb 2005, col 1423, emphasis added: 'We have a unique system of *very close co-operation, and I am worried that we would jeopardise it* if we used intercept as evidence'. See also Charles Clarke, Evidence to Home Affairs Committee, HC 321, 8 February 2005, Q15, emphasis added: 'the level of collaboration between law enforcement and intelligence in this country is *uniquely strong*'. Baroness Ramsay of Cartvale, Hansard, HL Debates, 13 December 2005, col 1229, emphasis added: 'we have a *uniquely close, interwoven relationship* between our intelligence and security services and our law enforcement agencies. It is therefore much more difficult to disentangle the various contributions of intercept material.'
48 *Hansard*, HL Debates, 13 December 2005, col 1236.
49 'Lift phone tap ban in terror trials, says new Met chief', Rachel Sylvester, *Daily Telegraph*, 5 February 2005.
50 Kingsley Hyland, 'Intercept as Evidence', paper delivered at the JUSTICE/Sweet & Maxwell Conference on Counter-Terrorism and Human Rights, 26 June 2005.
51 Written ministerial statement on intercept evidence, *Hansard*, 26 Jan 2005, col 19WS.

52 *Hansard*, HL Debates, 13 December 2005, col 1236.
53 However, the argument from technological change does not apply to all areas of intercepted communications. For instance, Part I of RIPA applies not only to the interception of telecommunication systems but also to intercepted letters sent via post – a means of communication whose essential features have not changed substantially in over 400 years.
54 *Malone v United Kingdom* (1984) 7 EHRR 14.
55 (1997) 24 EHRR 523.
56 Foundation for Information Policy Research, *Interception of Communications in the United Kingdom: A response to the Home Office Consultation Paper* (16 August 1999).
57 See eg Lord Dubs, Minister in the Northern Ireland Office, HL Debates, 26 Mar 1998, col 1362: 'the use of intercept material would result in pressure for increased disclosure by the prosecution'.
58 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL 240/HC 1576, 1 August 2006, para 100.
59 Baroness Ramsey of Cartvale, *Hansard*, HL Debates, 18 November 2005, col 1306. See also eg Lord Robertson of Port Ellen, *Hansard*, HL Debates, 18 Nov 2005, col 1311: 'If one element of evidence is put into court, it will be simply a matter of time, logic or even fairness that all the intercepted information is placed outside the protected world where it had previously resided … Depending on the discretion of the judge – at the end of the day, that is what we would be depending on – the defence can range far and wide, as it has done in the past, and compromise material that should not be compromised.'
60 See eg the 1999 consultation paper, n23 above, para 8.8: 'any arrangements which make intercept material available to one or both parties would have to be both practical and affordable'.
61 *R v H* [2004] UKHL 3, para 35.
62 Evidence to the Home Affairs Committee, Q244, 28 February 2006, emphasis added.
63 HC 321, 8 February 2005, Q15.
64 *Hansard*, HL Debates, 13 December 2005, col 1229.
65 Butterfield J, *Review of criminal investigations and prosecutions conducted by HM Customs and Excise* (July 2003), para 12.103.
66 Ibid, para 12.107.
67 Roy Hattersley, 'Terrorism, marmalade and MI5', *Guardian*, 7 February 2005.
68 *International Terrorism: Reconciling Liberty And Security - The Government's Strategy To Reduce The Threat* (Home Office, 22 February 2005).
69 See Clare Dyer, n32 above, emphasis added.
70 Statement of Louis Freeh, FBI Director, to the Federal Communications Commission, 27 January 1999, para 18.
71 Written ministerial statement on intercept evidence, *Hansard*, 26 Jan 2005, Col 18WS.
72 Lloyd report, n34 above, para 7.10
73 Statement of Louis Freeh, n73 above, para 10, emphasis in original. For details of the use of intercepts in US law enforcement, see *Report of the Administrative Director of the United States Courts on Applications for Authorizing or Approving the Interception of Wire, Oral or Electronic Communications, 2005*: www.uscourts.gov/wiretap05/WTText.pdf.
74 In particular, 12 authorisations for interception between 2004-2005 were given for specific terrorist offences – see Table 4 (offences in respect of which authorizations were given, specifying the number of authorizations given in respect of each of those offences), ibid, pp8-9.
75 Brief of Janet Reno and others as Amicus Curiae in *Padilla v Commander, Consolidated Naval Brig*, (No 05-6396), 14 June 2005, pp23-24, emphasis added. P2 of the brief makes clear that 'electronic surveillance' is the equivalent term to telecommunication interceptions.
76 See eg then Home Secretary Charles Clarke, *Hansard*, HC Debates, 7 December 2004: 'All nations are considering the interrelationship between serious organised crime and terrorism'. See also Home Office, *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society* (Cm 6147: February 2004) at p27: 'much existing legislation aimed at combating organised crime is also helpful in the fight against terrorists who often rely on such methods to finance their activity'.
77 Lloyd Report, n34 above, para 7.11.

78 Lord Carlile of Berriew QC, *Proposals By Her Majesty's Government For Changes To The Laws Against Terrorism,* 6 October 2005.
79 Conor Gearty, 'Short Cuts', *London Review of Books*, 17 March 2005: 'The government's reluctance to allow intercept evidence to be used in court to procure conviction of terrorist suspects seems mysterious and self-defeating: why deny yourself such a key weapon in the 'war against terrorism', especially if there are 'several hundred' terrorists already in the country, as the prime minister has recently claimed?'
80 S23 Terrorism Act 2006.
81 Sch 8, Terrorism Act 2000, as amended by s306 Criminal Justice Act 2003.
82 Memorandum of the Secretary of State for the Home Department to the Home Affairs Committee, *Terrorism Detention Powers* (4th Report, HC 910: 3 July 2006), Ev 101.
83 Evidence to the Home Affairs Committee, 8 July 2004, Q59.
84 (2001) 2 All ER 58.
85 See ibid, per Lord Hobhouse at 73: 'The law of country A under which these intercepts were made does not treat secrecy as paramount; it permits, subject to judicial supervision, the use of intercepts in evidence. There is no basis for the argument that there is a rule of English public policy which makes this evidence, which is admissible in country A, inadmissible in England'.
86 Ibid, per Lord Hobhouse at 74.
87 See eg Guy Mansfield QC, then Chair of the Bar Council of England and Wales, 'Intercept evidence – no legal or operational problem with using it in court', 18 February 2005: 'The current law is illogical. Broadly speaking, telephone intercept evidence cannot be used. However, telephone intercepts lawfully obtained in foreign jurisdictions are admissible in English courts. A tape recording of a telephone conversation made by one of the participants is admissible. Conversations recorded from a bug legally planted in premises used by drug dealers are admissible, and such conversations can include what is said by a suspect into the telephone'; see also Andrew Mitchell MP, *Hansard*, HC Debates, 7 Feb 2005, col 1238: 'there are already eclectic and disparate cases in which intercept evidence is used in criminal courts, albeit as an exception to the general rule, and there has not been any damage to police or intelligence service operational capabilities and methodology.'
88 See also Lord Thomas of Gresford, *Hansard*, HL Debates, 18 Nov 2005, col 1328: 'Intercept evidence is not admissible, but directed or intrusive surveillance or the use of covert human intelligence under Part 2 of the Regulation of Investigatory Powers Act 2000, can be. So, for example, there is no problem about a member of the security services breaking into somebody's home and planting a bug there or for the product of that particular piece of covert surveillance being used in court. If a person's car is bugged, there is no problem in producing a record of the conversations that take place within the car. So, on the one hand, there is total prohibition on intercept evidence, and, on the other, you can use foreign intercept evidence and the product of surveillance freely in the courts of this country'.
89 S48(4) RIPA.
90 A recording of a person speaking into a mobile phone is not an interception of a communication 'within the course of its transmission' within the meaning of s2(2) RIPA: see *R v E* [2004] EWCA Crim 1243. See also *R v Smart and Beard* [2002] EWCA Crim 772 (DAT recordings of a suspect speaking into a telephone was not an 'interception' within the meaning of s1(1) of the 1985 Act).
91 S4(4) RIPA. See also *R v Allan and others* [2001] EWCA Crim 1027: evidence of telephone calls via a prison phone network admissible because not within s1(1) of the 1985 Act.
92 S4(1) RIPA.
93 See eg BBC News Online, 'Huntley set fire to girls' bodies', 28 November 2003.
94 Part II of RIPA governs directed and intrusive surveillance other than interceptions. For examples of admissible evidence from bugs see *R v Allsop and others* [2005] EWCA Crim 703.
95 See eg *Code of Practice: Covert Human Intelligence Sources* (Home Office), para 4.41: 'a source, whether or not wearing or carrying a surveillance device, and invited into residential premises or a private vehicle, does not require additional authorisation [under

Part II of RIPA] to record any activity taking place inside those premises or vehicle which take place in his presence'.

96 See eg *R v Rosenberg* [2006] EWCA Crim 6.

97 Hong Kong Law Reform Commission, *Privacy: the Regulation of Covert Surveillance*, para 5.60. See also the remarks of La Forest J in the Canadian Supreme Court case of *R v Duarte* [1990] 1 SCR 30: 'I am unable to see any logic to this distinction between third party electronic surveillance and participant surveillance. The question whether unauthorized electronic surveillance of private communications violates a reasonable expectation of privacy cannot, in my view, turn on the location of the hidden microphone. Whether the microphone is hidden in the wall or concealed on the body of a participant to the conversation, the assessment whether the surreptitious recording trenches on a reasonable expectation of privacy must turn on whether the person whose words were recorded spoke in circumstances in which it was reasonable for that person to expect that his or her words would only be heard by the persons he or she was addressing. As I see it, where persons have reasonable grounds to believe their communications are private communications in the sense defined above, the unauthorized surreptitious electronic recording of those communications cannot fail to be perceived as an intrusion on a reasonable expectation of privacy'.

98 'A Judge on Judging: The Role of A Supreme Court in A Democracy', *Harvard Law Review*, vol 116, no 1 (November 2002), pp 19-162 at 148.

Parliamentary scrutiny: an assessment of the work of the constitutional affairs select committee

Alexander Horne

This article examines the history and functions of the House of Commons constitutional affairs select committee, detailing the inquiries undertaken by the committee and assessing the impact of the committee's work upon government policy. *The author is grateful to Collette Rawnsley and Andrew Le Sueur for their comments on an earlier draft of this article. Any errors remain his own.*

The select committee system

In respect of the House of Commons, select committees are appointed to perform a variety of functions on the House's behalf. Composed of a number of Members of Parliament (usually between 11 and 15) they are committees of inquiry, which proceed by taking evidence, deliberating and producing reports for the consideration of the House. Select committees in the House of Lords are of a different nature in terms of their composition and operation and thus their works are not dealt with in this article. Erskine May, the bible of Parliamentary practice, suggests that 'increasingly, this scrutiny work has become the most widely recognised and public means by which Parliament holds government ministers and their departments to account'.[1]

In his last book, the late Anthony Sampson indicated of Parliamentary select committees that:[2]

> *The select committees still have severe limitations – especially when compared to congressmen and senators in Washington whose committees have teams of lawyers and researchers to amass volumes of evidence … In Select Committees the MPs take turns in asking their own questions without any direction or plan and without a special counsel, as in America, to co-ordinate the investigation.*

Whether or not this was ever the case, this certainly cannot be said of modern select committees. Admittedly, most departmental select committees do have a relatively modest staff, comprising one or two clerks, some relevant specialists, such as lawyers and accountants, and the necessary support staff. Nonetheless,

other resources are available. The House has established (and committees have recourse to) the Scrutiny Unit, which contains a further pool of lawyers, accountants, statisticians and other specialists. Committees also have the option to appoint specialist advisers. Over the past three years, the Constitutional Affairs Committee, (whose work this article will reference below) has been able to boast the appointment of a number of well regarded silks (including Andrew McFarlane QC (now Mr Justice McFarlane), Edward Faulks QC, Nicholas Blake QC, Ben Emmerson QC and John Leighton Williams QC) and equally well respected academics (such as Tony Dugdale, Andrew Le Sueur, Hazel Genn and Richard Moorhead).

Prior to oral hearings, committee members are provided with comprehensive briefing papers by committee staff, containing relevant statistics, evidence and suggested questions. They also have the opportunity to take oral briefings, both from committee staff and specialist advisers. Almost all inquiries have terms of reference and stakeholders are generally given the opportunity to send in written submissions prior to oral hearings. Consequently, large 'volumes of evidence' are frequently amassed, analysed and subsequently published as appendices to committee reports.

The Constitutional Affairs Committee

The Constitutional Affairs Committee is a relatively new committee. It was first established in January 2003 to examine the work of the Lord Chancellor's Department (LCD) and associated public bodies. Following the constitutional changes announced on 12 June 2003, the Department for Constitutional Affairs (DCA) succeeded the LCD and the committee was subsequently renamed to reflect that change. The committee has had the benefit of the consistent and committed chairmanship of Rt Hon Alan Beith over the past two Parliaments. This has compensated for its otherwise changing membership, which included a former Solicitor General (Ross Cranston QC) and several lawyers, both academic and practising.

Prior to the establishment of the committee, the LCD was largely spared from effective, constant scrutiny, although the home affairs select committee had some responsibility and former Lord Chancellors Mackay and Irvine had accepted their obligation to account to that committee.[3] In 1998, Drewry and Oliver noted the fact that 'the Lord Chancellor has become pre-eminently a departmental minister' and stated that 'the sheer size and costliness of the services administered and delivered by the Lord Chancellor's Department require commensurately bigger and more robust mechanisms of public accountability'.[4] The chairman of the Home Affairs Committee acknowledged the increasing size of the LCD and the consequent difficulties of providing adequate scrutiny at an

evidence session with Sir Hayden Phillips, the former Permanent Secretary of the LCD, in 2002.[5]

In conjunction with an increase in scrutiny has come an increase in the work of the DCA. The new department is vast, responsible for a myriad of government policies, including freedom of information, coroners and elections as well as the more familiar legal and constitutional areas, such as devolution, legal aid and the courts service. The DCA, which would be the first to admit that it had not been used to detailed scrutiny from a select committee, could also be seen to take its obligations more seriously, appointing senior staff to co-ordinate its relationship with its new, and often critical, friend.

The table (below) illustrates much of the work of the committee over the past three years. It shows that while the committee may choose some of its inquiries on an ad hoc basis, sometimes considering pressing issues of the moment, or examining bills, it is also able to have a longer term perspective, following up areas of particular interest. Over the three-year period highlighted in the table, one can see consistent interest in DCA policies and activity relating to legal aid, asylum appeals and the practical workings of the court system.

The committee has also had the opportunity to conduct two inquiries into the Freedom of Information Act. The first anticipated the legislation coming into force. The second inquiry, which recently concluded, was an assessment of the Act one year on.

Date	Name of inquiry	Subject matter
Session 2003-4	*Judicial appointments and a Supreme Court (court of final appeal)*	The committee's inquiry followed the government's announcement of proposals for a new Supreme Court and a new Judicial Appointments Commission and for the abolition of the office of Lord Chancellor.
	Asylum and immigration appeals	Examination of a 'live' bill (Asylum and Immigration (Treatment of Claimants, etc) Bill).
	Civil legal aid: adequacy of provision	A substantial inquiry intended to examine the adequacy of civil legal aid provision and the existence of 'advice deserts'.
	Draft Criminal Defence Service Bill	Consideration of a draft bill designed to restore means testing for legal aid.

Session 2004-5	*Freedom of Information Act 2000 – progress towards implementation*	An inquiry designed to foreshadow the implementation of the Act and identify any areas of potential difficulty.
	Constitutional Reform Bill [Lords]: the government's proposals	A follow up report considering changes to the bill that had been made in the House of Lords.
	Family justice: the operation of the family courts	A comprehensive six month inquiry into issues relating to child contact.
	Legal aid: asylum appeals	A shorter follow up inquiry to *Asylum and immigration appeals*, looking at the impact of proposed legal aid changes.
	Electoral registration (joint report with the committee on the Office of the Deputy Prime Minister (ODPM))	A joint report with the ODPM committee considering the merits of individual electoral registration.
	The operation of the Special Immigration Appeals Commission (SIAC) and the use of special advocates	An investigation into the use of special advocates at SIAC. This inquiry was undertaken during the passage of the Prevention of Terrorism Act.
Session 2005-6	*The courts: small claims*	A short inquiry focusing on the small claims limit, enforcement procedures and the European Small Claim Procedure.
	The office of the Judge Advocate General	Consideration of the operations and future role of the office of the Judge Advocate General and its relationship with the Department for Constitutional Affairs.
	Compensation culture	A substantial inquiry over several months considering two 'live' bills (Compensation Bill and NHS Redress Bill).
	Legal Services Commission: removal of Specialist Support Services	Following a single evidence session with the LSC, the committee released a report highlighting the flawed decision-making process behind the decision to end provision of Specialist Support Services.
	Compensation culture: NHS Redress Bill	The committee revisited the compensation scheme proposed under the NHS Redress Bill.

