# JUSTICE JOURNAL

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# Editorial

## People, participation and process

The unifying theme that emerges through the diverse contributions to this issue of the *JUSTICE Journal* is the importance of people, participation in politics and the process by which policy is made. The Bishop of Durham, Dr Tom Wright, and Professor Mona Siddiqui grapple with the issue of the relationship of man-made human rights (celebratedly referred to in Francesca Klug's resonant title as Values for a Godless Age)[1] to what they accept as the divine. Both return, as does Rabinder Singh QC in his commentary on Dr Wright's piece, to a touchstone of the best of both human rights and all religions: active respect for the individual.

Professor Siddiqui bravely deals with what she calls the 'malfunctions of faith', the consequence of the paradox that the divine can only be expressed in terms that are necessarily historically specific. She explores the dynamic effect of examining the accretion of culture and history on religious practice through the lens of a contemporary understanding of human rights. Keir Starmer QC and myself explore the rather more concrete, if limited, world of how values are implemented. Keir Starmer analyses the extent to which recent developments in the law relating to terrorism reflect human rights. My article looks at the likely practical consequences of the government's commitment to a form of competitive tendering for legal aid.

The issue addressed in this editorial is that raised in Eric Metcalfe's piece on Lord Goldsmith's paper on citizenship and Jack Straw's speech on a bill of rights. Both are responses to Gordon Brown's bold initiative in the early days of his premiership to take the initiative in relation to the constitution. They reflect on aspects of the *Governance of Britain* agenda.[2] This is, at one and the same time, both ambitious and interesting but also cluttered and uncertain.

JUSTICE has undertaken considerable work on the meaning of a bill of rights and Jack Straw gave his paper at an event organised at the *Guardian* where he was debating the proposals set out in our publication A British Bill of Rights: Informing the debate.[3] We do not advocate a bill of rights and, in common with Liberty and the British Institute of Human Rights, did not precipitate the debate about one. Rather bizarrely, it is the three main political parties that have given a degree of credence to the idea before they had made it absolutely clear what they meant by the term. They are now having to give this some attention: we await the result with interest. For our part, though the content, form and effect of a bill of rights are important, we emphasise the importance of the process by which

these issues would be determined. The downside of democratic engagement is well illustrated by Northern Ireland where we still await agreement on a bill of rights a decade after all parties to the Good Friday agreement expressed their commitment to have one. No one, however, said that democracy was easy. It is perfectly possible that the noisier the debate surrounding it, the more valuable a bill of rights may be. One of the problems with the Human Rights Act 1998 is that it was insufficiently debated before it became legislation.

The idea of a bill of rights raises, by itself, issues of immense complexity – particularly if it is phrased, as the government tends to do, as a 'British' bill of rights. Initial response by the Scottish National Party government is unwelcoming to such a London-based initiative – even, or particularly, if it is coming from a Scottish prime minister. Those involved in the Northern Irish process begin to ask how the work that they have done might be recognised, as it currently is not, in the government's thinking. Throw in the striking absence in the government's discussion of a British bill of rights of the possible reference of the European Charter of Fundamental Rights and Freedoms – Jack Straw voted for the 'opt out' from the Charter on the very day that he gave the speech printed here – and you have the perfect political storm. Combined in one issue are human rights, the European Union and devolution. Even prime ministers at the height of their game might baulk at taking on such elemental forces. It would be a bold adviser who counselled Gordon Brown that he could currently turn this issue to his political advantage – at least in the short term.

But, this is not all. The issue of a bill of rights is linked in the government's *Governance of Britain* green paper to two other equally intractable issues: citizenship and identity. Eric Metcalfe's analysis of the former is based on the fundamental defining feature of citizenship, as articulated by thinkers like Aristotle and Thomas Paine: participation in the political process. Lord Goldsmith's report on citizenship[4] seeks something rather different – a definition that is as much exclusive as inclusive. As a result, he ends with the absurdity of recommending removal of the vote from certain categories of resident in order to magnify the difference.

But, if ideas of citizenship are vague, those of identity are nebulous. Nevertheless, the two are integrally connected in the *Governance of Britain* green paper: 'The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world'.[5] Debates about citizenship elide into 'Britishness'. Interestingly, the Number 10 website contains a speech by Professor Linda Colley of the London School of Economics and Political Science on this very topic which she delivered in 1999.[6] It merits reading. Her argument is essentially that 'Britishness' is a will o' the wisp that is dangerous and difficult to follow. She opens with the observation that,

almost uniquely, our language is not our own – unlike French or Swedish – and is 'acutely susceptible to the forces of globalisation, and especially to Americanisation'. What is more, the historical uniqueness of our political institutions has survived little better than that of our language. Globalisation has muted the traditional national identities of class; decolonisation has diminished the sense of superiority and of belonging to a global empire on which the sun never set; Europe and devolution are challenging the effortless equivalence of Englishness with Britishness. Almost all serious thinking on identity acknowledges the superficiality of Lord Tebbitt's test of what national cricket jersey you aspire to wear – equally confusing to large parts of the native Scottish, Welsh or Northern Irish populations and to those from immigrant communities with family connections to countries like the West Indies and India. However, current notions of 'Britishness' may well be equally nebulous and hard to define.

The difficulty is that once you stray away from the firm soil of justiciable rights and constitutional drafting you enter a swamp of conflicting and competing concepts in which the way forward is very easily lost. This is particularly so because the government is wrapping just too many separate issues up into one package. It has at least three objectives.

First, it wants to overcome the hostility among the public that has been engendered around the Human Rights Act 1998. It knows that much of this is specious and often based on wilful misunderstanding but it wants to address it. This is inherently desirable though fraught with the danger that the conflation of rights with duties will – deliberately or inadvertently – mute the effect of rights, such as those in Article 3 European Convention on Human Rights in relation to torture, with which the government has expressed its impatience, at least in relation to foreigners whom it wants to send back to countries where they have a risk of being tortured.

Second, it wants to recognise and deal with the consequences of devolution and large-scale immigration by asserting an overall set of rights and values that are distinctively British. This is designed, creditably enough, to overcome the centrifugal forces of nationalism within the UK and as a balance to the perceived excesses of 'multi-culturalism' that have stressed separateness more than community.

Finally, it seeks to invigorate the political process and re-engage the young into politics. As Professor Beetham, among others, has pointed out: some chance of that from the government that ignored the greatest political mobilisation of the young since Vietnam over its entry into the second Iraq war.[7]

This is too much for one programme to bear. The solutions, if any, to political disengagement are likely to be political, not constitutional – something positively visible in the success of the current Barack Obama presidential campaign in increasing voter registrations in the USA. As Professor Colley bravely argued to Downing Street, the answers to the questions of Britishness are best left to materialise in a way as mysterious as the concept itself. Citizenship needs to return to participation, to what she calls the creation of a 'citizen nation'. She wants the replacement of emphasis on the trappings of monarchy, hierarchy and peerages with acceptance of more diffusion of power and encouragement of participation. She wants a:

> *Constructive and imaginative focussing on Citizenship rather than an obsession with identity. A renovated Citizen Nation, with a charter of rights, with a more open, less hidebound culture, with a different brand of monarchy, with a broader diffusion of power and a more comprehensive vision of politics, and with equal opportunities for minorities and women positively and persistently pursued.*

Of course, what citizenship really needs is an active citizenry. You would expect them to come first. The process by which a 'citizen nation' is created is crucially important to the success of its creation. This is absolutely the same issue as in relation to a bill of rights. The government is absolutely right – and rather bold – to raise these issues. They both call out for people to participate in a public debate about power. That may be rather difficult and rather unlikely at a time when both major political parties backed a discredited war in Iraq on a false prospectus; both are, perhaps understandably, show themselves to be drawn more to the black arts of political spin rather than true participation; and both feel their dependency on a media largely uninterested in these issues and, in relation to human rights, actively hostile and deceitful. However, the government deserves credit for letting the genie out of the bottle. Let us hope that it proves satisfactorily difficult to put it back again.

***Roger Smith, Director, JUSTICE***

**Notes**

1 Penguin, 2000.
2 Green paper, Cm 7170, July 2007.
3 JUSTICE, 2007, £9.99 or available to download at www.justice.org.uk.
4 *Citizenship: Our Common Bond*, March 2008.
5 Para 185.
6 *Britishness in the 21st Century*, http://www.number-10.gov.uk/output/page3049.asp.
7 *What is Britishness? Citizenship and Identity*, Democratic Audit, Rowntree governance seminar, April 2008.

# Towards a bill of rights and responsibility

**The Right Honourable Jack Straw MP**

*This is the text of a speech given at an event organised by JUSTICE and the Guardian on 21 January 2008. The speech discusses how a British bill of rights and responsibilities fits into a long British tradition and how we would be greatly impoverished without the Human Rights Act 1998.*

## Introduction

Back in October I delivered the Mackenzie Stuart lecture at the Cambridge Faculty of Law.[1] In that lecture I described how a bill of rights and responsibilities might fit into the post war development of rights. In my remarks this morning I would like to build on that theme. I am going to discuss four areas in particular:

First, to set out why enforceable human rights are a proud British achievement;

Second, to show how British citizens themselves would be impoverished if we turned the clock backwards;

Third, to argue – paraphrasing John Maynard Keynes – that as circumstances change, so must our approach. I therefore set out the need better to articulate the responsibilities which implicitly have always balanced rights; and

Fourth, alongside that, to consider the case for the expression of further rights.

## Part one: Rights – a proud British achievement

2008 marks the 60th anniversary of the Universal Declaration of Human Rights (UDHR) which has been described as the 'Magna Carta of mankind'.[2] That comment underlines the central role which Britain has played in the history and development of rights. It is a pedigree that stretches back to 1215, through the narrative of the Magna Carta, the Peasants' Revolt, the English Civil War, the Bill of Rights, through Adam Smith and the Scottish Enlightenment, the battle for the franchise, for the emancipation of Jews, Catholics and non-conformists, of women and of non-whites, and the fight against fascist totalitarianism.

The UDHR on 10 December 1948 was a direct response to the Nazi oppression and the horrors of the Second World War. It was not in itself intended to create legal rights. It was aspirational, offering a normative counterpoint to the evil that had so recently gone before. It was the expression of a global desire and

drive to establish common ethical standards of behaviour applicable to all humankind.

The European Convention on Human Rights (ECHR) was borne from this, taking this non-enforceable declaration as its base but developing the principles which underpinned it through the protection and framework of the law.

It seems curious to think that given the significance and sentiment behind the circumstances of their genesis, that in some circles 'human rights' are seen as an unwelcome 'European' creation as if in any event Europe was culturally and philosophically separate from us.

Yet, far from being grafted on by some 'foreign', 'continental' – I suppose worse, some 'Napoleonic' Europe – Britain was at the forefront of these rights in a context which had ramifications for the whole world.

On 20 July 1950, the Labour Foreign Office Minister, Kenneth Younger, stated that the European Convention in which these rights were enshrined 'contains a definition of the rights and limitations thereto which follows almost word for word the actual texts proposed by the United Kingdom representatives'.[3] And the drafting had in turn been led by a leading Conservative, David Maxwell Fyfe QC, later Lord Kilmuir, Lord Chancellor from 1954 to 1962.

We led the negotiations, we led the drafting, we led the way in Europe. We were among the first to sign it in November 1950 and the first to ratify it in 1951. Yet in spite of having been so instrumental in the development of the ECHR, we did not incorporate it into our own domestic law to the same degree as most other signatory nations. There were many linked reasons for this. There was the fact that we were the only European nation that had not in recent centuries experienced an existential crisis of dictatorship, occupation, defeat or the moral hazard of neutrality in a just war, and felt content – if not self-satisfied – about the adequacy of our own institutions. Other concerns were more immediate – including suspicion about a supranational court, and fear that too much ECHR might fuel the movement for colonial freedom.

But, whatever the reasons in the early fifties for non-incorporation, by the end of the century it was clear that our failure to incorporate the Convention into national law was putting British citizens at a disadvantage. They had to appeal to Strasbourg to access their rights, eroding public understanding of the British heritage of these rights and replacing it with a sense that they were in some way a continental imposition.

As the Australian constitutional expert Professor Leslie Zines commented, in pre-Human Rights Act days:[4]

> *Outsiders see Britain in practical terms having something in the nature of a Bill of Rights that is interpreted and applied by foreigners. It passes my understanding why the British do not see the virtue of having such questions determined by their own courts, at least initially.*

That was wise advice. We did not have to leave the matter entirely to 'foreigners'. In 1998 we rectified the situation with the introduction of the Human Rights Act which brought rights home. This had the very practical benefit of making it quicker, cheaper and easier for British people to access and to claim their rights in British courts. Moreover, British judges were able to exert a more pronounced influence over the development of the Convention's jurisprudence. But there have also been the important and wider societal benefits of elevating human rights onto a constitutional level.

Lord Steyn put it well:[5]

> *Observance of human rights is instrumentally valuable. It tends to promote the conditions in which democratic systems* can flourish for the benefit of people generally.

## Part two: How ending the Human Rights Act would impoverish the British people

The Human Rights Act 1998 (HRA) was passed with broad agreement between the parties. The then Conservative spokesperson, and former Attorney General, Nick (now Lord) Lyell wished the Act well on its third reading in the Commons. Now, sadly, there are those who lament the decision we made in 1998 and would turn the clock backwards. Our main opposition party appears to be in that position. They propose to repeal the HRA and replace it with a bill of rights parallel to the ECHR. According to David Cameron, and his shadow Justice Secretary Nick Herbert, this would both 'restore British parliamentary supremacy' and would strengthen the fight against terrorism by making it easier to deport suspected terrorists.

The Conservatives say, however, that they do not intend to withdraw from the Convention itself, so scrapping the HRA would still leave the ECHR in place as an overarching set of principles – and they would still be unable to deport foreign nationals at real risk of torture.

The reason for this is that any UK bill of rights which did not incorporate Convention rights could not have a reduced or more heavily qualified set of

rights than those currently contained in the ECHR without placing the UK in breach of its international obligations. No wonder, that even Dominic Grieve, the shadow Attorney General, admits that this is not the case, saying 'It would be quite wrong to suggest that it would completely transform the situation'.

At this point David Cameron reaches for a 'get out of jail free' card claiming all will be ok if we follow the model of the German Basic Law. But his reliance on the German Basic Law is misplaced. Research by Oxford University demonstrates that in countries like Germany which have their own bill of rights alongside the ECHR, the courts are in fact stricter and less flexible in their approach to interpreting fundamental rights in national security cases than the UK courts and the German government does not 'win' security cases more often than the British government.[6]

Repealing the HRA and simply replacing it with a separate bill of rights would reduce the margin of appreciation that UK courts enjoy. It would have the effect of restricting the flexibility and the application of balance within the UK courts. So the Conservative claim that replacing the HRA with a bill of rights would give the UK courts a greater 'margin of appreciation' is, I am afraid, the opposite of the truth.

Repealing the HRA would only result in delay for British people seeking justice and much less influence by British jurists over European jurisprudence. Rather than seeking remedy in a British court, and heard by a British judge, the British people would have to look forward to joining the back of a very long queue of those waiting for justice in Strasbourg. It would lead to an impoverishment of rights available to British citizens. What an irony, that by following the path now laid down by David Cameron we would be giving those 'alien European foreigners' more, not less, control over the British people.

To seek to circumvent our ECHR obligations would have dire consequences, not just in a legal context, but it could well mean we would have to leave the Council of Europe and potentially the European Union. To do so would undo decades of progress, and do grave harm to the interests of the British people.

## Part three: Responsibilities

Whilst the HRA represents a significant milestone, the government has never regarded it as the final destination. In 1998 I described it as 'a living development of rights to assist our citizens' – 'a floor and not a ceiling'. It has always been our belief that the incorporation of the ECHR into British law could provide the basis of Britain's own bill of rights. But not merely a bill of rights – we also want to consider the responsibilities that go with them.

The government hopes that developing a bill of rights and responsibilities with the British people can help to foster a stronger sense of shared citizenship. It can do so by establishing and articulating the balance between the rights to which we are all entitled to and the obligations we all owe to each other.

Many duties and responsibilities already exist in statute, common practice or are woven into our social and moral fabric. But elevating them to a new status in a constitutional document would reflect their importance in the healthy functioning of our democracy. Just as there was a powerful legal and moral case for incorporation of the ECHR in 1998, I believe there is now a compelling societal case for taking the next step. We have learned, since then, both the strengths of the HRA and what it does not do. We want to build on the benefits of the HRA, not detract from them, and to address the omissions. The rights enshrined in the ECHR already encompass responsibilities – but implicitly. I believe that now we should seek to articulate them explicitly.

But why now? It is not because we are a society in turmoil but because we are a society in flux. We live in a modern, individualistic, consumerist age, in which old social classes have eroded. Much of this is welcome. But the consumer society has shifted attitudes in ways that also present us with some challenges. As Meg Russell has said:[7]

> *It is difficult to find anything more antithetical to the culture of politics than the contemporary culture of consumerism. While politics is about balancing diverse needs to benefit the public interest, consumerism is about meeting the immediate desires of the original. While politics requires us to compromise and collaborate as citizens, consumerism emphasises unrestrained individual freedom of choice.*

In the civic sphere, it has arguably given rise to the commoditisation of rights, which have become perceived as yet more goods to be 'claimed'. This is demonstrated in how some people seek to exercise their rights in a selfish way without regard to others – which injures the philosophical basis of inalienable, fundamental human rights. Alongside that, some people resent the rights that are afforded to fellow humankind – we see this in the media uproar around human rights being a 'terrorist's charter' or there for the benefit of minorities alone.

'Liberty means responsibility', wrote George Bernard Shaw, 'that is why most men dread it'.[8]

Let me say here that I fully understand that there is not, and cannot be, an exact symmetry between rights and responsibilities. In a democracy, rights tend to be

'vertical' – guaranteed to the individual by the state to constrain the otherwise overweening power of the state. Responsibilities, on the other hand, are more 'horizontal' – they are the duties we owe to each other, to our 'neighbour' in the New Testament sense. But they have a degree of verticality about them too, because we owe duties to the community as a whole.

Justice Kate O'Regan, Judge of the Constitutional Court, describes the operation of this idea of 'horizontality' in South African law:[9]

> *What is clear already is that when a court develops the common law, for example, libel law, the court must consider the obligations imposed by the Bill of Rights. In the case of libel, this involves several rights: freedom of expression on the one hand and the right to dignity and privacy on the other. The court has to consider these rights in developing the rules of common law liability.*

I suggest we need to look at the experience from South Africa and other jurisdictions, as to how they have applied a bill of rights in their own national contexts and how this might apply to the United Kingdom.

## Part four: 'new rights'

As with other more 'classical' human rights, a debate about whether encapsulating these generically and incorporating them into a bill does not imply that they have been absent until now.

A fundamental difference between before and after the Second World War has been the development of legally enforceable economic and social rights. It was a process set in train by the 1906 Liberals, taken on by Beveridge in his 1942 report,[10] and then implemented by Attlee's 1945-51 Labour administration. We call this the welfare state.

It is significant that when Beveridge wrote his plan, the rights he described came with responsibilities:

> *Social security must be achieved by cooperation between the state and the individual. The state should not stifle incentives, opportunity or responsibility; in establishing a national minimum, it should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself or his family.*

Many of the pre-existing 'generic' economic and social rights are already legally enforceable – social security, the minimum wage, many others. But we would

have to look very carefully before making any further economic or social rights justiciable.

Equality and a right to administrative justice raise some of the same issues. We have extensive laws on equality. These, down the years, are among my party's proudest achievements, ones which really do distinguish us from other parties. Judicial review has developed significantly in recent years; and, as I have seen comparing my experience as a Minister over the last decade with my experience as a Special Adviser in the seventies, really does help ensure that executive decisions are made with proper regard for the rights of the individual.

Now I am certain that there is a consensus, and one which is shared by the judiciary, that it would be quite inappropriate (and unwanted) if the courts had to make decisions on levels of spending of resources which rightly should be the preserve of Parliament.

I entirely agree with the words of Lord Bingham, in his important speech on the rule of law, when he said that the importance of predictability in law must preclude 'excessive innovation and adventurism by the judges',[11] and that was echoed by Justice Heydon of the High Court of Australia who suggested that judicial activism, taken to extremes, can spell the death of the rule of law.[12]

If these rights are part of our bill – and no decisions on that have been taken – but do not become further justiciable, this would not in any way make the exercise worthless. As Philip Alston described, bills of rights are 'a combination of law, symbolism and aspiration'.[13] What he makes clear is that the formulation of such a bill is not a simple binary choice between a fully justiciable text on the one hand, or a purely symbolic text on the other. There is a continuum. And it is entirely consistent that some broad declarative principles can be underpinned by statute. Where we end up on this continuum needs to be the subject of the widest debate.

