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Contents

Editorial

- Radical change 4
Roger Smith

Papers

- Miscarriages of justice: a challenging view 6
Laurie Elks

- 'Free to lead as well as to be led': section 2 of the Human Rights Act and the relationship between the UK courts and Strasbourg 22
Eric Metcalfe

- Towards a codified constitution 74
Stephen Hockman QC, Professor Vernon Bogdanor et al.

- Devolution and human rights 88
Qudsi Rasheed

Articles

- The European Court of Human Rights: time for an overhaul 110
Jodie Blackstock

- Policing, accountability and the rule of law: proposals for reform 121
Sally Ireland

Book reviews 127

- Repairing British Politics: A Blueprint for Constitutional Change
Richard Gordon

- Youth Justice and the Youth Court: An Introduction
Mike Watkins and Dianne Johnson

- Blackstone's Criminal Practice 2010
Lord Justice Hooper and David Ormerod (eds)

- Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform
Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag

- The Judicial House of Lords: 1876-2009
Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds)

JUSTICE briefings and submissions

- 1 November 2009 – 31 March 2010 135

- Cumulative Index 2004-10 137

Editorial

Radical change

This edition is dominated by issues relating to the constitution. This is, in part, the result of proposals to repeal or substantially amend the Human Rights Act (HRA). But, it is also wider than that. Lord Mackay of Clashfern, then Lord Chancellor, once said of legal aid that ‘we have gone about as far as we can without radical change’. The same could be said of our constitutional arrangements. On issues from the overload of the European Court of Human Rights to the pressures on the devolution settlement, further reform will be necessary, whatever the next government, to accommodate the pressure for change.

This issue contains four articles on the constitution. Eric Metcalfe considers the concept of ‘judicial dialogue’ relevant to whether s2 HRA should be amended. Is it necessary to alter wording that encourages the domestic courts to ‘take into account’ decisions of the European Court of Human Rights? Jodie Blackstock looks at how the Strasbourg Court might be reformed. Qudsi Rasheed is the author of JUSTICE’s paper on the legal aspects of the relationship between devolution and possible amendment of the HRA. Finally a group formed by Stephen Hockman QC when he was chairman of the Bar publishes the questions that it thinks necessary to ask of any proposal significantly to advance that part of our constitution which is written. In addition among the book reviews we look at Richard Gordon’s [Repairing British Politics: A Blueprint for Constitutional Change](#).

Other contributions include a paper by Laurie Elks, a former member of the Criminal Cases Review Commission, on miscarriages of justice. This is a long-time concern of JUSTICE that also raises the constitutional issue, albeit narrower than others, of the approach of the Court of Appeal in such cases. Sally Ireland considers police accountability and discusses proposals for reform of the methods by which police officers and forces should be accountable to elected officials.

As members of JUSTICE will be aware, we have taken unprecedented care to consult them on what kind of bill of rights would be acceptable as a replacement for the HRA. Interestingly, the Equality and Human Rights Commission have just gone through the same exercise. They came up with four principles to underlie any reform.

First, any bill of rights that replaces the HRA should not be brought into force unless it contains at least the same levels of protection of rights and mechanisms available under the HRA, and complies with obligations under international

treaties. Second, the government and any future government should ensure that the process of developing any bill of rights involves and includes all sectors of society; that the process and result creates a feeling of ownership in society as a whole. Third, the government should actively promote understanding of the HRA, the European Convention on Human Rights (ECHR) and the rights they protect, as well as countering any misconceptions. Finally, the recommendations from the Commission's Human Rights Inquiry shall inform its response to any bill of rights.

These are not that distant from the seven conditions highlighted by JUSTICE:

1. Any bill of rights must attract a degree of wide consensus, not just of lawyers and politicians but also the public at large;
2. The process of agreeing a UK bill of rights, and its content, must reflect the increasingly devolved nature of the United Kingdom;
3. A UK bill of rights should be 'ECHR plus';
4. Any domestic bill of rights should be compatible with the international obligations of the UK;
5. The key enforcement mechanisms of the HRA should be re-enacted;
6. Any statement of responsibilities or duties must not detract from the protection of human rights;
7. The scope for reform should not be oversold.

The last point is important. Certain elements in the media have taken against the HRA: *The Sun* and *Daily Mail* openly campaign for its repeal. But, the debate needs to be conducted within the parameters of what is possible. All major political parties agree that the UK should remain a member of the Council of Europe and hence (necessarily) subject to the ECHR. In that case, the scope for reform is extremely limited. Unpopular and minority causes will still rightly be protected. The ECHR will still apply. The European Court of Human Rights will still require compliance with its judgments. There is little point in a bill of rights which is sold to the public on the basis of limiting the ECHR, but which turns out to be ineffective. No doubt, we will be returning to this issue in due course.

Roger Smith is Director of JUSTICE.

Miscarriages of justice: a challenging view

Laurie Elks

A recent work edited by Dr Michael Naughton and incorporating papers by members of the Innocence Network UK argues that the Criminal Cases Review Commission (CCRC) has not fulfilled the expectations of JUSTICE and others and frequently fails the innocent. This article discusses the ways in which the intentions of the Runciman Commission to establish a commission that would assist victims of miscarriage have been watered down both in the Criminal Appeal Act 1995 and in subsequent case law where the Court of Appeal has concentrated on the sufficiency of trial procedures in priority to the possibility of innocence. The Court has also increasingly favoured an 'atomistic' approach to the impact of new evidence. Whilst the broad thrust of Naughton's critique is not accepted, it is suggested that the role of the CCRC might be due for review with greater scope being given for the Commission to refer cases where it is concerned about possible miscarriages of justice.

The creation of the Criminal Cases Review Commission (CCRC) is one of JUSTICE's greatest achievements. Tom Sargant, JUSTICE's founding secretary, worked ceaselessly for the establishment of an independent body to review miscarriages of justice. Meanwhile, JUSTICE itself took on some 200 cases annually using pro bono lawyers to pursue the necessary casework. The appointment of the Runciman Commission and the subsequent creation of the CCRC represented the successful culmination of a long campaign. Despite some initial reservations JUSTICE concluded that the CCRC was fit for purpose and discontinued its own casework, transferring its resources to other campaigns.

A new book, [The Criminal Cases Review Commission: Hope for the Innocent?](#)¹ edited by Michael Naughton of Bristol University, radically challenges this comforting view. The work is the outcome of a symposium of the Innocence Network UK (INUK) and contains papers contributed by practitioners, campaigners and academics seeking to show that the CCRC is bound up in legal technicalities and often fails the innocent victims of miscarriage.

Naughton argues that 'the establishment of the CCRC signalled the silencing of innocence as an organising counter-discourse against miscarriages of justice amid a mistaken widespread belief that it was indeed the body recommended by the [Runciman Commission] and JUSTICE to remedy the wrongful conviction of innocent people'.² In the light of the CCRC's deficiencies, JUSTICE's decision to discontinue independent casework was premature and INUK has been set up to provide a casework service focused on innocence, with law students providing the footwork once contributed by JUSTICE members. Whilst not necessarily averse to working through the CCRC,³ Naughton argues that casework for the

innocent may sometimes need to bypass the flawed CCRC/Court of Appeal route, for instance by arguing for the exercise of the royal prerogative of mercy.

In claiming that the CCRC has abandoned the innocent, Naughton does scant justice to the formidable difficulties of defining either 'miscarriage of justice' or 'innocence' and his views on this subject have been subject to forceful criticism.⁴ Much as one would wish it otherwise, innocence is only exceptionally clear, tangible and certain. The identification of failures of process and 'legal technicalities' may sometimes be as close as it is possible to get to identifying a miscarriage of justice in practice. Furthermore, as I have argued elsewhere,⁵ Naughton's hypothesis goes further than the individual papers in his book (which contain various criticisms of the procedures and methodology of the CCRC) warrant.

Nevertheless, having spent ten years as a CCRC Commissioner, it appears to me that the reassertion of the Court of Appeal's role, post Runciman, as a court of review, and its sometimes restrictive view of CCRC referrals, gives colour to some of the concerns expressed by INUK members in Naughton's work. The discussion which follows outlines ways in which the expectations of JUSTICE have been pared down by the statutory test introduced in the wake of Runciman and its subsequent interpretation.

The Runciman 'settlement'

Runciman had at the core of its remit the review of miscarriages of justice and made four major recommendations for the rectification of such miscarriages for the future.

A revised test of safety

Runciman proposed that the complex provisions of s2 Criminal Appeal Act 1968 (the 1968 Act) be replaced by a simple formulation: that the correct approach is for the court to decide whether a conviction 'is or may be unsafe'.⁶ Runciman drew a clear distinction between cases where the Court of Appeal (the Court) finds that a conviction *is* unsafe; which should be quashed without more, and ones where it finds that the conviction *may be* unsafe; where a retrial should be ordered if practicable.

Lurking doubt cases

Runciman received conflicting evidence about the extent to which the Court applied in practice the 'lurking doubt' principle first formulated in *Cooper*.⁷ Submissions that the Court was amenable to quashing convictions on the basis of lurking doubt were contradicted by the evidence of practitioners and the research findings of Kate Malleson⁸ suggesting that the Court rarely quashed convictions on this ground. Runciman suggested that where 'on reading the transcript and hearing argument the Court of Appeal has a serious doubt about the verdict, it should exercise the power to quash'⁹ and recommended that the

redrafted section 2 should make it clear that lurking doubt constituted a ground of appeal irrespective of the absence of any mistake of law or irregularity at trial.

Admission of new evidence

Runciman recommended a review of section 23 of the 1968 Act which defines the powers of the Court to receive fresh evidence on appeal. Runciman thought it arguable that the Court had construed these powers too narrowly and stated that: 'the court must be alive to the possibility that the fresh evidence, if true, may exonerate the appellant or at least throw serious doubt on the conviction.'¹⁰

An independent review body

JUSTICE had long argued for such a body which it foresaw standing outside the normal appellate system. In the report of the Waller Committee, JUSTICE argued for an independent body, not bound by judicial rules of evidence and reporting to the Secretary of State.¹¹ The Secretary of State would be bound to report on actions taken in response to reports received by him and the Waller Committee gave emphasis to the political accountability of the minister.

Runciman rejected the suggestion that there should be any form of separate jurisdiction for miscarriages of justice and 'ordinary' appeals (which, it must be conceded, would have been extremely problematic) and opted for a review body embedded within the appeal system and subordinate to the Court. It would refer cases to the Court where 'there were reasons for supposing a miscarriage might have occurred.'¹² Runciman made this recommendation in the presumption that the test of safety would be altered to favour victims of possible miscarriages (the words *might have* quoted above carry particular weight in this context). This was a reasonable presumption given that it had been concern over the Birmingham Six and other miscarriage cases that had given rise to Runciman's appointment in the first place. What Runciman almost certainly did not consider was that the subordinate role of the new body made it hostage to any decision to water down the changes to the definition of the test of safety it had proposed.

Implementation of the Runciman Report: the Criminal Appeal Act 1995

This is not the place to discuss in detail the interesting semantics of the debates leading to the Criminal Appeal Act 1995 (the 1995 Act)¹³ but three principal points should be noted.

The new test of safety

In bringing forward the Criminal Appeal Bill, the government proposed the test suggested by Runciman: that the Court shall allow an appeal against conviction if they think that the conviction is *or may be* unsafe. The italicised words were dropped after it was urged that the power of the Court to quash convictions

which *may be* unsafe already existed as a result of the decision in *Cooper* making the words redundant (and possibly also tautological).¹⁴ It was also suggested that the new Lord Chief Justice, Lord Taylor, would ensure that the Court would apply a liberal approach to miscarriages cases. This placed a touching (and it is proved misplaced) faith that a liberalising lurch in the constitution of the Court would be sustained for the future.¹⁵

In the outcome, the simplified section 2 (shorn of the words 'or may be') was deemed to preserve the pre-existing law. In the Standing Committee, the Minister of State said: 'the Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought and they believe that the new test re-states the existing practice of the Court of Appeal.'¹⁶ As Professor Smith pointed out this statement gave strongly persuasive force to the argument that the law stood where it had previously been.¹⁷ This was judicially affirmed in a number of cases.¹⁸ In *Hickey and others* Roch LJ, applying the new test of safety, observed:¹⁹

This Court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction.

He continued:

Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.

The appellants' convictions were quashed due to trial irregularities, in particular the unexplained rewriting of police interviews established by ESDA tests. *Hickey* concerned the murder of the newspaper boy Carl Bridgewater – a case which had attracted much public interest. Giving judgment, Roch LJ told the serried ranks of the press present that, far from declaring the appellants innocent, 'suspicion will remain that these men, or some of them, were the perpetrators of these offences.' Nevertheless, the principles of justice required that the convictions be quashed.

Despite the liberality of Roch LJ's statement, particularly the second part of it, the approach he set out contained the seed of the problem that concerns Naughton. The statement that 'the integrity of the criminal process is the most important consideration for the Court' leads readily to the proposition that just as the convictions of the 'possibly guilty' should be quashed where the trial has been marred by irregularity, so the convictions of the 'possibly innocent' should be upheld if the jury has reached its verdict at the conclusion of an impeccable trial. The nuance sought by Runciman, to establish a system for

redress of convictions where a miscarriage of justice *might have* occurred, sits ill with a system of review where the 'integrity of the criminal process' is the central point of concern.

The role of the CCRC

Section 13 of the 1995 Act provides simply that the CCRC shall not refer a conviction to the Court 'unless [it considers] that there is a real possibility that the conviction ... would not be upheld were the reference to be made.' The test gives the CCRC no scope to make a referral in order to raise concern that a miscarriage of justice *might have* occurred, unless the referral also gives rise to such a 'real possibility'. The CCRC is more circumscribed in this respect than the Home Secretary who could previously refer convictions where he *thought fit* enabling him to make a 'contrarian' referral of a suspected miscarriage irrespective of the likelihood that the Court would actually quash.²⁰

This legal test explains the statement (derided by Naughton) which has appeared on the CCRC's website for many years: 'We do not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of an original decision.'²¹ This statement is somewhat misleading given that admissible fresh evidence to show that a person is innocent provides unimpeachable grounds for demonstrating that a conviction is unsafe. Nevertheless, it is clear that the want of safety of a conviction cannot necessarily be equated with innocence and to this extent Naughton's statement that the CCRC is not exactly the body that JUSTICE campaigned for arguably has some force.

The CCRC's approach to new evidence

Since the CCRC may only refer a conviction on the basis of a real possibility that the Court will quash, it can only do so on the basis of evidence which there is a real possibility that the Court will admit. Therefore, the CCRC must predict whether the Court will exercise its power under section 23 of the 1968 Act to admit the new evidence, a point confirmed by the Divisional Court in *Pearson*.²² Specifically, the Court may decline to receive evidence having regard to the fact that they consider that (a) it is not capable of belief; (b) it does not afford any ground for allowing the appeal; (c) it would have been inadmissible at trial; or (d) there is no reasonable explanation for the failure to adduce the evidence at trial.²³

These exclusions are particularly contentious in the area of expert evidence. The Court has a presumption against receiving fresh expert evidence to improve or amplify an expert forensic case put forward at trial (the 'bigger and better expert').²⁴ Thus in *Kai-Whitewind* the Court stated:²⁵

The fact that the expert chosen to give evidence by the defence did not give his evidence as well as it was hoped ..., or that parts of his evidence were

exposed as untenable thereby undermining confidence in his evidence as a whole, does not begin to justify the calling of further evidence, whether to provide "substantial enhancement" of the unsatisfactory earlier evidence, or otherwise. Where expert evidence has been given and apparently rejected by the jury, it could only be in the rarest of circumstances that the court would permit a repetition, or near repetition of evidence of the same effect by some other expert to provide the basis for a successful appeal.

This presumption will be overborne by the Court on a good day but it is not possible to predict with confidence when it will do so.

This puts the CCRC in a difficult position. Poor forensic defence work is a common problem at trial and defence lawyers are often poorly placed to select the best expert at the start of the case.²⁶ I would argue that the CCRC should be liberal in exercising its predictive power to assume that the Court *will* receive relevant and cogent new evidence irrespective of any normative presumptions to the contrary. The CCRC has generally been resourceful in seeking out fresh expert evidence and indeed some of its referrals have extended the scope of expert evidence which the Court has been willing to receive.²⁷ Nevertheless, the judgment may be a difficult one and Campbell Malone argues with some force in Naughton's book that the CCRC has been too ready on occasions to presume that the Court would not receive expert evidence, sometimes being less liberal than the Court itself.

Limitations imposed by the Court on the CCRC's effectiveness

The CCRC's early referrals were enthusiastically welcomed by the Court and its decision in the posthumous appeal of *Derek Bentley*²⁸ was both notable and unexpected. The Court quashed the conviction principally due to the prejudicial summing-up of Goddard LCJ. This ground of appeal had been rejected at B's original appeal but the Court considered it unconscionable that the conviction should stand and propounded the doctrine of 'modern standards of fairness' in wide terms. This paved the way for numerous pre-PACE convictions to be referred and quashed both in England and Wales²⁹ and in Northern Ireland³⁰ due to failure to comply with modern procedures – particularly the protection of vulnerable suspects from oppressive interrogation.

However, it is perhaps fair to say that the Court has subsequently wearied of the CCRC's referrals and has not hesitated to administer a prefectorial ticking off when it considers that the Commission has overreached itself.

Limitation of the CCRC's jurisdiction

In a number of cases, the Court has sought to limit referrals by circumscribing the CCRC's effective jurisdiction.

Sentence-tariff cases

The 1995 Act enables the CCRC to refer sentence cases on the basis of ‘an argument on a point of law, or information’ not previously raised in trial or appellate proceedings. Although the Court is willing to entertain first-time appeals on the basis of disparity between the tariff and sentencing authorities, it ruled in effect in *Graham*,³¹ and affirmed in *Robbery*³² and *Ballard*,³³ that it would not countenance referrals from the CCRC based on such considerations.

Capital cases

The Court warned the CCRC against taking up the time of the Court with old capital cases in *Knighton*³⁴ and *Ellis*,³⁵ affirming this position in dismissing the judicial review of the CCRC’s decision not to refer the conviction of Timothy Evans, wrongly convicted of the Rillington Place murders.³⁶

Change of law cases

In *Cottrell and Fletcher*³⁷ Judge LJ (as he then was) forcefully urged the CCRC against referrals based on a point of law decided post-trial. Following judicial lobbying, the government introduced a new clause 16(c) into the 1968 Act which gives the Court discretion to dismiss any appeal based on change of law where it would have refused leave to appeal the point out of time. This effectively permits the Court to reject any change-of-law appeal it dislikes and is likely to reduce the flow of future referrals as the Court’s practice in such cases becomes clear.

Adverse judgments on CCRC references

There have also been cases where judgments on CCRC references have been designed to ‘pass a message’ to the Commission and stem the flow of similar referrals for the future.

Legal incompetence

This issue greatly exercised JUSTICE and there remains a widely held concern that deficiencies in the performance of defence lawyers remain a fertile source of miscarriages. Unfortunately, the Court seems to have had an ‘issue’ with CCRC referrals based on incompetence – at any rate where the performance of counsel is questioned. This came to a head in *Day*.³⁸ Pre-trial preparation by solicitors had clearly been appalling and the CCRC considered that the very late instruction of leading counsel (on the Friday preceding a Monday murder trial) put the effective conduct of the defence beyond repair. Unfortunately, the referral put in issue the performance of very distinguished leading counsel and this led to a withering public rebuke from Buxton LJ. The judge said that pre-trial negligence had no impact on safety unless there was a demonstrable impact on the trial itself. Moreover the CCRC had failed to appreciate that: ‘it would have been well within the competence of criminal advocates less experienced than Mr Amlot to deal with those matters effectively within the time and under the conditions presented to Mr Amlot.’

In effect, the sensitivity of the Court to *lèse-majesté* made it difficult for the CCRC to frame references based on the performance of counsel and indeed in both *G(G)*³⁹ and *R(M)*⁴⁰ the Court went to the length of exonerating counsel from making a slip even when counsel acknowledged having done so. Happily the Court has recently relented to some degree and allowed appeals raising counsel's competence in *Adams*⁴¹ and *G(R)*.⁴²

Late tendering of medical evidence

It is a paradoxical fact that offenders who commit offences due to psychological or personality disorders are frequently in denial about their problems leading them to withhold information from their own lawyers and resulting in an arguable medical defence being missed at trial. In *Weekes*,⁴³ the Court laid down guidelines about the circumstances in which it would excuse an appellant from withholding relevant medical evidence at trial. As a result of over-optimistic referrals by the CCRC in *Sharp*⁴⁴ and *Shickle*,⁴⁵ these guidelines have been more restrictively re-stated by the Court, the judgment in *Sharp* being a particularly vituperative attack on the Commission.

Inferences from silence

Several referrals have been based on the insufficiency of warnings given to juries about the drawing of adverse inferences from silence pursuant to the Criminal Justice and Public Order Act 1994. In *Boyle and Ford*⁴⁶ the Court considered how it should deal with such referrals concluding: 'it is important to recognise that it was open to the appellants in this case to take the points now taken, if anyone had thought of them at the trial or immediately after the trial, if it were thought that there was force in any argument that the trial had been unfair.' That is to say if the argument – that the defendant was prejudiced by the inadequacy of the jury warning – was any good, learned counsel would have taken the point at trial or the first time appeal. Again, the effect of this judgment has been to staunch the flow of referrals to the Court.

The Court's approach to new evidence

The Court has also reduced the 'real possibility' of referrals resulting in successful appeals through its restrictive approach to the jury impact of new evidence.

In *Pendleton*, it appeared that the law was moving in a direction helpful to applicants. P's conviction for murder was referred on the basis of new psychological evidence that his confession had been unreliable. The Court upheld the conviction as they considered that the unimpeached evidence was sufficient to persuade them that it remained safe. On appeal to the House of Lords, Lord Bingham giving the majority opinion stated:⁴⁷

The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these

reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.

Pendleton broadly reaffirmed the existing authority of *Stafford and Luvaglio*⁴⁸ but appeared to give the law a tweak in favour of the appellants perhaps most particularly where a conviction which was already 'a case of any difficulty' was re-assessed in the light even of modest additional evidence.

The Court's reaction to *Pendleton* commenced with the case of *Hakala*.⁴⁹ The referral was based on evidence of unexplained re-writing by police of notes of interview when H was said to have confessed to offences of rape. H's stance at trial had been that the confessions had been made but were untrue. The new evidence, suggesting that the confessions could have been fabricated, therefore went against the grain of H's evidence at trial. Judge LJ stated:⁵⁰

The judgment in 'fresh evidence' cases will inevitably therefore continue to focus on the facts before the trial jury ... if the fresh evidence is disputed, this court must decide whether and to what extent it should be accepted or rejected, and if it is to be accepted, to evaluate its importance, or otherwise, relative to the remaining material which was before the trial jury: hence the jury impact test.

The difficult point is this. If the new evidence goes against the grain of the defence case at trial it is to be depreciated, but is the converse true – can any lingering uncertainties left over from the trial (or an earlier appeal) be aggregated with any doubts occasioned by the new evidence so that the question of safety be assessed 'holistically'? The traditional view expounded by Roch LJ – that *the integrity of the criminal process* lies at the core of the Court's remit – would suggest not. If the jury has found the case proved beyond reasonable doubt, then it is no part of the Court's job to look for doubts where the jury had none.

Initially, the Court's approach seemed likely to veer in a more liberal approach following *Pendleton*. In *Mills and Poole*⁵¹ the issue was whether the defendants had murdered a fellow drug user. M argued non-involvement and P self-defence. There were two eyewitnesses in the room, Stadden whose evidence supported the prosecution and Jukes who did not give evidence. There was evidence at the first appeal that Jukes had given an account supportive of the defendants but had been pressurised by police to change his account and that he had been improperly warned off attending committal proceedings by DI Gladding. The principal new matter before the CCRC was that Gladding's misconduct had been more sharply delineated after he unsuccessfully sued Channel 4 for matters said about him in a *Trial and Error* programme. The CCRC declined to refer as the new evidence added nothing of substance to matters canvassed at the original

appeal. The decision not to refer was upheld on judicial review but Woolf LCJ nudged the Commission to reconsider stating: 'although the new material may not be that significant it can still be sufficient to tip the balance, from upholding the conviction to allowing an appeal.'⁵²

The CCRC duly referred and although the Court found little new evidence it was attracted by a reformulation of the legal arguments by Vera Baird QC. The Court, allowing the appeal, commented: 'in our view, the *Pendleton* jury impact test, looked at as a range of permissible intrusion into the jury's thought processes for confirmatory purposes, is equally applicable where the new matter is one of argument, either of law or of interpretation of, or of inference from, the evidence at trial'.⁵³

In *Cooper and McMahon*⁵⁴ – the Luton Post Office Murder case – the defendants were convicted largely on the evidence of one Mathews who stated that he had been an accomplice in the attempted robbery. Mathews, received a substantial reward for his evidence and was handled by the officer in the case, DCS Drury, who was subsequently convicted of corruption. In 1973, Colin Murphy, jointly convicted on the evidence of Mathews, appealed on the basis of a new witness named Edwards. Edwards gave an account (for which there was some corroboration) of seeing Murphy on the day of the robbery which, if accepted, would show that Mathews had lied in evidence. The Court accepted Edwards' evidence and allowed Murphy's appeal prompting the Home Secretary to refer Cooper and McMahon's convictions in 1975 and again in 1976; the Court rejecting both appeals. In 1980 Cooper and McMahon were freed by the Home Secretary in exercise of the royal prerogative.

The case was referred by the CCRC. Some limited new matters were raised by the referral but these were only likely to carry weight if considered alongside matters already known by the Court at the earlier appeals. The Court applied *Pendleton*:⁵⁵

We, with the distinct advantage and benefit of the decision of the House of Lords in Pendleton in 2001, respectfully disagree with the Court of Appeal's assessment in 1975. If the jury at the trial had had the benefit of Edwards' evidence exculpating Murphy ... it would have been directed by the trial judge that such evidence was also relevant to the jury's assessment of the truthfulness of Mathews ... in respect of Cooper and McMahon. In our opinion it is impossible to say that such evidence would have made no impact on the jury in respect of Mathews' veracity ...

The Court side-stepped the question whether there was very much new evidence raised by the new appeal stating simply:⁵⁶

For present purposes it is unnecessary to say that one of those matters, or any combination of them, is decisive. It is sufficient to say that in their totality they persuade us that these convictions are no longer safe, and that the appeals against conviction must be allowed.

In *Brannan and Murphy*,⁵⁷ the Court also applied *Pendleton*. B and M were charged with the murder of one Pollitt. Eyewitnesses at trial said that P had been about to fire a gun – supporting the defendants’ account of self-defence. The jury convicted. Additional witnesses supporting this account were heard at the first time appeal but the Court rejected their evidence as late invention. The CCRC’s referral and the second appeal were based on the evidence of further witnesses (including some of associates of the victim) giving evidence to support the defendants’ account. The Court was not very impressed with the new witnesses but acknowledged that the evidence of the new witnesses could have had a *knock on effect* on the jury’s assessment of the witnesses they heard at trial and allowed the appeal.

It could be said that in *Brannan and Murphy* the Court adopted a ‘holistic’ approach considering the safety of the conviction on the basis of the *cumulative* weight of evidence to support the defendants’ account, and expressly acknowledging that the new evidence might have tipped the balance of the jury’s decision. An ‘atomistic’ approach, by contrast would regard the jury’s assessment (and the Court of Appeal’s previous assessment) of the witnesses they heard as final and would look narrowly at the impact of the new evidence.

The assertion of an atomistic approach

From the Court’s perspective, the problem with a holistic approach is that it leaves it far too open to the CCRC’s applicants to seek to re-open matters decided at trial as well as tempting an over-susceptible Commission to give undue credence to new witnesses who should have been tendered at trial. It is my contention that, as part of the Court’s backlash against the decision in *Pendleton*, the Court has reverted to an atomistic approach which makes it more difficult for new evidence appeals to succeed, particularly in lurking doubt cases.⁵⁸

In *Thomas*, the CCRC referred on the basis of new evidence but appeal counsel chose to run the appeal as a virtual re-run of matters dismissed at the previous appeal.⁵⁹ The Court stated: ‘in the absence of new argument or evidence, the proper exercise of the Court’s power to depart from its previous reasoning or conclusion should, we believe, equally be confined to “exceptional circumstances”’.⁶⁰ It cited the following passage from *Chard*, decided following a Home Secretary’s reference:⁶¹

... the court that hears the reference will give weight to the previous judgment, from which it will be very slow to differ, unless it is persuaded

that some cogent argument that had not been advanced at the previous hearing would, if it had been properly developed at such hearing, have resulted in the appeal against conviction being allowed.

The decision to reject T's appeal was reasonable on the facts but the Court's general dicta give rise to two difficulties. First, in a case of *no* new evidence or argument the Court added a gratuitous extra hurdle of 'exceptional circumstances'. The CCRC was given power to refer a case where it considers that 'there are exceptional circumstances which justify making [a reference]⁶² notwithstanding the absence of any new evidence or argument. If the CCRC considers that such a case should, exceptionally, be referred, it is the Court's duty to determine whether the conviction is safe without imposing a second hurdle of exceptionality upon the first imposed by statute. Second, by saying that the Court will be 'very slow to differ' from its own previous judgment, the Court is essentially advancing the consideration of 'respect' for its own judgment over the 'disrespect' of the CCRC in referring the case back to appeal!

Where this thinking leads is seen in the case of *Stock*.⁶³ S was convicted of robbery of a Tesco store in Leeds in 1970 the principal evidence consisting of (a) eyewitness identification evidence – slightly more than a fleeting glance – of one Wilson; (b) identification evidence of three Tesco cashiers that a man seen in the store two days previously (and possibly casing the joint) was S; (c) confession evidence attested by two police officers; and (d) paraphernalia associated with the robbery found near Wetherby racecourse – said to be on a logical route from the crime scene to Stock's home in Stockton. S was put in the frame for this offence only because West Yorkshire police officers thought that identikit pictures made up by Wilson resembled S. The police disregarded other lines of enquiry including a trail of abandoned cars which suggested that the robbers might have made their escape in the direction of York.

S's case has been considered by the Court on four occasions; once following a Home Secretary's reference and twice on CCRC references. The Home Secretary's reference followed a confession to the offence by a London-based supergrass – his account of a getaway via York was consistent with the location of the abandoned cars and the dumped paraphernalia at Wetherby. Furthermore, during the course of the appeals virtually all of the prosecution case has unravelled. The evidence of the three cashiers has been deemed inadmissible due to the prior showing of photographs of S – it is also likely that Wilson was shown photographs; one of the detectives was forced to leave the force due to misconduct tainting the evidence of verbal confessions (which also seem to modern eyes to have been given in highly improbable terms); there were violations of contemporary (let alone modern) procedures in the way the police arranged a confrontation with S, police conduct which seems likely to have coloured Wilson's view as to whether S was the man he had seen; an absence of any *Turnbull*⁶⁴ type of identification warning and other matters.

On any 'holistic' view the evidence against Mr Stock is now totally threadbare compared with that presented at trial. However, the Court has chosen to adopt an atomistic approach at each appeal choosing to treat the prosecution case (or what remained of it following prior appeals) as watertight and treating the impact of the new evidence in the narrowest possible terms. It has also cited the dicta in *Thomas* quoted above, citing the need for exceptionality to revisit its previous judgements. As things stand (and it seems unlikely that S's case can be referred again in the face of such judicial intransigence), the conviction now hinges solely on Wilson's identification but is nevertheless deemed safe.

Another example of the atomistic approach is *G(G)*⁶⁵ – a historic sex abuse case. G was convicted of sexual offences against his daughter, CA, roughly over the period 1974 to 1978, complaint first being made 20 years later in 1998. CA's evidence was uncorroborated and evidence she gave of having made contemporaneous complaint was not supported by or inconsistent with established facts.⁶⁶ She had also not conceived despite over 150 alleged acts of intercourse although she had subsequently had children without gynaecological help.

The CCRC's reference raised a number of matters including further information to undermine CA's account of contemporary complaint; concern about the adequacy of the judge's warning to the jury respecting the prejudicial effect of delay; concern about the effect of the loss of records which might have assisted G; concern about counsel's failure to request a stay of proceedings; and the possibility of the exercise of the Court's 'residual discretion'⁶⁷ to set aside a historic case given that the delay had deprived G of any opportunity to mount a more active defence. All of these matters fell to be considered (in the CCRC's view) alongside a somewhat slender Crown case at trial.

The Court however saw the matter differently. It recited the weaknesses of the Crown case but noted that the jury had nevertheless convicted:⁶⁸

One thing is clear: the jury saw the witnesses and we have not. Therefore they were in a better position to judge where the truth lay than this court. Furthermore, the trial process depends upon our confidence in the jury system ... Therefore juries in cases of this sort must be left with the difficult task of determining where the truth lies.

So far from considering whether any new matters or arguments might have 'tipped the balance' (as the Court allowed in *Mills and Poole*) the 'confidence in the jury system' was deemed to override any doubts that the matters raised by the referrals might have occasioned.

Is it time for a review of the CCRC's role?

This somewhat lengthy excursion shows some of the limitations that have been imposed upon the CCRC's remit. It is suggested that in the outcome, the scope of the Commission is narrower than Runciman envisaged and that the restrictive 'atomistic' approach of the Court to new evidence is a matter of particular concern. This gives some colour to Naughton's suggestion that the current arrangements may sometimes fail the victims of miscarriage of justice.

It does not by any means mean that the CCRC is *routinely* prevented from dealing with miscarriages and, in particular, Naughton fails to acknowledge that most of the cases recognised as miscarriages of justice, both prior to the CCRC's formation and subsequently, have been so recognised on the basis of new evidence.⁶⁹ The CCRC's references have resolved many miscarriages of justice based on, *inter alia*, evidence of false or unreliable testimony; fresh forensic evidence; and evidence of police and prosecution misconduct. The Court has welcomed, sometimes in fulsome terms⁷⁰ the work of the Commission in uncovering such miscarriages. Moreover, it is surely illusory to suppose that the students at INUK (or indeed a reconstituted JUSTICE task force) would uncover 'golden nuggets' of evidence of innocence in circumstances where the CCRC would not – other than in a tiny handful of instances. Naughton might also concede that trial irregularities such as non-disclosure, which he characterises as 'legal technicalities', have provided the basis to quash numbers of convictions which are widely considered to be miscarriages of justice.

This is not to say that the CCRC's role should be exempt from critical review. Whilst the problems described in this article are not primarily of the Commission's own making, there is a danger that a commission which is placed in a subordinate role to the Court of Appeal will unduly internalise the Court's way of thinking in its own deliberations and indeed this is a point made by a number of the contributors to Naughton's book.

It may indeed be time to carry out a review of the CCRC's remit – a review promised at the time of the passing of the 1995 Act. It would for instance be possible to widen the CCRC's power of referral to include – exceptionally – cases where it suspects that a miscarriage of justice has occurred even where it is not persuaded that the *real possibility* test has been satisfied. This would compel the Commission to draw its frame of reference in wider terms. It would also perhaps compel the Court to confront the concerns that exist in relation to such cases and apply a more holistic approach to the safety of such convictions. Despite the obvious shortcomings of Naughton's critique of the CCRC, a critical debate of its role would be welcomed by many JUSTICE members.