Session 2005-6	*Freedom of information: one year on*	A follow-up from the committee's report in 2004.
	Reform of the coroners system and death certification	An ongoing inquiry where a draft bill is expected.
	Party funding	An ongoing inquiry into the system of funding of political parties. Its aim is to establish how well the current system is working and the practicability of any possible reforms.

Scrutiny of bills and draft bills

Griffiths and Ryle on Parliament indicates that 'the most important recent development in the work of select committees has been the pre-legislative scrutiny of draft bills'.[6]

Certainly, much of the work of the Constitutional Affairs Committee involves pre- and post- legislative scrutiny. This is a serious responsibility, particularly in the light of the reform of the LCD and the establishment of the DCA. As mentioned above, the department is now a much larger organisation, responsible for a multitude of government policies. Accordingly, a large number of government bills now originate from or impact upon the department. In a recent article, John Ludlow (the head of the Law Society's Parliamentary Unit) concluded that:[7]

> *The detail in so many bills today is left to later regulation, allowing the government much greater flexibility in how they implement Acts and – in effect – how they update them. Ministers will say that this approach allows for the tweaking and fine-tuning of statutes without recourse to costly and time-consuming fresh primary legislation, while opponents will argue that it simply allows the government to by-pass important parliamentary scrutiny.*

This criticism seems extremely valid and many of the bills and draft bills that have gone before the Constitutional Affairs Committee have been skeletal in nature and have lacked any real detail, a difficulty that necessarily impacts on the quality of the scrutiny that can take place. In addition to the bills produced by the department, there is also an ever increasing number of consultation papers, some of which have been described as having 'something of the character of Richard III' about them.[8]

The government has acknowledged that the 'degree of flexibility' provided for in recent legislation has 'caused some concern'.[9] However, it nonetheless seems deeply wedded to the convenience offered in making substantial legislative amendments by way of secondary legislation, as can be seen by the recent evidence Jane Kennedy MP, a former Minister of State at the Department for Health, gave to the committee. She suggested that:[10]

> *One of the beauties of doing regulation by secondary level legislation which we do in Parliament – which when you are in government you love, when you are not in government, you get very frustrated by – is that you can quickly and relatively easily make amendments of that kind to legislation.*

The overall quality of the scrutiny provided by select committees was recently considered by Dawn Oliver. She suggested that when a select committee does engage in scrutiny of real or draft bills the consideration is 'relatively objective but not guided by explicit, collectively adopted, published criteria of any kind' and has suggested that 'scrutiny standards and checklists could remedy this deficit'.[11]

The Power Commission has called for more influence to be granted to select committees, indicating that:[12]

> *Select Committees should be given independence and enhanced powers including the power to scrutinise and veto key government appointments and to subpoena witnesses to appear and testify before them. This should include proper resourcing so that committees can fulfil their remit effectively.*

The Power Commission's recommendations would appear to want a move towards the American model discussed above. In fact, committees already have the power to compel large categories of people to attend and give evidence and they also have powers to call for documents. It is also arguable whether a system scrutinising appointments would work particularly well – this was certainly something the committee thought should be avoided in relation to judicial appointments – although it could be argued that this conclusion was reached for different reasons related to judicial independence.

Andrew Kennon, the former Head of the Scrutiny Unit in the House of Commons (and now a Principal Clerk), highlighted that whilst there is almost universal

agreement that pre-legislative scrutiny is right in principle, no bill that is highly controversial between the political parties has been subject to pre-legislative scrutiny. There are also continuing difficulties in relation to the timing of draft bills. A common complaint noted by Andrew Kennon is that:[13]

> *The end date having been fixed, there are usually then delays in getting the draft Bill ready for publication and so the start date slips back. Given the timing of parliamentary sessions and recesses, this leads to draft Bills being published in the summer with committees expected to consider them in periods when Parliament is not sitting. This leaves little time for outsiders to comment before the committee has to take oral evidence.*

This was certainly a problem the Constitutional Affairs Committee encountered when it considered the draft Criminal Defence Service Bill, which was designed to restore means testing for criminal legal aid. The bill (which contained only four clauses) arrived very late, leaving the committee less than two months to take evidence and scrutinise the merits of the proposals. This task was made even more difficult by the fact that the department had not finalised the regulations that would form the detail of the scheme and instead presented the committee with three different options as to how it might work. The committee's proposed work on a draft bill in respect of coroners has been similarly delayed.

However, the greatest limitation in scrutinising the work of government is the absolute constraint on Parliamentary time, a fact that was conceded by the current chairman of the Constitutional Affairs Committee, Alan Beith MP, in evidence to the constitution committee.[14]

In respect of Commons committees, there is little that can be done to remedy this deficiency, since however much independence and prestige is garnered by Commons committees, Members of Parliament have a limited amount of time that they can dedicate to committee work. Typically, the Constitutional Affairs Committee would conduct two or three inquiries at any one time, and it is difficult to imagine the members being able to engage with too much additional work in a detailed and comprehensive fashion. This is a problem that has been identified by the government in its reply to a recent report by the Lords' committee on the constitution, in which it concluded that 'the demands placed on existing select committees are already considerable. The capacity for increasing ad hoc evidence-taking committees is not unlimited.'[15] There seems little point in increasing capacity if standards cannot be maintained.

The influence of Parliamentary select committees: how to measure outcomes

It is always difficult to judge the actual impact of select committees' recommendations on government policy and departmental strategy. A lengthy list of general select committee 'achievements' can be found in How Parliament Works.[16] Nevertheless, inquiries by the Constitutional Affairs Committee with immediately concrete and measurable outcomes are infrequent. In its four-year history a number of important outcomes following work by the committee can be identified. These include the resignation of the board of the Children and Family Court Advisory and Support Service, following a critical report by the committee;[17] the removal of the proposed ouster clause contained in the Asylum, Immigration (Treatment of Claimants) Bill following detailed scrutiny by the committee;[18] and, perhaps most importantly, a delay in implementing the Constitutional Reform Act[19] following an initial recommendation from the committee, allowing a further comprehensive analysis of the government's proposals by the select committee on the Constitutional Reform Bill. This eventually resulted in the retention of the office of Lord Chancellor, albeit in a much different form.

The committee's inquiry into family justice also produced clear results, with a consensus emerging that greater transparency was required in the family courts. Shortly after the report was published, the government agreed to hold a consultation exercise, giving the impression that it would improve access for both the press and the public. In order to ensure that enthusiasm for this project remained high on the departmental agenda, the committee held a follow-up session with Sir Mark Potter, the new President of the Family Division, in April 2006 to measure the progress made.

Moreover, it is plain to see from its most recent work that the committee has made a real difference in some of its shorter inquiries, exposing poor decision-making in the case of the removal by the Legal Services Commission of Specialist Support Services; focussing debate (particularly over the small claims limit and compensation culture); and suggesting real improvements to proposed legislation.[20] In relation to the issue of Specialist Support Services, following a somewhat hostile reception by the committee, Brian Harvey, the acting chief executive of the Legal Services Commission accepted that in the light of 'consideration of the process of consultation' the decision to withdraw the service would be reconsidered.[21] This was a clear example of an immediate outcome, where the LSC's failure to hold an adequate consultation and its subsequent flawed decision-making process was plainly exposed at an oral hearing.

Relations with the judiciary

Material from select committees is not only used in Parliament, but frequently informs academic articles. Interestingly, committee reports are also regularly considered by the judiciary, in speeches,[22] articles[23] and even in judgments.[24] The Constitutional Affairs Committee has been eager to take evidence from the judiciary during the course of its inquiries. Indeed, in its second report considering the Constitutional Reform Bill, it went further, actively advocating that the Constitutional Affairs Committee should serve the function of being the committee 'with responsibility for judicial matters', with the proviso that 'it would be appropriate for both Houses to have their own committees for maintaining a relationship with the judiciary which can meet jointly, if they see fit'.[25]

Whilst the idea that Parliamentarians should be allowed to question judges is a relatively recent innovation,[26] the judiciary now provides considerable amounts of evidence to the Constitutional Affairs Committee and it has been suggested that 'the new Department for Constitutional Affairs select committee goes some way to connect the judiciary to Parliament'.[27] As mentioned above, the idea of holding 'confirmation hearings' of the type which occur in the United States has never really taken off in the United Kingdom. When it considered the matter, the committee concluded that it had 'heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges'.[28] Nonetheless, the current relationship should allow the committee the opportunity of holding the judiciary to account over practical issues of administration, while allowing the judiciary an opportunity to voice its concerns about how the government's proposals (including allocation of resources) will impact upon the administration of justice.

This relationship was acknowledged by the former Lord Chief Justice, Rt Hon Lord Woolf, in a lecture he gave about the relationship between the judiciary and Parliament at a reception organised by the committee in February 2006.[29] Certainly, on the basis of current experience, judicial appearances have been of mutual benefit and have not presented any difficulty or controversy for either party. It will be interesting to see how the relationship progresses following the constitutional developments that took effect in April of this year.

Post-legislative scrutiny

If pre-legislative scrutiny continues to be hindered by the use of skeleton bills and legislation by way of secondary legislation, the way forward may be an increased use by Parliamentary committees of post-legislative scrutiny. There is

certainly a great deal of value in looking into the way that legislation works after it has been enacted, to ensure that it does not have any unforeseen side effects and even whether it was necessary in the first place.

The Law Commission issued a consultation paper on post-legislative scrutiny in December 2005.[30] The paper suggested that 'the overall picture is that post-legislative scrutiny does take place but it is not systematic and there are many gaps. It is apparent that post-legislative scrutiny means different things to different people in terms of its objectives and the mechanisms adopted to carry it out.'[31] The consultation goes on to argue that Parliamentary committees generally conduct post-legislative scrutiny on an 'ad hoc basis', adding the perhaps worrying qualification 'often in response to public concern over a specific Act.' The Constitutional Affairs Committee can certainly rebut this accusation, having conducted follow-up work on legislation relating to family justice, freedom of information and legal aid well after any initial public concerns had passed.

In many areas, such as asylum, immigration and crime, the government legislates at a prodigious rate, often even where no additional powers are actually required. Moreover, whenever there is a crisis, new legislation appears to be the government's answer, frequently angering those campaigning about human rights and civil liberties.

One suggestion for an improvement in such legislation is to include a 'purpose clause', a suggestion which has been supported by the current chairman of the Constitutional Affairs Committee, who has stated that 'there should be a government view about the effect of its legislation and whether it has fulfilled its purpose, and one of the possible triggers for post-legislative scrutiny is the publication by government of an assessment which the committee can then consider'.[32] An alternative, particularly with controversial legislation, is the use of 'sunset clauses' that bring the legislation to an end at some defined period.

Conclusion

On analysis, it is evident that departmental select committees can go some way to improving the decision-making process in government departments, and more frequently, can help pressurise the government to improve the often unimpressive legislation that emanates from departments. The Hansard Society has claimed that '[p]re-legislative scrutiny has enhanced the role of Parliament and made the legislative process more effective in recent years'. Hopefully this will continue to be the case.

Limitations do exist, however. Some committees do not necessarily have a very high profile beyond a limited group of interested stakeholders. This can mean that detailed and important work is often reduced by the media to a misleading statement attributed to 'an influential group of MPs'. This is a significant issue because committees have to engage with the public and stakeholders in order to receive adequate evidence when conducting inquiries and ultimately, to retain credibility.

The Committee Office introduced a team of media officers in 2003. Nonetheless, some of the work conducted by committees appears to be too complex and technical to grasp the attention of the press and so other methods of engaging the public may be necessary. That said, some significant changes have been seen over recent years, including an increased use of e-consultation, the employment of media officers and internal reviews seeking to engage the public through outreach.

More importantly, due to the legislative timetable, the Constitutional Affairs Committee has often had limited time to examine 'live' bills. Legislation is frequently skeletal in nature in any event, with much detail to follow in less well-publicised statutory instruments, often well after any initial controversy has died out. As Lord Rees-Mogg has recently commented, '[w]hole chunks of legislation come to the Lords without having had detailed scrutiny in the Commons; the Government itself has to introduce scores of amendments to its own legislation in every session.'[33] As much of DCA legislation originates in the Lords, the Constitutional Affairs Committee has often found the converse to be true, with bills being pushed through their second reading in the Lords, later subject to substantial amendment. Neither situation suggests that sufficient consideration is given to the form and substance of bills prior to legislating.

Alexander Horne is a barrister and was the legal adviser to the constitutional affairs select committee in the House of Commons between 2003 and 2006. He is still employed by the House of Commons.

Notes

1 Erskine May, Parliamentary Practice, 23rd edn, Butterworths, 2004.
2 John Murray, Who runs this place? The Anatomy of Britain in the 21st Century, 2004.
3 Lord Mackay first appeared before the Home Affairs Committee with Sir Thomas Legg, the Permanent Secretary to the LCD in January 1992, see HC 214 I and II.
4 Drewry and Oliver, Parliamentary Accountability for the Administration of Justice, Butterworths, 1998, pp36-37.
5 At which he accepted that: 'Our difficulty, as you know, is that the volume of work which comes out of the Home Office is so vast that we feel we have not been able to give adequate attention to your department.' Home Affairs Select Committee, Minutes of Evidence, 23 July 2002, Q8. In contrast, the previous Lord Chancellor, Lord Irving of Lairg, commented that: 'This new Committee, if I may say so, will increase the visibility and the accountability of the Lord Chancellor's Department' at his first appearance before the Committee, Select Committee on the Lord Chancellor's Department, 2 April 2003, Q40.
6 Robert Blackburn and Andrew Kennon, Griffith and Ryle on Parliament: Functions, Practice and Procedures, 2nd edn, Sweet and Maxwell, 2003, para 11-093, p624.
7 *Law Society Gazette*, Thursday 16 March 2006.
8 'Deform'd, unfinish'd, sent before [their] time into this breathing world scarce half made up'. See Derek Morgan et al, *Constitutional Innovation, The Creation of a Supreme Court for the United Kingdom; domestic comparative and international reflections*, a special issue of *Legal Studies*, 2004, (hereafter referred to as *Constitutional Innovation*), pvi.
9 *Government Response to the Constitutional Affairs Committee's Reports: Compensation Culture and Compensation culture: NHS Redress Bill*, April 2006, Cm 6784.
10 Constitutional Affairs Committee, *Compensation Culture*, Third Report of Session 2005-6, HC754, para 96.
11 Dawn Oliver, 'Improving the scrutiny of Bills: The case for standards and checklists', [2006] PL Summer, 219.
12 *Power Commission Report*, March 2006, p21.
13 Andrew Kennon, 'Analysis: pre-legislative scrutiny of draft Bills', [2004] PL 477.
14 Where he commented: 'If a committee works mainly on the basis of a weekly meeting of several hours each week it is quite difficult to sustain the range of tasks'. Select Committee on the Constitution, Minutes of Evidence, 26 May 2004, Q147.
15 Select Committee on the Constitution, *Parliament and the Legislative Process: The Government's response*, Sixth Report Session 2004-5.
16 Robert Rogers and Rhodri Walters, How Parliament Works. 5th edn, Pearson Education, 2004, p339-340.
17 *Children and Family Court Advisory and Support Service*, Constitutional Affairs Committee, Third Report Session 2002-3, HC614.
18 *Asylum and Immigration Appeals*, Constitutional Affairs Committee, Second Report Session 2003-4, HC 211.
19 *Judicial Appointments and a Supreme Court (court of appeal)*, First Report Session 2003-4, HC48.
20 *The courts: small claims*, Constitutional Affairs Committee, First Report of Session 2005-6, HC519; *Compensation Culture*, Third Report of Session 2005-6, HC754; *Legal Services Commission: Removal of Specialist Support Services*, Fourth Report of Session 2005-6, HC 919.
21 *Legal Services Commission's response to the Fourth Report on Removal of Specialist Support Services*, Constitutional Affairs Committee, First Special Report 2005-6, HC1029, Appendix.
22 See for example Lord Woolf's comments about the Select Committee inquiry into the Asylum, Immigration (Treatment of Claimants) Bill in the Squire Centenary Lecture, entitled 'The Rule of Law and a Change in the Constitution', 4 March 2004.
23 Mr Justice Munby's article in the December 2005 edition of *Family Law* contains an interesting assessment of the Constitutional Affairs Committee's recommendations on transparency in the family courts: [2005] Fam Law 945.
24 The Committee's views on the use of special advocates was cited in the judgment of Lord Bingham in *Roberts v Parole Board* [2005] UKHL 45.
25 *Constitutional Reform Bill [Lords]*, Constitutional Affairs Committee, Third Report 2004-5, HC275, para 83.
26 See Andrew Le Sueur, 'Developing mechanisms for judicial accountability in the UK', *Constitutional Innovation*, p97.

27 See KE Malleson, *Constitutional Innovation*, p133.
28 First Report Session 2003-4, HC48, para 87.
29 Transcript available at the Committee's website.
30 *Post Legislative Scrutiny*, A consultation paper, The Law Commission, December 2005. The Consultation period recently ended (April 2006).
31 Ibid, para 3.1.
32 Select Committee on the Constitution, Minutes of Evidence, 26 May 2004, Q161.
33 William Rees-Mogg, 'The House of Conundrums', *Times*, 8 May 2006.

