JUSTICE JOURNAL

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JUSTICE – advancing access to justice, human rights and the rule of law

JUSTICE is an independent law reform and human rights organisation. It works largely through policy-orientated research; interventions in court proceedings; education and training; briefings, lobbying and policy advice. It is the British section of the International Commission of Jurists (ICJ).

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Editorial

Out with the old: in the new

Politics is a brutal business. One day, you have the car, the red boxes, the invitations to speak. Then, your replacements ride into town; the language of government changes; your websites are taken down; your content archived; and, in the words of the song, 'you are not half the man (or woman) that you used to be'. This edition grapples with the consequences of where we now stand with a coalition government which has given us, in the form of its *Programme for Government*, an unparalleled guide to its intentions. It also contains an article looking at how Labour might take on board its new leader's stated greater commitment to civil liberties. All this is put into a broader, constitutional context by Rabinder Singh's Tom Sargant memorial lecture, Qudsi Rasheed's paper on the state of human rights in Scotland, and JUSTICE's own paper (now hopefully looking of historical interest) on the conditions under which the Human Rights Act might be amended.

The coalition has decided that its mark on history will be left by the reduction in government debt and the consequent budget cuts to almost all departments. The *Programme for Government* announced a 'fundamental review' of legal aid so that the Ministry of Justice can play its part. Belatedly, ministers discovered that we had already had a 'fundamental review' of legal aid under Lord Falconer – a document so dire that it was binned without publication. So, we now have what will be entitled a legal aid 'policy assessment'. Just as a rose by any other name sounds as sweet; proposals for cuts will be as unwelcome whatever the title of the document in which they are announced. And cuts there will be. By the time of publication, we will know their full extent. At the time of writing, we expect them to amount to a reduction of around £350m over four years on legal aid's £2.1bn budget.

As an area of public expenditure, legal aid resembles education and is distinguishable from welfare benefits. The money is spent in providing the salaries of those who perform the service and not in direct payment to the end recipients. The widespread receipt of legal aid payments throughout the legal profession has proved a bastion for its support. In countries with fewer providers, recipients of legal aid have not found such staunch allies from the equivalents of the Bar Council and Law Society. Our spending has undoubtedly held up better than countries like Australia or the US, for example, because so many lawyers are dependent on its payments and are consequently determined that services should be maintained. However, there is a flip side to this. Lawyers are clearly vulnerable to advancing their self-interest. Cuts of the kind

contemplated will decimate firms and advocates with certain types of work in London and other large conurbations where, hitherto, legal aid has been funded at levels that encouraged specialisation. Particularly at risk will be those where there is no alternative private market to pick up the slack. Already, the impact of existing cuts on immigration firms in London and other major towns has been seen in the drop of numbers of providers.

However, lament for the past and the hankering for protection of professional interest will gain no traction in the debate on spending cuts to come. Social workers, probation officers, librarians, police officers are all going to be made redundant. Lawyers cannot ask for special treatment on the basis of assertions, however stirring, that, for example, 'justice has no price'. There will be little sympathy for any plea of special treatment in a time of such widespread retrenchment.

That is not to say that the process should proceed without argument. Lord Justice Goldring's report into court closures shows the way forward. Jack Straw wanted to close 157 magistrates and family courts. At the request of the Lord Chief Justice, Sir John Goldring painstakingly went through the case of each proposed closure. He agreed in 46 cases; demurred in 34 and regarded the case as unproven in 77. His methodology was to consult on the practical implications of closure and to ask if you really could, for example, get from Frome in Somerset to Taunton if the former's court was closed (you can't. Not easily.) Sir John is impliedly applying a test of reasonable access to the courts. He accepts that closures must be practical and must leave ordinary people dependent on public transport with a reasonable journey to get to a court where they are a witness, party or defendant. The result is, overall, dramatic. Jack Straw contemplated closing around a third of all courts: Sir John accepted the case in less than a tenth.

The government's proposals will need detailed consideration but, initially, there are at least five principles by which they should be judged:

- First, it is, of course, legitimate for the government to look for legal aid savings just as it can look to close 'under-utilised' and unnecessary courts. There is nothing sacrosanct about current levels of funding.

- Second, the government has a duty to provide access to justice, both under common law and, in a more detailed way, under the European Convention on Human Rights, predominantly under Article 6.

- Third, successful policies on access to justice must mobilise all relevant elements: substantive law, procedural arrangements and funding. This was

the original impetus behind the 'access to justice' movement of the late 1970s. So, reform should be conceived functionally. If savings are being considered from family law, then government needs to look at divorce, separation and ancillary relief from every angle, not just legal aid. And, it has to bear in mind that, if this exercise was easy, it would have been done before.

- Fourth, access to justice implies 'equal justice', a term favoured in the United States where it is engraved above the Supreme Court. It is not fair if one party is, for example, forced into mediation when the other party may decline to take that option as a way of resolving a dispute – as would happen if women are simply denied legal aid in matrimonial cases where men (generally with higher resources) are able to litigate at will.

- Finally, an important element in modern access to justice is the accountability of public power. This arises from procedures such as judicial review which have been developed over the last thirty or so years. Legal aid for such procedures forms an important constitutional check on the state, central and local. The temptation by those in power to shackle those who might call them to account in the courts must be resisted.

The next edition of the *Journal* will record our response to the government's proposals against these criteria.

Roger Smith is Director of JUSTICE.

The UK constitution: time for fundamental reform?

Rabinder Singh QC[1]

The 2010 JUSTICE/Tom Sargant memorial annual lecture was based on the text of this paper.

It is an honour to have been asked to give this year's Tom Sargant memorial lecture even though I feel unqualified to follow in the footsteps of the distinguished speakers who have given the lecture in the past. In particular it is right that we should remember Lord Bingham, who gave the lecture in 2001. Many fulsome tributes have been paid to him since his untimely death earlier this year. I would like to add just a few words of my own as an advocate who had the privilege of appearing before him. As a judge he was unfailingly courteous and fair. This country can count itself fortunate that, at this troubling time in the early 21st century, it was able to turn to this wise man for moral leadership when it was so badly needed. In the *Belmarsh* case[2] he reminded us of our better selves: if we had left people languishing in prison without trial I don't think we would have been proud of ourselves. I believe that for generations to come Lord Bingham's opinion in the *Belmarsh* case will be read by anyone who is interested in liberty and equality.

As is well-known, in May this year the United Kingdom elected a coalition government for the first time since the Second World War. On 19 May Nick Clegg, the leader of the Liberal Democrats and Deputy Prime Minister, made a speech in which he promised the British people that:[3]

> *This government is going to persuade you to put your faith in politics once again. I am not going to talk about a few new rules for MPs, not the odd gesture or gimmick here or there to make you feel a bit more involved. I am talking about the most significant programme of empowerment by a British government since the great reforms of the 19th century. The biggest shake up of our democracy since 1832 when the Great Reform Act redrew the boundaries of British democracy, for the first time extending the franchise beyond the landed classes.*

While this reforming zeal is welcome, it is slightly surprising to hear that the new coalition government's proposed reforms are going to be the most fundamental since 1832. Even allowing for political hyperbole, this seems to give no credit to the last government, which came to office in 1997 with an

ambitious programme of constitutional reform and in large part delivered it, although I will suggest it left some of the biggest questions unresolved. In his 2001 lecture Lord Bingham referred to 'the flood of constitutional legislation released by the Blair government after the 1997 election.'[4] Professor Vernon Bogdanor has even described the package of constitutional reforms enacted in the last 13 years as amounting to the 'new British constitution.'[5] In October 1997 another young and energetic leader had just come to power. At that time Tony Blair said this:[6]

> *The Government is pledged to modernise British politics. We are committed to a comprehensive programme of constitutional reform. We believe it is right to increase individual rights, to decentralise power, to open up government and to reform Parliament.*

The main features of that programme of constitutional reform are well-known and can be summarised briefly.[7] First, there was devolution to Scotland, Wales and, following the Good Friday Agreement of 1998, Northern Ireland. Devolution was not imposed by the UK government but was approved by referendum in each of the relevant regions. The powers of the Scottish Parliament and Executive in particular are strong and wide-ranging, covering most areas of domestic policy.

Secondly, the House of Lords was reformed in 1999 to remove all but 92 of the hereditary peers. However, it proved impossible for agreement to be reached in Parliament about what degree of elected element should be included in a reformed upper chamber, and that is undoubtedly unfinished business. It is perhaps ironic that the only members of the House of Lords who can claim to have been elected by anyone are the 92 hereditaries who are literally elected from among their own peers. There was a proposal in the Brown administration's Constitutional Reform and Governance Bill which would have ended the system for by-elections when a hereditary peer dies, but this had to be dropped in the last days of that administration in order to facilitate agreement with the Opposition to allow the bill to be passed before the general election this year. So it is that we still have 92 hereditary peers in our legislature and the only people who can vote for them in by-elections are other hereditary peers.

Thirdly, the electoral systems for most tiers of government, whether in the devolved assemblies, the Greater London Assembly or the European Parliament, were all based on some system of proportional representation. However, the promised referendum for electoral reform for the House of Commons never came: the report by Lord Jenkins, which recommended a system of election known as 'AV Plus', which would have retained constituency MPs elected on the basis of the Alternative Vote but with additional 'top up' MPs elected from

a regional list to ensure a degree of proportionality, has been allowed to gather dust since it was published in 1998.[8]

Fourthly, there were reforms to the judicial system. The judicial functions of the House of Lords were removed to create a new Supreme Court of the UK, so that the British people and others would instantly recognise our highest court for what it is – a supreme court which is independent of the legislature. The Lords of Appeal in Ordinary, or Law Lords as they were more commonly known, became Justices of the Supreme Court and no longer sit in the legislature. The Lord Chancellor was replaced as the head of the judiciary in England and Wales by the Lord Chief Justice: no longer do we have a member of the cabinet also sitting as a judge in our highest court. And the important role of the Lord Chancellor in making judicial appointments has been transferred in substance if not in form to the independent Judicial Appointments Commission (JAC). It is important to appreciate that these reforms to the judicial system were made for reasons of principle, in particular the principle of the separation of powers. In an article in February this year the chair of the JAC, Baroness Prashar, said that:[9]

> *The balance between democratic aspirations and judicial independence was struck with great deliberation and thought during the course of the passage of the Constitutional Reform Bill in 2005. … My experience of attempting to give effect to the objectives of this legislation has confirmed to me how important it is not to lose sight of the fundamental principles that underpinned this change in 2005 – independence, excellence and legitimacy – and not to be swayed by short-term imperatives, bureaucratic convenience, ill-informed sniping or those resistant to change.*

It is therefore disturbing to read that, for example, the Supreme Court is on a list of so-called 'quangos' whose very existence is apparently being reviewed by the government with a view to making cuts in public spending. It is important to recall why Lord Bingham supported the creation of the Supreme Court when he said this in his 2001 Tom Sargant lecture:[10]

> *the institutional structure should reflect the practical reality. If the appellate committee of the House of Lords is, as for all practical purposes it is, a court of the United Kingdom and as such entirely independent of the legislature, it should be so established as to make clear both its purely judicial role and its independence. … When, for example, the Pinochet case was appealed to the House of Lords some foreign observers mistakenly thought that the issue had ceased to be a judicial one and had become a political one.*

I would venture to suggest that it may not have been only foreign observers who made that mistake.

Last but certainly not least the Labour government's programme of constitutional reform gave us the Human Rights Act 1998, which came into full force in October 2000. The coalition agreement which was reached in May this year between the Conservatives and the Liberal Democrats stated that: 'We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties.'[11] For the time being at least the Human Rights Act appears to be safe although that wording does not make express reference to it. Much could be said about the history of the Human Rights Act in its first ten years, and has been, but time does not permit me to dwell on this now. What I would like to say is that it is clearly not yet the subject of universal affection. It is a sorry state of affairs when even the phrase 'human rights', with its noble history, is regarded as a dirty one in some quarters. The concept of human rights has a long pedigree, both in religious thought (and not only in the Judaeo-Christian tradition) and in secular thought going back to the Enlightenment and earlier. As the late, great New Zealand judge, Lord Cooke, put it in *Daly*:[12]

> *some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.*

One of the interesting features of the new constitution which has been emerging since 1997 is that it was the product of cross-party co-operation. Although the Labour party secured its biggest ever victory (in terms of seats) in the general election of 1997 and then almost exactly repeated the scale of that victory in 2001, and although there was no formal coalition or pact, nevertheless there was an agreement with the Liberal Democrats in 1997 as a result of the Joint Consultative Committee on Constitutional Reform,[13] which included the late Robin Cook, whose early death deprived this country of one of the most thoughtful politicians to grace the House of Commons in recent times. Such cross-party co-operation is surely desirable even if not always attainable when the fundamental rules of how a society is to be governed are to undergo change. Constitutional reform does not have to be the subject of consensus although it usually requires acceptance of a fundamental change as being irreversible even if it was vehemently opposed at the time. So the extension of the franchise was initially resisted by the Tory party in the early 1830s but eventually accepted by it and led to its transformation into the Conservative party under the leadership of Sir Robert Peel. Similarly, devolution to Scotland was not supported by the Conservative party, which feared it would lead to the break-up of the Union (and perhaps it may still do so if Scotland votes one day for independence) but

it is surely now an irreversible part of the constitutional scene, especially as it was supported by a large majority of Scottish voters in a referendum.

The other thing to note about the Blair government's programme of constitutional reforms is that they were largely the product of pressure from civil society on the Labour party in the long years of opposition when it was looking for something to do once it regained power. In particular NGOs like Charter 88 effectively saw their wish-list of reforms adopted by the Labour party as its programme in the early and mid-1990s. Although the Labour government could be criticised, and often was, for not having an overall narrative for what its disparate reforms amounted to in total, it seems to me that criticism could equally be made of the groups in civil society which had persuaded the Labour party to adopt their recommendations for reform in the first place. It is not entirely fair to blame Tony Blair for failing to be a constitutional theorist when the likes of Earl Grey, Gladstone and Asquith had been no more successful. But in any event, I am not sure that criticism is really warranted. One of the advantages of the British constitution is said to be its flexibility and its pragmatism. Although purists may have wished for a comprehensive theory to join the dots and provide a coherent explanation of the Blair reforms, the history of this country's incremental approach to reform suggests that we got in the end what we probably deserved.

Against that background, it seems to me that there are three specific areas of unfinished business for the new coalition government to address. First is the proposal for fixed-term parliaments, so taking away from the Prime Minister the power in effect to choose the date of a general election in order to suit the interests of his or her political party. This was an important part of the initial coalition agreement. As Nick Clegg said on 19 May, the new government has already fixed the date of the next general election for 7 May 2015. Primary legislation has been introduced to give the concept of fixed-term parliaments effect in law.[14] So in a modified form we are seeing implemented the last of the six points of the People's Charter: although annual parliaments are probably to no one's taste now, at least the Chartists would be pleased that the term of a parliament is to be fixed by law and not left to the prerogative of the monarch, in reality the Prime Minister of the day. Like many people I would have preferred a fixed term of four years, not five, but that perhaps is a minor quibble.[15] In countries such as Australia, New Zealand and Canada the term is one of three years and that would probably be regarded as too short for this country, as it tends to lead to there being little time in between elections for hard decisions to be taken in the national interest.

There is one aspect of the proposed legislation for fixed-term parliaments which is particularly controversial. This is the requirement that any decision to call a

general election before the end of the normal fixed-term will require a special majority in the House of Commons of two-thirds (as in the Scottish Parliament and not the 55% majority that was originally mooted).[16] It seems to me that this is defensible on the ground that it should prevent the government itself (or the bigger partner in the coalition) calling an early general election when it might suit its own party interests. It should not prevent a vote of no confidence in the government being carried on a normal majority in the House of Commons. It may be that the current coalition will not survive for a full five years: if some or all Liberal Democrat MPs were to withdraw their support from it and vote with the Opposition in support of a motion of no confidence, the Prime Minister would have to resign in accordance with normal constitutional convention. If that scenario arises in the next few years it would not necessarily follow that there would have to be an immediate general election because it might be possible for the leader of the Opposition to form a government, either a minority administration or a new coalition. But the most likely consequence would be another election. It seems to me that nothing in the proposed legislation for fixed-term parliaments does or should prevent an early election taking place in such circumstances. As Lord McNally, the deputy leader of the House of Lords, has put it: 'Parliament would still be able to dismiss a Government, but the Government would not be able to dismiss Parliament.'[17]

The second main area of unfinished business that the coalition government is addressing is reform of the voting system for the House of Commons. There is to be a referendum, currently planned for next May, on whether we should adopt the Alternative Vote (AV) system, sometimes called the preferential voting system, which enables the voter to number each candidate standing in a single member constituency in order of preference.[18] The Liberal Democrats would have preferred to introduce a much more proportional system like the Single Transferable Vote, which is used in the Republic of Ireland, but which requires multi-member constituencies. The Conservatives would like to see no change at all to the current system which is known as the 'first past the post' system. This label is not entirely accurate as in most races the post is usually fixed in advance and the winner is the first to pass that post. In our current system there is no fixed post. It could more accurately be described as a simple plurality system, in other words in each constituency the candidate with the most number of votes wins, even if they win by one vote over the second placed candidate and even if they have less than 50 per cent of the votes cast. It seems to me that the case for replacing the current system of voting has become overwhelming for several reasons.

First, it is unfair and risks undermining the legitimacy of the House of Commons and therefore the basis on which our government is chosen. No government in recent times has won a majority of the votes cast at a general election and yet

the current system has delivered to single party governments not only safe majorities but sometimes very large ones on not much more than 40 per cent of the vote. This was as true of the Labour victories of 1997 and 2001 as it was of the Conservative victories of 1983 and 1987. But it can be worse than that, because the current system can deliver a majority of seats to a party that has come second in the share of the national vote. This is what happened in 1951, when the Attlee government lost even though it won more votes and indeed Labour won its largest vote in history. In the first election of 1974, a minority Labour government was formed because it had won more seats although it had fewer votes than the Conservatives.

In effect our House of Commons is an electoral college, which decides who is to form the government. The government and the Prime Minister are not directly elected by the people although it is often thought that they are. We are prone to smirk at the Americans for their electoral college system for deciding who should become president, which has twice meant that the person who came second in the national vote has become president: once in 1876, which led to the ignominious ending of the period known as 'Reconstruction' after the Civil War; and more recently in the disputed election of 2000, which was eventually decided in favour of George W. Bush by the US Supreme Court.

But our system is no better and is getting worse. In the 2005 election the Labour party was able to retain power with a safe majority of seats on less than 36 per cent of the national vote. This year the Conservatives actually did better in the sense that they won 37 per cent of the votes cast but failed to secure a majority and had to enter a coalition with the Liberal Democrats. If they had won perhaps another percentage point in the share of the votes cast, they would have obtained a majority. And, as we shall see later, that would have unlocked the door to the apparently limitless power that control of Parliament gives a government. That is how close this country came to electing a government that had made a manifesto commitment to repeal the Human Rights Act. Some opinion polls were predicting that Labour might remain the largest party in the House of Commons even if it came second or even third in the share of the national vote. That would surely have made even the Conservatives think twice about the legitimacy of the current system.