Laurie Elks was a member of the CCRC from its inception in 1997 to 2006 and is author of Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission published by JUSTICE.

Notes

- 1 The Criminal Cases Review Commission: Hope for the Innocent? Palgrave Macmillan, 2009.
- 2 Ibid, p17.
- 3 Two cases supported by student law schools have been referred by the CCRC: *Allan* [2001] EWCA Crim 1607, which was quashed and *Simon Hall* which is currently pending.
- 4 See in particular S Roberts and L Weathered, 'Assisting the Factually Innocent: the Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission', *Oxford Journal of Legal Studies* [2009] 43-70.
- 5 L Elks, 'A review of 'The Criminal Cases Review Commission. Hope for the Innocent?' *Archbold Review* [2010] 1, 5-6.
- 6 Report of the Royal Commission on Criminal Justice Cm 2263, HMSO, 1993, p168, para 32.
- 7 [1969] 1 QB 267.
- 8 Report of the Royal Commission on Criminal Justice, Review of the Appeal Process, Research Studies No 17 and 18, HMSO, 1993.
- 9 N6 above, p171, para 46.
- 10 Ibid, p173, para 55.
- 11 JUSTICE, Miscarriages of Justice, 1989, p72.
- 12 N6 above, p183, para 12.
- 13 For penetrating contemporary discussion of this subject see articles by JC Smith, 'The Criminal Appeal Act 1995: Part 1: Appeals against Conviction', *Crim LR* [1995] 920-928 and D Schiff and R Nobles, 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' *MLR* [1996] 573-581.
- 14 Ibid, Smith, p922.
- 15 Schiff and Nobles, n13 above, p577.
- 16 HC Standing Committee B col 26, 21 March 1995.
- 17 Smith, n13 above, p924.
- 18 See in particular *Graham* (1997) 1 Cr App R 302 and *Davis, Rowe and Johnson* (2001) 1 Cr App R 8.
- 19 [1997] EWCA Crim 2028.
- 20 The second referral of the convictions of *Cooper and McMahon* in 1976 – discussed below – is possibly a case in point.
- 21 I have been advised that the CCRC website is being revised and that this statement will not appear in the website in the future.
- 22 *R v CCRC ex parte Pearson* (2000) 1 Cr App R 141.
- 23 Section 23(2)(d) Criminal Appeal Act 1968 as amended.
- 24 See in particular *Jones (Steven)* (1997) 1 Cr App R 86.
- 25 *Kai-Whitewind* [2005] EWCA Crim 1092, para 97.
- 26 It is much easier to pass judgment on the qualifications of an expert after the expert evidence has been argued at trial, but that is too late for the convicted person!
- 27 See for instance *Blackburn* [2005] EWCA Crim 1349 (expert psychological evidence on the susceptibility of a normal teenager to yield to coercive police interrogation); *H(I)* and *G(T)* [2005] EWCA Crim 1828 (evidence relating to the power of memory to recall incidents in detail from early childhood).
- 28 (2001) 1 Cr App R 21.
- 29 See L Elks, Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission, JUSTICE, 2008, chapter 6 for details of relevant cases.
- 30 Ibid, chapter 13.
- 31 (1999) 2 Cr App R (S) 312.
- 32 [1999] EWCA Crim 1372.
- 33 [2004] EWCA Crim 3305.
- 34 [2002] EWCA Crim 2227.
- 35 [2003] EWCA Crim 3556.
- 36 *Westlake (R on the application of) v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin).
- 37 [2007] EWCA Crim 2016.

- 38 [2003] EWCA Crim 1060.
39 [2005] EWCA Crim 1792.
40 [2007] EWCA Crim 518.
41 [2007] EWCA Crim 1.
42 [2008] EWCA Crim 241.
43 (1999) 2 Cr App R 520.
44 [2003] EWCA Crim 3870.
45 [2005] EWCA Crim 1881.
46 [2006] EWCA Crim 2101.
47 [2002] 1 All ER 524 per Lord Bingham at para 719.
48 [1974] AC 878.
49 [2002] EWCA Crim 730.
50 *Ibid*, para 11.
51 [2003] EWCA Crim 1753.
52 *Ibid*, para 119.
53 *Ibid*, para 64.
54 [2003] EWCA Crim 2257.
55 *Ibid*, para 26.
56 *Ibid*, para 43.
57 [2002] EWCA Crim 120.
58 N29 above, chapter 3.
59 It would be much harder to do this now since s315 Criminal Justice Act 2003 now prevents an appeal being pursued on grounds other than the grounds of referral without leave of the Court.
60 [2002] EWCA Crim 941, para 73.
61 (1984) AC 279, p294.
62 Section 13(2) Criminal Appeal Act 1995.
63 [2004] EWCA Crim 2238 and [2008] EWCA Crim 1862.
64 [1977] Q.B 224.
65 *G(G)*, n39 above.
66 In particular, she claimed that she had succeeded in getting admitted to hospital due to feigned illness as a way of escaping from her father. Records showed that she had been admitted due to established organic illness.
67 As propounded by Woolf LCJ in *Bell* [2003] EWCA Crim 619 (but doubted by the Court in subsequent judgments).
68 *G(G)*, n39 above, para 73.
69 At the launch of his book, Naughton argued that the CCRC would not have referred the case of the Birmingham Six. This appears to be clearly wrong – the convictions were quashed at the final appeal on the basis of new evidence which would have formed ample grounds for a referral.
70 See for instance the observation of the Court in *Carrington-Jones* [2007] EWCA Crim 2551, quashed on evidence that a rape complainant was a serial falsifier: *'We must express our gratitude to the Commission, which in this case has performed precisely the function for which it was created and has investigated a difficult problem in close detail and produced an extremely helpful analysis of all the relevant issues.'*

'Free to lead as well as to be led': section 2 of the Human Rights Act and the relationship between the UK courts and Strasbourg

Eric Metcalfe

This article looks at section 2 of the Human Rights Act 1998 which directs UK courts to 'take account' of the jurisprudence of the European Court of Human Rights and which, in a larger sense, might be said to govern the relationship between the UK courts and Strasbourg. It considers the legislative history and case law surrounding section 2 over the past decade, and looks at the current debate among British judges and politicians concerning the status of Strasbourg caselaw.

Introduction

When Parliament first came to debate what would eventually become the Human Rights Act 1998, the Conservatives tabled an amendment to force UK judges to follow the decisions of the European Court of Human Rights (ECtHR) in Strasbourg. Without such an amendment, the late Lord Kingsland reasoned that Britain's judges would be 'cast ... adrift from their international moorings' for want of 'accurate charts by which to sail'.¹ If the courts were not bound by Strasbourg's decisions, he warned, UK judges would be free to 'go in whatever direction they wish' and the Human Rights Bill would 'effectively [become] a domestic Bill of Rights'.

The Tory amendment to make ECtHR judgments binding on UK courts was ultimately withdrawn. Instead, section 2 of the Human Rights Act 1998 (HRA) as enacted requires only that judges 'take into account' judgments of the Strasbourg Court. (By way of contrast, section 3 of the European Communities Act 1972 requires UK courts to treat decisions of the European Court of Justice in Luxembourg as binding). In particular, it was thought that the flexible language of section 2 would enable British judges to contribute to the development of Strasbourg jurisprudence. As the Lord Chancellor Lord Irvine put it: 'our courts must be free to try to give a lead to Europe as well as to be led'.² And indeed many liberals had initially hoped that the judges would use the freedom given to them under section 2 to do precisely what Kingsland feared: use Convention rights as the basis for developing a set of domestic human rights with a content independent of that given to them by the Strasbourg Court.³

Instead, over the past decade, the UK courts have struck a much more cautious line, one that has become known as the 'mirror principle' – the idea that, absent good reasons to the contrary, a claimant in a British court can expect to obtain the same result as he or she would in Strasbourg: 'no more, but certainly no less'.⁴ The courts have not invariably followed ECtHR rulings, though, and in a small number of cases, UK courts have judged Strasbourg's rulings too unclear to implement.⁵ In such cases, the mirror principle has been complemented by the concept of 'judicial dialogue' between the UK courts and Strasbourg.⁶ In any event, s2 HRA certainly has not led to the development of a wholly autonomous set of domestic human rights based on the language of the European Convention on Human Rights (ECHR), as Kingsland had warned it might and others had hoped it would.

Ironically enough, the past decade has also seen the Conservatives become much more well-disposed towards the idea of a domestic bill of rights but far more hostile to the thought of UK judges following decisions of the European Court of Human Rights. In November 2009, for instance, Michael Howard MP – tipped to be the next Lord Chancellor – complained that the HRA, 'requires our courts to apply the European Convention on Human Rights in every decision they make'.⁷ Accordingly, he concluded, 'one of the biggest threats to the democratic authority of Parliament and government has come from the judges'. Another member of the shadow cabinet, Nick Herbert MP, complained that the HRA had not delivered on its promise of allowing British judges to contribute to the jurisprudence of the ECtHR. 'The enactment of the Human Rights Act, and the successive verdicts of British courts', he said, have 'had no effect whatsoever on the decisions of Strasbourg judges'.⁸ And last November, the shadow Justice Secretary, Dominic Grieve MP suggested that the 'marked deference' shown by British judges towards Strasbourg decisions under the HRA was problematic, and indicated that a 'key area' for reform under the Conservative's proposed 'British Bill of Rights' would be:⁹

a reconsideration and recalibration of the relationships of our national courts and Parliament and of our national courts and the Strasbourg Court in particular, respecting the extent to which our courts are bound by decisions of the Strasbourg court.

Thus, whereas the Tories had originally criticised the HRA for giving UK judges the freedom to disregard Strasbourg's rulings, they now blame the Act for the judges' decision to almost always follow them. What was previously the solution is now apparently the peril to be avoided, and vice versa. Having once feared that judges would be cast adrift, the Conservatives now resolve to bind them to the mast.

What, then, are we to make of s2 HRA and the UK court's approach to Strasbourg jurisprudence under it? Does section 2 give too much freedom to the judiciary, as the Tories originally feared? Or does the fault lie in the cautious approach to section 2 taken by the judiciary? Does the general willingness of British courts to follow Strasbourg judgments really threaten the democratic authority of Parliament? Or is the actual problem the willingness of our courts to sometimes refuse to apply the ECtHR's judgments? What, overall, is the correct approach that British courts should take towards Strasbourg rulings? And, given that all main political parties accept the UK's continued acceptance of the ECHR as a baseline, how could any 'British Bill of Rights' hope to strike a different approach to the decisions of the Strasbourg Court? These are the questions this paper sets out to answer. Part 1 considers s2 HRA and the political intentions behind it. Part 2 looks at the UK case law over the past decade to see how section 2 has been interpreted by our courts. The final part, Part 3, analyses the various extra-judicial comments and political proposals that have been made concerning the relationship between the UK courts and Strasbourg.

Part 1: The history of s2 HRA

While the design of s2 HRA reflected the government's overall intention to incorporate the ECHR into UK law, the government was also keen to ensure that the courts would have sufficient flexibility to depart from Strasbourg jurisprudence wherever they thought it appropriate. As will be seen, the courts have since identified a variety of circumstances in which it may be appropriate for a UK court to decline to follow a judgment of the Strasbourg Court.

The incorporation of the Convention into UK law was a manifesto commitment of the Labour party:¹⁰

Citizens should have statutory rights to enforce their human rights in the UK courts. We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts. The incorporation of the European Convention will establish a floor, not a ceiling, for human rights. Parliament will remain free to enhance these rights, for example by a Freedom of Information Act.

As we will see, this idea of the Convention being 'a floor, not a ceiling' was a recurring theme, particularly among those who believed that the HRA would allow the judges to create a domestic jurisprudence built on Convention rights. However, it is worth noting that the 1997 manifesto speaks only of Parliament enhancing rights, rather than the courts themselves.

Following the 1997 election, the white paper *Rights Brought Home* in October put the case for incorporation in greater detail:¹¹

*The effect of non-incorporation on the British people is a very practical one. The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost. **It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom,** and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make **a distinctively British contribution** to the development of the jurisprudence of human rights in Europe.*

Accordingly, the white paper promised that, when considering Convention points, 'our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights', although it also made clear that 'these will not be binding'.¹²

Accordingly, when the Human Rights Bill was introduced in Parliament the following month, clause 2 required that UK courts 'must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights'. At committee stage in the House of Lords, however, the shadow Lord Chancellor Lord Kingsland tabled an amendment to replace the words 'must take into account any' with 'shall be bound by'.¹³ Explaining the purpose of the amendment, he said:¹⁴

The problem is that if our judges only take account of the jurisprudence of the European Court of Human Rights, we cast them adrift from their international moorings. The Bill, crewed by the judges, will have no accurate charts by which to sail because the judges are obliged only to take into account the provisions of the convention. That means that the Bill is effectively a domestic Bill of rights and not a proper incorporation of international rights. It means that the judges ... are not obliged to act on it and can go in whatever direction they wish. I have great confidence in Her Majesty's judges, but I believe that they need greater guidance than they receive from the expression 'take into account'.

However, the amendment was resisted by the government on the grounds that it was both unnecessary and would remove an important element of flexibility. First, the Lord Chancellor Lord Irvine noted that the Conservative amendment would require the UK courts to follow all Strasbourg decisions when, under international law, the UK government was only strictly obliged to give effect

to any judgment of the Strasbourg Court 'to which they are parties'.¹⁵ Not only would it be 'strange', he said, for UK courts to be bound by Strasbourg decisions to which the UK government had not been party, but it would also be 'quite inappropriate to do so' since they were concerned with the laws of other countries.¹⁶ Such cases may be persuasive authority but should not be treated as 'binding precedents which we necessarily should follow or even necessarily desire to follow'.¹⁷

Secondly, the Lord Chancellor argued, making Strasbourg decisions binding on UK courts would put 'the courts in some kind of straitjacket where flexibility is what is required'.¹⁸ Although it was generally expected that UK courts would apply convention jurisprudence, the language of clause 2 was nonetheless intended to allow UK courts the freedom 'to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so *and it is possible they might give a successful lead to Strasbourg*'.¹⁹

The example Irvine gave was a case in which 'there has been no precise ruling [by the Strasbourg institutions] on the matter and a commission decision which does so has not taken into account subsequent Strasbourg case law'²⁰ In other words, where the existing Strasbourg authority was unclear (or clear but evidently unsatisfactory) it would be better to leave the matter to the UK courts to suggest a way forward than to tie their hands. As Irvine put it, 'our courts must be free to try to give a lead to Europe as well as to be led'.²¹

The government's desire for a flexible approach towards Strasbourg judgments was undoubtedly influenced by several factors. First, like many continental jurisdictions, the Strasbourg Court does not itself have a doctrine of binding precedent. (Indeed, not even Scotland shares the English courts' strong insistence on being bound by their previous decisions).²² Since much of the operation of precedent in English law depends on courts successfully identifying the ratio of a previous decision, etc, treating judgments of the Strasbourg Court in the same manner as English decisions without regard to their different juridical context could give rise to serious difficulties.²³ And, as Sir Rupert Cross once put it, the English doctrine of precedent means that 'it is more difficult to get rid of an awkward decision in England than almost anywhere else in the world'.²⁴

Secondly, the UK is a 'dualist' jurisdiction under international law, meaning that a treaty signed by the government is unable to create rights or impose duties without first being incorporated into UK law by Act of Parliament.²⁵ Hence the European Convention on Human Rights had no effect in UK law for fifty years, despite the fact that the UK was among the first countries to sign the Convention on 4 November 1950. This is very different from the process of incorporation in so-called 'monist' jurisdictions in which treaties become potentially capable of being applied by the courts as soon as they are ratified (which is why ratification is often treated as a legislative act in other jurisdictions).²⁶ Since the European

Court of Human Rights has ultimate jurisdiction to interpret the Convention,²⁷ this means that the national courts of monist countries such as France or Germany approach decisions of the Court in relation to the self-executing provisions of the Convention very differently than those of dualist countries such as the UK or Ireland.

For dualist jurisdictions such as the UK, there are a variety of legislative methods by which provisions of international law may be incorporated into domestic law. The best example of full-blown, 'direct' incorporation of an international treaty by the Westminster Parliament is the European Communities Act 1972, under which all provisions of the various EC treaties became directly effective in UK law.²⁸ When Parliament came to incorporate the ECHR into UK law, though, it chose to do so indirectly by requiring the courts to give effect to the Convention rights contained in Schedule 1 of the HRA – what the Lord Chancellor described as 'a very distinctive scheme of incorporation'.²⁹ Plainly, the government thought it better for the courts to be able to mediate the effect of Strasbourg rulings on Convention rights, rather than have them apply directly in the manner of judgments of the European Court of Justice under Community and EU law. However, this indirect method of incorporation also led many to predict that section 2 would enable UK courts to develop the rights in Schedule 1 as free-standing:³⁰

[It would] be open to national courts to develop a jurisprudence under the Convention which may be more generous to applicants than that dispensed in Strasbourg, while remaining broadly consistent with it.

Part 2: The UK courts' approach to s2 HRA

From the outset, however, the approach taken by UK judges to section 2 HRA was bound to disappoint anyone who had hoped for a series of bold departures from Strasbourg jurisprudence, in whatever direction. Instead, the following principles can be identified from the UK courts' decisions over the past decade:

- (i) The rights in Schedule 1 HRA are distinct from Convention rights;
- (ii) Nonetheless, the general rule is that a claimant in UK courts will receive the same outcome in the UK as they would in Strasbourg, 'no more, but certainly no less';
- (iii) This is true even to the extent that the UK's obligations under the ECHR have been displaced by a superior principle of international law that has not been otherwise incorporated into UK law;
- (iv) Mindful that an adverse ruling against the government cannot be appealed, the UK courts will be cautious in extending Strasbourg jurisprudence too far in marginal cases;
- (v) At the same time, UK courts will sometimes anticipate the development of Strasbourg jurisprudence, in circumstances where the Strasbourg Court has

yet to rule, but there is good reason to think that, if it did, it would be likely to rule;

- (vi) The UK courts may decline to follow Strasbourg case law where that case law is unclear, or where there is good reason to believe the Strasbourg Court was misinformed about or may have misunderstood the relevant UK law;
- (vii) The UK courts will not decline to follow a Grand Chamber judgment of the Strasbourg Court involving the UK where the ruling is clear on its terms, even if UK judges strongly disagree with Strasbourg's conclusion; but
- (viii) The UK courts may, however, decline to follow a Grand Chamber judgment in a non-UK case or a chamber judgment in a UK case where it would be desirable for the Strasbourg Court to reconsider its ruling in light of various factors identified by the UK court;
- (ix) The lower courts are bound to follow the decisions of higher courts, even where they are inconsistent with subsequent Strasbourg authority. Section 2 HRA does not displace the normal operation of stare decisis.

Each of these principles, and the case law supporting them, are set out in more detail below.

(i) Convention rights not directly incorporated by the HRA

UK courts were relatively quick to acknowledge that the HRA did not directly incorporate Convention rights, but rather created a mirror version of those rights in UK law. As Lord Hoffmann noted in 2002:³¹

*the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them ... Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. **It is not the treaty but the statute which forms part of English law. And the English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so.***

In *McKerr* in 2004, Lord Nicholls reiterated that the rights in Schedule 1 HRA were not legally identical to the rights created at international law by the Convention:³²

These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of

the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act. **It by no means follows that the continuing existence of a right arising under the Convention in respect of an act occurring before the 1998 Act came into force will be mirrored by a corresponding right created by the 1998 Act.** Whether it finds reflection in this way in the 1998 Act depends upon the proper interpretation of the 1998 Act.

Lord Nicholls's analysis was subsequently followed by Lord Rodgers in *S and Marper*,³³ and by Lord Bingham in *Al Skeini and others v Secretary of State for Defence*.³⁴

In the *Animal Defenders* case in 2008,³⁵ the appellant sought a declaration that the ban on 'political advertising' on television imposed by s321(2) Communications Act 2003 was incompatible with the right to freedom of expression under Article 10 ECHR. In doing so, they relied heavily upon the 2001 judgment of the Strasbourg Court in *VgT Verein gegen Tierfabriken v Switzerland*,³⁶ in which the Court found a very similar Swiss provision to be in breach of Article 10. Indeed, when passing the 2003 Act, the Secretary of State was obliged to make a rare statement under s19(1)(b) HRA that 'although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill'.³⁷ In defending the case, the government relied heavily on a more recent Strasbourg decision from 2003, the case of *Murphy v Ireland*,³⁸ that indicated that a broadcast ban on religious advertising was within the state's margin of appreciation under Article 10. It was on this basis that the House of Lords unanimously found that the ban under the 2003 Act was compatible with Article 10. Lord Scott nonetheless made reference to the distinct status of the rights in Schedule 1 as a possible basis for refusing to follow the decision of the Strasbourg Court in the *VgT* case, in the event that the Lords analysis was found to be incorrect:³⁹

The result of the present appeal to this House shows, therefore, no more than the possibility of a divergence between the opinion of the European Court as to the application of article 10 in relation to the statutory prohibition of which [the appellant] complains and the opinion of this House. The possibility of such a divergence is contemplated, implicitly at least, by the 1998 Act.

Lord Scott's dicta was strongly criticised by Lord Bingham and Baroness Hale, however.⁴⁰ Schedule 1 HRA may indeed contain domestic rights, said Hale, 'but the rights are those defined in the Convention'.⁴¹

(ii) Ullah and the 'mirror principle'

Although it is the 2004 speech of Lord Bingham in *Ullah v Special Adjudicator* which is best known for its exposition of the proper approach to Strasbourg judgments, the general principle was first set out by Lord Slynn in the 2001 case of *Alconbury*:⁴²

Your Lordships have been referred to many decisions of the European Court of Human Rights on article 6 of the Convention. Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant.

In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.

In *Ullah*, Lord Bingham expanded on Lord Slynn's analysis:⁴³

*[Lord Slynn's statement in Alconbury] reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. **From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.** It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, **but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.***

At least five reasons can be identified for this 'no more, no less' approach of the UK courts, as set out by Lords Slynn and Bingham:

- (a) *Authority*: the Strasbourg Court is the authoritative interpreter of Convention rights under international law;

- (b) *Uniformity*: 'the meaning of the Convention should be uniform throughout the states party to it';
- (c) *Section 6 HRA*: although courts are not bound to follow Strasbourg case law, they are nonetheless under a duty to act compatibly with Convention rights;
- (d) *'Rights brought home'*: A central purpose of the HRA is to bring Convention rights into UK law and to reduce the need to go to Strasbourg. It would frustrate this purpose if UK courts departed unnecessarily from the 'clear and constant' jurisprudence of the Strasbourg Court, where that is only likely to trigger an adverse judgment against the UK;
- (e) *The separation of powers*: the government may have intended the Convention to be 'a floor, not a ceiling' but it is for Parliament to build on Convention rights, not the courts.

These reasons have been expanded upon in a number of other cases. In the 2001 Court of Appeal decision in *Anderson*, which concerned the mandatory life sentence for murder, Buxton LJ suggested that a uniform interpretation of the Convention throughout the Council of Europe was important as a matter of both fairness and international comity:⁴⁴

*The Convention is a broadly stated international treaty, applying to a wide range of countries. Not only is it the objective of the Convention to bring its benefits to all of those countries, **but also fairness between the citizens of those different countries requires that its terms have a uniform and accessible meaning throughout the member countries.** The principal machinery for achieving that end is to be found in the Court, and in the interpretative rulings that it gives. There may well be many cases facing a national court where the jurisprudence of the ECtHR is unclear, or on the particular point in issue non-existent. Then the national court has to do the best that it can. But that is not this case. **Here, there is clear and consistent jurisprudence of the Strasbourg Court. If we are to say that that jurisprudence is wrong, we will be creating in England and Wales a different set of Convention rules from those that apply in other countries who are signatories to the Convention.** That will be a clear departure from international comity within the Convention, and a step that should only be taken in extreme circumstances.*

The Court of Appeal also identified an additional ground for deferring to the ECtHR rulings: not only does the Strasbourg Court have exclusive jurisdiction under international law to determine the meaning of the Convention, but it is also *institutionally better-placed* than national courts to do so. As Buxton LJ said: 'where an international court has the specific task of interpreting

an international instrument it brings to that task a range of knowledge and principle that a national court cannot aspire to.⁴⁵

Lord Bingham's speech in *Ullah* has often been criticised for being too narrow, ignoring both the autonomous nature of the rights in Schedule 1 and the intention behind the HRA as making the Convention a 'floor, not a ceiling'.⁴⁶ The implication clearly being that the HRA was meant to allow UK judges to build a distinctively British set of rights. This was undeniably a popular view at the time, and perhaps it was the tacit understanding of those involved that the courts would indeed be allowed to go fashion an autonomous set of rights based on the Convention.

But, as a matter of purely legal analysis, this criticism seems hopelessly wide of the mark. The original reference in the 1997 Labour party manifesto to the Convention as a floor to be built on was followed immediately by the statement that *Parliament* 'will remain free to enhance these rights'. It says nothing about the courts being free to do so. It is true that the white paper twice refers to British judges being free to 'contribute' to the development of Convention case law, but that is very far from the idea of UK courts using the Convention as a basis for the development of free-standing rights in UK law.⁴⁷ Nor is there anything in Hansard, the explanatory notes or the text of the Act itself to suggest that the courts would be free to go further in the manner that many thought they should.

More generally, it would be a striking break with the doctrine of the separation of powers for UK courts to have the power to fashion autonomous rights in this way. Certainly, the courts are free to develop the common law as they see fit but, as Baroness Hale noted in the *Animal Defenders* case, the HRA gives the courts special powers to interpret and declare primary legislation incompatible with Convention rights:⁴⁸

I do not believe that, when Parliament gave us those novel and important powers, it was giving us the power to leap ahead of Strasbourg in our interpretation of the Convention rights. Nor do I believe that it was expecting us to lag behind.

Indeed, if Parliament had intended the courts to leap ahead of Strasbourg, one would have expected it to say so in clear terms, rather than the modest language of s2 HRA. The prospect of the courts developing autonomous rights based on the Convention text would also undermine legal certainty. For, whatever one thinks of Strasbourg jurisprudence, it at least offers a reasonable guide by which to predict how the Strasbourg Court is likely to rule in a particular case. For British courts to develop free-standing rights, however, raises the question of what principles they would use to do so. This is not an insuperable problem, of course – most constitutional courts have faced it at one point or another – but

it tends to confirm the wisdom of Lord Bingham's approach to s2 HRA: ie that it would be improper for UK courts to depart significantly from Strasbourg's jurisprudence without a plain and unambiguous mandate from Parliament to do so. Lord Bingham's approach in *Ullah* was affirmed most recently by Lord Phillips in the UK Supreme Court judgment of *Ahmed and others v HM Treasury* in January 2010.⁴⁹

(iii) Displacing Convention rights in UK law

One corollary of the mirror principle set down in *Ullah* is that a claimant is not entitled to receive a better remedy under the HRA than they could hope to receive in Strasbourg. As Lord Bingham put it in *Greenfield* in 2005: 'the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg.'⁵⁰

At its most extreme, this principle has meant that a claimant cannot rely on a Convention right before UK courts if the UK government could successfully point to a superior obligation under international law before the Strasbourg Court. In *Al Jeddah v Secretary of State for Defence*,⁵¹ the appellant was a dual UK/Iraqi national who had been detained indefinitely without trial by British forces in Iraq. The UK government maintained that it was detaining Mr Al Jeddah pursuant to an internment power granted to it by UN Security Council Resolution 1546 (UNSCR 1546). Article 25 of the UN Charter makes Security Council resolutions binding on member states. Moreover, Article 103 of the Charter provides that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

In other words, the Secretary of State argued, the UK government's obligation under Article 5 ECHR to respect the appellant's right to liberty was displaced or 'trumped' by its superior obligation under the UN Charter to give effect to UNSCR 1546. For its part, the House of Lords accepted the proposition that the claimant could not succeed if it could be shown that he would not succeed before the Strasbourg Court,⁵² although it ultimately concluded that his right under Article 5 was not necessarily completely displaced by the Security Council resolution.⁵³ Although the House heard submissions from JUSTICE that the rights in Schedule 1 HRA were enacted by Parliament and could not be overridden by an unincorporated international obligation, it declined to address the point directly. Lord Rodger did acknowledge that 'the Convention rights in Schedule 1 to the HRA are distinct obligations in the domestic legal systems of the United Kingdom'.⁵⁴ However, he followed the lower courts in observing that

the HRA defines the Convention 'as it has effect for the time being in relation to the United Kingdom', taking this to mean that Parliament had intended Convention rights to be interpreted by the UK courts having regard to other relevant obligations of the UK government under international law.⁵⁵

The decision in *Al Jedda* was followed most recently by the UK Supreme Court in the case of *Ahmed and others v HM Treasury*,⁵⁶ in which the Court concluded that any HRA arguments were displaced by the UK government's obligations under various UN Security Council resolutions. In particular, Lord Phillips rejected the appellant's argument that the House of Lords decision in *Al Jedda* was likely to be the subject of a successful complaint in Strasbourg, in light of the recent judgment of the European Court of Justice in *Kadi*:⁵⁷

I do not think that it is open to this court to predict how the reasoning of the House of Lords in Al-Jedda would be viewed in Strasbourg. For the time being we must proceed on the basis that article 103 leaves no room for any exception, and that the Convention rights fall into the category of obligations under an international agreement over which obligations under the Charter must prevail. The fact that the rights that G seeks to invoke in this case are now part of domestic law does not affect that conclusion. As Lord Bingham memorably pointed out in R (Ullah) v Special Adjudicator [2004] 2 AC 323, para 20, the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. It must be for the Strasbourg court to provide the authoritative guidance that is needed so that all the contracting states can adopt a uniform position about the extent to which, if at all, the Convention rights or any of them can be held to prevail over their obligations under the UN Charter.

(iv) Asymmetry of appeal rights to Strasbourg

Although the approach in *Ullah* recognises the importance of not frustrating the HRA's object of bringing rights home by unnecessarily departing from Strasbourg case law, it is also apparent that UK courts will sometimes err on the side of caution in marginal cases, in light of the fact that the government cannot appeal an adverse ruling to the Strasbourg Court whereas an unsuccessful claimant can. In *Al Skeini*, for instance, Lord Brown referred to Lord Bingham's speech in *Ullah* as follows:⁵⁸

I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more.' There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights

have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg Your Lordships accordingly ought not to construe article 1 as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach.

Similarly, in the 2007 control order case of *JJ and others*, Lord Brown again cited the asymmetry of appeal rights as a reason for adopting a cautious approach:⁵⁹

*I think that nowadays a longer curfew regime than 16 hours a day (with the additional restraints imposed in these cases) would surely be classified in Strasbourg as a deprivation of liberty. **It may be, indeed, that 16 hours itself is too long. I would, however, leave it to the Strasbourg Court to decide upon that, were any such argument to be addressed to it. (The government itself, of course, cannot complain to Strasbourg about adverse decisions of your Lordships' House.)***

(v) Anticipating the outcome in Strasbourg

Just as the UK courts will sometimes err on the side of caution in marginal cases, so too UK courts have often been prepared to go further than Strasbourg yet has, in cases where there is good reason to think that Strasbourg is likely to rule in the applicant's favour, or where the matter falls within the margin of appreciation accorded to the national authorities.

Indeed, it is often overlooked that *Ullah* – the usual touchstone for the 'no more, no less' principle – was itself a case in which the Law Lords went slightly further than the Strasbourg Court had yet done. As the Court of Appeal noted, although 'the Strasbourg Court has contemplated the possibility of [the *Soering* principle applying to articles other than article 3] it has not yet taken it', and took this as a basis for refusing to extend it in this case. Lord Steyn ruled that the Court of Appeal's approach was:⁶⁰

too narrow an approach to the evolving jurisprudence of the ECtHR. Where it concludes that there was no breach of a convention right, the ECtHR may nevertheless rule on the reach of the right.

Similarly, in *Limbuella*, the House of Lords unanimously concluded that the Secretary of State's refusal to reinstate asylum support to a destitute asylum seeker was capable of amounting to ill-treatment contrary to Article 3 ECHR, notwithstanding that it concerned a failure to provide support, rather than positive mistreatment – something which the Strasbourg Court had yet to rule on, although there was certainly sufficient material in the Strasbourg case law to support the Law Lords' analysis.

This willingness of the UK courts to anticipate Strasbourg can also be seen in the two more recent House of Lords cases from 2008: *In re P (Northern Ireland)* and *EM (Lebanon)*. In the *P* case,⁶¹ the House of Lords went beyond Strasbourg jurisprudence in holding that the Northern Irish law that barred unmarried parents from adopting children was contrary to Article 14 ECHR. In doing so, a majority of the House concluded that, even though Strasbourg had not yet issued a ruling to this effect, it was clear from the existing case law that it would be very likely to reach the same conclusion. For example, Lord Hoffmann predicted that it 'seems to me not at all unlikely that if the issue in this case were to go to Strasbourg, the Court would hold that discrimination against a couple who wish to adopt a child on the ground that they are not married would violate article 14'.⁶² He went further to say that, even if the Strasbourg Court continued to find that the matter was still within the state's margin of appreciation, it could still be open to the UK courts to determine the matter in the appellants' favour.⁶³

In such a case, it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch It follows, my Lords, that the House is free to give, in the interpretation of the 1998 Act, what it considers to be a principled and rational interpretation to the concept of discrimination on grounds of marital status.

Unlike Lords Hoffmann, Hope and Mance, Baroness Hale was much more uncertain that the Strasbourg Court would be likely to find a violation of Articles 8 and 14:⁶⁴

What did Parliament mean when it required the courts to act compatibly with the Convention rights? Did it mean us only to go as far as Strasbourg would go? Or did it mean us, in at least some cases, to be able to go further? It seems clear that Parliament recognised the problem and intended the latter For what it is worth, there were also clear statements by the Home Secretary ... and by the Lord Chancellor ... that the courts must be free to develop human rights jurisprudence and to move out in new directions Hence, if there is a clear and consistent line of Strasbourg jurisprudence, our courts will follow it. But if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment.

In *EM (Lebanon) v Secretary of State for the Home Department*, the House unanimously found that removal to Lebanon would give rise to a flagrant breach of the mother and son's Article 8 rights, notwithstanding that the flagrant breach test had never been found 'to be satisfied in respect of any of the qualified Convention rights in any reported Strasbourg decision'.⁶⁵ Lord Hope noted that it was only the 'very exceptional' facts in this case that justified going further than Strasbourg Court had yet ruled.⁶⁶

By contrast, it is also worth noting one other case in which the House of Lords found the existing case law too unsettled to justify the UK courts going further than Strasbourg Court yet had. In *R (Clift) v Secretary of State for the Home Department*, the Law Lords considered whether a prisoner's status could amount to grounds of discrimination under Article 14 ECHR.⁶⁷ Although Lord Hope thought that protection under Article 14 'ought not be denied just because the distinguishing feature ... has not previously been recognised', he noted that:⁶⁸

*the Strasbourg jurisprudence has not yet addressed this question As Lord Bingham said in [Ullah] the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time. **A measure of self-restraint is needed, lest we stretch our own jurisprudence beyond that which is shared by all the States Parties to the Convention.***

(vi) *Lack of clarity and judicial dialogue*

It has long been mooted that the UK courts may decline to follow Strasbourg case law where that case law is unclear, or where there is good reason to believe the Strasbourg Court was misinformed about or may have misunderstood the relevant UK law.