A bill of rights and responsibilities could give people a clearer idea of what we can expect from the state and from each other, and provide an ethical framework for giving practical effect to our common values.

## Conclusion

In an enabling state, in a democratic society, it is far more than the law that binds us together. But the law has a powerful role to play. The introduction of the Human Rights Act was a landmark in the development of rights.

Notably however, the Act has not become an iconic statement of liberty as in the US, or with the South African Bills of Rights. Perhaps this is because our

statements of rights have been the production of evolution and not revolution. We have not had to struggle for self-determination or nationhood, nor have we been torn apart by social strife. Do we in Britain value these rights less as a result? I do not think so.

I think an innate understanding of rights is a part of our national psyche, it is the amniotic fluid in which we have grown, so too is an inchoate appreciation at least, of the obligations we have to each other. But we could make them better understood.

If a bill of rights and responsibilities that clarifies this relationship is to be more than a legal document and become a 'mechanism for unifying the population', it is vital that it is owned by the British people and not just the lawyers. The HRA has become highly valued if not necessarily widely loved. But it is the subject of myth, misunderstanding and misapplication which has, in some eyes, devalued its worth. Whilst in reality, it is an enormously important and defining piece of legislation. And I hope that the Equality and Human Rights Commission will continue to champion the benefits of enforceable human rights and dispel these damaging myths.

For a bill of rights and responsibilities to have real traction with the British people they must have an emotional stake in, and connection with it. We have to make a reality of Francesca Klug's assertion that the true meaning of human rights is about providing 'a framework of ethical values driven not just by the ideals of liberty, autonomy and justice, but also by normative values like dignity, equality and community'.[14] That is why we wish to have the widest possible debate on it before we come to final conclusions.

***The Right Honourable Jack Straw MP is Lord Chancellor and Secretary of State for Justice.***

**Notes**

1 University of Cambridge, 25 October 2007.
2 Erica-Irene Daes, 'Freedom of the Individual under Law: a study of the individual's duties to the community and the limitations on human rights and freedoms', UN 1990.
3 CAB 129/41. From Marston, *International and Comparative Law Quarterly*, Vol 42, 1993.
4 Leslie Zines, Constitutional Change in the Commonwealth, Cambridge University Press, 1999, pp71-72.
5 Lord Steyn, Holdsworth lecture, 30 November 2001.
6 See http://www.justice.gov.uk/publications/research270907.htm.
7 *Must Politics Disappoint?* Fabian Society, 2005, p10.
8 George Bernard Shaw, Man and Superman, 'Maxims: Liberty and Equality', 1905.
9 Kate O'Regan, '*The Challenge of Change: 13 years of constitutional democracy in South Africa*', London, 23 October 2007.
10 *Social Insurance and Allied Services*, Cm 6404, November 1942.
11 Lord Bingham, '*The Rule of Law*', Sixth Sir David Williams lecture, November 2006.

12 JD Heydon, 'Judicial Activism and the Death of the Rule of Law', *Quadrant*, January-February 2003.
13 Promoting Human Rights Through Bills of Rights, Oxford University Publishing, 1999.
14 Values For A Godless Age: The History of the Human Rights Act and its Political and Legal Consequences, Penguin Books Ltd, 2000.

# God in public? Reflections on faith and society

**The Bishop of Durham, Dr N T Wright, with a comment by Rabinder Singh QC**

*This is the revised text of a lecture given at the London School of Economics and Political Science on 14 February 2008 as part of the law and faith lecture series run by the LSE law department and organised with JUSTICE. Rabinder Singh QC was one of the discussants; his comments follow the text of the lecture.*

## Introduction: signs of the times

I am grateful for, and honoured by, the invitation to start off this series on law and faith. A theologian lecturing in the London School of Economics feels much as an economist might if invited to preach in Westminster Abbey: it is quite a challenge. And when it comes to God in public we may note that today, 14 February, provides that odd phenomenon, a saint's day which is also a major public, indeed secular, festival. And with those confusions we get down to business. First, some signs of the times.

Ten years ago it would have been unthinkable for the *New Statesman* to run a cover story with the word GOD in massive type.[1] *Time* magazine and *Newsweek* do that sort of thing quite frequently but then, as we know, America is different. *The Economist* had a similar feature last November, and others have done the same. Clearly there are some raw nerves being touched. Issues thought to be long dead and buried are knocking on their coffins and threatening to emerge, skeletons at the feast of contemporary secularism. Since I believe in resurrection, I am not surprised at this, but clearly many today, not least in the media, are not only surprised but shocked and alarmed. Most of the articles in the *New Statesman* reflect that; only one, that by Sholto Byrnes, gets near the heart of the matter.[2] In my judgment, we are seeing at last a late and panicky attention being given to issues that should have been part of public debate all along. As Professor John Bowker argued twenty years ago in his book Licensed Insanities,[3] the reason our leaders cannot even address the world's problems, let alone solve them, is because none of them read religious studies at university. An indication of this incapacity was the substantial debate in the House of Lords two weeks ago on the reasons for the war in Iraq, in which speaker after eloquent speaker addressed all kinds of issues but none thought to raise the question of the *religious* reasons why so many Americans supported George W Bush, and the particularly *religious* paradox of our own Prime Minister being carried along on that tide.[4]

The second sign of the times has come this last week, when a well-argued lecture by the Archbishop of Canterbury[5] caused a massive media fire-storm. The Archbishop was addressing the same question as I am tonight, though from the more specific angle of the relation of Islam to public law. Three issues seem to me to be raised by the speech and its aftermath.

First, quite simply, the Archbishop did not say what the media said he said. His real offence is that he has presumed to challenge the media's vice-like control on public opinion, and so is being called arrogant and patronising by people who do not want reasoned discourse and prefer only catchy soundbites.

The second issue raised by the Archbishop's speech is his careful deconstruction, in line more or less with that of Professor John Gray of this institution,[6] of the Enlightenment myth of secular progress and its accompanying political discourse. He has pointed out on the one hand the religious and indeed Christian roots of the Enlightenment's vision of justice and rights, and, on the other, the way in which the secularist rhetoric, growing ever more shrill these days, effectively cuts off the branch of reason on which it claims to be sitting – as, again, we see in the media reaction. With this deconstruction he is challenging the monopolistic idea of a secular state, in the name not of an arrogant faith elbowing its way into the public domain but as part of the inner logic of the Christian-derived Enlightenment vision itself. The danger he has in mind is that of a state which can pass ever more draconian laws to constrict not only what religious people may do but what they may say and how they may think. The slogan 'vox populi, vox Dei' may have begun as a cry for liberty from clerical oppression, but it quickly turns into a new form of self-justifying tyranny, seeking to prevent religious belief from having any effect on public life. One of the ironies here, of course, is that the very secularists who are insisting that there must be one identical law for everyone about everything do not want to live by that when it comes to, say, the blasphemy laws, the fact of the established church, or the present ban on euthanasia.

The third issue raised by the Archbishop was the more specific one of the place of Islam and its legal codes within a contemporary plural society. He was arguing against a state-sponsored and state-regulated form of multiculturalism in which only those aspects of cultures which fit in to current secular thinking are permitted, and for a recognition of 'multiple affiliations' within what he calls an 'interactive pluralism'. He was not recommending parallel jurisdictions, but simply suggesting that some aspects of traditional Islamic law might find their way into the realm of permitted local options.

The questions that then arise are familiar to the Anglican Communion from our own recent internal debates: how do you know which local options are to be

allowed, and who says? Those are important questions, but at a second stage. In addressing them, the Archbishop raised the notions of 'human dignity as such' and of 'shared goods and priorities', all the more disturbingly because he has set them within a larger universe of discourse than that of secularism. Secularism invokes the grandiose vision of the Enlightenment. But, as the Archbishop's deconstructive argument has shown, it loses its apparent moral force by claiming too much (that it will solve all the problems of cultural plurality) and by denying the very ground (that of western Christian tradition) on which it stands.

I have spoken at some length about the Archbishop's lecture and its aftermath because it seems to have touched several raw nerves in our culture. When that happens at the dentist, we know it is going to be painful but we also know we need to get things sorted out. The third sign of the times to which I draw attention is another of this type, namely the decline of democracy. Last year Professor Vernon Bogdanor sketched, in the *Times Literary Supplement*, the ways in which contemporary western democracy is under threat, not so much from absolutist terrorism, which threatens life and limb but not systems of government, but from within.[7] Democracy is the current western answer to the problem of how to avoid chaos without lapsing into tyranny, and vice versa. But we cannot assume (as the present government assumes in its proposals for constitutional reform) that just because people are able to vote every once in a while that means that we have the balance right. In fact, there are several signs of chaos on the one hand, the unfettered rule of multinational companies and banks being one example, and of tyranny on the other, such as the imposition of new and fierce regulations designed to stop people living out their faith.[8] Certainly the way in which western democracies currently operate – one need only look at the enormous time, attention and money devoted to an entire year's worth of electioneering in the USA, not to mention the fact that, though the new President of the USA will have effective power over the whole world, it is only Americans who get to vote – calls into sharp question the normal western assumption of recent years, that if only we could export more western-style democracy to more parts of the world all problems would be solved. I believe, on the contrary, that as the Archbishop said about law, human dignity and shared goods and priorities, so it is with democracy. Democracies, like all other rulers, need to be called to account, as Kofi Annan said in his retirement speech,[9] both in what they actually do and in what they actually are. We will only recover a sense of genuine participation, and hence the reality of democracy, when we deconstruct some of the grandiose claims that have been made or implied and rethink our social and political practices from the root up. And part of that root, in the western world at least, comes from the Judaeo-Christian tradition, in ways which I shall explore presently. (I know of course, to anticipate objections, that within the Christian tradition there has been a good deal of tyranny and

other horrid things. But I remain convinced that that same tradition enshrines the resources we need if we are to refresh our political discourse, never mind our practice.) Only when we get our democracy in better working order will the rule of law again be felt as an appropriate framework for civil life rather than an arbitrary and potentially unjust imposition.

Three signs of the times: I could have instanced many more, such as the sacking of a British Airways employee for wearing a cross (this, I learn, was the initial stimulus for the present series of lectures), or the French banning of Muslim headdress, or the recent debate about government funding for theology degrees, or – since 9/11 stands inevitably behind much of our current fresh questioning – the worrying spectacle of western leaders, in the aftermath of that horrible and unimaginably wicked event, reading the Koran to see what was going on. Frankly, one might as well offer a New Testament to an Iraqi civilian staring at the bombed devastation of her home and family and suggest that she read it to find out why America and Britain were smashing her world to bits. But it is time to move on from these straws in the wind, first to analysis and then to proposal.

## Analysis: history and post-modernity

I regard it as a hopeful sign that we are today being more explicit than we were a generation ago about the ambiguous nature of the European and American Enlightenment. Many have highlighted the way in which our perceptions of that many-sided moment and movement have themselves turned into carefully constructed myths, such as that of the great victory of reason and science over ignorance and tyrannical tradition. It is no longer possible simply to say 'we are the children of the Enlightenment, therefore we must think and behave thus and so': any movement that gave us, so to speak, the guillotine as one of its first fruits and the gulag as one of its finest cannot simply be affirmed as it stands. This is not, of course, to suggest that we unthinkingly embrace a post-modern, still less a pre-modern, viewpoint. To refer again to dentistry: I have no desire to have my teeth hacked about by either a post-modern or a pre-modern dentist.

But the myths of the Enlightenment have given birth today to the widespread phenomenon of a worrying stand-off between an increasingly shrill secularism and an increasingly powerful fundamentalism, whether Christian, Muslim or some other. In that stand-off, as with many such polarisations, any suggestion of a nuanced approach which redraws the map are rejected and vilified as straightforward capitulation to the other side in the assumed battle, as the Archbishop found after his speech in February. There are shades of Shakespeare's *Julius Caesar*, where Cinna the poet is mistaken for Cinna the conspirator, and when the mistake is discovered the mob goes ahead and lynches him anyway.

Once the blood-lust is up, saying 'that is not what I said' is met with a shrug of the shoulders.

This stand-off between secularism and fundamentalism takes many forms. There is, for example, the well known fresh attack on religious belief of all sorts launched in the name of empirical science by Richard Dawkins, Christopher Hitchens, Sam Harris and others. I say 'in the name of', but actually the rhetoric used by those three goes way beyond empirical science itself and into the realm of good old fashioned mud slinging. Just as the media refused to engage with what the Archbishop actually said, so Dawkins and others refuse to engage with real theologians, not to mention real communities of faith that are making a real difference at places where the world is in deep pain, a pain which the great advances of science have if anything exacerbated (through weapons technology and the like) rather than alleviated. Just as European science in the nineteenth century was anything but politically neutral, but must be understood within the Enlightenment-based projects of imperial and technological expansion, leading inexorably to the First World War, so the present anti-religious scientific protests must be understood within the multivalent culture of late modernity. That, however, is a subject for another day. The recent books by Tina Beattie[10] and Becky Garrison[11] at least get some sort of debate going.

More important for our purposes, and indeed going to the heart of tonight's topic, are the tricky interfaces I have highlighted between faith and public life. We need, very briefly, to set them in historical context.

As various writers have pointed out, the earlier eighteenth-century belief (expounded by one of my most famous predecessors, Bishop Joseph Butler) that intelligent people could more or less deduce the main points of Christian theology from observation of the natural order had been blown apart by the Lisbon earthquake of 1755 (three years after Butler's death). That event was one of the major drivers for the way the Enlightenment gathered steam. This generated, initially at least, a deism in which God was removed from the natural world and so unable to be blamed for its horrors. Religion then became a matter of private spirituality in the present and an escapist heaven in the future. Theologians will note that prior to this many had embraced a post-millennial vision of a coming earthly utopia, and that it was after this that the pre-millennial, dualistic vision of Armageddon and 'rapture' began to be popular. This is discussed, though not I think always understood, in the interesting but to my mind flawed first chapter of Gray's new book Black Mass.[12] But the shift to deism was not just a matter of solving a tricky metaphysical problem, namely the involvement of the supposedly good creator with the apparent arbitrary violence of the present creation. It correlated exactly with the politics of the day. Remove God from involvement in the world, and we can then carve up

the world without interference. The clergy are there to tell people how to go to heaven, not to lecture them about slavery or profit margins or manufacturing techniques. Many today still assume that position, seeing any involvement of God within the public world as a straightforward category mistake, with no awareness of how culturally and historically conditioned, and indeed how culturally bizarre, such a perspective actually is – let alone how much manifest wickedness has been perpetrated in its name.

The Enlightenment precipitated several attempts at addressing the question of God in public. We here glance at four. To begin with, the United States enshrined a complete and formal separation of church and state, to which appeal is constantly made today, for instance in the debates about prayer in schools and about the propriety of printing 'In God We Trust' on dollar bills. (When I go to the States I astonish people when I speak about the massive involvement of the English church in public education.) This separation did not at all mean the suppression of the churches, but rather the insistence that the churches should not deal in politics. Not long ago a preacher who insisted on talking about current political issues was threatened that his church might lose its charitable status. However, over the last thirty years, at least since Ronald Reagan made 'God Bless America' his campaign song, it has become increasingly clear that you cannot keep faith and politics separate in the United States, and for many there the question now is how to hold them together. The last few years have not made this any easier.

The second example, France, is superficially similar, with a revolution around the same time, but quite different underneath, reflecting the fact that whereas the American revolution was more anti-British than anti-clerical (and the latter only insofar as it was getting rid of the bishops sent over by George III), the French revolution was explicitly and avowedly anti-clerical: Ecrasez l'infame! The American settlement was therefore a post-*Protestant* deism, perhaps particularly a post-*Anglican* one, the French one a post-*Catholic* variety. And the perception there of Catholicism as a heavy-handed system, determined to dominate the whole society, has generated, in reaction, a much more overt and insistent secularism in which the way things actually work is disconnected from what everyone has to go on saying about a united uniform republic, and questions of reform are difficult to raise because the system is supposed already to be perfect. The Enlightenment-driven privatisation of religion and faith has thus taken very different forms in America and France.

Third, there is the straightforward replacement of religion by the state, as in the old Soviet Union. The idea of an atheist state did not just mean, of course, that the leading communists happened not to believe in God, but rather that the role of God within the entire system was actually taken by the state, more

particularly by the party. This is vox populi vox Dei with the lid off – or rather with the lid clamped firmly down on the system, so that whatever is deemed to be good for the state or the party is deemed to possess the kind of self-evident rightness which no-one in their right mind would challenge or question. The answer to God in public is both that there is no God as such and also that the state has become divine.

Fourth – and this will surprise some, but I am quite clear that it belongs on the same map – there is the present English system which we still call the Established Church. (I speak only of England. Scotland, Wales and Ireland have their own stories to tell.) The present system goes back of course to the sixteenth-century reformation, with one major rupture in the mid-seventeenth century. But the present mode and working of Establishment owes just as much, I suggest, to its Enlightenment reshaping as it does to its reformation origins. Many people today do not understand this, imagining that Establishment makes the church simply a branch of the state or even vice versa. Indeed, some who argue against Establishment do so on the basis that it gives the church too much power in the state, others on the basis that it gives the state too much power over the church. These cannot both be true, and in fact neither is. But the realignment of power within England in the late eighteenth and early nineteenth century, producing Parliamentary democracy and constitutional monarchy as we know them today, has radically changed the mood and flavour of Establishment from anything that would have been recognised in, say, the 1660s, let alone the 1580s. Though at some levels church and state in England remain of course confusingly intertwined, in many other ways they are just as carefully distinguished as in the United States, albeit by steady implicit secularisation rather than by sudden constitutional pronouncement. And, for the record, the place both of the free churches and of the Roman Catholic church within this country are also, by reflex as it were, to be understood within the same cultural setting. And that whole complex position of church and state, given the post-enlightenment understanding of 'religion' as something people do in private, away from public life, then frames the more recent perceptions of the so-called 'other faiths', making it exceedingly hard for people in this country even to conceive of the kind of worldviews represented by, say, Judaism and Islam, far less to understand what it might mean for their adherents to belong to, or to flourish within, the England of today.

So much for a very brief analysis of where we are and how we have got there. I now have a threefold proposal. Firstly, the confusions we have observed are indications of an increasing instability which has generated the present stand-off between secularism and fundamentalism, as the two sides in the deist divide now perceive themselves as fighting for their lives against a suddenly awakened foe. Secondly, the chilly winds of post-modernity, blowing their deconstructive

gales through the entire eighteenth-century settlement, are threatening the Enlightenment systems themselves and the secularism and fundamentalism to which they often seem reduced. Thirdly, out of this post-modern moment there might yet emerge, as the Archbishop has been suggesting, new paths towards a wise and civil society in which the genuine values for which the Enlightenment was striving can be preserved and enhanced while the excesses to which it has given rise can be avoided. The first two parts of this proposal will complete the middle section of this lecture, and the third takes us forward into the final section.

Nobody familiar with England or America, to look no further, could doubt that the eighteenth-century settlement has become increasingly unstable. This is not just because of the large-scale migrations of people who hold to very different religions. It is, rather, that the neat separation of religion and culture, church and state, faith and public life, upon which the settlement was predicated simply is not true to religion, church and faith on the one hand or to culture, state and public life on the other. Keeping them apart is artificial and sometimes impossible. I remember watching with fascination after 9/11 as George Bush led a great service in Washington National Cathedral: what on earth should we make, granted the clear church/state separation in the United States, of the President officially leading such an act of worship? Faced with such scenes – and our own great tableaux of civic religion often have the same feel – one is reminded of those moments in older romantic films when the hero and heroine, who were not supposed to be entangled with one another, emerge from a sudden kiss or clinch and stare at each other with awkward embarrassment. What was that all about? Does it mean we do belong together after all? If so, how, and when? and what will our own partners – the secularist myth on the one hand, the fundamentalist dream on the other – have to say about it when they find out? To be sure, the secularist, looking on, is furious at the unfaithfulness of the state, and the fundamentalist at the church's apparent compromise. And so the battle is renewed.