Secondly, whatever the merits of the current electoral system may have been when we had a two party system it cannot cope when our voting habits have become much more varied. Even leaving aside the devolved regions of the UK with their multi-party systems, in England we now have not only a strong third party in the Liberal Democrats but also UKIP, the Green party and even sadly the BNP. In a democracy we have to see off the threat of fascism and racism

through legitimate debate and electoral politics, not by pretending that it does not exist.

Thirdly, the main merit of the current system is often said to be that it delivers stable majority governments. But even that cannot be taken for granted now. In this country the system has given us the first peacetime coalition since the 1930s. In Canada, the only other major democracy that still uses the first past the post system, the last two elections in 2006 and 2008 have produced minority Conservative governments, not a stable majority. Conversely, the result of our election this year has shown that, even if one party does not win an election outright, we were perfectly capable in this country of putting together a coalition within days of the election which was able to agree a programme of government and is able to function with a working majority in the House of Commons.

But, if the current voting system is in need of reform, is the AV system on offer any better? In my view, it is, while I would certainly not claim it is perfect. It retains the advantages that the current system is said to have, in particular the link of an MP to a single member constituency and it tends to deliver governments with stable majorities, although that was not the outcome of this August's election in Australia, where Labor retained power but as a minority government supported by some Independent MPs, giving it a notional majority in Parliament of just one seat. There can be no doubt that AV can, if anything, exaggerate the effect of big swings in votes as between the main parties, so that in 1997 the Labour party would have secured an even bigger victory over the Conservatives if AV had been used than under the current system. However, it has to be an improvement on the current system, in my view, and should receive support in the referendum. This is because it does at least mean that in any particular constituency the winning candidate has to win a majority of the votes cast after second and further preferences have been counted, and not simply have the most votes in the first round. This is the system used for the direct election of the Mayor of London. It is to be hoped that the leader of the Opposition will support AV in the referendum, as it is in effect the system of voting that elected Ed Miliband the leader of the Labour party after his brother David came first in the first round of voting. In my view the AV system will give greater legitimacy to each MP and therefore to the government which is elected on the basis that it has a majority in the House of Commons.

The third main piece of unfinished business is House of Lords reform. This has been waiting not just since 1999 but since 1911 when the Parliament Act envisaged that it would be a temporary measure pending the placing of the upper chamber on a popular footing. The point can be put simply. It is not legitimate or acceptable in a democracy for any part of our legislature to be unelected. If the moral and political authority of government rests on the

consent of the governed then those who make our laws must be elected by the people. There is much to be said for the election of members of the upper house to be on a different system than the House of Commons: for example if it were conducted on a pure proportional system it would tend not to give any party a majority and so the new chamber might legitimately act as a restraining influence on the lower House. And, if it were thought desirable, there might be appropriate recognition of the different regions of the UK, perhaps within England too, by having regional constituencies as for the European Parliament.

There is also a case for stipulating that the members of the upper house should be elected for a much longer period than MPs, perhaps for a single term of 15 years, and perhaps with one third of the house having to stand down every five years, since they could then act as they saw fit in the national interest without the fear of losing their seat at the next election. But the central principle must remain that no one should any longer be a member of our legislature who has not been elected. It is often said that the House of Lords has the benefit of having among its members people who are experts in a variety of fields. While this is true, and was often given as a reason for retaining the Law Lords as members of the legislature, I think in the end it is not a sufficient reason to outweigh the imperative of the democratic principle. There would be nothing to stop such experts from standing for election to a reformed upper house but, even if they did not, there are other ways in which the house or Senate, as it might be renamed, could gain access to their expertise, for example by taking evidence in committee.

But the last and most important question I want to ask is whether all of this is mere tinkering. Should we now go all the way and adopt a written constitution? Of course, in one sense we do have a written constitution. It may not be codified, or written down in one place, but we have had constitutional documents in the past: eg Magna Carta and the Bill of Rights (neither of which was an act of Parliament if by that is meant the Queen or King in Parliament). And more recently, we have had not only such important statutes as the Representation of the People Acts, which gave us universal suffrage, but also the European Communities Act 1972, the devolution legislation of 1998, the Human Rights Act of the same year, the Constitutional Reform Act 2005 and the Constitutional Reform and Governance Act 2010. There is a lot of constitutional law in writing if the citizen wishes to look it up.

Conversely, as is well-known, even a written constitution like that of the US does not in practice contain all the rules which govern the way in which that country is governed. Every system of government has unwritten conventions to meet the needs of a changing society. But what we don't have (apparently) is a fundamental law, with a higher status than ordinary law, which defines

the powers of the main constituent parts of the state. In my view, there is much to be said for having a written (or codified) constitution even if it does no more than set down in one place the framework for how we are currently governed. As Stephen Hockman QC and others have observed, we would not be much impressed if, on applying to join a tennis club, we asked for the club's constitution, only to be told that it was not set out in one place but could be found in previous minutes of the club, decisions of past presidents and unspoken conventions.[19] A written or codified constitution could have a valuable role to play in educating the citizens of the future.

But it seems to me that the time has come for more fundamental reform: I suggest that what we need to recognise explicitly is the principle of constitutionalism – that all power is limited, including the power of Parliament. Just as in modern administrative law there is no such thing as an unfettered discretion, so in constitutional law, I suggest, there should be no body in the state which enjoys absolute power. We need to move from a lop-sided constitution in which apparently the ultimate constitutional principle is parliamentary sovereignty to a balanced constitution in which each part of the state is limited by higher constitutional principles. What we need to recognise is that it is not Parliament which is sovereign but the constitution itself.

In the early 21st century can our constitution plausibly be reduced simply to one principle, the doctrine of parliamentary sovereignty? Suppose a visitor came to the UK in the manner of Montesquieu or de Tocqueville now. Apart from any question of normative theory, simply in descriptive terms, how would that visitor describe the essential features of the current British constitution? I would make this tentative suggestion as to its essential features:

1. It is a monarchy but a constitutional monarchy, ie the nominal head of state does not in practice exercise political power but acts on the advice of Her Majesty's government.
2. It is a parliamentary democracy. This has two components. First the legitimacy of Her Majesty's government depends on the ability to command a stable majority in the House of Commons. And secondly, the House of Commons is clearly the dominant chamber in a bi-cameral legislature: if necessary, it can act without the consent of the House of Lords to make laws under the Parliament Acts 1911 and 1949.
3. There is an independent judiciary and the government itself is subject to the law. The rule of law is a constitutional principle, as section 1 Constitutional Reform Act 2005 describes it, reminding us that we do indeed have a constitution and that it consists of principles.

4. Fundamental human rights are respected. The UK is a party to the European Convention on Human Rights and other international treaties on human rights.
5. The UK is part of the European Union, which has legislative authority over many aspects of social and economic life, and increasingly other parts of public policy. Directly effective EU law is given effect in the domestic legal order without the need for further enactment by section 2(1) European Communities Act 1972. In so far as there is any inconsistency between a norm of the domestic legal order and the supranational European legal order, the latter is to prevail, even if the domestic norm is contained in an Act of Parliament and even if that Act was passed after the 1972 Act.[20]
6. The UK has devolved administrations in Wales and Northern Ireland, and also in Scotland, which has a Parliament enjoying wide legislative powers on matters which are not reserved to Westminster.

Traditional constitutional theory would have it that the British constitution is flexible and yet strangely that it has not developed at all since 1689, when the Crown of England was offered to William and Mary on condition that they accept the Bill of Rights, which in effect established the supremacy of Parliament over the Crown; or perhaps 1885, when Dicey published the first edition of his famous work on the law of the constitution.

Apparently, the Queen in Parliament has absolute power to make or unmake any law. So it could legislate for New South Wales or India in spite of the Statute of Westminster of 1931 or the fact that India became a dominion in 1947 and a republic in 1950. It could abolish the Scottish Parliament without even a referendum of the people of Scotland, who voted for that Parliament in 1998. It could abolish the principle of universal suffrage. It could abolish future elections and so extend its lifetime in perpetuity. It could abolish the concept of judicial review and indeed the courts themselves and perhaps vest all judicial power in the monarch or the Prime Minister. And of course it could legislate to decree that all blue eyed babies shall be killed. Whenever this kind of extreme scenario is posed, the conventional response is to say that these examples are absurd and, of course, Parliament would do no such thing: blue eyed babies are safe.

And yet, Parliament (for which one should read the government, which has an absolute majority in the House of Commons) has in recent times done things in relation to minorities that it would not have done generally. It is easy to forget that when Lord Scarman gave his famous Hamlyn lectures in 1974, where he advocated incorporation of the European Convention on Human Rights into the laws of this country, what prompted his concern was what had happened in 1968, when Parliament deprived Asian people living in east Africa who were British citizens of the right to come to this country when they feared

persecution. This measure was regarded by the European Commission of Human Rights as being motivated by racial prejudice and found to constitute degrading treatment under Article 3 of the European Convention.[21] More recently, after 9/11, Parliament rushed through the Anti-terrorism, Crime and Security Act 2001, which empowered the Secretary of State to detain certain suspected terrorists who were foreign nationals without trial. This was the subject of the *Belmarsh* case, and eventually led to a declaration of incompatibility being made under section 4 Human Rights Act in respect of Part 4 of the 2001 Act. But that did not enable the House of Lords either to strike down the offending provisions or to order the release of the detainees, since they were lawfully detained under the authority of Parliament.[22] And of course it is not impossible that the Human Rights Act itself may be repealed, since it is not an entrenched statute. It is often said that the other two democracies which are closest to the UK are Israel and New Zealand because both recognise the doctrine of parliamentary sovereignty and neither has a written constitution. But what each does have is a system of proportional representation for its legislature and certain statutes which are entrenched against ordinary repeal.[23]

This then starkly raises the question: how can fundamental human rights be protected in a constitutional system such as ours which apparently confers absolute power on Parliament? As James Madison put it in the *Federalist Papers*:[24]

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*

What auxiliary precautions are available to us in this country to prevent tyranny and protect human rights? A conventional understanding of our constitution, based on Dicey, would suggest that it is not possible. But other voices deserve to be heard.

Professor Philip Allott, in a 1979 essay on the relationship between the rule of law and parliamentary sovereignty, said this:[25]

> *Brilliantly in his articulation of the concept of the Rule of Law, less comfortably in his articulation of the concept of the Sovereignty of Parliament, Dicey sought to demonstrate the validity of the system in*

> *terms of its own coherence. Dicey's is a coherence theory of a constitutional system. It invited us to understand why it works by understanding how it works. The purpose of the present study is to recall that it is possible to take another view of our constitutional system, in particular a 'higher law' view, and to suggest that there are grounds for thinking that such a view is now not only possible but also necessary.*

In similar vein, Trevor Allan said in an article in 1997 that: 'When constitutional debate is opened up to ordinary legal reasoning, based on fundamental principles, we shall discover that the notion of unlimited Parliamentary sovereignty no longer makes any legal or constitutional sense.' [26]

Without any claim to originality I would suggest that it is arguable that parliamentary sovereignty is not in fact the fundamental principle of our constitution,[27] for the following reasons:

1. That doctrine cannot itself be the product of the will of Parliament because that would be circular. In any event there is no Act of Parliament which lays down that doctrine. The doctrine therefore appears to be a rule of the common law and, as such, could be altered in the future.
2. Parliament does not exist in a state of nature but rather within a system of law. For example, what Parliament is and how it may validly enact a law are questions that may have to be determined, as they were in *Jackson*.[28]
3. The doctrine of implied repeal of statutes has quietly disappeared in the case of so-called 'constitutional statutes.'[29] The European Communities Act 1972 is not regarded as being impliedly repealed by a later inconsistent statute, as the House of Lords held in *Factortame*.[30] The same can also be said of the Human Rights Act: sections 3 and 4, for example, have been used in relation to later statutes (as in the *Belmarsh* case), whereas traditional theory would have had it that the later statute impliedly repealed those provisions to the extent of any inconsistency.
4. If this can happen then that suggests that the traditional view that there cannot be entrenchment by prescription of the form and manner of future Acts of Parliament is also wrong. The experience of Israel and New Zealand suggests that, at the very least, some form of parliamentary entrenchment is possible even in systems like ours.
5. It may even be that there are certain express laws which it would not be within the power of Parliament to enact, if they strike at the very heart of our constitutional arrangements, eg to abolish Parliament itself; to repeal the principle of universal suffrage; to abolish the courts or their power of judicial review. Take the example of ouster clauses: there is a certain incoherence in an Act which creates a tribunal with limited jurisdiction and then purports to confer immunity on that tribunal from judicial

> review – which instruction by Parliament are the courts supposed to obey? Experience suggests that they will not give effect to a clause which purports to oust judicial review completely.[31]

And we need to get our constitutional theory right. Parliamentary sovereignty cannot just be explained away as a political fact – that explanation may be available to a political scientist or historian or some other external observer. But this is to ignore what Hart himself called the internal point of view,[32] ie the point of view of someone who is an actor within the legal system and believes that it is a legitimate system which deserves his or her allegiance. It is not, I suggest, available to a lawyer, still less a judge – judges do not owe allegiance to a political fact, they owe allegiance to the law. They must try to work out, using appropriate legal materials, what their legal system requires of them. A priest should not be an atheist. If Parliament is truly unlimited in its powers in our legal system that is because that is a legal principle which deserves our loyal adherence, not because it is a political fact.

However, I would agree with those who have suggested that it would be better if the courts did not have to take on the task of deciding that the powers of Parliament are limited under our common law constitution and for there to be a public debate about these issues. Ultimately there should be a written constitution adopted and approved by the people in a referendum, setting out the powers of Parliament and the other branches of the state.

Then we would have restored the constitution to basic principles, that all public power is conferred by the people and is held in trust on their behalf – it cannot be used to attack the very structural principles which help to define not only our constitutional arrangements but our values as a free and democratic society governed by the rule of law.

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Notes

1 I would like to thank the Legal Information Team at Matrix Chambers for their assistance with research for this lecture.
2 *A v Secretary of State for the Home Department* [2005] 2 AC 68.
3 Deputy Prime Minister, Speech on Constitutional Reform, 19 May 2010, p1.
4 'The Evolving Constitution', JUSTICE/Tom Sargant Memorial Annual Lecture, 2001, p2.
5 V Bogdanor, The New British Constitution, Hart Publishing, 2009. See also the same author's 'Human Rights and the New British Constitution', JUSTICE/Tom Sargant Memorial Annual Lecture, 2009.
6 Prime Minister's preface to the White Paper 'Rights Brought Home', CM 3782, which accompanied the introduction of the Human Rights Bill in October 1997.
7 For more detail see Sir Jack Beatson, 'Reforming an Unwritten Constitution', Blackstone Lecture, Oxford, 16 May 2009.
8 See further R Brazier, Constitutional Reform, 3rd edn, OUP, 2008, pp60-61.
9 Baroness Prashar, 'Judicial Appointments: A Work in Progress', Law Society Gazette, 18 February 2010, p8.
10 N4 above, p30.
11 *The Coalition: Our Programme for Government*, Cabinet Office, 20 May 2010 p11.
12 *R v Secretary of State for the Home Department, ex p. Daly* [2001] 2 AC 532, para 30.
13 See further Brazier, n8 above, pp31-35.
14 Fixed-term Parliaments Bill.
15 See also the second report of the House of Commons Political and Constitutional Reform Committee for the session of 2010-11, HC 436, 9 September 2010, which noted that most of the opinion available to the Committee suggested that a fixed term of four years would be preferable to one of five years.
16 Deputy Prime Minister's Statement on political and constitutional reform, House of Commons, 5 July 2010.
17 HL Debates col 133, 27 May 2010.
18 Parliamentary Voting System and Constituencies Bill.
19 S Hockman and V Bogdanor et al, 'Towards a Codified Constitution', *JUSTICE Journal* Vol 7 No 1, p74. I was a member of the working group which produced this document.
20 *R v Secretary of State for Transport, ex p. Factortame (No. 2)* [1991] 1 AC 603.
21 *East African Asians case* (1981) 3 EHRR 76.
22 N2 above.
23 New Zealand's Constitution Act 1986 and Electoral Act 1993; Israel's Basic Law: Human Dignity and Liberty 1992.
24 *Federalist Papers, No. 51*, 6 February 1788.
25 P Allott, 'The Courts and Parliament: Who Whom?' [1979] CLJ 79, at p80. For a different view, which obviously deserves respect, see Lord Bingham, 'The Rule of Law and the Sovereignty of Parliament', Commemoration Oration, King's College London, 31 October 2007; and also Lord Clarke and John Sorabji, 'The Rule of Law and our Changing Constitution' in M Andenas and D Fairgrieve (eds), Tom Bingham and the Transformation of the Law, OUP, 2009.
26 T Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 LQR 443, at p449. See also the same author's books, Law, Liberty and Justice, Clarendon Press, 1994, esp. Ch 11; and Constitutional Justice, OUP, 2003, esp. Ch 7.
27 See also *R (Jackson) v Attorney General* [2006] 1 AC 262, per Lord Hope at paras 104-107.
28 Ibid.
29 *Thoburn v Sunderland City Council* [2003] QB 151.
30 N20 above.
31 Eg. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and *R v Secretary of State for the Home Department, ex p. Fayed* [1998] 1 WLR 763.
32 H L A Hart, The Concept of Law, 2nd edn, OUP, 1994, pp89-91.

Scotland: human rights and constitutional issues

Qudsi Rasheed

This paper was written by Qudsi Rasheed during his time at JUSTICE as researcher on our project to defend the Human Rights Act. It reflects issues that arose in JUSTICE's work in Scotland that followed our engagement with the issue of the impact of devolution on the possible reform of the Human Rights Act. It has been prepared with considerable assistance from a number of lawyers and academics in Scotland, to whom our thanks is due.

Over the past year JUSTICE has been engaging with greater vigour in human rights and other related constitutional issues in Scotland. In February 2010, a report was published examining devolution and human rights,[1] followed by meetings organised by JUSTICE staff with lawyers and politicians in Scotland to discuss a number of issues within JUSTICE's policy areas. In addition, preliminary work has begun on the creation of a Scottish section of JUSTICE, with the formation of a Scottish Advisory Group. A third-party intervention was also made by JUSTICE in the most recent Scottish case before the UK Supreme Court.[2]

In order to consolidate this work, and create a platform for future engagement with Scotland, a more comprehensive study of aspects of the Scottish constitution relevant to JUSTICE's policy areas was commissioned. The purpose of this study was to attempt to highlight a cross-section of issues that could be considered either by JUSTICE or by interested parties in Scotland. This report is the culmination of that study. The intention is that this paper will form the basis of discussions in Scotland about potential future developments and improvements within the Scottish constitutional framework. The issues that are raised are by no means comprehensive; there are many which have not been addressed at all. Nor should it be supposed that the treatment of the issues that have been covered is comprehensive. The paper simply provides a brief overview of a small number of varied subjects in order to stimulate and promote debate and discussion. Further, no definitive conclusions are made. Rather, questions are raised; the answers are to be left for another time.