In *Brown v Stott*,⁶⁹ heard by the Privy Council in an appeal from Scotland in 2000, for instance, Lord Steyn expressed dissatisfaction with the ruling of the Strasbourg Court in *Saunders v United Kingdom* on the issue of self-incrimination,⁷⁰ describing its reasoning as 'unsatisfactory and less than clear',⁷¹ and suggested that its observations may 'have to be clarified in a further case by the European Court'.⁷² Nonetheless, in *Brown* the Privy Council felt it was unnecessary to depart from *Saunders*, instead preferring the view that the High Court in Scotland had misinterpreted it 'as laying down more absolute a standard than I think the European Court intended'.⁷³

When *Saunders'* case came back before the House of Lords in 2002, the Law Lords were invited to quash his (pre-HRA) convictions and those of his co-defendants under the Companies Act 1985, in lights of the rulings of the Strasbourg Court that the use of certain self-incriminatory statements had violated their right to a fair trial under Article 6 ECHR. The House of Lords refused to do so, primarily on the basis that the HRA did not have retrospective effect and therefore could not affect the validity of their convictions under offences provided by statute.

However, Lord Hoffmann said that even if the HRA applied, it might be that it would make no difference.⁷⁴ He suggested the possibility that the UK courts might depart from a Strasbourg judgment in order to invite future clarification by the ECtHR:⁷⁵

*It is obviously highly desirable that there should be no divergence between domestic and ECtHR jurisprudence but section 2(1) says only that the courts must 'take into account' the decisions of the ECtHR. If, for example, an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECtHR to reconsider the question **There is room for dialogue on such matters.***

This prediction was realised in the case of *R v Spear*⁷⁶ the following year, in which the House of Lords drew attention to shortcomings in the recent chamber judgment of *Morris v United Kingdom* concerning court martials.⁷⁷ Lord Bingham noted that:⁷⁸

*It goes without saying that any judgment of the European Court commands great respect, and section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account, as it routinely does. There were, however, a large number of points in issue in *Morris*, and it seems clear that on this particular aspect the European Court did not receive all the help which was needed to form a conclusion In my opinion the rules governing the role of junior officers as members of courts-martial are in practice such as effectively to protect the accused against the risk that they might be subject to 'external army influence', as I feel sure the European Court would have appreciated had the position been more fully explained.*

In the subsequent case of *Cooper v United Kingdom*,⁷⁹ the Grand Chamber considered at great length the points raised by Lords Bingham and Rodger in *Spear* and accepted their analysis that there were in fact sufficient safeguards in the court martial system, contrary to the conclusion reached in *Morris*.⁸⁰

Similarly, the Strasbourg Court has itself held that it will not lightly depart from the carefully reasoned conclusions of national courts on matters of domestic law. In its 2001 judgment in *Z and others v United Kingdom*,⁸¹ for instance, the Grand Chamber considered the complaint of the unsuccessful appellants in *X and others v Bedfordshire County Council*,⁸² in which the House of Lords had struck out their action for negligence against the defendant local authority. The appellants submitted, among other things, that the striking-out of their claim breached Article 6 ECHR in light of the earlier Strasbourg judgment in *Osman v United Kingdom*.⁸³ The Grand Chamber declined to find a breach, however, on the basis that subsequent UK judgments had led it to revise its earlier view:⁸⁴

The Court considers that its reasoning in Osman was based on an understanding of the law of negligence ... which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords.

It concluded that there was no violation of Article 6, among others things because:⁸⁵

it is not for this Court to find that this should have been the outcome of the striking-out proceedings since this would effectively involve substituting its own views as to the proper interpretation and content of domestic law.

In the 2006 case of *Roche v United Kingdom*, the Grand Chamber held that:⁸⁶

Where ... the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law.

In the 2008 case of *Doherty*,⁸⁷ (which concerned the compatibility of possession hearings under English law with Article 8 ECHR), the House of Lords were asked to reverse their previous majority judgment in *Kay v Lambeth*⁸⁸ in light of a more recent chamber judgment of the Strasbourg Court in *McCann v United Kingdom* (which, among other things, endorsed the minority judgment in *Kay*).⁸⁹ The House of Lords in *Doherty* declined to do so, largely on the basis that they thought it was impossible to derive clear guidance from the judgment. As Lord Hope put it:⁹⁰

I am not convinced that the Strasbourg court – which did not hear oral argument in McCann – has fully appreciated the very real problems that are likely to be caused if we were to [reverse Kay]. [The judgment in McCann] suffers from a fundamental defect which renders it almost useless in the domestic context. It lacks any firm objective criterion by which a judgment can be made as to which cases will achieve this standard and which will not The whole point of the reasoning of the majority [in Kay] was to reduce the risks to the operation of the domestic system by laying down objective standards on which the courts can rely. I do not think that the decision in McCann has answered this problem. Until the Strasbourg court has developed principles on which we can rely on for general application the only safe course is to take the decision in each case as it arises.

Similarly, Lord Scott said:⁹¹

I am not prepared to [reverse Kay] because I consider the McCann judgment to be based on a mistaken understanding of the procedure in this country I consider, also, that the McCann judgment discloses a misunderstanding of the various factors that would have been taken into account by the domestic court that dealt with the possession application It is, perhaps, unfortunate that the Fourth Section did not receive any oral submissions or argument from the parties but dealt with the case with the assistance only of written submissions.

At least some of the hesitation came from the fact that *Kay v Lambeth* had been heard by a panel of seven Law Lords, whereas *Doherty* involved a panel of five. Given the narrow (4-3) majority in *Kay*, the smaller panel in *Doherty* clearly felt uncomfortable reversing the previous judgment. But *Doherty* is also the best example yet of how UK courts will decline to follow a judgment of the Strasbourg Court on grounds of both lack of clarity and the belief that the Strasbourg Court failed to apprehend the relevant UK law.

By contrast, in the 2002 case of *Anderson*,⁹² the House of Lords strongly rejected the Home Secretary's submission that the House should decline to follow the Strasbourg ruling in *Stafford v United Kingdom* (which held there should be no distinction between discretionary and mandatory life prisoners in relation to the nature of tariff-fixing) on grounds of lack of clarity and reasoning. Lord Bingham said:⁹³

*It was argued for the Home Secretary that the House should not follow this judgment, which was criticised as erroneous and lacking in reasoning to justify and explain the court's departure from its previous ruling. I cannot accept this argument. While the duty of the House under section 2(1)(a) of the Human Rights Act 1998 is to take into account any judgment of the European Court, whose judgments are not strictly binding, the House will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber **Here, there is very strong reason to support the decision, since it rests on a clear and accurate understanding of the tariff-fixing process and the Home Secretary's role in it. The court advanced ample grounds for its change of opinion ...***

(vii) UK courts will not depart from clearly reasoned Grand Chamber judgments involving the UK other than in the most exceptional circumstances

In the past decade, no British court has declined to follow a final judgment of the Strasbourg Court in a UK case where the ruling is clear on its terms, even

where UK judges have strongly disagreed with Strasbourg's conclusion. In the passage from *Anderson* quoted above, Lord Bingham suggested that they would not do so 'without good reason'. The judgment of the House of Lords in *AF* (discussed in this section) and that of the UK Supreme Court in *Horncastle* (discussed in the following section) strongly suggest that such a departure would be wholly exceptional. In *Alconbury*, Lord Hoffmann suggested one hypothetical example:⁹⁴

*[S]ection 2(1) of the Human Rights Act 1998 requires an English court, in determining a question which has arisen in connection with a Convention right, to take into account the judgments of the European Court of Human Rights ("the European court") and the opinions of the Commission. The House is not bound by the decisions of the European court and, **if I thought that the Divisional Court was right to hold that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed.***

However, as Hoffmann himself accepted, no judgment of the Strasbourg Court has ever compelled such a conclusion.

In *Secretary of State for the Home Department v AF*,⁹⁵ the House of Lords was asked to determine whether there was an absolute minimum entitlement to disclosure of closed evidence in control order proceedings under Article 6 ECHR. Less than two weeks before the hearing began, the Grand Chamber delivered its judgment in *A and others v United Kingdom*, in which it held there was an absolute minimum entitlement to disclosure in closed proceedings before the Special Immigration Appeals Commission under Article 5(4) ECHR.⁹⁶ The House unanimously held that the Grand Chamber decision in *A and others* compelled the conclusion that there was, at the very least, a similar absolute minimum entitlement under Article 6, notwithstanding that a majority of the Law Lords of the House expressed misgivings about the Grand Chamber's conclusions.

Lord Phillips, for instance, thought that 'the approach approved by this House in *MB* ... could have been applied without significant risk of producing unjust results'.⁹⁷ He nonetheless accepted that the matter was now settled by the Grand Chamber judgment. Referring to the conflict between the public interest in fair proceedings and that in national security, he said:⁹⁸

How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the Convention, as applied by the HRA. That Act requires the courts to act compatibly with Convention rights, in so far as Parliament permits, and to take into account the Strasbourg jurisprudence. That is why the clear

terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals.

Lord Carswell's conclusion was more resigned:⁹⁹

*section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account. **Whatever latitude this formulation may permit, the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it. Views may differ as to which approach is preferable, and not all may be persuaded that the Grand Chamber's ruling is the preferable approach. But I am in agreement with your Lordships that we are obliged to accept and apply the Grand Chamber's principles** in preference to those espoused by the majority in MB.*

Lord Rodger, on the other hand, was truly laconic:¹⁰⁰

Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.

But if Lord Rodger was the most succinct, Lord Hoffmann was surely the most trenchant:¹⁰¹

I agree that the judgment of the European Court of Human Rights ... in A v United Kingdom ... requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to 'take into account' decisions of the ECtHR. As a matter of our domestic law, we could take the decision in A v United Kingdom into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.

Indeed, of the nine Law Lords who heard the appeal, only three (Lords Hope and Scott and Baroness Hale) expressed unequivocal support for Strasbourg's conclusions.¹⁰² The majority's grudging acceptance of the Grand Chamber

ruling shows the extent to which the UK courts will treat clearly reasoned final judgments of the Strasbourg Court as effectively binding.

(viii) UK courts may decline to follow a non-final judgment involving the UK in order to invite the Strasbourg Court to reconsider its ruling

The flipside of the House of Lords judgment in *AF*, signalling clear obedience to Grand Chamber judgments involving the UK, is the decision of the UK Supreme Court in *R v Horncastle*.¹⁰³

Horncastle concerned the provisions of the Criminal Justice Act 2003 (the 2003 Act) which largely abolished the long-standing common law rules against the use of hearsay in criminal trials. *Horncastle* was one of four appellants who complained that their convictions were based on hearsay, and that this breached their right to a fair trial under Article 6 ECHR. In a long line of cases, most recently the chamber judgment of *Al-Khawaja and Tahery v United Kingdom* in early 2009,¹⁰⁴ the ECtHR has held that a conviction based 'solely or to a decisive extent' on evidence from a witness that the defendant had no opportunity to cross-examine breaches the right to confront witnesses under Article 6(3)(d). By the time that the Supreme Court heard the appeal in *Horncastle*, the UK government had already requested that the chamber decision in *Al Khawaja* be referred to the Grand Chamber.

The Supreme Court rejected the appellants' submission that its approach in *Secretary of State for the Home Department v AF (No 3)* – in which 'the Committee held itself bound to apply a clear statement of principle by the Grand Chamber in respect of the precise issue that was before the Committee' should apply in the present case:¹⁰⁵

*I do not accept that submission. The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. **There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.** This is such a case.*

As should be clear from the preceding sections, the Supreme Court's approach was hardly unprecedented. On the contrary, it was a possibility that had been squarely contemplated from the very beginning. From the outset, the House of

Lords had suggested that it might depart from Strasbourg authority where there were good reasons ('special circumstances' as Lord Slynn said in *Alconbury*) for doing so. And Lord Hoffmann said as early as 2001 that an English Court might 'wish to give a judgment which invites the ECtHR to reconsider' on the basis that there was 'room for dialogue on such matters'.¹⁰⁶ Nor was *Horncastle* the first case in which the House of Lords had declined to give effect to a Strasbourg ruling – it declined to follow *Morris* in *Spear* in 2002, for instance, and also declined to follow *McCann* in *Doherty* in 2008.¹⁰⁷

What distinguishes *Horncastle* from other Strasbourg cases which the UK courts have so far declined to follow is that the concerns of the Supreme Court are as much to do with the Strasbourg's substantive conclusions, as much as they are to do with the clarity or reasoning of the Strasbourg case law (although those concerns are undoubtedly also present). It is also the clearest instance yet of the kind of judicial dialogue first envisaged by Hoffmann in 2001, in which the Grand Chamber is explicitly invited to address the concerns identified by the UK courts.

Like the Court of Appeal below, the Supreme Court suggested a number of technical defects with the 'sole or decisive' rule as it applied to the use of hearsay under the 2003 Act. First, it suggested that, while Strasbourg had recognised the possibility of exceptions to the rule in Article 6(3)(d) ECHR, the manner in which the Strasbourg Court has approved those exceptions 'has resulted in a jurisprudence that lacks clarity'.¹⁰⁸ Secondly, the 'sole or decisive' rule had been introduced by Strasbourg: 'without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions'.¹⁰⁹

The Supreme Court also felt that the 'sole or decisive' rule 'would create severe practical difficulties if applied to English criminal procedure'.¹¹⁰ It concluded that the 2003 Act 'contains safeguards that render the sole or decisive rule unnecessary'.¹¹¹

Horncastle is also notable for the weight that the Supreme Court placed on the practice of certain other common law jurisdictions, in this case Canada, Australia and New Zealand, in concluding that the use of hearsay evidence was acceptable. For a not-infrequent criticism made of the mirror principle was that it implicitly gave greater weight to Strasbourg jurisprudence than that of other common law courts, c.f. Lord Bingham's speech in *Sheldrake v DPP*:¹¹²

On a number of occasions the House has gained valuable insights from the reasoning of Commonwealth judges deciding issues under different human rights instruments ... I am accordingly grateful to counsel for exploring in detail, and addressing the House on, the treatment of reverse burdens

*in other jurisdictions. In the result, I do not think I should be justified in lengthening this opinion by a review of the cases relied on. Some caution is in any event called for in considering different enactments decided under different constitutional arrangements. **But, even more important, the United Kingdom courts must take their lead from Strasbourg.***

The suggestion that Lord Bingham's speech downplayed the importance of comparative common law jurisprudence seems wide of the mark, particularly in light of cases like the Belmarsh case,¹¹³ the Torture evidence case,¹¹⁴ and *R v Davis*¹¹⁵ – cases in which the House of Lords cited extensively from common law authority to support their analysis of the Strasbourg case law. However, *Horncastle* shows the opposite: the selective use of comparative common law jurisprudence to cast doubt on Strasbourg's conclusions. That this analysis was selective was partly conceded by the Supreme Court – it acknowledged, for instance, that the approach of the US courts under the Sixth Amendment was even more absolute than that taken by the Strasbourg Court. However, while it was content to cite decisions from Canada, Australia and New Zealand, the Supreme Court made no mention of the position in the Republic of Ireland – the only other common law signatory to the ECHR.¹¹⁶

The *Horncastle* decision is also striking to the extent that the Supreme Court was prepared to find that Parliament had struck the correct balance under the 2003 Act (and by extension the Criminal Evidence (Anonymity of Witnesses) Act 2008), rather than use the Strasbourg jurisprudence to analyse Parliament's choices. The Supreme Courts' conclusion that 'the application of that rule would give rise to severe practical difficulties under our system',¹¹⁷ is also difficult to reconcile with its observation that English judges are already obliged to withdraw a prosecution case from the jury if, among other things, it is based 'wholly or partly on hearsay evidence';¹¹⁸ and that English law 'would, in almost all cases, have reached the same result in those cases where the Strasbourg Court has invoked the ['sole or decisive'] rule'.¹¹⁹

While the Supreme Court rightly identified problems with the concept of 'decisive',¹²⁰ these are problems that apply equally to the application of the same rule to cases involving anonymous witnesses (*R v Davis*) and the use of closed evidence (*AF*). In truth, the Supreme Court's concern about the clarity and reasoning behind the 'sole or decisive' view,¹²¹ and the practical difficulties it would cause, are not especially compelling. Rather, the sentiment underlying the Court's judgment seems very clearly to be that an absolute application of the 'sole or decisive' rule as required by Strasbourg would simply be wrong in principle. Although this was also probably the view of the majority of the House of Lords in *AF*, Lord Brown was at pains to distinguish the approach taken in that case from that of the Supreme Court in *Horncastle*: in *AF*, the Grand Chamber had issued a 'definitive' judgment 'on the very point at issue and where each member of the Committee felt no alternative but to apply it'.¹²² Not

only was the Strasbourg ruling in that case 'clear and authoritative' but it also 'expressed an entirely coherent view'.¹²³ In *Horncastle*, by contrast, 'we are faced here not with a Grand Chamber decision but rather with the possible need for one'.¹²⁴ Similarly, the chamber decision in *Al Khawaja* is 'altogether less clear than was the decision in *A*'.¹²⁵

Another example of UK courts declining to follow an arguably clear ruling from the Strasbourg Court is the judgment of the Scottish Court of Session in *HM Advocate v Duncan McLean*, handed down less than two months before the Supreme Court decision in *Horncastle*.¹²⁶ In *McClean*, the Court of Session declined to follow the Grand Chamber judgment of *Salduz v Turkey* which held that the right to legal assistance under Article 6(3)(c) ECHR extended to access to a lawyer before questioning by police. Suggesting that the *Salduz* ruling was ambiguous (something which, on reflection, seems doubtful), the Court maintained that Scots law provided sufficient guarantees against an unfair trial, notwithstanding that accused persons did not have access to a lawyer while being questioned by police.¹²⁷ It also laid considerable emphasis on the fact that the Grand Chamber in *Salduz* was addressing the situation under Turkish law rather than Scots law:¹²⁸

In the present case the United Kingdom was not a party to the process in Salduz. Although a British judge was a member of the Grand Chamber, there is no suggestion in any of the opinions that either he or any of his fellow judges had brought to their attention any features of Scottish criminal procedure - although the Scottish system had previously been examined by the Commission without adverse comment ... The implications for that system cannot be said to have been 'carefully considered'. In these circumstances we are of opinion that, while the judgment in Salduz commands great respect, we are not obliged to apply it directly in Scotland [citing Spear and Doherty]. This is not, in our view, a situation in which the decision in Salduz requires this court to answer the reference in the minuter's favour (contrast with Secretary of State for the Home Department v AF and Another [2009] UKHL 28).

Ostensibly, both *McClean* and *Horncastle* are cases in which the UK courts have identified a lack of clarity and attention to UK law in a non-final ruling from the Strasbourg Court, and – on that basis – have declined to apply it. In fact, both are cases in which the Strasbourg authority in question is not nearly as ambiguous or as indifferent to the situation in the UK as the UK courts suggest. Instead, both *McClean* and *Horncastle* are examples of the UK courts using the opportunity for judicial dialogue to invite the Strasbourg Court to reconsider an authority that they consider to be wrong in principle.

(ix) Section 2 HRA does not displace stare decisis

Last but not least, it is well-established that the lower UK courts are bound to follow the decisions of higher UK courts, even where they are inconsistent with subsequent Strasbourg authority. Section 2 HRA does not displace the normal operation of stare decisis.

In *D v East Berkshire Community NHS Trust*,¹²⁹ the Court of Appeal departed from the unanimous judgment of the House of Lords in *X (Minors) v Bedfordshire County Council*,¹³⁰ on the basis that the latter decision was made well before the introduction of the HRA, the Act had substantially altered the relevant law, and there had since been a clear ruling from the Strasbourg Court (*Z v United Kingdom*) on the issue.¹³¹ This conclusion was later approved by the House of Lords on appeal.¹³²

In *Kay v Lambeth*, however, the Court of Appeal was faced with a clear inconsistency between a 2003 decision of the House of Lords in *Qazi*¹³³ and a 2004 judgment of the Strasbourg Court in *Connors v United Kingdom*, which was plainly incompatible with the Lords' decision in *Qazi*.¹³⁴ The Court of Appeal held that it was bound to follow *Qazi* in any event. On appeal, JUSTICE and Liberty submitted that the House should vary the doctrine of precedent to allow lower courts to depart from higher court decisions that are clearly incompatible with subsequent Strasbourg authority.¹³⁵ Despite the support of all the parties, the proposal was unanimously rejected. Lord Bingham said:¹³⁶

As Lord Hailsham observed ... 'in legal matters, some degree of certainty is at least as valuable a part of justice as perfection'. That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.

Indeed, Bingham went as far as to argue that strict observance of doctrine of precedent was more in keeping with the scheme of the Convention:¹³⁷

*There is a more fundamental reason for adhering to our domestic rule [of precedent]. **The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states** [I]n its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much*

importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.

Bingham added that the approach of the Court of Appeal in the *East Berkshire* case was very much an exception to the general rule, based on the fact that the House of Lords decision in question was decided well before the HRA was passed, had involved no Convention points, and the unsuccessful claimants in that case had not only gone onto succeed at Strasbourg but recovered 'very substantial reparation'.¹³⁸ It was only the 'extreme facts' in that case that justified the Court of Appeal's exceptional departure from precedent.¹³⁹

Part 3: Extrajudicial and political discussion of s2 HRA

Given the significance that Convention rights now have in UK law, it is hardly surprising that the relationship between the UK courts and the ECtHR has attracted comment elsewhere than in court. On the one hand, several of our senior judges have discussed the broader process of judicial dialogue between the UK and Strasbourg. Indeed, one Law Lord went as far as to launch a spectacular attack on the Strasbourg Court shortly before his retirement. On the other hand, the approach of the UK courts to ECtHR judgments has again become a political issue, with several senior Conservative politicians suggesting a variety of reforms in order to reduce the influence and blunt the impact of Strasbourg rulings in UK law. Last but not least, the Strasbourg Court has been undergoing its own process of reform in order to deal with its ever expanding case load, culminating in the recent Interlaken Declaration by the Council of Europe and the coming into force of Protocol 14 in June of this year.

(i) The idea of constructive judicial dialogue

As mentioned earlier, the concept of judicial dialogue between national courts and the European Court of Human Rights is not a new one. Indeed, it is important to bear in mind that – with 46 other member states in the Council of Europe – the UK courts are hardly the Strasbourg Court's only interlocutor. Equally, as the last of the original signatories to the Convention to incorporate it into its domestic law, the UK was very much a latecomer to a conversation already long under way. For instance, the European Court of Human Rights publishes an annual report under the title, *Dialogue between Judges*, focusing on precisely this issue.

In 2006, the report included a speech given by Lord Justice Sedley, commenting on the particular issues between the UK Courts and Strasbourg. He noted that, despite the HRA's indirect incorporation of the Convention into UK law:¹⁴⁰

*[O]ur courts reserve the right to question your jurisprudence. They have done so, for example, in relation to your decision in Saunders v. The United Kingdom, which we consider goes unreasonably far in protecting suspects from self-incrimination. In a judgment I wrote late last year, I took the liberty of questioning some of the reasoning of the Grand Chamber in Bankovi and Others v. Belgium and Others. **These are not acts of indiscipline or insubordination. They are part of the opportunity which a dualist system affords for a constructive dialogue between national and supranational courts. There is nothing which prevents this Court from modifying its own jurisprudence in response to the considered judgments of national courts.***

Sedley, moreover, pointed to the fruits of this dialogue:¹⁴¹

One thing that is quietly gratifying to us has been to see how the judgments of your Court have moved steadily towards the British model of full – sometimes extremely full – exposition of facts and reasons. There is a value to this, just as there is a problem with the Delphic mode of the French arrêt. Among other things, it enables other courts to discern what is incidental and what constitutes legal principle in each decision. We note too that, despite its early insistence that yours is not a precedent-based court, the fundamental requirement that like cases should be decided alike has moved you steadily towards a system of precedent with which we, in the common-law tradition, are very comfortable. It enables us in turn to pay close regard to the jurisprudence of this Court in coming to our own decisions on human rights issues.

The Strasbourg Court too has recognised the importance of clarity in its own judgments, as the President of the Court, Judge Costa, noted last year:¹⁴²

*The States have on the whole made remarkable efforts to apply the Convention guarantees and to implement the Strasbourg judgments. We need to be pragmatic. There is no point in chanting the maxim 'pacta sunt servanda' on which Grotius based international law. The Court could only have been influential and it can only avoid the danger of being misunderstood, or even rejected, **so long as it observes a degree of restraint and explains again and again to judges and other national authorities the basis for its decisions.***

In November 2009, another Court of Appeal judge – the Master of the Rolls Lord Neuberger – gave a lecture on social housing law, in which he also made reference to the courts' approach to s2 HRA and the idea of judicial dialogue. Referring to Lord Bingham's speech in *Ullah*, he commented that this was not 'an invitation to national courts to adopt a slavish and unreflective approach to Strasbourg jurisprudence'.¹⁴³ Nonetheless, he noted what one Circuit judge has described as an 'unedifying game of ping-pong' between the UK courts and Strasbourg concerning whether Article 8 ECHR can be raised as a defence to a claim for possession, leading the judge in question to ask 'how long can the House of Lords, Canute-like, continue to resist the European tide?'¹⁴⁴ Referring to the fact that unsuccessful appellants in the House of Lords case of *Kay v Lambeth* have now lodged their complaint with Strasbourg, the Master of the Rolls notes that the Strasbourg Court has asked the parties to address its ruling in *McCann* (which the House of Lords declined to follow in *Doherty*):¹⁴⁵

The reference to McCann in the question would appear to suggest that notwithstanding the views expressed in Doherty the Strasbourg court continues to view McCann as something more than useless. If it does and it once more affirms O'Connor and McCann in Kay it may well become difficult for the Supreme Court to maintain its commitment to Kay. That is something else for the future. I am sure it is something which we all watch with interest.

The Master of the Rolls suggested that the Supreme Court may now consider following the judgment of Lord Mance (one of three Law Lords in the minority in *Kay*), but that the law was likely to remain in flux until the Supreme Court had the opportunity to revisit the matter. He concluded that:¹⁴⁶

Inevitably, there is a need for the domestic courts to work out the law, often with the assistance of Strasbourg. But I hope that Strasbourg will not regard its role as being that of dictator to national courts; mutual respect and understanding, through the means of constructive dialogue, should be the order of the day.

The same month as Lord Neuberger gave his lecture, yet another English Court of Appeal judge, Lady Justice Arden, delivered a lecture addressing the concept of judicial dialogue between the UK courts and what she termed the 'supranational' courts of Europe: the European Court of Justice in Luxembourg and the ECtHR in Strasbourg.¹⁴⁷ Arden noted a risk that, with 'their jurisprudence ... becoming ever more pervasive', the incorporation of European law may introduce 'concepts which do not sit easily with our own domestic law'.¹⁴⁸ She expressed concern that national judges 'tend to react to each case or line of authority on an ad hoc basis' instead of 'thinking in a long term way about the relationship as a whole'. Lady Justice Arden went as far to speculate that 'this may be the first occasion when a judge has raised the question of how the judiciary should

react to the case law on a collective basis'.¹⁴⁹ In light of the extensive judicial and extra-judicial discussion cited above, this seems highly unlikely. Nonetheless, Arden's speech represents an important contribution to the debate, not least because she suggests that, whereas the 'supranational courts are not slow to say what they expect of national courts', it is 'time to turn the tables and ask what the national courts are entitled to expect of supranational courts'.¹⁵⁰

Arden makes a number of positive points concerning the relationship between the UK courts and Strasbourg. First, she acknowledges the need for 'a court with ultimate authority to interpret the Convention', and that it is desirable that this is an international court rather than a national one.¹⁵¹ Not only does the international court strengthen the independence of national judges, but 'the Convention system gives us a legitimate interest in how other countries treat their citizens' and this is 'a more powerful position than could be achieved at the political level'.¹⁵² Secondly, she notes that 'not every human rights case has to go Strasbourg' and that the ECtHR 'recognises that it is not a fourth level of appeal from the decision of a trial judge'.¹⁵³ Indeed, since the HRA came into force, she notes that the UK 'is now one of the jurisdictions from which the Strasbourg court receives the fewest applications'.¹⁵⁴ So the HRA seems to have been effective in one of its primary aims of reducing UK complaints to the Strasbourg Court. Thirdly, referring to the recent chamber judgment of the ECtHR in *Gillan v United Kingdom*, she describes the Strasbourg Court as a valuable corrective against the potential complacency of English judges on matters of fundamental rights.¹⁵⁵

In Gillan v United Kingdom, the Fourth Section of the Strasbourg court held that the United Kingdom was in breach of article 8 of the Convention because it had enacted a broad power to stop and search individuals for articles which could be used in connection with terrorism even when the police officer had no grounds for suspecting the presence of articles of that kind. The Strasbourg court held that this power was excessive and did not contain sufficient safeguards. In this respect, its decision differed from those of both appeal courts in England. Liberty is a very precious right, and, living in a law-abiding country, we can forget that it is important to maintain this right. The benefit of decisions of the Strasbourg court is that they encourage domestic courts vigorously to enforce fundamental rights, and correct our decisions if we forget the importance of those rights.

At the same time, Arden also makes several claims that seem unjustified. For instance, she notes that UK courts have 'no control over which cases become the subject of an application to the Strasbourg court, or over which cases are held to be admissible by the Strasbourg court'.¹⁵⁶ From this, she concludes that 'it may not be able to conduct a dialogue with the Strasbourg court through its

judgments so as to indicate to that court what the domestic court thinks the answer should be'.¹⁵⁷

It is certainly true that UK courts have no control over which cases are heard by the Strasbourg Court. By the same token, few courts anywhere have any control over which cases are heard by their superiors.¹⁵⁸ But that has never prevented UK judges from indicating their views to Strasbourg through their judgments, as the discussion in Part 2 amply shows. In *Roberts v Parole Board*, for instance, Lord Steyn famously offered the withering dissent that the judgment of the majority of his fellow judges was 'deeply austere'.¹⁵⁹

It encroaches on the prerogatives of the legislature in our system of Parliamentary democracy. It is contrary to the rule of law. It is not likely to survive scrutiny in Strasbourg.

Indeed, Arden later contradicts herself when she describes judgments of the UK courts as a 'very important means of dialogue'.¹⁶⁰

*It is obviously of great benefit to the United Kingdom in terms of influencing the direction of the jurisprudence in the Strasbourg court that the United Kingdom courts are able to give judgments interpreting the Convention rights, rather than rights conferred by domestic law. **The national court can in effect send a message to the Strasbourg court by reflecting its views on the Strasbourg jurisprudence in its judgment either in the case before it goes to Strasbourg or some other case raising the same issue.** The Strasbourg court is not bound to accept what the national court says but it has gone a very long way towards recognising the role of superior national courts in assisting it in its role.*

In fact, Arden accepts that 'the Strasbourg court has been very receptive to reasoned criticism', but she nonetheless goes on to suggest there is 'however, a small domestic problem here generated by section 2 of the Human Rights Act 1998',¹⁶¹ in that 'to some extent, our domestic courts are disabled from having an active dialogue' due to the way s2 HRA 'has been interpreted'.¹⁶² Discussing Lord Bingham's speech in *Ullah*, Arden notes that it has both advantages and disadvantages. The advantages include the recognition of the Strasbourg Court as 'the organ for the authoritative interpretation of the Convention'.¹⁶³ The disadvantages, she suggests, is that the mirror principle 'does not ... acknowledge that the Strasbourg court is only laying down minimum guarantees'.¹⁶⁴

More fundamentally, it is difficult to have an effective dialogue if the courts start from a position of deference. That deference must colour the national court's approach.

Arden also suggests that Lord Bingham's reasoning in *Ullah* 'sits uneasily with the wording of the duty' in s2 HRA to 'take into account Strasbourg jurisprudence, rather than to follow it':¹⁶⁵

From that it would appear that Parliament intended that the courts should be free in an appropriate case to go further than Strasbourg case law (though this would have to be an exceptional case), or, not as far as Strasbourg case law. Our courts should not in any event be expected to apply jurisprudence from another source without being having investigated its reasoning.

Arden goes on to argue that:¹⁶⁶

*What we need is a **right of rebuttal**. We need to be able to say to the Strasbourg court that it has not made the principle clear, or that it has not applied the principle consistently, or that it has misunderstood national law or the impact of its decisions on the UK legal system. I do not suggest there should be a free for all, or that domestic courts should be free to reinvent the wheel on human rights jurisprudence. However, I would argue in favour of an approach which is more flexible than the *Ullah* approach*

Arden notes that this in fact was done in *Doherty*, but makes no mention of the much longer line of authority stretching from *Alconbury*, *Spear*, or *Lyons* which made clear that this has always been an approach open to UK courts to take – and was indeed taken in *Spear*. In her speech to Strasbourg in January, she similarly suggests that the decision of the UK Supreme Court in *Horncastle* indicates that 'the attitude of the UK courts may be changing'.¹⁶⁷ Again, no mention is made of the much longer line of House of Lords authority – and Bingham's own statements – that UK courts may depart from Strasbourg decisions where there is 'good reason' to do so.¹⁶⁸ Contrary to Arden's speech in Strasbourg in January, *Horncastle* almost certainly does not represent a change of judicial attitude. Whether or not the Supreme Court were right on the point of substance (which they almost certainly weren't), their decision to invite the Strasbourg Court to reconsider was wholly consistent with the previous case law of the House of Lords on s2 HRA, including Lord Bingham's speech in *Ullah*. There is no need, therefore, for any additional 'right of rebuttal', for it has long been clear that UK courts may decline to follow Strasbourg case law in order to invite Strasbourg to clarify its reasoning or to correct misunderstandings of UK law.

Arden's criticisms of the *Ullah* principle are similarly misconceived. As has already been shown, there is nothing in the text of s2 HRA, or any of the surrounding parliamentary material, to show that Parliament ever intended the UK courts to give Convention rights an autonomous meaning. Nor is there anything in Lord Bingham's speech in *Ullah* that suggests any need for *deference*

to Strasbourg, or that UK courts should simply apply its jurisprudence without first considering its reasoning. On the contrary, the consistent line of House of Lords (and now UK Supreme Court) authority has made clear that s6 HRA requires the courts to act consistently with the Convention, at the same time as s2 HRA gives the courts the discretion to depart from Strasbourg authority where there is good reason to do so.