Change in the coroners' courts

Rachel Brailsford

This article discusses the development of the coroners' courts in England and Wales and analyses the reform proposals contained in a recent consultation paper and draft bill from the Department for Constitutional Affairs.

> *The systems in England, Wales and Northern Ireland for the certification of most deaths by doctors and the investigation of others by coroners have been seriously neglected over many decades. They must undergo radical change if they are to become fit for the purposes of a modern society and capable of meeting future challenges. The need for reform is widely recognised and supported.*[1]

It is widely acknowledged that the coronial system in England and Wales is in need of reform. On 6 February 2006, Harriet Harman, Minister for Constitutional Affairs, made a statement to the House of Commons in which she committed the government to reforming the coronial system:[2]

> *I am sure that we all want a coroner service that enables committed coroners and their officers to ensure that the public interest is served in all inquests in every part of the country, and which enables bereaved relatives to have their answers; that is not the case at the moment.*

This was followed by the publication of a consultation paper and draft bill by the Department for Constitutional Affairs (DCA) in June 2006.[3] The draft bill proposes wide changes to a system in urgent need of them. It is expected that the bill will be introduced to Parliament in the 2006-2007 session. The DCA will uniquely make use of a 12 member panel of recently bereaved people who have experience of the coronial system to assist the development of the bill.[4] The draft bill also contains a draft charter for bereaved people who come into contact with the coroner service.

This article will consider the historical evolution of the role of coroners before assessing the arguments for reform and the proposed changes to the coronial system contained in the draft bill, before concluding with important case-law developments following the implementation of the Human Rights Act 1998.

History

The role of coroners dates back to 1194 when the office of an independent judicial officer, charged with the investigation of sudden, violent or unnatural death, was formally established by the Articles of Eyre.[5] The role evolved dramatically in 1836 when the first Birth and Deaths Registration Act was passed, introducing major changes to the investigation of deaths in the community.

Since then there has been gradual legislation but not much overall change. In 1887 the Coroners Act was passed; this was, in fact, the last time that there was a substantive legislative review of the coronial system.[6] Following the 1887 Act coroners became more concerned with establishing the circumstances and the actual medical causes of sudden, violent and unnatural deaths, for the benefit of the community as a whole. Legislation surrounding the coronial system has changed little since then. The current legislation is the Coroners Act 1988 (which was introduced to consolidate all the existing legislation) and the Coroners Rules 1984 (which consolidated the existing 1953 rules and the many subsequent amendments to them).

Under the Coroners Act 1988 an inquest must be held if a person has died an 'unnatural or violent' death[7] or a 'sudden death of which the cause is unknown',[8] if a person dies in prison,[9] if the death occurs in police custody,[10] if the death was caused by an accident, poisoning or disease, notice of which brings s19 of the Health and Safety at Work etc Act 1974 into play,[11] or if the death occurred in 'circumstances the continuance or possible recurrence of which is prejudicial to the health and safety of the public or any section of it'.[12] The death must be reported to the coroner before an inquest can be held. The purpose of the inquest is to determine who the deceased was, and where, when and how the deceased came by his or her death.[13] Of crucial consideration, the inquest is intended to reach a determination without apportioning blame or civil or criminal liability.[14] Coroners can be medically or legally qualified.[15] There are currently 110 coroners. Traditionally the coronial system has been under control of the local authority. This has had implications for the resources for the system:[16]

> *A key, but often unspoken dynamic that underpins the work of a coroner is that his or her office is a profoundly under-funded and under-resourced institution. To a large extent the problem is rooted in the fact that inquests fall within the ambit of local authority services. In the nature of things an authority will be more inclined to put money into preventing deaths than into inquiring into them after the event.*

There have been several independent reviews of the coronial system. There was the Chalmers Report in 1910, the Wright Report in 1936 and the Broderick Report in 1971.[17] Little action was taken after each report. A JUSTICE report, published in 1986, also considered the coroners' courts, and complimented the Broderick report for its careful investigation of the role and functioning of the coroners' system. The JUSTICE report called for a centralised system of appointments of coroners:[18]

> *Overall we feel that close links with the local authority can only compromise the independence of the coroner. On this ground alone we would support central appointment of Coroners and their deputies and assistants.*

The report then went further in its calls for centralisation of the system:[19]

> *We therefore recommend that Coroners' Officers should constitute a national, full-time service, independent of all other services. In line with our proposals on the appointment of Coroners, we envisage that appointment, training and funding would be handled centrally.*

However the coroners' courts remained predominantly unchanged until impetus for review of the system grew with the publication of two reports in 2003. The *Report of a Fundamental Review of Death Certification*, widely known as the Luce Report,[20] was published in June 2003 and called for six areas of major change to create:

1) a consistent professional service, based on full-time leadership throughout England, Wales and Northern Ireland;
2) consistency of service to families to be underpinned by a Family Charter which would have legal effect;
3) a service which deals effectively with legal and health issues, works effectively across the full range of public health and public safety, and supports and audits the death certification process;
4) a 'two tier' certification system which would apply to all bodies whether buried or cremated and replace the existing 'three tier' cremation process;
5) more informative and accessible outcomes to coroners' death investigations;
6) proper recognition of the work of coroners' offices.

The report was much welcomed but still no change was implemented. The third report of the Shipman Inquiry conducted by Dame Janet Smith also considered the matter of death certification and the coroners' system.[21] The report drew attention to the evidence that families of deceased persons are little involved in

the processes of certification and investigation of a death. The report was also critical of the training, education and leadership of the coronial system:[22]

> *Until recently, there was virtually no training for coroners. Recently, the Home Office began to provide some training. However, it is not compulsory and some coroners do not avail themselves of it. Many coroners, particularly part-time coroners, have little contact with their colleagues and operate in virtual isolation. In the past, they have received little advice or guidance. There is no leadership structure. The only challenge to a coroner's decision is by way of judicial review which is rare; there is no appellate body offering regular guidance on the interpretation of the relevant statutory provisions. As a consequence of all these factors, there is considerable variability of practice and standards in different coroner's districts.*
>
> *It would be desirable to achieve a measure of consistency of practice and of high standards. To achieve these ends, there is a need for leadership, organisation and structure in the work of coroners. Coroners must also receive continuing education and training.*

The report also considered the purposes of the coronial system and concluded:[23]

> *In the modern era, the purposes of the public inquest should be to conduct a public investigation into deaths which have or might have resulted from an unlawful act or unlawful acts, to inform interested bodies and the public at large about deaths which give rise to issues relating to public safety, public health and the prevention of avoidable death and injury, and to provide public scrutiny of those deaths that occur in circumstances in which there exists the possibility of an abuse of power.*

In March 2004 the Home Office published a position paper,[24] drawing heavily on the recommendations of the *Fundamental Review* and Shipman reports, with key proposals for change to reform the coronial system, calling for an independent, professional, medically-skilled, modern, consistent, robust and transparent system. A key element in the position paper was the need to make changes so that the system would be more sensitive to the needs of the bereaved, mainly in the form of a family charter.

There was then a slight delay to the reform proposals, possibly caused by the transfer of overall responsibility for the coronial system from the Home Office to the Department for Constitutional Affairs (DCA) with effect from 1 June 2005. This move is logical, given the DCA's existing role for courts and tribunals.

However it is important that the distinction between the court process and the coronial system is rigorously maintained given that the latter is for determining fact and not civil or criminal liability. In February 2006 the government restated its commitment to reforming the coronial system and in June 2006 the draft bill and consultation paper were published by the DCA.[25]

The government's draft bill

The draft bill proposes to replace the whole of the Coroners Act 1988, with the majority of the clauses being new.[26] Under the draft bill coroners must now investigate a death if there is reasonable cause to suspect a violent or unnatural death, if the cause of death is unknown, or if the deceased has died while in prison or otherwise lawfully detained in custody.[27] This expansion to include on the face of the bill investigations into deaths in lawful custody does leave a gap in the protection of coroners' investigations when the death has occurred when the person is unlawfully in custody, for example following an unlawful arrest or if a court subsequently determines that the arrest was unlawful. The European Court of Human Rights has stressed that '[i]n the context of prisoners ... persons in custody are in a vulnerable position and ... the authorities are under a duty to protect them'.[28] There may be such cases which do not fall within the other categories requiring an investigation, where the bill could remove the opportunity for a coroner and a jury to establish the circumstances of the death, potentially leaving the bereaved family and representatives without the prospect of an investigation.

The draft bill limits the cases where a jury is needed. It is no longer on the face of the bill that an inquest must be held with a jury if there are health and safety implications raised by the death.[29] Although clause 13(3) grants the senior coroner the right to hold an inquest with a jury if there is sufficient reason for doing so, there should be a continued presumption that in cases where there is local authority responsibility for the health and safety of the public there should be an inquest with a jury.

Under clause 13(2) an inquest must be held with a jury if the death of the deceased resulted from an act or omission of a police officer in the purported execution of his duty. The definition of police officer should be extended to include employees of the Serious and Organised Crime Agency who have been designated as having the powers of a police constable.[30] As the powers of Police and Community Support Officers are extended, it is arguable that they should also be covered by this clause. Furthermore, given the increased use of detention by the Immigration and Nationality Directorate, the act or omissions of IND officers should also be included. It is illogical not to include other officials who perform similar functions to the police.

The draft bill also reduces the number of the members of the jury, from between seven and eleven to between five and seven.[31] In the interests of ensuring that the process is effective, the jury does not necessarily need to be so large because it is not a criminal process to determine guilt and the system is inquisitorial, not adversarial. Five is an appropriate minimum. Juries in coroners' courts should continue to be similarly qualified to jurors in all other courts.

There is a partial move to create a more centralised coronial system. The bill creates a Chief Coroner,[32] but the system remains fundamentally local. It is vital that coroners are, and are seen to be, independent and impartial. Close links with local authorities can only compromise the independence of the coroner. It is appropriate that the Chief Coroner will be responsible for training and guidance and for investigating complaints. There is urgent need for centralised and sufficient funding for the coronial system, as highlighted by the House of Commons Constitutional Affairs Committee who have been highly critical of the draft bill, describing it as a missed opportunity for substantial reform:[33]

> *We further recommend that the Government should reform the structure of the coronial system by creating a national service with centralised and adequate funding so that all coroners are able to work to the same high standards.*

The draft bill gives increased powers to coroners in relation to entry, search and seizure (under clauses 50 and 51). However there is a low threshold for use of these powers. Under s8 Police and Criminal Evidence Act 1984 (as amended by the Serious Organised Crime and Police Act 2005, Schedule 7) the police may enter and search premises if a justice of the peace is satisfied that there are reasonable grounds for believing that an indictable offence has been committed, that there is material on the premises which is likely to be of substantial value, it is likely to be relevant evidence and that it is not items subject to legal privilege, excluded material or special procedure material. In the draft bill the Chief Coroner may authorise the entry and search of premises if there is reasonable cause to suspect that there may be anything on the land which relates to a matter which is relevant to the investigation.[34] In granting such authorisation the Chief Coroner would have to be aware of individuals' rights to privacy[35] and property.[36] The section should be amended to increase the threshold for granting authorisation to enter, search and seize to when there is reasonable suspicion that entry, search and seizure is necessary for the coroner to fulfil his or her duties in carrying out a proper investigation into the death and that it is not reasonably practicable to obtain the material in another less intrusive manner.

The draft bill creates a new appeal structure for the coronial system. Under the bill an interested person may appeal to the Chief Coroner against a decision, a failure to make a decision, a determination or a finding made in connection with investigations and inquests. This is a way to give bereaved people and other interested persons more involvement in the process but there are concerns at possible implications for the efficiency of justice, risking possible delays in the system. It is essential that interested parties have adequate representation at inquests and investigations. The current law maintains the general exclusion for legal aid for inquests:[37] funding is granted if exceptional circumstances are met, if Article 2 ECHR is engaged or if there is a significant wider public interest. While we welcome the overall outcome of the bill to grant greater involvement to the bereaved in the coroners' process, there must be appropriate safeguards to ensure that the process remains fair and that expectations are not inappropriately raised.

Human rights

The government must comply with Article 2 of the European Convention on Human Rights,[38] incorporated into British legislation by the Human Rights Act 1998. This places the government under a positive obligation to conduct a formal and effective investigation when an individual dies in circumstances that may have breached Article 2.[39] In the draft bill clauses 10 and 12, defining the purpose and outcome of the investigation, are the means by which the government aims to fulfil these obligations. The explanatory notes[40] specify that guidance will be issued before the bill is implemented to ensure a broad consistency of approach with the requirements of Article 2. The Parliamentary Joint Committee on Human Rights, in its inquiry into deaths in custody, looked at the duty on the state to investigate when such a death had occurred:[41]

> *An effective system of investigation which ensures accountability for unlawful killings is seen as essential to the practical protection of the right to life.*

The committee list the criteria for an effective investigation which were determined by the European Court of Human Rights in *Jordan v UK*.[42] These include the investigation being carried out by the state's own initiative; that the investigation is independent, effective, prompt and transparent; and that the family of the bereaved are able to participate in the process. The committee state that the main problem with the current system failing to satisfy the positive duties under Article 2 relate to the 'limited purpose and scope of a coroner's inquest under the current legal framework'.[43] The committee cite *R v Secretary of State for the Home Department ex parte Amin*[44] where:[45]

> *The House of Lords unanimously agreed that a coroner's inquest would not satisfy the procedural obligations in Article 2 because of the various*

legal restraints contained in the Coroners Act 1988 and the Coroners Rules 1984.

Clause 10(2) seeks to address this by putting on the face of the bill the fact that the purpose of the investigation can be extended to ascertain the circumstances by which the deceased came by his or her death, if this is necessary to avoid a breach of Article 2.

JUSTICE is concerned at the weakness of the power regarding the outcome of the investigation. This is a matter of concern in the existing system and the bill echoes the current legislation, with one amendment. As with the current law, there is provision for the senior coroner to report the matter (if action should be taken to prevent the recurrence of fatalities similar to that which is the subject of the investigation) to a person who may have power to take such action and (the new provision) to report to the Chief Coroner (under clause 12(2)). While the creation of the new post of Chief Coroner is welcome, he or she is given no specific power in the bill regarding the outcome of the investigation. The case of Joseph Scholes highlights the lack of power in the present system where the coroner, along with continued support from the bereaved family, lawyers, politicians and support groups, has called for a public inquiry, yet the recommendation has not been taken up.[46] Joseph Scholes hanged himself in a young offenders institution after being sentenced to a two year detention and training order when he was 16 years old. The Court of Appeal recently held that the requirement under Article 2 for an effective investigation had been satisfied in this case by the government's referral of the custodial sentence to the Sentencing Guidelines Council, appointment of a former inspector of the Social Services Inspectorate to examine the operational issues raised by the case and the request to the Youth Justice Board to consider the adequacy of custodial protection for vulnerable young offenders. There was therefore no need for there to be a public inquiry as this was only one of the ways in which the positive obligations under Article 2 could be met.[47] Permission is being sought to appeal the case to the House of Lords.

There should be an amendment to the draft bill to allow the Chief Coroner to make recommendations to Parliament in certain cases. If the coroner's recommendations are made public and the Chief Coroner considers the circumstances were such that a public inquiry would be warranted, then the Chief Coroner could lay before Parliament the recommendations to the relevant minister who would have to respond in a reasonable amount of time, eg 28 days. The minister would have to give a reasoned decision which, barring issues in the interest of national security, would be made public and therefore would be open to judicial review, maintaining the increased right for the bereaved to challenge decisions. This process would only happen in exceptional cases, but

it ensures the transparency of the system and strengthens the position of the Chief Coroner as leader of the service.

Clause 10(3) limits the coroner and jury from expressing any opinion other than on the manner and circumstances of the death. This restricts an important part of the inquest process, restraining the coroner and jury's power of public expression about matters of potentially significant public interest. Inquest verdicts can, and should, express opinions about the generality of the situation.

The scope of an inquest has been affected by case law following the introduction of the Human Rights Act 1998. In *R v HM Coroners for the Western District of Somerset ex parte Middleton*[48] and *R v HM Coroner for West Yorkshire ex parte Sacker*[49] the House of Lords widened the scope of an inquest. The 'how' a person died was extended to include 'by what means and *in what circumstances*'.[50] This means that the coroner is able to ask the jury for a narrative verdict, which can be useful for influencing policy and changing procedure to ensure that similar circumstances to those in question do not reoccur. The Joint Committee on Human Rights welcomed this development, with particular regard to deaths which occur in custody.[51]

Conclusion

The draft bill has been a long time coming. The process of change has been welcomed:[52]

> *INQUEST welcomes the government's draft bill as a long overdue opportunity to reform one of the most ancient and archaic areas of the British legal system.*

However, there has been strong criticism of the substance of the proposals. The Coroners' Society have rejected the draft bill, 'for the reasons clearly expressed by the [Constitutional Affairs] Select Committee. The draft bill is unworkable in its present form'.[53] INQUEST echo this: '[t]here is a risk that unless the government amends the Bill they will simply be tinkering at the edges of the system and will fail to deliver an improved system'.[54] The resources available for the system remain a critical issue with regard to the effectiveness of the reforms. The consultation process on the draft bill ended in September 2006 and it will be interesting to discover what changes will be made to the reform proposals when a revised bill is published. While there are many gaps in the reform proposals that must be addressed before implementation, at long last change in the coroners' courts is close.