Since devolution in 1999, Scotland has a much clearer and distinct constitution, with human rights a central pillar of that framework. There have however been a number of gaps and deficiencies in the development of this constitution over the last 11 years. This paper looks to consider some of them.

The Scottish constitution

Scotland has an independent constitutional tradition dating back to at least the fourteenth century and the Declaration of Arbroath.[3] Up until the Acts of Union in 1707, Scotland continued to have a thriving constitution and one that was philosophically different to England and Wales. For example, '[t]he principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey.'[4]

The Acts of Union in 1707 did not mark, as sometimes thought particularly south of the border, the point at which Scotland was subsumed by England, but rather a merger of the two constitutional systems. Therefore, elements of the Scottish constitution and constitutional principles would have been intended to survive and find their way into the UK constitution, although in practice this did not happen to any great degree.

Despite the disappearance of many aspects of the Scottish constitution, the independent Scottish legal system was explicitly preserved by the Act of Union:[5]

> *no Causes in Scotland be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas, or any other Court in Westminster-hall; and that the said Courts, or any other of the like Nature, after the Union, shall have no Power to cognosce, review, or alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same.*

In the time between the Acts of Union and devolution in 1998, the Scottish legal system developed with very little input from the Westminster. This was especially so in the area of criminal law which was largely developed incrementally by the Scottish courts and judiciary

Devolution in 1999 created, for the first time since the Act of Union, a Scottish Parliament and Executive. The Scotland Act 1998 (SA), passed at the same time as the Northern Ireland Act 1998 and the Government of Wales Act 1998, re-established many parts of the Scottish constitution albeit making very clear that these were subsidiary to and limited by the constitutional principles of the UK.

Constitutional issues

For the purposes of this paper, three major constitutional issues have to be considered. First, that the Scotland Act 1998 created a Scottish Parliament

and an administration with legislative and executive powers; second, that the Scottish Parliament and Executive are bound by the rights in the European Convention that have been incorporated in the UK; and third, that on issues related to devolution the UK Supreme Court is the final court of appeal.

The Scotland Act conferred legislative powers on the newly created Scottish Parliament.[6] 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 Executive, headed by the First Minister, was also made.[7]

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).[8] 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. It is also outside the scope of legislative competence to undertake any act that is incompatible with the rights contained in the European Convention on Human Rights, which have been incorporated in the UK by section 1 Human Rights Act (HRA).

Despite the Westminster Parliament retaining the legal authority to legislate on all matters, whether reserved or devolved, a constitutional convention has arisen that it will not legislate on devolved matters without the consent of the Scottish Parliament, 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:[9]

> *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.*

The relationship between courts

The Acts of Union explicitly preserved the Scottish legal system. In relation to civil cases, although there were originally doubts as to whether appeals could be

made to the House of Lords, the courts soon made it apparent that such appeals could be taken.[10] Indeed, the House of Lords has been influential in shaping Scottish civil and common law and in fact, Scottish cases have been influential in shaping English law. However, in criminal cases, no appeals came to London for over 300 years with the Scottish High Court of Justiciary as the final court of appeal.

Under the devolution settlement, Scottish institutions are bound by the European Convention on Human Rights in two ways. The HRA binds all public authorities to the Convention rights, whilst the Scotland Act limits the competence of the Scottish Parliament and Executive such that they cannot act in any manner that is incompatible with the Convention rights. The Scotland Act 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.[11]

The Scotland Act retains the existing appeals structure, except that where there is a challenge on the basis of an alleged violation of Convention rights either by Parliament or by the Executive, this raises a devolution issue, which can be appealed to the UK Supreme Court.[12] This process would be effected by raising the devolution issue through notice by a devolution minute in the judicial proceedings in Scotland.[13] The Scottish court would then either accept or reject the minute. If it accepted the minute, it would then have to decide whether or not there had been a breach of the Convention right in question. The devolution issue would be resolved and the proceedings would continue or be discontinued as deemed appropriate. The courts have held that the decision to reject the devolution minute, or the dismissal of the claim of a Convention breach following acceptance of the minute, can both be appealed to the Supreme Court.

Claims under the HRA follow the existing court appeal structure which has not been altered under the Scotland Act. This would mean that if a claim is raised that the High Court of Justiciary (whether exercising its original jurisdiction or as the final criminal court of appeal) acted in a manner contrary to the Convention rights, this could not be appealed to the UK Supreme Court, as the High Court itself is bound to the Convention rights only by way of the HRA and not the Scotland Act. There would therefore be no devolution issue to raise.

However, the courts have held that the acts of the Lord Advocate, who is the head of the prosecution service as well as a member of the Scottish Executive, can be challenged as devolution issues under the Scotland Act. What this has meant in practice is that acts or omissions of prosecutors in criminal cases in Scotland can now be challenged for alleged violations of Convention rights,

with final appeal in these cases coming before the UK Supreme Court. This has opened up the Scottish criminal justice system (albeit only in areas of human rights) to the courts of the UK for the first time since the Acts of Union.

These developments raise a number of issues for consideration. First, many argue that the independence of the Scottish criminal justice system, as guaranteed in the Acts of Union, is a fundamental aspect of the Scottish constitution such that it is inappropriate for the UK Supreme Court to have jurisdiction over criminal matters, even where human rights are involved. It is further argued that this outcome – that actions of prosecutors are regarded as executive action because of the status of the Lord Advocate – was not intended in the devolution settlement. In *Montgomery v HMA*,[14] Lord Hoffman expressed doubts over whether the Scotland Act devolution jurisdiction of the Judicial Committee of the Privy Council had been properly invoked as he inclined to the view that the duty of ensuring a fair trial rested on the judge rather than on the prosecutor and accordingly the minute could not be said to raise a devolution issue since it impugned no act of a member of the Scottish Executive. However, Lord Hope referred to the specialities of the historic office of the Lord Advocate in Scotland to say that ensuring a fair trial was a responsibility of the Lord Advocate as well of the Court.[15]

Second, linked to the prior issue, but in a broader sense, a discussion ought to be had over the benefits or, possibly, dangers of the harmonisation of the laws of Scotland with the laws of England and Wales as a result of appeals coming before the UK Supreme Court. Some have argued that the result of devolution allowing more Scottish cases to come before the Supreme Court might be said to consolidate a general appellate second-tier jurisdiction in Scottish criminal cases in a court situated outside Scotland with non-Scottish judges amongst its members. There appears to be some concern about whether or not the Supreme Court has a sufficient understanding of the uniqueness of Scottish law such that it can shape the legal system of that jurisdiction in an appropriate manner. An institutional change has been created which opens up Scottish criminal law and procedure to external scrutiny by non-Scots who will form the majority in most appeals to London. This, according to some, will inevitably lead to pressure for greater harmonisation as between Scotland and the rest of the United Kingdom.[16]

Third, as well as the substantive questions about the nature and scope of the Supreme Court's jurisdiction over the Scottish legal system, a number of procedural questions arise about how this jurisdiction is invoked. In civil cases, an appeal from the Inner House of the Court of Session automatically goes before the Supreme Court without need for leave,[17] whereas in England and Wales either the lower court must give leave or the Supreme Court itself must

exceptionally give leave if the case raises an arguable point of law of general public importance.[18] The Supreme Court has no control over what cases might be brought before it on appeal from the Inner House of the Court of Session. All that is required for an appeal to be brought from Edinburgh to London in civil matters is a signature from counsel certifying that such an appeal would be in their view reasonable. Criticism has been made that '[i]t is contrary to the public interest that the time of the House [now the Supreme Court] should be taken up with appeals which do not raise an arguable question of general public importance.[19]

In criminal cases (where there is a devolution issue), the position is still developing, but it appears that although there is a particular procedure that must be followed, namely, the lodging of a formal notice of the intention to raise before the Scottish courts a devolution issue, the Supreme Court will look at substance over form in deciding whether or not to give leave. For example, in *Allison v HM Advocate*, even though there had been no devolution issue formally raised, and as a result the Advocate General had no intimation and was therefore denied the opportunity of making submissions, because there was an alleged Article 6 violation, the Judicial Committee gave leave. The High Court of Justiciary had refused to give leave to appeal to the Judicial Committee because the requisite procedure was not followed, and therefore, as there was no determination of Convention rights by the High Court of Justiciary (because it was not raised), there was nothing that could be appealed. The Judicial Committee disagreed, although no clear reasons were given.[20]

Finally, a serious question has arisen about the relationship between the right to a fair trial as protected in the ECHR and thereby incorporated in the HRA and the SA, and the statutory test of a miscarriage of justice. It is without doubt that there is some overlap between the two concepts; the question is how far does this go. In *Fraser*[21] the Scottish Appeal Court questioned the extent of the overlap. In *McInnes*,[22] however, the Supreme Court appeared, for the first time, to explicitly equate the statutory test of 'miscarriage of justice', which the Scottish appeal court applies in considering appeals under the Criminal Procedure (Scotland) Act 1995, with the test as to whether there has been an unfair trial contrary to the requirement of Article 6 ECHR.[23] This issue is of some significance to the relationship between the Supreme Court and the Scottish courts because issues relating to a fair trial would be devolution issues that could in principle come before the Supreme Court. Where there is a potential miscarriage of justice that would not be 'unfair' for the purposes of the Convention (or indeed where there is an unfairness that cannot be attributed to the prosecution and only the court) the Scottish courts would be the final court of appeal.

On 22 January 2010, Professor Neil Walker published his report: *Final Appellate Jurisdiction in the Scottish Legal System*, which looked at a number of these issues. This report was commissioned by the Scottish government in 2008 to look at possible options for reform of the constitutional arrangements between the Scottish and UK courts.

Division between devolved and reserved matters

As set out above, the constitutional arrangements under the devolution settlement devolve certain legislative and administrative powers to Scottish authorities. However, there is still a lack of clarity as to where exactly the division of power lies.

Questions have been raised as to the division between devolved and reserved powers. Himsworth explains that there are some areas:[24]

> *for policies in 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 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'.[25]

A related problem concerns the convention that normally requires the consent of the Scottish Parliament if Westminster is to legislate on devolved matters relating to Scotland. As Bradley and Ewing explain: [26]

> *[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:[27]

> *[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.*

In relation to human 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 they are arguably a devolved matter.[28] Elsewhere, he explains that '"human rights" are not, as such, reserved to the Westminster Parliament'.[29] If it were the case 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' to either 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.[30]

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 which touched upon areas of devolved competence (such as housing, education and local government) would require the consent of the devolved Parliament in Scotland. Despite it being over ten years since the devolution settlement, there has been very little jurisprudence defining the line between devolved and reserved matters. Whilst this has not yet been problematic, for Sewel motions have been relatively forthcoming, it may help constitutional clarity for there to be better definition.

The role of the Lord Advocate

The Lord Advocate is the principal legal adviser to the Scottish government and is also the head of the Prosecution Service in Scotland. The Lord Advocate

also represents the Scottish government in all civil proceedings. From the Acts of Union in 1707 until devolution in 1999, the Lord Advocate was legal adviser to the UK government and the Crown in Scotland, as a member of the UK executive. With the creation of a Scottish government in 1999, the Lord Advocate has been a member of the Scottish Executive advising the Scottish government.[31] The Crown Office and Procurator Fiscal Service is headed by the Lord Advocate and the Solicitor General for Scotland, and is the public prosecution service in Scotland.

As explained previously, the fact that the Lord Advocate is both the head of the prosecution service as well as a member of the Scottish Executive means that acts of the prosecution can be challenged as devolution issues under the Scotland Act, with appeals ultimately to the UK Supreme Court.

Despite section 48(5) Scotland Act 1998 confirming that '[a]ny decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person', concerns have been raised about the dual role of the Lord Advocate as a member of the Scottish Executive as well as the head of the prosecution service. It has been argued that the role has become increasingly politicised, bringing into question the independence of the prosecution service.

The Calman Commission was established by the Scottish Parliament in 2008 '[t]o review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.'

The judiciary in the Court of Session made a submission to the Commission in October 2008, in which the appeals structure and the role of the Lord Advocate were discussed. In relation to the role of the Lord Advocate, one possible suggestion was that:[32]

> *the position of the Lord Advocate could be changed, so that she might remain as a full member of the Scottish Executive, but her responsibilities as the public prosecutor could be transferred to an independent "Director of Public Prosecutions" in Scotland, who would be responsible for the prosecution system, but who would not be a member of the Scottish Executive. Such a change would rob the Lord Advocate of most of her functions, but would leave the Scottish Executive with a Lord Advocate who was a general legal advisor to the Executive. Again, such a change as that*

> *would render the position in Scotland more akin to that currently existing in England and Wales. The consequence of either of these possible changes would be that the particular kind of litigation to which reference has been made [namely, criminal appeals to the UK Supreme Court as discussed earlier in this paper], under paragraph 13 of Schedule 6 to the Scotland Act 1998 would come to an end in criminal cases.*

A more sweeping suggestion made in the submission by the judiciary, which also addresses the issue of appeal to the UK Supreme Court discussed above was:[33]

> *that there could be introduced a general right of appeal in criminal matters from the criminal appeal court in Scotland, no doubt with leave, to the Judicial Committee, or, as it will soon be, the Supreme Court. That court would then be faced directly with the responsibility of reconciling the different approaches adopted hitherto in relation to, for example, fresh evidence. Legislation to that end would almost certainly require to be of the United Kingdom parliament. A change of such a radical nature would be likely to generate considerable controversy. However, it would put the criminal appeal court in Scotland on the same footing as the court of appeal in England and Wales in relation to criminal matters.*

The submission concludes by stating that 'there is no agreement between members of the judiciary as to which of the possibilities mooted ought to be adopted and, accordingly, none of them can be commended by us.'[34]

As such, discussion ought to be had about the role of the Lord Advocate, and whether or not the role ought to be modified, or indeed split into separate functions. As indicated, this could, but does not necessarily need to, be tied to the broader discussion about criminal appeals to the UK Supreme Court.

A public law and human rights culture in Scotland

Since 1999, through a combination of the Scotland Act and the Human Rights Act, human rights have been embedded deeply into the fabric of the Scottish constitution. However, there has continued to be a stark absence of any strong human rights or public law culture. Although the situation should improve with the recently created Scottish Human Rights Commission, there are still a number of areas in which improvements could perhaps be made.

The political framework

The HRA, and human rights more generally, are tied and embedded into the Scotland Act, which provides that the devolved institutions have no competence to act in any manner that is contrary to the 'Convention rights'.[35]

For the purposes of the Scotland Act, '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 section 1.

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.[36] 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.[37] There is some doubt as to the effectiveness of these measures, relying as they appear to do on legal advice which is not subject to scrutiny.

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.[38] Post-enactment, the compatibility of the Act with the Convention rights can be challenged as a 'devolution issue' before any court.[39]

The HRA similarly requires that all legislation from the UK Parliament be compatible with the Convention rights, with the exception made that if a bill is thought to be incompatible with the Convention rights, the minister responsible for the legislation should declare this to Parliament. In order to strengthen protection of human rights, the Joint Committee on Human Rights (JCHR) was established to consider matters relating to human rights in the United Kingdom. The JCHR consists of twelve members appointed from both the House of Commons and the House of Lords. The Committee is charged with considering human rights issues in the UK but cannot take up individual cases.

The Committee undertakes thematic inquiries on human rights issues and reports its findings and recommendations to the House. It scrutinises all government bills and picks out those with significant human rights implications for further examination.

The Committee also looks at government action to deal with judgments of the UK courts and the European Court of Human Rights where breaches of human rights have been found. As part of this work, the Committee looks at Remedial Orders, the legislative mechanism that allows legislation to be amended in response to these judgments.[40]

Despite human rights forming a central aspect of the Scottish constitution, and being extremely relevant to a number of devolved areas of competence (not

least criminal justice, housing and education), no equivalent body appears to exist in Scotland.

There is a parliamentary Cross-Party Group (CPG)[41] on human rights and civil liberties, which includes a number of MSPs, non MSP individuals, and interested organisations. Its purpose is to facilitate consideration and understanding on human rights issues amongst MSPs and to encourage dialogue on such issues between MSPs and wider Scottish society. However, it is not clear how the CPG operates, what role (if any) it has in scrutinising proposed legislation, or considering other policy areas within the Scottish Parliament. Indeed, on its website it appears to have undertaken no activity since June 2008. As such, serious questions should be raised as to the effectiveness of using only a CPG in the promotion of human rights in Scottish politics.

Unlike CPGs, committees in the Scottish Parliament are considerably more effective. Committees play a central part in the work of the Parliament – taking evidence from witnesses, scrutinising legislation and conducting inquiries. At present, no committee has the responsibility for examining human rights in Scotland. The remit of the Justice Committee is to consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland. Whilst human rights issues would no doubt be involved within its remit, it has no separate jurisdiction to consider human rights as a free-standing issue.

At present, despite the importance of human rights in the Scottish constitution, it appears that there has been insufficient attention paid to human rights by the Scottish Parliament, resulting in an absence of any strong human rights or public law culture. It is suggested that either the CPG on human rights and civil liberties is considerably strengthened, human rights as a free-standing issue is brought explicitly within the remit of the Justice Committee, or a new Committee on Human Rights is established along similar lines to the JCHR in the UK Parliament.

The Scottish Human Rights Commission and other human rights organisations

The Scottish Human Rights Commission (SHRC)[42] was established by an Act of the Scottish Parliament and started work in 2008. The Commission is independent of government, and the Scottish and Westminster Parliaments. The functions of the Commission are set out in the Scottish Commission for Human Rights Act (2006) (the Act). Under the Act the Commission has a general duty to promote awareness, understanding and respect for all human rights – economic,

social, political, cultural and civil – to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights.

The Commission also has a number of powers. These include:

- The power to conduct inquiries into the policies or practices of Scottish public authorities, either those working to deliver a particular service, or public authorities of a particular description i.e. those working on certain issues or a particular description.
- The ability to provide education, training and awareness raising, and by publishing research.
- Recommending such changes to Scottish law, policy and practice as it considers necessary.
- The power to enter some places of detention as part of an inquiry, and the power to intervene in civil court cases where relevant to the promotion of human right and where the case appears to raise a matter of public interest.

The Commission promotes and protects the human rights guaranteed by the European Convention on Human Rights, which forms part of the law of Scotland through the Human Rights Act 1998 and the Scotland Act 1998, as well as other human rights which are guaranteed by international conventions ratified by the UK.