More generally, there are limits to dialogue between courts. As Arden herself acknowledges, 'dialogue cannot go on forever'.¹⁶⁹ More to the point, dialogue should not be confused with democracy. The Strasbourg Court has final authority to determine the meaning of Convention rights. National courts do not. It is entirely right that national courts express their concerns to Strasbourg through their judgments, and equally right that Strasbourg takes account of those concerns. But legal certainty requires Convention rights to mean one thing and not another, and Lord Rodger was right to express the view, however grudgingly he meant it, that once Strasbourg has given a clearly reasoned final judgment, the matter is closed. If a signatory to the Convention has enduring disagreements with the ECtHR's interpretation of Convention rights, then it is ultimately not for national courts to try to resolve them.

(ii) Resolutions and referrals: Rifkind, Arden and Protocol 14

A month before Arden's lecture, the former Foreign Secretary Sir Malcolm Rifkind gave a lecture at Lincoln's Inn in which he discussed the Conservative party's proposals concerning the ECHR and the HRA.¹⁷⁰

He acknowledged that there were some benefits to the HRA having incorporated the Convention, but that it also gave rise to serious problems in that there was no possibility of reversing or overturning a judgment of the Strasbourg Court 'regardless of how controversial, inappropriate or foolish such a judgement might be'.¹⁷¹ Accordingly, 'one of the main consequences of incorporation is lack of flexibility regardless of the implications'.¹⁷² Referring to the judgment of the Grand Chamber in *McCann and others v United Kingdom* in the days before the HRA, which held that the UK's operation of a 'shoot to kill' policy had breached the Article 2 ECHR rights of three IRA members, Rifkind said:¹⁷³

In the past if the Court in Strasbourg found there had been a breach of the Convention the British Government was obliged to respond but could do so at a pace, and in a manner, which was sensible and appropriate. In an extreme case, as with the European Court's finding, in 1995, that British soldiers violated the right to life of three IRA bombers by shooting them dead during their mission to Gibraltar to blow up an army band, the finding of the Court was rejected. In most other cases the ruling was accepted but its implementation could be adapted to national practices and procedures.

Post-HRA, Rifkind claimed, there is 'no such flexibility':¹⁷⁴

A ruling in favour of the litigant must take effect immediately regardless of the implications. There are certain safeguards. If to implement the Convention would be incompatible with an Act of Parliament, there is no automatic implementation. The Government is expected to introduce amending legislation to remove the incompatibility and can, doubtless, take its own time to do it. While this protection is welcome it will be of only limited value as in many cases the problem will be incompatibility with British practice rather than with an Act of Parliament.

Sadly, it does little credit to the former Foreign Secretary to give a lecture that contains such significant inaccuracies. First of all, Rifkind is wrong to suggest that the UK government refused to implement the Grand Chamber judgment in *McCann*. By its judgment of 27 September 1995, the Grand Chamber ordered the UK government to pay the successful applicants £38,700 'for costs and expenses incurred in the Strasbourg proceedings'. On 20 December 1995, the Committee of Ministers – the body responsible for supervising the enforcement of judgments under the Convention – recorded that 'the Government of the United Kingdom paid the applicants the sum provided for in the judgment of 27 September 1995', and concluded that the judgment had been implemented.¹⁷⁵ For the avoidance of doubt, the Joint Committee on Human Rights publishes regular reports complaining about the UK government's delay in implementing Strasbourg judgments:¹⁷⁶ *McCann* is not one of the judgments mentioned.

Secondly, Rifkind is equally wrong to claim that 'a ruling in favour of the litigant must take effect immediately regardless of the implications'. Indeed, the position in relation to Strasbourg judgments remains as it was before the HRA came into force: the UK government is under an international obligation to give effect to the final judgment in any case to which it is a party. However, Strasbourg judgments cannot be directly enforced other than by way of the UK courts, and s2 HRA imposes no duty on them to follow Strasbourg's rulings. The UK courts *are* bound by s6 HRA to act compatibly with Convention rights but the number of Strasbourg judgments that would be capable of being applied directly at first instance is vanishingly small. Either the first instance court will remain bound by the (presumably incompatible) precedent of the UK courts (either the Court of Appeal, the House of Lords or, now, the Supreme Court), in which case there will be months of litigation in which the government can make its case before there is any prospect of an adverse ruling. Or the Strasbourg judgment will concern inconsistent legislation, which – as Rifkind himself concedes – there is no possibility of the UK court making a ruling that would affect the continuing operation or legal validity of an Act of Parliament (s4(6) HRA).

It is for these reasons, the nine successful appellants in *A and others v Secretary of State for the Home Department (No 1)* remained in indefinite detention in Belmarsh notwithstanding that the House of Lords declared Part 4 of the Anti-Terrorism Crime and Security Act 2001 to be in breach of Articles 5 and

14 ECHR; the DNA of persons neither charged nor convicted is still kept on the National DNA database despite the contrary Grand Chamber ruling in December 2008; the stop and search power under section 44 Terrorism Act 2000 continues to be used by the Metropolitan police despite the judgment of *Gillan* earlier this year; and prisoners in the UK still do not have the right to vote notwithstanding the judgment of the Grand Chamber in *Hirst v United Kingdom* more than two years ago.

Even if we take Rifkind's doubtful claim that the most problematic cases involve incompatible practice or policy rather than legislation, it is still plainly the case that UK courts have considerable discretion when it comes to granting remedies, as well as the ability to stay the execution of their judgments. It is telling that the only instance of 'inflexibility' that Rifkind gives is the Scottish case of *Starrs v Ruxton* from 1999 – before even the HRA came fully into force – concerning the appointment of temporary Sheriffs in Scotland. Although he rightly notes that the decision in *Starrs* did cause the average waiting period for civil cases in Perth to go from 10 weeks to 15 weeks, and from 10 weeks to 21 weeks in Stirling, if this is the best example of inflexibility that Rifkind is able to find in more than ten years of operation of the HRA, then his case is surely a weak one.

Nonetheless, Rifkind argues that amendment of the HRA is necessary to prevent UK courts from following Strasbourg case law where this might have unwelcome effects:

Rather than repealing the Human Rights Act it might be sufficient to amend it. A provision could be added which would make a ruling under the Convention unenforceable not just if it was incompatible with a British statute but, also, if, within a given time, the Government secured the approval of Parliament, either by legislation or by Resolution of both Houses, that enforcement would not take place. It might be appropriate to require a two thirds majority in each House to ensure that the Government of the day had to have cross-party support if it did not wish to comply with a court decision. Such a power would be used sparingly, as were comparable powers before 1998 but its existence would ensure that Parliament and not judges continued to have the last word in accordance with our traditions and Constitution.

In addition to being utterly unnecessary, Rifkind's proposal has the additional benefit of being unworkable. First, he does not make clear whether by 'a ruling under the Convention' he is referring to a Strasbourg judgment, or merely a UK court's ruling based on Strasbourg case law. Assuming that it is the former, the Strasbourg ruling would still fall to be applied by a UK court at first instance, which – depending on the substance of the ruling – will either be bound by precedent to reject it (*Kay v Lambeth*), have no power to give effect to it because it involves inconsistent legislation (s4 HRA), or may decline to follow it in

any event (s2 HRA). Assuming the highly improbable hypothetical case that it is a ruling capable of being given immediate effect by a first instance court, Parliament could always pass emergency legislation to authorise the incompatible practice (as it did, for example, following the judgment of the House of Lords in *R v Davis*). As such, it is hard to take seriously the idea of an amendment to the HRA to enable Parliament to make a resolution against the enforcement of Strasbourg judgments, given that Parliament can already legislate to remedy any problems that may arise (and, indeed, is likely to prefer to do so, given the two-thirds majority that Rifkind's resolution would require).

If, on the other hand, Rifkind is talking about UK decisions under the Convention, his proposal becomes even more unworkable. At which stage of judgment would Parliament convene to debate its resolution? To be remotely effective, it could only take place once all appeals had been exhausted, which means the judgment is likely to be that of the Court of Appeal or the Supreme Court. Again, it is impossible to see why Parliament would prefer to make a resolution against implementing a Supreme Court judgment, when it could just as easily use ordinary legislation to achieve its purpose. What would a resolution add or change? For one thing, as a purely reactive measure, it would not require Parliament to focus its mind on the substantive issue, nor provide any opportunity to tailor a remedy to address any problems identified by the judgment. For another thing, it would be much harder to secure the two thirds majority that Rifkind proposes. As problematic as emergency legislation often is, Rifkind's resolution would inevitably be a poorer, cruder and more unwieldy substitute.

It also raises the question of why such a power, even if thought practicable, should be limited to Convention rights? For instance, in *Ahmed and others v HM Treasury*, the UK Supreme Court quashed the Treasury's asset-freezing measures using ordinary principles of legality, rather than the HRA. The Supreme Court furthermore refused to grant the Treasury a stay of execution. Consequently, the government felt necessary to rush through the Terrorist Asset Freezing (Temporary Provisions) Act 2010 in a mere two days. Rifkind's proposal raises the question: if Parliament is to get into the business of suspending the effect of judgments it doesn't like, why it should restrict itself to judgments under the HRA? But the better answer must be that such a power would in all events be unnecessary, because Parliament already 'has the last word' in matters of fundamental rights.

In her November lecture, Lady Justice Arden noted Rifkind's proposal in the context of the implementation of Strasbourg judgments:¹⁷⁷

The system of implementation through the Council of Ministers gives contracting states some time to reflect how best to make changes in their law consequent on Strasbourg decisions. In the United Kingdom,

*this freedom of choice may be taken away from them if the courts have meanwhile applied the Strasbourg jurisprudence in domestic law and decided what domestic law requires. **Accordingly the suggestion has recently been made that it should be possible in an appropriate case for an order to be made declaring that a new decision of the Strasbourg court shall have no effect in the United Kingdom for a specified period until Parliament has had the opportunity to decide how to change the law.***

Surprisingly, Arden does not challenge Rifkind's suggestion that the HRA might remove the government's 'freedom of choice' of how to implement a Strasbourg judgment. She cites the 'controversial' decision of the House of Lords in *In re P*¹⁷⁸ as a possible example of this, yet that was an example of the Lords going further in an area where the Strasbourg Court had not yet ruled – not a case where the Strasbourg Court gave a judgment which UK courts then gave immediate effect to, thereby preempting the Committee of Ministers. More to the point, it was open to the Northern Ireland government to seek primary legislation from Westminster to reverse the effect of the House of Lords decision. Instead, Arden draws attention to Protocol 14 to the Convention – now due to come into force on 1 June – which makes a number of changes to the Court's procedure to enable it to cope with the significant backlog of cases. Among the changes, Article 46 will be amended to provide that:¹⁷⁹

If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

Arden suggests that, once Protocol 14 comes into effect, 'domestic courts may wish to allow time for a case to be referred back to the Strasbourg court for clarification ... before they rule on its effect in domestic law'.¹⁸⁰ Similarly, she suggests, the government or Parliament 'might want a period of non-implementation to enable that step to be taken rather than to have to take an over-cautious approach to what the decision requires'.

There is, of course, no doubt that the Strasbourg Court is as capable as any national court of delivering a poorly reasoned judgment. And given the extraordinary pressure that the Strasbourg Court is under,¹⁸¹ it is hardly a surprise that it has from time to time delivered judgments of which the UK courts have rightly been critical. As Sedley says, it is not 'indiscipline or insubordination' for national judges to question the reasoning of the Strasbourg Court. On the contrary, cases such as *Spear*, *Doherty* and *Horncastle* are wholly consistent with the scheme of the Convention, in which national courts play their part in drawing Strasbourg's attention to possible defects in existing case law, and

inviting it to clarify and reconsider its reasoning and conclusions. In principle, Protocol 14 provides a further formal mechanism by which that clarification can be sought.

In practice, however, there is nothing in the survey of cases under s2 HRA over the past decade to suggest that it would be necessary to use the procedure in relation to UK cases. It would, moreover, be utterly contrary to the spirit of the Convention for the government or Parliament to fall back on Protocol 14's referral mechanism as an opportunity to delay the implementation of judgments that they find unwelcome, in the manner that Rifkind's parliamentary resolution would operate. Like her suggestion of the need for a 'right of rebuttal', Arden's speculation that UK courts might delay implementation of Strasbourg decisions to allow for referral seems highly ill-considered. A British court should only do so as a last resort, where it believes there is good reason to do so and where other avenues for judicial dialogue have failed. To do so without good reason would likely frustrate the purpose of the HRA: instead of rights brought home, it would be rights sent back, or at least rights held in abeyance while the government decides.

(iii) Lord Hoffmann and the international judge

In what may be the most extreme form of judicial dialogue with the Strasbourg Court by a senior UK judge, Lord Hoffmann gave a lecture shortly before his retirement in 2009 in which he derided the role of the European Court of Human Rights having ultimate jurisdiction to determine the meaning of the Convention.¹⁸² The Strasbourg Court, he said, 'lacks constitutional legitimacy' to 'impose uniform rules on Member states' in the area of fundamental rights. Indeed, for the Court to decide on issues such as noise pollution, hearsay evidence and the rule against self-incrimination under the rubric of human rights was to 'trivialise and discredit the grand ideals of human rights'.¹⁸³

Hoffmann's main argument is that that international courts are inherently ill-suited to determine human rights questions because rights are 'universal in abstraction but national in application'.¹⁸⁴ He complains that international judges are poor judges of human rights matters because they are not part of the 'national legal system,' not 'integral' with the 'given society',¹⁸⁵ nor 'part of the community which they serve'.¹⁸⁶ He gives as examples of the lack of the Strasbourg Court's overreach its case law in two areas: the rule against self-incrimination and the hearsay rule.

In the cases of the rule against self-incrimination, Hoffmann criticised the decision of the Strasbourg Court in *Saunders* for its failure to have regard to the earlier English cases on the right to silence, particularly the analyses of Lords Mustill and Templeman suggesting that the right to refuse to answer questions is only justifiable 'on the grounds that it discourages ill-treatment of a suspect'.¹⁸⁷ Hoffmann notes that, in areas where the risk of ill-treatment was minimal,

Parliament had enacted a number of exceptions to the general rule. In Saunders' case, however, the Strasbourg Court held that a right against self-incrimination was implicit in the right to a fair trial, stating that 'the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.' Hoffmann describes this as an instance of 'what Bentham called teaching grandmothers to suck eggs.'¹⁸⁸

Concerning the ECtHR's case law on the hearsay rule, Hoffmann is even more trenchant. Claiming that the rule 'has generally [been] thought irrational and an obstacle to justice', he notes that the rule was abolished by Parliament in civil cases following the Civil Evidence Act 1985 and substantially scaled back in criminal cases under the Criminal Justice Act 2003.¹⁸⁹ Nonetheless, in the recent case of *Al-Khawaja and Tahery v United Kingdom*, 'the Strasbourg court has discovered that the hearsay rule is a fundamental human right'. This is because the evidence was based 'solely or to a decisive degree' on a statement by a person whom the accused has had no opportunity to examine. Hoffmann proclaims:

*It is quite extraordinary that on a question which had received so much consideration in the Law Commission and Parliament, the Strasbourg court should have taken it upon themselves to say that they were wrong.*¹⁹⁰

Hoffmann's main complaint is that the Strasbourg Court has overruled the decisions of the British Parliament and British courts. The question is not whether Strasbourg's decision is right or wrong (although Hoffmann plainly thinks they are wrong), but that the ultimate decision on the interpretation of human rights in the UK has been made by international judges who are not part of 'the nation, its institutions and values,' nor a 'part of the community which they serve.' Strasbourg's rulings on self-incrimination and hearsay seem to ignore the fact that the UK is 'subject to a system of laws which expresses its own political and moral values.'

But Lord Hoffmann's choice of examples is curious, to say the very least. First of all, they are obviously issues upon which reasonable people could disagree. Secondly, and more significantly, they are issues upon which reasonable people *in the UK* disagree. In other words, the rule against self-incrimination and the rule against hearsay are plainly matters upon which people who are part of the UK nation, or society or whatever take different views. It is true that Parliament and the courts have weighed in on both issues and reached a particular point of view but that does not mean that they are necessarily right. More to the point, that does not even mean that they are consistent with the UK's own 'political and moral values.'

Lord Hoffmann's error lies in confusing the 'moral and political values' of the UK with the decisions of its Parliament and courts. Take, for example, the recent

Strasbourg judgment in *Gillan v United Kingdom*, which held the stop and search power under s44 Terrorism Act 2000 to be incompatible with Article 8 ECHR. While its compatibility with fundamental rights was the subject of public and parliamentary debate, the legislation was certified by the Home Secretary as being compatible with Convention rights, it was passed by both Houses of Parliament and subsequently held to be compatible by two Divisional Court judges, three Court of Appeal judges, and five Lords of Appeal in Ordinary. Similarly, the retention by police of the DNA of people acquitted or never charged with a criminal offence was unanimously deemed by the Divisional Court, the Court of Appeal and the House of Lords to be entirely compatible with the right to privacy under Article 8 ECHR, until the Strasbourg judgment in *S and Marper v United Kingdom* in December 2008. If we are to believe Hoffmann's analysis, the judgments of the Strasbourg Court in *Gillan* and *S and Marper* were not vindications of long standing UK values of fundamental rights, but acts of arrogance by an international court.

The same is true of the rules against hearsay and self-incrimination.¹⁹¹ Not only was the Strasbourg Court entitled to come to the conclusion that it did, but its decisions were also entirely consistent with common law values.¹⁹² Indeed, what is striking about Lord Hoffmann's choice of examples is that it might easily be said that – as with section 44, secret evidence and the retention of DNA evidence – the Strasbourg Court has often done a better job of standing up for British values than Britain's Parliament and Britain's courts have. If the Strasbourg Court were truly 'teaching grandmothers to suck eggs', it is because grandmothers sometimes appear to have forgotten how.

(iv) The Shadow Justice Minister

Plainly, November 2009 was a busy month for discussing the UK's relationship with the Strasbourg Court. In addition to the talks given by Lady Justice Arden and the Master of the Rolls, the shadow Justice Minister Dominic Grieve QC MP gave a talk at the Middle Temple in which he set out the latest Conservative party thinking on its proposal for a 'British Bill of Rights'.¹⁹³ As was mentioned at the outset of this paper, Grieve suggested that the 'marked deference' shown by British judges towards Strasbourg decisions under the HRA was problematic.¹⁹⁴ Citing Lady Justice Arden's call for UK courts to have a 'right of rebuttal' against Strasbourg, he said that a 'key area' for reform under the Conservative's proposed British Bill of Rights would be: 'a reconsideration and recalibration of the relationships of our national courts and Parliament and of our national courts and the Strasbourg Court in particular, respecting the extent to which our courts are bound by decisions of the Strasbourg court.'¹⁹⁵

Unfortunately, Grieve did not spell in any great detail out how this proposed recalibration would work. He referred to an ongoing debate as to whether the Bill of Rights would include Convention rights verbatim or whether they would be reworded. Clearly mindful that keeping the existing text of the Convention

rights would create a strong presumption that they should be interpreted in the same manner as before, Grieve expressed his own inclination to 'use the Convention rights as currently drafted, as a starting point. To do otherwise appears to me to risk pointless confusion'.¹⁹⁶ Specifically on s2 HRA he said:¹⁹⁷

We should also ... reconsider the duty in Clause 2 to 'take into account' Strasbourg jurisprudence. As I have already said, it has been interpreted as requiring a degree of deference to Strasbourg that I believe was and should be neither required nor intended. We would want to reword it to emphasise the leeway of our national courts to have regard to our own national jurisprudence and traditions and to other common law precedents while still acknowledging the relevance of Strasbourg Court decisions.

Like Arden before him, Grieve is wrong to claim that the *Ullah* principle involves any degree of deference. As this paper has shown, the concept plays no part in s2 HRA nor in any of the UK case law interpreting it over the past decade. It is equally wrong to suggest the need for UK courts to have 'leeway ... to have regard to our own national jurisprudence and traditions and to other common law precedents' in considering Convention rights. (Indeed, those who suggest that the common law has been downplayed in relation to Convention jurisprudence have either not read the judgments in the Belmarsh case, the Torture Evidence case, *R v Davis*, or in *R v Horncastle*, or, if they have read them, they have plainly not understood them). Grieve was equally wrong to echo Arden's call for a 'right of rebuttal': no right is needed, for the existing case law already makes clear that UK courts are perfectly entitled to invite Strasbourg to clarify its reasoning and to think again, if they believe there is good reason to do so.

(v) The Interlaken Declaration

Although mention has already been made of the referral procedure in Article 46(2) that will be introduced by Protocol 14 later this year, this is but one issue in the larger ongoing process of reform of the Strasbourg Court to enable it to cope with its massive workload, and to protect 'the quality and consistency of the case law and the authority of the Court'. In February 2010, the states parties to the Convention issued the Interlaken Declaration on the Court's future direction.¹⁹⁸

Among the many issues addressed, at least three are of direct relevance to the relationship between the UK courts and the ECtHR. First, with the entering into force of the Lisbon Treaty, the accession of the European Union to the Convention is no longer a theoretical possibility. Secondly, the increased emphasis given to the concept of subsidiarity, as the preamble explains:¹⁹⁹

the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities,

i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level.

In other words, national institutions – including the courts – play an important role in implementing the Convention. In particular, the action plan set out in the declaration calls upon states parties to commit themselves among other things to:²⁰⁰

*taking into account the Court's developing case-law, **also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system.***

This is a reference to the idea that the obligation in Article 46(1) ECHR by which states parties undertake to 'abide by the final judgment of the Court in any case to which they are parties' should be broadened, so that States parties treat all final judgments of the court as binding erga omnes ('towards all'). In practical terms, this has not been a problem in the UK, as Lady Justice Arden notes:²⁰¹

*Strictly the United Kingdom is only bound to give effect to those decisions which are given in relation to the United Kingdom. It has been suggested that those are the only decisions which should be taken into account by domestic courts. **My view is that that suggestion is, with respect, absurd.** Since it is likely that the Strasbourg court would apply those decisions to other cases, the courts of England and Wales at least do not draw any such distinction.*

Third, the declaration invites the ECtHR to:²⁰²

avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court.

Conclusion

Nearly ten years have passed since the HRA came fully into force in UK law. In that time, our courts have handed down a number of judgments based on Strasbourg case law that the government and others have found unwelcome. Understandably enough, the attention paid to such judgments has drawn attention away from a smaller number of cases in which the UK courts have reasonably declined to follow ECtHR jurisprudence, in order to invite the Strasbourg Court to clarify its judgment on a matter of UK law.

Distracted by high-profile decisions based on Convention case law, it is surely tempting for politicians to blame s2 HRA for giving UK judges the freedom

to follow Strasbourg decisions in the first place. A no doubt equally seductive alternative is to believe that the fault lies, not with s2 HRA, but with how it has been interpreted by the courts. As this paper makes clear, however, neither s2 HRA nor the courts' interpretation of it deserves the slightest blame. On the contrary, s2 HRA strikes a commendable balance between the UK's obligations under the Convention and the UK's status as dualist jurisdiction under international law. Similarly, the approach established by the House of Lords in *Ullah* – variously derided as being too inflexible, too deferential and too timid – has in fact been the wisest course to steer between an unnecessarily dogmatic adherence to Strasbourg jurisprudence and an equally unnecessary disregard for it. As cases such as *Spear*, *Doherty*, and *Horncastle* have shown, there is more than enough room in Lord Bingham's approach in *Ullah* to allow UK courts the flexibility to depart from Strasbourg authority where the circumstances require it.

More generally, politicians must learn not to draw the wrong conclusions from unwelcome decisions on matters of Convention rights. Adverse decisions are not something that can be avoided by amending the HRA. On the contrary, they are an inevitable consequence of the UK's continuing commitment to the European Convention on Human Rights, which requires it to follow the decisions of the Strasbourg Court. The best way to minimise the number of adverse judgments is not to try and immunise government from their consequences, or to wreck the careful balance wrought by s2 HRA by instructing the courts to avoid Strasbourg case law. The best way to minimise adverse judgments is to refrain from passing laws and making decisions that are incompatible with fundamental rights in the first place. There is, in short, no need to bind the judges to the mast. Instead, it is politicians who must learn to resist the siren calls.

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Notes

- 1 Hansard, HL Debates, 18 November 1997, col 512.
- 2 Ibid, col 515.
- 3 See eg R Clayton, 'The Human Rights Act Six Years On: Where Are We Now' (2007) 12 EHRLR 11 at p18.
- 4 *Ullah v Special Adjudicator* [2004] UKHL 26 per Lord Bingham at para 20. This was described as the 'mirror principle' in J Lewis, 'The European Ceiling on Human Rights' (2007) *Public Law*, p720. See also Masterman, 'Section 2(1) of the Human Rights Act: binding domestic courts to Strasbourg' [2004] *Public Law*, p725.
- 5 See most recently the judgment of the UK Supreme Court in *R v Horncastle and others* [2009] UKSC 14.
- 6 See eg *R v Lyons* [2002] UKHL 447 per Lord Hoffmann at para 46: '*It is obviously highly desirable that there should be no divergence between domestic and ECtHR jurisprudence but section 2(1) says only that the courts must 'take into account' the decisions of the ECtHR. If, for example, an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECtHR to reconsider the question: compare Z v*

- United Kingdom (2001) 10 BHRC 384. There is room for dialogue on such matters' [emphasis added]. See more recently the speech of Lady Justice Arden, 'Peaceful or Problematic? The relationship between national supreme courts and supranational courts in Europe', annual Thomas More lecture, Lincoln's Inn, 10 November 2009, at para 35, calling for 'more dialogue ... between national judges and judges of the European supranational courts'.
- 7 'We must replace the Human Rights Act with a British Bill of Rights', Conservative party blog, 22 November 2009.
- 8 'Rights without responsibilities – a decade of the Human Rights Act', speech to the British Institute of Human Rights, 24 November 2008.
- 9 'Can the Bill of Rights do better than the Human Rights Act?', Middle Temple Hall, 30 November 2009. See also eg David Cameron, 'Balancing freedom and security – a modern British Bill of Rights', 26 June 2006, in which he suggested that one of the chief benefits of a British Bill of Rights would be the establishment of a new relationship with the European Court of Human Rights, in which the Court would '*tend to respect and uphold the principles laid down in the Bill of Rights whenever they can*'.
- 10 1997 Labour Party Manifesto. Emphasis added.
- 11 'Rights Brought Home: The Human Rights Bill' (Cm 3782, October 1997), para 1.14, emphasis added. See also para 2.5: '*The Convention is often described as a 'living instrument' because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention*' [emphasis added]. See also eg A Lester and D Pannick ((2000) 116 LQR 380, 383): '*The central legislative purpose [of the HRA] is that of bringing the Convention rights home, that is, of domesticating them so that they are not regarded as alien rights protected exclusively by a 'foreign' European Court. To change the metaphor yet again, Convention rights must be woven into the fabric of domestic law. In the absence of a written British constitution, it is especially important to weave the Convention rights into the principles of the common law and of equity so that they strengthen rather than undermine those principles, including the principle of legal certainty*' [emphasis added].
- 12 Ibid, para 2.4.
- 13 HL Debates, 18 November 1997, col 511, amendment 9.
- 14 Ibid, col 512.
- 15 See Article 46 ECHR: '*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*'. When the Convention was first signed, states parties were under an obligation '*abide by the decisions of the Court in any case to which they are parties*' (old Article 53), rather than its final judgments. This was because the original structure of the Convention was based on first instance decisions being made by the European Commission on Human Rights, with a single appeal to the Court. Under Protocol 11 which came into force in November 1998, the Commission was replaced by the two-tier Court and Article 53 replaced by the new Article 46, meaning that states parties would continue to only be formally bound by the Court's final decision (whether first instance or Grand Chamber).
- 16 HL Debates, 18 November 1997, col 514.
- 17 Ibid.
- 18 Ibid, col 515.
- 19 Ibid.
- 20 Ibid.
- 21 Ibid.
- 22 See Cross and Harris, Precedent in English Law, 4th edn, OUP, 1991, p1: '*Judicial precedent has some persuasive effect almost everywhere because stare decisis (keep to what has been decided previously) is a maxim of practically universal application. The peculiar feature of the English doctrine of precedent is its strongly coercive nature. English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so*'.

- 23 See eg Lord Browne-Wilkinson, HL Debates, 18 November 1997 at col 513: *'The doctrine of stare decisis, the doctrine of precedent, whereby we manage to tie ourselves up in knots for ever bound by an earlier decision of an English court, does not find much favour north of the Border, finds no favour across the Channel and is an indigenous growth of dubious merit. It would be unhappy if in dealing with the convention law we enacted that an English court, unlike any other court subject to the convention, was bound to follow an earlier decision of the European Court at Strasbourg'*.
- 24 N22 above, p24.
- 25 See eg the speech of Lord Oliver in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500. The most notable exception to this rule is that principles of customary international law (eg the *jus cogens* prohibition against torture) are deemed to form part of the common law. See more generally, S Fatima, [Using International Law in Domestic Courts](#), Hart Publishing, 2005.
- 26 This assumes of course that the terms of the treaty are self-executing, ie capable of being given direct effect by the courts. Hence, even a treaty ratified by a monist jurisdiction will sometimes require transposition in order to be effective in domestic law.
- 27 See Article 32 ECHR: *'The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention'*.
- 28 See eg section 2(1) of the 1972 Act: *'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly'*.
- 29 HL Debates, 18 November 1997, col 508.
- 30 Grosz, Beatson and Duffy, [Human Rights: The 1998 Act and the European Convention](#), Sweet & Maxwell, 2000, p20.
- 31 Lyons, n6 above, para 27. Emphasis added.
- 32 *Re McKerr* [2004] UKHL 12 at para 25. Emphasis added.
- 33 *S and Marper* [2004] UKHL 39 per Lord Rodger at para 66: *'the appellants seek to rely on the article 8(1) Convention right which they enjoy under the Human Rights Act 1998. That is a right under domestic law, but a right of a special kind which was, in the words of Lord Nicholls of Birkenhead in In re McKerr ... "created by the 1998 Act by reference to the Convention". So, in order to interpret article 8 and the other Convention rights in schedule 1 to the 1998 Act, courts must have regard to the scope of the equivalent rights in the Convention. For that reason, while the decisions of the European Court of Human Rights on the interpretation of the Convention are not binding, they provide authoritative guidance which courts have to take into account when interpreting the rights in domestic law. In formulating its decisions the Court considers the spectrum of attitudes across the contracting states in order to determine the contemporary content of rights under the Convention. It is the decisions reached in this way that help to shape the content of the Convention rights in our domestic law'* [emphasis added].
- 34 *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26 at para 10.
- 35 *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.
- 36 (2001) 34 EHRR 159.
- 37 As the explanatory notes to the Bill stated, the fact that *'the Minister made a statement under section 19(1)(b) of that Act does not ... mean that the Government believes the ban would necessarily be found to be incompatible if the ban were to be challenged in the United Kingdom courts or to be considered by the European Court of Human Rights'* (para 680).
- 38 (2003) 38 EHRR 212.
- 39 *Animal Defenders* case, n35 above, at para 44, emphasis added. See also paras 44-45: *'The judgments of the European Court are ... not binding on domestic courts. They constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the European Court's interpretation of an incorporated article. It is, in my opinion, important that that should be so and that its importance is not lost sight of'*. Referring to the remarks of Lord Hoffmann in *Alconbury* (discussed

- below), he concluded that the ‘importance of the maintenance of reasonable statutory restrictions on political advertising makes these remarks particularly pertinent’.
- 40 Ibid, per Lord Bingham at para 37: ‘It is true, of course, that the 1998 Act gave domestic effect to the Convention rights defined in section 1 and that, under section 2, the obligation of the courts is to take into account any Strasbourg decision, not to follow it as a strictly binding precedent. But section 6(1) makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. The House has held that in the absence of special circumstances our courts should follow any clear and constant jurisprudence of the Strasbourg court, recognising that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court: *R (Ullah) v Special Adjudicator* As the law now stands, I see little scope for the competition between conflicting interpretations which my noble and learned friend appears to envisage’.
- 41 Ibid, para 53.
- 42 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at para 26. See also Lord Slynn’s statement in *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51 at para 44: ‘In my opinion, even if the United Kingdom courts are only to take account of the Strasbourg Court decisions and are not strictly bound by them (section 2 of the Human Rights Act 1998), where the Court has laid down principles and, as here a minimum threshold requirement, United Kingdom courts should follow what the Court has said. If they do not do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed’.
- 43 [2004] UKHL 26 at para 20. Emphasis added. This passage has since been affirmed on numerous occasions: see eg *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at para 18: ‘While the case law of the Strasbourg court is not strictly binding, it has been held that domestic courts and tribunals should, in the absence of special circumstances, follow the clear and constant jurisprudence of that court’.
- 44 *R(Anderson) v Secretary of State for the Home Department* [2001] EWCA Civ 1698 at para 89, emphasis added. See also eg para 90: ‘we can only say what the Convention means in England and Wales. Unless there is a decision in the same terms by the courts of Scotland and Northern Ireland, murderers in those parts of the United Kingdom will continue to be dealt with under the Convention as it is understood in Strasbourg. That is perhaps a local, but nonetheless a pressing, example of the dangers of deviating from an international norm’.
- 45 Ibid, para 91. See also Simon Brown LJ (as he was then) at para 65: ‘whatever advantage we might enjoy through our domestic knowledge and experience of the mandatory life sentence regime could perhaps be thought balanced (or even conceivably outweighed) by the ECtHR’s deeper appreciation of the true ambit and reach of Articles 5(4) and 6(1) of the Convention’.
- 46 See eg J Lewis, ‘The European Ceiling on Human Rights’, [2007] *Public Law* 720, criticising Bingham’s approach for being ‘contrary to both the intent and wording of the HRA’.
- 47 As will be seen below, however, there have in fact been several cases in which the House of Lords has gone slightly further than Strasbourg has yet gone.
- 48 *Animal Defenders* case, n35 above, at para 53.
- 49 [2010] UKSC 2 at para 74: ‘As Lord Bingham memorably pointed out in *R (Ullah) v Special Adjudicator* ... the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court’.
- 50 *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 at para 19. See also eg Lord Bingham’s near-identical statements in *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 at para 25: ‘A party unable to mount a successful claim in Strasbourg can never mount a successful claim under [the HRA]. For the purpose of the 1998 Act was not to enlarge the field of application of the Convention but to enable those subject to the jurisdiction of the United Kingdom and able to establish violations by United Kingdom public authorities to present their claims in the domestic courts of this country and not only in Strasbourg’; and in *R(SB) v Denbigh High School* [2006] UKHL 15 at para 29: ‘the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom

- whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg'.
- 51 [2007] UKHL 58.
- 52 Ibid, per Lord Bingham at para 36: 'I do not think that the European Court, if the appellant's article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law'.
- 53 Ibid, para 39: 'there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention'.
- 54 Ibid, para 51.
- 55 Section 21(1) HRA.
- 56 [2010] UKSC 2.
- 57 Ibid, para 74. In *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225, the ECJ held that obligations under UN Security Council resolutions were incapable of displacing fundamental rights - the opposite conclusion as the House of Lords in *Al Jedda*.
- 58 *Al Skeini*, n34 above, at para 106-107. But c.f. Lord Hope in *In re P*, n61 below, at para 50: '[Lord Bingham said] the duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: "no more, but certainly no less". Not, it should be noted, 'certainly no more'. The Strasbourg jurisprudence is not to be treated as a straightjacket from which there is no escape'.
- 59 *JJ and others v Secretary of State for the Home Department* [2007] UKHL 45 at para 106, emphasis added.
- 60 *Ullah*, n43 above, para 35.
- 61 [2008] UKHL 38
- 62 Ibid, para 27. See also Lord Hope at para 53: 'I agree with Lord Hoffmann that it seems now to be not at all unlikely that if the issue in this case were to go to the Strasbourg the court would hold that the discrimination of which the appellants complain violates article 14'.
- 63 Ibid, paras 37-38.
- 64 Ibid, paras 119-120.
- 65 [2008] UKHL 64 per Lord Bingham at para 38.
- 66 Ibid, para 18.
- 67 [2006] UKHL 54.
- 68 Ibid, paras 48-49, emphasis added. See also the speech of Lord Brown in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 at paras 139-140, in which he concluded that the hunting ban did not engage article 8 ECHR: 'But I strongly wish that it were otherwise and for my part would hope to see the jurisprudence governing the scope of article 8 further developed by the Strasbourg Court Naturally I have considered whether this House ought itself properly to construe and apply article 8(1) sufficiently widely to encompass some at least of these appellants. But I conclude not. It is one thing to say that Member States have a margin of appreciation, perhaps a wide margin, when it comes to striking any balance that falls to be struck under article 8(2) (or, for that matter, in respect of any other qualified right); quite another to say that a comparable margin exists for determining whether the qualified right (here article 8(1)) is engaged in the first place. The reach of article 8 must be for the Strasbourg Court itself to develop'.
- 69 [2000] UKPC D3; (2003) 1 AC 681.
- 70 (1996) 23 EHRR 313.
- 71 *Brown v Stott*, n69 above, at 711.
- 72 Ibid.
- 73 Ibid, per Lord Bingham. See also Lord Kirkwood: 'In the circumstances I consider that the High Court, which did not have the benefit of submissions on the issues of balance and proportionality, placed too much weight on the observations in *Saunders*, a case in which

- the European Court appears to have laid down a more absolute standard than the other jurisprudence of the court indicates’.*
- 74 Lyons, n6 above, para 46.
- 75 Ibid.
- 76 [2002] UKHL 31.
- 77 (2002) 34 EHRR 1253.
- 78 Spear, n76 above, para 12.
- 79 (2004) 39 EHRR 8.
- 80 Ibid, para 117-134.
- 81 (2002) 34 EHRR 3.
- 82 [1995] 2 AC 633.
- 83 (1998) 29 EHRR 245.
- 84 Z, n81 above, at para 100.
- 85 Ibid, para 101. The Grand Chamber did find, however, that ill-treatment they received together with the lack of an effective remedy in UK law in the appellants’ case violated their rights under Articles 3 and 13 ECHR.
- 86 (2006) 42 EHRR 30, para 120, emphasis added.
- 87 *Doherty v Birmingham City Council* [2008] UKHL 57.
- 88 [2006] UKHL 10.
- 89 See *McCann v United Kingdom* (2008) 47 EHRR 913 at para 54: *‘The court does not accept that the grant of the right to the occupier to raise an issue under article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in [Kay v Lambeth] observed ... , it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings’.*
- 90 *Doherty*, n87 above, para 20.
- 91 Ibid, para 82. See also Lord Walker at para 115: *‘In common (as I understand it) with the rest of your Lordships I do not think, despite the decision in McCann, that it would be right for this Appellate Committee to depart from the decision recently arrived at in Kay by an Appellate Committee of seven members. That is my view even though we now know that McCann will not go to a full hearing before the Grand Chamber. But your Lordships certainly have to take account of McCann’.*
- 92 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.
- 93 Ibid, para 18. Emphasis added.
- 94 *Alconbury*, n42 above, para 76. Emphasis added.
- 95 [2009] UKHL 28.
- 96 *A and others v United Kingdom*, 19 February 2009.
- 97 AF, n95 above, para 62.
- 98 Ibid, para 64.
- 99 Ibid, para 108. Emphasis added. See also Lord Brown at para 121: *‘national security may need to give way to the interests of a fair hearing. That is where the ECtHR has chosen to strike the balance between the competing interests. Some of your Lordships may consider that it could and should have been struck differently, perhaps as it was in MB. Plainly there is room for at least two views about this, as indeed the differing opinions expressed in MB and by the various first instance and Court of Appeal judges in the present cases amply demonstrate. But, as I suggested at the outset, the Grand Chamber has now pronounced its view and we must accept it’.*
- 100 Ibid, para 98.
- 101 Ibid, para 70.
- 102 Lord Scott differed the most from the majority, not only endorsing the Grand Chamber’s ruling but also holding that *‘the common law, without the aid of Strasbourg jurisprudence, would have led to the same conclusion’* (para 96).
- 103 [2009] UKSC 14.
- 104 (2009) 49 EHRR 1.
- 105 *Horncastle*, n103 above, para 11. Emphasis added. See also Lord Phillips at para 108: *‘I hope that in due course the Strasbourg Court may ... take account of the reasons that have led me not to apply the sole or decisive test in this case’.*
- 106 Lyons, n6 above.