But, meanwhile, and more hopefully, there are many places – my own diocese is certainly one of them – in which everyone takes for granted a cheerful co-operation of church and state, not just the Anglican church either, on a hundred matters of public life. The church is perceived as an intelligent and valued partner in housing, education, the care of the elderly, the plight of the hill farmers, the challenge of asylum-seekers, and much besides. Likewise, in America, many churches are extremely active in areas which the state, in its hands-off anti-communist mode, has been reluctant to touch, particularly the provision of social, medical and similar help for those who cannot afford it. The lines are (in other words) increasingly blurred, and the implicit settlement in which 'God into public won't go' is more and more obviously called into

question. This, as I say, has merely increased the sense that the Enlightenment split no longer corresponds to reality – which in turn increases the fury of the secularists whose cherished rumour of the complete demise of religion turns out to be exaggerated and premature. They then behave like a maverick doctor, faced with the apparent recovery of the patient he had pronounced terminally ill, who turns to euthanasia to justify his diagnosis.

All this is part of the post-modern revolution which deconstructs more or less everything about the eighteenth-century western settlement. Technology has brought nightmares as well as blessings. The post-Enlightenment empire has enslaved more millions than it has liberated, has brought wealth to the few and poverty to the many. Western justice favours those in power, not only incidentally but structurally. And the banishing of religion to the margins of life has been found sterile, denying something as basic to being human as music or falling in love. As I have argued elsewhere, we all know we should do justice but we are puzzled at how difficult it is; we all want spirituality but we are not sure where to find it; we all love beauty but we cannot understand why; we know we are made for relationships with one another but we have forgotten how to get it right. We have deconstructed the big stories by which our society has lived for two hundred years, perceiving them as dehumanising, serving the interests of a powerful elite. And this post-modern mood has called everything into question, including reason itself. That in turn is why, though in many ways our media love to feed us with the sterile nostrums of late modernity, their methods are relentlessly post-modern: spin and smear, innuendo and multiple misrepresentation. This is an exciting but dangerous time, and we cannot take anything for granted as we try to find our way forward into the new century.

## Proposal: God, kingdom and hope

In this complex situation we need to listen again for the rumour of other possibilities. Like St Paul in Athens (a parallel with my situation in this lecture which was borne in on me at various points, not least the scorn with which some in the audience greeted my attempt to talk about Jesus and the resurrection in a secular context), the task of the church is to offer both a critical analysis of the swirling currents of thought and life and a fresh possibility, a new fixed point, from which one might work outwards to fresh agendas. And that means talking about the kingdom of God.

The fate of this overused slogan illustrates nicely the problem we face. The phrase 'kingdom of God' meant to some in the first century, and has meant from time to time since, the establishment of a hands-on theocracy in which God himself would step in and direct the course of affairs. Since few have thought that the world's creator would be visibly present to do this, the scheme usually meant the delegation of the kingdom to some favoured earthly

representative: a tyranny, in other words, of God's spokesmen (they were usually men). So strong was this vision among first-century Jews that they embarked on crazy wars with the Romans until, having been beaten again and again, some declared (in the mid-second century) that they should abandon the hope of the kingdom and instead 'take upon themselves the yoke of Torah': in other words, settle for private study and keeping of their own law, while being content to live under whichever empire happened to be in power.[13] So most Jews have remained to this day, negotiating in generation after generation that settlement under pagan law which seemed best at the time, always aware that the pagans might make demands on their consciences and aware of what would happen when they did. That represented, in the second century, a middle position between the Christians, who went on insisting that Jesus was in fact the world's true Lord, and often died for it, and the Gnostics, who insisted that the 'kingdom' was a purely spiritual sphere into which one could escape, thus avoiding the political question altogether.

That already hints at the second meaning of 'kingdom of God'. From quite early on the phrase was used in what has come to be its primary or even its only meaning for many: the realm of 'heaven', a disembodied post mortem existence with no connection whatever to public or political life. Tracking this shift is not our present purpose, but I want to make it clear, in line with my recent book on the subject,[14] that the first-century Christians, following Jesus himself, insisted as does the Lord's Prayer on God's kingdom coming 'on earth as in heaven'. 'All authority,' declares the risen Jesus at the end of Matthew's gospel, 'in heaven *and on earth* has been given to me'; and that forms the basis for his commission to the disciples to their worldwide mission. As recent New Testament studies have emphasised, here and elsewhere the early Christians turn out to have embraced what we today would call, if not exactly a political vision, a vision with direct political consequences. Jesus is Lord, therefore Caesar is not. And the vision of the ultimate future which accompanies this is not, as so often imagined, a dream of an other-worldly sphere, away from space, time and matter altogether. The older idea that the early Christians expected the imminent end of the space-time universe is itself a post-Enlightenment construct, a way of parking Jesus and his first followers in a safe place where they could not get out and disturb the ongoing Enlightenment project. No: the early Christians held to a vision of creation renewed and reordered, in which renewed humans (the word is 'resurrection', of course) will live in renewed bodies. And, most disturbing of all, the early Christians believed that this new state of affairs, this 'new creation' as they called it, had actually already begun, with the resurrection of Jesus himself. (This paragraph is, indirectly but importantly, a provisional response to the interesting but highly misleading account of Jesus and early Christianity in the first chapter of John Gray's Black Mass).[15]

Now of course the early Christians knew that this belief was ridiculous, and they were routinely ridiculed for it. We must never slip into the silly Enlightenment idea that only with the rise of modern science do we know that dead people do not rise. Homer knew that. So did Plato and Pliny, and everybody else. The Jews believed that people would be raised at the end of time; the Christians agreed, but said that one person had been raised in anticipation of this event, and that he was therefore the world's true Lord. God in public, indeed: the scandal of the resurrection has never been merely that it breaks the laws of nature so called, but that it breaks into the *political* order, the world of societies and laws and government, and insists that a new world has begun and that the puzzles and pains of the old one can not only be understood but addressed and solved by addressing them from within the new one.[16]

The proof of the pudding was, and is, in the eating. The communities that sprang up under the lordship of this strange figure called Jesus were themselves the evidence of a God at work in the public domain, generating a new kind of justice, of rationality, of spirituality, of beauty, of relationship. The life which these communities exemplified created a head-on challenge to actual regimes, which was why the church was so viciously persecuted for nearly three centuries. They also provided an alternative society to which people were drawn in increasing numbers, so that the church went on growing despite that persecution. This explains why standard Enlightenment discourse includes a list of the church's obvious failings – crusades, inquisitions and the like – and a strange silence about its massive achievements in health, education and many other spheres.

From very early on, leading Christian thinkers realised that the question of 'God in public' was vital and central, and they answered it in various ways. One of the extraordinary triumphs of the Enlightenment has been to suggest that there could be no such thing as 'Christian political theology', since by late eighteenth-century standards such a thing would be a category mistake. There was in fact a massive and serious tradition from the first century, with the writings of the gospels and of Paul, through to the eighteenth century, with which we are only just now starting to reconnect, perhaps just in time.[17] I now want to suggest, briefly and tendentiously but I hope provocatively, that this tradition can refresh and renew the tired political discourse we have observed up to now this evening. John Gray's new book Black Mass highlights what he calls the would-be Christian utopianism of Bush and Blair. I suggest that the movements of thought he analyses are in fact a parody, a caricature, of a reality, and that the reality is both more interesting and more potentially fruitful.

The first thing to be said about a Christian political theology is that it envisages God working through human beings to bring order and justice to the world.

The Judaeo-Christian tradition insists that humans are made in God's image: not just reflecting God back to God, but reflecting God into God's world. They are, that is, called to be *stewards of creation*. The Bible applies this notion directly to the idea of political authority. Whether or not particular rulers consciously acknowledge the creator God, they are given the responsibility to bring God's wise order to human society and indeed to the whole created order. Within this, they can be *rulers*, not just 'leaders', because there is such a thing as wise order, the giving of a framework to things, not just the chance to take people forward into new experiences and possibilities. The post-enlightenment suspicion of the very word 'rulers', as though it automatically entailed tyranny, has its sting drawn by the multiple imagery, throughout the Judaeo-Christian scriptures, of tending the garden, looking after the flock of sheep, dressing the vine, and so on. A shepherd who tyrannises the flock soon will not have any sheep left. Gardeners who uproot plants and put up concrete buildings instead are not gardeners any longer.

The trouble is, of course, that at the point where ancient theology and contemporary philosophy meet we find a new awareness of the problem of evil. If we had not noticed it before – if, for instance, we thought we had 'evil' solved in principle until 9/11 came along and spoiled it all – that merely demonstrated how naive we were being.[18] The ancient doctrine of original sin, and the post-modern insistence that all our great stories are designed to boost someone's power and prestige, converge at this point: those who are called to rule, by whatever means they come to that status, are instantly tempted to exercise that power for their own benefit. The idea that any earthly ruler, be they never so devout in their private life, can exercise a pure authority and go about ridding the world of evil always was a crazy dream, whether it be in the Crusades of the Middle Ages or those of the last five years. What has happened, of course, is that in the post-Enlightenment split-level reality, the utopian dreams have not actually been inspired by the Christian message, but by the Enlightenment's self-fulfilling prophecies of its own automatic superiority over the rest of the world, qualifying the enlightened west to be the world's policeman – at the same time, conveniently, as technology has enabled it to be the world's only superpower. Here the Enlightenment has shown at last that it knows it really is based on the moral foundation of the Judaeo-Christian heritage, the calling to bring justice and mercy to the world; but by denying that which lies at the very heart of that heritage, the essential message of and about Jesus himself, it has twisted that tradition into a horrible parody.

What, then, lies at the heart of that heritage? And how can it affect our thinking about God in public, about the possibility of new hope within the political and legal sphere coming from that unlikely place, the home of faith and spirituality?

The answer lies in the notions of service and suffering, which stand in the Jewish scriptures as the sign that the people who bear witness to the creator God will live out of tune with the world which insists on going its own way. Bit by painful bit, ancient Israelite poets and prophets wrestled with the strange possibility of the kingdoms of the world becoming the kingdom of God, and found themselves ground between those upper and nether millstones. And it is out of that essentially Jewish vision of a people bearing witness to a different way of being human, serving God and serving God's world, that the first Christians, following the hints of Jesus himself, interpreted his horrible death not simply as a tragedy (though it was that as well) but as the climax of his kingdom-announcement, and also the point at which all that suffering came rushing together, as Israel's Messiah was executed by the pagan powers outside the walls of his own capital city. Evil did its worst to Jesus, and he took it and exhausted its power. And that, too, only made the sense it did because the Christians dared to believe, from exceedingly early on, that in that event they had witnessed, all unknowing, 'God in public', God stripped naked, God shamed and beaten, God ruling the world from the cross with the power, not of military might, but of love.

This dream is of course completely off the radar screen for much of our contemporary culture, not least because the churches have themselves hushed it up. The western churches have colluded so effectively with the split-level world of the Enlightenment that the cross is reduced to the celestial mechanism whereby we escape the wicked world of sin rather than the coming of God into the public world to establish his kingdom. One of the reasons (not the only one) why so many church people declared themselves outraged at what they were told Archbishop Williams had said is that many western Christians have never asked themselves what Jesus meant when he taught us to pray that God's kingdom would come *on earth as in heaven*. But the original vision of the crucified Jesus will in fact deconstruct the angry rant of the fundamentalist even as it will confront the scorn of the secularist. The cross will not let the fundamentalist corrupt the message into self-serving power, just as it will not let the secularist get away with the standard critique of dangerous religion. The cross is at the heart of a redefinition of the word 'God' itself which will open up new possibilities for what it might mean to think of 'God in public.'

Church history is of course littered with ghastly mistakes, as emperors and popes have translated the kingdom of God too readily into the kingdom of their own systems, eliminating both the service and the suffering. But with Jesus the new order has been inaugurated, and political power – anybody's political power – can now be seen as the anticipation of the rescuing, restorative justice by which the living creator God will one day put the whole world to rights. And that contextualises all political and legal work in the present, and moreover bequeaths

to the church the task of holding governments of whatever sort to account. The early church, like the ancient Jews, was not particularly concerned with how governments and rulers came to power. They were extremely concerned to hold up a mirror to them and show how they were doing in terms of the yardstick of the restorative justice of God himself. The Enlightenment world gets that the other way round: we are obsessed with how people come to power, and then, as long as a vote has taken place, we suppose that all that follows is automatically legitimated. I have heard serious Americans declare that, because George Bush was validly elected – that of course is itself questionable, but we will let it go for now – nobody, certainly no Christian, had any right to object to his bombing Iraq. No: the political and legal vision of 'God in public' by which the early Christians lived involved the simultaneous *affirmation* of the *authority* of rulers and *critique* of what they actually *did* – a balance which the modern western world has found it hard to maintain, leading to the post-modern collapse where all we have is critique and no affirmation at all, and the new secularist would-be tyranny where whatever the government decrees must be instantly binding on all subjects, even if it squashes their consciences out of shape.

So the first point is that God desires to work through human beings to bring his wise, healing stewardship to the world. Secondly though, and much more briefly, this vision must not stop with a small number of elite rulers. That rule must be shared, all the way through the system: the restoration of genuine responsible humanness must be the method as well as the goal. And that means the sharing of power; which means, in the last analysis, some form of democracy. Here again we glimpse the truth that the Enlightenment was actually quite a close-up Christian heresy. It was attempting to gain the great prize of a genuinely Christian vision of a humane and humanising society, but without the Christian faith to back it up. It grasped instead at the dream of its own glory, claiming to be the climax of history through which everything would be healed. But in doing so it pushed the real climax of history, the 'God in public' moment of Jesus and his death and resurrection, into the long-range backdrop for a 'religion' whose street-level energy had been drained off into a detached spirituality.

There are three further points to make regarding this. Firstly, with Jesus God's rule has been inaugurated, and present rulers must be held to account, in the light not of some abstract or ancient ideal but of the coming putting-to-rights of all things. Secondly, this must work out in the present in ways that are themselves ennobling, drawing more and more people up into their full human stature as part of the decision-making process. Thirdly, and finally, the signs of this 'kingdom' will be a society at work to rescue and heal, to reorder priorities so that the weakest are defended and the strongest prevented from pride and power. It is wonderfully ironic that inside the front cover of the *New*

*Statesman*,[19] right behind the enormous word 'GOD', there is an advertisement for the Salvation Army, under the heading 'Belief in Action'. And the actions in question, I need hardly add, are not dropping bombs or bullying minorities, but helping the homeless, befriending the endangered young, and healing drug addicts. That is not the only thing that 'God in public' looks like from a Christian point of view, but it stands near the centre of that vision. It is a sign of hope, hope that refuses to die – or, if it does, insists on rising again soon afterwards.

## Conclusion: public God, public agenda

Some brief remarks in conclusion, to relate all this to current controversies. To begin with, the stand-off between secularism and fundamentalism. In the words of the American Jim Wallis, 'the right get it wrong and the left don't get it'.[20] The church is called on in every generation to be a community, a public community, working with all who will do so for the public good in the belief that God will one day put all things to rights, and that he has already begun to do so through Jesus. If the church had been doing that the last two hundred years – and it was of course two hundred years ago last year that Wilberforce and his friends got the slave trade abolished – we would be having a very different debate today. And, ironically, it is because the church has so often shirked its public role, regularly justifying that withdrawal by using the language of 'heaven' but filling it with Enlightenment dualism, that our present puzzles about 'Establishment' have taken the shape they have.

'Establishment' is a way of recognising that we are still essentially a Christian country, both in the sense that our history and culture have been decisively shaped by the Christian faith and life and in the sense that at the last census over 70 per cent called themselves 'Christian'. As the Archbishop said in his speech,[21] this means that the 'established' church has a special responsibility to take thought for, and speak up for, the small minorities, and to ensure that they are not squashed between an unthinking church and an uncaring secular state. Hence his perfectly proper concern for the particular sensitivities of Muslims, as indeed of Jews and others. And most Church of England leaders would insist today that if some way could be found to share our 'Established' status with our great sister churches, we would be delighted. But let's not fool ourselves. To give up 'Establishment' now would be to collude with that secularism which post-modernity has cheerfully and rightly deconstructed. Rather, the challenge ought to be to make it work for the benefit of the whole society. To aim at that would be to work with the grain both of the Christian gospel itself and of the deep roots of our own society and traditions.

In particular, we need to recapture that which the Enlightenment highlighted but which has been lost in the world of post-modernity and spin-doctors: the

emphasis on reason in our thinking and public discourse. Reason is correlated with trust. When you do not really trust your conversation partner to be thinking things through in a reasoned manner, you cut in with smear and innuendo. And when you do not quite trust *yourself* to think things out either, you resort to spin and slogans. And that double lack of trust correlates directly, if ironically, with the Enlightenment's insistence on separating God from the public world. Many politicians, and many in the media, hope to control what people think and do, and if they can't they rubbish them instead. Trusting people is altogether different, and needs different back-up mechanisms. Perhaps part of the unintended consequence of the post-modern revolution is to show that if reason is to do what it says on the tin we may after all need to reckon with God in public. And when that happens we need wise Christian voices at the table, and for that matter wise Jewish and Muslim voices and many others beside, voices neither strident nor fundamentalist, voices both humble and clear; the voices not of those with instant answers but of those with a fresh grasp of God's truth, whose word will carry conviction because it appeals, like Paul in Athens with the altar to the unknown God, to things which everybody half knows but many try to suppress.

Within that project, finally, there is a massive challenge to our contemporary democratic institutions. The way successive governments have tinkered with constitutional reform, playing with long-established structures as though they were a set of toy soldiers, pays no attention to the checks and balances in the old system, and lacks any kind of guiding vision except the vague one that more voting is probably a good thing, presumably because the Enlightenment said so. Well, I am all for voting, for the reasons I have already given, but I am also all for having structural means of holding executives and governments to account, which both in broad outlines and in specific generalities it still seems extremely difficult to do. One of the urgent tasks of the church in this country might be to help give an account of our democratic structures, how they are failing in their tasks at the moment, and how they might be reformed to address them better. That would take us into other areas, of course, not least the European scene where all the ideological battles I have been describing are magnified and multiplied very considerably. But the church should not simply be sitting on the sidelines trying to protect an anachronistic privilege. If those of us who belong to the church believe what we say, we should be helping give a lead in figuring out what it means in tomorrow's world to do God in public, and encouraging our fellow citizens, not least other households of faith, into that wise, reasoned and civil discourse which alone will get us where we need to go and keep us on track as we make the journey into the strange, dangerous but also hopeful world of post-post-modernity.

## A comment following the Bishop of Durham by Rabinder Singh QC

I am grateful for the invitation to address you this evening although I feel singularly unqualified to do so on this important topic. I do not claim any specialist knowledge about theology in general, nor even about Sikhism in particular. I have a passing acquaintance with the law, although Lord Hoffmann (having had to endure my submissions in court earlier this week) may have reason to doubt even that.

I have listened with great interest to what the Bishop of Durham has had to say this evening. I agree with much of what he has said but by no means all. In particular I agree that in this country we need to be able to have serious debate about issues such as the relationship between faith and the law in a way which is thoughtful, respectful of the views of others and not conducted in a shrill or abusive way.

I approach these issues from the perspective of a lawyer with a particular interest in human rights. Human rights thinking does not necessarily provide answers to difficult questions but what it does seek to do is set out a framework of values so that problems can be addressed in a principled way. The Universal Declaration of Human Rights (UDHR) begins, in Article 1, with the fundamental statement that: 'All human beings are born free and equal in dignity and rights'. The UDHR was adopted in 1948 but of course its roots go back much further than that, not just to the Enlightenment but I would suggest to older traditions in western thought including the Judaeo-Christian tradition. But it was intended to be and I believe is a statement of values which have universal application. The drafting committee deliberately included members from different parts of the world and not just from the west. Certainly, it would not seem at all alien in an eastern country like India, which is not only the largest democracy in the world but has a written constitution, a bill of rights and a supreme court charged with enforcing them which is held in the highest regard both within India and around the world. India is interesting because it is a religious country but a secular state, in which freedom of religion is guaranteed. There are many faiths, not only Hindus, who form a large majority of over 80 per cent but one of the largest Muslim populations in the world, and also smaller communities of Christians, Jews and Parsis as well as Sikhs. It is not always appreciated in the west that there are more Christians in India than there are Sikhs.

Returning to this country, it seems to me that one of the hallmarks of a liberal democracy is that the law must respect fundamental human rights, including both freedom of religion and the freedom not to believe. It also includes the

right to freedom of expression. These rights are important for three main reasons.

First, they facilitate the development of the individual human being. A person's freedom of thought and conscience is absolute. No one can be made to think or believe something because the state or others in authority force them to do so.

Secondly, they contribute to what is conventionally called the 'marketplace of ideas', so that society itself may benefit from the various and perhaps conflicting views which are aired.

Thirdly, they help to maintain social peace, in particular in a society where there are people of many (perhaps conflicting) faiths and many who have no faith at all – and do not wish to have any faith imposed upon them.