The creation of the SHRC was clearly a welcome step in the promotion of human rights in Scotland, and it undoubtedly has a very positive role to play in the development of human rights and a human rights culture. However, what appears to be missing in Scotland are non-governmental organisations and charities focused on the promotion of human rights, who could support the work that will be undertaken by the SHRC, as well as having strong educative and campaigning functions. There was in Scotland, until 2005, a Scottish Human Rights Centre (a sister organisation to Liberty). It had existed for over 30 years but closed due to funding issues.

JUSTICE is an all party law reform and human rights organisation dedicated to advancing access to justice, human rights and the rule of law. This paper highlights a number of issues to be addressed within Scotland that fall within JUSTICE's policy areas. However, the uniqueness and independence of the Scottish constitution places JUSTICE at a disadvantage in contributing to the debate because of its London-based outlook to date. As such, plans are in place to set up a Scottish section of JUSTICE. Quite how this will operate is still to be discussed, but it is intended that it will consist of Scottish lawyers and other interested persons who are committed to JUSTICE's values and objectives, with

a view to pursuing these values and objectives in Scotland. At present, a Scottish Advisory Group has been established to feed into JUSTICE's work on Scotland and will form the embryo of any Scottish section which would be formed. Hopefully, such a section would not only be of value in itself, just as JUSTICE is south of the border, but it may also spur the establishment of other similar initiatives within Scottish legal and political spheres.

Standing

Questions have been raised about the issue of standing in judicial review cases in Scotland; in particular that a narrow and unclear approach may have been contributing to the absence of a strong public law culture within the Scottish legal system. The general position on standing in Scottish public law derives from the much quoted statement of Lord Dunedin in the case of *Nicol*:[43]

> *By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase 'title to sue' has been a heading under which cases have been collected from at least the time of Morison's Dictionary and Brown's Synopsis, I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.*

Two recent cases in the Scottish courts broadly reflect this position. *Forbes v Aberdeenshire Council*[44] concerned an attempted review of the granting of planning permission for a leisure development and golf course along the coast north of Aberdeen on environmental grounds, the petitioner being a local resident.

For the petitioner, reliance was placed on *McCall* v *Crofters Commission*,[45] where Lord Malcolm, under reference to the case of *Nicol* and the indication there given by Lord Dunedin that for a person to have title to sue he must be a party to some legal relation which gives him some right, said '[i]t is plain that the language used was not intended to be construed in a technical or restrictive fashion.' Although Lady Smith had 'no difficulty in agreeing with Lord Malcolm that Lord Dunedin's words were not intended to be construed in a technical or restrictive fashion', she ultimately decided that the petitioner did not have the requisite interest and thus lacked standing.

AXA General Insurance[46] was a case brought by a number of insurance companies seeking to challenge an Act of the Scottish Parliament which removed their

common law protection from suit in pleural plaque cases. In explaining Lord Dunedin's test set out above, Lord Emslie stated:[47]

> *In certain contexts, no doubt, as mentioned by Lord Dunedin in his speech in Nicol, a pursuer must be able to identify some specific legal status or relationship to serve as the basis for court action …. But in other cases, especially those with a public law element, the qualifying relationship may be of a rather broader and more general nature …. Accordingly, where a party's personal, social, political, economic or proprietary interests are demonstrably affected by some real (as opposed to merely academic or theoretical) public law issue or grievance, then as a general rule he will be held to have title to raise proceedings for judicial review in that connection.*

This apparently liberal approach seems to be a development from the traditionally narrow approach to standing, and seems somewhat closer to the position in English law, where a claimant for judicial review must be able to satisfy the test of 'sufficient interest' in the subject matter.[48] The courts' approach to sufficient interest has been described as follows:[49]

> *From the case law on standing in judicial review it is possible to extract a number of principal themes. First, that the general approach of the Court to standing is a liberal one. Secondly, that financial interest may be sufficient but will seldom if ever be necessary. Thirdly, that public interest considerations favour the testing of the legality of executive action. Fourthly, that it would be against the public interest if there were a 'vacuum' (or lacuna) of unchecked illegality for want of a challenger with standing. Fifthly, that the Courts seek to strike a balance, distinguishing broadly between busybodies and those with a legitimate grievance or interest. Sixthly, that one factor which may in some situations count against a claimant is where there is an obviously better-placed challenger who is not complaining.*

Indeed, in *Forbes*: [50]

> *In advancing his submission that the petitioner had title and interest to sue, senior counsel for the petitioner … submitted that when it comes to general public rights, there was no need to have regard to individual interest and properly understood, Scots law should develop in line with English law which, he said, sees sufficient interest being established by being a neighbour, being a recognised group in respect of a particular interest or being a recognised non-governmental organisation.*

The approach to standing in Scotland appears to be more restrictive than in England, interest normally deriving from pecuniary rights or status.[51] A traditionally narrow test, it has often been difficult for representative groups to show standing in the Scottish courts – most famously in *Rape Crisis Centre v Secretary of State for the Home Department*[52] where the claimants were found to lack standing to challenge the Home Secretary's decision to grant a temporary visa to Mike Tyson, a convicted rapist, to fight a boxing match in Glasgow.[53] Lord Hope criticised the standing law in the light of this decision but did not expect significant improvements in the immediate future.[54]

It may be helpful to examine the position of standing in judicial review cases in Scotland in two respects:

(a) Clarity – It appears that the exact requirements of standing are not completely clear. What has traditionally been seen as a narrow test has in some more recent cases appeared to be expanded, although the jurisprudence is far from consistent. As such, clarifying the legal position may help legal certainty and could give greater guidance to petitioners wishing to bring cases.

(b) Scope – On balance, despite recent developments, the approach to standing is narrow. It could be suggested that rather than only focusing on the interest (legal or otherwise) of the petitioner, there may be some benefit in considering the public interest value in the case being brought, as indicated in the principles to standing in English judicial review described above, in particular, the value of testing the legality of executive action, and of preventing lacunae of unchecked illegality for want of a challenger.

Positive consideration of standing in Scottish judicial review cases may contribute beneficially to the development of a stronger public law culture within the Scottish legal system, and also better administration and governance.

Third party interventions

There is an almost complete absence of interventions in the public interest in the Scottish courts. Although there have always been a steady number of interventions in the courts of England and Wales, the Human Rights Act 1998 resulted in a huge increase. Despite the Human Rights Act (and the inclusion of human rights in the Scottish constitution through the Scotland Act 1998) having had a significant impact in Scotland, the same pattern with respect to third party interventions has not followed.

The position of third party interventions in the courts of the UK and of England and Wales was discussed in a recent JUSTICE report.[55] Interventions can be made in the High Court, the Court of Appeal and the Supreme Court. The statistics show that comparable numbers of interventions have been made by public bodies as have been made by NGOs and private parties.

In judicial review proceedings in the High Court, 'any person' may apply to the Court to either file evidence or make representations at the hearing,[56] which is done by letter with no fee. The application is considered by the judge on the papers. Whilst there are no formal criteria, the main informal criterion is whether the proposed intervention would provide the Court with some information, expertise or perspective not already provided by the parties, for example evidence or submissions on comparative law. Leave would not likely be given if the proposed intervener was simply duplicating the submissions of the parties.

In the Court of Appeal, there is no formal provision for interventions in the Court Procedure Rules, and there are at least two methods. First, a formal application on the form designed for parties, which includes a fee of £200, and second, an informal letter to the Civil Appeals Office requesting leave to intervene.

In the Supreme Court, the position is explicitly governed by rule 26 of the Supreme Court Rules:

> *(1) After permission to appeal has been granted by the Court or a notice of appeal has been filed, any person and in particular—*
>
> *(a) any official body or non-governmental organization seeking to make submissions in the public interest,*
>
> *(b) any person with an interest in proceedings by way of judicial review,*
>
> *(c) any person who was an intervener in the court below or whose submissions were taken into account under rule 15, may apply to the Court for permission to intervene in the appeal.*
>
> *(2) An application under this rule must be made in the appropriate form and shall be considered on paper by a panel of Justices who may refuse permission to intervene or may permit intervention—*
>
> *(a) by written submissions only; or*
>
> *(b) by written submissions and oral submissions and any oral submissions may be limited to a specified duration.*

By the time that the Supreme Court had started hearing cases in 2009, interventions in its predecessor, the House of Lords, had become commonplace and unremarkable.[57] As described by Lord Hoffman: [58]

> *In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.*

Interventions can also be made before the European Court of Human Rights. The position is governed by rule 44 of the Rules of the Court, which indicates that the President of the Court may, in the interests of justice, grant leave to intervene in a case communicated to a state party either by submitting written comments or exceptionally in the oral hearing. The intervener is not allowed to address the facts or the merits of the case, and the submissions are not to be more than ten pages long.

The position is Scotland is currently somewhat unclear. Although the courts have a discretion to allow anyone to intervene in a case, in practice, there has been no tradition of third party interventions. It could be argued that this absence of interventions is both reflective and causative of an absence of a strong public law and human rights culture within the Scottish legal system.

The power of the Scottish Human Rights Commission to intervene in cases is clearer. Section 14 Scottish Commission for Human Rights Act 2006 gives the Commission a statutory power to intervene, although it is restricted to civil proceedings and subject to the leave of the court, or at the invitation of the court. The Court has amended the Sheriff Court Rules and the Rules of the Court of Session to provide the procedure for intervention by the Commission, but these are specifically for the Commission or, in the case of the Sheriff Court Rules, the Equality and Human Rights Commission as well. Intervention is in the form of a written submission of up to 5000 words.[59]

It may be valuable for other organisations to be given similar scope to intervene in cases in Scotland, taking into account the approach of other courts in the UK. Third party interventions have had a clear benefit in judicial review cases in England and in the UK courts. Allowing individuals and organisations to contribute to cases in the public interest would not only assist the courts, but also positively improve the quality of decision making, contributing to

a healthier public law and human rights culture within the Scottish legal system. Discussions and investigations could be undertaken to see how, if at all, interventions could be incorporated, within the existing legal framework, or whether it would be more appropriate for legislative, administrative or judicial action.

Conclusion

In addition to the broad issues raised in this paper, there is no doubt that there are a number of specific human rights issues in Scotland that will continue to arise. For example, earlier this year, JUSTICE intervened in a Scottish appeal to the Supreme Court considering the compatibility of the Scottish criminal justice system with fair trial rights under the European Convention on Human Rights, in preventing access to a solicitor at a police interview. Human rights issues will continue to be relevant in Scotland, and it is hoped that a thorough investigation into the Scottish political and legal system will highlight these and help to resolve them. It is expected that, with the encouragement of a human rights and public law culture in Scotland, issues will be raised in a more satisfactory and open manner, and dealt with more effectively. To this end, JUSTICE intends to continue its work in Scotland.

Qudsi Rasheed was Legal Officer (Human Rights) at JUSTICE from September 2009 to September 2010.

Notes

1 *Devolution and Human Rights*, JUSTICE, February 2010.
2 *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43.
3 The Declaration of Arbroath, 1320, made two constitutional claims about the authority of the King: first, that the authority of the King was based on the consent of the people of Scotland and second, that the continued authority of the King was conditional on his maintenance of the integrity and independence of the Scottish nation.
4 *MacCormick v Lord Advocate*, 1953 SC 396 (IH), per Lord President Cooper at p407.
5 Act of Union 1707, Article XIX.
6 S1 SA.
7 S44 SA.
8 Ss28 and 29 SA.
9 Cm5240, para 13, December 2001.
10 *Mackintosh v Lord Advocate* (1876) 2 App Cas 41, HL (Scot).
11 N1 above at paras 15 and 70.
12 This is governed by Schedule 6 of the Scotland Act 1998.
13 The procedural requirements are contained in Chapter 40 of Schedule 2 to the Act of Adjournal (Criminal Procedure Rules) 1996.
14 2001 SC (PC) 1.
15 A O'Neill, 'Case Commentary – the end of the independent Scottish criminal legal system?'
16 Ibid.
17 S40(4) Constitutional Reform Act 2005 provides that the Scottish jurisdiction of the Supreme Court is to be determined by reference to the pre-existing law and practice in relation to appeals from Scotland to the House of Lords. The primary provision regulating this issue is s40(1) Court of Session Act 1998.
18 *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29.

19 Ibid.
20 N15 above.
21 *Fraser v HM Advocate* 2008 SCCR 407.
22 *McInnes v HM Advocate* [2010] UKSC 7.
23 N15 above.
24 C Himsworth, 'Devolution and its jurisdictional asymmetries', (2007) 70 MLR 31, p46.
25 R Hazell, 'The continuing dynamism of constitutional reform', *Parliamentary Affairs* (2007) 60(1), 3-25, at p6.
26 A Bradley and K Ewing, Constitutional and Administrative Law, 13th edn, Longman, 2002, p46.
27 N25 above.
28 C Himsworth, 'Greater than the sum of its parts: the growing impact of devolution on the processes of constitutional reform in the UK', *Amicus Curiae* (2009) 77, p229.
29 N24 above, p55.
30 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.
31 S44 SA.
32 *The Operation of section 57(2) and Schedule 6 of the Scotland Act and related matters*, Submission by the Judiciary in the Court of Session to the Calman Commission, October 2008, para 14.
33 Ibid, para 15.
34 Ibid, para 16.
35 S29 and s54 SA.
36 S31(1) SA.
37 S31(2) SA.
38 S33(1) SA.
39 S98 and Schedule 6 SA
40 For more information see the JCHR homepage on the UK Parliament website.
41 Cross-Party Groups (CPGs) provide an opportunity for members of all parties, outside organisations and members of the public to meet and discuss a shared interest in a particular cause or subject. More information can be found on the Cross-Party Groups page of the Scottish Parliament website.
42 The Scottish Human Rights Commission website has further details about the SHRC's work.
43 *D & J Nicol* v *Dundee Harbour Trustees* 1915 SC HL 7, pp12-13.
44 [2010] CSOH 01.
45 [2007] Housing Law Reports 46.
46 [2010] CSOH 02.
47 Ibid, para 57.
48 Supreme Court Act 1981, s31(3): *No application for judicial review shall be made unless the [permission] of the High Court has been obtained in accordance with rules of court; and the court shall not grant [permission] to make such an application unless it considers that the [claimant] has a sufficient interest in the matter to which the application relates.*
49 M Fordham, Judicial Review Handbook, 3rd edn, Hart Publishing, 2001, pp604-607.
50 [2010] CSOH 01, para 14.
51 *Swanson v Manson 1907 SC 426 at 429, per Lord Ardwall.*
52 2000 SC 527.
53 CJS Knight, 'Taking an AXA to the Acts of the Scottish Parliament', *Judicial Review* (2010) p165.
54 Lord Hope of Craighead, 'Mike Tyson Comes to Glasgow – A Question of Standing' *Public Law* ([2001) p294.
55 *To Assist the Court: Third Party Interventions in the UK*, JUSTICE, 2009.
56 CPR rules, 54.17(1).
57 In 2008, for example, of a total of 75 cases before the House of Lords, 21 had interventions.
58 *In re E (a child)(Northern Ireland)* [2008] UKHL 66.
59 Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2008 and Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Miscellaneous) 2008).

Religious freedom in the workplace

Aileen McColgan

This paper was delivered to the 12th annual JUSTICE/Sweet and Maxwell Human Rights Law Conference on 20 October 2010, and was intended to form the basis for discussion.

In this paper I consider two aspects of Article 9 of the European Convention on Human Rights (ECHR). The first concerns the nature of the beliefs protected by that provision. The purpose of this discussion is to ascertain whether assumptions made in the domestic jurisprudence as to the limits of protection under Article 9 are merited. The second, and related, issue concerns the application of Convention rights generally, and of Article 9 rights in particular, in the employment context. This discussion is undertaken independently of consideration of the domestic anti-discrimination provisions which also apply. The purpose of this discussion is to draw attention to the potential dangers of combining the European Court of Human Rights' 'value-neutral' approach to the 'beliefs', religious or otherwise, protected by Article 9 ECHR with the very broad protections against religious discrimination provided by domestic (and EU) law. In particular, it will be suggested that the combination of these two factors risks undermining the legitimate protection of other rights and interests.

Article 9 ECHR provides:

> *(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom … to manifest his religion or belief, in worship, teaching, practice and observance.*
> *(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*

The Equality Act 2010 prohibits direct and indirect discrimination 'because of' religion or belief, these concepts being defined in turn as follows:[1]

> *(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.*
> *(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*

> *(3) In relation to the protected characteristic of religion or belief*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.*

It has become commonplace for the domestic jurisprudence to assert, or assume, that the 'beliefs' protected by Article 9 are subject to some kind of decency threshold. In introducing the amendment to the Employment Equality (Religion and Belief) Regulations 2003 (the Regulations) which did away with the original requirement that 'philosophical beliefs' had to be 'similar' to religious beliefs, Baroness Scotland, for the government, stated that:[2]

> *the term 'philosophical belief' will take its meaning from the context in which it appears … philosophical beliefs must therefore always be of a similar nature to religious beliefs… any philosophical belief must attain a certain level of cogency, seriousness, cohesion and importance, must be worthy of respect in a democratic society and must not be incompatible with human dignity… [Beliefs] that might not [qualify] ... would be support of a political party or a belief in the supreme nature of the Jedi Knights …*

Baroness Scotland's qualifications are based on an assumption that the Regulations protect the same beliefs as Article 9 ECHR. In *R (Williamson & Ors) v Secretary of State for Education and Employment* Lord Nicholls, dealing with Article 9, recognised that '[e]veryone … is entitled to hold whatever beliefs he wishes', although:[3]

> *when questions of 'manifestation' arise … a belief must satisfy some modest, objective minimum requirements …. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual*

> *are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention…*

In the Court of Appeal Arden LJ had stated that:[4]

> *to be protected by art 9, a religious belief, like a philosophical belief, must be consistent with the ideals of a democratic society, and that it must be compatible with human dignity, serious, important, and (to the extent that a religious belief can reasonably be required so to be) cogent and coherent.*

In the House of Lords Lord Walker, while 'recognis[ing] that the views of Arden LJ quoted above are not without some support in the jurisprudence of the Strasbourg Court', expressed the view that:[5]

> *I find these qualifications rather alarming, especially if they are to be applied to religious beliefs. For the reasons already noted, the court is not equipped to weigh the cogency, seriousness and coherence of theological doctrines…. Moreover, the requirement that an opinion should be 'worthy of respect in a 'democratic society' begs too many questions...*

As Lord Walker recognised in *Williamson*, the cases which impose threshold qualifications on beliefs as such arise under Article 2 of the First Protocol to the Convention which provides that 'the State shall respect the right of parents to ensure … education and teaching in conformity with their own religious and philosophical convictions'.