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Notes

1 *Death Certification and Investigation in England, Wales and Northern Ireland: the Report of a Fundamental Review 2003*, Cm 5831, Introduction, para 1.
2 *Hansard*, House of Commons debates, 6 February 2006, Col 607.
3 http://www.dca.gov.uk/legist/coronersreform.htm.
4 See DCA press release, 23 August 2006, 'Bereaved families to help Parliament shape new Coroner Law'.
5 See www.coroner.org.uk/public/history.asp.
6 See www.coroner.org.uk/public/media.asp.
7 S8(1)(a) Coroners Act 1988.
8 S8(1)(b) Coroners Act 1988.
9 S8(1)(c) Coroners Act 1988.
10 S8(3)(b) Coroners Act 1988.
11 S8(3)(c) Coroners Act 1988.
12 S8(3)(d) Coroners Act 1988.
13 S11(5)(b) Coroners Act 1988 and r36 Coroners Rules 1984.
14 See Leslie Thomas, Danny Friedman and Louise Christian, Inquests: a practitioner's guide, Legal Action Group, 2002, p16 at para 2.6: 'The parties – who are neither plaintiffs, defendants, nor accused – merely assist the coroner in establishing the 'truth' of how a person died'.
15 S2(1) Coroners Act 1988.
16 See n14 above, p48 at para 5.1.
17 These were, respectively, a select committee in 1910, a departmental committee chaired by Lord Wright which reported in 1936, and the *Report of the Committee on Death Certification and Coroners*, September 1971, Cmnd 4810. For a detailed discussion of each, see n14 above paras 2.9-2.18.
18 *Coroners Courts*, JUSTICE, 1986, para 11.
19 Ibid, para 23.
20 See n1 above.
21 Shipman Inquiry, *Third Report*, July 2003.
22 Ibid, para 81-82.
23 Ibid, para 112.
24 *Reforming the Coroner and Death Certification Service, A Position Paper*, Home Office, March 2004, Cm 6159.
25 See n2 and n3 above.
26 JUSTICE submitted a response to the DCA consultation paper in September 2006. The paper is available at www.justice.org.uk/inthenews/htm. The majority of our comments are detailed in this article.
27 Clause 1.
28 *Keenan v UK*, App No 27229/95, Judgement of 3/4/2001, ECtHR (Third Section), para 91.
29 As under s8(3) Coroners Act 1998 in the existing legislation.
30 S43 Serious Organised Crime and Police Act 2005.
31 Clause 14.
32 Clause 56.
33 House of Commons Constitutional Affairs Committee, *Reform of the coroners' system and death certification*, Eighth Report of Session 2005-06, HC 902-1.
34 Clause 50(3).
35 Article 8 ECHR.
36 Article 1, Protocol 11 to the ECHR.
37 Para 2 Sch 2 Access to Justice Act 1999.
38 Article 2(1): Everyone's right to life shall be protected by the law.
39 *McCann v UK* (1995) 21 EHRR 97. In this case the court stressed that Article 2 is one of the most fundamental provisions in the Convention (at para 147).
40 See n3 above, p25.
41 Joint Committee on Human Rights, *Deaths in Custody*, Third Report of Session 2004-05, HC 137 – 1/ / HL 15-1 at para 282.
42 (2003) 37 EHRR 2, paras 105-109.
43 See n41 above, para 291.
44 [2003] UKHL 31.

45 See n41 above, para 291.
46 See http://inquest.gn.apc.org/joseph_scholes_public_inquiry.html.
47 *Yvonne Scholes v Secretary of State for the Home Department* [2006] EWCA Civ 1343.
48 [2004] UKHL 10.
49 [2004] UKHL 11.
50 See *Middleton*, n48 above, at para 35, emphasis added.
51 See n41 above, at para 300.
52 *INQUEST's response to the draft Coroners Reform Bill*, 15 September 2006, para 3.
53 Motion passed at the AGM of the Coroners' Society of England and Wales 2006 held on 28 September – 1 October 2006.
54 See n52 above at para 16.

Multiple discrimination – problems compounded or solutions found?

Gay Moon

Recent European equality directives have expanded the number of prohibited grounds for discrimination. This has led to an increasing awareness of the problems experienced by people who have been subjected to discrimination on more than one ground. Our current legal provisions do not address this. This article, reflecting current work undertaken by the Equalities Project at JUSTICE, considers the options for law reform in order to address multiple discrimination appropriately.

Introduction

The Government commissioned the Equalities Review to consider how to:[1]

> *provide an understanding of the underlying long-term causes of disadvantage that need to be addressed by public policy*

in relation to equality and diversity. This is a large and somewhat amorphous task, but one matter that it is surely necessary to consider is the extent to which different kinds of disadvantage are found in the same situation. There have been a number of research projects that have pointed to the coexistence of such disadvantage in the day-to-day experience of many different classes of people.

For example, the Equal Opportunities Commission has recently investigated the problems experienced by Bangladeshi, Pakistani and Black Caribbean women at work.[2] They have concluded that although these women leave school with good qualifications they are more likely to be unemployed than comparable white women and less likely to be in senior roles within the workplace. This is a problem of multiple discrimination, or what is sometimes called intersectional discrimination.

Though this problem of multiple discrimination has been shown by research to be widespread, there have been few cases where multiple ground discrimination has been raised. Those cases which have been raised directly have suffered from evidential problems. For pragmatic reasons lawyers have tended to argue them on the strongest available ground and to ignore the other aspects. This is not satisfactory since it represents only a half truth about the case. There is therefore much for both the Equalities Review and the Discrimination Law Review to

consider. However the interim report of the Equalities Review has had little to say about this kind of discrimination.

This is a significant omission. It seems that neither the Equalities Review nor the Discrimination Law Review have yet really started to grapple with these problems. Thus this paper seeks to help make good that omission by considering the nature of the problem, the way in which UK law has approached it so far, and the possibilities for change within the context of European constraints. It discusses approaches in comparative legal systems and concludes with some recommendations for further consideration.

The nature of the problem of multiple discrimination

People are frequently disadvantaged as a result of more than one cause, so discrimination is very often complex. A person may suffer disadvantage because she is a black woman; another may suffer discrimination because he is a disabled gay man; yet another because she is a Muslim woman. The multiplicity of possibilities is obvious. These multiple identities are part of the diversity of our society. Recognising this kind of diversity is now understood to be important in the next step in promoting social inclusion of the most disadvantaged.

In 1990 Kimberlé Crenshaw discussed this kind of problem in relation to African American women and pointed out the inadequacy of a single ground approach to discrimination law:[3]

> *… in race discrimination cases, discrimination tends to be viewed in terms of sex or class-privileged Blacks; in sex discrimination cases, the focus is on race- or class-privileged women.*
>
> *This focus on the most privileged group members marginalises those who are multiply burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon … Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.*

This distorted single issue way of thinking about discrimination influences the way that politics are presented: struggles against prejudice become posed as arising only from singular issues and remedies are therefore crafted to reflect

this. Kimberlé Crenshaw's comments were written in relation to the United States but they are certainly true of the way that both UK and European discrimination law has been written, as is discussed later in this article. Yet the political thinking on this issue is undoubtedly changing. For instance, Patricia Hewitt, when Secretary for Trade and Industry, put the point well when setting expectations for our domestic equality organisations. She pointed out:[4]

> *As individuals, our identities are diverse, complex and multi layered. People don't see themselves as solely a woman, or black, or gay and neither should our equality organisations.*

This need to address multiple identities became one of the primary reasons for moving from separate equality commissions to a single new Commission for Equality and Human Rights (CEHR). While mulitiple discrimination is now widely recognised by those working in the equality field as a serious problem,[5] little has been done to create coherent legal rights to address it.

Take an ethnic minority woman who suffers discrimination because of her racial or ethnic origin *and* her gender. Suppose also that she is disabled, or gay or old or any combination of these. The current law will only focus on one of these factors at a time. Thus her treatment as an ethnic minority person is compared to that of a white person: her treatment as a woman is compared with the treatment afforded to a man, and so on. This paper asks: is this the right way to approach her situation, and if not what is?

Intuitively the answer to the first question is 'no': it is often not possible to separate out different aspects of a person's identity. It is easy to see that the discrimination that a black woman may experience may be wholly different from that experienced by a black man or a white woman. Indeed it may be argued that to take such a single issue approach is itself a form of discrimination. Professor Sandra Fredman has observed:[6]

> *The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.*

That the intuitive answer to the question posed above is the right answer has been born out by a more penetrating enquiry into the nature of prejudice. Thus it has been shown that people who are prejudiced against any ethnic group are twice as likely as the population as a whole to be prejudiced against gay and lesbian people, and four times as likely to be prejudiced against disabled people.[7] This research provides a very strong basis to infer that when someone is the subject of discrimination on the ground of one aspect of their individuality they

may also be subjected to discrimination on another aspect. This has been called *intersectional prejudice*.

Types of multiple discrimination

There are many different ways in which multiple discrimination can be experienced.[8] Such discrimination might occur when someone experiences discrimination on different grounds on different occasions and it might occur when there is a combination of grounds on each occasion. The second additive type could, for instance, arise where a series of attributes are desirable attributes to be searched for in the process of selecting for a particular job. A typical selection might be based on a preference system, in which if an applicant lacks one preferred attribute he will lose a point and if he lacks two he will lose two points and so on.

The facts of *Perera v Civil Service Commission (no 2)*[9] provide an example of this kind of approach. In this case the employer set out a series of requirements for a potential post-holder. Mr Perera was turned down for the job because of a variety of factors which were taken into account by the interviewing committee – his experience in the UK, his command of English, his nationality and his age. In this case the lack of one factor did not prevent him getting the job but it did make it less likely, and the lack of two factors decreased yet further his chance of selection for the job. Ultimately he was unsuccessful because his personal circumstances were such that he was not preferred on a variety of different grounds.

There is yet a third type of multiple discrimination which occurs when the discrimination involves more than one ground and these grounds interact with each other in such a way that they are completely inseparable. This is the type of discrimination addressed in *Bahl v the Law Society*[10] which is discussed further below.

The capacity of UK law to address these issues

The capacity of UK statutory discrimination law to address these types of multiple discrimination is hugely hampered by the way in which it has developed on a ground specific basis. It is usually said that discrimination law started with race discrimination laws,[11] followed soon after by sex,[12] later joined by disability,[13] and then transgendered status. Sexual orientation, religion or belief came later as a result of new European laws and were finally joined in 2006 by age.

Each piece of legislation reflects the campaigns waged by different single interest groups and none specifically addresses multiple discrimination. But what is inevitable is that sooner or later such a case would come up. That happened in *Bahl v the Law Society,* where the questions whether, and if so how, this

legislation could be used to address alleged multiple discrimination were critical to the ultimate resolution of the case. The result was not positive and certainly did not reflect the kinds of analysis of interaction set out above.

In *Bahl,* an Asian woman claimed that she had been subjected to discriminatory treatment both on the grounds that she was Asian and also on the grounds that she was a woman. At first instance, the employment tribunal ruled that she could compare herself to to a *white man*, so that the combined effect of her race and her sex could be considered. However, both the Employment Appeal Tribunal and the Court of Appeal ruled that this was not possible and was indeed an incorrect interpretation of the law.

In the Court of Appeal Lord Justice Peter Gibson held:[14]

> *In our judgment, it was necessary for the ET to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr Bahl on whom lay the burden of proving her case. It failed to do so, and thereby, as the EAT correctly found, erred in law.*

Thus the Court of Appeal judgment made it clear that each ground had to be disaggregated, separately considered, and a ruling made on it, even if the claimant had experienced them as inextricably linked. To understand why this approach was taken it is necessary to explain at some length the role of an apt comparison in UK law.

The role of the comparator in UK law

In a direct discrimination case such as *Bahl* it is currently necessary to consider whether there has been less favourable treatment than that which would have been afforded to a comparable person who does not have the same critical characteristics as the complainant. Thus the comparator in an ordinary sex discrimination case brought by a woman is a man whose circumstances are the same or not materially different.

In some cases, particularly where there is a real competition for a post or some other benefit, there will be an actual person who can be considered appropriately as the comparator. Here the law requires that there be a comparison between the treatment of the claimant and that received by a real person comparator. However where no real person exists that fits the bill for a direct comparator whose circumstances are the same or not materially different from that of the claimant then a different task has to be undertaken. Here it is sometimes said that the court must consider what would be the treatment of a hypothetical comparator.

If there is no exact comparator but there is evidence as to how others in not entirely dissimilar circumstances have been treated, this evidence may explain why the complainant has been treated in the way that they have. The evidence helps the tribunal to hypothecate what would happen to someone in the same circumstances as the complainant but lacking their particular characteristics.

These points have been explained in *Shamoon v Chief Constable of the Royal Ulster Constabulary.*[15] In that case Lord Scott said:[16]

> *Comparators come into play in two distinct and separate respects … First, the statutory definition of what constitutes discrimination involves a comparison: '... treats that other less favourably than he treats or would treat other persons'. The comparison is between the treatment of the victim on the one hand and of a comparator on the other hand. The comparator may be actual ('treats') or may be hypothetical ('or would treat') but 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other' … If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator ...*
>
> *… secondly, comparators have a quite separate evidential role to play … The victim who complains of discrimination must satisfy the fact finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground eg sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, … by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing*

> *the inference that the victim was treated less favourably than she would have been treated if she had been the [fully relevant] comparator.*

Thus, it can be seen that the role of the comparator can be over-emphasised. While the primary role is to establish if there has been less favourable treatment of the complainant vis-à-vis another real person, the secondary evidential role is to supply a basis from which it may be inferred how it should be hypothecated that a real comparator (had they existed) would have been treated. This is one of a series of different ways of proving that discrimination has occurred, and this secondary limb role could easily be replaced by asking the question why the discrimination has occurred. There is no reason why the answer to such a question could not encompass several grounds without difficulty.

The importance of this question was explored by Lord Nicholls in his opinion in the same case:[17]

> *… in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue) … Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining … Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined ... This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason?*

So asking why was a person treated in the way in which they were has an important part to play in the analysis of any direct discrimination case.

But it must also be remembered that in cases of multiple discrimination it may not be easy to construct a hypothetical comparator who does not share any of the prohibited characteristics with the claimant. It may become a difficult and somewhat unreal task. This is important since in such cases a fully relevant direct comparator will be very unlikely to be found. So this is likely to be the kind of case in which it is preferable to ask the question why the claimant was treated as she was. In this way the employment tribunal or court will not

have to spend much intellectual effort to little purpose trying to hypothecate whether a person has been treated less favourably than some other because of the entirety of the multiple grounds on which he or she relies.

The limits imposed by European law on a multiple discrimination claim

In Recital 14 of the Race Directive the possibility of combined gender and race discrimination is acknowledged:[18]

> *In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should … aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.*

So it might be thought that some more specific provision would have been made in the text of the Directive. Unfortunately it was not. Despite this express recognition of the problems of multiple discrimination, all the relevant anti-discrimination directives have adopted a single ground comparison model and none makes any express provision for combatting multiple discrimination.

However, it has been suggested that it may be possible to read the European anti-discrimination directives purposively, as prohibiting discrimination on combined grounds, in the fields of employment and occupation. Professor Dagmar Schiek has argued that:[19]

> *The purposive method of interpreting any norm of Community law would lend itself to assisting the Community courts to actually acknowledge these dimensions of multidimensionality. It would not do justice to the purposes of all the equality instruments taken together to deny the specific situation of intersected human beings.*

Clearly it would be much more preferable that European law should expressly deal with the possibility of multiple discrimination, and there are signs of a developing discussion within the European Commission on this point. A conference addressing these issues is likely to occur as a result of the Commission's arrangements for 2007 as the European Union's Year of Equal Opportunities for All.

Harassment

There is an alternative route in both UK and European law to a finding of discrimination. The UK route has been introduced as a result of the extended definition of direct discrimination in European law which equates harassment with direct discrimination.

European law in relation to racial harassment may be taken as a paradigm of the approach in relation to all grounds. Thus:[20]

> *Harassment shall be deemed to be a form of discrimination … when unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment …*

In the UK this definition has been transposed in a more generous way by replacing the conjunctive 'and' with the disjunctive 'or' in between 'person' and 'of creating'.

It can be seen immediately that this is not a comparison test. The key issues are violation of dignity and/or a hostile working environment. It seems entirely possible in a European context that dignity may be especially violated by a combination of grounds as well as on a single ground. However under domestic law it remains to be seen whether the reasoning of *Bahl* would be applied in such a case.