It is important to appreciate what I am not saying. I am not saying that these rights are unlimited. Liberty is not the same thing as licence. Individuals do have the responsibility to respect the rights of others around them too. Article 29 UDHR recognises that. Although in human rights law freedom of thought is absolute, the right to express those thoughts and the right to manifest one's religion are not absolute. Like many human rights, they may be qualified so far as necessary in a democratic society. This is where the principle of proportionality comes in. The European Court of Human Rights has frequently said that there is a need to strike a fair balance between the rights of the individual and the general interest of the community. The Court has also emphasised that a democratic society which is committed to human rights is not simply one in which the will of the majority will always prevail. It is rather a society which is characterised by tolerance, pluralism and broad-mindedness.

In the particular context of religious freedom this means, in my view, that it is not necessarily open to the state to use the coercive power of the law to ban the wearing of religious symbols in public institutions. It has often been said that everyone must be treated equally before the law. Of course that is right. But equality is not the same thing as uniformity – it includes the notion of diversity. Sometimes to treat people in the same way irrespective of their differences has the effect of treating them unequally. Our law recognises that in the context of disability discrimination and sex discrimination.

It is therefore arguable that the French law on religious symbols violates the European Convention on Human Rights because it breaches the principle of proportionality and also the principle of equality. There is nothing new or surprising about the notion that the law should recognise the right of individuals to act in accordance with their own faith or conscience. For example, when

abortion was legalised in 1967 Parliament saw fit to acknowledge that some hospital staff could simply not act contrary to their conscience and should not be required to do so. The law is well able to make reasonable adjustments to allow everyone to participate in society on an equal basis.

But there is another dimension to this. Just as human rights law protects religious groups from oppression by the state, so it protects individuals within religious groups too. Although a pluralistic society allows space for faith groups to organise themselves in accordance with their own beliefs there are limits to this. Religious groups have no more right to abuse the rights of women or gay people than anyone else does. Vulnerable individuals and sub-groups within religious groups are entitled to invoke the protection of the general law of the land.

How then should the law of the land respond to the diverse society we now live in? I would like to end with a quotation from a judgment in the Court of Appeal which seems to me to indicate the way. It is the judgment of Munby J in an immigration case called *Pawandeep Singh v Entry Clearance Officer*.[22] At para 62 he said:

> *The fact is that we live in a secular and pluralistic society. … One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation.*

At para 64 he continued:

> *We live in a society which on many social, ethical and religious topics no longer either thinks or speaks with one voice. These are topics on which men and women of different faiths or no faith at all hold starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them. The days are past when the business of the judges was the enforcement of morals or religious belief.*

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**Notes**

1 31 January 2008.
2 'Keep the faith', 31 January 2008.
3 Darton, Longman and Todd Ltd, 1987.
4 HL debates col 338, 24 January 2008.
5 '*Civil and Religious Law in England: a Religious Perspective*', Foundation lecture at the Royal Courts of Justice, 7 February 2008.
6 Straw Dogs: Thoughts on Humans and Other Animals, Granta Books, 2002; False Dawn: The Delusions of Global Capitalism, New Press, 2000; Heresies: Against progress and other illusions, Granta Books, 2004.
7 Vernon Bogdanor, 'For the PM's New Library', *Times Literary Supplement*, 13 July 2007, p10.
8 In the discussion after this lecture was given Lord Hoffman asked for examples of this. The *Church of England Newspaper* for 15 February 2008 gives an immediate and obvious one: the Sheffield magistrate who appealed for the right not to have to co-operate with same-sex couples adopting children, and whose appeal has been turned down by the Appeal Court. Some newspapers have now picked up on this kind of thing, and, suspecting that the Archbishop had this in mind as well as sharia, have insisted all the more strongly that the same law must apply to all – even though the laws in question are newly minted.
9 '*Ten years after: a farewell statement to the General Assembly*', 19 September 2006.
10 The New Atheists, Darton, Longman and Todd Ltd, 2007.
11 The New Atheist Crusaders and Their Unholy Grail: The Misguided Quest to Destroy Your Faith, Thomas Nelson Publishers, 2008.
12 Black Mass: Apocalyptic Religion and the Death of Utopia, Allen Lane, 2007.
13 See N T Wright, The New Testament and the People of God, SPCK, 1992, p199.
14 Surprised by Hope, SPCK, 2007.
15 See n12 above.
16 See N T Wright, The Resurrection of the Son of God, SPCK, 2003.
17 See Oliver O'Donovan and Joan Lockwood O'Donovan, Bonds of Imperfection: Christian Politics Past and Present, William B Eerdmans Publishing Company, 2004.
18 Evil and the Justice of God, SPCK, 2006.
19 See n1 above.
20 God's Politics: Why the Right Gets It Wrong and the Left Doesn't Get It, HarperOne, 2005.
21 See n5 above.
22 [2005] QB 608.

# Is Islamic law ethical?

**Professor Mona Siddiqui**

*This is the revised text of a lecture given at the London School of Economics and Political Science on 26 February 2008 as part of the law and faith lecture series run by the LSE law department and organised with JUSTICE.*

When I gave Professor Cranston this title, I had no idea that Islamic law, or as is commonly understood in the west, sharia, would be in the public spotlight so much – I have the Archbishop [of Canterbury] to thank for that. While I am pleased that the panic over his comments about a 'constructive accommodation' of Muslim practice has died down, it is unfortunate that the debate about religious law and civil society may also disappear from the public's radar. For I think that fundamental to our understanding of how religion and public life have become such a controversial area over the last decade is the fact that it is precisely the competing claims made by religious law and its ethical values which have become contested issues. Alongside the anxiety felt by many that the leader of the Anglican church said sharia and Britain in the same breath sending alarm bells ringing for politicians, media pundits and religious figures, the other question raised was why was the primate of the Church of England not talking more robustly about a Christian vision for the UK rather than musing about the possibility of different legal systems alongside the civil laws of England? What did this mean for the Christian or the secular majority in the UK? For some of course the hysteria was based on little else than the crude perception that Muslim law was nothing other than stoning of adulterers and chopping of hands – arcane and barbaric laws which have no place in humane and civilised societies.

Such issues raise a central question relevant for all religious communities today, ie to what extent can they use scripture and the post scriptural intellectual and social traditions to determine the basis of their contemporary ethical stances, especially if the ethics needs to be a normative ethics. With the advances in sciences and medicine, with an increased awareness of world poverty and the issues of socio-economic justice related with it, with the shift in gender roles and expectations, the social and political impact of modern life and globalisation, the demise of structured and more formal expressions of religious allegiance, those who believe that scripture still contains within its pages all the solutions come across the biggest challenge as believers: how does one face the challenge of being innovative whilst at the same time staying engaged with legacy of tradition?

This is of acute concern in our globalised world. One of the effects of globalisation and cultural migration has been the influence on religious language to mobilise religious consciousness. Over the last few years we have witnessed how theological language is not an ivory tower exercise which breathes and dies in textbooks. No, it is a living and passionate reality, it travels thousands of miles and echoes within people's hearts and minds and in so doing affects people's social, political and political realities at all levels, local, national and international.

In our current climate Islam is perhaps the faith most affected and caught up in the effects of globalisation, quite simply because this religion underpins more than most the very tension on which so much of globalisation balances conceptually – modernity and tradition. While I am fully aware that words such as tradition and modernity are hugely contested, since neither is a monolithic term and both require active participation to be fostered, for many believers modernity is a challenge because it demands keeping alive a meaningful interface between the divine and the secular. Let me say here that the religious and the secular should not be seen in opposition to each other as very often they traverse each others boundaries in our most complex human concerns. But it is hugely important to recognise that modernity has presented itself to Islam and Christianity in historically different ways. While modernity came to the Christian west through the context of the enlightenment, it came to much of the Muslim world through the colossal impact of colonialism from which it would be fair to say much of the Muslim world has never really recovered. Thus, many societies do not live in the post-colonial but rather neo-colonial state.

A few years ago at a conference in Berlin, the German Minister of Interior said to me in a rather cryptic sentence, 'Since the demise of the wall, Islam is the biggest issue in Germany.' He was not referring to legal issues around nationality etc for minorities in Germany. Nor was it the existence of cultural differences between the various minority groups which has been allowed to exist in Germany and indeed most of western Europe for the last 50 years – the issue at hand was the question of values. What was problematic for him along with many in the west is the question – do Muslims hold different values which will inevitably clash with the values of liberal democracies and civil societies of the west?

Seen against this background and now through the prism of the war on terror, sharia becomes even more difficult to discuss. Let me try and give some explanation of what sharia can mean. For the ordinary Muslim, sharia is God's law, indispensable for the good, obedient and moral life. Sharia is commonly translated as Islamic law and regarded within the Islamic tradition as divine in its quality. Strictly speaking, sharia refers to God's law as it is with God and his Prophet, in which is to be found an ideal of Islamic society. In its simplest

definition, however, sharia is not law as we understand law in the modern world ie a set of rules and regulations for the ordering of society. Sharia is contained within the corpus of revelation, both the Qur'an and the deeds of the Prophet, but it developed and was given expression in the hands of the jurists (fuqaha) around the eighth century onwards through the intellectual discipline of fiqh or understanding. It is through their writings that individual legal schools were created marking the transition from the spoken word to the written text. However, the process by which the words of the early Muslim scholars acquired written form is still relatively unknown and the original formulation of the genre may in fact elude our knowledge forever. A tentative suggestion is that fiqh initiated in response to a need for laying down the practical consequences of Islamic monotheism. The need to outline man's duty to God and his fellowmen had its inspiration in the Qur'an and the life/way (sunna) of the Prophet but it became obvious that the nature and scope of man's duties were not entirely self-evident from these primary sources; if they had been the sacred texts would not have become merely the source of law but the law itself. The texts may have contained the law, the sharia, but they do not state the law in any legal sense – this was the production of juristic activity. This juristic activity or fiqh became the queen of sciences in the Muslim world. The classical period which witnessed the rise of juristic scholarship and the monumental works that seek to define the ideal of God's law occupied the best theological minds. Fiqh developed as the apogee of the Islamic sciences incorporating in its development all that was considered the basis of religious knowledge: the Qur'an, the Prophet's words, reason and analogical thinking. The aim of the law was not to set down firmly what was right and wrong but to look at all areas of human life and worship as within the boundaries of accepted behaviour and define and elaborate the basic prescriptions of the Qur'an. The domain of fiqh was to interpret sharia – God's ideal law. Although philosophy and theology held their own status in which ethical thought was considered in relation to virtuous action, law in all its different forms remained the primary pious output of the jurists.

Diversity of views on a single issue lay at the heart of this writing. Thus Islamic law developed neither as an unequivocal nor a monolithic expression of God's will. It became rather a scholarly discourse in which religious scholars interpreted the sources in different ways and both agreed and disagreed on essential legal and moral matters. However, their aim was to explore right and moral behaviour not just with respect to worship (ibadat) but to all aspects of social relations in life (mu 'amalat). This included everything from dress, marriage, business transactions to penal law and thus all juristic reflection became to some degree 'sacred' law.

Law occupied a central place in much of the Islamic intellectual tradition. The different discourses around law and its application in various parts of the

Muslim world, both formally as state law and informally as social practice, are in fact testaments to how Muslims have tried to understand their relationship to God and to one another, through their understanding of sharia itself. As Schacht said:[1]

> *Islamic law is the epitome of Islamic thought … The very term fikh, 'knowledge', shows that early Islam regarded knowledge of the sacred law as the knowledge par excellence. Theology has never been able to achieve a comparable importance in Islam; only mysticism was strong enough to challenge the ascendancy of the Law over the minds of the Muslims, and often proved victorious … it is impossible too understand Islam without understanding Islamic law.*

However, during recent decades, scholars have focused much attention on the historically prescriptive nature of Islamic law and how much of this tradition can continue to be valued as normative law in any real sense. The lament amongst some scholars is that if sharia is positive law, it is not always consistent with the ethical and moral imperatives of the Qur'an itself.[2] There are those who claim that in regarding the classical heritage as an immutable body of law, Muslims have ignored the essence of Islamic law in society, ie whether in application or content, it was always changing. They state that even where modifications have been made, or the laws have been subsumed within post-colonial western legal codes, the Muslim world has tied itself to conceptualising human relations within a largely medieval framework. They call for ridding Muslim governments and societies of arcane expressions of law and returning to only the Qur'an and the exemplary sunna of the Prophet as the true sources of Islamic law which contain eternal principles. Others argue the contrary, that it is indeed this classical heritage wherein lie the principles for developing laws and practices which would be more harmonious with contemporary norms of justice and human dignity. They claim that these juristic works are the repository of pious reflection, by men who had interpreted the fundamental sources of Islam; they contain within them the resources necessary for a re-thinking of social and legal attitudes and thus the revisioning of Islamic societies in line with more contemporary notions and standards of human dignity and universal principles of human freedom.[3]

The problem here is that many of the thinkers who are calling for a revisiting of the classical sources are criticised for knowing exactly what answers they want before they embark on the process of rethinking. They are criticised for being disingenuous when they talk about inquiry since their own moral positions have usually been formed whether through experience or learning well before they call for a reformulation. The other issue is that the clichéd but still destructive critique of being labelled westernised, which usually means not progressive but

secular and preaching nothing more than moral relativism becomes their label. This criticism is so threatening that for many it stifles debate before the debate has even started.

A religion where the notion of law, expressed broadly through the word sharia, seems to prevail as the fundamental essence of Islamic thought in both popular perception and academic debate, the emphasis on ethics has seen a gradual rise in prominence over the last decade. The idea that law must also be ethical stems quite simply from the view the human condition rests on moral ambiguity and ethics provides guidance for the changing dilemmas of human existence.

My understanding of ethics lies somewhere within the following definition that ethics is a generic term for various ways of understanding and examining the moral conduct of human behaviour and actions. It is the study of standards of conduct and moral judgement, standards that govern the conduct of members of a group and the branch of philosophy that deals with the distinctions between right and wrong.

Ethics may be implied in Islamic law but it comes under a separate Arabic term, akhlaq. This term has more to do with correct and appropriate manners of behaviour rather than the philosophical theories of how we should act. In reality there is no single word that reflects ethics as the word has come to mean in western philosophical and moral discourse. An obstacle to formulating a comprehensive understanding of ethics lay largely in the sentiment that theorising about right and wrong was not the same as acting upon what was right and abstaining or prohibiting wrong. At the risk of a little generalisation, Semitic culture, Fazlur Rahman argues, saw morality not expressed in terms of propositions but rather in terms of divine dictates and actions. George Makdisi writes of ethics in the Islamic traditionalist doctrine as the quest for a science that seeks to know what actions should be done and which avoided, a practical science it seeks knowledge not for the sake of knowledge, but rather in the Aristotelian sense, knowledge is sought to be applied in practical ways for the whole of a virtuous human life.

Crudely put, the traditionalist stance was that revealed law had priority of place over reasoned law and that good and bad are known through revelation. This was refuted by the philosopher theologians, principally the mutazila who claimed that reason had a prior knowledge of good and evil, right and wrong and that the Qur'an only corroborated what reason acknowledged anyway. It was not until the publication of the Miskahwayh's tenth century work, 'Treatise on Ethics' (Tahdhib al-Ikhlaq), that ethics was raised to a fully fledged discipline of philosophy, laying out for the Islamic world a set of reflections equivalent to that of Aristotle's ethics in classical Greece.

Today ethics has become associated with a diverse range of sciences and disciplines. When we ask the question today (is Islamic law ethical?) we do not mean can it distinguish between moral principles, we mean does Islamic law conform to contemporary ideas of human dignity and freedom?

I give here two different examples to show two current views around Islamic law.

The claim is often made that the major reason why sharia is faulted is because the 1948 Universal Declaration of Human Rights (UDHR) is the standard through which sharia is evaluated.[4] Whilst acknowledging the necessity of revisionist thinking in many areas of Islamic laws, for some scholars, their unease with the criticism lies in their claim that the UDHR is essentially a western document, rooted in the political and liberal culture of western society. As such, the UDHR brings its own understanding of what constitutes human dignity. They claim that Islamic law has its own resources for challenging those rules which seem to violate human dignity. But as Ann Mayer says:[5]

> *International human rights law is not tied to peculiar western values. People from various parts of the world had input into the Universal Declaration of Human Rights … accepting its principles does not mean an endorsement of western civilisation …*
>
> *International human rights law is at odds with all local particularisms, which means that conservative legal traditions like that of the United States have great difficulties coming to terms with international human rights law. This is why the US often winds up in the same group as Muslim countries who oppose aspects of international human rights law.*

What has been the most significant aspect of the UDHR is the recognition of 'the inherent dignity and of the equal and inalienable rights of all members of the human family' which is said to be the 'foundation of freedom, justice and peace in the world.' One of these freedoms is Article 18 UDHR which reads: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'.

On the issue of freedom of religion, the Qur'anic verses, 'Let there be no compulsion in religion', (Q2:256) and 'The truth has come from your Lord; let him who will believe and let him who will, reject it,' (Q18:29) are cited to argue that the 'Qur'an overrules compulsion, which violates dignity, even in

the acceptance or rejection of Islam itself.'[6] In Islamic law, freedom of religion is analysed within the context of riddah or 'turning away from the faith':

> *O you who have attained faith, if you ever abandon your faith, God will bring in time forth (in your place) people whom he loves and who love him. (Q5:54)*

> *Your enemies will not cease to fight you till they have turned you away from your faith. But if any of you should turn away from his faith and die as a denier of truth – for these people, their works will count for nothing in this world and in the life to come. (Q2:217)*

The concept of apostasy as one who leaves one religion for another is not particularly developed as such in the Qur'an, nor is any corporeal punishment ascribed to one who turns away from Islam. Verses such as the above must be seen in the wider political picture of Islam as a fledgling faith, where survival of the community was imperative and those who left the faith, both formally or informally, would be seen as a physical threat, equivalent to sedition or treason against the state. While there is no divine punishment mentioned in the Qur'an for turning away from Islam, there is some evidence of this in certain disputed hadith or prophetic sayings. In addition, the concept was enlarged to incorporate other sorts of utterances which could be understood as heretical or blasphemous. This, combined with the juristic judgement that those who left Islam, should be regarded as enemies of Islam, or deniers of God, kuffar, meant that from very early on, Muslim law articulated 'irtidad' or 'turning away' as a serious crime against God, deserving of earthly punishment. While the apostate had the opportunity to repent and return to Islam, either death or imprisonment could be the consequences if the apostate refused. There was of course no penalty for conversion to Islam from other faiths. As Ann Mayer explains:[7]

> *Pre-modern shari 'a rules also provided that apostasy constituted civil death, meaning among other things that the apostate's marriage would be dissolved and the apostate would become incapable of inheriting.*

The classical doctrine of apostasy laws incurring serious penalties such as the death penalty has been subject to serious critique by both Muslim and non-Muslim scholars. While no unanimity has been reached and while these laws still form part of the penal code of state legislation in many Muslim countries, they continue to be the focus of both speculation and criticism for failing to comply with international human rights standards. But many scholars have contested that the challenge posed is not simply about the challenge to human rights posed by the UDHR. Instead, they emphasise that what is being violated

with such punishments is the inherent teaching of the Qur'an itself which neither states any punishment and which insists on giving absolute freedom of religion to the individual.[8] Their grievance is that the non-coercive directive of the Qur'an has been eclipsed by the established and still pervasive rules of the medieval jurists.

This issue is further complicated by the fact that the Qur'an mentions those who follow other religions, notably Jews and Christians as people who also enjoy God's favour:

> *Those who are believers and those who are Jews and Christians and the Sabians and who believe in God, and the Last day and do good works shall have their reward with their Lord; on them shall be no fear. (Q2:62)*

Also, God has created diversity within humanity, as a test of how human beings can live with each other:

> *O Mankind, we have created you male and female, and appointed you races and tribes, that you many know one another. Surely, the most noble amongst you in the sight of God is the most God fearing of you. (Q49:14)*

Such verses have been used by many scholars to make the claim that the Qur'an contains an inherent pluralism, the egalitarian spirit of which has been lost in much of the juristic works. Though many have questioned exactly what kind of pluralism, Islamic history shows that co-existence had to be both accepted and managed:[9]

> *Religious pluralism for the shari 'a was not simply a matter of accommodating competing claims to religious truth in the private domain of individual faith. It was and remains inherently a matter of public policy in which a Muslim government must acknowledge and protect the divinely ordained right of each person to determine his or her spiritual destiny without coercion. The recognition of freedom of conscience in matters of faith is the cornerstone of the Koranic notion of religious pluralism, both interreligious and intrareligious.*
>
> *The combination of apostasy laws and mere tolerance of other faith communities has been largely responsible for the social and theological tensions between Muslims and others in many Islamic societies. Despite the Qur'anic references to coexistence with other faiths, it would be fair to say that the new political society, which emerged in the post-Prophetic era, gradually created an exclusionary view of itself in which dialogue with others was not always based on any desire for inclusivity but necessity.*

> *Freedom to practice one's religion may have been the ethical directive of the Qur'an, but it did not always develop sufficiently to mean 'freedom of religion and conscience' as understood in contemporary debates on human rights or human dignity.*

The second example is marital consent and the infantilisation of gender relations.