In *Campbell and Cosans v UK* the European Court of Human Rights (ECtHR), considering a complaint that the use of corporal punishment in schools violated the claimants' rights under Article 2 of the First Protocol, stated that:[6]

> *Having regard to the Convention as a whole, including Article 17, the expression 'philosophical convictions' in the present context denotes … such convictions as are worthy of respect in a 'democratic society' and are not incompatible with human dignity…*

The distinction between Article 9 and Article 2 of Protocol 1 does not appear to have been appreciated in the domestic case-law arising under the Regulations.[7] In *McClintock v Department of Constitutional Affairs*, in which a magistrate sought exemption from involvement in same-sex couple adoption, Elias J, as he then was, relied on *Campbell and Cosans* in stating that 'the test for determining whether views can properly be considered to fall into the category

of a philosophical belief is whether they have sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society'.[8] And in *Grainger v Nicholson*, in which the Regulations were accepted as protecting a 'strong philosophical belief in man-made climate change', the Employment Appeal Tribunal (EAT) ruled that:[9]

> *Although the support of a political party might not meet the description of a philosophical belief, a belief in a political philosophy, such as socialism, Marxism, communism, or free-market capitalism, might qualify … an alleged philosophical belief based on a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example. The way to deal with that would be to conclude that it offended against the requirement that the belief relied on must be worthy of respect in a democratic society and not incompatible with human dignity.*

There is no support in the case-law under Article 9 ECHR, however, to support such a qualification. The provision creates both an absolute right (to hold views, religious and otherwise) and a qualified right (to manifest these beliefs in practice, etc). The approach taken by the Convention organs to this Article has not been to restrict the beliefs to which it affords protection. Instead, the European Commission of Human Rights (the Commission) and ECtHR have tended to take a narrow approach to what they accept as amounting to the 'manifestation' of a belief protected by Article 9, and to the recognition of 'interferences' with religion or belief in the form of failures of accommodation. Further, where 'interferences' have been found, they tend to be readily justified. These issues are considered further below.

Similarly, in dealing with the right to freedom of expression under Article 10 ECHR, which is in broadly similar terms, the ECtHR has not adopted the approach of excluding particular viewpoints from the protection of the article *per se*. Despite statements in a number of cases that, for example, racist views 'did not enjoy the protection of Article 10',[10] closer inspection finds, invariably, a pattern whereby it is either conceded or held that the view falls within Article 10 but that the interference with it is justified, in particular in view of Article 17 ECHR which provides as follows:

> *Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

Thus, for example, in *Jersild* itself, the Court stated that '[i]t is common ground that the measures giving rise to the applicant's case constituted an interference with his right to freedom of expression'.[11] The cases cited in support of its conclusions; *Kunen v Germany*[12] and *Glimmerveen and Hagenbeek v Netherlands,*[13] also turned on the question of justification, as did *Kuhnen v Germany*[14] and *Remer v Germany.*[15]

Whether or not 'a belief in the supreme nature of the Jedi Knights' is protected by the Equality Act 2010 is perhaps not a question of central importance, however shaky the underpinnings of this conclusion. Of much more concern is the potential of the Regulations to protect beliefs which are not worthy of respect in a democratic society, and/or which are incompatible with human dignity. Under the Regulations, and assuming that, for example, a belief in white supremacy is a 'belief' (because there is nothing in the Act, or in Article 9 ECHR, to conclude otherwise), any less favourable treatment meted out on the basis of that belief (rather than because of behaviour based on that belief) will amount to direct discrimination and will be unlawful unless a specific exception applies. And while it is probable that an anti-racist organisation may apply a genuine occupational requirement (GOR) relating to anti-racism in relation to at least some staff, it is by no means clear that most other employers could do likewise. The defence would require, other than in the case of employers having 'an ethos based on religion or belief', that 'being [or not being] of a particular religion or belief is a genuine and determining occupational requirement' and that 'it is proportionate to apply that requirement in the particular case'.[16]

One of the difficulties to which this result might give rise can be extrapolated from the facts in *Redfearn v SERCO*.[17] It is entirely possible that an employer in the situation of that employer might have had grave concerns about entrusting vulnerable Asian clients to the care of someone whose political activities made it clear that he was racist. Regardless of the absence of any complaints about Mr Redfearn's behaviour, ought his employer to be required to place Redfearn's interests in retaining his employment above other concerns? The answer under the Equality Act would appear to be 'yes'. Leaving aside the question of the position under EU law, is this result mandated by the Convention?

Articles 9 and 10, like Article 11, protect the rights and freedoms guaranteed thereby from interference by the state whether directly or (for example, where the potential claimant is employed in the private sector) indirectly by failing to prevent or remedy 'quasi breaches' by private individuals. In the case of Article 9, interferences may be justified except where they relate to the absolute 'right to freedom of thought, conscience and religion'. Assuming for the moment that a decision to dismiss in a case such as *Redfearn* could potentially be justifiable by reference to, for example, the rights of others, the question which will arise

is (for the sake of argument where the employer is a public authority) whether a dismissal based on bare knowledge of the fact of (say) a white supremacist belief is an interference with the *absolute* right or whether, because such a belief is unlikely to be known to the employer other than through (for example) BNP membership, articulation or actions, whether the interference is only with the *qualified* right.

This is a question which is of particular interest at present given the recent controversy over the decision of the government not to ban teachers from membership of the BNP. There is not a great deal of case-law on this question but it appears from the decision of the ECtHR in *Kalac v Turkey*[18] that the Court is likely to err on the side of finding manifestation rather than bare belief even in a case in which membership of the relevant organisation is in doubt. There the claimant, a military judge, was dismissed 'for breaches of discipline and scandalous conduct' because 'his conduct and attitude 'revealed that he had adopted unlawful fundamentalist opinions'. The respondent government claimed, but Kalac denied, that he was a member 'as a matter of fact, if not formally' of the 'Muslim fundamentalist Suleyman sect', of whose existence the applicant claimed to have been unaware at the relevant time. The government further claimed that Kalac 'had participated in the activities of the Suleyman community, which was known to have unlawful fundamentalist tendencies', and produced evidence that he 'had given it legal assistance, had taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect'. It argued that 'the protection of art 9 could not extend, in the case of a serviceman, to membership of a fundamentalist movement, in so far as its members' activities were likely to upset the army's hierarchical equilibrium'.

The Commission found in Kalac's favour, in part on the basis that the evidence relied upon 'did not support the argument that Kalac had any links with [the] sect'. On reference to the ECtHR, however, the Court ruled as follows:[19]

> *The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see* Kokkinakis v Greece *[2003] ECHR 14307/88 at para 31). Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, art 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.*

> *In choosing to pursue a military career Mr Kalac was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see* Engel v Netherlands *[1976] EHCR 5100/71 at para 57). States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.*
>
> *It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.*
>
> *The Supreme Military Council's order was, moreover, not based on Group Captain Kalac's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude ... According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.*
>
> *...*
>
> *There has therefore been no breach of Article 9.*

What is striking about this decision is the fact that the Court, without expressing any conclusion as to whether Kalac in fact belonged to the sect in question, or otherwise on what it was that he was alleged to have done, simply accepts the assertion in paragraph 30 that Kalac's dismissal was based on his 'conduct and attitude' rather than his 'religious opinions and beliefs or the way he had performed his religious duties'. The decision appears to be a 'fudge' designed to get around the absolute nature of the first aspect of Article 9, and may well be confined to employment in the military context. It is unlikely in my view that such a bare approach to the absolute rights protected by Article 9 would be followed in the domestic courts. Certainly in *McFarlane v Relate Avon Ltd,* the EAT suggested that 'in the absence of any other context, it may be permissible to infer that an employer who dismisses an employee for wearing an item of jewellery or clothing with a religious significance does so because of an objection to the belief so manifested'[20] in which case the direct discrimination provisions of the (now) Equality Act 2010 would be applicable and no general justification defence available.

The wearing of religious jewellery or clothing is one thing. Adherence to (for example) racist or homophobic views is another. The danger that is left open, however, by the unlimited nature of the 'beliefs' entitled to at least that bare protection provided by Article 9 is that protection may be equally afforded under the Equality Act 2010 to the white supremacist or others accommodation (however minimal) of whose beliefs may be incompatible with the human dignity of others.

This is an issue which is likely to arise in the domestic context, given what I suggest is the unsustainable approach taken in some of the case-law to the scope of protected 'beliefs'. When, as I suggest is inevitable, the absence of any decency threshold for such beliefs is recognised, the danger will be that the broad prohibitions on, at least, unjustifiable *direct* discrimination on grounds of such belief may result in unpalatable decisions of law.

Such decisions would not, in my view, be required under the Convention (as distinct from a matter of EU law). The 'beliefs' protected by Article 9 are, as we have seen, broad. But the Court has proven willing in *Kalac* to read very narrowly the scope of the absolute right. Further, as we shall now see, the protection provided by Article 9 against interference with the *manifestation* of religious beliefs is minimal, particularly in the context of employment.

In the first place, the ECtHR has been reluctant to accept as the 'manifestation' of a belief much of the conduct associated with the holding of the belief; *Arrowsmith v UK* is a well-known example of this reluctance.[21]

Secondly, the Court has been relatively slow to find 'interferences' by the state in cases involving failures of accommodation of religious or other beliefs. Among the pertinent examples of this are *Ahmad v UK*[22] and *Stedman v UK*,[23] both of which concerned refusals of accommodation in the context of the workplace (specifically, the organization of work to permit religious observance). Many more examples arise in secular states as regards the visible display of religious adherence.[24]

Thirdly, even in cases in which interferences have been found (or accepted), the Court has been ready to find such interferences justifiable.[25] It could be argued, at least as regards religious dress, that this justification turns very significantly on the fact that the challenges have arisen in the context of 'secular' states. It is distinctly possible that (for example) a broad-based prohibition on the wearing of religious dress in the UK context would breach Article 9. But what is equally clear is that the ECtHR typically gives short shrift to Convention claims arising out of employment whether those claims arise under Article 9 or otherwise.

Ahmad and *Stedman* both concerned Article 9 challenges to employer rules which prevented employees from complying with their religious obligations. In both cases the Commission ruled the complaints inadmissible on the grounds that no interference with the relevant right had occurred, the employees having voluntarily 'contracted-out' of protection by undertaking the employment in question.[26] In *Ahmad* the Commission ruled that a Muslim teacher who was refused time off to attend the Mosque on a Friday afternoon 'remained free to resign if and when he found that his teaching obligations conflicted with his religious duties'. And in *Stedman* the Commission ruled that a woman sacked for refusing, on religious grounds, to agree to have her contractual terms varied to require Sunday working had been dismissed for 'failing to agree to work certain hours rather than her religious belief as such and was free to resign and did in effect resign from her employment'. In neither case did the Commission accept that there had been any interference with the Article 9 right.[27] A similar approach was taken in *Kontinnen v Finland* to the claimant who, having found that his working hours conflicted with his religious beliefs, was in the view of the Commission free to get out of the kitchen.[28] As Lord Bingham observed in *B v Denbigh School:*[29]

> *the Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or convenience.*

There have been employment-related cases in which interferences with Convention rights have been found. Typically, however, these have involved direct state action in the form of state employment[30] or the application of legislation which itself has been asserted to breach the Convention right.[31] Even in cases of state employment, interference with the Convention rights of workers, where recognised as such, has been readily accepted as justified by the rights of others. Thus, under Article 10 for example, the Commission has dismissed as 'manifestly unfounded' complaints concerning dismissal or subjection to disciplinary action of employees who had spoken out about safety fears at a defence installation[32] or accused employers of discrimination on grounds of sexual orientation.[33] In *X* v *UK,* the Commission accepted that a teacher's colleagues had a protectable interest in avoiding exposure to his evangelising posters and stickers.[34] The freedom of the local government politician employed at Aldermaston defence installation to speak out about the safety concerns relating thereto had to give way to the interests of his employer in silence.[35] In *Morissens*, the freedom of the lesbian teacher to protest against the discrimination she believed she had been subject to had to give way to her

employer's interest in not being thought to have discriminated against her.[36] And in *X*, the freedom of expression of the devoutly religious teacher had to give way to the interest of his employer in not having his other employees bothered by this expression. A rare example of an employment-related case in which a breach of Article 9 has been found is *Ivanova v Bulgaria*, in which a non-teaching member of school staff was dismissed in connection with her membership of a religious organisation whose (compulsory) application for registration by the state had been refused and which was therefore 'illegal'. [37]

The Convention organs have, of course, accepted that at least some of the ECHR provisions impose obligations on the state to secure the protected rights against violations by private individuals (including private sector employers), and challenge can be made to the state's failure so to do.[38] In *Stedman,*[39] the Commission accepted that, had an interference with the applicant's Article 9 rights been found on the assumption that she had been employed by the state, some protective obligations would arise even in the case of private sector employment.[40] In such cases, however, justification appears to be readily provided by the 'interests of others'. The limitations on the protection afforded by Article 10 are particularly apparent in cases concerning private sector employers. In *Rommelfanger* v *Germany*, for example, the Commission required only that there was a 'reasonable relation between the measures affecting freedom of expression and the nature of the employment as well as the importance of the issue for the employer'.[41] The applicant, a doctor, had been sacked from his position at a Catholic hospital having put his name (one of 50) to a letter concerning domestic abortion legislation. There the Commission accepted that the doctor had not fully contracted out of his right to freedom of expression on the abortion issue by accepting employment at a church-run hospital. But it found on the facts that no breach of Article 10 had occurred.

I would argue, therefore, that while the scope of protection afforded by Article 9 ECHR is very broad (ie, no threshold of reasonableness has to be overcome before the belief is 'worthy' of protection), the nature of that protection is very limited. It requires very little by way of the accommodation of religious belief, it seems that workers are expected to leave their religious convictions at the door of the office. Where a worker is discriminated against because of, for example, an adherence to white supremacist views, it is unlikely that this would be found to amount to an interference with the absolute right protected by Article 9; either because the worker is not employed by the state or, even if they are, on the basis that whatever brought the beliefs to the attention of the employer brought the claim out of the absolutely protected sphere.[42] It is then likely, even if the claim is accepted to relate to the 'manifestation' of a belief, that no interference will be found. Even if such an interference is found, it is likely to be regarded as justified. By contrast, in their application of the Equality Act 2010

the domestic courts may find themselves caught between, on the one hand, the very broad approach to 'beliefs' protected by Article 9 (and therefore, it seems, by the Equality Act 2010) and the unjustifiable nature of direct discrimination on that ground. Whether employers ought to be able to discriminate on grounds of belief other than where a 'genuine occupational requirement' applies is perhaps a matter open for debate. Such debate should, however, be conducted on the basis of a clear understanding of the impact in this context of Article 9.

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Notes

1 Section 10 Equality Act 2010.
2 Hansard, 13 July 2005 p1109.
3 *R (Williamson & Ors)* v *Secretary of State for Education and Employment & Ors* [2005] 2 All ER 1.
4 *R (On the Application of Williamson) v Sec of State for Education and Employment* [2003] QB 1300, para 258.
5 Ibid, para 60.
6 *Campbell & Cosans v UK* (Application no. 7511/76; 7743/76), 25 February 1982.
7 Note that neither the Regulations, nor Council Directive 2000/78, on which they are founded, apply to the subject matter of Article 2 Protocol 1.
8 [2008] IRLR 29.
9 *Grainger Plc & Ors v. Nicholson* [2010] IRLR 4.
10 *Jersild v Denmark* (1994) 19 EHRR 1, para 35.
11 Ibid, para 27.
12 Application No. 9235/81, 29 D. & R. 194.
13 18 D. & R. 187.
14 Application No. 12194/86.
15 App. No. 25096/94 (1995) 82-A DR 117.
16 Regulation 7 Employment Equality (Religion and Belief) Regulations 2003.
17 [2006] IRLR 623.
18 (1997) 27 EHRR 552.
19 Ibid, paras 27-30.
20 [2010] IRLR 196, para 18.
21 Application No.7050/75, Comm. Rep 1978, 19 DR 5.
22 (1982) 4 EHRR 126.
23 (1997) 23 EHRR CD 168.
24 *Dahlab v Switzerland* Application No.42393/98 (15 February 2001, unreported).
25 *Sahin v Turkey* (2007) 44 EHRR 5, *Dogru v France* Application No. 27058/05.
26 See also *X v Denmark* (1976) 5 D&R 157.
27 A similar decision was reached by the Commission in *Karaduman* v *Turkey* (1993), 74 D&R 93, which involved the prohibition of headscarves by a Turkish university in pursuit of secularism in education.
28 Application 24949/9487-A DR 68 (1996).
29 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, para 22.
30 For example, *Vogt* v *Germany* 21 EHRR 205, *Ahmed* v *UK* (1998) 29 EHRR, *Smith & Grady v UK* (1999) 29 EHRR 493.
31 *Thlimmenos v Greece* (2000) 31 EHRR 411 and *Sidabras v Lithuania* (2004) 42 EHRR 104.
32 *B* v *UK* 45 D & R 41.
33 *Morissens* v *Belgium* 56 D & R 127.
34 16 D & R 101.
35 N32 above.
36 It is distinctly arguable that domestic provisions prohibiting victimisation (eg s4 Sex

Discrimination Act and s2 Race Relations Act) provide considerably more protection, certainly after the decisions of the House of Lords in *Nagarajan* v *London Regional Transport* [1999] 3 WLR 425 and the Court of Appeal in *Chief Constable of the West Yorkshire Police* v *Khan* [2000] IRLR 324.

37 (2007) 23 BHRC 208.

38 See for example *Young, James & Webster v UK* 8 EHRR 123.

39 N23 above.

40 See also *Fuentes Bobo* v *Spain*, Application 00039293/98, 29 February 2000.

41 D & R 151.

42 This in reliance on *Kalac*, n18 above.

Civil liberties and the coalition

JUSTICE

This briefing was drafted by JUSTICE policy staff for a conference to which members and others were invited at the end of October 2010. It indicates the approach for which JUSTICE advocates in relation to the content of the coalition's Programme for Government. *In general, it applauds the approach promised for civil liberties – though not without criticisms and concerns.*

Introduction

David Cameron and Nick Clegg are not bashful about their achievement in leading their parties into a coalition government. They described the coalition's *Programme for Government* as 'an historic document in British politics: the first time in over half a century two parties have come together to put forward a programme for partnership government'.[1] And they are right. Both the coalition itself and the *Programme* are a new departure. The latter is the kind of document that we have rarely seen and would be more familiar to someone from continental Europe where coalitions are more frequent.

JUSTICE is an all party organisation and a registered charity. Engaged in it at every level are members of all three major UK political parties. For both internal and external reasons, therefore, we cannot in any way favour any one political party. This paper, where critical of the coalition government, implies no preference for the alternative views of any other political party or grouping. Those that have read our briefings and commentary on the Labour government from 1997 until earlier this year will understand that we were fiercely critical of elements of its policy. We are here attempting to interrogate the proposals of the government from what we hope will be accepted as a politically neutral position as espoused in the way in which we usually describe our mission: to advance access to justice, human rights and the rule of law. We are, unavoidably, being political in the first sense usually given to the term by dictionaries: 'of, relating to, or dealing with the structure or affairs of government, politics, or the state'. We are not, however, being political in the sense of partisan.