- 107 Doherty, n87 above.
- 108 *Horncastle*, n103 above, para 14. See also eg Lord Phillips at para 73: *'the Court has used language that has tended to obscure the fact that it is, in reality and in special circumstances, countenancing a failure to comply with the requirements of paragraph (3)(d).'*
- 109 *Ibid.* See also Lord Phillips at para 80: *'The Court in Doorson v The Netherlands gave no explanation for the sole or decisive rule. It was not a rule that was relevant on the facts of that case, so an English jurist might suggest that it was mere obiter dicta which need not be afforded much weight. But the rule was propounded repeatedly in subsequent cases, and it is necessary to consider these in order to attempt to deduce the principle underlying the rule. I have set out a brief analysis of a number of the decisions in an attempt to identify the governing principle. This forms Annexe 3 to this judgment'*
- 110 *Ibid.*
- 111 *Ibid.*
- 112 *Sheldrake v DPP* [2004] UKHL 43 at para 33. For criticism of this view see eg Lewis, n4 above, p732 and Masterman, n4 above, p726.
- 113 *A and others v Secretary of State for the Home Department (No 1)* [2004] UKHL 56.
- 114 *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.
- 115 [2008] UKHL 36.
- 116 Two other ECHR signatories – Cyprus, Malta – have mixed common law/civil law systems. While Gibraltar is a common jurisdiction, it is not a separate signatory to the ECHR.
- 117 *Horncastle*, n103 above, para 81 per Lord Phillips.
- 118 *Ibid.*, para 38(iii). English law has the additional requirement that *'the evidence is so unconvincing that, considering its importance, the defendant's conviction would be unsafe'*.
- 119 *Ibid.*, para 14.
- 120 See eg *ibid.*, para 91.
- 121 See eg Lord Phillips, *ibid.*, at para 107: *'[the 'sole or decisive' rule] appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure. Nor, I suspect, can the Strasbourg Court have given detailed consideration to the English law of admissibility of evidence, and the changes made to that law, after consideration by the Law Commission, intended to ensure that English law complies with the requirements of article 6(1) and (3)(d).'*
- 122 *Ibid.*, para 118.
- 123 *Ibid.*, para 119.
- 124 *Ibid.*, para 120.
- 125 *Ibid.*
- 126 [2009] HCJAC 97.
- 127 *Ibid.*, paras 24-26.
- 128 *Ibid.*, para 29.
- 129 [2004] QB 558.
- 130 *X*, n82 above.
- 131 (2001) 34 EHRR 97.
- 132 *JD v East Berkshire Community Health Trust* [2005] UKHL 23.
- 133 *Qazi v Harrow LBC* [2003] UKHL 43.
- 134 (2004) 40 EHRR 189.
- 135 *Kay*, n88 above, para 40 per Lord Bingham: *'Reference has already been made to the duty imposed on United Kingdom courts to take Strasbourg judgments and opinions into account and to the unlawfulness of courts, as public authorities, acting incompatibly with Convention rights. The questions accordingly arise whether our domestic rules of precedent are, or should be modified; whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the Court in Strasbourg'*.
- 136 *Ibid.*, para 43.
- 137 *Ibid.*, para 44. Emphasis added.
- 138 *Ibid.*, para 45.
- 139 *Ibid.*: *'such a course is not permissible save where the facts are of that extreme character'*.

- 140 'Personal reflections on the reception and application of the Court's case-law', *Dialogue between Judges* (Council of Europe, 2006) p63. See also at p64: '*Although a dualist system gives no direct effect even to decisions in cases brought against the United Kingdom, adverse judgments of the Court are always given effect. Some eleven statutes were amended, for example, in response to Saunders, despite serious judicial and administrative reservations about it*', [emphasis added].
- 141 *Ibid*, p65.
- 142 Speech given on the occasion of the opening of the judicial year, 30 January 2009 (Council of Europe, 2009), emphasis added.
- 143 'The current legal challenges facing social landlords: A judge's perspective', *Social Housing Law Association Annual Conference*, 27 November 2009), para 24.
- 144 *Ibid*, para 25. See HHJ Madge, 'Article 8 – la lotta continua', 9 March 2009.
- 145 *Ibid*, para 31.
- 146 *Ibid*, para 35.
- 147 'Peaceful or Problematic? The relationship between national supreme courts and supranational courts in Europe', annual Thomas More lecture, Lincoln's Inn, 10 November 2009, para 4: '*What I am concerned with is how we absorb Strasbourg and Luxembourg jurisprudence into our legal system, how we manage the case load to which it gives rise, how we maximise the potential for working together, how we contribute to the creation of their jurisprudence and how we can have the most influence on their work*'. Arden delivered a more summary version of the same lecture at the opening of the judicial year in Strasbourg in January 2010 – see n155 below.
- 148 *Ibid*, para 8.
- 149 *Ibid*, para 6.
- 150 *Ibid*, para 10.
- 151 *Ibid*, para 32.
- 152 *Ibid*.
- 153 *Ibid*, para 16.
- 154 *Ibid*, para 29.
- 155 Arden, 'Is the Convention ours?', Opening of the judicial year at the European Court of Human Rights, 29 January 2010, para 2. Emphasis added.
- 156 Arden, n147 above, para 16.
- 157 *Ibid*.
- 158 Arden's own court, the English Court of Appeal, is relatively unusual in having the power to grant a party leave to appeal to the UK Supreme Court from its own decisions. Similarly, UK Courts can refer cases to the ECJ for rulings on matters of EU law.
- 159 *Roberts v Parole Board* [2005] UKHL 45 at para 97.
- 160 Arden, n147 above, paras 39-40. Emphasis added.
- 161 *Ibid*, para 26.
- 162 *Ibid*, para 41.
- 163 *Ibid*, para 42.
- 164 *Ibid*, para 43.
- 165 *Ibid*, para 44.
- 166 *Ibid*, para 47. Emphasis in original.
- 167 Arden, n155 above, at paras 19-20.
- 168 See eg *Anderson*, n92 above, at para 18 per Lord Bingham.
- 169 Arden, n155 above, para 22.
- 170 'Governed by Law or by Lawyers? International Treaties and Human Rights', Sir Malcolm Rifkind QC MP, Denning Lecture, 28 October 2009.
- 171 *Ibid*, p13.
- 172 *Ibid*, p14.
- 173 *Ibid*, p16. Emphasis added.
- 174 *Ibid*, pp16-17. See also p21: '*Many of the decisions under the Convention which have been most resented have not been incompatible with British statute but with British practice. One thinks, for example, not just of the controversy about temporary judges but the unsuccessful attempts to return asylum seekers to their own countries. In such cases no discretion or national autonomy remains*'.

- 175 See Committee of Ministers, *McCann and others v United Kingdom – Resolution under Article 54(1)* ECHR, 20 December 1995.
- 176 See eg Joint Committee on Human Rights, *Implementation of Strasbourg Judgments: First Progress Report* (HL 133/HC 954, March 2006).
- 177 Arden, n147 above, para 48.
- 178 *In re P*, n61 above.
- 179 Article 16(3) of Protocol 14. The Committee of Ministers also has the power to refer cases back to the Court in cases of non-compliance to allow the Court to rule on whether the state party is in breach of its primary obligation under Article 46(1).
- 180 Arden, n147 above, para 48.
- 181 N142 above, p65: '*Over its first forty years, [the Strasbourg Court] delivered just over 800 judgments on the merits, in other words around 20 a year, even if this average masks what was in reality a gradual increase, with a steep rise in later years Since then the Court has issued tens of thousands of inadmissibility decisions (or striking-out decisions), but also more than 9,000 judgments on the merits: that is an average of more than one thousand a year and in fact well over that average in 2008. The increase in the number of applications has the effect of generating a persistent deficit. There continues to be far too great a gap between the number of judgments rendered and decisions, on the one hand, and the volume of newly registered applications, on the other (for 2008 some 1,900 applications gave rise to judgments and there were 30,200 decisions, but there were also around 50,000 new applications). In these circumstances the number of cases pending (97,000 at the end of 2008) continues to grow, leading to increasing delays in the processing of cases It is true that the potential applicants to the Court number over 800 million and that proceedings are instituted almost exclusively through individual applications, even though at present there are two inter-State cases pending, both brought by Georgia against the Russian Federation. Currently 57% of the applications pending before the Court are directed against just four States (the Russian Federation, Turkey, Romania and Ukraine), whose combined population accounts for only about 35% of the total population of the Convention States*'.
- 182 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.
- 183 The arguments in this section are a summary of those presented in E Metcalfe, 'The Strange Jurisprudence of Lord Hoffmann: Human Rights and the International Judge', (2009) *UCL Human Rights Review* 35-50.
- 184 N182 above, para 23.
- 185 *Ibid*, para. 39.
- 186 *Ibid*, para 43. Hoffmann does acknowledge the Court's own doctrine of the margin of appreciation, which affords a degree of latitude to member states in certain areas, but argues that '*the Court has not taken the doctrine... nearly far enough*'.
- 187 *Ibid*, para. 28.
- 188 *Ibid*, para. 34.
- 189 *Ibid*, para. 31.
- 190 *Ibid*.
- 191 On the issue of noise pollution, the Strasbourg Court ultimately sided with the British government against the complainants – Hoffmann's complaint seems only to be that noise pollution didn't really seem to be a human rights issue.
- 192 This is even more remarkable given that most Strasbourg judges come from the civil law tradition – historically much more accepting of hearsay than the common law.
- 193 N9 above.
- 194 *Ibid*, p6.
- 195 *Ibid*.
- 196 *Ibid*, p8.
- 197 *Ibid*, p9.
- 198 *High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration*, 19 February 2010.
- 199 *Ibid*, pp6.
- 200 *Ibid*, Action plan, para 4(c). Emphasis added.

- 201 Arden, n147 above, para 20, emphasis added. Arden is here referring to Dominic Raab's suggestion that henceforth UK courts should only have regard to Strasbourg decisions in UK cases (The Assault on Liberty, Fourth Estate, 2009, p227).
- 202 Interlaken Declaration Action Plan, n200 above, para 9(b).

Towards a codified constitution

Stephen Hockman QC, Professor Vernon Bogdanor et al.

This paper has been produced by a group of lawyers and other constitutional experts led by Stephen Hockman QC and Professor Vernon Bogdanor. Known to its members as the 'constitution working group', we held a series of meetings to discuss the questions which would need to be addressed if the United Kingdom decided to draft a written constitution. We hope that this working document is a valuable, if modest, contribution to the debate which is taking place about the process of constitutional reform.

Introduction

Britain has always been anomalous amongst democracies in lacking a written or codified constitution. Indeed, she shares this anomalous situation with just two other democracies – Israel and New Zealand. We do not always appreciate how anomalous our situation actually is. Suppose one joined a tennis club and, having paid one's subscription, asked to see the rules of the club. How would we feel if we were told, 'Actually, the rules have not been collected and brought together all in one place. They are scattered around amongst the decisions of past presidents of the club, and decisions made by the various committees of the club. You can search through the minutes to try to find them, but it will be a long job. In addition, there are some rules which are not written down at all – unspoken conventions. These you will pick up as you go along. But, please do remember that, if you have to ask what the rules are, you do not belong'. We would hardly be mollified. Indeed, we might ask for our subscription back. But that is the position in which the citizen finds herself in relation to the British constitution.

This anomaly has become even more striking in recent years. For, since 1997, this country has been going through a period of profound constitutional change. These changes have included such wide-ranging measures as the Human Rights Act 1998, the devolution legislation, reform of the House of Lords and the Freedom of Information Act 2000. Further constitutional change is very likely. Indeed, all three of the main political parties seem to favour it. In its green paper, *The Governance of Britain*, the government hinted that the various constitutional reforms that it was proposing 'might in time lead to a concordat between the executive and Parliament or a written constitution'.¹ In a written statement to the House of Commons on 3 July 2008, the Lord Chancellor and Minister for Justice, Jack Straw MP, said that the government sought to secure 'a new constitutional settlement'. On 10 June 2009, the Prime Minister went further, saying that:²

It is to some people extraordinary that in Britain we still have a largely unwritten constitution. I personally favour a written constitution but I recognise that changing this would represent an historic shift in our constitutional arrangements so such proposals will be subject to wide public debate and ultimately the drafting of such a constitution would be a matter for the widest possible consultation with the British people themselves.

More recently, on 2 February 2010, the Prime Minister announced the establishment of a cross-party group to identify the principles which should be included in any written constitution. He suggested that 'if we are to decide to have a written constitution the time for its completion should be the 800th anniversary of the signing of the Magna Carta in Runnymede in 1215'.³ The Conservatives are also proposing a number of constitutional reforms, amongst them: reducing the number of MPs; 'English votes for English laws' to combat what they regard as the inequalities in the devolution settlement; and a 'British Bill of Rights' to replace the Human Rights Act. Finally, the Liberal Democrats have long argued for a written constitution and an entrenched bill of rights.

It has become increasingly apparent that we have, in a piecemeal and unplanned way, been codifying our constitution. Much that was previously accepted in the form of convention or tacit understanding has now become statutory. The expenses crisis has perhaps strengthened the feeling that unwritten conventions are no longer sufficient and that clear rules are needed.

It is, moreover, a paradox, that we have, since 1997, been through a period of such profound constitutional change without being wholly clear what our constitution actually is. How can we attempt to reform our constitution successfully if we do not really know what it is that we are reforming? If the parties are asking the people to endorse constitutional changes or proposed constitutional changes, surely the people are entitled to know and understand what our pre-existing constitutional arrangements actually are. Indeed, one important aim of producing a constitution must be that of public education.

Our purpose in what follows, however, is not to make the case for a codified or entrenched constitution. That is for the politicians and the people to decide. Our purpose is the more limited one of analysing the main problems which need to be resolved and the key questions which need to be answered if, in the future, it is decided to enact a constitution. We present this report, therefore, as an aid to public debate. We recognise that we will not have identified all of the problems and questions that might arise, but hope that the report will provide a useful foundation for further work and discussion.

It is assumed for the purposes of this document that a constitution would codify rather than reform our political arrangements. For this reason, many questions which might otherwise be analysed, eg the form and functions of a second

chamber, will not be discussed in this report. Our aim is to analyse what is the case, not what perhaps ought to be the case. We have taken this approach in part because it is a necessary first step to be clear about the current constitutional arrangements before serious consideration is given to what should be changed.

The report therefore lists what we believe to be the most important questions which will have to be considered when drafting a written constitution for the United Kingdom. It does not propose answers to those questions, but does flag (mainly in footnotes) some of the issues that would be raised.

Preparation

A constitution, to be effective, needs legitimacy. In the modern world, this can only come about if it has public support. The draft of a constitution would obviously have to be produced by a small body of people – a mixture of experts (for example lawyers and academics) and members of the public perhaps. The following issues will need to be addressed:

- Should a constitutional commission be established, on the model of past Royal Commissions?
- If so, how should it be composed?⁴
- How should the work of a commission be supported, in terms of a secretariat and legislative drafters?
- To what extent should the membership include politicians?
- How should places for politicians be allotted? Should it be on a proportionate basis, based on seats in the House of Commons? Or, should it be based on a proportion of the popular vote? Should these be calculated on the basis of a single, most recent, election, or averaged over a certain number of previous elections (say, post-war years)? The results of a single election may be contingent on issues that do not reflect broader political consensus over time. What provision should be made for minor parties?
- Is there a role for other key figures in public life, such as media representatives, business and trade union leaders or the leaders of the various religious faiths?
- Should there be representation of the nations and regions of the United Kingdom? If so, on what basis?
- How, if at all, should the Crown dependencies of the bailiwicks of Jersey and Guernsey and the Isle of Man be involved? How, if at all, should the British overseas territories be involved?
- Should the general public be represented on the commission? If so, how should members of the public be chosen? In the Canadian provinces of British Columbia and Ontario, Citizens' Assemblies on Electoral Reform were established to consider the right electoral system for the province, with

the members chosen by lot. Would such an arrangement be appropriate in the United Kingdom?

Principles

A written constitution is an embodiment of the principles its drafters consider to be fundamental and 'constitutional' in nature, in that they say something relevant about the structure and role of the State. What those principles should be, and in particular how a constitution should deal with rights, must be the subject of specific consideration. For example:

- What should the constitution do? Should its aims be set out in the form of a preamble? What force would a preamble have?
- What should the constitution say about sovereignty? Where does sovereignty now lie?
- To what extent should principles such as the separation of powers, independence of the judiciary, accountability, and the rule of law, be explicitly stated in the constitution, rather than merely reflected in its various provisions?⁵
- Should there be a reference, perhaps in the preamble, to 'the people'?⁶ How should a constitution reflect the interaction between 'the people' and the various institutions of government?
- How, if at all, should the United Kingdom of Great Britain and Northern Ireland be described? As a 'union' state? As a 'unitary' state?
- Is the constitution to be for the whole of the United Kingdom? Should there be separate documents for its component parts – England, Scotland, Wales and Northern Ireland?⁷

Rights

The following are some of the issues which will arise under this heading:

Should there be a bill of rights?

- What would be the purpose of a bill of rights?
- What would be the relationship between a bill of rights, the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA)?
- What are the drawbacks and advantages of a constitution which does *not* contain or refer to a bill of rights?

The content of a bill of rights

- What rights should be included? What political rights should be put in the constitution, eg the right to vote, to stand for election, freedom of information, etc. Should economic and social rights be included?
- Should the right to equality and non-discrimination be made a free-standing right?⁸

- Which rights, if any, would be qualified, and how (by general or specific limitation clauses, bearing in mind the absolute nature of some rights, such as the right not to be subject to torture)?
- Should the bill of rights apply horizontally between private citizens, as well as vertically between citizen and state?
- Should a bill of rights contain a section on responsibilities? Should it be a 'Bill of Rights and Responsibilities'? If so, what responsibilities and to whom? Should any of the [non-fundamental] rights in a bill of rights and responsibilities be made contingent upon responsibilities? Can judges take note of responsibilities in any manner (including as interpretive principles)?

'New' rights – socio-economic rights, right to a clean environment, cultural rights etc.

- What are 'social rights', 'economic rights' or 'cultural rights'? What issues would arise if the bill of rights were to contain 'social' or 'economic rights' (or other types of rights not contained in the ECHR)?
- If the bill of rights should include economic and social rights, should it make them justiciable, or should the non-justiciable but 'aspirational' approach be taken?
- If such rights are included and are justiciable, should they be qualified? Should they in particular be qualified to take into account 'reasonableness' or pressure of resources, as in the South African constitution?
- Should a bill of rights contain new rights going beyond those provided for in the HRA, such as a right to equality; to good administration; social and economic rights in the spheres of healthcare, housing and education; 'cultural rights', for example in relation to minority languages such as Welsh, Gaelic etc; children's rights; or rights in relation to the environment? Should any such rights be able to be invoked by groups, or by individuals, or both?

Should the bill of rights be part of the constitution, or a separate document?

There are advantages and drawbacks to each option, particularly bearing in mind that a 'rights and responsibilities' section may attract more interest and therefore be more conducive to meaningful public engagement and consultation than would other potential sections of a written constitution. The US Bill of Rights is part of the Constitution but an amendment to it and therefore, to that extent, a separate document; the French equivalent is a totally separate document; the EU Charter of Rights was intended to be an integral part of the 'Constitution' but is now self-standing and given legal status in the Lisbon Treaty; while rights are an integral part of the German Basic Law.

Institutions

- Which institutions and public offices should be recognised as having constitutional status in a codified constitution? How should each institution be defined?
- To what extent should the powers and duties of each institution be set out in the constitution (as opposed to ordinary legislation or left to convention)? Candidates would include:
 - The Monarch¹⁰
 - The United Kingdom Parliament (including separate reference to the powers of the House of Commons and the House of Lords)
 - The government of the United Kingdom as a collective entity (including reference to the cabinet)
 - The office of Prime Minister
 - The office of Secretary of State
 - The office of Lord Chancellor
 - The Privy Council
 - The United Kingdom Supreme Court (including the President, Deputy President and Justices)
 - The Lord Chief Justice of England and Wales (and which other judicial officer holders in England and Wales?).
 - The Lord Chief Justice of Northern Ireland (and which other judicial office-holders in Northern Ireland?)
 - The Lord President (and which other judicial office-holders in Scotland?)
 - The Law Officers of the Crown
 - The Comptroller and Auditor General (National Audit Office)
 - The civil service
 - The Parliamentary Commissioner for Administration
 - The Commission for Local Administration
 - The Commissioner for Public Appointments
 - Her Majesty's Chief Inspectors
 - The Scottish Parliament and the Scottish government
 - The National Assembly for Wales and the Welsh Assembly government
 - The Northern Ireland Assembly and the Northern Ireland Executive
- What is meant by the executive? Should there be a reference to the cabinet, the government as a whole, the position of the Prime Minister, the role of the opposition etc, given that these are as much a product of convention as of law? (We consider conventions in more detail below.)
- What, for the purposes of the constitution, is the Crown, and what role does it play?
- How should the relationship between the two houses of the legislature be defined? This relationship is regulated as much by convention as by

law. To what extent should the various conventions¹¹ be included in the constitution?

- Should the constitution include recognition of the status and role of local authorities throughout the United Kingdom?
- How is the judiciary to be defined? To what extent do courts and tribunals which are not courts of inherent jurisdiction fall within such a definition?
- Is a definition using the terms of 'exercising the judicial power of the State' (see s19 Contempt of Court Act 1981) an appropriate starting point?
- How is the role and function of the judiciary to be defined?¹²
- In connection with all of the above it is to be borne in mind that the UK has three separate legal systems. See s41 Constitutional Reform Act 2005.

The electoral process and referendums

- Should a constitution state the electoral system used to choose Members of United Kingdom Parliament? Should it state the electoral systems used for the devolved bodies and local authorities?
- To what extent should a constitution include reference to political parties? It would perhaps be unrealistic not to mention them at all. Should the constitution contain the kinds of provisions in the Political Parties, Elections and Referendums Act 2000, regulating the internal procedures, candidate selection mechanisms and funding of the political parties?
- Should political parties be bound by 'basic constitutional values'? Should the constitution embody a 'strong democracy', for example should it cover the circumstances in which referendums are held, their status, and the extent to which they bind Parliament and government?¹³

Devolution

- Does the legislation providing for devolution to the non-English parts of the United Kingdom provide the basis for constitutions for these areas?
- Should the constitution require a referendum to be held before significant changes to the scope of powers of the devolved institutions are made?
- To what extent should the constitution set out in detail the legislative competence of the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly?
- Should the Sewel Convention be stated in the constitution? Should there be reference to other conventions affecting relations between the United Kingdom government, the United Kingdom Parliament and the devolved bodies?
- Should the constitution expressly make Northern Ireland being part of the United Kingdom dependent on the consent of the people and include provision for a referendum? (see s1 Northern Ireland Act 1998). Should

similar provision be made in relation to any other part of the United Kingdom?

- Which inter-governmental organisations should be recognised by the constitution? For example the Committee of Ministers and the British-Irish Council.
- What would be the role of the UK Supreme Court in resolving disputes?
- What, if any, reference should the constitution make to the Crown dependencies of the bailiwicks of Jersey and Guernsey and the Isle of Man?
- What, if anything, should the constitution say about the common travel area between Crown dependencies of the bailiwicks of Jersey and Guernsey and the Isle of Man and the United Kingdom?
- What, if any, reference should the constitution make to the British overseas territories?

International Relations

Background questions

- How should the constitution deal with international law?
- How should membership of the European Union be characterised in a constitution for the United Kingdom given the tension between the sovereignty of Parliament and the superior legal order of the European Union?

Specific provisions

- Should the constitution state that the United Kingdom is a member of any international organisations? If so, which ones? Consider the following possibilities:
 - European Union
 - Council of Europe
 - Commonwealth of Nations
 - United Nations
- How, if at all, should the constitution state the relationship between national and international law? In particular, to what extent should international treaty obligations be referred to in the constitution, particularly in respect of international bodies whose actions affect the United Kingdom such as the WTO and the UN? Should there be express reference to customary international law and its relationship to domestic law?
- Should there be different or separate treatment as between (i) *jus cogens*, ie peremptory norms of international law which permit no derogation, and (ii) international law more generally? Should international human rights law be treated in a different or separate way from international law more generally?

- Should power of ratification of treaties lie with Parliament?
- What role should be given to incorporated treaties in the resolution of domestic disputes?

Conventions

Conventions are customs or rules that are respected as a fundamental part of a constitution even though they are not enforceable as rules of law. They are of very different types, and distinctions will need to be made between these different types, since they are of very varying strengths and importance. It will be necessary when drafting to evaluate the role of specific conventions, perhaps on an ad hoc basis. It will be appropriate to codify some but not others. What follows are background questions that will generally apply to all conventions.

- How are conventions to be identified and distinguished from mere practices?
- Can conventions be stated in sufficiently precise terms? If not, is that a weakness or a strength?
- Can a convention's content be accurately discovered merely by stating it?
- How can the status of a convention be determined? What tests should be used?
- How can we decide whether a convention has fallen into desuetude? A convention which has seemingly faded from view may be rapidly resurrected.
- Could a codified convention be altered by a change in practice? Is there an appropriate constitutional mechanism for altering it?
- Would the violation of a codified convention mean that the action concerned was unconstitutional, illegal or both?¹⁴
- With regard to conventions which are not suitable for inclusion in a constitution, eg parliamentary control of the war power, might there be some other form of codification such as a joint parliamentary resolution?¹⁵
- Should conventions perhaps be included in a document separate from the constitution? An authoritative but non-binding document may be useful for clarificatory and educative purposes. Might such a document have a status in-between that of a written constitution and ordinary legislation, as in France or Spain with their organic laws?
- What role should be given to 'concordats' and 'memoranda of understanding'?¹⁶ How should the constitution deal with sub-conventions and implementing concordats?¹⁷

Adoption

How to adopt a constitution will be an important decision. Any constitutional document will be quite unlike anything else in British law. There are four main options:

- Ratification by the Crown-in-Parliament. There could conceivably be a requirement of a qualified majority. The House of Lords could be given a veto, as with any bill seeking to extend the life of Parliament.
- Ratification by Crown-in-Parliament *and* regional elected bodies and assemblies. Separate consideration by regional bodies may be appropriate if significant changes are to be made to existing devolution legislation.
- Ratification by the people in a referendum. A qualified majority or minimum turnout requirement may be included in this.
- Ratification by the people by referendum in each region. Again, this may be thought appropriate for those parts of the country which adopted devolution legislation by referendum, which is being substantially altered by the new document.

Amendment

How one can amend the constitutional document is arguably the most important question of all. The approach to amendment may well dictate the type of document to be produced, and so may answer some of the questions raised in other areas.

Different provisions of the constitution may be made subject to different amendment rules. For example, the sections on rights or devolution may be made subject to a more stringent amendment process than other sections. The options are as follows:

- A simple parliamentary majority and royal assent, ie the traditional Crown-in-Parliament formula of Dicey.¹⁸
- A simple parliamentary majority and royal assent, but with a requirement of express repeal along the lines established in the European Community Act 1972 and the HRA (and possibly more widely in *Thoburn v Sunderland CC* [2002] EWHC 195 (Admin)).
- A constitutional long-stop along the lines of the House of Lords being able to block legislation which extends the life of Parliament (the Parliament Acts 1911-49, especially section 2 of the 1911 Act).
- A qualified majority in the House of Commons, eg two-thirds. This tends to be the approach adopted in the majority of constitutions.
- An additional requirement of prior consent of/consultation with devolved bodies,¹⁹ as is generally the case in federal states.

- Referendums (in the entire country or only in a part of the country, depending on the subject matter).²⁰ If the referendum is adopted for constitutional amendment, some thought needs to be given to its constitutional status – is it to be mandatory or merely advisory?
- Should some provisions be unamendable as in the Indian and German constitutions, eg certain basic rights?

Status

This section considers the status of the constitution, as distinct from the amendment process. In particular, what powers to strike down legislation should the courts have if they hold that a measure is unconstitutional?

Remedies

There are five broad possibilities:

- Power to declare an unconstitutional measure invalid. Unconstitutional means illegal.²¹
- Power to disapply an unconstitutional measure without strictly pronouncing upon its validity.²²
- Power to declare a measure incompatible but leaving it legally valid.²³
- Power to declare a measure incompatible with the constitution, but with Parliament having the ability to override the declaration only for a period limited to the length of one Parliament, ie a sunset clause which forces the government to face re-election on the measure.²⁴
- Duty to interpret a measure, as far as possible, without pronouncing on its validity.²⁵

These options are not necessarily mutually exclusive (particularly the latter three points).

Other judicial powers

- Should the courts have the ability to pronounce upon the constitutional validity of a proposed bill, before it becomes law?²⁶ If so should this be available generally or only on a reference by the executive and/or Parliament.
- How should the constitution affect the judicial review of measures other than primary legislation?

Constitutional severability

- Can different parts of the constitutional document be treated differently?
- Can certain parts be made non-justiciable?
- Could the breach of particular provisions be remedied by a body other than a court (such as a parliamentary committee/Ombudsman)?²⁷

Miscellaneous

Citizenship

- What should the constitution say about British nationality?

Symbols of national identity

- What should the constitution say about national flag(s), anthem(s) and motto?
- Should the constitution state that English is the official language of the United Kingdom? What provision should be included on the status of the Welsh language? What provision should be included on the status of other minority languages (Gaelic, Ulster-Scots)?
- Should the constitution state that London is the capital city of the United Kingdom? What, if any, provision should be made for the status of Cardiff, Edinburgh and Belfast?