The classical legal world did not have the concept of young, free and single – this is a modern phenomenon. For the classical world, there was a transition from parental home to marital home and the idea of single people was not really entertained. Today this is a challenge on the social front but also on the moral front. Classical Hanafi law states that an adult, sane and free woman can contract herself in marriage without the consent or approval of her father or guardian. This by its very wording implies female choice and autonomy. But many Muslim societies have developed on the basis of strict segregation laws which have inevitably curtailed the possibility of choice. But women are also denied this freedom because custom and moral codes within cultures disapprove of female autonomy, thus making the legal/ethical imperative almost impossible. This leads to forced marriages, denial of women's rights or family pressures to such an extent that abuse of the law becomes systematic since law assumes an inferior position to cultural norms and expectations. In essence culture is presented as law. Thus the law provides the space for manoeuvre and changing circumstances – it is ethically ahead of society … the values of liberty and choice are already there.

Let me conclude that in the UK cultural diversity is expressed largely through religious diversity. While this poses challenges, it still allows us, at times demands that we compare and contrast value systems and different lifestyles so that we can establish a dialogue aimed at building more universal values and beliefs. We will have to make some choices about what we tolerate and what we keep out. This is fundamentally a debate about ethics. Even diversity has its limits. For all of us, this means in the end having the conviction that our faiths and cultures can have a positive impact and work for the welfare of the wider society. But we must also have the courage and humility to speak out against what the theologian calls the 'malfunctions of faith.'

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**Notes**

1 Joseph Schacht, An Introduction to Islamic Law, Clarendon Press, 1964, repr 1993, p1.
2 Fazlur Rahman, Islam, University of Chicago Press, 1979, pp100-102.
3 Two of the most significant contributors to any reformative, systematic thinking of Islamic law are Khaled Abou el Fadl and Abdullahi An–Na`im. See particularly, Khaled Abou El Fadl, Speaking in God's Name; Islamic Law, Authority and Women, OneWorld, 2001; Abdullahi An-Na`im, Towards an Islamic Reformation, Syracuse University Press, 1996. An–Na`im draws upon the teachings of his mentor and the Sudanese reformer, Mahmoud M Taha, and focuses on the methodology of abrogation (naskh) through which the Meccan and Medinan verses must be re-evaluated for a reconstruction of Islamic law.
4 I have elaborated on this argument in more detail in my article, `Divine Law and Divine love: complimentary or competing claims on human dignity,' in The God of Love and Human Dignity, Essays in honour of George Newlands, T&T Clark, September 2007.
5 Ann E Mayer in conversation with Dina Ibrahim, `Human dignity and Islamic law; Are they compatible?' http://www.geocities.com/CapitolHill/Parliament/3251/spring99/mayer.html.
6 Mohammed Hashim Kamali, The Dignity of Man, Islamic Texts Society, 2002, p37.
7 Ann E.Mayer, Islam and Human Rights, Westview Press, 1991, p141.
8 For a comprehensive analysis of apostasy, see Abdullah Saeed and Hassan Saeed, Freedom of Religion, Apostasy and Islam, Ashgate, 2004. Also, Wael Hallaq, `Apostasy,' in Encyclopaedia of the Quran, Vol 1, Brill, pp119-122.
9 Abdulaziz Sachedina, The Islamic Roots of Democratic Pluralism, Oxford University Press, 2001, p25.

# Human rights v the rights of British citizens

**Eric Metcalfe**

*Following on from recent constitutional developments (particularly the Governance of Britain green paper, Lord Goldsmith's review of citizenship and debates about a new British bill of rights and responsibilities), this article discusses the difference between human rights and citizen's rights, considers the concept of citizenship and explores the relationship between citizenship and national identity. In addition the articles examines what rights British citizens have, who is a British citizen and concludes by considering what rights citizens should have.*

Citizenship is a fashionable concept in government these days. One of the first acts of Gordon Brown's premiership, the *Governance of Britain* green paper released in July 2007 laid heavy emphasis on 'active citizenship' as the basis for 'constitutional renewal'.[1] In particular, it announced a review of citizenship to be carried out by Lord Goldsmith QC, who had resigned as Attorney General less than a week earlier. The aim of the review, the green paper explained, was to examine both the legal and non-legal aspects of citizenship 'including civic participation and social responsibility'.[2] In particular:[3]

> *The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world. British citizenship – **and the rights and responsibilities that accompany it** – needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves.*

By considering the status of citizenship, therefore, Goldsmith's review was linked to the prospect of a new British bill of rights and duties – which would not only be an 'articulation of the rights of each citizen'[4] but also provide 'a framework for giving practical effect to our common values'.[5] In February 2008, the Prime Minister again stressed the connection between citizenship, rights and responsibilities:[6]

> *The vision of British citizenship that I believe in … is founded on a **unifying idea of rights** matched with responsibilities.*

This time, however, Gordon Brown tied the concept of citizenship explicitly to the government's new 'points-based' immigration policy. In particular, he introduced the idea of 'earned citizenship' – citizenship 'explicitly founded not

just on what [immigrants] receive from our society but what [immigrants] owe to it'. This idea of 'earned' citizenship stands in contradistinction, one supposes, to the way that most people gain British citizenship, ie sheer accident of birth.

In March 2008, Lord Goldsmith reported on the outcome of his review of citizenship, recommending among other things an end to the voting rights of Commonwealth citizens resident in the UK.[7] Goldsmith's review, though, is even more interesting for the questions that it raises, even if the answers it provides are on the whole thin and unsatisfying: What is citizenship? Who is entitled to it? And, most importantly, what is the proper relationship between citizenship and rights? For Lord Goldsmith's review and the broader constitutional proposals of Gordon Brown highlight a deeper legal and political tension between the rights that people have because they are citizens and the rights people have simply because they are human.

## What is citizenship?

The core concept of citizenship, from Periclean Athens onwards, has been the idea of *membership of a political community*. But such membership did not come from simple obedience to the law: after all, slaves, resident foreigners and women were all subject to the law without being citizens. Instead, Aristotle argued, the defining feature of citizenship was *participation* in governance.[8] The freedom and, indeed, the duty to actively involve oneself in government was what distinguished the citizen of a state from the mere subject of its laws.[9]

Citizenship meant participation, moreover, on *equal* terms. However unequal the classical societies of Athens or Rome were in reality, the formal ideal was that each citizen's vote was accorded the same weight as any other. It is unsurprising, therefore, that a strong emphasis on citizenship has always sat uneasily with monarchical systems of government. A typically robust articulation of the republican ideal was that given by Thomas Paine:[10]

> *The romantic and barbarous distinction of men into kings and subjects, though it may suit the condition of courtiers, cannot that of citizens; and is exploded by the principle upon which governments are now founded. Every citizen is a* ***member of the sovereignty****, and, as such, can acknowledge no personal subjection; and his obedience can be only to the laws.*

Edmund Burke, though, better reflected the distaste and horror with which the British establishment viewed the developments in late 18th century France:[11]

> *the Republicans in France, and their associates in other countries, make it always their business, and often their publick profession, to destroy all traces of ancient establishments, and to form a new commonwealth in*

> *each country, upon the basis of the French Rights of Men. On the principle of these rights, they mean to institute in every country, and as it were, the germe of the whole, parochial governments, for the purpose of what they call equal representation.*

In this light, explanations for the relative lack of a formal political conception of British citizenship are not hard to seek. As the government's green paper put it:[12]

> *Britain has in recent centuries largely avoided the upheavals that have led other countries to define the rights, responsibilities and values that bind their people and communities. A large part of what we describe as Britishness traces straight back to our own civil war, its ultimate resolution in the Declaration of Rights of 1689 and the Acts of Union. Our relative stability as a nation is reflected in a relative lack of precision about what we mean to be British.*

This is putting it mildly, however. It would be more accurate to say that a key factor in the 'relative stability' of British constitutionalism has been its insistence upon pragmatism and a corresponding hostility towards formalism and abstraction. Hume in 1742 cited Britain's 'mixed form of government … neither wholly monarchical, nor wholly republican' as the key to its success,[13] and there can be little doubt either that Burke and his contemporaries were keen to preserve this 'mixed form of government' from dogmatism of all stripes, whether foreign or domestic. In this sense, a 'relative lack of precision' about Britishness was not simply some oversight caused by Britain's political stability. On the contrary, the overarching 'lack of precision' in Britain's unwritten constitution was both the foundation for its political stability and, consequently, an integral part of its legal and political identity vis-à-vis revolutionary France and the various other absolutisms of Europe. The lack of a formal definition of the rights and duties of British citizens is therefore no accident: the idea of the British as citizens rather than subjects was part of what Nelson at Trafalgar and Wellington at Waterloo were fighting to oppose.

It should be obvious enough from the above discussion that citizenship is first and foremost a *political* concept. But citizenship has never been purely so. First, the gradual shift away from small city-states towards much larger political entities meant a corresponding shift in the nature of civic engagement: citizenship in this sense became less about active involvement in politics and more as a formal *legal* status denoting, among other things, the entitlement or *right* to participate.[14] Secondly, the emphasis given to civic virtue in republican conceptions of citizenship contributed to the emergence of citizenship as a *social* concept as much as a political one.

But it was the 18th century preoccupation with the nation-state that led to the distinction between the Enlightenment ideal of citizenship as a purely legal status and the more romantic conception of membership in a *nation* or a *people* – the organic, moral community separate from the state.[15] This distinction, in turn, helped frame nationalism as a *political* ideal: the belief that the inhabitants of a state should, as far as possible, share a common nationality.

Nationalism fuelled two competing political forces across 18th and 19th Europe. The first was the movement of stateless or substate groups towards self-definition as a nation or people as a means to articulate political claims against existing states, including claims to statehood in their own right (eg Italy and Germany). The second was the movement by already-existing states to foster a sense of shared nationality among their own populations, especially through a system of public education through which a national language and the idea of a national history could be promoted (eg France).[16]

As we have already seen, however, the British political establishment strongly resisted such formal articulations of citizenship and the English common law had little to say on the subject.[17] Blackstone succinctly expressed the basic rule as follows:[18]

> *Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection ...*

By the 19th century, British identity was increasingly imperial; not just 'Great Britain' but '*Greater* Britain' – spanning British North America, most of the West Indies, India, Australasia and large parts of Africa.[19] Indeed, contemporaries were proud to boast of the British identity running beyond even the bounds of Empire:[20]

> *In America, the peoples of the world are being fused together, but they are run into an English mould: Alfred's laws and Chaucer's tongue are theirs whether they would or no. There are men who say that Britain in her age will claim the glory of having planted greater Englands across the seas. They fail to perceive that she has done more than found plantations of her own – that she has imposed her institutions upon the offshoots of Germany, of Ireland, of Scandanavia and of Spain. Through America, England is speaking to the world.*

By contrast to this expansive vision of British institutions spreading across the globe, other conceptions of national identity in the same period were drawn rather more narrowly; less concerned with law and civil society and more with

shared traditions and history. In particular, the Romantic conception of a nation as people bound by a common culture became increasingly synonymous with the idea of people bound by a common *ethnicity*. Eric Hobsbawm cites the 1938 remarks of the Nazi Kreisleiter of Innsbruck as illustrating the logical endpoint of this elision:[21]

> *Culture can't be acquired by education. Culture is in the blood. The best proof of this today is the Jews, who cannot do more than appropriate our civilization but never our culture.*

Unsurprisingly enough, this ethnic conception of German nationality was reflected in the rules governing German citizenship. As the Nuremberg Laws stipulated:[22]

> *A Reich citizen is a subject of the State who* ***is of German or related blood****, who proves by his conduct that he is willing and fit faithfully to serve the German people and Reich.*

It should be plain, therefore, that citizenship is more than just a matter of fostering national identity. It may also form the basis by which rights and goods are distributed within a society, for better or – as the Nuremberg Laws illustrated – for worse. It is, of course, a principle of international law that each state is free to set its own rules concerning who is, and who is not, a citizen. As the International Court of Justice ruled in 1955:[23]

> *It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals.*

But the experience of the Nuremberg Laws amply demonstrated the shortcomings of this principle. The 1948 Universal Declaration of Human Rights, and the corpus of international human rights law that followed it, therefore marked a fundamental recognition that certain basic rights were too important to be contingent on citizenship. For most of the 20th century too, liberal political thought has been marked by an insistence upon the equal civil and political

rights of each inhabitant. Citizenship, therefore, has become an increasingly residual category in legal terms, as many (but, as we will see, not all) basic rights are determined on the basis of a person's presence within the territorial jurisdiction of a state, or even within the effective control of the state, rather than the possession of citizenship. Similarly, the ever-expanding scope of EU competencies has seen virtually all of the legal rights associated with British citizenship made available on equal terms to citizens of other EU countries (and, of course, vice versa).

At the same time, there have been three developments that have led to renewed attention to the concept of citizenship in western democracies in recent years:

(1) a steady increase, across the 20th century, in the extent of welfare provision by the state, and the resulting economic burden required of taxpayers;[24]
(2) an overall decline in formal political participation, whether measured by turnout at general elections or membership in political parties;[25] and
(2) a marked rise in immigration, particularly following the end of the Cold War and, in particular, in applications for asylum.[26]

These developments help to explain why calls for a clearer social and political conception of citizenship have come from across the political spectrum, whether it be from liberals wishing to encourage greater political participation; conservatives wishing to encourage greater individual responsibility and thereby discourage reliance on the state; social democrats and communitarians keen to stress the importance of duties to others and to society as a whole; not to mention those keen to exclude more recent arrivals from sharing in the benefits of British society. As Lord Hoffman put it in 2002:[27]

> *There was a time when the welfare state did not look at your passport or ask why you were here. The state paid contributory benefits on the basis of contribution and means-tested benefits on the basis of need. Some flat-rate non-contributory benefits like family allowances required residence in the UK for a minimum period of time. But immigration status was a matter between you and the Home Office, not the concern of the social security system.*
>
> *As immigration became a political issue, this changed. Need is relative, not absolute. Benefits which in prosperous Britain are regarded as sufficient only to sustain the bare necessities of life would provide many migrants with a standard of living enjoyed by few in the misery of their home countries. Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social*

> *duty to fellow citizens in need but not a duty on the same scale to the world at large.*

It is also not hard to see the appeal for Gordon Brown in particular: citizenship as a way to cement a British national identity as against the potentially fissiparous nationalisms of the Scots, English and Welsh; citizenship as a tool to modernise Britain's often fusty and archaic constitution; citizenship as a means to combat social exclusion. As the green paper complains:[28]

> *French citizens have a clear understanding of their values of liberty, equality and fraternity. America has a strong national perception of itself as the 'land of the free'. But there is a less clear sense among British citizens of the values that bind the groups and communities who make up the body of the British people. The principles of liberty, democracy, tolerance, free speech, pluralism, fair play and civic duty may be widely felt,* ***but they are not fully articulated in way that helps to define who we are and how we should behave****.*

This plays on a popular anxiety of states in an age of rising immigration and increasingly diverse populations: the fear that without a strong sense of national identity, its inhabitants will lack a clear sense of belonging, leading to any number of social ills, ranging from anomie, despair, rising crime and even separatist violence. It is easy enough to poke fun at such neuroses – it should come as no surprise, for instance, that, despite their strong sense of citizenship, the French and Americans also fret and wring their hands about their respective national identities[29] – but the rise in ethnic nationalism at the end of the Cold War and the fate of the former Yugoslavia and Soviet Union in particular are object lessons for those who would dismiss all such fears out of hand. Even without such foreign examples, Britain's own experience in Northern Ireland is testament enough to what may happen to a society when its inhabitants have strongly-differing loyalties.

## What rights do British citizens have?

As noted above, the British have never had much time for the concept of citizenship and, as I discuss below at more length, what legal concept there is was largely developed ad hoc in the 20th century as a response to the loss of the Empire and rising immigration. It should therefore come as no surprise to anyone that the legal rights attaching to British citizenship are remarkably limited. Indeed, one of the chief virtues of Lord Goldsmith's review is his valiant attempt to enumerate the legal rights and responsibilities of that citizenship.[30]

As he concedes at the outset, this exercise is limited in a number of respects. First, many rights are enjoyed by non-citizens as they are by citizens though

he also notes that 'not all non-citizens have the same rights when it comes to economic support and healthcare'.[31] Secondly, 'EU citizens have many of the same rights as UK citizens'.[32] Thirdly, in respect of responsibilities:[33]

> *citizens and non-citizens alike are obliged to comply with the criminal law and there are very few areas of that law which do not apply to non-citizens as they do to citizens.*

Bearing all these caveats in mind, what actual rights do British citizens have that others do not? Goldsmith lists the following:[34]

- the right to abode and freedom of movement within the UK (shared with Irish and EU nationals);
- the right to vote (shared with EU and Commonwealth citizens);
- the right to stand for public office (shared with EU and Commonwealth citizens);
- the right to apply for a passport;
- the right to seek diplomatic protection (shared with EU nationals and UK permanent residents);
- access to social security benefits (shared with EU nationals and UK residents);[35]
- access to community care (shared with some EU nationals and some asylum seekers);
- access to housing assistance and housing allocation (shared with some EU nationals, UK residents and some asylum seekers);
- access to healthcare (shared with EU nationals, UK residents and asylum seekers);
- access to education (shared with EU nationals, UK residents and asylum seekers).

At first glance, it may seem as though virtually all the rights of British citizens are shared to some degree by EU nationals and British residents, the sole exception being the right to a passport (which, as it involves the exercise of the royal prerogative, is in legal terms not so much a right as a general expectation). Certainly, Goldsmith's list is likely to dismay those who argue for British citizenship as a distinctive *legal* status. But, as I will argue later, that is no more than it should be and, if anything, the list could stand to be watered down further. The impression that many rights and benefits of citizenship are shared with many non-citizens also tends to miss the significant differences in access between those categories: a British citizen and an asylum seeker who has been granted temporary leave to remain may both have an equal right to access housing assistance, healthcare and education, but for an asylum seeker to get to that point would only follow an eighteen month battle with the Home Office.

The main benefit of citizenship in this context is a clear and unequivocal right of access from day one. Indeed, given that so many of rights now depend merely on being within the jurisdiction of the UK, the unfettered right of British citizens to leave and enter that jurisdiction may be the most valuable right of all.

## Who is a British citizen?

Of the approximately 59 million people who currently reside in the UK,[36] somewhere in the region of seven million are foreign-born,[37] including nearly half a million people thought to be residing illegally.[38] In other words, approximately 12 per cent of the inhabitants of Britain are not citizens. If we are serious about the idea of Britain as a country in which everyone has the same rights, we therefore need to consider closely how British citizenship is distributed.

For the overwhelming majority of British citizens, British citizenship is simply a condition of birth: anyone born to a British citizen is themselves a citizen.[39] Indeed, this was the pragmatic test proposed by Aristotle: 'the criterion of having citizen-parents',[40] and the so-called ius sanguinis ('right of blood') is the oldest-recognised way of defining nationality. By itself, however, ius sanguinis is a recipe for dramatic unfairness: until 1999, for instance, German citizenship was limited by descent, meaning that people born and raised in Germany but with foreign parents were ineligible to acquire citizenship. Given large numbers of Turkish guest workers in Germany, this meant often second- and third-generation immigrants denied citizenship.[41] At the same time, ethnic Germans from the former Soviet Union were eligible to gain citizenship, despite not speaking German or having any familiarity with German society.