A different approach to multiple discrimination in Canada

In Canada there is a very different definition of discrimination from that used within the UK.[21] The Canadian concept of discrimination depends less on a comparison of the treatment of complainant and another as on the effect on the complainant. Moreover Canada has eroded the distinction between direct and indirect discrimination with the result that its concept of discrimination is much closer to our concept of harassment. This has enabled multiple discrimination to be more fully considered.

Canadian legislation now uses the same provisions for each ground of discrimination: consequently, there is an increasing awareness of the need for an intersectional approach to discrimination so as adequately to address multiple grounds.

This is interesting not only from a comparative point of view but also because a similar awareness could emerge once the new Commission for Equality and Human Rights is up and running, even if domestic equality law has not developed in the same way. There is a statutory requirement that the CEHR focus on diversity, so it would be natural for it to address the complexity of multiple identities. This highlights the forthcoming intensity of tension between the political awareness of the problem and the inadequacy of existing laws.

Canadian discrimination provisions come into play at a number of different levels. Canada is a federation of provinces: its equality provisions derive from legislation at both the federal and the provincial levels. Canada places these equality laws in human rights legislation. At the zenith at the federal level is the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act 1985. While the Charter operates to limit all provincial and national legislation,[22] the Canadian Human Rights Act has a limited application to federal institutions and federally *governed* institutions such as the federal government, banks, airlines and the Canadian armed forces. Beneath the federal level, each province has a Human Rights Act and/or Charter that specifically enacts equality law. There are slightly different provisions from province to province.

The Canadian Charter has an open list of grounds making it easier to adapt the law to encompass multiple grounds for discrimination. A combined ground has been seen as simply a possible new ground.

There had been a tension between these two measures, in that the Canadian Human Rights Act had a closed list of grounds, so such a straightforward solution was not so readily available when it was applicable. As a result of the increasing recognition of the complexity of discriminatory events, a clause was added to the Canadian Human Rights Act 1985 to clarify that a discriminatory practice includes one that is based on more than one ground:[23]

> *For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.*

This approach reflects fully the state of political discourse. Thus the Ontario Human Rights Commission considers that discrimination on multiple grounds is different from that experienced on any of the individual grounds. For example, it considers that the experience of discrimination suffered by a black woman is intrinsically different from that suffered by a black man, or a white woman. It is the:[24]

> *… intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone …*

This Canadian approach permits the particular experience of an individual to be both acknowledged and remedied. It is clearly very significant that it can do so. The Ontario Human Rights Commission estimated that between April 1997 and December 2000 48 per cent of the complaints that they had received included more than one ground.[25]

The Ontario Human Rights Commission point in particular to difficulties suffered by older people with disabilities, people with disabilities from ethnic minority groups, and ethnic minority people who have a particular religion, for example. They assert that taking an intersectional approach has led to a greater focus on society's response to the individual and a lesser focus on what category the person may fit into. This enables a court to make a more person specific analysis of the effect of treatment in question. The Commission concludes:[26]

> *within the Commission, there is a growing recognition that we can improve our understanding of the impact when grounds of discrimination intersect and that tools for applying an intersectional analysis will be very helpful in the handling of complaints, from inquiries through to litigation, and in our policy work.*

Is a pragmatic approach the way forward?

The approach to the problem which the Court of Appeal said in *Bahl* was necessary may require the complainant and litigator to take a pragmatic approach and to choose one ground as the leading point in the case. Where such an approach is taken it is obvious that the decision how to proceed is likely to be based on the availability of evidence, or perhaps on the strength of the law in that particular area. As I shall explain below I do not consider that this is an adequate response to the problem.

Professor Carasco, who wished to take a discrimination case, has provided an interesting illustration of the problem of this pragmatic approach to evidence:[27]

> *Proving systemic discrimination based on gender in my case was made possible by the availability of research and statistics relating to women in Canadian universities. Proving systemic discrimination based on the combination of race and gender would have been a lot more difficult simply because of the paucity of women of colour in Canadian universities and the corresponding lack of salary data … As a woman of colour, I could not help wondering if it was indeed necessary to prove that other women of colour had been treated in a similar fashion before my own treatment, as a woman of colour, could be acknowledged.*

Canada (AG) v Mossop,[28] decided before the changes outlined above, provides another illustration of the problems of a pragmatic approach to the law. In that case, a gay man failed in his claim for bereavement leave in order to attend his partner's father's funeral. At the time that the case was heard sexual orientation was not a prohibited ground for a discrimination claim so it could not be used; however 'family status' was a recognised ground. The case was therefore argued

on this ground. It was lost because the evidence of discrimination on grounds of 'family status' was insufficiently strong.

It is also interesting because of the comments in the powerful minority judgment of Madame Justice L'Heureux Dubé:[29]

> *... categories of discrimination may overlap, and ... individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.*

What are the possible solutions for the UK?

So, if a purely pragmatic approach is not the right way forward, what are the possible solutions for the UK? A law that permits complaints of multiple as well as single ground discrimination would surely be an improvement. The question is how could this be done without diluting or making less effective the current anti-discrimination provisions?

Differential exclusions

A very important initial problem is to unify the reach of the legislation. Each prohibited ground for discrimination has been given its own different set of exceptions. Whilst there are some, such as the genuine occupational requirement provisions, which are common to all the grounds, there are others such as age discrimination which have a much wider set of exclusions.

How much does this matter? Is it possible to apply one exception to one aspect of the case and another, or indeed none, to the other aspect of the case? The answer to these questions depends on the kind of society that is desired. A society that puts a high value on social inclusion might conclude that in a case of multiple discrimination the exceptions should be very limited. In a more liberal society less concerned with equality in the fullest sense a less strict approach might be taken.

Germany has taken the former approach in its very recent legislation. The German solution to this problem is to say that any justification must apply to each of the grounds in question: [30]

> *Discrimination based on several of the grounds … is only capable of being justified … if the justification applies to all the grounds liable for the difference of treatment.*

The German provisions for establishing direct and indirect discrimination are the same for all the named grounds, although the General Non-Discrimination Act does have differential justification requirements, both for religion or belief and for age. This clause will mean that with any combined grounds justification will need to be established to the highest standard.

Once the issue of exceptions is addressed, what are the possible ways of enabling multiple discrimination to be addressed?

1. Opening the list of grounds

Currently both the UK legislation and the European directives operate with a fixed and closed list of named grounds for prohibiting discrimination. By contrast, Article 14 of the European Convention of Human Rights uses an open text and prohibits discrimination:[31]

> *on any ground **such as** sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

An open ended set of grounds like this enables a discrimination claim to be made out in relation to any combination of these grounds, so facilitating multiple discrimination claims.

This is clearly one solution to the problem of how to make a multiple discrimination complaint, although it would entail making major changes to the structure of UK discrimination legislation. However it has a major consequence: if the range of grounds is unlimited it is impossible to have a principle that direct discrimination is incapable of justification. Consequently, all forms of discrimination, whether direct or indirect, would have to be open to justification. Such a solution would put a much greater emphasis on the 'justification' of alleged discriminatory acts and in so doing it could put more power into the hands of the judiciary and perhaps create more uncertainty.

2. Extended harassment solution

Another radical alternative would be to ignore the distinction between direct and indirect discrimination, with their need for a comparative assessment, and to substitute an extended concept of harassment. Abolishing the distinction outright would probably not be consistent with European law and hence it would be necessary to continue with the existing definitions of direct and indirect discrimination. However, that does not mean that the concept of harassment could not be expressly enlarged so as to permit actions founded on several grounds where a person's dignity has been violated. This would take effect when it can be shown that the claimant has been treated in a manner

which reflects prejudice, stereotyping, historic disadvantage or the exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions for a life with dignity.

If such a solution was to be adopted it would be essential to ensure that there is a strong objective test for the violation of dignity to prevent its misapplication to minor or trivial events. However, in the light of current political sensitivities concerning the scope of harassment this solution is, perhaps, not likely to prove popular. It is, however, in essence the way that Canadian law operates.[32]

3. Multiple comparisons

Another possible solution is expressly to permit multiple comparisons to be made, enabling courts and tribunals to combine consideration of two or more grounds, perhaps with a limit as to the maximum number of grounds that could be considered in any one case. A black woman could compare her situation to that of a white man. A two ground comparison such as this would be relatively easy, and may not even require the construction of a hypothetical comparator. However, as discussed above the more elements that are added into the comparative exercise the more theoretical and difficult it becomes to imagine who might be the hypothetical better treated comparator. This approach requires a ready answer to the question does a black lesbian disabled woman compare herself to a white able-bodied hetrosexual man, or a white able-bodied hetrosexual woman, or some other combination of similarities and opposites. So this approach certainly raises the question: are such comparisons too complicated to be practical?

While they will certainly not be without difficulty, there is some evidence that they can be undertaken within a more limited framework. In America the courts have developed the notion of ground-plus to deal with this problem.[33] This approach effectively limits consideration to two grounds for discrimination so the complainant has to elect which is alleged to be the primary and which the secondary cause of action.

Of course it may well be asserted that in cases of truly intersectional discrimination such distinctions will be difficult, if not impossible to make.

The unified approach of the Canadian Human Rights Act 1985 that a discriminatory practice includes one that is based on more than one ground could also be relevant here.[34] The adoption of a similar clause might be possible within the UK jurisprudence without the need to adopt the rest of the Canadian definition for discrimination which is substantially different from the UK model. Though it is likely that the existence of different exclusions, scope and level of

protection for some of the prohibited grounds would give rise to problems with this solution, although these should not be insurmountable.

4. A greater emphasis on 'but for' and 'reason why'

Two questions that are often asked in all discrimination cases are

1. Would the disadvantage have been experienced 'but for' the operation of the prohibited grounds?
2. Why was the treatment in question afforded to the complainant?

The answers to these questions will certainly help establish discrimination on multiple grounds, particularly if it is asked more specifically 'were the combination of grounds in question the 'reason why' the disadvantage occurred?' An increased emphasis in the legislation on these questions together with a decrease in the emphasis on establishing a comparator would certainly provide a more apt way of considering the issues that are raised in multiple discrimination cases.

Some conclusions

While the existence of multiple discrimination is not in doubt, the best way to tackle it is far less clear or obvious and requres careful consideration. Yet if the reality of disadvantage, discrimination and inequality in the twenty-first century is to be tackled the law must find a workable solution. Within the limits of the EC equality directives there are some adjustments to our existing provisions that could be made.

Firstly, the inclusion of a provision similar to that in the Canadian Human Rights Act, clearly permitting action to be taken in respect of discrimination based on several grounds, should be introduced. As the comparison becomes more complex with each additional ground it might be prudent, at least initially, to limit the number of grounds that could be combined, perhaps to a maximum of three grounds.

Secondly, the omission of clauses requiring that 'the circumstances in the one case are the same, or not materially different, in the other' would prevent the stymeing of cases on the grounds that they were too complicated to be addressed. This would lessen the importance of a hypothetical comparator and put more emphasis on the 'reason why' the discrimination occurred.

Thirdly, a choice will have to be made as to whether to take the German approach to exclusions or to have some more liberal but less socially inclusive solution.

Finally it should be noted that the provisions for remedies in the single ground domestic legislation will need to be altered to make it clear that awards for injury to feelings can reflect the fact that discrimination has occurred on more than one ground.

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Notes

1 See http://www.theequalitiesreview.org.uk/about.aspx.
2 See http://www.eoc.org.uk/Default.aspx?page=17693.
3 Kimberlé Crenshaw, 'Demarginalising the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum*, 1989, p150.
4 DTI press release 12/5/04.
5 See, for example, *UN General Assembly Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2000*, declaration no 2: 'We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.'
6 Sandra Fredman, 'Double trouble: multiple discrimination and EU law', *European Anti-Discrimination Law Review*, issue no 2, 2005, pp13-18 at p14.
7 *Profiles of Prejudice*, Stonewall, 2001.
8 See Timo Makkonen, Multiple, compound and intersectional discrimination: bringing the experiences of the most marginalised to the fore, Institute for Human Rights, Abo Akademi University, April 2002.
9 [1983] IRLR 166.
10 [2004] IRLR 799.
11 See the Race Relations Acts of 1965 and 1968. The Race Relations Act 1976, though much amended, is now the core of the provisions by which race discrimination is outlawed.
12 See the Equal Pay Act 1970 and the Sex Discrimination Act 1975.
13 In fact there is a plausible argument for saying that the Disabled Persons Employment Act 1944 was the first to deal with the need of disabled persons for some positive action to remedy their disadvantaged place in society. This Act was repealed and replaced by the Disability Discrimination Act 1995.
14 [2004] IRLR 799, para 137.
15 [2003] IRLR 285.
16 Ibid, paras 107-108.
17 Ibid, paras 7,8 and 11.
18 Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
19 See D Schiek, 'Broadening the scope and the norms of EU gender equality law: towards a multidimensional conception of equality law', *Maastricht Journal of European and Comparative Law*, vol 12, no 4, 2005, pp427-466, at p465.
20 See Article 2(3) of Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
21 See G Moon, 'From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the UK?', *European Human Rights Law Review*, 2006, issue 6 (forthcoming).
22 See *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.
23 Canadian Human Rights Act 1985, section 3.1 as amended in 1998.
24 M Eaton, 'Patently confused, complex inequality and *Canada v Mossop*', (1994) 1 Rev Cons Stud 203 at 229.
25 *An Intersectional approach to discrimination; addressing multiple grounds in human rights claims,* discussion paper, Ontario Human Rights Commission, 2001, p11.

26 Ibid, p6.
27 E Carasco, 'A case of double jeopardy: Race and Gender', (1993) 6 CJWL 142 at p152.
28 [1993] 1 SCR 554.
29 *Canada (AG) v Mossop*, [1993] 1 SCR 554 at p645.
30 General Non-Discrimination Act 2006 (AGG), art 1, ch 1, para 4 – I am grateful to Dr Mark Bell for drawing my attention to this provision.
31 Emphasis added.
32 See G Moon, n21 above, and G Moon and R Allen, 'Dignity discourse in equality law: a better route to equality?', EHRLR, 2006, issue 6 (forthcoming).
33 See D Schiek, n19 above, at p456, referring to *Phillips v Martin Marietta Corp.,* 400 US 542 (1971) and *Jeffries v Harris County Community Action Association* 615 F 2d 1025 (5th Circ.).
34 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.' Canadian Human Rights Act 1985, S3.1.

A solid foundation for the house: does the EU have the legislative competence to harmonise areas of member states' criminal procedure laws?

Maik Martin

The member states of the European Union have committed themselves to an ambitious programme of legislative projects at EU level aimed at improving police and judicial co-operation in criminal matters. A number of these measures would provide for the harmonisation of minimum levels of procedural guarantees, rights and standards in criminal proceedings in all member states, from core defence rights to minimum standards to be observed in the gathering of evidence. Yet, doubts have emerged as to the legislative competence of the EU to adopt such measures, to the extent that they would also affect purely domestic criminal cases. There are sound political and structural arguments for the adoption of instruments flanking current and prospective mutual recognition measures at EU level. Whether the legal argument also comes down in favour of the existence of an EU competence to adopt such measures may still be considered to be a somewhat open question. While the author believes that the EU is actually endowed with such competence, it is to be hoped that member states will allow the European Court of Justice to rule on this issue soon and authoritatively settle this dispute.

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the European Court of Justice to rule on this issue soon and authoritatively settle this dispute.

In the Hague Programme which EU member states adopted unanimously in November 2004 to strengthen security, freedom and justice in the European Union,[1] the EU laid out a multi-annual legislative programme for the improvement of police and judicial co-operation in criminal matters under the Third Pillar of the EU Treaty. The guiding principle of the numerous measures envisaged in the Hague Programme aimed at enhancing criminal justice co-operation between the member states is that of mutual recognition of judicial decisions throughout the EU. A working system of free movement of judicial decisions in a European judicial area, however, clearly depends on a high degree of confidence by member states in the adherence of all member states' criminal justice systems to a common level of procedural standards and guarantees afforded to defendants in criminal proceedings. The EU Council expressed this unambiguously in the Hague Programme:[2]

> *The further realisation of mutual recognition as the cornerstone of judicial co-operation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.*

The Council thus recalled that 'the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation in criminal matters having a cross-border dimension.'[3] Consequently, member states proclaimed that:[4]

> *[t]he comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which encompasses judicial decisions in all phases of criminal procedures or otherwise relevant to such procedures, such as the gathering and admissibility of evidence, conflicts of jurisdiction and the ne bis in idem principle and the execution of final sentences of imprisonment or other (alternative) sanctions, should be completed and further attention should be given to additional proposals in that context.*

On the basis of this declaration, in 2005 the European Commission adopted the Hague Action Plan[5] which envisages, inter alia, the publication of proposals for framework decisions on minimum standards relating to the taking of evidence,

on judgments rendered in absentia and on uniform rules for jurisdiction of member states in cross-border cases. In the spring of 2006, the Commission also published a green paper on the presumption of innocence,[6] with the responses aimed at feeding into an eventual legal instrument fleshing out certain aspects of this highly complex principle enshrined in Article 6(2) of the European Convention on Human Rights (ECHR). However, proposals for Third Pillar instruments harmonising specific aspects of member states' laws of criminal procedure have attracted sustained criticism from a group of member states including the UK and Ireland, who argue that the EU lacks the legislative competence to adopt instruments that would require the member states to make changes to the way they deal with purely domestic criminal cases, eg in the context of trials in absentia.