This paper will go on to consider the detail of the government's programme and its implications. However we want to begin with one general observation. David Cameron and Nick Clegg begin their foreword to the *Programme* by stating:[2]

> *We are agreed that the first duty of government is to safeguard our national security and support our troops in Afghanistan and elsewhere.*

Lord Bingham in his book on the rule of law makes reference to this notion of the first duty of government which he traces to a phrase of Cicero's: 'the safety of the people is the supreme law'.[3] He also quotes a commentary from one John Selden (1584-1654) to the effect that 'there is not any thing in the world more abused than this sentence' and Benjamin Franklin's statement that 'he who would put security before liberty deserves neither'.

There is an important point here. The primary duty on states can be expressed in various ways but protection from external aggression is surely to be linked with the preservation of core elements of the constitution. In our own case, Magna Carta privileges the rights of the church and the liberties of free men; the Bill of Rights 1689 called for vindication of 'ancient rights and liberties' and Dicey used the language of the 'rule of law'. The oath administered to an incoming US President indicates a similarly wide notion of protecting national security:

> *I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.*

Thus, we would assert that the 'first duty of government' is to safeguard rights, freedoms and liberties, as determined by Parliament, within the United Kingdom from external violence, foreign invasion and any internal subversion. As Lord Bingham concluded: 'We cannot commend our society to others by departing from the fundamental standards which make it worthy of commendation'.

It is from this principled perspective that we examine the proposals of the coalition in its *Programme for Government*,[4] set out below in italics and accompanied by JUSTICE's response. We concentrate solely on matters relating to civil liberties.

'We will implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion'

We commend the coalition for this commitment and for its early review of matters such as counter-terrorism legislation and anti-social behaviour orders.

'We will introduce a Freedom Bill'

A bill was announced in the Queen's Speech 'to restore freedoms and civil liberties, through the abolition of Identity Cards and repeal of unnecessary laws'. A 'Your Freedom' website was established on which the public could make suggestions as to what should be included within it. A wide range of proposals

have been made – some of them somewhat outlandish. The government has announced that it will respond in due course. The original impetus for this exercise appears to have been an initiative from the Liberal Democrats who launched a consultation on a specific draft bill. The general intention of this bill is excellent. It would be a pity if its detailed effect was marred by poor drafting and we hope that the government will allow time for further consultation on specific draft proposals.

'We will scrap the ID card scheme, the National Identity register and the ContactPoint database, and halt the next generation of biometric passports'

JUSTICE welcomes the announcement to scrap the ID card scheme and the National Identity register, both of which it opposed in parliamentary briefings. We note that the ContactPoint database is only one of a number of government-run databases introduced in recent years. Rather than debate the merits of particular measures, we recommend that the government undertake a comprehensive review of existing databases, in particular whether they are truly necessary and proportionate. We also recommend establishing a clear set of principles governing the creation of any new government databases.

'We will outlaw the finger-printing of children at school without parental permission'

We welcome this proposal and, in March 2007, we wrote to the Liberal Democrat Shadow Spokesman on Schools to express our view that the collection of biometric data by schools for purposes of monitoring attendance and allowing access to meals and libraries was a wholly unnecessary and disproportionate interference with pupils' right to respect for privacy.

'We will extend the scope of the Freedom of Information Act to provide greater transparency'

The Freedom of Information Act 2000 was one of the major positive measures of the previous government. We strongly support the new government's commitment to build upon the 2000 Act to extend its scope.

'We will adopt the protections of the Scottish model for the DNA database'

JUSTICE recommended the adoption of the Scottish model in its parliamentary briefings on the Crime and Security Bill. This would bar the retention of the DNA of any person arrested or charged but not convicted of a criminal offence (with an exception for the retention of a person's DNA for up to three years in cases of sexual or violent offences). This seems to us a proportionate response to the judgment of the European Court of Human Rights in *S and Marper v United Kingdom* in December 2008.[5]

'We will protect historic freedoms through the defence of trial by jury'

The right of any person charged with a serious criminal offence to a jury of his peers is a constitutional right recognised throughout the common law world. On this basis, we opposed the previous government's proposal to restrict trial by jury in cases of serious fraud and as a jury tampering measure, on the basis that both were unnecessary restrictions whose purposes could be better achieved by other measures. We therefore welcome the new government's commitment to protect the right to jury trial in cases involving serious criminal offences. Some jury trials do last for such long periods that they put tremendous pressure on jurors. It would be desirable to look at how the length might be reduced. At its lowest, this might mean that judges were more consistent in taking greater control of time-tabling.

'We will restore rights to non-violent protest'

JUSTICE opposed the various restrictions on public protest introduced by the Serious Organised Crime and Policing Act 2005, as well as measures such as the disproportionate use of stop and search powers under section 44 of the Terrorism Act 2000. We also gave oral evidence to the Joint Committee on Human Rights inquiry into Policing and Protest in June 2008. We therefore welcome the coalition government's commitment to restoring the right to peaceful protest, a fundamental right under Article 11 of the European Convention on Human Rights.

'We will review libel laws to protect freedom of speech'

JUSTICE supports initiatives to review existing libel laws to safeguard freedom of speech and expression. We responded to the recent Ministry of Justice consultation on the double publication rule. Other key aspects of libel reform that must be pursued including reducing costs and ending conditional fee agreements, ending so-called 'libel tourism', and strengthening the defences of fair comment and public interest.

'We will introduce safeguards against the misuse of anti-terrorism legislation'

JUSTICE has long been engaged with the human rights aspects of the UK counter-terrorism legal framework. Although we do not doubt that the UK faces a serious threat from terrorism, it is plain that terrorism legislation is increasingly used against individuals and organisations with no connection to terrorism, such as the use of stop and search powers against protestors, the freezing of the assets of the Icelandic government under the Anti-Terrorism Crime and Security Act 2001, or the interference with photography in public places by police using section 76 of the Counter-Terrorism Act 2008. As with surveillance, this is an issue requiring a comprehensive overhaul of existing

legislation and policy, in order to prevent the arbitrary and disproportionate use of terrorism powers by public officials.

'We will further regulate CCTV'

The UK has gained the unenviable reputation as a market leader in the field of CCTV, with more cameras per capita than any other country. We have repeatedly criticised the lack of regulation in this area, for instance in our oral evidence to the House of Commons Home Affairs Committee inquiry on the 'surveillance society' in June 2007, and to the House of Lords Constitution Committee inquiry on Surveillance and Data Collection in February 2008. We welcome the coalition government's promise to regulate CCTV, but note that it is but one aspect of the more general issue of surveillance reform.

'We will end the storage of internet and email records without good reason'

JUSTICE has opposed the increasing trend of government to seek the retention of internet and email records, most recently in the Communications Data Bill published by the previous government. This issue is linked to the scope of the government's surveillance powers under the Regulation of Investigatory Powers Act 2000, as well as the more general trend of increasing government databases.

'We will introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences'

In our many briefings on criminal justice and counter-terrorism legislation over the years, we have repeatedly counselled against the creation of further criminal offences where existing powers are already more than adequate. Indeed, the proliferation of criminal offences is just part of a broader problem of unnecessary legislation generally, as well as unnecessary emergency or 'fast-track' legislation. (Among other things, we gave oral evidence to the House of Lords Constitution Committee's inquiry into emergency legislation in March 2009). We therefore strongly welcome the coalition government's commitment to govern well by legislating less, and are happy to discuss ways to identify a workable mechanism to prevent further legislation.

'We will amend the health and safety laws that stand in the way of common sense policing'

It is unclear which health and safety laws have prevented common sense policing.

'We will introduce measures to make the police more accountable through oversight by a directly elected individual, who will be subject to strict checks and balances by locally elected representatives'

We are unconvinced by the arguments for directly elected police commissioners. We are conducting a joint pilot project with the Police Foundation in relation to a wider range of issues about policing and we consider that there should be a comprehensive review of policing powers, organisation and accountability before implementing reform in this area.

'We will give people greater legal protection to prevent crime and apprehend criminals' and
'We will ensure that people have the protection that they need when they defend themselves against intruders'

JUSTICE has consistently opposed proposals to further extend the existing law governing the use of force in self-defence. In our view, the current law strikes a reasonable balance between the interests of suspects and occupiers. We note, for instance, that in the most recent *cause célèbre* of Munir Hussain in December 2009, self-defence was not even raised as a defence – Mr Hussain's defence was instead that he did not participate in the beating of his would-be kidnappers, which was not accepted by the jury. It would be unwise for the coalition government to legislate in circumstances where there is such significant public misunderstanding of the true state of the law.

'We will review the operation of the Extradition Act – and the US/UK extradition treaty – to make sure it is even-handed'

There has been considerable criticism of the US/UK extradition treaty and of the operation of the European Arrest Warrant, both of which were given force by the Extradition Act 2003. One point which may be made about the treaty is the contrast in the scrutiny that it was given in the US, which was considerably more than in the UK. While it took several years to gain approval from the US legislature, here it passed through Parliament under the Ponsonby Rule, a constitutional convention that dictates that most international treaties must be laid before Parliament 21 days before ratification. There is an argument that the treaty is unbalanced in the relative obligations of both signatories but, in fact, requests for extradition from the UK are dealt with under the Extradition Act 2003. The US is designated as a category 2 country which does require consideration of whether there are reasonable grounds for arrest. Problems with extradition to the US lie less in the wording of the Treaty or the Act and more in the different approaches of the two legal systems to matters such as white collar fraud and sentencing. This is a rather more intractable problem.

JUSTICE is currently engaged in a project to monitor the operation of the European Arrest Warrant (EAW). The major problem appears to be one of

proportionality with some countries, such as Poland, using the EAW for very minor crimes.

'We will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution'

We welcome the government's promise to halt deportations in this area. It is well established that, whether or not an asylum seeker is entitled to the protection of the Refugee Convention, no person should be deported to a country where they face a real risk of torture, inhuman or degrading treatment contrary to Article 3 ECHR. In addition, it is also well-established that no person should be deported to a country where it would give rise to a flagrant breach of another of their Convention rights, eg the right to private life under Article 8 ECHR. We note that the judgment of the Court of Appeal in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*[6] requiring 'discretion' on the part of gay and lesbian asylum seekers if returned, is currently under appeal to the UK Supreme Court. In the event that the appeal is dismissed, we trust that the government will nonetheless implement a policy of non-return in such circumstances.

'We will never condone the use of torture'

The prohibition against the use of torture is a fundamental principle of both common law and international human rights and humanitarian law. Despite this, JUSTICE was gravely concerned at the previous government's apparent willingness to turn a blind eye to the use of torture by its allies as part of the US-led 'war on terror', whether by allowing rendition flights through UK airports, receiving material from third countries obtained using torture, or even alleged complicity in interrogations involving torture abroad. We gave evidence to the UN Committee against Torture concerning these issues in October 2004 and oral evidence to the EU Parliament's Temporary Committee on alleged CIA transportation and illegal detention of prisoners in October 2006. We intervened before the House of Lords in *A and others v Secretary of State for the Home Department* (No 2)[7] to argue against the use of evidence obtained by torture, and we intervened before the Court of Appeal in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*[8] in February 2010 to argue for the disclosure of material indicating UK complicity in torture abroad.

In this context, we very much welcome the new coalition government's promise never to condone the use of torture. In light of the previous government's protestations to the same effect, however, we would note that promises alone are not enough. With mounting evidence suggesting complicity of UK officials in the use of torture abroad, nothing less than an independent public inquiry

is needed to fully investigate the various allegations that have been made. This inquiry should look at, among other things, the guidance provided to members of the intelligence services, the degree of involvement of the government departments responsible for the services, and the adequacy of the existing oversight arrangements (including the role of the Intelligence and Security Committee). The statement of the Foreign Secretary William Hague MP on 20 May that a judicial inquiry will be held on the issue, the launch of which the Prime Minister subsequently announced on 6 July, is an important first step in this direction.

'We will create a new 'right to data' so that government-held datasets can be requested and used by the public, and then published on a regular basis'

We welcome this initiative. The right to access government data is an important complement to the principles of freedom of information, and the right to receive and impart information under Article 10 ECHR. More generally, it promotes democratic transparency and accountability, and more effective public policy.

'We will end the detention of children for immigration purposes'

We strongly support the government's commitment to end the detention of children in this area. This should be accompanied by a comprehensive review of the use of immigration detention in general. In 2001, JUSTICE intervened in *Secretary of State for the Home Department ex parte Saadi*[9] to argue that detention should only be allowed where it is strictly necessary to do so, and must never be used purely for the sake of administrative convenience. Notwithstanding the previous government's claim to only use detention proportionately, the use of immigration detention has grown dramatically since the policy of so-called 'fast-track' detention was introduced in the late 1990s.

'We will … tackle human trafficking as a priority'

We welcome this assurance. JUSTICE was one of a number of organisations that had urged the previous government to sign and ratify the Council of Europe Convention on Action against Trafficking in Human Beings, and we submitted written evidence to the Joint Committee on Human Rights inquiry on the issue in January 2006. We regret the government's decision not to opt in to the EU directive on human trafficking. We note that this was explained on the following grounds:[10]

> *The UK already complies with most of what is required by the draft EU directive. The government will review the UK's position once the directive has been agreed, and will continue to work constructively with European partners on matters of mutual interest. By not opting in now but reviewing our position when the directive is agreed, we can choose to benefit from*

being part of a directive that is helpful but avoid being bound by measures that are against our interests.

We consider that the failure to opt in to this directive is unfortunate and sends the wrong message. It is unclear what part of this directive might be against our interest.

'We will explore new ways to improve the current asylum system to speed up the processing of applications'

We agree that the processing of asylum applications leaves much to be desired, and that delays can give rise to considerable hardship and injustice. However, delay in processing applications is but one of a number of flaws in the current system, the most problematic of which is the *quality* of the decision-making process. As JUSTICE has made clear in numerous submissions on immigration legislation, most recently in relation to the Borders, Citizenship and Immigration Act 2009 and the draft Immigration and Citizenship Bill in 2008, poor quality decision-making at first instance is an endemic problem, giving rise to considerable pressure on the appeals process. This problem was made worse by the previous government's repeated attempts to limit the appeal rights of applicants. In our view, the most effective way to reduce the overall waiting time in processing asylum applications would be to ensure that the decisions made at first instance are made by properly qualified staff who, among others things, have a good understanding of the UK's obligations under the Refugee Convention and the European Convention on Human Rights. More accurate decisions at first instance would, in turn, reduce the need for appeals and delays.

The Government believes that more needs to be done to ensure fairness in the justice system. This means introducing more effective sentencing policies, as well as overhauling the system of rehabilitation to reduce reoffending and provide greater support and protection for the victims of crime'

There is a major need to reduce the inappropriate use of prison. We welcome the apparent renewed interest in 'restorative justice'.

'We will introduce a 'rehabilitation revolution' that will pay independent providers to reduce reoffending, paid for by the savings this new approach will generate within the criminal justice system'

We welcome a commitment to reduction of re-offending although we are concerned that an overly mechanistic approach to the reduction of offending may not be helpful.

'We will conduct a full review of sentencing policy to ensure that it is effective in deterring crime, protecting the public, punishing offenders and cutting reoffending. In particular, we will ensure that sentencing for drug use helps offenders come off drugs' and
'We will explore alternative forms of secure, treatment-based accommodation for mentally ill and drugs offenders'
We welcome the review of sentencing and hope that it will lead to a more balanced approach.

'We will change the law so that historical convictions for consensual gay sex with over 16s will be treated as spent and will not show up on criminal records checks'
We welcome this reform.

'We will introduce effective measures to tackle anti-social behaviour and low-level crime, including forms of restorative justice such as Neighbourhood Justice Panels'
We support greater use of restorative justice measures.

'We will urgently review control orders, as part of a wider review of counter-terrorist legislation, measures and programmes.
JUSTICE has long opposed the use of control orders under the Prevention of Terrorism Act 2005 on the basis that they are unnecessary, expensive, ineffective, and offend basic principles of our justice system. We intervened in all the major control order appeals, including *Secretary of State for the Home Department v MB*[11] and *Secretary of State for the Home Department v AF and others*.[12] We have also briefed both Houses of Parliament on the annual renewal of the 2005 Act, recommending against renewal. We therefore welcome the new coalition government's commitment to urgently review control orders as part of a broader review of counter-terrorism legislation and measures.

We have long argued for a comprehensive review of the UK's counter-terrorism legislation, and this was also one of the central recommendations of the February 2009 report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights entitled *Assessing Damage, Urging Action,* an initiative of the International Commission of Jurists of which JUSTICE is the UK section.[13] Since the Terrorism Act 2000, which was itself intended to be a comprehensive framework for counter-terrorism measures, Parliament has enacted the Anti-Terrorism Crime and Security Act 2001 (in response to 9/11), the Prevention of Terrorism Act 2005 (in response to the Belmarsh judgment), the Terrorism Act 2006 (in response to the 7/7 bombings) and the Counter-Terrorism Act 2008 (which was built around the government's proposed increase of the maximum period of pre-charge detention to 43 days). In addition to the problems caused

by the broad statutory definition of terrorism under the 2000 Act, subsequent Acts have given rise to a number of measures offending fundamental rights including indefinite detention under the 2001 Act, control orders under the 2005 Act, and the extension of the maximum period of pre-charge detention to 28 days under the 2006 Act. Among other things, the previous government's preference for exceptional measures in the name of national security has led to an unprecedented rise in the use of closed proceedings and special advocates in British courts since 1997, as detailed in our report; *Secret Evidence*.[14] We urge the new coalition government to review the use of secret evidence as part of its broader review of counter-terrorism measures.

'We will seek to find a practical way to allow the use of intercept evidence in court'

JUSTICE first argued for the ban on intercept evidence to be lifted in our 1998 report *Under Surveillance: Covert Policing and human rights standards*. In October 2006, we published *Intercept Evidence: Lifting the ban*, which set out in greater detail the arguments in favour of using intercept in open court. The report also included a comparative study of the use of intercept evidence in Australia, Canada, Hong Kong, Ireland, South Africa and the United States. We subsequently gave oral evidence to the Privy Council review of Intercept as Evidence chaired by Sir John Chilcot, and the 2008 report of the committee cited our 2006 report.

We remain of the view that the case for lifting the ban on intercept is as strong as ever, not least because of the prominent role played by intercept material (ultimately obtained from California) in the conviction of three men of conspiracy to blow up transatlantic airliners in September 2009, as well as the recent decision of the Special Immigration Appeals Commission in the case of Abid Naseer in May 2010. The use of intercept as evidence would be a major step towards closing the gap between suspicion and proof that has been the engine of so many disproportionate measures adopted since 9/11, including indefinite detention, pre-charge detention and control orders.

Since 2008, we have met the Home Office team working on the implementation of the Chilcot report on two occasions, and have made clear our view that it is perfectly feasible to introduce legislation allowing the use of intercept material in criminal and civil proceedings in a manner that would both protect sensitive details about interception capabilities while remaining compatible with the European Convention on Human Rights.