The other main way of distributing nationality is the far more inclusive ius soli ('right of territory') – ie granting citizenship to anyone born within the territory of the state. The most famous example of this is the Fourteenth Amendment to the US Constitution, which provides that:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*

Until very recently, ius soli was the governing principle of British nationality also. As Blackstone noted in 1765:[42]

> *The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such.*

Indeed, it was not until 1983 that anyone born in the UK ceased automatically to be a citizen (unless their parents were foreign diplomats or enemy aliens). The 1981 Act instead restricted this to all children in the UK born either to a British citizen, an EU citizen or a resident with indefinite leave to remain.[43]

However, this limitation of ius soli in UK territory pales in comparison to the broader disenfranchisement of the great majority of British subjects and Commonwealth citizens across the 20th century from being to enter, live and work in Britain. At the turn of the last century, close to one quarter of the world's population were British subjects.[44] Although the rights and duties vesting in that status varied from place to place (so that the rights of subjects in a Dominion such as Australia differed from those in non-Dominion holdings such as India),[45] the status of British subject provided a common political identity across the British Empire, one 'whose formal members came to include, for example, Cantonese-speaking factory workers in Hong Kong as well as Muslim peasants in the Straits Settlements'.[46] Goldsmith's review provides a short history of the changes to British citizenship across the 20th century, and is generous enough to concede that:[47]

> *The history of British citizenship through the 20th century is one of an ideal of some common British citizenship for all born within the Empire which gradually was eroded as the dominions of the Empire grew into self-governing Commonwealth countries.*

In particular, although the historicism of Goldsmith's task prevents him from fully acknowledging it, the review illustrates how the formal legal status of British citizenship emerged across the last century entirely in reaction to external events: the self-government of the Dominions under the Statute of Westminster in 1948; the decolonisation of the rest of Empire across the 1950s and 1960s; and Britain's decision in 1971 to join the European Community (as it was then). Goldsmith's review also helps to explain how, even in 2008 when the sun has long since set on the Empire, there are still no less than six categories of British citizenship – including British overseas territory citizens; British nationals (overseas); and British Protected Persons.[48] From a population of approximately 450 million British subjects at the beginning of the 20th century, therefore, only about 50 million remained as British citizens by its end: an attrition rate of roughly nine to one.

Other than being born in Britain and/or being born to a British citizen, the only other route to acquiring British citizenship is that of naturalisation. The process of naturalisation is far from easy, however, requiring as a minimum of six year's lawful residence in the UK (eg any time spent in Britain illegally will not count). In itself, six years may not seem especially onerous but, for the overwhelming

majority of non-British nationals, it is extremely difficult to obtain temporary leave to remain for more than two years. Even the grant of indefinite leave to remain (or permanent resident status) typically requires a minimum of five year's lawful residence. Indeed, merely to be granted even temporary leave to enter the UK is, for most of the world's population, a significant accomplishment in itself.

Other than those foreign nationals exceedingly fortunate enough to satisfy the rigid entry requirements and remain lawfully in Britain for more than six years, it is clear that the basis of acquiring British citizenship is very much the lottery of birth.

## What rights should citizens have?

Having looked at the concept of citizenship, what rights flow from British citizenship and who is entitled to it, we now must consider the implicit question raised by the green paper and Lord Goldsmith's review: what rights *should* British citizens have? This in turn raises the more general question of whether it is fair to use citizenship as a basis for distributing rights at all.

The basic difficulty with distributing rights according to citizenship is that it is, at its base, a morally arbitrary distinction. The ideal of equal rights is a core value of liberal political thought and it is profoundly hostile to the idea that some people may be entitled to greater rights because of their class, ethnicity, religion, language or nationality. Where members of a particular social group have rights and liberties that others do not, this is taken to indicate that the state does not consider members and nonmembers as either alike in political status or as *morally* alike. When we consider that the great majority of British citizens owe their citizenship not to any choice or decision but mere accident of birth, it becomes difficult to avoid the conclusion that citizenship seems prima facie an illiberal basis for distributing fundamental rights.

In recent years, communitarians and even some liberals have nonetheless argued that the importance of preserving a state's national identity can sometimes justify an unequal distribution of rights, including restrictions on immigration and citizenship.[49] Indeed, a key proponent of such 'group-differentiated' rights, Will Kymlicka, has argued that citizenship is itself an 'inherently group-differentiated' concept:[50]

> *Liberal theorists invariably limit citizenship to the members of a particular group, rather than all persons who desire it. The most plausible reason for this – namely, to recognize and protect our membership in distinct cultures – is also a reason for allowing group-differentiated citizenship within a state …. so far as liberal theorists accept the principle that citizenship can*

> *be restricted to the members of a particular group, the burden of proof lies on them to explain why they are not also committed to accepting group-differentiated rights within a state.*

But the mere fact that most states do place limits on immigration and restrict access to citizenship is hardly an argument that they should. There is no shortage of examples, both historical and present day, of states using immigration and citizenship laws to exclude people of various ethnic groups, but it is hard to reason that such examples are in any way commendable. Nor is it clear why citizenship – rather than residency or common humanity – should be the 'inherent' basis for distributing rights and benefits to things like education or housing. The obvious difficulty with Kymlicka's argument is that merely showing that citizenship is or may be limited in this way cannot establish that it ought to be.

Instead, the best justification for restricting unfettered immigration is the wholly pragmatic one that – living as we do in a world composed of rival and competing states – no state can afford to open its borders to all comers unilaterally and hope to sustain the sort of welfare provision that we would wish to provide to the poorest and least fortunate within our jurisdiction. It is not, as Lord Hoffman suggests, that we acknowledge 'a social duty to fellow citizens in need but not a duty on the same scale to the world at large'.[51] For a start, it is difficult to see how a moral duty restricted only to one's fellow passport holders could be justified. Rather, we simply recognise that the limits of jurisidiction and resources are real and practical limitations on our ability to fulfil such a duty to all those in need, wherever in the world they are situated. A suitable analogy would put the state in the role of a lifeboat: keen to extend its rights and duties to as many people as possible, but without letting so many people on board that it ends up sinking.[52] Or, to put it very crudely in Rawlsian terms, limits on immigration and citizenship could only be justified where such limits can be shown to benefit the worst-off (ie those excluded from entry) more than a uniform distribution would (eg allowing entry and citizenship to all who seek it).[53] A third alternative – allowing entry to all but instead restricting access to basic goods such as housing and healthcare to citizens only – would offend what Lord Ellenborough, Chief Justice in the celebrated 1803 decision of *R v Inhabitants of Eastbourne*, described as 'the law of humanity':[54]

> *As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving.*

Thus, while it may be permissible in principle to set maximum limits on immigration to prevent resources being overwhelmed, it is very difficult to see how any significant disparity between the rights of inhabitants and the rights of citizens could be justified in a country committed to the idea of equal rights per se. Ironically enough, Goldsmith's review of citizenship and its denuded list of citizens' rights in chapter three in particular shows that this is more or less the reality of British citizenship today: apart from unqualified right of abode, there are virtually no rights accorded to citizens that are not also extended in some way, shape or form to non-nationals. Indeed, rather than cast about for rights to be restricted in order to bolster an allegedly shaky sense of national identity (as Goldsmith suggests restricting the right to vote to citizens only),[55] we should be looking to ensure equal enjoyment of basic rights to all those within our jurisdiction, eg removing the pernicious and foolish restrictions on non-resident foreign nationals accessing hospital care in the UK.[56]

Similarly, while limits on immigration may be theoretically permissible, the UK has always been very far from reaching the point where levels of immigration threaten to overwhelm the state's ability to sustain itself. Despite the many feverish claims to the contrary, increased immigration over the past decades has not led to a rise in crime,[57] or preference given to new arrivals ahead of existing residents,[58] or any of the other horror stories regularly foisted on a credulous public by the mendacity of the press, both tabloid and broadsheet. On the contrary, immigration is by most accounts a net asset to the UK economy[59] and the diversity it brings adds immeasurably to its common culture. Indeed, the economic contribution of migrants in particular highlights a key flaw in Goldsmith's own account of the benefits of British citizenship. Noting the welfare benefits offered by the state, Goldsmith observes that:[60]

> *The state is only in a position to offer these protections because citizens have chosen them. In crude terms, the social and economic benefits of citizenship rely on* ***the willingness of citizens to pay for them collectively****.*

What this overlooks, however, is that it is not just citizens who pay for them. Unlike some countries, citizenship is not the basis for tax liability in the UK. Instead liability to pay income tax is determined by residence. Similarly, people in the UK are liable to pay taxes on goods and services and corporate taxes whether or not they are citizens. This adds an additional argument against restricting basic rights and services to citizens only.

More ominous still is the green paper's description of core British values that manages to omit any reference to the fact that the 'rights of citizens' it lists are all in fact *human* rights:[61]

> *At the heart of British citizenship is the idea of a society based on laws which are made in a way that reflects* ***the rights of citizens*** *regardless of ethnicity, gender, class or religion. Alongside this sits the right to participate, in some way, in their making; the idea that all citizens are equal before the law and are entitled to justice and the protection of the law; the right of all citizens to associate freely; the right to free expression of opinion; the right to live without fear of oppression and discrimination ...*

The green paper similarly elides 'the rights of British citizens'[62] under the common law with the rights of 'everyone in the UK' under Schedule 1 of the Human Rights Act 1998.[63]

If it seems ungracious for the Brown government to redescribe human rights as citizens' rights, this loss of civility is epitomised by Goldsmith's proposal to remove the longstanding right of Commonwealth citizens resident in the UK to vote in British elections:[64]

> *This would recognise that the right to vote is one of the hallmarks of the political status of citizens; it is not a means of expressing closeness between countries. Ultimately, it is right in principle not to give the right to vote to citizens of other countries living in the UK until they become UK citizens.*

It may seem strange that Britain, once so proud of exporting its democratic institutions 'to the world', should now be reduced to removing the right of its former subjects to share in that democracy at home. It is even sadder that it should seek to do so largely for the sake of shoring up its own flagging sense of identity. The Brown government has made much of Britain's 'passion for liberty',[65] but it seems to little appreciate that it is precisely that tradition of liberty that has made the idea of citizenship so unimportant in its own democratic traditions. The fact that ancient British liberties are not limited to its citizens but are shared equally among all its inhabitants is not a sign of weakness but of wisdom. For, if British history shows anything, it is that a strong sense of nationhood hardly needs formal articulation in law and that there are certain things – rights and democracy chiefly among them – that matter more than such vanity.

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**Notes**

1 *The Governance of Britain*, Cm 7170, July 2007, p6.
2 Ibid, para 193.
3 Ibid, para 185. Emphasis added.
4 Ibid, para 211.
5 Ibid, para 209.
6 Speech on Managed Migration and Earned Citizenship, 20 February 2008. Emphasis added.

7 *Citizenship: Our Common Bond*, March 2008.
8 Aristotle, The Politics, III.i.1275a22: 'What effectively distinguishes the citizen proper from all others is his participation in giving judgment and in holding office'.
9 See also eg Rousseau, The Social Contract, trans GDH Cole, Everyman, 1993, who distinguished between '***citizens***, *as sharing in the sovereign authority, and* ***subjects***, *as being under the laws of the State*', p192. Emphasis in original.
10 The Rights of Man, 1791, p130. Emphasis added.
11 Thoughts on French Affairs, December 1791.
12 See n1 above, para 184.
13 Hume: 'The reason, why the laws indulge us in such a liberty seems to be derived from our mixed form of government, which is neither wholly monarchical, nor wholly republican'(Of the Liberty of the Press, 1742).
14 See eg JGA Pocock, 'The Ideal of Citizenship since Classical Times', (1992) *Queens Quarterly* 99: 33-55.
15 See eg Anderson, Imagined Communities, Verso, 1991, Ch 6; Hobsbawm, Nations and Nationalism since 1780: Programme, Myth, Reality, 2nd edn, Cambridge University Press, 1992; Smith, National Identity, Penguin, 1991, Ch 5.
16 Ibid.
17 The case law, such as it was, was overwhelmingly concerned with the circumstances in which foreign-born individuals might come to owe allegiance to the Crown, see eg *Calvin's Case* (1608) 7 Coke Report 1a, 77 ER 377, in which Coke LCJ held that, following James I's Union of the Crowns, all Englishmen and Scotsman born after 1603 were hereafter jointly subjects of England and Scotland: '*if the obedience and ligeance of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England, as of all other nations, and is immutable, and that postnati and we of England are united by birthright, in obedience and ligeance (which is the true cause of natural subjection) by the law of nature; it followeth that Calvin the plaintiff being born under one ligeance to one King, cannot be an alien born*' (394). The only references to the idea of 'citizenship' to be found in such decisions were in the classical references of the Court alone. More generally, see Karatani, Defining British Citizenship: Empire, Commonwealth and Modern, Routledge, 2003, Ch 3.
18 Blackstone, Commentaries, 1765, 1:354, 357.
19 See eg Marshall (ed), The Oxford History of the British Empire, Oxford University Press, 1999.
20 Sir Charles Wentworth Dilke, Greater Britain: A Record of Travel in English Speaking Countries during 1866 and 1867, 1869.
21 Quoted in Hobsbawm, n15 above, p63.
22 S2(1) Reich Citizenship Law, 15 September 1935. Emphasis added.
23 Judgment of the International Court of Justice in *Nottebohm's case (Liechtenstein v Guatemala)*, 1955 ICJ 4. Note that, like the English common law, 'citizenship' is not itself a concept recognised by international law. Instead, international law is concerned with 'nationality'. While it is important to note that the terms are not equivalent, eg it is possible to be a national of a state under international law without being a citizen under domestic law, it is the case that all citizens are by definition nationals.
24 See eg Marshall, Citizenship and Social Class, Cambridge University Press, 1950; Waldron, 'Citizenship, Social Citizenship and the Welfare State' in Liberal Rights, Cambridge University Press, 1993.
25 See eg Power to the People: The report of Power, an Independent Inquiry into Britain's Democracy, chaired by Baroness Kennedy QC, March 2006.
26 See eg Cesarani and Fulbrook (eds), Citizenship Nationality and Migration in Europe, Routledge, 1996; Geddes, The Politics of Migration and Immigration in Europe, Sage, 2003.
27 *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, paras 19-20.
28 See n1 above, para 194. Emphasis added.
29 See eg National Public Radio, 'French Election Turns on National Identity', 9 April 2007; The *New York Times*, 'Immigration is Defying Easy Answers', 30 December 2007, noting that, '*[f]or many voters in the primary races, immigration has become an urgent national security concern and* ***a challenge to the American identity***' [emphasis added].
30 See n7 above, Ch 3.
31 Ibid, p20.
32 Ibid.

33 Ibid.
34 Ch 3.
35 For present purposes, this includes refugees, those granted exceptional leave, humanitarian protection, discretionary leave and indefinite leave to remain.
36 The UK population at the last census in April 2001 was 58,789,194 people (Source: National Statistics Office).
37 2006 Labour Force Survey (Source: Bank of England).
38 See House of Lords Economic Affairs Committee, *The Economic Impact of Immigration*, HL 82, April 2008, para 12, citing 'Home Office estimates'.
39 S2 British Nationality Act 1981.
40 See n8 above at 1275b22. In fact, Aristotle's definition was slightly stricter, requiring *both* parents to be citizens.
41 See the discussion in Kymlicka, Multicultural Citizenship, Clarendon Press, 1995 at p23. See also eg 'New German government to reform citizenship laws', CNN, 15 October 1998; Roger Cohen, 'Germany Makes Citizenship Easier for Foreigners to Get' The *New York Times*, 22 May 1999.
42 See n18 above, pp361-2.
43 S1 of the 1981 Act.
44 See eg Lloyd, The British Empire 1558-1995, Oxford University Press, 2nd edn, 1996.
45 See Karatani, Defining British Citizenship: Empire, Commonwealth and Modern, Routledge, 2003, Chs 2 and 3 tracking the development of British subjecthood following the loss of the American colonies up until the British Nationality Act 1948.
46 Ibid, p39.
47 See n7 above, Ch 2, para 4.
48 For the sake of simplicity, this article refers only to full British citizenship as 'British citizenship'. The other, residual categories are identified by their full titles, eg British Overseas Citizenships.
49 See eg Kymlicka, n41 above; Miller, On Nationality, Clarendon Press, 1995; Taylor, 'Can Canada Survive the Charter?' (1992) 30 *Alberta Law Review* 427.
50 Kymlicka, ibid, p124-126.
51 See n27 above.
52 See, however, Miller's criticism of this metaphor, n49 above, p25, pp41-42.
53 It is fair to say that Rawls has never endorsed such a sweeping interpretation of his theory of justice, which applies nationally rather than internationally. See eg The Law of Peoples, Harvard University Press, 1999.
54 (1803) 4 East 103.
55 See Goldsmith's review, n7 above, Ch 4.
56 See the National Health Service (Charges to Overseas Visitors) Regulations 1989.
57 See eg 'Migrant crime wave a myth – police study', *Guardian*, 15 April 2008.
58 See eg 'Alleged jumping of housing queues by new arrivals is a myth, research reveals', *Guardian*, 21 April 2008.
59 Although a recently-established Lords committee was unable to determine the economic benefits of immigration (see n38 above), it appears to have been in the face of positive testimony from many of its own witnesses, see eg evidence from the Confederation of Business Industry, the Institute for Public Policy Research, the Economic and Social Research Council (referring to a ESRC-funded study at UCL which found '*the impact of immigration on employment, participation, unemployment and wages of the resident population and finds no evidence that immigration has overall effects on any of these outcomes at the aggregate level.*'), and the City of London Corporation ('*the majority of migrants use relatively fewer public services than indigenous households and, in general terms, are less of a burden on the public purse*').
60 See n7 above, para 7. Emphasis added.
61 See n1 above, para 204. Emphasis added. The rights to non-discrimination, free association and free expression, for instance, are all contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.
62 See n1 above, para 207.
63 Ibid.
64 See n7 above, pp75-76.
65 Speech on Liberty, 25 October 2007, www.number-10.gov.uk/output/Page13630.asp.

# Key recent developments in counter-terrorism law and practice

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## Introduction

This paper addresses key recent developments in counter-terrorism law and practice. The starting point is the Terrorism Act 2006, which is the fourth statute dealing with terrorism to have been passed in six years and includes the much-discussed offences of encouraging terrorism and disseminating terrorist publications. It also widens the already broad definition of 'terrorism' found in the Terrorism Act 2000 and provides for longer periods of detention of terrorist suspects.

Then there is the fast-developing case-law on preventative measures intended to counter terrorism. That has thrown up fundamental issues for all those concerned with the state of human rights in the UK such as the very meaning of liberty and the critical question of what is the core irreducible minimum of a fair trial.

## The Terrorism Act 2006 and problems of definition

S1 Terrorism Act 2006 creates an offence of encouragement of acts of terrorism or Convention[1] offences. This is said to have been introduced to implement the requirements of Article 5 of the Council of Europe Convention on the Prevention of Terrorism (the Convention). This requires state parties to have an offence of 'public provocation to commit a terrorist offence'. This new offence supplements the existing common law offence of incitement to commit an offence.

The new offence is committed if a person publishes a statement – ie a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences – or causes another to publish such a statement and s/he has the necessary mens rea. The mens rea is that, at the time of publishing or causing to publish, s/he either intends members of the public to be directly

or indirectly encouraged or otherwise induced, by the statement to commit, prepare or instigate acts of terrorism or Convention offences, or s/he is reckless as to whether members of the public will be so directly or indirectly encouraged by the statement.

S1(3) of the Act provides that indirect encouragement of terrorism includes a statement that glorifies the commission or preparation of acts of terrorism or Convention offences but only if members of the public could reasonably be expected to infer that what is being glorified in the statement is being glorified as conduct that should be emulated by them in existing circumstances. The words 'by them in existing circumstances' are intended to narrow the scope of the offence since they require that members of the audience might themselves commit the acts of terrorism. As Professor Helen Fenwick observes,[2] they also indicate that it would not suffice to show that the acts being glorified are acts that might be committed many years in the future by an audience member.

Glorification is defined as including praise or celebration.[3] In response to criticism that this definition is too vague and broad, Charles Clarke, when Home Secretary and giving evidence to the Joint Human Rights Committee, rested upon 'a distinction between "encouraging and glorifying" on the one hand and "explaining or understanding" on the other. The last two, he says, would not be caught by the new offence, because they do not amount to encouraging, glorifying, or celebrating'.[4] Reference to conduct that should be emulated in existing circumstances includes references to conduct that is illustrative of a type of conduct that should be so emulated.[5] For example, if it was reasonable to expect members of the public to infer from a statement glorifying the bomb attacks on the London Underground on 7 July 2005 that what should be emulated is action causing severe disruption to London's transport network, that would be caught.

The statement indirectly or directly encouraging terrorism is to be taken as a whole and looked at in all the circumstances in which it was made.[6] It is not necessary to show that anyone was actually 'encouraged or induced' to commit any relevant offence by the statement.[7]

S2 Terrorism Act 2006 creates offences relating to the sale and other dissemination of books and other publications, including material on the internet, that encourage people to engage in terrorism, or provide information that could be useful to terrorists. For an offence to be committed, it is necessary for an individual to engage in the act of dissemination and for him/her either to have an intention that an effect of his/her conduct will be a direct or indirect encouragement or other inducement to terrorism, an intention that an effect of his/her conduct will be the provision of assistance in the commission or

preparation of acts of terrorism, or for him/her to be reckless as to whether his/her conduct has one of these two specified effects.