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(*participated in discussions but not responsible for the conclusions)

Notes

- 1 Ministry of Justice, *The Governance of Britain*, CM 7170, 3 July 2007, para 212.
- 2 In a statement delivered to the House of Commons on the topic of constitutional renewal, 10 June 2009.
- 3 'Transforming politics', speech to the RSA, 2 February 2010.
- 4 The Scottish Constitutional Convention, which sat from 1989 to 1995 and was composed of representatives of the Scottish political parties sympathetic to devolution and representatives of Scottish civil society, played an important part in laying down the principles of what became the Scotland Act 1998.
- 5 The Constitution Reform Act 2005 is novel not least for its use of the concept of 'the rule of law', albeit without any definition. A definition would undoubtedly prove challenging given the lack of agreement as to the precise meaning of the term. See, however, Lord Bingham's suggested definition in his 2006 Sir David Williams lecture, 'The rule of law', CLJ [2007] 67-85 at p69: 'The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or

private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'.

- 6 A concept very rarely seen in British constitutional thought but more common in the French and American constitutional traditions.
- 7 In a federal state, there is usually a constitution for the federation and also constitutions for the various component parts - the sub-national units.
- 8 Article 14 ECHR only guarantees non-discrimination in access to other convention rights. The UK has not signed Protocol 12, which makes it a free-standing right available against all state action. Existing statutory instruments, as well as the draft Equality Bill which seeks to codify them, put far-reaching obligations on the state, but through a statute.
- 9 In its report, *A Bill of Rights for the United Kingdom?* HL 165-1, HC 150-1, 2007-8, the Joint Committee on Human Rights proposed that economic and social rights, including the right to a healthy and sustainable environment, instead of being made justiciable, should impose a duty on the part of government and other public bodies, of 'progressive realisation', the principle adopted in the South African constitution. This principle would require the government to take reasonable measures within available resources to achieve realisation of these rights.
- 10 No doubt reformers would wish to ask how the powers of the monarch and principles of succession should be defined. And further, what should be done about the rule of primogeniture and the specific ban on the Monarch being a Roman Catholic or any member of the royal family marrying a Roman Catholic?
- 11 For example the Salisbury Convention, an understanding that a 'manifesto' bill, foreshadowed in the governing party's most recent election manifesto and passed by the House of Commons, should not be opposed by the second chamber on second or third reading.
- 12 Reformers may wish to ask whether there should be a constitutional court, and, if so, how should it be composed. Or, alternatively, should one follow the Irish practice and make use of the senior judges of the Supreme Court to deal with constitutional questions?
- 13 Should there be reference to the right to recall MPs, and the ability of the public, or a section thereof, to demand a parliamentary debate on any issue through signature ballots?
- 14 It does not follow that the inclusion of a convention in a constitution need necessarily make it justiciable. Some conventions seem more justiciable than others. The Sewel Convention, for example, regulating relations between Westminster and the devolved bodies, perhaps borders on being judicially enforceable, but to try to make the convention of individual ministerial responsibility justiciable would be to enter a political minefield. Can one then accurately or adequately distinguish between different types of conventions within a constitution so that some are justiciable while others are not?
- 15 This question has arisen over Parliamentary control of war powers of the executive.
- 16 These are documents of potentially immense importance and often of a highly constitutional nature (eg the concordat between the Lord Chancellor and the Lord Chief Justice on the separation of their roles and the functioning of the judiciary) but without apparent legal force. Memoranda of understanding regulate the relationships between Westminster and the devolved bodies.
- 17 This is a problem particularly with respect to the devolution settlements where inter-governmental relations are subject to a raft of different measures of different status.
- 18 The Diceyan formula is obviously familiar, but leaves the document with the same status as any other piece of primary legislation. A constitution, however, may be thought to be more important than, for example, the Dangerous Dogs Act.
- 19 This may be especially important to consider if, for example, the adoption process recognises separate voices from the nations of the United Kingdom such as a referendum in Scotland and Wales as well as England.
- 20 The Irish approach.
- 21 The USA approach.
- 22 The EU law formula.

- 23 The s4 HRA approach.
- 24 The Canadian approach under the Charter of Fundamental Rights.
- 25 The s3 HRA approach.
- 26 This power is given to the Irish Supreme Court and the French Conseil Constitutionnel.
- 27 An example might be a breach of a constitutional convention such as that of individual ministerial responsibility, which could be assessed by the legislature rather than the judiciary.

Devolution and human rights

Qudsi Rasheed

This paper considers the impact of devolution and human rights. It builds on existing work carried out by JUSTICE on a bill of rights for the UK, most notably its 2007 report, A British Bill of Rights: informing the debate. It has been widely circulated, particularly in the devolved jurisdictions. Jointly with the Faculty of Advocates and the Scottish Public Law Group, JUSTICE held a meeting in Edinburgh in February 2010 to discuss some of the issues raised by the paper.

Introduction

It has become evident that a Conservative government would consider implementation of a 'British Bill of Rights and Responsibilities or Duties' as an early priority after winning an election. A Labour government might do so, though with much less priority. An administration influenced by the Liberal Democrats would take up the issue but only as part of a move to a written constitution.

The Ministry of Justice published, in March 2009, a government green paper dealing with a number of issues related to a bill of rights for the UK.¹ Although briefly addressed in the green paper, one area in which serious consideration has been lacking is the effect of a bill of rights on the devolved settlements across the UK, which now make up part of the fabric of the UK's constitution.

This report was inspired by feedback given to JUSTICE by a number of its Northern Irish members who highlighted the lack of engagement with the devolved jurisdictions. JUSTICE held a seminar in the summer of 2008 to discuss some of these issues further with individuals from Scotland, Wales and Northern Ireland.

This report addresses the broader issue of human rights and devolution in the context of the political calls for a UK bill of rights, and some calls for the repeal of the Human Rights Act 1998. It briefly outlines the relevant history of devolution and the framework of the 1998 devolution settlements, focusing particularly on the protection of human rights. The relationship between the Human Rights Act and the protection of rights in the devolution statutes is examined, and suggestions for amendment to or repeal of the Human Rights Act and/or enacting a bill of rights are considered from a legal, constitutional and political perspective.

A draft of this report was circulated to a number of legal and constitutional experts in this field in November 2009, and this final version has taken on board

the very helpful and constructive comments, suggestions and criticisms that were provided, and JUSTICE is very grateful to all those who contributed.²

In the Ministry of Justice green paper, the government stated the following:³

Consideration of a Bill of Rights and Responsibilities for the UK will clearly need to include Parliament, the devolved legislatures, and the devolved executive bodies as well as the Human Rights Commissions which operate in the different parts of the UK. Each has its own history, conventions and identity and has different responsibilities and obligations in relation to fundamental rights, how they are safeguarded, and how they are respected in the delivery of key public services. In order to generate the degree of consensus appropriate for a Bill of Rights and Responsibilities, each will have an important contribution to make about the way rights and responsibilities should be expressed. This will require further careful consideration.

This report is intended to be a contribution to the careful consideration that, rightly, the green paper has identified as being necessary.

Executive summary

The devolution statutes create an extremely complex and complicated system by which some powers have been devolved to institutions in the devolved jurisdictions.

Human rights have been protected both by the Human Rights Act (HRA), and by the devolution statutes. In fact, there is a very close relationship between the HRA and the devolution statutes, which collectively have a symbiotic relationship in the protection of human rights.

The HRA itself incorporates some of the rights contained in the European Convention on Human Rights (ECHR). The devolution statutes incorporate the HRA rights into their own framework, and thus the substantive rights protected under both the HRA and the devolution statutes are the same.

Indeed, the procedural mechanisms of rights enforcement and application in the HRA are directly and indirectly incorporated into the devolution statutes. The duty of the courts to take into account Strasbourg case law found in the HRA has been implied by the courts as being a requirement under the devolution statutes. Analogous provisions to the interpretive obligation to construe legislation compatibly with Convention rights found in the HRA, are found in the devolution statutes. The tests for standing and damages in the devolution statutes are the same as in the HRA, with direct references to the relevant provisions of the HRA and also to the ECHR.

The devolution statutes and the HRA are tied together in order to provide mutually supporting and complementary rights protection, both in terms of substantive rights and procedural mechanisms. From a legal perspective, if the HRA was amended or repealed, and/or a bill of rights was enacted covering the devolved jurisdictions, there would almost certainly be a need for amendments to the devolution statutes.

A strong argument can be made that 'human rights' have been devolved to the Scottish Parliament and the Northern Irish Assembly, or at least that the 'observation and implementation' of the ECHR, has been devolved. If this is the case, although from a legal perspective the Westminster Parliament could still legislate in this area, constitutionally, the consent of the devolved bodies would be needed. As such, because any amendment to, or repeal of, the HRA and/or legislation enacting a bill of rights covering the devolved jurisdictions would touch upon 'human rights' or the 'observation and implementation' of the ECHR, from a constitutional perspective, the consent of the Scottish Parliament and the Northern Irish Assembly would be needed.

Even if the argument that 'human rights' or the 'observation and implementation' of the ECHR has been devolved is rejected, because any amendment to or repeal of the HRA and/or legislation enacting a bill of rights may touch upon areas of devolved competence – such as housing, education and local government – again, from a constitutional perspective, the consent of the Scottish and Northern Irish legislatures would be needed.

Additional complications arise in Northern Ireland. Not only was the motivation for devolution in Northern Ireland different to the rest of the UK in that it was part of the peace settlement of the Belfast (Good Friday) Agreement (GFA), but there has been a ten year discussion that has already taken place in Northern Ireland on a Northern Ireland bill of rights – something that was arguably required by the GFA itself. Thus, special consideration has to be given to the legal requirements of the GFA as well as the sensitivities and concerns over the Northern Ireland bill of rights.

Politically, a 'UK/British' bill of rights could be extremely divisive in the devolved jurisdictions, particularly in Scotland and Northern Ireland. A bill of rights must have a high degree of political and popular consensus, and this may be difficult to achieve in the devolved jurisdictions.

Any move to amend or repeal the HRA and/or legislate for a bill of rights would need to overcome these legal, constitutional and political hurdles. Although these hurdles are not insurmountable, they are complicated and potentially problematic and as such, serious consideration ought to be given to whether any legislative action in this area would be worth the associated difficulties.

Overview of devolution

Some background

Scotland was historically a separate jurisdiction with its own courts, Parliament and monarch until, in 1707, the Act of Union ended the Scottish Parliament and brought together England with Scotland under the government and Parliament in Westminster. Scotland, however, retained its own legal system and continued to be a separate legal jurisdiction from England. The Labour Party came into power in 1997 with devolution as an important priority, and Parliament passed the Scotland Act 1998 which gave a degree of autonomy and power to a newly formed Scottish Parliament in Edinburgh.

England and Wales have been part of the same legal jurisdiction since the Laws of Wales Act 1536, which provided that England and Wales were united and Welshmen and Englishmen were to be subject to the same laws and have the same privileges. The Government of Wales Act 1998 gave a degree of responsibility to the devolved Welsh bodies, which was increased by the Government of Wales Act 2006.

The history of, and motivation for, devolution in Northern Ireland is different to that in Scotland and Wales. The Government of Ireland Act 1920 sought to establish separate Parliaments (and 'home rule' as it was then known) for what was to be called Northern and Southern Ireland within the UK. The 1920 Act applied to Northern Ireland (until 1998) but in what became the Republic of Ireland the 1920 Act was not accepted and never took effect, and it took its separate constitutional path from the United Kingdom. In Northern Ireland the 1920 Act provided for a devolved parliament and government at Stormont and for a separate legal jurisdiction (subject to the House of Lords having ultimate appellate jurisdiction). Nevertheless within Northern Ireland a persistent divide endured between those who wished Northern Ireland to remain part of the United Kingdom (unionists or loyalists), and those who wished it to be separate from the United Kingdom and reunited with the remainder of the island of Ireland (nationalists or republicans). The devolutionary settlement of 1920 continued until the conflict became so severe that Westminster re-assumed all legislative and executive powers in 1972, through the Northern Ireland (Temporary Provisions) Act. The Belfast (Good Friday) Agreement of 1998 (and subsequent developments over a ten year period), signalled a settlement for Northern Ireland between most categories of unionists/loyalists and nationalists/republicans. Consequently, a 'power sharing' Executive has been established together with a devolved Assembly at Stormont.

Framework of devolution

The Scotland Act 1998 (SA) conferred legislative powers on the newly created Scottish Parliament.⁴ Scotland would continue to send representatives to sit in the Westminster Parliament, as well as electing members of the Scottish Parliament, sitting in Edinburgh. Provision for the creation of a devolved

Scottish government known as the Scottish Administration,⁵ headed by the First Minister, was also made.

The key to the devolution settlement in Scotland was that the Scottish Parliament was given the power to legislate on all matters that were not specifically reserved to the Westminster Parliament ('devolved powers').⁶ As such, the Scotland Act sets out, in Schedule 5, a list of all matters reserved to the Westminster Parliament ('reserved powers'). It is unlawful for the Scottish Parliament to legislate with respect to any of these areas.

The Government of Wales Act 1998 gave limited responsibilities to the newly formed Welsh Assembly.⁷ In essence, however, these were mainly executive functions (those formerly exercised by the Secretary of State for Wales). The Government of Wales Act 2006 (GWA 2006), in response to criticism of the former Act, created a Welsh government separate from the Welsh Assembly.⁸

At present, the power of the Assembly to exercise legislative or legislative-like functions depends on the UK Parliament or the UK government. There are two sources of such power. The first is by use of 'framework powers' conferring wider and more permissive powers on the Assembly. The second source of such power is contained in ss93-95 GWA 2006. Section 98 makes provision for Orders in Council, known as Legislative Competence Orders (LCOs), to confer legislative functions regarding 'matters' in a specified field (contained in Schedule 5) on the National Assembly. Enactments of the Assembly pursuant to LCOs are known as Assembly Measures.⁹

Unlike the SA, which gives the devolved bodies the power to deal with all matters not specifically reserved, the GWA 2006 specifies exactly what powers have been devolved.

The Northern Ireland Act 1998 (NIA) represented a new constitutional settlement for Northern Ireland founded upon the Belfast (Good Friday) Agreement (GFA) in April 1998.¹⁰ The GFA is multi-dimensional – in one respect it is a peace agreement between rival factions in that part of the UK, in another it takes effect as a bilateral treaty between the UK and the Republic of Ireland.¹¹

The provisions of the GFA were enacted by the UK Parliament in the NIA – the preamble to the NIA states that it is 'for the purpose of implementing' the GFA. Accordingly, the nature of devolution in Northern Ireland differs from that in Scotland and Wales in that the primary objective of the NIA was to give the force of law to the essentials of the GFA.¹² Additionally, there is a modern history of devolution in Northern Ireland that sets it apart from Scotland and Wales.¹³

The NIA provided for the creation of a devolved Northern Ireland Assembly,¹⁴ Northern Ireland Ministers, an Executive Committee and Northern Ireland

Departments.¹⁵ The Executive is led by a First Minister and Deputy First Minister, with the members of the Executive elected on the basis of a complex voting system intended to reflect cross-community interests and party strength as demonstrated in the elections to the Northern Ireland Assembly.

The NIA recognised three categories of powers. In defining the limits of competence, the NIA distinguishes between 'transferred matters', 'excepted matters' and 'reserved matters'.¹⁶

'Excepted matters' are those that remain entirely within the competence of the UK Parliament and are set out in Schedule 2.¹⁷

Excepted matters under the NIA and reserved matters under the SA include the Crown, the UK Parliament, defence of the realm, nationality, immigration and asylum, UK taxes and international relations/foreign affairs.¹⁸

Significantly, 'observing and implementing' all international obligations, including those under the European Convention and all other human rights treaties, is not within the scope of 'international relations/foreign affairs' and is therefore not an excepted matter under the NIA or a reserved matter under the SA.¹⁹

'Reserved matters' are those in respect of which Westminster can legislate or the Northern Ireland Assembly may legislate with the consent of the Secretary of State.²⁰ Reserved matters include the conferral of functions of Northern Ireland Ministers, criminal law and public order including police.²¹ Provision is made that any of the reserved matters may be subsequently devolved,²² and discussions over the devolution of criminal justice and police are currently taking place.

'Transferred matters' are those that the NIA conferred on the Northern Ireland Assembly and Executive.²³ The Act itself (like the SA) does not specifically recite the transferred powers but simply defines them as those that are neither excepted nor reserved. As the first two categories are specifically enumerated, any matter that is not listed within the first two categories falls within the competence of the devolved institutions. Westminster, however, retains the power to legislate in all areas.

Where a devolved institution has acted outside its competence, its actions can be challenged as a 'devolution issue'. The court will then determine whether or not the devolved institution did in fact act outside its competence.

Despite the Westminster Parliament retaining the legal authority to legislate on all matters, whether reserved/excepted or devolved/transferred, a constitutional convention has arisen that it will not legislate on devolved/transferred matters

without the consent of the devolved Parliaments and Assemblies, which is given through legislative consent motions (formerly known as ‘Sewel Motions’).

A Memorandum of Understanding (MoU) between the UK Government and the devolved administrations reflects this position. It says: ²⁴

The United Kingdom Government retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administration will be responsible for seeking such agreement as may be required for this purpose on approach from the UK Government.

Two relevant problems within the devolution framework

The first problem relates to the division between devolved and reserved powers (or excepted, reserved and transferred powers in Northern Ireland). Himsworth explains that there are some areas: ²⁵

where the division between what is devolved and what is reserved is unclear in the first instance. The difficulties here are borne out by overlaps between the (devolved) responsibility for housing in general and the (reserved) responsibility for housing of asylum seekers; the (devolved) responsibilities for policies in relation to children and education and the (reserved) responsibility for the expulsion of illegal immigrants; the (devolved) responsibility for charities and the (reserved) responsibility for their taxation; and the (devolved) responsibility for planning and the (reserved) competences for nuclear power.

Hazell makes the point that ‘[i]t was naive at the dawn of devolution to suppose that powers could be neatly separated into watertight compartments’.²⁶

The second problem relates to the convention that normally requires the consent of the Scottish Parliament and Northern Ireland Assembly if Westminster is to legislate on devolved matters relating to Scotland or Northern Ireland. As Bradley and Ewing explain in the context of Scotland: ²⁷

[o]n devolved matters, there is a firm convention that Westminster should not legislate without the prior consent of the Scottish Parliament, given by a so-called ‘Sewel motion’. This extensive use of Westminster’s continuing supremacy is controversial and might not be sustainable if in future a

close political relationship is not maintained between the governments in Edinburgh and London.

On Sewel motions, Hazell makes the point that:²⁸

[i]n most cases it reflects the frequent entangling of reserved with devolved powers: a reflection of the impossibility of maintaining watertight compartments [the first problem that has already been highlighted]. In others it reflects a decision by Scotland to opt into a uniform regime.... Not surprisingly, the initiative for most of these uniform policies come from the centre, but it is always open for the Scots to opt out.

The protection of human rights in the devolution settlements

The Human Rights Act

The Human Rights Act 1998 (HRA) applies throughout the UK, including the devolved jurisdictions. The devolved authorities and institutions, including the devolved Parliament in Scotland and the Assemblies in Wales and Northern Ireland, are public authorities within the meaning of s6 HRA such that it is unlawful for them to act in any way contrary to the Convention rights.

According to Hazell:²⁹

[d]espite the vehement opposition of the tabloids, it was hard to sustain a case that the HRA had been a disaster. Although there was an initial surge of cases in Scotland, the initial dire predications of floods of cases and judges running wild has not been borne out.

The operation of the HRA in Northern Ireland might be similarly so described.³⁰

The Devolution Acts

The HRA, and human rights more generally, are tied and embedded into the devolution statutes. These provide that the devolved institutions have no competence to act in any manner that is contrary to the 'Convention rights'.³¹ For the purposes of the devolution statutes, 'the Convention rights' are defined as having the same meaning as in the HRA, namely those rights of the European Convention that are specifically mentioned in s1 HRA.³²

According to Beatson et al:³³

[s]hould the UK Parliament ever choose to amend the HRA by introducing any qualifications on the meaning or breadth of the Convention rights that

are given effect by the HRA, this will automatically and correspondingly expand or reduce the competence of [the devolved bodies].

While the Convention rights have been given similar effect under the devolution statutes, the impetus for doing so was not the same.

In the case of Northern Ireland, the desire to give overriding effect to the Convention rights was integral to the new constitutional settlement heralded by the GFA, and enacted by the NIA. The fact that none of the devolved institutions established by the NIA has power to act incompatibly with the Convention rights was required by the GFA. It was not directly the result of the UK Government's decision to incorporate the Convention into domestic law, although the reforms were undoubtedly interwoven.³⁴

In the case of Scotland and Wales, however, the overriding effect given to Convention rights was part and parcel of the wider process of giving effect to the Convention in domestic law.

This competence, or lack of it, is controlled in a number of ways. When bills are going through the Scottish Parliament, the minister responsible for the bill must give a statement indicating that the bill is compatible with the Convention rights.³⁵ The Parliament's Presiding Officer must separately give his opinion on whether the bill is within the competence of the Scottish Parliament, which includes its compatibility with the Convention rights.³⁶ The Advocate General, Attorney General or Lord Advocate may refer for decision by the Supreme Court the question of whether the bill or a provision of the bill is within the legislative competence of Parliament.³⁷ Post-enactment, the compatibility of the Act with the Convention rights can be challenged as a 'devolution issue' before any court.³⁸

In Northern Ireland and Wales, the positions are analogous although there are some subtle differences.

According to Gray:³⁹

[w]ith regard, in particular, to the implementation and enforcement of Convention rights ... the NIA 1998 provides a more superior mechanism to that outlined in the corresponding provisions of the HRA 1998 governing parliamentary procedure, as can be seen from a comparison of the relevant provisions in the two Acts.

Although the HRA has s19, requiring a ministerial statement of compatibility whilst the bill is going through Parliament, 'the NIA 1998 provides for legislative scrutiny at a number of different stages of the legislative process and by a number of different bodies'.⁴⁰

The Minister in charge of a bill, on or before introducing it to the Assembly, is required 'to make a statement to the effect that in his view the bill would be within the legislative competence of the Assembly'.⁴¹ Further, if the Presiding Officer decides that any provision of the bill is outside the legislative competence of the Assembly, the bill will not be introduced.⁴² In addition, the Northern Ireland Human Rights Commission is mandated to advise the Assembly on whether a bill is compatible with human rights.⁴³ The Attorney General for Northern Ireland may refer the question of whether or not a provision of a bill would be within the legislative competence of the Assembly to the Supreme Court, and this would include whether a provision of a bill is compatible with the Convention rights.⁴⁴ Post-enactment, the compatibility of the Act with the Convention rights can be challenged as a 'devolution issue' before any court.⁴⁵

Similarly in Wales, the person in charge of a proposed Assembly Measure must, on or before the introduction of the proposed Assembly Measure, state that, in that person's view, its provisions would be within the Assembly's legislative competence, which would include compatibility with the Convention rights.⁴⁶ A proposed Assembly Measure may not be introduced in the Assembly unless the Presiding Officer has stated 'whether or not' in his view its provisions are within the legislative competence of the Assembly.⁴⁷ Again this would include compatibility with the Convention rights. The Counsel General or the Attorney General may refer the question of whether a proposed Assembly Measure or any provision of it would be within the legislative competence of the Assembly – including its compatibility with the Convention rights – to the Supreme Court for decision.⁴⁸ Like the position under the NIA and the SA, post-enactment, the compatibility of the Assembly Measure with the Convention rights can be challenged as a 'devolution issue' before any court.⁴⁹

Relationship between the HRA and the devolution statutes

It is important to note that specific provision is made in both the SA and the NIA to prevent the devolved Parliament and Assembly from modifying the HRA.⁵⁰

The consequence of the incompetence of the devolved institutions to do anything incompatible with the Convention rights is that the Convention rights are protected both under the devolution statutes and under the HRA albeit in different ways.⁵¹ This allows for the possibility that claims of violations of Convention rights, in most cases, may be brought either under the HRA, claiming that the relevant act of the public body was unlawful, or as a 'devolution issue', claiming that the relevant act was outside the competence of the relevant public body, because it was contrary to a Convention right.⁵²

As set out above, under the devolution statutes, the term 'Convention right' is given the same meaning as that in s1(1) HRA.

In addition to the substantive rights set out in s1 HRA being incorporated into the devolution statutes, the procedural mechanisms are likewise interrelated.⁵³

Unlike the HRA, the SA does not establish any duty on the Scottish courts to take into account Strasbourg case law.⁵⁴ However, in *Clancy v Caird*, Lord Sutherland stated that it is the duty of the Scottish courts to have regard to the decisions of the European Court of Human Rights when considering the interpretation of the Convention. As his Lordship explained, these decisions are not precedents and should not be treated in the same way; but he went on to say that '[i]nsofar as principles can be extracted from these decisions, those are the principles which will have to be applied'.⁵⁵ Lord Hope has said since the meaning of the Convention rights is the same under the devolution statutes and the HRA, 'there is no doubt that the same material must be considered'.⁵⁶

As such, the duty to take into account Strasbourg case law under s2 HRA has been implied by the Scottish courts and the House of Lords to be the same duty when deciding compatibility with Convention rights as a devolution issue. It is safe to assume that same approach would be taken under the NIA and the GWA 2006.

Section 83 NIA contains an interpretive obligation to construe Acts, bills and subordinate legislation as within the legislative competence of the Assembly or the authority of the Northern Ireland Executive. Since legislation will exceed the competence of the Assembly if it is incompatible with Convention rights, and subordinate legislation will be invalid if it is incompatible with Convention rights, s83 is similar in effect to s3 HRA in relation to devolved Northern Irish legislation. Although the provisions contain some important differences, according to Beatson et al, 'developing different approaches under sections 3 and 83 would be undesirable, costly and unduly legalistic'.⁵⁷

There is an analogous interpretive obligation in s101 SA. In *Anderson v Scottish Ministers*, Lord Hope stated that the purpose of s101 is 'to enable the court to give effect to legislation which the Scottish Parliament has enacted wherever possible rather than strike it down'.⁵⁸ Again, although there are some differences, the interpretive obligation has the same effect as s3 HRA. The interpretive obligation in s154 GWA 2006 is in exactly the same terms as s101 SA.

Although there are slightly different formulations in the devolution statutes when compared to s3 HRA, in view of the statement of Lord Hope that 'the proper starting point is to construe the legislation as directed by section 3(1) of the [HRA]', the different formulations should not make any difference in practice.⁵⁹

Section 100(1) SA provides that nothing in the Act enables a person to bring proceedings on the ground that any Act of the Parliament or conduct of the

Scottish Executive is incompatible with Convention rights, or to rely on such incompatibility in other legal proceedings, unless that person would be a victim under Article 34 ECHR. This seeks to prevent persons who could not claim under ss6 and 7 HRA from being able to claim instead under the SA. Its purpose is to 'ensure there is no inconsistency' between the SA and the HRA.⁶⁰ Analogous provisions are contained in s7(1) NIA and s81(2) GWA 2006.⁶¹

Section 100(3) SA provides that the SA 'does not enable a court or tribunal to award any damages in respect of an act of which is incompatible with any of the Convention rights which it could not award if sections 8(3) and 8(4) of the [HRA] applied'. Ss 8(3) and (4) HRA provide that damages must only be awarded where it is necessary to afford just satisfaction in light of the principles applied by the Strasbourg Court under Article 41 ECHR.⁶²

Section 71(4)(b) NIA states that s24, which renders acts of the NI Ministers or Departments ultra vires, does not enable a court or tribunal to award damages which it could not award on finding the act unlawful under s6(1) HRA. This provision is similar to s100(3) SA, except that there is no specific reference to s8 HRA. If the same approach is taken to s71(4)(b) as to the SA, the courts will be able to award damages as they would under s8 HRA for acts or failures of the Northern Ireland Ministers or Departments that are incompatible with Convention rights.⁶³ The provisions in the GWA 2006 are the same as those in the NIA.⁶⁴

What can be seen is that the devolution statutes contain a number of provisions which help ensure broad congruence with the HRA. The substantive rights in s1 HRA (which itself incorporates some of the rights contained in the ECHR) are directly incorporated into the devolution statutes. Likewise, the procedural mechanisms in ss 2, 3, 7 and 8 are, in different ways, adopted explicitly or implicitly. In addition to direct references to the HRA in the devolution statutes, reference is also made in some sections to the provisions of the ECHR. As explained by Beatson et al:⁶⁵

Although, as the jurisprudence on the Scotland Act shows, the schemes for protecting Convention rights under the HRA and under the devolution statutes are not identical or necessarily interdependent, they should in principle be understood in a mutually coherent and reinforcing way.

Status of human rights – devolved, reserved or neither?

Although the HRA itself is a 'protected provision', such that the devolved institutions cannot legislate to modify the HRA or the scope or meaning of the Convention rights, it is not totally clear whether 'human rights' are a devolved or reserved matter under the devolution statutes.

Himsworth argues that because human rights have not specifically been reserved to Westminster, under the framework of the SA (and likewise the NIA) they are arguably a devolved matter.⁶⁶ Elsewhere, he explains that “human rights” are not, as such, reserved to the Westminster Parliament.⁶⁷ If it were that human rights were a devolved matter, then any legislation by Westminster relating to human rights that would affect the devolved jurisdictions may need the consent of the devolved parliaments in accordance with the constitutional convention that Westminster will not legislate on devolved matters.

It could however be argued that it is unhelpful to assign ‘human rights’ as to any of the categories. Rather, the obligations under the HRA and the devolution statutes could be seen as overarching provisions that apply to all categories of legislation wherever made. It has been suggested that to ask whether human rights are a devolved matter is like asking whether fairness and consistency are devolved matters, and that human rights are values, not fields of public administration.

A subtler yet associated argument is that rather than ‘human rights’ being a devolved matter simply because they have not been specifically reserved, the ‘observation and implementation’ of the ECHR is a specifically devolved matter.⁶⁸

As already briefly mentioned above, the SA and the NIA both indicate that ‘foreign affairs/international relations’ are reserved/excepted matters such that it is within the sole competence of the Westminster Parliament to legislate in these areas.⁶⁹ However, the Acts also specifically state that foreign affairs/international relations do not include the observation and implementation of the ECHR.⁷⁰ As such, it appears that the SA and the NIA clearly devolve the responsibility to observe and implement the Convention. What this would mean is that not only do the devolved institutions have legislative competence to pass laws in relation to the observation and implementation of the Convention, but that any legislative action taken by the UK Parliament to do with the observation and implementation of the Convention, would be touching upon a devolved matter, such that constitutionally the consent of the Scottish Parliament and the Northern Ireland Assembly would be required through a legislative consent motion.

Specifically, the HRA is a piece of legislation that is explicitly concerned with the observation and implementation of the Convention. Although, because it is a protected provision it cannot be modified by the devolved institutions, any repeal or amendment of the HRA by the UK Parliament might require the consent of the Scottish Assembly and Northern Ireland Assembly as it would come within the legislative competence of the devolved jurisdictions.

That 'human rights' as a category have been devolved, or that the 'observation and implementation of the Convention' is a devolved matter, is confirmed by the practice of the devolved jurisdictions.

For example, the Convention Rights (Compliance) (Scotland) Act 2001, an Act of the Scottish Parliament, was directly concerned with amending aspects of Scottish law that were incompatible with the Convention. This appears to support the argument that human rights, or the observation and implementation of the Convention, are devolved matters. Similar support is found when one considers the devolved human rights commissions.

Some interesting implications can potentially be drawn from the creation and work of the relevant human rights commissions. The Scottish Commission of Human Rights (SHRC) was established by the Scottish Commission for Human Rights Act 2006 (an Act of the Scottish Parliament). The SHRC's general duty is to promote human rights and to encourage best practice in relation to human rights by public authorities.⁷¹ As has already been indicated, the Scottish Parliament can only legislate in devolved areas. Since it has legislated for a Scottish Human Rights Commission, it could therefore be argued that human rights and/or the observation and implementation of the Convention are devolved matters, supporting the arguments set out above.⁷²

Section 7 of the Equality Act 2006 provides that the Equality and Human Rights Commission (EHRC) (the British Human Rights Commission) may not take human rights action in relation to a matter, or consider the question whether a person's human rights have been contravened, if the Scottish Parliament has legislative competence to enable a person to take action of that kind in relation to that matter, or to consider that question. That general prohibition does not, however, prevent the EHRC from taking action with the consent of a person established by an act of the Scottish Parliament whose principal duties relate to human rights, for example, the SHRC.⁷³ What this seems to indicate is that the EHRC needs the consent of the SHRC to deal with issues in Scotland on which the Scottish Parliament, and therefore the SHRC, has competence. This would seem to include human rights issues in Scotland, further supporting the position that human rights and/or the observation and implementation of the Convention are devolved matters.

The Northern Ireland Human Rights Commission (NIHRC) was established under the Northern Ireland Act 1998,⁷⁴ the first of the commissions to be established. Its powers and duties are set out in s69 NIA. One of its key functions and the one most relevant for the purposes of this paper is its role in regard to a possible 'bill of rights for Northern Ireland', which is discussed further below.

In any event, irrespective of any attempt to categorise 'human rights' or the 'observation and implementation of the Convention' as either reserved

or devolved, it is arguable that any legislation in the field of human rights (including any amendment to the HRA or passing of new legislation) which touched upon areas of devolved competence (such as housing, education and local government) would require the consent of the devolved Parliament in Scotland and the devolved Assemblies in Wales and Northern Ireland.

According to Himsworth:⁷⁵

[a] Bill in the UK Parliament designed to repeal or amend or replace the Human Rights Act would, I assume, require a legislative consent (Sewel) motion in the Scottish Parliament because of the Bill's encroachment on devolved matters – both in respect of its touching on human rights at all and, if this were the case, its extension into other aspects of devolved legislative competence such as criminal justice or education or housing policy.

Northern Ireland

A number of additional considerations and problems arise in the context of Northern Ireland.

The responsibilities of the NIHR, required by the GFA, include the duty to advise the Secretary of State on the content of a bill of rights for Northern Ireland. The NIHR should:⁷⁶

...consult and...advise on the scope for defining, in Westminster legislation, rights supplementary to those in the ECHR, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on International instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.

Section 69(7) NIA reflects this aspect of the GFA and requires the Secretary of State for Northern Ireland to request the NIHR to provide advice in relation to a possible bill of rights for Northern Ireland.

The NIHR produced its report dated 10 December 2008 recommending an extensive and comprehensive bill of rights for Northern Ireland. The report was produced following detailed and lengthy consultation throughout Northern Ireland. It recommended that a bill of rights for Northern Ireland should include various rights supplementary to the ECHR.⁷⁷

The Northern Ireland Office (NIO), after considering the recommendations of the NIHR for a year, published its consultation document on a bill of rights for

Northern Ireland on 30 November 2009.⁷⁸ In its report, the NIO rejected most of the NIHRC's recommendations on the basis that the rights suggested by the NIHRC were not specific to the circumstances of Northern Ireland (as required by the terms of reference), and that they might be more appropriately addressed as part of the debate over a UK bill of rights. The NIO consultation document focuses on rights which in the government's view, 'can be argued to reflect the particular circumstances of Northern Ireland and the principles of mutual respect for the identity and ethos of both communities.'⁷⁹ This is essentially limited to rights related to sectarian and community issues. All responses to the NIO consultation are to be received by 1 March 2010.

Although this paper is not the appropriate forum for detailed discussion of the NIO's proposals, two brief points can be made.