'We will deny public funds to any group that has recently espoused or incited violence or hatred. We will proscribe such organisations, subject to the advice of the police and security and intelligence agencies'

Incitement of violence has been a criminal offence since at least the 19th century, and there are also more recent offences covering the incitement of racial and religious hatred. To this extent, we would be extremely surprised if there were any groups engaged in this activity found to be in receipt of public funds, rather than being prosecuted. The Terrorism Act 2000 already provides the power to proscribe groups involved in terrorism, and the scope of the proscription powers were extended by the Terrorism Act 2006. In our many briefings on counter-terrorism legislation, and in particular in our submission to Lord Carlile's review of the statutory definition in March 2006, we have noted that the definition of 'terrorism' under the 2000 Act remains unacceptably broad, and would in principle apply to the democratic resistance in countries such as Burma or North Korea. We urge the new coalition government to exercise its proscription powers under the 2000 Act in a way that respects the legitimate and proportionate use of force against oppressive and non-democratic foreign governments.

'We believe that Britain should be able to deport foreign nationals who threaten our security to countries where there are verifiable guarantees that they will not be tortured. We will seek to extend these guarantees to more countries'

JUSTICE strongly opposes the use of assurances against torture as a means to seek the deportation of persons to countries which are known to use torture. As we made clear in our interventions before the House of Lords in *RB (Algeria) v Secretary of State for the Home Department*[15] in October 2008, and before the European Court of Human Rights in *Othman v United Kingdom* (pending), virtually all the countries in this category are already signatories to the UN Convention against Torture and therefore are already known to have broken their promise not to use torture. The coalition government should not be so unrealistic as to believe the promise of a government that is known to use torture. Not only are such assurances unenforceable and unreliable, but they are likely to undermine the international prohibition against torture. Rather than seek to negotiate special exemptions from countries which practise torture in relation to specific individuals, the UK government should work with foreign governments to end the use of torture. More generally, deportation of suspected terrorists is an ineffective way of addressing the threat of terrorism, as the Privy Council Review of the Anti-Terrorism Crime and Security Act 2001 noted in December 2003. The new coalition government should concentrate its efforts on prosecuting terrorists, rather than exporting them.

Notes

1 *The Coalition: Our Programme for Government*, Cabinet Office, 20 May 2010, p7.
2 Ibid.
3 T Bingham, The Rule of Law, Allen Lane, 2010, p136.
4 N1 above.
5 (2009) 48 EHRR 50.
6 [2009] EWCA Civ 172.
7 [2005] UKHL 71.
8 [2010] EWCA Civ 65.
9 [2001] EWCA Civ 1512.
10 See the News section of the Home Office website in relation to the trafficking directive.
11 [2007] UKHL 46.
12 [2009] UKHL 28.
13 *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, ICJ, February 2009.
14 *Secret Evidence*, JUSTICE, June 2009.
15 [2009] UKHL 10.

Conditions for a British bill of rights

JUSTICE

Proposals for a 'British' or UK bill of rights are currently somewhat in abeyance – though a commission on the proposal is suggested in the coalition government's agreed programme. Thus, the idea is likely to re-surface in some shape or form. The content of this paper was prepared after consultation with JUSTICE's membership and after debate within JUSTICE's Council and Executive Board. It sets out the seven conditions that JUSTICE would require if it was to support the idea of a British bill of rights that replaced the Human Rights Act.

In recent years, proposals for a bill of rights have been made by all three major political parties – albeit in rather different terms. There is considerable uncertainty about what such a bill might look like, what it would contain, and how its provisions might be enforced. We, like others, worry that a bill of rights might, by design or unforeseen consequence, result in undermining the provisions of the Human Rights Act (HRA). In 2007, JUSTICE published *A British Bill of Rights: Informing the debate*.[1] This report represented an attempt to set out the issues that needed to be decided under the headings of:

- Content;
- Amendment;
- Adjudication and enforcement;
- Process.

Informing the debate took no position on these issues. It sought merely to set out what needed to be decided. We maintain that position. The section below identifies the requirements that JUSTICE considers should be contained within any bill of rights that seeks to replace the HRA. A fundamental point is that any such proposal would amount to reform of constitutional dimensions and should only be introduced with the transparency and width of debate appropriate to such a measure.

What follows are seven principles that we think should underlie any attempt to amend the Human Rights Act by introducing a bill of rights.

Any bill of rights must be based on a broad consensus, not just of lawyers and politicians but also the public at large.

This is a tall order. At present, a non-partisan approach seems unlikely. However, the language of the Glorious Revolution of 1688 and the Bill of Rights 1689 cannot be appropriated by any one political party. The original Bill of Rights had a wide degree of political support. That must be replicated in any later document which seeks to echo its language. The drafting of a bill of rights goes beyond a political project: it is constitutional in nature. As a result, any proposal for a bill of rights should be subject to considerable independent review and public consultation, eg by a Royal Commission or equivalent body. This would help to overcome the way in which support or opposition to the HRA has tended to be portrayed as a party political matter even though, as a matter of fact, all parties contain people holding a wide range of views. The public need a debate which expressly identifies a British bill of rights as building on the European Convention to protect additional civil liberties which they understand as relevant to them.

The process of agreeing a UK bill of rights, and its content, must reflect the increasingly devolved nature of the United Kingdom.

The HRA is built into the devolution settlement for Northern Ireland, Scotland and Wales. Under the Good Friday Agreement, the Northern Ireland Human Rights Commission was to advise on the scope for rights supplementary to those in the European Convention which were required by the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission has done so, though its advice has been largely rejected by the Northern Ireland Office.

The devolution statutes are complicated, and their underpinning human rights' framework is tied up in a number of ways with the HRA and, 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 statute.[2] The Westminster Parliament undoubtedly has the ultimate competence to amend these without the consent of the devolved jurisdictions as a result of the doctrine of ultimate parliamentary sovereignty. However, under present legislation and depending on exactly what was proposed, the consent of at least the Northern Ireland Assembly and the Scotland Parliament would surely be required, as a matter of practice and pragmatic politics. The UK government must also ensure

that it does not derogate from its international treaty obligations to the Republic of Ireland in regard to the Belfast (Good Friday) Agreement.

In these circumstances, political parties may consider an omnibus bill of rights which contains separate content for each jurisdiction in the United Kingdom. It would, of course, be possible for each jurisdiction to have its own bill, thereby presumably transforming the proposal to four bills of rights - English, Scottish, Welsh and Northern Irish. This would, however, potentially challenge the coherence of the project. By way of a compromise, it might be possible to have some common UK provisions reflecting international obligations and then different sections for the four jurisdictions that added rights which were particular to each, such as jury trial in England and Wales. However, this would raise the issue of competing jurisdictions within the UK.

A UK bill of rights must guarantee as a minimum, or extend beyond, the rights guaranteed by the European Convention on Human Rights.

All main political parties accept that the UK must remain subject to the European Convention. Therefore, the content of any British bill must comply both with the provisions of the ECHR and subsequent relevant case law of the European Court of Human Rights (ECtHR). The UK is bound by international law to implement decisions of ECtHR to which it is a party. No attempt can be made to fudge that commitment. The ECHR, in any event, is not an alien document: it successfully articulates UK traditional civil liberties within the context of the human rights framework.

The UK's relationship with the Council of Europe and its ECHR is now woven into our legal and political fabric. As a matter of political reality, any move to alter our model of rights protection must build on the foundations laid by the ECHR. Those who object to the ECHR itself and, with it, the UK's membership of the Council of Europe, must engage in a different debate. This applies also to our continuing membership of the European Union, which in practice is conditional on compliance with the ECHR. Britain cannot risk accusations of hypocrisy by distancing itself from the very standards it sets for others in its political and diplomatic relations.

Any proposed model for a British bill of rights must therefore be 'ECHR-plus'. A British bill of rights must not detract from any of the rights in the ECHR. The argument is sometimes made that a domestic bill of rights would encourage the ECtHR to allow the UK greater flexibility under its doctrine of the 'margin of appreciation'. However, the crucial factor remains the *substance* of legal protection, not the fact that a bill of rights is presented as being specific to a particular country. The provisions of a British bill of rights will not affect the

ECtHR's power to rule that a member state has breached the ECHR. States with their own constitutional bills of rights such as Germany (whose constitution gives even greater protection than the ECHR in some respects) continue to be subject to close adjudication by the ECtHR. Meanwhile, the ECtHR is increasingly receptive to case law developed under our current HRA, the quality of which has had significant influence on European human rights jurisprudence and is central to a proper understanding of how human rights work in the British context.

Much of the support for a British bill of rights stems from the wish to 'domesticate' human rights jurisprudence. British judges, adjudicating within the domestic context, would become more authoritative on the domestic constitutional text. It might be argued that this could stand the courts in good stead in terms of defending against potentially less well-informed decisions from the ECtHR, which lacks the insight of British judges in relation to the British system. The domestication of rights would proceed on the basis that the ECHR rights already incorporated into British law constitute the minimum level of protection.

Inevitably, any proposal for a bill of rights which goes beyond the terms of the ECHR will prove contentious. The ECHR has existed since 1950 and its provisions are relatively well understood. The UK government was particularly sceptical of the EU's attempt to go beyond the relative clarity of the ECHR when it drafted its proposed EU Charter of Fundamental Rights in 2000.

Nevertheless, while any British bill of rights must ensure an ECHR-minimum, it is worth exploring options for a model which strengthens or expands the ECHR. If agreement were possible, it would constitute a significant advance in safeguarding rights, not to mention an educative process to encourage understanding of the nature of rights in the British constitution.

Any domestic bill of rights should be compatible with the international obligations of the UK.

The UK government has signed and ratified a number of international human rights treaties, covering for example torture, children and equality, which should be reflected in any new domestic bill of rights. This would be an excellent opportunity to underline the UK's domestic commitment to these international obligations.

The key enforcement mechanisms of the HRA should be re-enacted.

The core of the HRA imposes a duty on public authorities to comply with the ECHR; requires the courts to interpret legislation 'so far as it is possible'

in accordance with the ECHR; obliges them to take account of ECtHR jurisprudence; and allows for the making of declarations of incompatibility. These are essential to ensure that the Convention is fully and predictably applied both by UK public authorities and courts. Otherwise, it would, once again, become slower and more costly to obtain a ruling on the application of the European Convention to the UK, by requiring recourse to the ECtHR. Speed and lower cost were major objectives behind enactment of the HRA. It would be illogical for the UK to be bound by the European Convention but to exempt public authorities from any duty to comply with it.

It would be incoherent to block UK courts from 'taking into account' European Court judgments in making decisions, at least to the extent that the development of UK law is compatible with decisions of the European Court. The recent case of *Horncastle* shows the way in which the UK courts can establish an appropriate measure of dialogue with the European Court of Human Rights over the application of its decisions to the UK. The Supreme Court said that:[3]

> *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 dialogue between this court and the Strasbourg court.*

The HRA was devised to reconcile the traditions of parliamentary supremacy with the operation of the European Convention. It establishes a 'dialogue' model in which the domestic courts have no power to strike down legislation. They may only give their view that the ECHR has been infringed. Separately from the HRA and under the ECHR itself, the UK accepts that it will implement a final judgement of the European Court of Human Rights. This is the minimum degree of enforcement of the ECHR that it is appropriate.

Any statement of responsibilities or duties must not detract from the protection of human rights.

Most rights are qualified and, in practical terms, depend on the responsibility of everyone in society to respect one another's freedoms. Even the right to life is not absolute. It may, for example, be limited by the use of proportionate force in various circumstances, such as effecting a lawful arrest. Freedom of expression can be curtailed under the European Convention for a set of reasons including

the protection of reputation and rights of others. Thus, speech can be prohibited which is designed to stir up hatred or violence. There are a number of dangers in setting out additionally expressed duties together with existing rights.

Some rights are absolute and cannot be limited. Very few rights are unconditional – for example the right against torture and inhuman treatment (Article 3 ECHR) and against slavery (Article 4 ECHR). These rights cannot be subjected to any all-encompassing limitation, such as that they are legally contingent on performance of set of duties and responsibilities. Their application regardless of such considerations is precisely the point of their existence. For example, however egregiously someone behaves; it is never acceptable to torture them.

Many duties are already enshrined in statute and the value of restating a duty is unclear. The Italian constitution repeats statutory duties to pay taxes: it is not evident that this has any additional effect. Human beings have important social duties with which they are morally bound to comply so that society functions harmoniously. Such duties depend on the integrity of each individual and are not legally enforceable through the machinery of human rights. The value of restating moral duties, such as to be a good neighbour and member of society, is similarly questionable in a document which is otherwise concerned with enforceable rights.

In terms of a bill of rights, the importance of social responsibilities and community relations is sometimes articulated in a preamble. A preamble, stating the purpose of the instrument, can emphasise that responsibilities are the (moral) counterpart to rights, even though the rights themselves are legally inalienable, and thus make a political point. If some recitation of responsibilities or duties is felt necessary, then they should be set out in another document or perhaps in a preamble to a document which, in itself, is concerned with rights.

The scope for reform should not be oversold.

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 ECtHR will still require compliance. 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 government will benefit from that in the long run. Suggestions that the UK might seek to evade its Convention responsibilities by simply ignoring its provisions or failing to follow decisions of the European Court to which the UK is a party would be contrary to a long

tradition of UK adherence to the rule of law and would affect our international reputation.

Conclusion

In addition to the seven minimum conditions, there are, of course, a number of other issues that need to be addressed in the process of drafting a bill of rights. Prime of these is content. This might include:

- Various guarantees of basic civil liberties that are traditionally British but not covered by the ECHR. This would include trial by jury, though this does not play the same role in Scotland as elsewhere;
- Social, economic and cultural rights, though there is wide disagreement as to the value of including any right which is not justiciable. At the same time, this debate often overlooks the extent to which some economic and social rights are already widely accepted in UK law, eg the right to health care under the NHS, and the right to education under the HRA;
- International obligations which go beyond the ECHR, not least the UN International Covenant on Civil and Political Rights;
- The European Union's Charter of Fundamental Rights.

A crucial issue will be the degree of entrenchment of any domestic bill. Some argue that the protection of rights through a specific bill of rights implies a degree of legislative entrenchment that limits amendment. However, it is extremely difficult under the UK constitution for one Parliament to bind another though provisions might be passed requiring amendment to be made only after passage of legislation that obtains the consent of both Houses of Parliament. The HRA provides a minimum form of enforcement through the 'dialogue model' referred to above. There should be discussion and decision as to whether judiciary should have any more extensive 'strike down' power over legislation that breaches the provisions of the bill of rights.

Implementation of the HRA during its first decade has depended on crucial decisions both of the domestic Supreme Court/House of Lords and of the ECtHR. To some extent, this has been a result of the failure of Parliament adequately to test legislation against the standards of the European Convention. The full operation of any bill of rights and, indeed, the HRA, depends on the vigilance of Parliament as against the executive. Decisions of the European Court, such as that relating to the DNA database, suggest that Parliament needs to find ways to strengthen its ability to monitor and amend legislation that is incompatible with the ECHR or any bill of rights. Failing that, too much reliance will be placed on the courts to do so. This requires Parliamentarians to demonstrate greater independence of the executive and of party, an admittedly difficult issue to address. The case is sometimes made against the HRA that it has handed

disproportionate power to the judges. Any bill of rights – and, indeed, the HRA if it is to find a better fit into the constitutional structure of the UK – must be guarded more jealously by Parliament and mechanisms should be put in place to strengthen its position against the executive. After all, the US bill of rights was seen as its proponents quite distinctly as a limitation on the power of the executive. As Thomas Jefferson put it:

> *[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse.*

Notes

1 Available to download from the JUSTICE website.
2 Q Rasheed, 'Devolution and Human Rights', *JUSTICE Journal,* Vol 7 No 1, 2010, p106.
3 [2009] UKSC 14, para 11.

Labour, civil liberties and human rights

Roger Smith

JUSTICE spent a considerable amount of time in discussion with the Labour government on matters relating to civil liberties and human rights. In his leader's speech at the party conference earlier this year, Ed Miliband indicated that he is seeking to change the party's approach and reputation now that it is in opposition. This article raises the issues to be borne in mind if this is to be achieved.

At a tumultuous conference, Ed Miliband signalled a major U-turn on the Labour party's approach to civil liberties. He said:

> *Protecting the public involves protecting all their freedoms. I won't let the Tories or the Liberals take ownership of the British tradition of liberty. I want our party to reclaim that liberty.*

That followed a passage in which he re-positioned his party away from some of the policies that it had adopted in government:

> *I believe in a society where individual freedom and liberty matter and should never be given away lightly. The first job of government is the protection of its citizens. As prime minister, I would never forget that. And that means working with all the legitimate means at our disposal to disrupt and destroy terrorist networks. But we must always remember that British liberties were hard fought and hard won over hundreds of years. We should always take the greatest care in protecting them. And too often we seemed casual with them. Like the idea of locking someone away from 90 days – nearly three months in prison – without charging them with a crime. Or the broad use of anti-terrorism measures for purposes for which they were not intended.*

At the joint fringe meeting that JUSTICE held with the Society of Labour Lawyers, Jack Straw, with somewhat surprising candour and the virtue of hindsight, admitted that he too now agreed that the government had been wrong to argue for 90 days pre-trial detention; to have promoted the Prevention of Terrorism Act 2005 (which introduced control orders) with undue haste through Parliament; and to have failed to see how stop and search powers granted to deal with anti-terrorism were being used so widely. Given the political prominence of these issues at the time, those admissions are startling. They prepare the way for a fundamental re-appraisal of policy.

Ed Miliband's pitch and Jack Straw's admissions indicate an awareness of how far the Labour government alienated those with a concern for human rights and civil liberties. The scale of disaffection with the Labour government is best illustrated by the success of the Convention on Modern Liberty[1] which was held on 29 February 2009. This event became an anti-government jamboree that led to an attendance of a 1300 people at its London venue – where speakers in the main hall had to be relayed to overflow facilities. A further 760 watched the facilities by way of televised transmission at seven regional locations. A galaxy of presenters was headed by Lord Bingham who accorded his gravitas to the day – remarking to applause that the House of Commons should be 'a bastion' of civil liberties not an 'accomplice' to their erosion. No less than 142 speakers took part in total (including from JUSTICE). Fifty organisations partnered the event. Media coverage was commensurate with the scale of the event.

The political consequences of the strength of the movement in defence of civil liberties translated itself into the political sphere before Ed Miliband's conversion. Indeed, it probably precipitated it. The coalition government committed itself to 'a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion.'[2] That programme is reviewed in another article in this edition.