The conduct is: distributing or circulating a terrorist publication; giving, selling, or lending a terrorist publication; offering a terrorist publication for sale or loan; providing a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of gift, sale, or loan; transmitting the contents of a terrorist publication electronically; and possessing a terrorist publication with a view to making it available in any of the ways listed.[8] This means that the offence will cover not only bookshops but also those that sell books and publications over the internet whether the publication is in hard copy or electronic. It will also cover libraries and the distribution of leaflets and flyers.

A publication will be considered a terrorist publication if it meets one of two tests. The first test is if matter contained in it is likely to be understood by some or all of the persons to whom it is or may become available as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism. The second test is if it contains any matter which is likely to be useful in the commission or preparation of such acts and it is likely to be understood by some or all of the persons to whom it is or may become available as being contained in the publication, or made available to them, wholly or mainly for the purposes of being so useful to them.

All of this brings into very sharp focus the definition of terrorism. That appears in s1 Terrorism Act 2000, but has been amended by the Terrorism Act 2006. It now covers the use or threat of action that meets the three elements set out in s1(1). The *first* of the elements is that the action must fall into s1(2). An action falls in s1(2) if it involves serious violence against a person or serious damage to property; it endangers a person's life (but this does not include the life of the person committing the action); it creates a serious risk to the health and safety of the public or a section of the public; or it is designed to seriously interfere with or seriously to disrupt an electronic system. The *second* element is that the use or threat is either designed to influence the government or is designed to intimidate the public or a section of the public. The Terrorism Act 2006[9] amends this element to include cases where the use or threat is designed to influence an international governmental organisation. The second element does not have to be satisfied if the use or threat falling into s1(2) involves the use of firearms or explosives (s1(3)). Explosives and firearms are defined in s121 Terrorism Act 2000. The *third* element is that the threat is made for the purpose of advancing a political, religious or ideological cause.

The Terrorism Act 2000[10] makes it clear that the definition of terrorism is not limited to things taking place in the UK or related to things in the UK. Action is defined as including actions outside the UK.[11] S1(4)(b) provides that a reference in the definition to a person or property means a person or property wherever s/he or it is situated. S1(4)(c) makes it clear that the public can be the public of a country other than the UK. S1(4)(d) provides that the reference to government is not limited to the central government of the UK but can also mean a government of part of the UK (such as of Scotland) and a foreign government.

As Professor Helen Fenwick points out,[12] when that definition is applied to the new offences under ss1 and 2 Terrorism Act 2006, it is criminal to vocalise support for armed opposition to regimes viewed by the speaker and by others in the international community as tyrannous and illegitimate. Since 'terrorist' acts are defined so broadly it is not necessary that the acts glorified could threaten life. The glorification of threats to damage property abroad in furtherance of the cause of a group fighting to establish a democratic regime in an oppressive state would be enough.

Whether the wide definition of terrorism in the Terrorism Act 2000 is compatible with the European Convention on Human Rights (ECHR) was tested in *R v F*.[13] In that case the defendant was charged under s58 Terrorism Act 2000 with two counts of being in possession of a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. The defendant accepted possession of one document but maintained that it was targeted at removing the Libyan government, which, being a tyrannical regime, was not included in the protective structure of the Terrorism Act 2000.

The Court of Appeal rejected that argument on the basis that the meaning of the phrase 'a country other than the United Kingdom' in s1(4)(d) Terrorism Act 2000 was plain and there was no reason why, given the random impact of terrorist activities, the citizens of Libya should not be protected from such activities by those resident in this country in the same way as the inhabitants of the Netherlands or the Republic of Ireland. There was nothing in the legislation to support such a distinction. The legislation did not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as terrorism in a just cause. Such a concept was foreign to the Act. Terrorism was terrorism, whatever the motives of the perpetrators.

## Extension of periods of detention of terrorist suspects

S23 Terrorism Act 2006 contains amendments to Schedule 8 to the Terrorism Act 2000, which deals, among other things, with extension of detention prior

to charging of those arrested under s41 of the 2000 Act. The original maximum period of detention of seven days was extended to a maximum of 14 days by s306 Criminal Justice Act 2003.

The amendments have two effects. Firstly, any period of extension must be for seven days unless the application asks for a shorter period or the judicial authority (or senior judge) to which the application is made is satisfied that there are circumstances which mean that it would be inappropriate to detain the suspect for a further seven days. Secondly, the maximum period that a warrant of further detention can last in total is extended from 14 days to 28 days. Under the counter-terrorism bill currently before Parliament, it is proposed to further increase the period of pre-charge detention to 42 days.[14]

## Control orders and liberty

The Prevention of Terrorism Act 2005 repealed Part 4 of the Anti-terrorism, Crime and Security Act 2001, including s23, which the House of Lords had found to be incompatible with Articles 5 and 14 ECHR in *A and others v Secretary of State for the Home Department*.[15] The purpose of the 2005 Act, as expressed in the long title, was 'to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity'. Under s2(1) the Secretary of State may make a non-derogating control order against an individual if he '(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual'.

The obligations imposed under such control orders obviously vary. The most onerous were in issue in *JJ and others v Secretary of State for the Home Department*.[16] The obligation in that case required the individuals in question to move away from the area in which they had been living and to live in specially selected and security cleared accommodation. There they had to remain from 4pm in the afternoon until 10am in the morning (18 hours) under curfew without stepping out as far as their yards, gardens or even communal corridors. They also had to wear an electronic tag 24 hours a day and to allow the police and/or monitoring company access to the premises any time. There was also a rule that no visitors should be allowed to the premises without Home Office approval, only to be given on production of the name, address and photo identity of the would-be visitor, and a rule that the individual subjected to the control order should not agree to meet anyone in the six hours that they were allowed of their premises, again unless they had Home Office approval to do so.

Whether those obligations were a good idea or a bad idea was not the issue before the court. The issue was whether they amounted to a deprivation of liberty, as the individuals argued, or merely a restriction on movement, as the Secretary of State argued. That was a crucial distinction because when Parliament passed the Prevention of Terrorism Act 2005 it insisted that the Secretary of State should not have power to make a control order that deprived an individual of his liberty. Only courts could make such an order.

The High Court (Sullivan J),[17] the Court of Appeal (unanimously)[18] and the House of Lords (by a majority)[19] found that the cumulative effect of the obligations did deprive the individuals of their liberty. Lord Bingham, who gave the leading judgment for the majority, accepted that 'In ordinary parlance a person is taken to be deprived of his or her liberty when locked up in a prison cell or its equivalent'. However, he also accepted that it also has an autonomous meaning: that is, it has a Council of Europe-wide meaning for purposes of the ECHR, whatever it might or might not be thought to mean in any member state.

Lord Bingham proceeded on the basis that continuous house arrest may reasonably be regarded as resembling, save as to the place of confinement, conventional modes of imprisonment or detention. But he also recognised, critically, that the European Court of Human Rights made clear in *Guzzardi v Italy*[20] that deprivation of liberty may take numerous forms other than classic detention in prison or strict arrest. The variety of such forms is being increased by developments in legal standards and attitudes, and the ECHR must be interpreted in the light of notions prevailing in democratic states.

What therefore has to be considered is the concrete situation of the particular individual. Thus the task of a court is to assess the impact of the measures in question on a person in the situation of the person subject to them. Account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question. There may be no deprivation of liberty if a single feature of an individual's situation is taken on its own but the combination of measures considered together may have that result.

Applying that approach the obligations imposed by the control orders in the case of *JJ and others v Secretary of State for the Home Department* amounted to a deprivation of liberty. But a different result followed in *E v Secretary of State for the Home Department,*[21] where the individual in question was required to live at his former family home with his family (including his children) and the curfew period was for 14 hours.

## Fair trial and closed evidence

Reliance on closed material[22] is central to the control orders regime. The schedule to the Prevention of Terrorism Act 2005 provides a rule-making power applicable to both derogating and non-derogating control orders. It requires the rule-making authority to have regard in particular to the need to ensure that disclosures of information are not made where they would be contrary to the public interest. Rules so made may make provision enabling the relevant court to conduct proceedings in the absence of any person, including the controlled person and his legal representative. Provision may however be made for the appointment of a person to represent a relevant party: a special advocate whose function is to represent the interests of a relevant party but who may only communicate with the relevant party before closed material is served upon him/her, save with permission of the court. The compatibility of these provisions with Article 6 ECHR was in issue in *MB v Secretary of State; AF v Secretary of State*.[23]

Although there are numerous cases dealing with the use of closed material at the disclosure stage, there is very little guidance on the use of closed material at the 'merits' stage – ie where it is actually relied on against an individual in the determination of the substantive issue in the case. In *R (Roberts) v Parole Board*,[24] which primarily concerned the question whether the Parole Board had the power to adopt a special advocate regime, the appellant's hearing had yet to take place, and it could not at that stage be known whether, and to what extent, the Board would make a finding adverse to the applicant in reliance on evidence not disclosed to or challengeable by him. However, when the case was considered by the House of Lords, Lord Bingham doubted whether a decision of the Board adverse to the applicant, based on evidence not disclosed even in outline to him or his legal representatives, which neither he nor they had heard and which neither he nor they had had any opportunity to challenge or rebut, could be held to meet the fundamental duty of procedural fairness required (in that case) by Article 5(4) ECHR.

Lord Woolf accepted 'the overriding obligation for a hearing to meet the requirements of Article 5(4) ECHR and of appropriate standards of fairness required by domestic law' and accepted the applicant's contention that there was 'a core, irreducible, minimum entitlement' for him as a life sentence prisoner to be able effectively to test and challenge any evidence which decisively bore on the legality of his detention. He held that if a case were to arise where it was impossible for the board to make use of information that had not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing, then the rights of the prisoner would have to take precedence. The applicant had a fundamental right

to be treated fairly and what would be determinative in a particular case would be whether, looking at the process as a whole, a decision had been taken by the Board which involved significant injustice to a prisoner. In the opinion of Lord Steyn the proposed procedure would override a fundamental right of due process and would be contrary to the rule of law. Lord Rodger associated himself with certain statements of Lord Woolf, including his reference to a fundamental right to be treated fairly, but held that the House of Lords could not decide in advance whether the full hearing, with a specially appointed advocate, would meet the requirements of Article 5(4) ECHR. Lord Carswell concluded that the interests of the informant and the public should prevail over the interests of the applicant, strong though the latter might be. But he emphasised that he was making a decision in principle on the power of the board to appoint special advocates and their compatibility with Article 5(4) ECHR, and he accepted that there might well be cases in which it would not be fair and justifiable to rely on special advocates. Each case would require consideration on its own facts.

In the control order case of *MB v Secretary of State; MF v Secretary of State,*[25] the issue arose squarely because the control order proceedings had been determined adversely to the appellant in reliance on closed material. Commenting on *R (Roberts) v Parole Board* in that case, Lord Bingham said:[26]

> *I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him.*

Lord Bingham did not doubt that the engagement of special advocates in cases such as these can help to enhance the measure of procedural justice available to a controlled person. On occasion it may be possible for a special advocate to demonstrate that evidence relied on against a controlled person is tainted, unreliable or self-contradictory. But, he agreed with what Lord Woolf had said in *R (Roberts) v Parole Board*, namely that 'The use of an SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him'.[27]

The reason for Lord Bingham was obvious:[28]

> *In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is*

> *available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given.*

The task of the court in any given case therefore is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person.

That being the applicable principle a further difficulty arose in *MB v Secretary of State; MF v Secretary of State*, namely that in receiving and acting on closed material not disclosed to MB and AF, the courts below had acted in strict accordance with the Prevention of Terrorism Act 2005 and the Rules. It was suggested in argument that the relevant provisions should be read down under s3 Human Rights Act 1998 (HRA), so that they would take effect only when it was consistent with fairness for them to do so. Although Lord Bingham questioned whether s3 HRA should be relied on because any weakening of the mandatory language used by Parliament would very clearly fly in the face of Parliament's intention and because, in his view, it might be thought preferable to derogate from Article 6 ECHR, the majority thought otherwise and, on that basis, both cases were referred back to the High Court for consideration by the judge in the light of the conclusions of the House of Lords.

## The priority of prosecution?

Where there is a realistic prospect of prosecuting an individual against whom it is proposed to take preventive counter-terrorism measures, should s/he be prosecuted? The government has always insisted that the answer is 'yes'. Thus, Lord Rooker, on behalf of the government, told Parliament on 29 November 2001 (in the context of detention without trial under the 2001 Act):[29]

> *Our aim throughout has been that our first priority would be to prosecute alleged terrorists; secondly, if we cannot prosecute them, to remove them; and thirdly, failing the opportunity, wherewithal and appropriate circumstances to remove such people, to detain them.*

He added that 'if we consider that there is sufficient admissible evidence to bring a prosecution, we will seek to do so at any point of the process'.[30] Following that approach, preventative measures should only be imposed where prosecution is not possible and only after the prosecuting authorities have 'reached the view that there is insufficient evidence and that it is not in the public interest to prosecute'.[31]

Insufficient evidence in this context is a term of art. It does not mean that there is not enough material or information to persuade a jury that the suspected person is unquestionably guilty. It means that there is insufficient evidence that can be admitted under the current rules of evidence to enable a prosecution to take place. That brings into sharp relief the question whether intercept evidence should now become admissible in ordinary criminal proceedings, particularly following the publication of the Privy Council review of intercept evidence published in January 2008.[32]

The principle that prosecution is a priority is rooted in fundamental basics of due process. If an individual is charged and prosecuted for a criminal offence, he is entitled to a fair trial. Although modifications to ordinary procedures are permitted to safeguard other interests, 'the overall fairness of a criminal trial cannot be compromised'.[33] Reliance on closed material, or secret evidence, has never been accepted in criminal proceedings.

By contrast, if an individual is subjected to preventative measures, basic requirements of due process are jettisoned. The individual loses the right to know the case against him/her. S/he cannot give meaningful instructions to the only advocate who sees the secret information relied on by the court. Preventative measures can be imposed on the basis of suspected, rather than proven, facts. There is little or no chance of an 'acquittal' and there is no fixed sentence. The decision whether an individual suspected of terrorist offences should be prosecuted or, alternatively, subjected to preventative measures is thus of critical importance to all concerned. As Lord Bingham observed in *E v Secretary of State*:[34]

> *… there can be no doubt about the governing principle. Nor in my opinion can there be doubt about its importance, since the control order regime is not intended to be an alternative to the ordinary processes of criminal justice, with all the safeguards they provide for those accused, in cases where it is feasible to prosecute with a reasonable prospect of success.*[35]

However, in *E v Secretary of State* the House of Lords rejected an argument that the Secretary of State must have made a clear decision whether to prosecute or not before making a contol order. The duty is to *consult* on the issue before making a control order, not to have decided the matter. There is also a duty to keep the prospect of prosecution under review.

***Keir Starmer QC is joint head of Doughty Street Chambers and head of the criminal team at Doughty Street Chambers.***

**Notes**

1 The Council of Europe Convention on the Prevention of Terrorism.
2 Civil Liberties and Human Rights, 3rd edn, Routledge Cavendish, 2007, p1419.
3 S20(2) Terrorism Act 2006.
4 *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, 2005-6, HL Paper 75-1, HC 561-1, para 27.
5 S20(7) Terrorism Act 2006.
6 S1(4) Terrorism Act 2006.
7 S1(5) Terrorism Act 2006.
8 S2(2) Terrorism Act 2006.
9 S34.
10 S1(4).
11 S1(4)(a).
12 See n2 above, p1420.
13 [2007] EWCA Crim 243.
14 Clause 22 and Schedule 1.
15 [2004] UKHL 56.
16 [2007] UKHL 45.
17 [2006] EWHC 1623 (Admin).
18 [2006] EWCA 1141.
19 Lords Hoffmann and Carswell dissenting.
20 (1980) 3 EHRR 533.
21 [2007] UKHL 47.
22 Ie material not disclosed to the controlled person or his/her lawyers.
23 [2007] UKHL 46.
24 [2005] UKHL 45.
25 [2007] UKHL 46.
26 Para 34.
27 Para 60.
28 Para 35.
29 HL debates col 459, 29 November 2001.
30 Ibid, col 509.
31 Ibid, col 510.
32 *Privy Council Review of Intercept as Evidence*, Cm 7324, 30 January 2008.
33 *Brown v Stott* [2003] 1 AC 681, per Lord Bingham.
34 [2007] UKHL 47.
35 [14].

# Legal aid: forward to nowhere

***Roger Smith***

*This article discusses the Legal Services Commission's consultation paper on 'Best Value Tendering for Criminal Defence Services'.*

The Legal Services Commission has taken one more step towards the competitive tendering of legal aid contracts with the publication in December 2007 of a consultation paper on 'best value tendering' (BVT) for criminal defence services. Thus, an idea floated by Lord Mackay, as Lord Chancellor, close to two decades ago came that bit closer to fruition.[1] The proposal was enthusiastically endorsed by the commission's chief executive, Carolyn Regan. She argued in a foreword that '[t]he procurement of professional services, including legal services, through market-based mechanisms is common around the world'. Like much of the paper itself, this is half-true. Competitive tendering is common around the world for certain types of contracts. Relatively few jurisdictions, outside of the United States, have, however, put their faith in the kind of contracts envisaged in the paper for criminal defence work.

Technically, the paper is of a questionable standard. For example, this paper is about constraining the cost of legal aid. The one issue on which the commission might have been predicted to be well informed is the cost of the scheme. It is somewhat unfortunate that the cost of individual elements of the scheme is incorrectly stated in one of the commission's own tables.[2] The sloppiness is, however, worse than just the odd slip: it is structural. The paper is presented in the form of a choice between three options:[3]

> *We invite providers to consider which, if any, of the options set out below they believe is the most desirable.*

The options are then set out – but hardly in any kind of balanced way. Option two is to nationalise all lawyers' practices, at least as regards criminal defence work. Quite understandably, this gets only eight lines – including the acknowledgement that it 'may be difficult' to sell to the practitioners concerned. Option one, which gets a full ten paragraphs, is the obvious way forward of 'administratively setting fixed and graduated fees'. This is rejected as providing no objective comparison on price and as allowing too much regional variation. No mention is made of the small numbers of salaried public defender offices currently run by the commission. These, though otherwise apparently pointless

as a form of delivery, have the one advantage of allowing the commission inside expertise on the appropriate level of fees. Option three is the only one sensibly considered and it takes the whole of the rest of the document.

It is, of course, conventional to put some dummy options in any government consultation paper and to hustle the reader to the preferred option. It is rare, however, for the drafting of government papers to be so unsubtle. This is not a paper that presents a choice, in reality, between three options. It is a description of one option, presented effectively on a 'take it or leave it' basis. Oh, and by the way, don't bother saying you want to leave it – because, actually, we are committed to competitive tendering.

Given this inherent bias in its structure, the paper is remarkably reticent on detail. Its authors appear somewhat unfamiliar with the legal aid schemes as they work at the moment. For example, the paper asserts that there are four kinds of defence services: taking place in the police station, magistrates court, Crown Court and very high cost cases. However, magistrates court cases are conventionally divided into two distinct categories: those covered by duty schemes and those funded as stand-alone cases. There is somewhat of a difference between the two – which will further develop if the government does significantly increase the sentencing powers of the magistracy, as it has threatened to do for some time.

The paper does not dwell for too long on difficulties. For example, one of the easiest places to start with competitive tendering would be the police station and magistrates court duty solicitor schemes. However, the difficulty is that, according to the paper, 40 per cent of suspects in police stations actually choose their own lawyers. They do not want the duty solicitors who would have to be imposed on them if competitive tendering is to proceed. Competitive tendering requires, at its essence, the removal of those providers with uncompetitive tenders. So, clients will find that their choice will be restricted. The paper raises this issue in three paragraphs but does not take it very much further.

The right of choice is, of course, integral to the articulation of the right to representation in Article 6 of the European Convention on Human Rights – though the European Court of Human Rights has been prepared to limit choice to those appropriately qualified.[4] Choice has a number of aspects but one has already been the subject of litigation – race.[5] The commission itself recognises the value of choice and accepts that 'client choice creates an incentive for providers to deliver high quality services that are responsive to clients'.[6] However, it is clear that its intention is to limit the provision of services only to those who have successfully bid for police station and magistrates court work.[7] Thus, clients will be able to choose only from those solicitors whose tenders

have been accepted by the commission. This, in turn, will be decided partly by cost but also by the decisions of the commission in relation to parcelling up blocks of duty cases. The commission expressly accepts that contractors need to be limited in order to provide minimum levels of work.[8] Thus, perfectly well qualified lawyers will be excluded from being the object of a client's choice.