It is this very argument that some member states have – so far very successfully – used in order to block the adoption of a legal instrument pre-dating the Hague Programme: the Framework Decision on certain procedural rights in criminal proceedings throughout the EU.[7] This proposal, which was published by the Commission in 2004, and according to the Hague Programme should have been adopted by the end of 2005, laid down five core rights every suspect and accused in criminal proceedings in each member state should enjoy in both purely domestic cases and those involving member state co-operation. These included: the right to legal assistance from the outset of a criminal investigation, free of charge where necessary; to interpretation and translation of essential documents; to contact with consular authorities and other persons; and to a 'letter of rights' setting out these rights in a way the suspect can understand. Proponents of the instrument as drafted by the European Commission argue that mutual trust between member states would be improved by a more uniform observance of the fair trial guarantees enshrined in Article 6 ECHR through a parallel, yet more precisely drafted, instrument at EU level. This instrument would flesh out the ECHR rights and make them more visible through implementing legislation in the member states. Yet, all efforts of member states to agree in Council on a meaningful draft of this framework decision – which features so prominently in the unanimously adopted Hague Programme – have been markedly unsuccessful. It remains unclear if the impasse in Council on this instrument can be overcome in the near future.

In this article, the example of this legislative project will be used to discuss the merits of adopting measures laying down sets of harmonised minimum procedural rights and standards applicable, inter alia, to domestic cases within the member states. In this discussion the issue of the legislative competence of the EU to adopt such measures will predominate, as it will, eventually, be determinative of the issue, regardless of the political and systematic arguments that could be advanced for such harmonisation.

The political and structural arguments for minimum harmonisation measures in criminal procedure at EU level – trust and coherence

It is a truism that near automatic recognition and enforcement of foreign judicial decisions, as envisaged by member states in the Tampere conclusions[8] and the Hague Programme, depends on a working level of mutual trust between the judicial authorities of all member states. As member states confirmed in the Hague Programme, the mutual recognition programme can only be based on a foundation of trust between member states: trust that court decisions throughout the Union are the result of procedures that conform to the requirements of Article 6 ECHR and that the recognition of pre-trial measures (eg arrest warrants under the European Arrest Warrant scheme) would not lead to individuals being exposed to situations where these Article 6 rights would be jeopardised. Yet, this trust cannot be imposed unilaterally by member states' governments: it has to be based on the positive experience of all actors involved in the exercise of criminal justice co-operation. It has to be earned, through justice not only being done, but being seen to be done. The concept of mutual recognition in the context of judicial co-operation celebrates the distinctiveness of member states' legal systems,[9] but only where there is a shared understanding of indispensable procedural standards and fair trial guarantees throughout the Union can mutual recognition work in overcoming the differences between the legal systems. This approach to mutual recognition was forcefully advanced by Advocate General Sharpston in her opinion in the *Gasparini* case[10] on the interpretation of the ne bis in idem provision in Article 54 of the Schengen Convention. Mutual recognition thus presupposes a sufficient degree of harmonisation of member states' legal systems: it cannot be a substitute for it.

Yet, is there a real need to provide for a set of procedural rights and safeguards *at EU level*, where the ECHR, and in particular its Article 6, should provide for an adequate and sufficiently uniform level of such standards and fair trial rights? Should not the common obligation of member states to adhere to the ECHR provide sufficient trust in the fundamental rights compliance of each other's legal systems, and thus be considered a strong enough backbone of the Union's mutual recognition programme in the area of criminal justice co-operation? At present it would seem that the answer to that question is a cautious 'no'. Findings against member states by the European Court of Human Rights (ECtHR) on grounds of Article 6 violations demonstrate that there is still room for improvement in the practical delivery of fair trial guarantees by member states. An explosion of the number of individual applications to the Strasbourg court[11] over the last two decades has put the court at the very real risk of being irremediably overburdened and incapable of exercising its supervisory jurisdiction adequately. Against this background, the Council of Europe's

Committee of Ministers, in its Recommendation (2004) 6, has admonished the signatory states to improve domestic remedies for ECHR violations so as to relieve the Strasbourg court of its caseload. Were the Community legislator now to adopt an instrument in the context of criminal justice co-operation not simply reproducing the wording of Article 6 ECHR but providing for a precisely framed set of very specific fair trial rights and guarantees at EU level (this would apply also to an eventual EU instrument on in absentia proceedings), this might go some way to making the rights contained in Article 6 rights more visible 'on the ground': under an EU instrument these rights, where necessary, would have to be implemented in member states' domestic laws and could, as such, be directly invoked in the criminal courts of all member states, irrespective of the status of the ECHR in each respective member state's legal order. This may lead to a more effective use of domestic remedies for breaches of the provisions that transposed the EU instrument into member states' domestic law, rendering resort to Strasbourg unnecessary in a larger number of cases. Thus, the Procedural Rights Framework Decision might prove to be more than an unnecessary duplication of established ECHR standards; it may well turn out to be a practically effective instrument bolstering individuals' right to a fair trial. The only (perhaps necessary, yet regrettable) shortcoming of this legislative project is the absence, in the draft framework decisions, of a provision addressing the consequences of a breach of the core rights laid down in this instrument.

There is also a potent *structural* argument for the adoption of secondary EU legislation fleshing out or even extending the procedural standards and rights enshrined in the ECHR in the context of judicial co-operation in criminal matters. It is evident that member states considered the judicial co-operation conventions concluded under the aegis of the Council of Europe as largely insufficient and in need of improvement through instruments adopted under EU powers. The adoption of the EU Mutual Legal Assistance Convention 2000[12] and the Framework Decision on the European Arrest Warrant makes this clear. Yet, since the EU has gone beyond what the Council of Europe had provided in terms of judicial co-operation measures by committing to more stringent and effective mechanisms at Community level, why then should it be objectionable to apply the same reasoning to the Council of Europe's instrument(s) enshrining the legal safeguards that have to be observed in the context of such co-operation? Structural coherence calls for instruments regulating these rights and safeguards – which underpin and complement enhanced criminal justice co-operation – at the same level, namely secondary EU legislation. It has to be conceded, though, that this argument would not explain why such safeguards should apply 'across the board', ie also to purely domestic proceedings where potential complications in the course of judicial co-operation could not arise. However, both common sense and cogent considerations of equality, as identified by the UK government in its response to a report by the House of Commons European

Scrutiny Committee on the draft Framework Decision on procedural rights,[13] require the extension of instruments laying down fundamental trial rights and standards not just to instances of criminal justice co-operation but to *all* criminal proceedings in the EU, wherever they take place:

> *[G]iven the nature of the safeguards being proposed it would not be feasible to limit the proposal to cases in which mutual recognition may be relevant, as this would create disparities and inequalities in criminal procedure with different categories of defendants being treated differently. Further, it would not be possible, in the context of ever increasing free movement of persons within the Union, to foresee in which cases the judicial co-operation of another member state should or could be requested.*

The legal case for the legal basis – the scope of Article 31 of the EU Treaty

Advocates of EU instruments harmonising fair trial rights and other procedural safeguards to apply beyond situations of judicial co-operation argue that Article 31(1)(c) EU Treaty would provide a sufficient legal basis for such harmonisation. This article provides that '*common action on judicial co-operation in criminal matters shall include … ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation.*' Harmonising measures providing for common minimum standards that also apply to purely domestic cases, the argument goes, are necessary to improve such judicial co-operation between member states.

This proposition is difficult to prove empirically, and such an extensive reading of Article 31(1)(c) EU Treaty may indeed overstretch its meaning.[14] However, it has to be conceded that a certain lack of uniformity in the application by member states of the fair trial guarantee of Article 6 ECHR in fact hampers judicial co-operation. The *Stapleton* case[15] amply demonstrates this, even though it did not concern the rights that would be set out in the Framework Decision: the Irish High Court refused to execute a European Arrest Warrant and order the surrender of an accused to the UK, holding that a fair trial of the defendant would not be possible due to the time that had elapsed since the alleged commission of the offence. The High Court went on to state that the English courts might not apply the same standard as the Irish courts when considering whether a fair trial would still be possible; the judge therefore decided not to allow the surrender of the person sought to England, so as not to put the accused person's Article 6 right at risk. However, were uniform standards applied by the Irish and English courts, the Irish High Court would most certainly not have decided this case the way it did. There can hardly be doubt that having clear, uniform standards at EU level (and, by way of implementation, also at member states' level eventually), would limit, if not finally prevent, the number

of judicial co-operation cases in which an affected individual could argue a breach of Article 6. This would certainly be the case in relation to arguments that a prospective or past trial would not or did not comply with Article 6 ECHR standards because of a failure to provide the defence rights proposed in the Procedural Rights Framework Decision.

A potentially compelling legal argument for the existence of EU competence to create instruments harmonising procedural rights and standards can be found in Article 31(1) TEU itself. The fields of common action expressly listed in Article 31(1) TEU are not exhaustive – they simply *'shall include'* the measures specified in articles (a) to (e). This was pointed out by Advocate General Kokott in her opinion in the *Pupino* case, which concerned a harmonising Framework Decision on the standing of victims in criminal proceedings.[16] This Framework Decision was aimed at improving the situation of victims of crime in domestic criminal proceedings; it was adopted seemingly without any doubt in Council as to the sufficiency of the legal basis in the EU Treaty. However, the Advocate General (AG) could not find a specific limb of Article 31(1) TEU that would have provided the legal basis for the measure. Article 31(1)(c) was not applicable as there was clearly no link of necessity between the improvement of the standing of victims in domestic proceedings and the functioning of the judicial co-operation regime, as that provision would have required. However, AG Kokott opined that the individual policy fields in Article 29 TEU 'describe only potential legislative spheres without thereby strictly delimiting the competence of the Union.'[17] She went on to state that the Union's competence:

> *is to be determined in the light of the general objectives of police and judicial co-operation in criminal matters, as they are laid down in Article 29 EU. The principal objective under that article is to provide citizens with a high level of safety within an area of freedom, security and justice through, in particular, improved judicial co-operation.*

She thus concluded that the non-exhaustive Article 31(1) TEU did indeed provide adequate legal basis for the adoption of an instrument on victims' rights applying not just to cross-border cases, but also to purely domestic situations. The European Court of Justice (ECJ) did not address this issue in its judgment, but obviously proceeded on the assumption that the Framework Decision was not void for want of legal basis. AG Kokott's approach attracted criticism in that, taken to its extreme, it would confer upon the EU a virtually unlimited competence in the area of criminal justice wherever it could legislate unanimously under Article 31 TEU.[18] This, it is argued by critics of Kokott's approach, could not be the case as it would contradict, by necessary implication, Article 35(6) TEU. This article gives the ECJ the power to entertain annulment actions on the grounds of a lack of legislative competence on the part of the

EU to adopt specific legal instruments. The ECJ's landmark judgment of 13 September 2005[19] demonstrates conclusively, however, that this argument is not wholly sustainable: at least where the European *Community* has legislative competence for the adoption of a legal instrument, there cannot be a parallel Union competence, even where the Council legislates with unanimity. There would therefore always remain 'room' for an annulment action under Article 35(6) TEU, even if a very wide view of the scope of the Union's legislative competence under Articles 29 and 30 TEU were taken. Thus, AG Kokott's reading of Article 31 TEU cannot be dismissed out of hand. Applying her reasoning in *Pupino*, there could hardly be any doubt as to the sufficiency of Article 31 TEU as a legal basis for the adoption of the Procedural Rights Framework Decision and other harmonising measures envisaged in the Hague Programme. It is an open question whether a contrary conclusion can be drawn from the inclusion of a more express mandate for minimum procedural standards and rules in the Constitutional Treaty.[20] Arguments could be advanced both for and against this difference in formulation having any legal significance.

Harmonisation of procedural rules and standards – the ECJ should take the floor!

While the laying down of minimum rules on issues such as defence rights, in absentia judgments or evidence-based procedural safeguards should generally be regarded as a welcome step towards the creation of a genuine area of justice throughout the EU, the legal arguments relating to such harmonisation have shown that it is not certain that the EU is legally competent to adopt such harmonising measures. The issue of sufficient legal basis will need to be considered individually for each new piece of legislation: however, some guidance can be provided as to the factors that will influence the determination of the issue.

Eventually, it will be for the ECJ to decide the question of the extent of the Union's lawmaking powers in the area of criminal justice co-operation and thereby end the current uncertainty over the scope of Article 31 TEU. Member states that doubt the sufficiency of the TEU as a legal basis should now seek a clarifying decision from the Court. Where a member state's *only* concern about an EU instrument it would otherwise support is the legislative competence of the EU, there can be no doubt that the most appropriate, albeit unorthodox, course of action would be actively to participate in the negotiations and, after the eventual adoption of the instrument, to bring an annulment action under Article 35(6) TEU in the ECJ on the ground of lack of legal basis. The ECJ would then be in a position to adjudicate upon the issue and authoritatively clarify this important – and currently paralysing – legal issue. It is regrettable that those member states that take a narrow view of the Union's legislative competence in the area of criminal justice do not seem to be prepared to do this.

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Notes

1 Council Doc 16054/04.
2 At para 3.3.1.
3 At para 3.3.2.
4 At para 3.3.1.
5 COM(2005) 184 final.
6 COM(2006) 174 final.
7 COM(2004) 328 final.
8 http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm
9 C-187/01 *Gözütök*.
10 C-467/04, opinion of 15 June 2006. It has to be pointed out that the Court did not follow AG Sharpston in her actual conclusions on the case, judgment of 28 September 2006.
11 From 404 in 1981 to 44,100 in 2004. See Lord Woolf's review of the court's working methods at http://www.echr.coe.int/echr.
12 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.
13 As reported in the House of Lords EU Committee's 1st Report of Session 2004-05, HL Paper 28, at para 35.
14 Cf the most instructive comments by Valsamis Mitsilegas in 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', *Common Market Law Review*, Oct 2006 (forthcoming).
15 *Minister of Justice, Equality and Law Reform v Stapleton* (IEHC) 43, 21 February 2006.
16 Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.
17 C-105/03, opinion of 11 November 2004.
18 Robin Lööf, 'Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU' (2006) 12 *European Law Journal* 421.
19 C-176/03 *Commission v Council*.
20 Especially Article III-270(2).

Childhood on trial: the right to participate in criminal proceedings

Sally Ireland

Crimes committed by children have attracted much media and political attention in recent years; at the same time, the youth justice system in England and Wales has attracted trenchant criticism from experts. Much commentary has focused on sentencing and diversion. This article focuses on the adversarial trial process itself, and in particular the suitability of the Crown Court and youth court as fora for the attribution of responsibility to children for offending behaviour. Alternatives that might provide viable directions for reform in the current political climate are considered.

Introduction

The trial of Robert Thompson and Jon Venables in 1993 for the murder of James Bulger was a landmark in the history of British criminal justice. Public horror at the murder, and political reaction to it, have long been cited as one important reason for the shift in direction of criminal justice policy in the early 1990s to the punitive trajectory which continues to this day. The effects of this trajectory have been deeply felt in youth justice: the use of custody for children, for example, is available – and employed – in a much wider range of circumstances. Custody for children remains, officially, the 'last resort' that it must be in order to comply with Article 37 of the UN Convention on the Rights of the Child (CRC); however, as the chair of the Youth Justice Board (YJB) has recently said, 'a last resort today is substantially lower than 10 to 15 years ago'.[1]

Another important effect of the trial, however, was that it exposed areas ripe for reform in the system of trial and sentencing, particularly of children. The setting of a tariff period by the then Home Secretary that was longer than that recommended by the Lord Chief Justice (LCJ), following the submission of petitions and a media campaign, highlighted the problems with executive involvement in tariff-setting in murder cases, which was ended following the House of Lords' judgment in *Anderson* in 2002.[2] The European Court of Human Rights (ECtHR) in *T v UK; V v UK* found that tariff-setting for juveniles detained at Her Majesty's Pleasure was a sentencing exercise and therefore the Home Secretary's role was in breach of Article 6 ECHR.[3] Further, as Fionda has highlighted, the image of the two small boys raised in the dock of the Crown Court, and their ECtHR challenge to the fairness of the proceedings in which

they were convicted, prompted new concerns regarding Crown Court trials involving defendants of that age:[4]

> *The mental age of a small child in the overwhelmingly large and austere surroundings of the Crown Court has an Alice in Wonderland surrealism and epitomises the antithetical reality behind the section 91 procedure. Children who commit very serious crimes lose the privilege of childhood and are assigned adult status, even though their physical (and possibly mental) capacity simply does not assimilate with that status.*

Following the verdict of the ECtHR in Thompson and Venables' cases, the now familiar practice direction, *Trial of children and young persons in the Crown Court*, was issued by the Lord Chief Justice.[5] As well as dealing with such practical matters as the removal of wigs and gowns, the placement of the young defendant in the court room and the taking of frequent breaks, it stressed that the 'trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress'. 'All possible steps', it added, 'should be taken to assist the young defendant to understand and participate in the proceedings'.[6] Following another adverse finding in the ECtHR in *SC v UK*,[7] further steps have been taken in the interests of promoting participation: the Police and Justice Bill, currently before Parliament, contains provisions allowing particularly vulnerable young defendants to give evidence in court via video link, a facility more widely available for child witnesses under the Youth Justice and Criminal Evidence Act 1999 (YJCEA).