A commitment to civil liberties undoubtedly comes easier to those in opposition than those in government. In its defence, the Labour government had to respond to the events of 9/11 in 2001 and the 7/7 bombings in London four years later. It also had to deal with legitimate public concern about levels of crime and degrees of anti-social behaviour. However, it is worth considering, as an example, the ways in which counter-terrorism legislation, as bequeathed by the Labour government, should now be amended. In time, Labour will, no doubt, come to review its own position. When it does, JUSTICE will repeat the submissions that it made to the Home Office review in August 2010 set up by the coalition government.[3]

There is a broader point, however, than the mere content of legislation. It is that made by Lord Bingham at the Convention on Modern Liberty. Government must cede power to Parliament to guard fundamental rights. The Labour government provides regrettable examples of where it overstepped the line. Two key pieces of legislation on counter-terrorism were pushed through Parliament with indecent haste: the Anti-Terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005. The first went through in a month: the second in 18 days from beginning to end. The 2005 bill proceeded at such a speed that the full text was not available for its second reading in the House of Lords. There had been no time for the printers to incorporate amendments made at third reading by the Commons. In a sign of its controversy, Lord Irvine,

Tony Blair's first Lord Chancellor, voted against the bill, the first time he had voted against the Labour government. The House of Lords held a record sitting of 30 hours as last-minute negotiations took place on its core provision: the establishment of control orders.

The consequence of this rushing of the bill through Parliament, where the government faced dissent from its own supporters in both Houses, was predictable. the judicial committee of House of Lords ultimately declared that the provisions in the 2001 Act which allowed the indefinite detention of foreign nationals suspected of international terrorism to be incompatible with the European Convention on Human Rights.[4] The 2005 Act was the government's response to that judgment: it implemented control orders to effectively allow the house arrest of such persons. This, in turn, gave rise to a flood of litigation from which the government emerged with severe bruising and during which the courts had been forced to give a level of scrutiny to the legislation that Parliament had been denied. Thus, both the European Court of Human Rights (ECtHR) and a panel of nine law lords found that control orders breached fundamental standards of fairness because the nature of the closed proceedings used to impose such orders were insufficiently mitigated by the presence of 'special advocates' and the degree of information given to the applicant.[5] In the latter case, Lord Hope remarked: 'The slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle.'[6]

Consequently, the Labour party needs not only to consider the content of legislation but also the way in which a large Commons majority provides a temptation to bypass democratic accountability. Legislation which concerns fundamental rights should be subject to particular supervision by Parliament just as much as the courts. The failure to accord Parliament a proper role in scrutiny of key civil liberties' legislation led directly to the engagement of the courts to provide the kind of corrective which it failed to give. This re-enforced the image of a government that was not disposed to take civil liberties seriously.

On amendments of substantive law, JUSTICE has various recommendations. In relation to counter-terrorism, we have set these out in our response to the Home Office Review and the detail can be consulted on our website. However, it may be worth quoting here the executive summary which sets out those amendments and repeals which, in our view, all political parties, including Labour, should now make:[7]

- Control orders are unnecessary, ineffective and offensive to basic principle. The Prevention of Terrorism Act 2005 should be repealed. The resources

committed to administration of the control order scheme should be instead put into surveillance of suspects.

- The stop and search power under section 44 of the Terrorism Act 2000 should be replaced with a much more narrowly drawn power, with stringent safeguards including prior judicial authorisation. Section 76 of the Counter-Terrorism Act 2008 should be repealed, and the right of photographers to photograph in public places made clearer.

- The maximum period of pre-charge detention in terrorism cases should be reduced from 28 days. We favour a return to 7 days, but would welcome a reduction to 14 days as an interim step.

- Deportation with assurances should not be pursued in relation to countries known to use torture.

- Additional measures to deal with organisations that promote hatred or violence are unnecessary. Incitement of hatred and violence are already criminal offences. Moreover the existing law on proscription is already overly broad and should be tightened. Sections 1, 2 and 21 of the Terrorism Act 2006 should be repealed.

- The use of surveillance powers by local authorities should be removed, as should their access to communications data without prior judicial authorisation.

- Terrorist asset-freezing powers are grossly disproportionate in their current form. We recommend comprehensive overhaul of the law in this area, including removal of the reasonable suspicion test.

- Other issues include consolidation of terrorism legislation, the lifting of the ban on intercept evidence, and tightening of the statutory definition. Although outside the scope of the current review, they should be addressed as a matter of urgency.

There is a third issue – beyond the process and content of legislation – which any Labour review of its civil liberties' policy must consider: the practical application of legislative provisions. This is illustrated by the notorious example of s44 Terrorism Act 2000, the provision that allows the police, in certain circumstances, to stop and search someone without any suspicion that they are committing an offence. After a blizzard of publicity and litigation through the courts, this provision was declared incompatible with the European Convention in *Gillan and Quinton v UK* in January 2010.[8] It transpired that a provision which

was intended to cover short periods of crisis with 28 day authorisations was being routinely rolled over so that some areas, such as London, were covered on a continuous basis. The provisions were also being widely used for purposes unconnected with terrorism and, in the particular circumstances of the case that went to Strasbourg, were being deployed to protect an arms fair from protestors and photographers. The ECtHR found that, in the absence of any effective check on the operation of the section by Parliament, the independent reviewer appointed by the legislation or the courts, there was a 'clear risk of arbitrariness' in how it was operated. Only once adverse publicity reached devastating levels did the police began to respond by reducing stop and searches under the provision by half in 2009-10 compared with comparable periods the previous year.

The real story of the case is how the Labour government missed – or failed to react to – indications that there was something to which they should respond in terms of how this provision was operating in practice. Lord Carlile was appointed by the Labour government to be the statutory reviewer of the terrorism legislation. His annual reports indicate a mounting unease about how the provision was working. He began by reporting no problems in 2001. The next year, he was indicating 'anxiety'. By 2007, he was saying that the section 'could be used less'. He repeated that in 2008. By 2008, he had discovered the most bizarre of twists. The police were responding to concerns about the disproportionate use of the power in relation to those from visible ethnic minorities by stopping white people simply to manipulate the published statistics. Unsurprisingly, he called this 'totally wrong'. Nor was Lord Carlile alone in criticising the operation of this section. Parliament, through the parliamentary Joint Committee on Human Rights had also had issued its warning: 'High profile examples of the inappropriate use of counter-terrorism powers include … stopping and searching a protestor and a journalist at an arms fair ….'[9]

There is a lesson here that would benefit the constitutional balance of powers. Governments should place more weight on the recommendations of those that they appoint to review the operation of legislation or parliamentary committees that are doing the same job. The dismissal of the Joint Committee's concerns allowed the Labour government to be portrayed as insensitive to events on the ground and led directly to the European Court intervening as the protector of liberties of last resort.

A striking omission from the language used by Ed Miliband in his speech is any reference to human rights. Yet, we saw repeatedly during the Labour government that it was only the operation of the European Convention on Human Rights that ensured, at the end of the day, a degree of compliance with human rights protections. The convention is, to a large degree, a transcription

of the rights of the common law into a human rights framework. However, the structure imposed by the convention is what gives it bite. It establishes an arbitrating court and a commitment by member states of the Council of Europe to abide by the determinations of the court in cases in which they are a party. Without this structure, traditional domestic rights are protected by the common law but vulnerable to being over-ruled by any government that can get its legislation through both Houses of Parliament. There is a limit to the extent to which judges can protect rights. They can demand clear legislative authority but, in its absence, they could do nothing – save perhaps, and contentiously, at the outer reaches of parliamentary abuse of power. Lord Justice Laws, as now he is, put himself within that common law tradition in a celebrated case where he decided that the Lord Chancellor, acting without statutory powers, could not indiscriminately charge court fees to all litigants, including those on income support: 'The executive cannot in law abrogate the right of access to justice, unless it is specifically permitted by Parliament; and this is the meaning of the constitutional right.'[10] The Labour party needs to re-assert its commitment to civil liberties within the context of human rights and to re-enforce its continuing belief in the Human Rights Act that it, itself, introduced.

Ed Miliband's speech was designed to set out the framework within which he will guide the Labour party through to, as he put it, a 'new generation'. With regard to civil liberties, there must now be a chance that the 'clear blue water' between the parties will have closed. All three major political parties in the UK will, as a result, be able to re-affirm their commitment to fundamental British freedoms which have been enshrined with the European Convention. Labour will no doubt be tempted, teased and taunted by the coalition government over exactly how it will react to the prospective repeal of a number of measures that it took while in government. This will be hard to bear but the prize will be a unanimous acceptance by all major political parties of a commitment to civil liberties. There is a particular prize for Parliament if it could emerge from this period of re-orientation with its members' individual commitment as legislators to the protection of ancient freedoms. To this end, we must hope that the speech of the Labour party's new leader is but the start of a process which leads through some form of review of existing policy to a decisive re-positioning of his party.

Roger Smith is Director of JUSTICE.

Notes

1 www.modernliberty.net
2 *The Coalition: Our Programme for Government*, Cabinet Office, 20 May 2010 p11.
3 'Response to the Home Office Review of Counter-Terrorism and Security Powers', JUSTICE, August 2010, available to download from the JUSTICE website.
4 *A v Secretary of State for the Home Department* [2005] 2 AC 68.
5 *A and Others v United Kingdom* (2009) 48 EHRR 29 and *Secretary of State for the Home Department v AF and others* [2009] UKHL 28.
6 *AF*, n5 above.
7 See n3 above, p2.
8 (2010) 50 EHRR 45.
9 Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing* protest, HL 47-I, HC 320-I, Marc 2009.
10 *R v Lord Chancellor ex parte Witham* [1998] 8 QB 575.

Book reviews

The Rule of Law

Tom Bingham

Allen Lane, 2010

224pp £20.00

Public Law after the Human Rights Act

Tom Hickman

Hart Publishing, 2010

360pp £45.00

'The greatest jurist of our time' is how the deputy President of the UK Supreme Court Lord Hope recalled Lord Bingham following his untimely death in September 2010. It seems impossible to disagree with that assessment. And although he ventured that it was Bingham, 'perhaps more than anyone else' to whom the Supreme Court itself owed its existence, Hope suggested that Bingham's true legacy lay in his judgments:

> *His energy, his unshakeable grasp of principle, the clarity and force of his language and his strong sense of history shone through everything that he said and wrote.*

The same can easily be said of Bingham's first – and now sadly his last – book, The Rule of Law. By his own account a short work rather than a detailed treatise, The Rule of Law is a collection of essays organised around its eponymous concept. Bingham is surely right to say that the idea of the rule of law is a central concept in legal thinking but, outside of academic circles, its meaning has largely been taken for granted: 'I was not sure quite what it meant, and I was not sure that all those who used the expression knew what it meant either, or meant the same thing'. Part I deals with an introduction to discussion of the concept and a quick historical survey of important milestones in its development. This survey, Bingham is quick to concede, is 'highly selective and shamelessly Anglocentric', but – then again – so is the common law itself and indeed the concept of the rule of law. (In a similar manner, he pleads guilty to citing a disproportionate number of cases in which he has been involved on the basis that 'these are the ones that are most familiar to me'). Bingham's love of history (and obvious ability as an historian in his own right) shines through the book. In Part II, in particular, Bingham sets out eight principles that he sees as essential components of the concept of the rule of law, including eg its accessibility, equality before the law, procedural fairness, and respect for fundamental rights, and each of these sections gives its own brief historical account of the evolution of the relevant principle.

Later sections of the book deal with issues that Bingham saw as central challenges to the concept now and in the future, including (i) the response of otherwise democratic governments to the threat of terrorism; (ii) the increasing role played by international law; and (iii) parliamentary sovereignty. Historically these were areas in which the domestic courts were seen to play a relatively limited role but, in recent years (and under Bingham's leadership as senior Law Lord) they have come to play an increasingly important part. Despite the relative brevity with which such major issues are dealt with, The Rule of Law serves as a thoughtful and

lucid account of the concept, rich with historical nuance, a deep understanding of fundamental principle and an equally keen perception of practice. It serves as an excellent layman's introduction to the concept of law itself, and should be the one book that any aspiring student of the common law should know from cover to cover. Bingham's judgments are his legacy, but this is an excellent primer.

Bingham's considerable impact in the field of public law is also evident throughout Tom Hickman's new book, Public Law after the Human Rights Act. Bingham was, after all, the Senior Law Lord for almost all of the Act's first decade and thereby played the leading role in cementing it as part of the UK's constitution. Hickman is an academic, as Professor Paul Craig puts it in his foreword, 'whose name is already well-known through a series of valuable and thought-provoking publications on a range of public law issues'. Hickman is also a practising barrister at Blackstone Chambers who has been a junior in some of the leading public law cases of recent years. Public Law after the Human Right Act is a collection of academic articles on public law, most of which have been published previously but virtually all of which have been substantially updated. In historical terms, public law is a field that has grown at a spectacular rate in a few short decades and the last decade has seen some of the most rapid growth of all, to the point where it is sometimes almost unrecognisable to practitioners familiar only with garden-variety *Wednesbury* unreasonableness.

The structure of Hickman's work reflects these developments, starting out by focusing on the state of the common law prior to the HRA, then moving into an extended discussion of constitutional theory and – in particular – different conceptions of the idea of constitutional dialogue between Parliament and the courts. This is followed by an analysis of the several different levels of intensity of review that now exist in public law, and a detailed exploration of what are now the two most critical concepts: proportionality and reasonableness. Later chapters explore further the importance of proportionality, the right of access to court, and – particularly crucial after 9/11 and 7/7 – the concepts of emergency and derogation. Throughout, Hickman moves deftly between the roles of constitutional scholar and public law practitioner providing a work that will undoubtedly prove thought-provoking and highly useful to both.

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Torture, Terror, and Trade-Offs: Philosophy for the White House

Jeremy Waldron

OUP, 2010

368pp £19.99

It is commonly said that things changed after 11 September 2001, and that they changed again after 7 July 2005. Frequently the claim is that we must re-adjust the balance between our security and our liberty; sometimes it is argued that practices once considered beyond the pale must now be countenanced.

In a series of thought-provoking essays Jeremy Waldron puts such claims under the microscope. One of his targets is the very idea that there is a straightforward trade-off between security and liberty. True, we may tackle some sources of insecurity by granting extra powers to the state. But it is not only our liberty which is thereby reduced - our security against the state itself is also diminished. Nor are all liberties the kind of thing which can simply be traded-away. Some are rights the very essence of which is their resistance to unrestricted balancing - if limitations are to be justified at all a high threshold must be met.

Things only get more complex once we realise that the winners and losers from the 'war on terror' are often very different people. Politicians talk glibly of 'our' liberty being traded for 'our' security. But it is often the marginalised who are made less free, and the well-to-do who become more secure. As Waldron points out, there is a question of justice which must be confronted here – one the political rhetoric only obscures.

Of course, to even talk of balance, one must know what one is putting in the scales, and Waldron is critical of those who fail to spell out what they mean by security. While there are important questions to ask about security on the individual level (are we only secure if we feel safe, and if so, how far should states go to reduce irrational fears?), Waldron's discussion is most interesting when considering what a secure *society* would look like. For even on the security side of the balance, he argues, we cannot simply trade-off some people's security for the sake of the security of others. If State X has a highly secure majority population, but an extremely insecure minority, one might think State X a relative success where the value of security is concerned. Not so, says Waldron. The legitimate state, he argues, must improve the lot of each of its citizens counted one by one, and the security at which a state must aim is security of this nature. To be careless with, or to attack, the security of some is to surrender that legitimacy. It is to become more like the terrorist groups with which the legitimate state is rightly counterposed.

If too little has been said about security, Waldron worries that too much has been said in recent years about the permissibility of torture. Others have argued that judges should be empowered to license torture by issuing 'torture warrants'. But Waldron remains steadfast in the belief that torture should remain a 'legal abomination'. His primary argument is that the prohibition on torture is what he calls a 'legal archetype' – a legal rule in its own right, but also an expression of the law's general rejection of brutality in all its forms. Such an archetype, he argues, is drawn on in other areas of the law to give weight to arguments

against brutality – arguments that forcing suspects to vomit up evidence violates procedural due process, or that corporal punishment in prisons is cruel and unusual. If the prohibition is undermined, Waldron argues, so is the archetype, and the strength of arguments which invoke it. The law's resistance to brutality in various domains may be weakened as a result.

There is much to say about this argument, and little room to say it here. Suffice it to say that Waldron himself recognises that his argument is contingent on empirical matters: will recognising tightly-confined exceptions to the prohibition on torture really deprive arguments against brutality of their weight in the courtroom? Does the prohibition against torture really have the wide-ranging impact on judicial reasoning which Waldron supposes, or is it often invoked as rhetorical window-dressing for decisions made on other grounds?

Whatever the answer, Waldron's argument, like so many of those to be found in this book, repays careful consideration. Throughout he displays an admirable talent for illuminating novel dimensions to urgent political problems. As well as the chapters discussed above, Waldron has interesting thoughts to offer on the distinctive features of terrorism, as well as on the way to go about interpreting references to 'inhuman' and 'degrading' treatment in human rights conventions. Some may find Waldron's approach here and elsewhere frustrating – he has little to say about whether terrorism can be justified, or whether inhuman treatment should ever be permitted, and he frequently draws attention to the limited scope of his contributions. My own view is that these are both virtues rather than vices – we cannot know how to respond to terrorism or torture until we understand what they are; and when the stakes are so high that first step is no matter for cursory attention. In all this, Jeremy Waldron's work has much to offer - even if it does not offer, and was never meant to offer, the final word.

James Edwards, criminal justice intern with JUSTICE, summer 2010.

JUSTICE briefings and submissions

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Available at www.justice.org.uk

1. Response to *The Coalition: Our Programme for Government*, April 2010;
2. JUSTICE Student Human Rights Network Spring Bulletin, May 2010;
3. Briefing on the Identity Documents Bill for Second Reading in the House of Commons, June 2010;
4. Response to the HM Treasury consultation on the Draft Terrorist Asset-Freezing Bill, June 2010;
5. Briefing for the UK on the European Investigation Order, July 2010;
6. *Criminal Justice: Areas for Action*, Criminal Justice Alliance (of which JUSTICE is a member) briefing, July 2010;
7. Briefing on the Defamation Bill for second reading in the House of Lords, July 2010;
8. Briefing on House of Commons renewal debate on 28 days pre-charge detention, July 2010;
9. Response to the Lord Advocate's Guidelines on Access to a Solicitor by Suspects in Scotland, July 2010;
10. Briefing on the Terrorist Asset-Freezing Bill for second reading in the House of Lords, July 2010;
11. Response to the Home Office Review of Counter-Terrorism and Security Powers, August 2010;
12. Briefing for the European Parliament and Council on the European Investigation Order, August 2010;
13. Briefing on European Commission proposal for a directive on the Right to Information in Criminal Proceedings, September 2010;
14. Joint NGO letter to Sir Peter Gibson concerning the torture complicity inquiry, September 2010;
15. Briefing and suggested amendments to the Terrorist Asset-Freezing Bill for committee stage in the House of Lords, joint with Liberty, September 2010;
16. Briefing and suggested amendments to the Terrorist Asset-Freezing Bill for report stage in the House of Lords, joint with Liberty, September 2010;
17. JUSTICE Student Human Rights Network Autumn Bulletin, October 2010;
18. Briefing on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, October 2010.

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