The commission does not make this reduction in choice explicit. Nor does it explore one of the likely consequences. It will require complicated and difficult compensatory measures to ensure that black and minority ethnic practitioners are maintained in the market. Since firms will be excluded from their livelihood as the result of failing to option a contract to continue their legal aid work, secondary litigation is inevitable to follow the existing challenges to the commission's practice.[9]

The Legal Services Commission dealt at greater length with the issue of the contribution of clients to quality in three paragraphs in a document issued simultaneously with the BVT consultation, *Assuring and Improving Quality in the Reformed Legal Aid System*. This states that the commission is 'currently considering ways in which' the deficit for clients in the information they have about the quality of legal aid suppliers may be addressed.[10] It is the commission's intention to make more information available so that clients 'can make better-informed decisions' on the choice of their lawyer. This is somewhat difficult to square with the proposed BVT contracting of legal aid where clients will, in fact, be directed to choose lawyers only from a shortlist prepared by the commission in order to create an artificial market. The point is that if clients retain the right of choice between practitioners to take a case then the commission cannot guarantee volumes of work to practitioners with a successful tender. It is only in relation to duty solicitor markets that the commission has the potential to guarantee levels of work.

## Comparative experience

For all Ms Regan's opening reference to comparative experience of competitive tendering elsewhere, the consultation paper fails to show much interest in this experience and there is no reference to any research – either in this country or anywhere else. This is all the stranger because the Legal Services Commission actually funds a world-class Legal Services Research Centre that specialises in cross-national comparisons and holds a biennial international conference on civil legal aid.

This absence of interest in overseas experience is regrettable, particularly as there are a number of relevant aspects to US experience which might have been noted by the commission. For a start, there is a well developed literature, including a study by the US Department of Justice published in 2000[11] and the reports of

the Oversight Committee established by the Appellate Division of the New York Supreme Court.[12] There is also the particular experience of New York where a somewhat controversial contracting scheme – with somewhat mixed long term results – was introduced in 1995 with the intention of breaking the monopoly then held by the Legal Aid Society.

Some of the US experience of contracting is not that helpful to the commission's argument – though it might be too cynical to suggest that this has led to its suppression. Not all empirical studies find cost savings. For example, Clark County Washington found – as summarised in a US Department of Justice report – that:[13]

> *Costs rose when the county moved to a contract system. In part, the increase resulted from an unforeseen rise in the number of felony cases. The study also noted, however, a decline in the quality of representation, including a decline in the number of cases taken to jury trial, an increase in guilty pleas at first appearance hearings, a decline in the filing of motions to suppress, a decline in requests for expert assistance, and an increase in complaints received by the court from defendants.*

In addition, there is a line of decided cases concerning issues of quality in the courts of states responsible for contract programmes.[14] As a consequence, national standards were developed by the American Bar Association and others for ensuring quality representation specifically in contracted schemes.[15]

Research reported by the US Department of Justice has led to the emergence of a set of lessons from experience that are widely accepted in the US.[16] In addition, it is worth supplementing these with the findings of a Nuffield Foundation study undertaken in 1998.[17] It is clear, for example, that certain types of contract models carry more risk than others. In particular, this applies to contracts solely based on cost (not the LSC proposal) and those 'with financial disincentives to investigate and litigate cases'. Requests for proposals should establish guidelines, qualifications and standards. National enforceable standards are needed. In particular, objective standards of caseload maxima are important. Monitoring and evaluation are important. All these were findings of the US Department of Justice. In addition, the Nuffield-funded study found, as one might expect, that the major determinant of high quality services is a high level of resources. It also suggested that contracting is best suited to routine caseloads and tends to lead to cases being dealt with as routine. In the US, contracting is facilitated by the fact that a much higher percentage of criminal cases are negotiated as plea bargains than in the UK. Another lesson from the US was that there should be separate funds for the disbursement of expenses, such as those on experts, and that contracting works best in a co-operative environment between funder and

providers. Some states went to considerable lengths to form a relationship with their contractors. Oregon was a particularly good example of this. All agreed that there needed to be strong professional and independent support for the integrity of the lawyer-client relationship.

## The role of the commission: the perils of micro-management and market-making

The commission's paper fails to consider its own role as the market-maker under BVT proposals. This is what it becomes under a tendering scheme. The commission will determine the level of competition – rather than, as now, the client. This is a heavy responsibility. The commission neither controls the flow of work nor the preference of clients. Work will rise and fall according to government policy and court practice. US experience is that contractors need some assistance from their funder in order to deal with peaks and troughs of work. The commission will effectively be making the decisions on expansion or contraction of resources.

However, as the commission acknowledges, it can control only access to the work and not work itself. The commission's responsibilities will include not only the initial establishment of contracts but also the management of contracts during their period of operation. For example, the commission will need to deal with firms that split, staff who leave etc. If contracts are to be somewhere like their current length of three years, it seems fanciful to suppose that firms will invest in training new solicitors. In that case, the commission will have to play an active role in managing and funding the provision of new staff and it will be very important – if perhaps unlikely – that, as the commission hopes, 'a post BVT environment continues to incentivise investment in new people'.[18]

There is only a limited amount of work that is directly under the control of the commission and which it could auction in a traditional way. There are options as to the units of work for which bidding could required. These could be defined by time eg duty police station cover on Monday nights; per case taken (as now); or as an appropriate percentage of an overall arbitrarily determined cost. If on the basis of price per case, the number of cases would not be under the control of the commission. What is more, the proportion of cases undertaken by suspects who choose their 'own solicitors' is, as we have seen, as high as 40 per cent. The paper does not make clear how these cases might be dealt with and it is difficult to see how bidding might work for cases where the client retains the right to instruct a solicitor. Even for a big firm, it would be difficult to estimate in advance the extent of the obligation and, therefore, a fair value for it. It may be that the commission envisages the end of a right to be paid under the Criminal Defence Service for 'own solicitor' work but, if so, that should be explicit and may require statutory amendment. This has wider implications.

One innovative area where best value tendering might possibly be used would be in relation to a centralised system of control of disbursement costs – were one ever to be introduced. One of the lessons from US experience is that contracting tends to encourage insufficient use of expert evidence as lawyers limit the work that they do and seek to maximise their own revenues. It may help to protect costs for disbursements by separating them out in a separate fund, provided that the commission does not thereby restrict their use to a greater extent than now. Thus, a workable system might well be a decision-making board of practitioners that decides whether an expert may be used and then a commission-run scheme for accrediting an approved list of experts with whom the commission agreed fixed fees or instituted a competitive bidding process. This could operate independently of whether price competitive tendering were established for legal practitioners.

A best value tendering system has been used in relation to very high cost cases though, in fact, it was carefully introduced in a controlled way which effectively amounted to requiring agreement to a suggested rate of payment. This showed a somewhat understandable nervousness about the process. If, however, ideologically committed to expanding competitive tendering, the commission could require bidding for units of work in this same way.

## Another elephant in the room

The consultation paper makes no reference to the issues that have bedevilled the US experience of contracting – the overload of lawyers by cases and the exodus of experienced practitioners. This is the obvious economic hazard of a contracting model. The commission speculates that it might have to set a minimum bid level – as it did for very high cost cases.

The commission should agree with the professional bodies acceptable workload standards. What is more, quality assurance needs to expand to ensure that practitioners are maintaining an approach of 'active defence'. For example, information needs to be monitored on the ratio of non-guilty to guilty pleas and on things like contested bail applications. Under BVT, practitioners will lose the incentive to impress their clients with their activity: the managerial imperative will become the need to impress the commission with the lack of cost. Any tender should have requirements as to maximum caseloads for staff of varying degrees and specifications of an appropriate level of experience.

There has been a vigorous debate in the United States about the maximum acceptable caseload for public defenders and contracted providers. The commission needs to anticipate the temptation for bidders to overload themselves and their staff in an attempt to make maximum profit out of a low bid. This is absolutely foreseeable and both the American Bar Association and

the National Legal Aid and Defenders Association in the US have been heavily involved in seeking to establish adequate safeguards.

## The way forward

The first mention of reducing the number of practitioners by competition was made in a consultation paper on contracting of legal advice issued by the then Legal Aid Board in 1988.[19] A white paper issued by the Conservative Lord Chancellor, Lord Mackay, in 1996 made an early reference to the Board needing to get the 'best value for money' and called for an 'element of competition' in the grant of legal aid contracts.[20] Lord Mackay's policy was then endorsed by Lord Irvine and re-endorsed by successive external reviews from that of Sir Peter Middleton in 1997 to Lord Carter in 2006.

Given the politically bipartisan nature of the policy and the wealth of reviewer endorsement, it may be significant that the current consultation paper is still heralding competitive tendering as the way forward, rather than saluting its successful implementation. Compulsory competitive tendering was almost introduced in January 2006 for criminal defence contracts in London. The Legal Services Commission consulted widely on its potential implementation.[21] However, Lord Carter's review provided an excuse for postponement.

Back in the early 1990s, the Legal Aid Board, which had initially raised the idea of compulsory competitive tendering, ultimately resiled from it:[22]

> *We would not seek to limit the number of franchisees to any category of law or geographical area.*

It seems apparent, therefore, that, for all the confidence with which the idea of BVT is advanced, there has been a degree of rather sensible trepidation as to how it actually might turn out. JUSTICE would commend a considerable degree of caution. Much of the commitment to BVT may be ideological rather than practical.

## Conclusion: requirements for extension of BVT

The commission appears hell-bent on implementing best value tendering and regards the opportunity for logical discussion as past. However, if we must have competition in this form, then the following set out what are surely the minimum conditions for its successful introduction.

***1. Acceptance that BVT is of use only in limited areas of the scheme and that its introduction should be carefully piloted and researched by the commission's research facility***

The commission would do well to start with the duty solicitor elements suggested above; run a pilot for a year or two and progress slowly. It is not apparent that BVT will, in fact, deliver savings. Costs control can be much more sensitively undertaken through control of costs per case. Regional variations should be progressively ironed out. The commission has a well respected Legal Services Research Centre. It is rather odd that most of its work relates to the need for civil cases and that its resources are not being deployed in this major and contentious area of legal aid reform.

***2. There should be retention of client choice of appropriately qualified lawyer***

Clients should, as a matter of principle, retain the right to choose their lawyer, provided that they are appropriately qualified, in cases of any complexity ie those beyond the duty schemes. This was the essence of the 'franchising' scheme developed initially by the Legal Aid Board. It means that the commission cannot guarantee contractors volumes of cases and, in practice, means that the commission would be better to develop fixed and graduated fee schemes open to all appropriately qualified practitioners.

***3. There should be separation of disbursements***

Disbursements might be separated from remuneration. The decision on authorising payment should be made by an independent board of expert practitioners. The commission may, however, wish to use BVT as part of the process of putting experts on approved lists.

***4. Particular attention should be given to client choice of black and minority ethnic (BME) lawyers***

If the commission proceeds with BVT, then contracts should include appropriate provisions to ensure sufficient diversity for clients to be able to have a breadth of choice eg so that a member of an ethnic minority has the possibility of choosing a lawyer of their own minority with whom they feel comfortable. This may require some 'out of area' provision. It will require considerable management by the commission. The commission's duty must be to ensure that it facilitates a client who wishes to choose an appropriately qualified BME representative.

***5. There must be protections against lawyers overloading themselves with cases to the detriment of their clients.***

This is a major lesson from the United States.

***Roger Smith is Director of JUSTICE.***

**Notes**

1 *Management Statement for the Legal Aid Board*, Lord Chancellor's Department, HMSO, 1994.
2 Table 8, annex 1, p81.
3 Para 2.3.
4 *Croissant v Germany* (1993) 16 EHRR 135.
5 See *Law Society* press release, 20 July 2007.
6 Para 4.35.
7 Para 3.8.
8 P26, preamble to question 16.
9 See *Law Society and Dexter Montagu and partners v Legal Services Commission* [2007] EWCA 1264.
10 Para 36.
11 *Contracting for Indigent Defense Services: a special report*, US Department of Justice, April 2000.
12 Eg *First Department Indigent Defense Organization Oversight Committee Report for 1998*.
13 See n11 above, p10.
14 Eg *State v Smith*, Arizona Supreme Court, 1984; *People v Barboza*, California Supreme Court 1981, *Bailey v State of South Caroline*, South Caroline Supreme Court 1992; *Wilson v State*, Mississippi Supreme Court 1990, *State v Lynch*, Oklahoma Supreme Court 1990.
15 Eg *ABA Standards for Criminal Justice: providing defense services*, American Bar Association, 1992; *Performance Guidelines for Criminal Defense Representation*, National Legal Aid and Defender Association, 1997.
16 Eg observe the fit between the conclusions in the Department of Justice published study in 2000, n11 above, and the conclusions of Roger Smith, Legal Aid Contracting: lessons from North America, Legal Action Group, 1998.
17 Published by the Legal Action Group, ibid.
18 Para 4.76.
19 This proposed a reduction in the number of offices undertaking legal advice work from over 11,000 to just over 2,000 by excluding those below a minimum turnover. *Second Stage Consultation on the Future of the Green Form Scheme*, Legal Aid Board, May 1989.
20 *Striking the Balance: the future of legal aid in England and Wales*, Lord Chancellor's Department, Cm 3305, HMSO, 1996, para 1.17.
21 Including *Improving value for money for publicly funded criminal defence services in London*, January 2005.
22 *Annual Report 1993/4*, Legal Aid Board, HC 435, HMSO, para 6.11.

# Book reviews

## The Just War Tradition: Ethics in Modern Warfare

*Charles Guthrie and Michael Quinlan*
Bloomsbury Publishing Plc, 2007
**64pp £10.00**

Guthrie and Quinlan provide a brief examination of the just war tradition, which was formulated by Christian thinkers and is based on 'practical reason and humanity-wide values, not scriptural or institutional authority.' It has been supported by Augustine of Hippo and Thomas Aquinas. The premise of the tradition is that killing and injuring are wrong, but it recognises that there are situations in which war is a necessary evil. From this recognition, the authors provide an ethical framework for 'moral' warfare that emphasises consideration of the adversary's humanity.

The main considerations for a morally justified war are jus ad bellum, which refers to the morality of going to war in the first place, and jus in bello, which deals with the morality of how the war is waged. Jus ad bellum consists of six criteria: a just cause, a proportionate cause, the right intention, the right authority, a reasonable prospect of success, and war as a last resort. Jus in bello is concerned with two principles: discrimination (deliberately attacking the innocent is forbidden) and proportionality (the harm should not outweigh the benefits). Included within the idea of proportionality is the jus post bellum duty – the obligation to face up to the war's effects on the people and country once military operations end.

The authors refer to recent events as examples of how the tradition's criteria are applied: the 2001 US action to overthrow the Taliban in Afghanistan, and the 1999 NATO intervention in Kosovo, to name two. However, the authors generally avoid taking positions on whether these events may ultimately be characterised as 'just'.

The just war tradition is particularly applicable to current events in light of the military operations taking place following the 2003 invasion of Iraq. Upon consideration of the invasion under the criteria set out by the tradition, it becomes apparent that the ideas remain highly relevant despite its centuries-old roots.

Specifically, the authors question whether the invasion was based on a proportionate cause, which involves consideration of comparative probabilities. One reason advanced for the invasion's 'just cause' was that terrorists could acquire weapons of mass destruction and use them to inflict harm in the US. However, many argue that the imminence of the threat was low and that it 'depended on a chain of hypotheses of which the combined probability could not have been regarded as very high.' The likelihood that the invasion would cost hundreds of lives and inflict massive damage was much greater. Thus, whether the costs incurred by the invasion outweigh the good is a subject of controversy. Other aspects of the invasion may be questioned as well, such as whether all reasonable, peaceful avenues

were pursued first, and whether the actions, taken without explicit Security Council approval, were based on 'right authority'. Thus, there is a strong argument that the 2003 invasion was not 'just'.

Overall, the authors provide a concise overview of the ethical considerations for warfare advanced by the just war tradition. The book claims to focus on humanitarian values, but also states that the costs of war should not always be measured by lives lost or physical damage. It also acknowledges some of the problems inherent in the tradition. For example, both sides to a conflict will likely believe that their cause is just, and this requires a determination of whose position is 'more right'. There is also an issue of what circumstances justify pre-emptive attacks. Thus, application of the tradition's criteria is largely open to debate and susceptible to differing interpretations. Nevertheless, the book provides useful guidelines in assessing the justifications for entering war in modern times.

**Joan Sim, intern, JUSTICE**

## Human Rights Act Toolkit (second edition)

*Jenny Watson and Mitchell Woolf*
Legal Action Group, 2008
**268pp £30.00**

Legal Action Group have published the second edition of the Human Rights Act Toolkit, a guide to using the Human Rights Act 1998 (HRA) in real-life situations.

The publication is a practical one, aimed at non lawyers – specifically non-legal public body and voluntary sector staff working in areas such as health, housing, education, planning, social services, transport, criminal justice, residential care and equalities who have no prior knowledge of the HRA.

Part one of the book contains specific checklists (set out in question and answer format) to use when developing new human rights compatible policies and practices or when auditing existing ones, or when making decisions in accordance with the HRA. The checklist focuses on five steps – identifying the context of the policy area or decision making process; the human rights involved in this area or process; how these rights need to be protected and whether a positive obligation arises; the concept of proportionality and whether the rights need to be balanced; and a consideration of the impact on the organisational process concerned. The book details two mini checklists as examples, one looking at the right to a fair trial and the other at discrimination, as well as case examples looking at a planning process and on re-housing a sex offender.

The second part of the book looks at the law – providing a detailed but accessible explanation and analysis of the HRA, as well as the European Convention on Human Rights (including a breakdown of the specific Convention rights incorporated by the HRA and the human rights principles which have developed through the jurisprudence of the European Court of Human Rights) and other international human rights law treaties.

> *The law is too important to be left to lawyers. Nowhere is this more true than in the field of human rights.*

So wrote Helena Kennedy QC in her foreword to the first edition of this

publication. As we now approach eight years since the HRA came into force, amidst a continuing debate about the value and 'usefulness' of human rights and the HRA itself, these words, and this publication, are a powerful reminder that we have to focus not just on the principles in the discussion about human rights, but also on their pragmatic use in both policy and practice in order to develop and maintain a human rights culture in society.

**Rachel Brailsford, research assistant, JUSTICE**

## The Legend of St Yves

*Bryan Gibson*
Waterside Press, 2008
**96pp £9.50**

This short publication, with a foreword by Marcel Berlins, tells the interesting tale of the man generally described as the patron saint of lawyers, St Yves. Born Erwan Helouri, in 1253 in Brittany, he studied philosophy, theology and canon law in Paris with Thomas Aquinas and civil law in Orléans with Peter de la Chapelle before becoming an advocate, acting for the poor and vulnerable in society, often unpaid, then later a magistrate. The author argues that the story of St Yves deserves greater recognition and that he should be known as not just the patron saint of lawyers, but as a symbol of law, justice and human rights.

**Rachel Brailsford, research assistant, JUSTICE**

# JUSTICE briefings and submissions

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Available at www.justice.org.uk

1 *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11*, November 2007;

2 A British Bill of Rights: Informing the debate report and *A Bill of Rights for Britain?* leaflet, November 2007;

3 Joint response with Liberty to the United Kingdom's sixth periodic report under the International Covenant on Civil and Political Rights to the United Nations Human Rights Committee, November 2007;

4 Joint submission with Liberty on the universal periodic review of the United Kingdom to the United Nations Human Rights Council, November 2007;

5 Response to the consultation on the future of the Attorney General, November 2007;

*6* *Multi-dimensional discrimination: Justice for the whole person* leaflet, November 2007;

7 Briefing on the Criminal Justice and Immigration Bill for second reading in the House of Lords, January 2008;

8 Supplementary briefing on clause 111 of the Criminal Justice and Immigration Bill for the House of Lords, January 2008;

9 Suggested amendments to Parts 1-7 of Criminal Justice and Immigration Bill for committee stage in the House of Lords; February 2008;

10 Response to Legal Services Commission consultation on 'best value tendering' in criminal legal aid cases, February 2008;

11 JUSTICE Student Human Rights Network New Year electronic bulletin; February 2008;

12 Briefing on the Counter-Terrorism Bill for second reading in the House of Commons, March 2008;

13 Joint briefing with Liberty, the British Institute of Human Rights, Help The Aged and Age Concern on the Health and Social Care Bill for second reading in the House of Lords, March 2008.

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