First, that it has now come to the stage where the relationship between the Northern Ireland bill of rights and any UK/British bill of rights needs to be seriously considered. This has been recognised by the government in its green paper on a bill of rights, which accepts that '[o]ne issue for examination is the relationship between any Bill of Rights and Responsibilities and a potential Bill of Rights for Northern Ireland.'⁸⁰

A number of possibilities have been suggested from Northern Ireland having its own bill of rights completely separate from any UK one, through to the Northern Ireland bill of rights forming a chapter in a wider UK bill of rights.

It is important, however, to remember that there has been over ten years of consultation and consideration in Northern Ireland over its bill of rights. As this process is coming to its end, it may be inappropriate to stall it by tying it to the debate taking place at the UK level. There is already a high level of frustration around that Northern Ireland process; were it to be interrupted by a UK bill of rights, it may fuel tension and disappointment. The bill of rights green paper explains that 'the Government does not wish the public debate about a UK instrument to detract from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland'.⁸¹ This is particularly so as it is generally regarded that the Northern Ireland bill of rights is a requirement of the GFA.

Indeed, to simply include Northern Ireland in a UK bill of rights may also upset the expectations of the Irish government in respect of the GFA. The Irish government has stated that it is awaiting specific legislation for Northern Ireland, indicating that it regards the international obligation of the UK as not being to implement a UK bill of rights including Northern Ireland, but rather a Northern Ireland bill of rights.⁸²

Regarding the bill of rights for Northern Ireland, I reiterate the commitment of the Government to ensure the full and effective implementation of all aspects of the Good Friday Agreement and the St Andrews Agreement. In that context, we attach importance to a specific bill of rights for Northern Ireland as envisaged in the Good Friday Agreement. The Government has consistently communicated that position in contacts with the current British Administration and with the Conservative Party Front Bench.

As stated above the primary objective of the NIA was to give the force of law to the essentials of the Belfast (Good Friday) Agreement of 10 April 1998. The GFA represented the foundation of a new constitutional settlement for Northern Ireland based on a commitment to constitutional government, human rights and the rule of law. The GFA seeks to achieve effective protection of human rights in a number of interconnected ways.

The fact that none of the devolved institutions established by the NIA has the power to act incompatibly with the Convention rights was required by the GFA. It was not directly the result of the UK government's decision to incorporate the Convention into domestic law, although the reforms were definitely interwoven. But given the commitment of the UK government as contained in the International Treaty with the Republic of Ireland (to which the GFA is annexed) it is essential that the ECHR continues to apply in Northern Ireland. Any attempt to alter the HRA (and/or pass a bill of rights covering Northern Ireland) in a way that diminished the human rights protection in Northern Ireland may put the UK in breach of the its international treaty obligations owed to the Republic of Ireland. The language of the GFA is unequivocal on this point and as a matter of international legal obligation there must be no diminution in the ECHR protection in Northern Ireland.

There is a reality that any tinkering with the HRA in regard to Northern Ireland and the human rights provisions in the Northern Ireland Act 1998 (at least of any category which interferes with the provisions of the 1998 Agreement) may not be achievable without both the consent of the Republic of Ireland and the Northern Ireland Assembly. Any such tinkering also risks inflaming tensions which exist already between different groups of society in Northern Ireland.

The politics of a bill of rights in the devolved jurisdictions

It has already been explained that, legally, amendments to the devolution statutes would be required and that the consent of the devolved institutions may be necessary for constitutional reasons, if there was to be repeal of, or amendment to, the HRA and/or a bill of rights for the UK. However, almost more importantly, political consensus and consent would be needed across the devolved jurisdictions if there was to be any 'British' or 'UK' bill of rights. Some

have argued that a debate about a bill of rights for the UK is an exercise that requires reopening competing assumptions about the Union.

There is the obvious problem of language. The Parliamentary Joint Committee on Human Rights (JCHR) has taken the position that a 'British' bill of rights would, by definition, exclude Northern Ireland:⁸³

There is also a geographical aspect to the term "British" which is relevant, in that Northern Ireland is part of the United Kingdom but not part of Great Britain. A "British Bill of rights" therefore could not, by definition, apply to Northern Ireland.

However, unionists and loyalists in Northern Ireland do regard themselves as, and wish to be acknowledged as, 'British'. So they may not be willing to accept exclusion from a 'British' bill of rights. Any such proposal of exclusion would create, or perhaps more accurately antagonise, unionist and loyalist feeling.

But equally labelling any bill of rights as 'British' also may create, or perhaps more accurately antagonise, nationalist feeling that already exists among some in Scotland, and nationalist and republican feeling in Northern Ireland.

If insensitively handled, a bill of rights from Westminster could present problems in Northern Ireland. As already indicated, if a bill of rights were for the whole of the UK, it could present difficulties for the republican and nationalist sections of the community. If it were just for Great Britain, excluding Northern Ireland, it could present difficulties for the unionist and loyalist sections of the community. As such, any bill of rights is likely to present difficulties for one section of the community in Northern Ireland. Even now, over ten years after the GFA, there is a precarious balance. There is an appreciable risk that the bill of rights debate may stoke the embers of sectarian and political conflict in Northern Ireland. At the very least, it may derail the long and arduous discussions about a bill of rights for Northern Ireland which (as discussed earlier) figured prominently in the GFA negotiations. It may be suggested that a compromise would be to have a Northern Ireland chapter within a wider UK bill of rights. This may still not be sufficient to either community for the reasons set out. However, it may be particularly controversial in light of the existing process in Northern Ireland for a Northern Ireland bill of rights, as briefly discussed earlier.

As it stands, the HRA applies to Northern Ireland, and the difficulties just mentioned have not arisen, partly because the HRA reflects wider international and regional human rights standards that all communities can agree to be bound by.

In relation to Scotland, Kenny MacAskill, Justice Minister for the SNP, in his evidence to the JCHR made it very clear that the ECHR was a minimum, and that:

we have the Human Rights Act and ECHR incorporated into our founding principles and these are dealt with by our courts and we are subject to challenge not simply on what we seek to legislate upon but also what we have legislated upon. We are happy with that and as a Government party we seek to expand upon that if and when the constitutional settlement changes.

He went on to say: 'Are we British? No, we are not. We consider ourselves Scottish and we consider those south of the border to be English. That is perfectly legitimate.'⁸⁴

Pursuance of a 'British' bill of rights may just further fuel calls for independence and undermine the Union.

There is the additional problem about content. In particular, much of the political debate has focused on the Magna Carta and the right to a trial by jury, as traditionally 'British' institutions that have been eroded. In fact, the Magna Carta is a traditionally 'English' institution which predates the Union of England and Scotland, and does not have the same symbolic resonance in Scotland that it does in England. Likewise, the right to a trial by jury is not regarded as a fundamental right in Scotland. England and Scotland (and to a certain degree Northern Ireland) have differing legal traditions, something that is often forgotten by many in Westminster.

Conclusions

The devolution statutes are complicated, and the human rights frameworks under them are tied up in a number of ways with the HRA and the indeed the ECHR.

A bill of rights covering the devolved jurisdictions would be legally, constitutionally and politically very difficult to achieve.

Any amendments to the HRA and any enactment of a bill of rights would almost certainly, from a legal perspective, require amendments to be made to the devolution statutes.

Any amendments to the HRA and any enactment of a bill of rights may, from a constitutional perspective – or simply to take account of the political ramifications – need the consent of the devolved institutions.

It would also require careful consideration so that the UK would not derogate from its international treaty obligations to the Republic of Ireland in regard to the Belfast (Good Friday) Agreement.

It may be possible to have an English bill of rights, but that would raise its own problems and complications. In particular there would be a raft of problems between the competing jurisdictions within the UK.

The HRA works, and at present the devolution framework has also been successful. Amendments to the HRA or legislating for a bill of rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself.

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Notes

- 1 Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009.
- 2 JUSTICE is grateful to the following for all their comments: Maggie Beirne, Brice Dickson, Catherine Donnelly, the Equality and Human Rights Commission, Neil Faris, Brian Garrett, Robert Hazell, Chris Himsworth, Ciaran McAteer, Chris McCrudden, Derek Munn, Colm O’Cinneide and Aidan O’Neill.
- 3 N1 above, para 4.42.
- 4 S1 SA.
- 5 S126 SA.
- 6 Ss28 and 29 SA.
- 7 S1 Government of Wales Act 1998.
- 8 S45 GWA 2006.
- 9 J Beatson, S Grosz, T Hickman and R Singh, Human Rights: Judicial Protection in the UK, Sweet & Maxwell, 2008, p801.
- 10 Cm 3883, April 1998.
- 11 N9 above, p772. See also C McCrudden, ‘Northern Ireland, the Belfast Agreement, and the British Constitution’, in J Jowell and D Oliver, The Changing Constitution, OUP, 2004.
- 12 A Lester, D Pannick and J Herberg, Human Rights Law and Practice, LexisNexis, 2009, p741.
- 13 N9 above, p771.
- 14 S4(5) NIA.
- 15 Ss16-21 NIA.
- 16 S4(1) NIA.
- 17 These are equivalent to the reserved powers under the Scotland Act.
- 18 See Schedule 2, NIA and Schedule 5, SA.
- 19 Schedule 2, para 3(c), NIA and Schedule 5, para 7(2)(a), SA.
- 20 S8 NIA.
- 21 Schedule 3 NIA.
- 22 S2(a) NIA.
- 23 Equivalent to the devolved powers under the Scotland Act.
- 24 Office of the Deputy Prime Minister, *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm 5240, December 2001, para 13.

- 25 C Himsworth, 'Devolution and its jurisdictional asymmetries', *MLR* (2007) 31-58, p46.
- 26 R Hazell, 'The continuing dynamism of constitutional reform', *Parliamentary Affairs* (2007) 60(1), 3-25, p6.
- 27 A Bradley and K Ewing, *Constitutional and Administrative Law*, 2002, Longman, p46.
- 28 N26 above p6.
- 29 *Ibid*, p16.
- 30 See B Dickson, 'The Impact of the Human Rights Act in Northern Ireland in Morison, McEvoy and Anthony, *Judges, Transition and Human Rights*, 2007, OUP, pp201-272.
- 31 S29 and s54 SA; s6 and s24 NIA; s81 and s94 GWA 2006.
- 32 S126 SA; s98 NIA; s158 GWA 2006.
- 33 N9 above, p735.
- 34 *Ibid*, pp718 and 775.
- 35 S31(1) SA.
- 36 S31(2) SA.
- 37 S33(1) SA.
- 38 S98 and Schedule 6 SA.
- 39 M Gray, 'The Northern Ireland Act 1998, Judicial Review and Human Rights', *Judicial Review*, (2000) 5(2), 114-120, p116.
- 40 *Ibid*.
- 41 S9(1) NIA.
- 42 S10 NIA.
- 43 S68(4) NIA. See below discussion on the Northern Ireland Human Rights Commission.
- 44 S11(1) NIA.
- 45 S79 and Schedule 10 NIA.
- 46 S97(2) GWA 2006.
- 47 S97(3) GWA 2006.
- 48 S99(1) GWA 2006.
- 49 S149 and Schedule 9 GWA 2006.
- 50 S29 and Schedule 4 SA; ss6(2)(f) and 7(1) NIA.
- 51 N9 above, p718.
- 52 See *Somerville v Scottish Ministers* [2007] UKHL 44, per Lord Hope.
- 53 See the discussion in Beatson, n2 above, chapter 8.
- 54 S2 HRA.
- 55 2000 SLT 546, at 549.
- 56 *HM Advocate v R* [2004] 1 AC 462, at para 54.
- 57 N9 above, p796.
- 58 [2003] 2 AC 602, at para 8.
- 59 N9 above, p811.
- 60 N56 above, para 27, per Lord Hope.
- 61 N9 above, p751.
- 62 *Ibid*, p758.
- 63 *Ibid*, p797.
- 64 S81(4)(b) GWA 2006.
- 65 N9 above, p796.
- 66 C Himsworth, 'Greater than the sum of its parts: the growing impact of devolution on the processes of constitutional reform in the UK', 2009, 77 *Amicus Curiae* 229.
- 67 N25 above, p55.
- 68 The argument that follows would only apply to the SA and the NIA because, as explained above, the scheme under the GWA 2006 is markedly different.
- 69 Schedule 5, para 7 SA; Schedule 2, para 3 NIA.
- 70 Schedule 5, para 7(1)(a) SA, Schedule 2, para 3(c) NIA.
- 71 S2 SA. See also ss3-5 SA.
- 72 There is an overlap that is addressed in a memorandum of understanding, between the responsibilities of the Scottish Human Rights Commission and those of the British Equalities and Human Rights Commission.

- 73 N12 above, p739.
- 74 S68(1) NIA.
- 75 N66 above.
- 76 Para 4 of the Rights Safeguards and Equal Opportunity section in Stand 3 of the Agreement.
- 77 See www.nihrc.org/bor.
- 78 Northern Ireland Office, *A Bill of Rights for Northern Ireland: Next Steps*, November 2009.
- 79 Ibid, para 4.1.
- 80 N1 above, para 4.38.
- 81 Ibid.
- 82 Answer of the Taoiseach in response to a question by Deputy Eamon Gilmore, 21 October 2009, Parliamentary Debates, Volume 692, No. 3, p564. Available at <http://debates.oireachtas.ie/Xml/30/DAL20091021.PDF>
- 83 Joint Committee on Human Rights, *A Bill of Rights for the UK?* 165-I/HC 150-I, HL, July 2008, para 76. Whilst the definition, 'Great Britain' excludes Northern Ireland, the term 'British' is arguably more nebulous. Although the JCHR take 'British' to be the adjective pertaining to Britain (and this is supported by the Chambers English Dictionary) and thus excluding Northern Irish people, some have argued that 'British' covers anyone coming from the UK.
- 84 Oral Evidence to the Joint Committee on Human Rights, HL 165-II/HC 150-II, July 2008, Ev 59 and 60.

The European Court of Human Rights: time for an overhaul

Jodie Blackstock

This article considers the evolution of the European Court of Human Rights as it has struggled with increasing membership in the Council of Europe, varying approaches to justice in the states parties and success of the individual petition. From the perspective of reducing the need for petitions, it reviews the many recommendations put forward for improvement of the Court and concludes by questioning whether the expanded role of the European Union could play a positive, rather than confusing role, in solving the current difficulties.

Introduction

The Council of Europe's approach to the European Convention on Human Rights (the Convention) is in need of a radical overhaul. Whilst it is making concerted efforts to ensure enforcement of European Court of Human Rights (the Court) decisions, this does not address the fact that more and more petitions are being made to the Court. The number of cases pending exceeded 100,000 this year.¹ With all 47 member states of the Council of Europe full contracting parties to the Convention, and thereby agreeing to secure to everyone the rights and freedoms set out in the Convention,² why 50 years subsequent to its signature, is the Court busier than ever?

There are arguments that the Court should evolve into a constitutional court akin to the United States Supreme Court with the ability to choose appropriate cases through which to clarify the law.³ Whilst this would remove the majority of applications received by the Court, it would also render the special feature of individual petition, allowing so many Europeans to seek vindication of their rights, obsolete.⁴ This does not therefore seem a satisfactory solution.

This paper considers the jurisprudential evolution of the Court's jurisdiction through the years since its inception, the effect of late membership of the Central and Eastern European states and the attitudes of the member states to the Court's jurisdiction. It will also look to the Court's geographically and socio-politically closest supranational institution, the EU, and whether the extension of its interest into human rights protection will have a salutary effect upon applications to the Court. Finally it will consider the many suggestions which have been made by various scholars and organisations to reduce the number of applications being made to the Court without compromising access to justice, in order to conclude that the Court remains of vital importance.

Developments in the Court's jurisdiction

Wojciech Sadurski comments that whilst the original text was envisaged as the antithesis to the horrors of the Second World War, and founded on the willingness of the then member states to prevent the repetition of such flagrant violation of basic rights, the Court in fact had very little call to deal with such issues in the beginning.⁵ The Western nations prided themselves on their liberal democracies and saw the Convention as an extension of their national practices.⁶ Rather, Sadurski describes the Court's role during the first 40 years of the Convention as a fine tuner of national legal systems.

Over the years, the Court, through judicial activism,⁷ developed the Convention into a living instrument,⁸ to which limitation of the interpretation and application of its articles should be narrowly construed⁹ and the mechanisms adopted to protect rights enshrined in the Convention should be practical and effective, not merely theoretical and illusory.¹⁰ The result should have been to give effect to the normative ideologies presented in the Universal Declaration of Human Rights, through real application of the Convention at a domestic level.

Whilst the Court was happy expanding its effectiveness in its judgments, the attitude to the Convention and the Court's jurisdiction has not been so forthcoming in the contracting parties; many countries do not actually want to be bound by decisions of the Court.¹¹ This is seen particularly in the older states where domestic courts insist on the ultimate supremacy of their own legal order and have created 'a zone of discretion' in deciding whether or not to respect a judgment of the Court.¹² There is a presumption that a supranational institution is not well equipped to consider the cultural traditions of the member state concerned, so as to ensure that the opinion the court gives is relevant to the country's practices.¹³ However, since this is the very purpose of the margin of appreciation, some have argued that the Court has offered too wide a discretion, abdicating its role of standard setter for Convention rights.¹⁴

This attitude of the older states can be contrasted with the newer, Central and Eastern European (CEE) states. At their point of accession, the Court's approach to the Convention had already been declared and provided a post-communist protection mechanism for human rights which domestic courts were yet to grapple with. Indeed, this provided support and protection to the domestic courts as they began to consider the implications of the Convention.¹⁵ The inclusion of the post-communist states created something of a paradox in that the original protections envisaged by the Convention were now beginning to be invoked on a large scale, revealing systemic non-compliance with the Convention's aims.¹⁶ Such an assertion of course ignores the earlier accession of Turkey, for whom regular challenges were brought in relation to the non-recognition of the Kurdish population, and the British response to the Northern Ireland troubles which repetitively invoked treatment that infringed Article 3, but is largely correct.

The authority of the Court continues to be undermined to a certain extent by concerns about the process for the nomination and appointment of its judges, the problem being that not all states are putting forward suitably experienced candidates or they are failing to ensure a gender balance.¹⁷ There are also legitimate concerns about the fairness, transparency and consistency of national selection procedures.

White's study found only 0.2 per cent of cases indicated a dissent from the judge of nationality.¹⁸ Other than the reluctance of the Turkish judge to see certain actions of the state security forces as the responsibility of the state, largely dissents were not related to national interests, but born of the open texture of the Convention and the margin of appreciation.¹⁹ Equally, interviews with judges at the Court showed that the majority had had Westernised training such that jurisprudential approaches were in large part uniform. They did think that the legal background of a judge played an influence on their application and interpretation of the Convention.²⁰ Bruinsma concludes that former trial judges and lawyers can be characterised as used to thinking in terms of case particularities, while former academics and administrators consider general interest and policy considerations.²¹ These were however merely tendencies and not universal truths. Voeten supports the concerns Leach records.²² Judges do vary in the deference they show to respondent states and politics plays a role in judicial appointments, with member states seeking to make appointments which match their preferences. However, the Court's composition has changed as governments have tended to replace restrained judges with more activist ones, driven by hopes of EU membership.

The increasing number of cases before the Court

Given the advancement of the Court's jurisprudence and the largely uniform approach to decision making seen in its judgments, why over the half century of human rights advancement are the number of cases not diminishing but increasing exponentially? A number of observations have been made, of which some examples are set out below.

Firstly, Judge Caflich of the Court suggests that today individuals, civil society and advocates are acutely aware of what their fundamental rights are and of the need to defend them. Sometimes this awareness may go beyond what is proper and necessary, which he suggests partly accounts for the great number of unfounded applications which obstruct access to the Court for more deserving applicants.²³ Indeed, 94 per cent of cases are declared inadmissible.²⁴

Secondly, Krzyzanowska-Mierzevska observes that domestic lower courts can be ignorant of the Court's decisions and therefore unable to apply them, resulting in continuing violations.²⁵ Sadurski has referred to abstinent opposition of the constitutional courts. For example, even though the Court specifically found the same violation of the Convention in Romanian rules giving the public

prosecutor quasi-judicial powers in two cases separated by five years,²⁶ the Constitutional Court repeatedly upheld the constitutionality of the provisions.²⁷ The same argument is playing out with interpretation of *Salduz v Turkey*²⁸ on the requirement of access to a lawyer in interview for compliance with Article 6 ECHR. The Belgian, Dutch and Scottish supreme courts have refuted its clear intention.²⁹

Thirdly, Seymour explains that unlike its inception in Western Europe, the incorporation of the Convention's values and standards into the domestic life of the CEE countries will not be perceived as a mere reflection of pre-existing national values but rather as a challenge.³⁰ Sadurski observes that whilst the central European states rose to the challenge, with the goal of becoming members of the European Union, giving the Convention a similar status to their constitutions and amending their laws to take account of the Court's judgments without difficulty,³¹ the east European post-soviet states did not.

Which leads, fourthly, to Russia. Russia accounts for a third of the cases pending before the Court.³² Russian judge at the Court, Anatolii Kovler, confirmed³³ that the Court had issued 40 findings of non-effective investigation of crimes in Chechnya,³⁴ and in more than 20 cases 'the absence of effective remedies' for Russians in relation to wrongful use of detention as a pre-trial 'measure of restraint', and in relation to conditions in remand prisons. But the most glaring tendency of 2008 had been the lengthy non-execution of judgments of Russian courts and the absence of a mechanism for payment of damages by the government for unlawful actions of judges. Some 72 per cent of judgments against Russia at the Court concern this problem, and there are now more than 5,000 of them awaiting decisions. Pourgourides, in a review for the Committee on Legal Affairs and Human Rights raised the same concerns.³⁵

Methods of reducing the number of applications to the Court

As Leach observes, in response to the unceasing litigation before the Court, it seems as if there has been an equal outpouring of reports (by the Evaluation Group,³⁶ Lord Woolf,³⁷ the Group of Wise Persons³⁸ and the Court³⁹), declarations, recommendations and resolutions (from the Committee of Ministers) and even a protocol or two proffering solutions to reduce the number of applications being made to the Court.⁴⁰ Protocol 14 provides many suggestions for dealing with the current caseload and is considered in detail by Judge Caflisch.⁴¹ The protocol, however, does nothing to address the number of applications being made to the Court.

The Group of Wise Persons convened by the Committee of Ministers proposed drafting a 'convention text' which would oblige member states to establish domestic measures of redress for delayed proceedings and excessive detention.

They argued that such a reform could, if effectively implemented, significantly reduce the Court's workload in relation to non-execution applications.

The group also advocated the extension of the Council of Europe's Information Office in the Warsaw project, which, *inter alia*, provides guidance to potential applicants on the process and conditions of lodging complaints at Strasbourg, to other member states where similar services are needed. If 94 per cent of applications are truly inadmissible, this is a vital project.⁴²

Resolution Res (2004)3,⁴³ provided the mandate for the Court to issue pilot judgments. A number of judgments have been made using the process, particularly in relation to Poland.⁴⁴ *Broniowski* disposed of a potential 80,000 applications relating to similar displacement and land ownership following the Second World War. The judgment contains not just a recommendation for future measures, but a command for amendment of the law.⁴⁵ However, this process is only effective if the state is willing to acknowledge the legitimacy of the decision. Sadurski observes that there has only been one pilot judgment relating to Russia,⁴⁶ despite a hundred cases in respect of non- or late enforcement of domestic judicial decisions since then.⁴⁷ They are not therefore a definitive answer to the problem.

Recommendation (2004)6⁴⁸ on the improvement of domestic remedies for Convention violations addresses both preventative and curative approaches to the stemming of the flow of applications to the Court. It urges member states to ascertain, through constant review of the Court's case law, that domestic remedies exist for anyone having an arguable complaint of a violation of the Convention, and that these remedies are effective. The Committee on Legal Affairs has produced a detailed examination of how the Convention is applied domestically.⁴⁹ Whilst examples can be seen of successful transposition, such as the Human Rights Act 1998 in the UK, the recommendation has not stemmed the flow of applications.

A ministerial conference of the Committee of Ministers on the future of the Court took place on 18 and 19 February 2010.⁵⁰ A declaration was prepared at the culmination of the conference making a number of recommendations to improve the implementation of the Convention at national level.⁵¹ The declaration reasserts a commitment to the Convention and its supervisory mechanisms. It asserts the need to achieve balance between the number of judgments of the Court and the number of applications received, as well as the need to reduce the backlog of cases currently pending. In a series of seven actions it commits to the right to individual petition, the application and implementation of the Convention at national level through raising awareness of Convention compliance within national authorities, full execution of the Court's judgments and consideration of the developing case law. The declaration recommends more effective filtering of cases through ensuring

potential applicants are familiar with accessibility criteria, the Council of Europe considering the extension of the role of its information offices and the Court improving its mechanisms. The declaration calls for states parties to facilitate the adoption of friendly settlements and unilateral declarations. The pilot judgment too should receive clear and predictable criteria for its application. The independence of the Court's judiciary is emphasised, with states parties called upon to ensure transparency and quality in selection criteria. The Court is asked to recall that it is not an appellate court and to use effectively the Protocol 14 admissibility criteria now in force. The Committee of Ministers is also requested to strengthen its supervisory role. Finally, the declaration calls for a simple mechanism for amending procedural provisions in the Convention, a nod perhaps to the difficulties in achieving consensus on the Protocol 14 amendments.

The declaration is to be welcomed. It seeks institutional reform that will recognise the contemporary role of the Court and Committee of Ministers in supervision of adherence to the Convention. It is scant on practical suggestions however, and relies heavily upon the institutions and states parties to present the necessary mechanisms for change. At least there are calls in the declaration for the states parties to inform the Committee of Ministers by the end of 2011 how they have implemented the recommendations, and seek terms of reference from the committee by June 2012 on the mechanisms to be adopted. Evaluation is envisaged between 2012 and 2015 with a view to concluding whether further action to improve standards is necessary. It seems somewhat optimistic to presume that the mechanisms will be sufficient given the systemic problems. There continue to be wide-ranging and duplicatory breaches of the Convention because contracting parties place governmental priorities over individual Convention rights. These attitudes will also have to be addressed if any reduction is to be effected.

In December 2009, JUSTICE joined a coalition of NGOs who submitted a statement on reform of the Court in readiness for the Interlaken meeting.⁵² As we observed in the statement, since 80 per cent of admissible applications to the Court are successful, if the contracting parties complied with their Convention obligations, the number of applications would be significantly reduced. Equally, effective remedy at national level and implementation of the Court's judgments would reduce repetitive cases, which account for half the cases before the Court. We assert that most importantly the political will of the 47 contracting parties is required to ensure compliance with the Convention and to adequately resource the Court and department for the execution of judgments.

Developments in the European Union

Twenty seven signatories to the Convention have undertaken a slow and careful development of human rights policy, within the structure of the European Union, culminating in the Lisbon Treaty. With 37,958 pending cases from the

EU member states in 2008,⁵³ this process is one to which the Council of Europe should pay attention.

Greer and Williams label the EU approach to human rights as institutional, a by-product of the effort to legitimise the EU project, which in all respects has as its primary goal the protection of the internal market.⁵⁴ O'Leary argues however that this focus can be harnessed to encompass any situation in which a European citizen sees her rights violated.⁵⁵ The discrimination directives in 2000 and Article 12 EC against discrimination on grounds of nationality demonstrate this. Williams further observes that the institutional framework (as a legislator, executive and adjudicator) of the EU gives it an advantage over the Council of Europe or the Organisation for Security and Cooperation in Europe to deal with the diversity of conceptions of human rights in Europe.⁵⁶

Greer and Williams' critique concludes that the efforts of the EU in the field of human rights have been piecemeal and limited. In their view, whilst the European Court Justice (ECJ) has applied Convention jurisprudence in recent decisions,⁵⁷ the flaws in access to the ECJ will not aid its development into a protector of human rights.⁵⁸ As a result they consider that accession of the EU institutions to the Convention will not improve its respect for human rights, and may even complicate human rights norms through the application of the Convention in the EU Charter of Fundamental Rights (the Charter).⁵⁹

In my view, this is too sceptical a conclusion. Article 2 TFEU confirms that the Union's future development places the citizen at its core.⁶⁰ Besson records that as early as the 1960s, the ECJ was looking to the protection of fundamental rights.⁶¹ The preliminary reference procedure⁶² ensures cases are heard far sooner before the ECJ than the Court. Its decisions are binding upon national courts, and legislative developments obligate domestic transposition. The Convention, despite its evolution through the protocols, is not a modern text comprehensively declaring the reach of human rights in the way that the Charter does.⁶³ The Charter incorporates the Convention and the socio-economic and anti-discrimination protections of EU/EC law. Accession to the Convention, coupled with a binding Charter will mean that new EU law must be Convention compliant.

Besson has concluded that not only has the EU the capacity, but that it should in fact become a new kind of a post-national human rights institution *latu sensu*.⁶⁴ The EU could provide a substantial support mechanism to the Council of Europe in its efforts to reduce Convention violations.

Conclusion

Perhaps it is naive to hope that after half a century of application of the Convention, there would be little need for the European Court of Human Rights. A substantial number of cases pending before the Court can be attributed

to enlargement and accessibility to the individual who, through relaxation of control of information, is far more aware of their rights and ability to obtain vindication for them. The primary explanation is however that member states continue to infringe Convention rights. But equally, Convention rights through the jurisprudence of the Court and the raising of national standards continue to demand greater protection.⁶⁵

How is the Court to reduce the number of petitions? A number of measures are needed. Education of potential applicants about applicability may remove cases which are genuinely manifestly ill founded. Education of domestic judges on application of the Convention would equally reduce the need to approach the Court.

An emerging method of reducing the number of cases from 27 of the member states may however be through the EU. Accession of the EU institutions to the Convention and a binding Charter of fundamental rights may provide a new route for the aggrieved citizen in the future, rather than exclusively to the Court. The ECJ has regularly demonstrated its willingness to apply Strasbourg jurisprudence in its decision making over the past two decades. This approach may mean that greater protection of human rights in those 27 member states is inevitable. But EU citizens can already boast to a better standard of living than in most other Council of Europe member states. If the scant resources of the Council of Europe can be spent addressing violations of the Convention in the 20 other member states, there may be a real opportunity to improve human rights standards for the citizens of those jurisdictions. It will be interesting to watch these developments unfold.

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Notes

- 1 Currently 117,850. See European Court of Human Rights website, *Pending Applications before the Court*, 01.01.2010.
- 2 Article 1 ECHR.
- 3 See L Wildhaber 'A constitutional future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161 and S Greer 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford Journal of Legal Studies* 405-433; [The European Convention on Human Rights: Achievements, Problems and Prospects](#), Cambridge University Press, 2006; and n50 below.
- 4 See P Leach 'Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?' (2006) 27 *Human Rights Law Journal* 11.
- 5 W Sadurski, 'Partnering with Strasbourg: constitutionalism of the European Court of Human Rights, the accession of Central and East European states to the Council of Europe, and the idea of pilot judgments' *HRL Rev.* (2009), 9(3), 397, at p400.

- 6 See also M Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics', (2007) 32 *Law and Social Enquiry* 137 at 144.
- 7 R White, 'Separate opinions in the European Court of Human Rights', HRL Rev (2009), 9(1), 37 and see P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', (1990) 11 *Human Rights Law Journal* 57.
- 8 *Tyrer v United Kingdom* A 26 (1978); 2 EHRR 19 at para 31.
- 9 See also *Klass v Germany* A 28 (1978); 2 EHRR 214 at para 42.
- 10 *Airey v Ireland*, App. No. 6289/73, 9th October 1979.
- 11 N5 above, p405 referring to the *Görgülü* case, BVerfGE 111, 307.
- 12 N Krisch, 'The Open Architecture of European Human Rights Law', (2008) 71 *Modern Law Review* 183, at p196.
- 13 N5 above, p434.
- 14 D Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe', (2005) 13 *Duke Journal of Comparative & International Law* 95 at 134 and S Greer, The European Convention on Human Rights: Achievements, Problems and Prospects, CUP, 2006, p223, who complains of the arbitrary nature of the doctrine.
- 15 N5 above, p439.
- 16 *Ibid*, p409.
- 17 P Leach, 'On Reform of the European Court of Human Rights', 6 (2009) EHRLR 725 at 729 citing Parliamentary Assembly Resolution 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights* (January 17, 2009).
- 18 N7 above.
- 19 *Ibid*, p54.
- 20 *Ibid*, p57.
- 21 F Bruinsma, 'Judicial Identities in the European Court of Human Rights', in A van Hoek (ed), Multilevel Governance in Enforcement and Adjudication, Intersentia, 2006, p203.
- 22 E Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights', (2007) 61 *International Organization* 669.
- 23 L Caflich, 'The reform of the European Court of Human Rights: Protocol no.14 and beyond', HRL Rev (2006) 6(2), 403-415, at 405.
- 24 Speech given by Mr Jean-Paul Costa, President of the European Court of Human Rights, on the Occasion of the Opening of the Judicial Year, 25 January 2008, (Council of Europe, 2008).
- 25 M Krzyzanowska-Mierzewska, 'The Reception Process In Poland and Slovakia', in Keller and Stone Sweet (eds), A Europe of Rights: The Impact of the ECHR on National Legal Systems, OUP, 2008, p592.
- 26 *Vasilescu v Romania* 1998-III; 28 EHRR 241; *Pantea v Romania* 2003-VI 40 EHRR 26
- 27 Decision 108/1998 of 14 July 1998.
- 28 App. No. 36391/02 (judgment of 27th November 2008).
- 29 *McLean v HM Advocate* [2009] HCJAC 97.
- 30 D Seymour, 'The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks', (1993) 8 *Connecticut Journal of International Law* 243 at 253.
- 31 N5 above, p452.
- 32 N1 above.
- 33 B Bowring, 'The Russian Federation, Protocol No. 14 (and 14 bis), and the battle for the soul of the ECHR', *Sravnitelnoe Konstitutsionnoe Obozrenie (Constitutional Comparative Review)* (2009) 4 (71) referring to a meeting with the Russian Constitutional Court in St Petersburg on Friday 27 February 2009.
- 34 See the judgments of the Court in the cases of *Bazorkina v Russia* (No. 69481/01), 27.07.2006 and *Imakayeva v. Russia* (No.7615/02), 09.11.2006
- 35 C Pourgourides, 'Implementation of Judgments of the European Court of Human Rights' AS/Jur (2008) 24, declassified on 2 June 2008.
- 36 J Harman, L Wildhaber and HC Kruger, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* (September 27, 2001).