However, beyond these alterations, conservatism in procedure has prevailed. Debate in England and Wales has not concentrated upon the propriety of the adult Crown Court as a venue for the trial of children from the age of ten, let alone the more specialised youth court. Commentators upon the sending of children to the Crown Court do not frequently describe it as trying them 'as adults', unlike commentators upon systems in the United States.[8] Critical focus upon the youth justice system in England and Wales has centred upon sentencing (in particular, the use and conditions of custody), and entry into the system – particularly the questions of the age of criminal responsibility, diversion and 'net-widening'. Given the pressures upon the system's institutions, particularly youth custody, the relative infrequency of trials in relation to guilty pleas, cautions or other disposals, and the focus upon preventing offending (the statutory principal aim of the youth justice system),[9] this is natural enough. A system and a government whose focus is upon containing, aiding and/or reforming the child that comes before it is likely to see trials as secondary. At worst, they can be viewed as a distraction sometimes necessary before the real business of the system – dealing with the offending behaviour – can begin. Many children who come before the courts will be children who are in trouble in some

sense; their responsibility for the individual offence in question is sometimes seen as less important to the system than the chance presented by their presence to deal with the problems that it has brought to the system's notice.

The more serious the offending behaviour of which a child is accused, however, the more easily this approach can be shown to be inappropriate. One reason for the high evidential standards maintained in the criminal process, after all, is in order that responsibility for serious offences is accurately attributed and appropriately dealt with. Beyond the obvious risk of a wrongful conviction, there are other ways in which a trial process in which the defendant cannot participate to an appropriate level can jeopardise this objective. For example, inaccuracies in the prosecution version of events may remain uncorrected, meaning that those responsible for the future treatment and supervision of the young person operate on an incorrect basis.

Further, even assuming that a 'problem-solving' approach to young offenders is an appropriate task for criminal courts, the *T v UK; V v UK* litigation raised important concerns about how an inappropriate trial process could have detrimental psychological effects that could persist past release and affect future development and capacity for future offending. Sir Michael Rutter, Professor of Child Psychiatry at the Institute of Psychiatry, University of London, observed in a report on Venables in 1998, cited in the ECtHR, that:[10]

> *In my opinion there are two negative aspects of the trial process as they apply to children of [V.'s] age. First, one serious consequence of the long time involved in a trial means that there is an inevitable delay in providing the psychological care and therapeutic help that is needed. A child of ten has many years of psychological development still to come and it is most important that there is not a prolonged hiatus when this is impeded by the trial process. In particular, when children have committed a serious act, such as killing another child, it is most important that they are able to come to terms with the reality of what they have done and with all that that means. That is not possible at a time when a trial is still underway and guilt has still to be decided by the court. Thus, I conclude that the very prolonged nature of the trial process is bound to be deleterious for a child as young as ten or eleven (or even older).*
>
> *The fact that the trial process is held in public and that the negative public reactions (often extreme negative reactions) are very obvious is a further potentially damaging factor. While it is crucially important for young people who have committed a serious act to accept both the seriousness of what they have done and the reality of their own responsibilities in the crime, this is made more difficult by the public nature of the trial process …*

The form of the trial process, therefore, may impact twofold upon the principal statutory aim of the youth justice system.

These questions become increasingly important as more children and young people face trial, in both the Crown Courts and the youth court. From 1961 onwards there were progressive relaxations on the types of case against children that could be heard in the Crown Court, and from the mid-1990s, youth courts were subject to greater encouragement to use the power.[11] The Crown Court, in turn, has no discretion to remit the case back to the youth court if it thinks that this procedure has been used over-zealously or in error. In 1993, over 300 juveniles were sentenced in the Crown Court. By 1997, the figure had risen to over 700, a level it reached again in 2002.[12] For children under 14, it does seem that there is a downwards tendency for convictions and acquittals in the Crown Court in recent years. In 2000, 148 were convicted and 96 acquitted in the Crown Court; in 2004, the figures had fallen to 82 and 57 respectively. Notably, however, only a handful of those were being tried for manslaughter, rape or drug offences (there were no murder trials). The vast majority were for other crimes.[13]

Participation of children in Crown Court trials

A recently published paper by the Standing Committee for Youth Justice, of which JUSTICE is a member, warns that:[14]

> *The UNCRC requires that the 'laws, procedures, authorities and institutions' for dealing with young people should be child specific. Yet considerable numbers of children are routinely subjected to procedures designed for adult offenders.*

The youth justice system in England and Wales is both situated within the adult criminal justice system and modelled upon it, with some adaptations on account of youth – more in the youth court, fewer in the Crown Court.

The adversarial mode of trial, while deeply rooted in the English legal consciousness, finds it hard to deal with defendants of limited capacity. The fitness to plead procedure has long recognised this; it focuses upon:[15]

> *… whether the accused will be able to comprehend the course of the proceedings so as to make a proper defence … Whether he can understand and reply rationally to the indictment is obviously a relevant factor, but the court must also consider whether he would be able to exercise his right to challenge jurors, understand details of the evidence as it is given, instruct his legal advisers and give evidence himself if he so desires.*

While it might be thought that these considerations would allow some very young children or those with developmental delay to avail themselves of the unfitness procedure, at a conference on the subject of child defendants held by the Michael Sieff Foundation in 2002, one participating lawyer said that:[16]

> *The fitness to plead procedure – which is the only way of raising these concerns [regarding learning disabled children and young people] in court – is hopelessly inadequate. It assumes the reason for unfitness is mental illness and has no criteria to address developmental immaturity.*
>
> *The US (for example, the state of Virginia) has completely revised its law on fitness to plead and has included a specific statutory criterion of developmental immaturity… Nor do we have an answer to the question: 'What do we do with young people who are causing problems to society but cannot have a fair trial within our procedures?' … I've just had a client who was found unfit to stand trial simply because his IQ was low and was then found by a different jury to have done the act of murder. He is now required by law to go to a psychiatric hospital and not a single consultant I have spoken to wants to take him, because they cannot do anything about his IQ.*

The ECHR remarked that the defence in *SC* had not asserted in the domestic proceedings that their client was unfit to plead. Despite the fact that he had been assessed as having 'a significant degree of learning disability' with a reasoning age of 'between six and eight years old',[17] a report upon him was said by the court to have found that '"on balance", the applicant probably did have sufficient intelligence to understand that what he had done was wrong, and that he was therefore fit to plead.'[18] Between 2000 and 2004, no children under 14 years of age were found to be unfit to plead in the Crown Court.[19] This is of particular concern in the light of the observation of the Royal College of Psychiatrists that:[20]

> *…Taking these links between low IQ and psychiatric disorder along with the association noted above between low IQ and crime, it is clear that disturbed, learning-disabled child offenders are likely to present commonly before the courts.*

Even if successful in such a case, the invocation of the fitness to plead procedure would often result in an inappropriate procedure and disposal for the child in question. After the finding of fitness to plead, the court then merely determines whether the defendant performed the act alleged. This is arguably an illogical restriction, since even a young child or one with a learning disability may well be capable of forming the requisite mental state for the crime in question. A

lower standard of conduct is therefore required to constitute a positive verdict, after which the court's options for disposal are limited: it must then make either an admission order to such hospital as the Secretary of State specifies; a supervision order; or an order for the accused's absolute discharge.[21] Even if the criteria for fitness were enlarged to include developmental considerations, or the range of disposals widened, it is difficult to see how this procedure could be an appropriate alternative to full criminal trial for a young child or one with developmental delay.

Alternatives to Crown Court trials

The difficulties with the traditional adversarial criminal process for younger children are one reason why many commentators have argued for the raising of the age of criminal responsibility in the UK. The establishment of a higher age of criminal responsibility – 14 is a figure sometimes mooted – would have many benefits: for example, it would avoid the acceleration of children into custody at a young age through progressive criminal convictions, and would enable the response to acts that would currently be offences to be led by considerations of child welfare, development and rehabilitation alone.

However, calls to raise the age, even from sources as distinguished as the European Commissioner on Human Rights[22] and the UN Committee on the Rights of the Child[23] have fallen upon stony ground. Political parties, in addition to fearing the 'soft on crime' label, may see the criminal justice system as offering the state the best chance to address and correct offending behaviour, even in the very young; feel obliged to step in, in the face of the decline of other formal and informal networks of social control for children; and wish to respond to the climate of public fear that has been termed 'paedophobia' in recent research.[24]

If it is indeed the political reality that the age of criminal responsibility in England and Wales is unlikely to be raised in the near future, what improvements are possible?

Extending the jurisdiction of the youth court

Commentators who have remarked upon the unsuitability of the Crown Court as a forum for trials of children have recommended the extension of the youth court's jurisdiction, with a suitably experienced bench:[25]

> *All cases involving young defendants who are presently committed to the Crown Court for trial or for sentence should, in future, be put before the youth court consisting, as appropriate, of a High Court Judge, Circuit Judge or Recorder sitting with at least two experienced magistrates. The only possible exception should be those cases in which the young defendant is*

> *charged jointly with an adult and it is considered necessary, in the interests of justice, for them to be tried together. The youth court so constituted should be entitled, save where it considers that public interest demands otherwise, to hear such cases in private, as in the youth court exercising its present jurisdiction.*

Similarly, Lord Justice Auld, in his *Review of the Criminal Courts of England and Wales*, said that:[26]

> *Most other European and Commonwealth countries have separate adult and youth criminal justice systems, and there appears to be wide agreement here that they should be treated differently from adults in this respect. Many contributors to the Review have urged that they should not be tried in the Crown Court or before a jury, whatever the seriousness of the charge. In my view, there is a strong case for removal of all such cases to the youth court. As Professor Andrew Ashworth has observed, their seriousness could be appropriately marked in that court, where necessary, by constituting it with a judge and magistrates…*
>
> *… I consider, therefore, that young defendants charged with murder or other grave offences that may merit a sentence of greater severity than is presently available to the youth court should no longer be tried by judge and jury in the Crown Court or be committed there for sentence. Instead, they should go to a youth court consisting, as appropriate, of a High Court Judge, Circuit Judge or Recorder sitting with at least two experienced youth panel magistrates and exercising the full jurisdiction of the present Crown Court for this purpose ... Notwithstanding the public notoriety that such cases now attract through intense media coverage, I consider that the court proceedings should normally be entitled to the same privacy as those in the present youth court. The only exception to this course should be for those young defendants who are presently brought before the Crown Court only because they are charged jointly with a person who has attained the age of 18 and it is considered necessary in the interests of justice that they should be tried together…*

Extending the jurisdiction of the youth court, therefore, has two key advantages: firstly, it means that youths can be dealt with separately from adults, in conformity with the CRC, and secondly that as both quotes above stress, it would mean that privacy was maintained at the trial. The presence and attitude of observers at the trial of Thompson and Venables prompted the finding of a violation of Article 6 ECHR by the majority of the Strasbourg court:[27]

> *although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.*

The effect on effective participation of feelings of intimidation has prompted provision for greater privacy under the LCJ's subsequent practice direction, and the forthcoming reforms in the Police and Justice Bill. However, these measures are discretionary. The chance to give video evidence under the Police and Justice Bill will only apply to particularly vulnerable children and will not affect any feeling of intimidation during the rest of the trial. Further, the Crown Court, with its jury, is by its nature a forum where a large number of adults are present, watching and listening to the proceedings – even if the public gallery is cleared. The youth court has the basic advantage that there need be far fewer adults in the room.

In a specialised youth court, radical procedural differences from the adult system would be much easier to justify. The tribunal and other participants could also receive specialist training, meaning that the nuances of adapting procedure to suit children of particular ages and developmental circumstances would be more successfully achieved.

The ECtHR in *SC* stressed the importance of the court's being able to adapt its procedure with regards to the capabilities of the defendant before it:[28]

> *… when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.*

It is notable that modifications in accordance with the LCJ's practice direction had been made in the Crown Court in SC's case, but he remained unable to comprehend proceedings to the extent that following the imposition of a custodial sentence, he did not understand that he could not go home with his foster parent.[29]

Adapting the youth court

It is suggested that privacy, and a specialised youth jurisdiction, should be available for all children and young people in all criminal cases. However, reform should go further: the youth court should be able, within its new-found jurisdiction, to adapt its procedure to respond appropriately to a spectrum of ages and abilities.

To enable this, assessment of the child or young person will be necessary in at least some cases. While funding is unlikely to be available for full assessment of each child before a criminal trial, it should be available where the defendant is very young; where the offence is very serious; or where there are suggestions of developmental delay or a mental condition. Medical confidentiality and the privilege against self-incrimination would militate in favour of the assessment being confidential to the defendant and his legal team unless disclosed by them to the court.

It is suggested that in the most serious cases of learning disability, no adaptations will be capable of leading to effective participation; a revised fitness to plead procedure should be considered for these cases. A finding of unfitness should result in the diversion of the case from the criminal court system: alternative, non-criminal proceedings may be necessary in order to consider a range of disposals centred upon welfare and/or treatment, as appropriate.

For other children, a spectrum of procedural adaptations should be available. As Apler has noted:[30]

> *Child development is progressive and variable … The age dependent bias for criminal responsibility does not consider individual variability in maturity. Nor does the sharp cut off for criminal responsibility take into account the progressive nature of maturation.*

While inquisitorial proceedings have traditionally been resisted in the UK, a much needed comprehensive review of youth justice procedures could consider their advantages in compensating for the difficulties for children in participating effectively in the adversarial system – difficulties that are well-recognised in civil proceedings in the UK. It is likely that there would be considerable difficulties in implementing such fundamental changes while retaining sufficient guarantees for fairness: the mindset and practices of judges, lawyers, police, and others, are steeped in the principles of adversarial justice.

However, it remains clear that the LCJ's practice direction and the introduction of video evidence for vulnerable young defendants will not solve the problems

raised in *T v UK; V v UK*; and *SC v UK*. An extensive review and consultation process should be launched as a matter of some urgency.

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Notes

1 Professor Rod Morgan, quoted in 'Youth Justice system is in crisis, officials warn courts', *Guardian*, 25 October 2006.
2 *R v Secretary of State for the Home Department, ex p (1) Anderson (2) Taylor* [2002] UKHL 46.
3 *T v UK; V v UK* 30 EHRR 121.
4 J Fionda, Devils and angels: youth policy and crime, Hart Publishing, 2006, p138.
5 16 February 2000, www.dca.gov.uk/ypeoplefr.htm.
6 Ibid, para 3.
7 App no. 60958/00, judgment of 15 June 2004.
8 See, for example, *The rest of their lives: life without parole for child offenders in the United States*, Human Rights Watch and Amnesty International, October 2005, ISBN: 1564323358.
9 S37 Crime and Disorder Act 1998.
10 *T v UK*, at para 18.
11 See Fionda, n4 above, pp132-138.
12 Ibid, p134, fig 6.1.
13 *Hansard*, Commons written answers, 16 Oct 2006 Col 1038W.
14 *Still waiting for youth justice: a position paper by the Standing Committee for Youth Justice*, 2006.
15 Peter Murphy (ed.), Blackstone's Criminal Practice 2007, OUP, 2006, para D11.23, p1547.
16 Mark Ashford, quoted in *Child defendants: is the law failing them?*, The Michael Sieff Foundation, report of conference 25 April 2002, www.michaelsieff-foundation.org.uk.
17 *SC v UK*, para 32.
18 *SC v UK*, para 36.
19 *Hansard*, Commons written answers, 16 Oct 2006 Col 1038W.
20 *Child defendants*, Occasional Paper OP56, March 2006, Royal College of Psychiatrists, p36.
21 S5 Criminal Procedure (Insanity) Act 1964.
22 *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom 4-12 November 2004, for the attention of the Committee of Minsters and the Parliamentary Assembly*, CommDH(2005)6, paras 105-107.
23 *Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 09/10/2002*. CRC/C/15/Add.188.
24 J Margo and M Dixon with N Pearce and H Reed, *The problems of modern youth: raising youth in a changing world*, Institute of Public Policy Research, 6 November 2006, ISBN: 186030303x.
25 Ibid, p21.
26 *Review of the Criminal Courts of England and Wales*, September 2001, ch 5, paras 208-211.
27 T v UK, para 88.
28 *SC v UK*, para 35.
29 *SC v UK*, para 33.
30 A Apler, 'Moral understanding and criminal responsibility of children', in S Bailey and M Dolan (eds), Forensic Adolescent Psychiatry, Arnold Publishers, 2004, pp51-57 at p52, quoted in *Child Defendants*, n20 above, p61.