- 37 Lord Woolf et al., *Review of the Working Methods of the European Court of Human Rights* (December 2005).
- 38 *Report of the Group of Wise Persons to the Committee of Ministers* (Strasbourg: Council of Europe, November 2006).
- 39 *Opinion of the Court on the Wise Persons' Report* (April 2, 2007).
- 40 N17 above, p426.
- 41 N23 above, pp408-412.
- 42 *Interim Report of the Group of Wise Persons to the Committee of Ministers*, 10 May 2006, CM(2006)88.
- 43 CM Resolution Res(2004)3 on judgments revealing an underlying systemic problem, (adopted by the Committee of Ministers on 12th May 2004, at its 114th Session).
- 44 See *Broniowski v Poland* (2005) 40 EHRR 21, *Hutten-Czapska v Poland* 42 EHRR 15.
- 45 L Garlicki, 'Broniowski and After: On the Dual Nature of 'Pilot Judgments', in Caflisch et al. (eds), Human Rights - Strasbourg Views: Droits de l'homme - Regards de Strasbourg: Liber Amicorum Luzius Wildhaber, Engel, 2007, p185.
- 46 *Burdov v Russia* 2002-III; 38 EHRR 29.
- 47 N5 above, p429.
- 48 CM Rec (2004)6 on the improvement of domestic remedies, (adopted by the Committee of Ministers on 12th May2004, at its 114th Session).
- 49 Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *The effectiveness of the European Convention on Human Rights at national level*, AS/Jur (2007) 35 rev 2.
- 50 There is a dedicated website to the conference at <http://www.eda.admin.ch/eda/en/home/topics/eu/euroc/chprce/inter.html> with numerous relevant documents and conclusions.
- 51 *High Level Conference on the Future of the European Court of Human Rights*, Interlaken Declaration, 19. February 2010.
- 52 Coalition of Amnesty International, the AIRE Centre, European Human Rights Action Centre, Human Rights Watch, Interights, International Commission of Jurists, Liberty, and Redress, 'Human Rights in Europe: Decision Time on the European Court of Human Rights', AI Index: IOR61/009/2009, 11 December 2009 available at http://www.humanrights.ch/home/upload/pdf/100209_JOINT_NGO_pre_Interlaken_Statement_final.pdf As of 16 February 2010, 156 signatory organisations supported the statement.
- 53 N24 above, p128.
- 54 S Greer and A Williams, 'Human rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?', *European Law Journal*, (2009) 4, 462, at p463.
- 55 S O'Leary, 'The Relation between Community Citizenship and Fundamental Rights', (1995) 32 *Common Market Law Review* 519.
- 56 A Williams, 'The (Im)possibility of the European Union as a Global Human Rights Regime', in Brownsword (ed.), Global Governance and the Quest for Justice, Volume IV: Human Rights, Hart Publishing, 2004, p77.
- 57 C-112/00, *Schmidberger* [2003] ECR I-5659 and C-36/02, *Omega v Bonn* [2004] ECR I-9609, see also Joined Cases C-402/05 P and C-415/05 P) *Kadi and others v Commission, Council, and UK*.
- 58 N54 above, pp 474-475.
- 59 *Ibid*, p480.
- 60 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'
- 61 S Besson, 'The European Union and human rights: towards a post-national human rights institution?' HRL Rev. (2006) 6(2), 323. See C-2/69, *Stauder v City of Ulm* [1969] ECR 419; C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; C-4/73, *Nold v Commission* [1974] ECR, 491; C-5/88, *Wachauf v Federal Republic of Germany* [1989] ECR 2609; and C-260/89, *ERT v DEP* [1991] ECR I-2925, at 343.

- 62 Article 267 TFEU (ex. Art 234).
- 63 N5 above, p404 citing P Lemmens, 'The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights--Substantive Aspects', (2001) 1 *Maastricht Journal of European and Comparative Law* 49.
- 64 N61, p326.
- 65 See for example *Salduz*, n28 above.

Policing, accountability and the rule of law: proposals for reform

Sally Ireland

The methods by and degree to which police officers and forces should be accountable to elected officials have been the subject of public and political debate for many years. Concerns have heightened recently because of fears of the 'politicisation' of the police – their entry into the political fray and interference with them on a political basis – and simultaneously, a wish on the part of politicians to make police more accountable to the public through elected representatives. Further, existing accountability arrangements have been criticised for their failure to generate public confidence. This article discusses the various proposals for reform.

The accountability of the police has two elements: their accountability to the public (directly or through elected representatives) for their priorities, strategies and performance; and their accountability for illegal acts – misconduct and human rights violations, sometimes constituting criminal offences. The former element can affect the latter, but in large part the solutions and arrangements for guaranteeing these differing types of accountability are different: one tends to promote a majoritarian point of view, the other protects the rights of individuals and (often unpopular) minorities (for example, criminal suspects). In 21st century England and Wales, there are strong arguments that both elements are in need of reform. Progress has been made on the latter type of accountability: policing today is of course very different from the era of 'verbals' and corrupt squads. However, events such as the response to the G20 protests in central London in 2009; the aftermath of the killing of Jean Charles de Menezes; and the ongoing, largely unreported, numbers of deaths in police custody relating to restraint and/or failures to provide appropriate care demonstrate that there is much more work to be done. This article, however, will look at the former element of accountability – to the public, locally and nationally.

Accountability to the public locally

There are three competing interests here: centralised (national) accountability; local accountability (these former two interests represent a greater or lesser degree of 'political control'); and the freedom of the police to make independent decisions (sometimes called 'operational independence'). The challenge is to determine at what level each of these should have absolute or relative priority.

It is widely accepted that decisions to embark upon individual cases/ investigations, and the conduct of those investigations, should be free from

either local or central 'political control'. Any linkage (real or apparent) of politics, particularly party politics, with an investigation raises concern – such as, for example, that which followed Metropolitan Assistant Commissioner Bob Quick's criticism of the Conservative party after the arrest of shadow minister Damian Green in 2008.¹ It is here that the second level of police accountability (restraint of, and remedies for, misconduct and human rights violations) comes in: any inappropriate investigation or misconduct in its course is better dealt with by those mechanisms, rather than at the level of political oversight.

However, the freedom of chief constables to set strategic operational priorities, in terms of which types of crime (as opposed to individual crimes) should be prioritised for investigation; where resources should be allocated (into foot patrols or car patrols, for example) is more controversial. These choices are intensely political ones – as demonstrated by the frequent promises by politicians to focus attention on certain crimes (for example, the sustained focus of New Labour on anti-social behaviour in recent years and the promises by both major parties to reduce police bureaucracy and therefore free up time for officers to spend on the beat). There is currently much political enthusiasm for giving the public more say over these decisions, linked to a desire to increase public confidence in the service. The 2008 policing green paper *From the Neighbourhood to the National: Policing Our Communities Together*² cited the Flanagan review³ which had seen evidence that the public 'feel they have little influence over the police and little say in decisions over policing'.⁴ The thinktank Reform has found evidence of a perceived disconnection between local and police priorities:⁵

In 1982, 92 per cent of people had confidence in the service; in 2004 only 47 per cent did. A 2002 ICM poll found that 68 per cent of people thought that the police did not reflect local priorities.

Suggested remedies for this situation have focused upon reform to local accountability mechanisms – currently, police authorities. It has been recognised that currently, police authorities are not sufficiently powerful or transparent to exercise strong controls over local policing priorities or satisfy the public that their views are being represented and taken into account. Both the 2008 government green paper and the Conservative party's 2010 draft election manifesto⁶ have sought to remedy this by creating a role for directly elected representatives in local police accountability. Elected representatives – in the form of local councillors – already sit on police authorities. The green paper proposed retaining some councillor involvement, but said that:⁷

*The majority on each police authority will, however, no longer be formed from local councillors however [sic]. **Instead, people throughout England and Wales will directly vote for individuals, known as Crime and Policing Representatives (CPRs), to represent their concerns locally.***

In areas where there was a directly elected mayor, that person would automatically become the crime and policing representative (CPR). This proposal was in fact not proceeded with: section 1 of the Policing and Crime Act 2009 instead only requires police authorities to have regard to 'the views of people in the authority's area about policing in that area' in discharging their functions. The Conservative draft manifesto however goes further, stating that:⁸

we will replace the existing, invisible and unaccountable police authorities and make the police accountable to a directly-elected individual who will set priorities for the policing of local communities.

Direct election to accountability mechanisms is not the only method of increasing public involvement in local accountability: neighbourhood policing initiatives, meetings with local communities, etc are efforts already being made to hear the concerns of local residents and provide reassurance that they are being responded to. Since, however, direct election is an idea that has been put forward in the last two years by both of the largest political parties, its merits should be examined. In responding to the 2008 policing green paper, JUSTICE warned of the dangers of using direct election for police accountability mechanisms:⁹

Although the paramount importance of democratic representation is not in doubt, this principle is applicable to legislative bodies but not, unless otherwise justified, to oversight bodies such as police authorities. We are particularly concerned that the turnout in such an election would be low, meaning that it could be hijacked by people with a particular agenda. What would be the impact, for instance, if a candidate from a racist political party was elected ...?

There are also other risks associated with direct election:

- If term lengths are excessive representatives may become unresponsive to the desires of the electorate; if insufficient, short-termist electioneering policies may be adopted to promote re-election;
- Elected representatives (particularly if only a single representative is elected) may have proved popular with the electorate while lacking the ability to provide proper local accountability for police – for example, if a representative has been elected on a single-issue platform or is even a 'joke' candidate;¹⁰
- Prioritising voters' concerns, while important, may impact negatively upon 'invisible' crimes less likely to capture voters' imaginations, such as domestic violence and fraud. Crimes against minorities and those who cannot vote (for example, children) may also receive less attention;

- If there is a single elected representative, there is the potential for a ‘clash of personalities’ between a Chief Constable and representative damaging effective working, or (and even more damaging) a (real or apparent) politicising of that relationship along party lines.¹¹

Many of the risks listed above could be mitigated by measures including encouraging turnout by holding elections on the same day as local government elections; electing multiple representatives or, if one representative, making the relevant area large (a large force area), therefore minimising the danger of extremist or ‘joke’ candidates succeeding; and retaining a role for national accountability in relation to national priority crime areas such as serious organised crime, fraud, people trafficking and domestic violence. The final risk in this list is extremely difficult to manage if a single elected representative is responsible for local accountability, and solutions will need to be found if such a proposal becomes reality.

Some commentators have doubted the seriousness of these risks: the Institute for Public Policy Research (IPPR), for example, has said in relation to options it has considered for reform of local accountability mechanisms:¹²

... the real dangers of politisation would come if elected figures were taking day-to-day policing decisions, which may well open policing up to corruption and partisan bias. On the contrary under all of the options below the doctrine of ‘operational independence’ is left intact: the directly or indirectly elected representatives set the policy framework, which is then applied on a day-to-day operational basis by the chief constable. This is no more political than the current system under which national priorities are set by the Home Office, also headed by elected politicians.

However, as they go on to acknowledge, ‘[d]emocratising an existing tier of governance of which most of the population are unaware risks generating very low levels of interest and participation.’¹³ It is this which chiefly distinguishes proposals for elected local representatives from current appointments of local councillors to police authorities.

National accountability

Concern has been generated in recent years not only by the weakened state of local police accountability mechanisms but also the by increased strength of centralised, Home Office control over policing.¹⁴ The use of national targets has been of particular concern, with IPPR finding that:¹⁵

Efforts to increase force accountability to the Home Office through central targets have not raised performance in key areas and have skewed local policing priorities.

In the 2008 policing green paper, the government recognised that:¹⁶

under previous national target regimes – in some places a ‘perverse incentive’ had been created where incidents that may easily be picked up were being used to meet targets and dealt with by arrest and charge or by a fixed penalty notice when words of advice could alternatively have been employed.

This was the ‘offences brought to justice’ target, which we believe had particular impact upon the criminalisation of children and young people for minor offences. The green paper therefore announced that there would in future be only a single national numerical target, ‘to improve public confidence’. Whatever the merits of that target, the perception is that national numerical targets can easily become counter-productive. However, it remains important that serious crimes crossing force boundaries and ‘hidden’ crimes targeting the vulnerable receive sufficient importance: in response to the single national target JUSTICE said:¹⁷

... we believe that the focus should be on reducing harm caused by criminal activity, rather than merely increasing public confidence ...

... concentrating on the community’s needs as the community perceives them may ignore some of its most vulnerable members. It may also result in undue focus upon the most vocal or well-resourced groups in the community, who are well-placed to complain ...

In fact, the Public Service Agreement (PSA) regime from April 2008 deals directly with harm reduction ‘and bringing a greater proportion of the most serious offences to justice’.¹⁸ Clearly, whatever the mechanism, the current government believes that national direction relating to serious crime is necessary.

Ring-fencing the funding of policing is another option for central government in seeking to control the priorities of forces and local accountability mechanisms. The use of substantial ring-fencing and targets by central government have been criticised by Reform:¹⁹

Although Police Authorities have some flexibility in spending their budgets, an increasing proportion remains ring-fenced for areas including neighbourhood policing and counter-terrorism. The plethora of government targets substantially limits police forces’ ability to spend money where it would have the most impact. The absence of a local funding model makes it impossible for police expenditure to be accountable to the local people who pay for it. The inevitable consequence of this is a “black hole” policing

system, swallowing all the cash it is allocated with little incentive to improve results.

However, both politicians and the public voting in general elections expect parties seeking election to have policies about crime and disorder and to be able to implement them once in government. A system free of central government influence except in the areas of serious and national/international crimes would represent a radical change. Nor is it desirable for police to focus on the local priorities of vocal representatives and voters at the expense of vulnerable and marginalised victims of crime. The current 'tripartite' model of police governance may have its faults, but it imports the notion of balance between national and local political priorities and independence in individual cases which, it is submitted, most successfully promotes and strengthens the rule of law.

Sally Ireland is Director of Criminal Justice Policy at JUSTICE.

Notes

- 1 See N Watt and W Woodward, 'Green inquiry officer apologises for Tory slur', *Guardian*, 22 December 2008.
- 2 Home Office, July 2008, Cm 7448. See now the Policing White Paper, *Protecting the Public: Supporting the Police to Succeed*, Home Office, Dec 2009, Cm 7749.
- 3 *The Review of Policing by Sir Ronnie Flanagan, Final Report*, February 2008, available from Home Office website.
- 4 N2 above, para 1.69.
- 5 D Bassett, A Haldenby, L Thraves, E Truss, *A New Force*, February 2009, Reform, p7.
- 6 *Crime – It's Time to Fight Back*, Conservatives Draft Manifesto 2010, p9, available from Conservative Party website.
- 7 N2 above, para 1.72, emphasis in original.
- 8 N6 above, p9, emphasis in original.
- 9 *JUSTICE Response to Policing Green Paper From the Neighbourhood to the National: Policing Our Communities Together*, October 2008, para 6.
- 10 The election of 'H'Angus the Monkey' (aka Stuart Drummond) as Mayor of Hartlepool in 2002 shows that this is not an impossible outcome.
- 11 The dismissal of Sir Ian Blair as Metropolitan Police Commissioner in 2008 and fears of potential political wrangling between the Home Secretary and Mayor of London over replacing him created the appearance of politicisation of the oversight of the Metropolitan Police. See, for example, 'Boris Johnson forces Sir Ian Blair to quit as police chief', *Times*, 3 October 2008.
- 12 R Muir and G Lodge, *A New Beat: Options for more accountable policing*, June 2008, Institute for Public Policy Research, p17.
- 13 *Ibid*, p18.
- 14 For example, see report of Oxford Policing Policy Forum *Politics and the Police*, 24 March 2009, The Police Foundation.
- 15 N12 above, p3.
- 16 N2 above, para 2.8.
- 17 N9 above, paras 4-5.
- 18 N2 above, para 2.10.
- 19 N5 above, p16.

Book reviews

Repairing British Politics: A Blueprint for Constitutional Change

Richard Gordon

Hart Publishing, 2010

198pp £17.95

Richard Gordon's book, Repairing British Politics: A Blueprint for Constitutional Change, is a coherent and well constructed argument in favour of a written constitution. It is a succinct yet masterful combination of politics, philosophy, constitutional theory, law and history, accessible to lawyers and non-lawyers alike. It is a must read for anyone interested in the future of the UK constitution.

Gordon argues that the time has now come for the UK constitution to be (re) written. Indeed, not just codification, but a fresh start and in light of the constitutional crisis highlighted by the 'expenses scandal', the time is ripe for change. He makes the point that a written constitution is not merely desirable, but in fact is a 'constitutional necessity if true democracy is to be achieved in Britain', making clear that it is democracy that is the driving force requiring a written constitution. He is strongly critical of parliamentary sovereignty and makes a convincing case that it is neither democratic nor has it ever been democratically endorsed – it is simply a power sustaining device. Gordon accuses parliamentary sovereignty as being 'responsible for perpetuating a hierarchical top-down system of government ... that obstructs rather than reflects representative democracy.' Although he does give some credit to the doctrine for its

historical role in the move away from an absolute monarch, he regards it as simply a stage in the process of constitutional development and not the necessary end-point. Gordon explains that an assumption is made that the way that we have it is the best way to have it. I think he is right on this point. The arguments in favour of parliamentary sovereignty and the merits of the flexible unwritten (non-codified) constitution are trite to those of us that have studied and/or taught constitutional law and theory. What Gordon does is shatter the foundations upon which these premises are based and he is persuasive in the simplicity of his analysis.

Gordon proposes three questions that ought to be considered:

1. Should we, as a people, endorse the *principle* of a written constitution?
2. (If so,) what should be the *content* of that constitution?
3. What process should be undertaken to answer these two questions?

After spending 35 pages dealing with his argument and thesis, the real meat of Repairing British Politics is Gordon's draft constitution, with accompanying observations and explanatory notes, which certainly leave the reader with much to chew on.

The draft constitution is made up of a preamble plus 14 parts dealing with the political and legal framework of the UK, including Parliament, the executive, the judiciary and a bill of rights. Each part is accompanied with specific commentary where Gordon highlights

the reasons behind and justifications for his approach in the given part.

Although there is no doubt that Gordon should be seen as a modern day Paine, he does concede that elements of the draft constitution are Burkean in nature. Whether this is genuine or simply an attempt to assuage conservatives, we will never know. Indeed, he does make the point that 'care has to be taken to preserve our institutions ... to as great an extent as is logically compatible with the ideas behind the new Constitution'. So despite maintaining the monarchy, Gordon advocates the disestablishment of the Church of England from the state and that the monarch ought to pledge allegiance to the constitution.

An innovative suggestion by Gordon is the creation of a citizens' branch and council – essentially a public committee made up of randomly selected members of the public who serve for a one year period. Their powers include the ability to petition the Supreme Court on certain issues, as well as initiating legislation, public inquiries and referenda. Such a system is derived from the Venezuelan constitution, but according to Gordon, may also have Athenian heritage.

In addition to substantive and procedural changes (proportional representation, a mainly elected upper house, two members – one male and one female – for each constituency in the lower house, an entrenched bill of rights, to name but a few), Gordon also suggests a number of cosmetic changes. The House of Lords would be renamed the Senate (palatable due to its pedigree), and the House of Commons renamed as the House of Representatives (maybe somewhat harder to swallow).

Richard Gordon has initiated a timely and much needed debate in legal and political circles over the future of the UK constitution. He makes a reasoned and persuasive case on the need for change. He posits a well-drafted proposal with explanations. Despite suggesting the disbanding of certain existing political bonds – not least parliamentary sovereignty – he does so with a justified cause, namely the promotion of real democracy. Although by no means perfect or indeed complete, the draft is good starting point from which to take this debate forwards.

Like Paine before him, Gordon offers us a way forward by re-depositing the ultimate power of society in the people themselves. Gordon's very own '*Republic*' is a platform for debate in classrooms, canteens and the Commons itself.

Qudsī Rasheed, Legal Officer (Human Rights), JUSTICE

Youth Justice and the Youth Court: An Introduction

Mike Watkins and Diane Johnson
Waterside Press, 2009

272pp £22.95

Youth Justice and the Youth Court is an introductory text, which outlines the elements of the criminal justice system specific to children and young people. Watkins and Johnson have a wealth of first hand experience of young people in the criminal justice system. This is demonstrated by the clear and concise discussion of relevant issues, offering an insight into the legal, societal and procedural aspects of the youth justice system.

The text is broken down into easily managed chapters with a helpful glossary of justice related terms and frequent diagrams summarising key points. The timeline and index make it accessible and appealing to a wide range of audiences.

The discussion commences with a dialogue on the perceptions of youth crime in the UK. High profile media examples and interesting statistics set the historical social context for the remaining chapters.

The identification of the international perspective is clear through the inclusion of relevant human rights treaties. A key number of international guidelines and case law have shaped the approach to youth justice and many of the reforms outlined throughout this text. However, coverage is basic at the most and merely outlines the rights available rather than providing an in-depth discussion.

On a domestic level, focus on the legislative framework is much more comprehensive. Beginning with the Crime and Disorder Act 1998 which arguably created a 'true system of youth justice',¹ the text broadly outlines the aims and mechanics of the youth justice system. The multi-agency nature of the system and its protagonists is clearly apparent and the authors appropriately integrate the legal, procedural and societal values associated with this field of justice.

The importance of restorative processes is also addressed with a discussion of the features and origins of the approach. Restorative justice processes are clearly visible in the youth justice system and underpin many of the recent reforms.

There is clear recognition throughout this text that prevention is a key element whether through early intervention or diversion from the criminal justice system itself. Such measures to address this preventative approach include controlling anti-social behaviour through civil Anti-Social Behaviour Orders (ASBOs) and welfare based initiatives to target social problems associated with deprivation and poor education.

Watkins and Johnson also specifically cover the age group of the 'under tens'. The debate surrounding the age of criminal responsibility persists and high profile media cases involving young children ensure that it remains on the agenda. While under the age of criminal responsibility, this group of children remain at risk from entering the youth justice system and recognition of this is a key part in being able to prevent it.

The book aptly covers the major changes and reforms introduced by the Criminal Justice and Immigration Act 2009. While mostly covering the criminal justice system as a whole, there are some key youth specific provisions. A helpful summary of notable reforms is provided for reference, while discussion is reserved for the following analysis of each stage of the process.

The stages of the criminal justice process are broken down into:

- arrest, detention and charge;
- diversion or prosecution?;
- the prosecution process;
- the youth court; and
- sentencing.

Each section details the relevant law and procedure whilst also identifying the key personnel involved. While providing the most comprehensive coverage of any of the chapters, a more in-depth analysis would be required for practitioners.

The discussion then focuses on the Youth Rehabilitation Order as the new community based disposal available to the youth court. Sentencers can effectively pick and choose from a menu of 15 requirements to create an individual and flexible approach as an alternative to custody. The complex nature of the law and guidelines which relate to these sanctions is acknowledged and a helpful summary is provided.

The controversy surrounding custody is also addressed with a discussion of the forms of sanction involving deprivation of liberty. Detention Training Orders as a criminal sanction and Secure Accommodation Orders under the Children Act 1989 both face similar challenges in safeguarding the rights of children and young people.

The chapters regarding sentencing should be read in conjunction with the relevant legal provisions and the most recent publication of the Sentencing Guidelines Council, 'Overarching Principles: Sentencing Youths'. This is helpfully included providing a youth-specific approach.

Youth Justice and the Youth Court is well structured and easy to navigate with its diagrams and glossary. Although very much an introduction to the area of youth justice, its comprehensive coverage of the recent reforms and inclusion of the newly published sentencing guidelines make it the ideal starting point for the student and

practitioner, or for those wanting to refresh their knowledge.

Rhyannon Blythe, criminal justice intern with JUSTICE, winter 2010

Notes

- 1 M Watkins and D Johnson, Youth Justice and the Youth Court: An Introduction, Waterside Press, 2009, p50.

Blackstone's Criminal Practice 2010

Rt Hon Lord Justice Hooper and David Ormerod (eds)

Oxford University Press, 2009

3264pp and supplement £250.00

The 20th year of Blackstone's Criminal Practice marks a number of changes for the authoritative publication. No longer a single volume reference work, the main book is now published with a simultaneous supplement, entitled supplement 1, which contains the Criminal Procedure Rules 2005 (CPR) and Sentencing Guidelines Council guidelines (these were previously included as appendices in the main work). This presents a number of advantages, lightening up the main volume whilst allowing for the fact that the both the CPR and guidelines have grown in size: the CPR now include additional materials relating to summary trials and the guidelines include additional sections on theft and burglary. The supplement has its own tables of cases, statutes, statutory instruments and an index, and otherwise adopts the same format as that of the appendices in the main volume. The fact that the CPR and guidelines are in a separate volume will be very helpful to criminal practitioners as they will now be able to consult the CPR and guidelines and refer to the main volume at the same time.

However in view of this it is arguable that the PACE code should also have been included in the supplement.

The editors are also continuing with their practice, introduced last year, of publishing cumulative supplements in February and June of each year, alongside a quarterly bulletin and free monthly online updating – the objective was clearly to ensure that Blackstone's Criminal Practice remained an up to date publication throughout the year, and this has arguably been achieved.

The 20th anniversary also marks a number of changes to Blackstone's Criminal Practice's highly regarded team of editors and contributors. Sadly, this year will be HHJ Peter Murphy's last as emeritus editor – one of the founders of Blackstone's Criminal Practice, he had already stepped down as editor-in-chief in 2007. Keir Starmer QC has also left the team of contributors following his appointment as DPP, and Duncan Penny, a barrister at 6 King's Bench Walk, took over responsibility for his chapter on human rights. Ronan Toal, a barrister at Garden Court Chambers, has also joined the team of contributors, whilst Adina Ezekiel of 6 KBW and Frances Webber of Garden Court Chambers have left.

In terms of content however, the main volume retains its six well thought-out main sections: criminal law (that is, general legal principles); offences; road traffic offences; procedure; sentencing; and evidence. The appendices are now shorter and simply contain the Codes of Practice under PACE, the Attorney-General's Guidelines, the Code for Crown Prosecutors, an appendix on Disclosure and the Consolidated Criminal Practice Direction. As mentioned above, the

CPR and guidelines are now to be found in supplement 1, and there are no longer appendices on human rights, and control and management of heavy fraud and other complex criminal cases. The main volume also includes a very thorough (but easy to use) tables section, including not only the requisite cases, statutes, statutory instruments and practice directions, but also codes of conduct, guidelines, protocols, circulars, international treaties and conventions, as well as EU legislation. The index is equally thorough, encompassing some 110 pages.

The 2010 volume also covers legislative developments such as the introduction of the Counter-Terrorism Act 2008, the abolition of the offence of incitement and its replacement with the offences of encouraging or assisting an offence (under the Serious Crime Act 2007), and further implementation of the Criminal Justice and Immigration Act (which profoundly affects sentencing). Other legislation covered includes the Borders, Citizenship and Immigration Act 2009, and the Health and Safety Offences Act 2008. In terms of case law, the publication covers new Strasbourg decisions such as *Grayson v UK* and *Al-Khawaja v UK* on hearsay. House of Lords judgments covered include *King v SFO* on restraint powers, *Briggs-Price* on confiscation, *JTB* on *doli incapax*, and *G and J* on the Terrorism Act 2000 offences. Court of Appeal decisions covered include Evans on gross negligent manslaughter, *Mayers* and *Powar* on anonymous witnesses, *Z* on hearsay and the use of s114(1)(d) Criminal Justice Act 2003, *Horncastle* on the ECHR compatibility of the hearsay regime, *D* on directing juries on delayed complaints of rape, and *O'Dowd* on case management and bad character.

Whilst structurally Blackstone's Criminal Practice has changed as it is no longer a single volume work, in terms of content it remains a work of very high quality that is also very well set out, practical and easy to use.

Catriona Cairns, *EU Justice and Home Affairs intern with JUSTICE, winter 2010*

Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform

*Jaya Ramji-Nogales, Andrew Schoenholtz
and Philip Schrag*

New York University Press, 2009

368pp \$39.00

Who better to summarise the research that is at the core of this book than Senator Edward Kennedy? He reports that it demonstrates that decisions on refugee claims in the United States are 'strongly affected by the immigration judge's work experience, personal bias, gender, and lack of training, by the court to which the case is assigned, and by whether the refugee is fortunate enough to have legal representation'

The findings will come to no surprise to any litigator. Choice of judge, particularly in cases with a high factual component, is vital and few will have proceeded far in their career without the odd surreptitious attempt to affect outcome by encouraging a late switch of court. So, this is research in the best tradition: it confirms what you largely knew already but gives you the ammunition to prove it.

The statistics provide stark evidence of the variance in individual decision-making. For example, the odds of a favourable decision from different

judges in Miami on the same facts vary between one in five and one in 20. The variables include those cited above by Senator Kennedy but there is a darker side to this variation. There is evidence of political bias. Judges appointed on political grounds that bypassed traditional merit examination by the Bush administration are far less likely to grant asylum than others.

Immigration judges in the US undertake a sufficient number of cases to be susceptible to statistic analysis. The same would be true in the UK. The book is bulked up by commentators of various kinds, including Robert Thomas, a lecturer at Manchester University. He argues that a degree of statistical variation is unavoidable; that decision-making in these cases is difficult; but that we should be concerned with quality in a judicial area which is dominated by the demands of high volume and quick turnover. He is probably right. It would be very interesting to repeat this US study over here and then to move on, if one could do it, to explore further the role of the personal in professional decision-making. We all instinctively know that it is present but how could we document and explore it? Decisions in asylum cases are undoubtedly a good place to start.

Roger Smith, Director, JUSTICE

The Judicial House of Lords: 1876-2009

Louis Blom-Cooper, Brice Dickson, and Gavin Drewry (eds)

Oxford University Press, 2009

912pp £95.00

Echoing the collaborative history of the judicial House of Lords, this volume contains a collection of essays from over 40 experts. Topics range from general historical perspectives, regional and external comparisons, to specific areas: international law, human rights, and criminal law among them.

As the Supreme Court ascends to its place in the British legal system, The Judicial House of Lords: 1876-2009 both reflects upon the complex history of the judicial committee of the House of Lords and charts its legacy, advocating for change where appropriate. Drewry and Blom-Cooper typify this double approach in their examination of the relationship between the House of Lords and the Court of Appeal. The authors both document the thorny appeals process under the former legal regime and advocate for increased judicial efficiency under the new legal order.

Fittingly, one of Monet's London Parliament series has been chosen to adorn the cover. This choice suits not only the subject matter, but the style. Monet painted the truth as it appeared to the eye, not an artificial or edited scene. So too, the authors discuss both the faults and virtues of the House of Lords. Monet's works sought to capture the essence of an ever changing subject. Likewise, the editors have compiled a collection of works that capture the dynamism of the judicial committee of the House of Lords. The impressionist style recognised movement as a crucial

element of human perception and experience, seeking to represent their subjects as animate, not static. Equally, the authors acknowledge that the value of the House of Lords lies in its evolving impact, rather than a hard and fast list of accomplishments.

To an American law student reviewing this work as an outsider to the British cultural heritage, some of the historical chapters were confusing and overly technical, as they presumed more than a working knowledge of the institutions. However, certain chapters were of particular interest, notably Tom Zwart's 'A Transatlantic Comparison'. Zwart deftly teased out the differences and similarities between the British and the American legal systems. He focused primarily on procedural aspects; dissecting standing, scope of judicial review, justiciability, and constitutional review. His comparison was enlightening and thought-provoking. However, one of his conclusions failed to resonate. Zwart purports that textualism, as a form of constitutional review, has resulted in decreased judicial manoeuvrability. As student in an American law school, I have had the pleasure of reading the opinions of Scalia and Thomas, the proponents of textualist interpretation. In so doing, I came to my own conclusion that the two employ textualism only when convenient. Furthermore, when employed, the two seem to consider only the convenient version of the text. These observations seem to support the conclusion that textualism may indeed increase judicial manoeuvrability rather than decrease it, by adding some sort of tacit textual endorsement. Though this conclusion may arise out of my admittedly liberal sympathies, Zwart glossed over the reasons for any divergent conclusion.

Certainly this work is not for the faint of heart, due to its sheer size and density alone. Yet, The Judicial House of Lords: 1876-2009 remains a collection of essays from leading legal minds, easily digestible individually. Furthermore, it achieves the difficult task of documenting the complex history of the judicial House of Lords, while predicting its impact upon the newly constituted Supreme Court.

Emily Dix, intern with JUSTICE from Boston College Law School, spring 2010

JUSTICE briefings and submissions

1 November 2009 – 31 March 2010

Available at www.justice.org.uk

1. JUSTICE (as part of a coalition of legal organisations) publication, *A Manifesto for Justice*, December 2009;
2. Response to Ministry of Justice consultation, *Defamation and the internet: the multiple publication rule*, December 2009;
3. Response to the Crown Prosecution Service consultation on the DPP's interim policy for prosecutors on assisted suicide, December 2009;
4. Briefing on the Crime and Security Bill for second reading in the House of Commons, January 2010;
5. Response to the European Commission Green Paper on obtaining evidence in cross-border criminal matters, January 2010;
6. Joint JUSTICE, Amnesty International (UK), Global Witness, Human Rights Watch, International Federation for Human Rights and Redress briefing for MPs on why changes to law of war crimes arrests should be opposed, January 2010;
7. Briefing on clause 1 (stop and search) of the Crime and Security Bill for committee stage in the House of Commons, together with suggested amendments, January 2010;
8. JUSTICE Student Human Rights Network electronic bulletin, New Year 2010;
9. Briefing on clauses 21-38 of the Crime and Security Bill, covering domestic violence; gang-related violence; and anti-social behaviour orders for committee stage in the House of Commons, February 2010;
10. Briefing on the Terrorist Asset Freezing (Temporary Provisions) Bill for both House of Commons and House of Lords, February 2010;
11. *Devolution and Human Rights*, published online, February 2010;
12. Briefing for the House of Commons renewal debate on the Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2010, February 2010;
13. Briefing and suggested amendments to the European Protection Order, an initiative of the Spanish presidency on the issue of vulnerable victims, March 2010;

14. Response to Ministry of Justice green paper, *Rights and Responsibilities: developing our constitutional framework*, March 2010;
15. Briefing and suggested amendments to the Crime and Security Bill for report stage in the House of Commons, March 2010;
16. Briefing on the Crime and Security Bill for second reading in the House of Lords, March 2010;
17. Response to the Ministry of Justice consultation on arrest warrants for crimes of universal jurisdiction, March 2010.

Cumulative Index 2004-10

Constitution

Constitutional reform, Roger Smith. [2004] 1, 5-7

Changing the Rules: the judiciary, human rights and the constitution, The JUSTICE annual debate. [2005] 2, 8-26

Government and the rule of law, The Rt Hon Lord Goldsmith QC. [2006] 1, 10-21

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Department and Clifford Chance in conjunction with JUSTICE, Ross Cranston QC. [2006] 1, 7-9

Writing it down, Roger Smith. [2006] 2, 4-7

Politics and the law: constitutional balance or institutional confusion? Professor Jeffrey Jowell QC. [2006] 2, 18-33

A Ministry of Justice and the rule of law, Roger Smith. [2007] 1, 4-7

Introduction to the second rule of law lecture series organised by the LSE Law

Department and Clifford Chance in conjunction with JUSTICE, Ross Cranston QC. [2007] 1, 21-23

The rule of law – form and substance, Sir John Laws, with a comment by Professor Carol Harlow. [2007] 1, 24-40

Justice, JUSTICE and judgment, Roger Smith. [2007] 2, 4-7

Are judges now out of their depth? Conor Gearty. [2007] 2, 8-18

People, participation and process, Roger Smith. [2008] 1, 4-7

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