Book reviews

Indirect discrimination: a case study into the development of the legal concept of indirect discrimination under EC law

Christa Tobler
Intersentia, 2005
xxiv + 516pp €107

This book is based on a 'habilitation' thesis, a preliminary requirement for eligibility for a professorship in German-speaking Switzerland. It is a detailed and necessarily academic study of the development of the legal concept of indirect discrimination under EC law, a work of real scholarship. It considers why the concept of indirect discrimination was originally required, how it has evolved and whether it is still needed. These are important, demanding and profound questions.

Indirect discrimination was first introduced to ensure that it was not possible to undermine prohibitions of discrimination by using formally neutral criteria which were discriminatory in their effect. In times when much direct discrimination is recognised as unacceptable, indirect discrimination still has a vital role to play in eliminating discriminatory practices.

Christa Tobler begins by considering the parameters of indirect discrimination and the historical precursors of the concept of indirect discrimination. She then goes on to consider its development as a legal concept through EC law, through both case-law and formal legal definitions in EC directives. She then looks at the demarcations between direct and indirect discrimination and concludes, as many practitioners have done, that there is a 'rather unclear dividing line'. She considers indirect discrimination and restrictions in a wider sense before considering whether we still need the concept of indirect discrimination. This book is not limited to the obvious area of equality law. Whilst it starts from a foundation of non-discrimination in relation to sex and nationality and free movement of workers, it moves on to consider its application to other areas of EC law including internal taxation of goods, freedom of establishment, agricultural law, free movement of services, transport law and free movement of capital.

This is an excellent book, so given the attention now being paid to resolving the problems sparked by multiple discrimination, it is perhaps disappointing that Tobler does not explore more fully how examples of multiple discrimination could be incorporated within the current or proposed definitions of indirect discrimination.

In the final chapter she revisits the need for the concept of indirect discrimination and possible ways in which to reform the current concept. She is critical of the current law as lacking consistency in that different definitions arise depending on the context: here she cites the definition in relation to sex discrimination, an inconsistency that has since been remedied. She also criticises the law as lacking precision in that it does not determine the precise level of requisite disparate impact and it is unclear as to the comparison to be made. The

provisions in relation to justification are criticised as they do not clearly indicate which aims and goals are legitimate for objective justification, and are insufficiently clear about the number of elements making up the proportionality test and their meanings. These are valid criticisms. There is a difficult balance to be achieved between certainty and giving a margin of discretion to member states in the way that directives are implemented. Of their nature, directives are less precise than member states' implementing legislation.

This leads Tobler to consider the options for reform: to maintain the status quo, to improve the definitions of indirect discrimination and clarify the dividing lines between the various concepts, or to rework the law entirely so as to erode the distinctions between some or all of the different concepts. The third option draws upon developments in Canadian law, which in adopting a purposive approach has eroded the distinctions between direct and indirect discrimination and removed the requirement of comparability, so that the prohibited act is closer to our concept of harassment than to the civil wrong of direct or indirect discrimination. Tobler concludes that the real options, within a European context, must be either to retain the status quo or to improve the definitions. She makes several apposite suggestions for alternative wordings to overcome some of the present difficulties. However, indirect discrimination is likely to remain a difficult subject, so books like this will continue to be useful to both academics and specialist practitioners challenged by the niceties of indirect discrimination.

Gay Moon, head of equalities project, JUSTICE.

Race matters: an international legal analysis of race discrimination

Anne-Marie Mooney Cotter
Ashgate, June 2006
312pp £60

Dr Cotter looks at the goal of race equality from an international perspective, and at the importance of legal provisions to counter discrimination. She seeks to assess the roles of legislation and the judicial system in relation to their impact on the fight against race discrimination. Her starting point is that '[t]he law is of central importance in the debate for change from racial inequality to racial equality … Law is a powerful tool, which can and must be used to better society.' This book follows her earlier work Gender injustice: an international comparative analysis of equality in employment, which provided a similar analysis of international gender norms.

Race Matters starts with a review of race relations round the world and follows this with a more specific examination of Australia and New Zealand, Africa and South Africa, Canada, Mexico and the United States, the UK and Ireland and finally the European Union. For each of these areas she provides a short commentary on the law and substantial extracts from the important legislative provisions in relation to race. In this respect the book is similar to a casebook. The scope is ambitious, however: most of the chapters consist of large sections of legislation or descriptions of legislation with almost no commentary. In order to be useful, it is important to know how these provisions have been applied and whether they have made a difference to people's lives.

The coverage is very uneven. As might be expected, the best chapter is that relating to Canada, Mexico and the United States which does contain some analysis. The worst is the one preceding it covering Africa and South Africa, which consists of little more than extracts from a number of African human rights instruments and, in the case of South Africa, extracts from the Constitution and the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act. During the course of the chapter Dr Cotter sets out the mandate and rules of the African Commission on Human and People's Rights: however, she says nothing about whether or not it has been effective, how it has been used or even if it is actually doing anything. At the end of each chapter is a most unsatisfactory one-paragraph conclusion. If she had referred to the periodic country reports of the UN Committee for the Elimination of all Forms of Race Discrimination this would have given the book more depth.

Unfortunately there are also mistakes. In the UK section Dr Cotter confuses the European Convention on Human Rights and the Human Rights Act 1998 (HRA), referring to s14 HRA as prohibiting discrimination (instead of making provisions for derogations), s4 as prohibiting slavery and forced labour (instead of dealing with declarations of incompatability) and s17 as prohibiting an abuse of rights (instead of dealing with the periodic review of designated reservations). She then puts in a short section on the Equal Pay Act 1970 and later a section on the Equal Opportunities Commission and the Code of Practice on Equal Pay: the relevance of these in a book about race is not immediately apparent.

This book would be useful for those wishing to have easy access to the comparative legal provisions on race discrimination: however, at £60 it would be an expensive shortcut, as most of these materials would be easily available on the internet.

Gay Moon, head of equalities project, JUSTICE.

Criminal justice: an introduction to crime and the criminal justice system

Peter Joyce
Willan Publishing, 2006
504pp £24.50

New Labour has imposed relentless change in policy, law and enforcement upon the criminal justice system. The introduction of anti-social behaviour orders, implementation of the Criminal Justice Act 2003 and establishment of the Serious Organised Crime Agency are just some of the numerous reforms already made. Despite being an introduction, this textbook 'charts the development of criminal justice policy' in an informative and comprehensive manner.

Joyce covers a vast spectrum of issues relevant to the criminal justice system. He begins with a discussion of the causes of crime and deviancy, examining and critiquing various theories including classicism, biochemical explanations, and the left-wing and right-wing approaches to criminal behaviour. A feminist perspective is also, refreshingly, included throughout the book. Chapter two provides further explanation of the causes of crime by giving an insight into crime prevention, in particular community safety. An account is also

given of white collar, middle-class and corporate crimes, in order to counter earlier theories and official statistics that suggest that crime is predominantly associated with the working classes.

The book also evaluates the main agencies in the criminal justice system, examining their role, function and working practices. Joyce cleverly assesses these agencies in the order in which they would deal with a typical criminal case. Therefore chapters three and four outline the method, structure and organisation of policing, and investigate the control and accountability of the police service. Joyce discusses the development of different styles of policing since the nineteenth century and examines how social disintegration has led to newer forms of policing in order to deal with fragmented communities. What is notable is that the book provides an updated guide to the criminal justice system: it therefore addresses the changing nature of crime as a result of globalisation, and the European response to cross border criminal activity and its impact on UK policing arrangements. In the chapter on 'control and accountability', Joyce plots the increasing role played by central government in police affairs and considers the police complaints machinery, which has culminated in the establishment of the Independent Police Complaints Commission.

Chapter five considers the operation of the prosecution process and the procedures in place to deal with the accused from arrest to sentencing. In addition to history, current reforms under debate regarding the legal aid system, trial by jury and sentencing policy are addressed. Joyce also covers the discriminatory way in which women are treated in the prosecution process and changes that have been made to deal with this problem. Chapter six is concerned with the judiciary. It sets out the organisation of the courts, their workings within the judicial process and also details the composition of the legal profession. In addition, there is a discussion of the relationship between judges and the state and the way in which judges are appointed. Joyce scrutinises the current system as being socially unrepresentative and recommends reforms to counter the deficit. The powers of the judiciary are examined in full, particularly the impact of the Human Rights Act 1998.

The next two chapters focus primarily on punishment and its aims. Chapter seven investigates the concept of punishment, examining an assortment of views on its purpose, and provides a sociological rationale for the use of different forms of punishment across historical periods. An analysis of restorative justice marking its advantages and disadvantages as a response to crime is welcomed as a notion that is gathering popularity. Chapter eight concentrates on imprisonment as a major form of punishment by detailing the evolution of the prison service and addressing the practical problems of running effective prisons to rehabilitate offenders due to overcrowding, understaffing and managerial weaknesses. Joyce also evaluates the merger of the probation and prison services into the National Offender Management Service.

New Labour's post-1997 policy to be 'tough on the causes of crime' has transformed its response to juvenile crime: therefore chapter nine is a necessary part of this work. It sets out the development of the youth justice

system and examines in detail the various new orders created to combat crime such as ASBOs, parenting orders, and youth community orders made under the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999. Joyce concludes his book with a chapter devoted to race and the criminal justice system. Chapter ten scrutinises the degree to which racial discrimination infiltrates and influences the operations of the differing agencies in the criminal justice system. He focuses on the Scarman and Macpherson Reports, concluding that the botched investigation of the murder of Stephen Lawrence has been the 'catalyst for change' to eradicate racism from the police force.

This book is accessible, well researched and topical. In each chapter, Joyce provides a historical background to the current system, which informs the present structures of the agencies and their responses to crime. The use of case studies to illustrate the changes made maintains the reader's attention and makes the book more digestible. However, this book is only an introduction and therefore can only provide a foundation for consideration of many of the core issues discussed. Nevertheless, Joyce seeks to overcome this problem by listing a selection of further readings and references at the end of each chapter, providing the reader with an opportunity to supplement their knowledge.

However, most commendable is the fact that Joyce's textbook deals with real concerns affecting criminal justice that are largely ignored or forgotten in many written accounts of the system. The focus on gender discrimination and racism in the criminal justice system throughout the book provides a wholesome and honest critique of a system that seeks to be fair and just. This is a brilliant starting point from which both students and practitioners can learn.

Sunyana Sharma, criminal justice intern, summer 2006, JUSTICE.

From Newbury with Love: letters of friendship across the iron curtain

Anna Horsbrugh-Porter and Marina Aidova
Profile Books, 2006
264pp £12.99

This is a touching collection of letters, with commentary, between Harold Evans, a Newbury bookseller, and a family in Kishinev, the capital of Moldova. The two were brought together when Harold responded to a list of the children of political prisoners circulated by Amnesty International in 1971. The resulting communication took place across 15 years; half a continent; and over years of Soviet repression and subsequent collapse.

The letters are a real justification for the vision of Peter Benenson, founder of Amnesty as well as of JUSTICE. Harold and his wife, Olive, played a crucial role in sustaining – morally and, through gifts, economically – a family, the father of which spent several years in a gulag for political dissent. At the end, the children of both families actually meet. This is, however, much better than just a simple chronicle of an Amnesty success. Harold emerges as a real person – dealing with age, retirement and the death of his wife – as the letters pass by.

Roger Smith, director, JUSTICE.

How Law Works

Ross Cranston
Oxford University Press, 2006
344pp £54.95

Professor Cranston has written a densely argued, thoroughly researched analysis of the civil justice system. Its content reflects his broad experience: LSE professor, Member of Parliament, member of the House of Commons Select Committee on Constitutional Affairs, minister and adviser to Lord Woolf's inquiry into access to justice.

Professor Cranston's overall concern is not so much with jurisprudence as with the machinery of justice, legal institutions and the impact of law. In the course of his examination, he gives detailed explanations of recent developments in three areas currently facing reform: access to justice, court procedure and the regulation of lawyers. He then looks at the impact of law in a general domestic chapter, which is followed by three looking at other countries: they focus upon the case of Australian aborigines, economic development in south and south-east Asia, and commercial law in Sri Lanka.

The book covers much ground and many contemporary disputes and debates. A critic might argue that Professor Cranston's recent experience of government affects his judgment too much. For example, this is his conclusion on the role of the judiciary:

> *The conventional view is that it is the task of the executive, with Parliament, not the courts, to govern the country and to determine moral and social disputes.*

The interesting issues, however, arise at the borderline between the political and the legal where there may sometimes be more to be said than Professor Cranston allows. For example, supporters of an active judiciary might feel that they were rather short-changed by the following response to their arguments:

> *Advocates of judicial activism fail to specify in detail the respective spheres of judicial and parliamentary action or to give sufficient attention to the issue of judicial accountability in a democratic society.*

This cavil apart, this is a thoughtful and wide-ranging book that has the great merit of focussing on what law actually does and how it does it.

Roger Smith, director, JUSTICE.

JUSTICE briefings and submissions

1 March 2006 – 31 October 2006

Available at www.justice.org.uk

1. Joint letter to EU Council experts on minimum safeguards for criminal proceedings throughout the EU, March 2006.
2. Briefing on the Violent Crime Reduction Bill for second reading in the House of Lords, March 2006.
3. Briefing on the Identity Cards Bill for the House of Lords consideration of the House of Commons amendments, March 2006.
4. Response to the European Commission's Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings, March 2006.
5. Response to Lord Carlile's review on the definition of terrorism in UK law, March 2006.
6. 'A Dignity Discourse in Discrimination Law: a better route to equality', for the Discrimination Law Review, (co-authored with Robin Allen), April 2006.
7. Letter to Minister on reforms required to Legislative and Regulatory Reform Bill, April 2006.
8. Joint open letter to the EU Justice and Home Affairs Council on the proposal for a framework decision on minimum safeguards in criminal proceedings throughout the EU (together with the Amnesty International Brussels Office), April 2006.
9. Joint letter from UK human rights NGOs to the Lord Chancellor concerning recent attacks on the Human Rights Act 1998, May 2006.
10. Response to Law Commission consultation paper no. 178, *Post-Legislative Scrutiny*, May 2006.
11. Response to Law Commission consultation paper no. 177, *A New Homicide Act for England and Wales?* May 2006.
12. Evidence on the G6 Home Affairs Ministers meeting in Heiligendamm to the House of Lords EU Sub-Committee F, May 2006.
13. Briefing to the European Parliament on the proposed Framework Decision on the transfer of sentenced persons, May 2006.
14. Submission on the proposed use of Article 42 on the Treaty of the European Union to the House of Lords EU Sub-Committee E, June 2006.
15. Briefing on the Fraud Bill for the second reading in the House of Commons, June 2006.

16. Briefing on the draft Legal Services Bill to the Joint Parliamentary Committee on the draft Legal Services Bill, June 2006.
17. Briefing on the Police and Justice Bill for the second reading in the House of Lords, June 2006.
18. Response to Home Office consultation on a code of practice for detention of persons suspected of terrorism offences, June 2006.
19. Response to Equalities Review Interim Report for Consultation, June 2006.
20. Response to *Getting Equal: Proposals to outlaw sexual orientation discrimination in the provision of goods and services*, June 2006.
21. Letter and short briefing for peers re Extradition Act 2003, July 2006.
22. Letter and short briefing for peers re criminal justice inspectorate reform, July 2006.
23. Joint Liberty/JUSTICE amendments and briefing re proposed new clauses of the Police and Justice Bill for House of Lords re video links in criminal proceedings, July 2006.
24. Response to Office for Criminal Justice Reform consultation, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape*, August 2006.
25. Written evidence for the House of Lords EU Sub-Committee E's inquiry into the development of the second generation Schengen Information System (SIS II), August 2006.
26. Response to Department for Constitutional Affairs consultation, *Coroners Reform: the government's draft bill: improving death investigation in England and Wales*, September 2006.
27. Open letter to EU Justice and Home Affairs Ministers calling for a rebalancing of EU justice and home affairs policies, September 2006.
28. Briefing on the Corporate Manslaughter and Corporate Homicide Bill for second reading in the House of Commons, October 2006.
29. Briefing on the Police and Justice Bill for report stage in the House of Lords, October 2006.
30. Written evidence to the House of Commons Home Affairs Committee inquiry into current issues of EU Justice & Home Affairs, October 2006.
31. *Intercept Evidence: Lifting the ban*, October 2006.
32. Joint letter on the Police and Justice Bill to House of Commons for consideration of House of Lords amendments, October 2006.
33. Joint amendments with Liberty on the Police and Justice Bill for House of Lords consideration of the House of Commons amendments, October 2006.
34. Amendments for the Corporate Manslaughter and Corporate Homicide Bill for House of Commons Standing Committee B, October 2006.
35. Submission to the House of Commons Constitutional Affairs Committee on behalf of the Standing Committee for Youth Justice, October 2006.

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