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Editorial

Reforming RIPA

This edition of the *Journal* reflects some of the breadth – and, indeed, depth – of JUSTICE's work over the last six months. For example, the papers and articles on Europe are derived from the Institute of Advanced Legal Studies conference *It Takes Two to Tango: the Council of Europe and the European Union* in which we were involved. *The Parlimentary Ombudsman and administrative justice* is the transcript from JUSTICE's Tom Sargant memorial annual lecture given by Parliamentary Ombudsman Ann Abraham. And, Francesca Klug's piece is her speech to one of our fringe meetings at the party political conferences on the Human Rights Act and the right of free expression.

In early November, we published a major report, funded by the Joseph Rowntree Charitable Trust, which was the culmination of more than a year's work by Dr Eric Metcalfe, formerly our director of human rights policy, on the reform of surveillance. The report is entitled *Freedom from Suspicion: Surveillance Reform for a Digital Age*. It is a major contribution to how the Regulation of Investigatory Powers Act 2000 (RIPA) should be reformed. Its publication is highly topical given the last minute withdrawal of a more benign assessment of the Act which was to have been published by Her Majesty's Inspectorate of Constabulary. Below is a slightly edited version of the concluding chapter of the report in which Dr Metcalfe reprises JUSTICE's position.

At the launch of his company's new networking software in January 1999, Scott McNealy, the CEO of Sun Microsystems, was speaking to reporters and analysts about internet security.[1] Dismissing concerns about online consumer privacy as a 'red herring', he apparently told the group, 'You have zero privacy anyway. Get over it'. Over a decade later, Mark Zuckerberg, the CEO of Facebook, told an audience in San Francisco:[2]

> *When I got started in my dorm room at Harvard, the question a lot of people asked was 'why would I want to put any information on the Internet at all? Why would I want to have a website?' And then in the last 5 or 6 years, blogging has taken off in a huge way and all these different services that have people sharing all this information. People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time.*

Whether or not a billionaire with a financial interest in harnessing his customers' private information is really the most objective person to assess a change in social norms, it seems clear that the digital capabilities of modern technology have begun to outstrip and erode our traditional expectations of privacy. But, contrary to the claims of some CEOs, this loss of privacy is not something to be accepted but something to be resisted and reversed. And central to this is a robust legal framework for its protection.

The law governing privacy is, of course, an issue that extends well beyond the use of surveillance by public bodies. But, as we have seen from the recent phone hacking saga, the legal framework for the use of surveillance powers lies at the heart of the broader law protecting privacy in the UK. It is, therefore, important to get that framework right. This is not just because privacy is important but because surveillance is important. It is, after all, a necessary activity in the fight against serious crime and a vital part of our national security. It has saved countless lives and helped convict hundreds of thousands of criminals.

Unnecessary and excessive surveillance, however, destroys our privacy and blights our freedoms. As Sir Erskine May wrote in the mid-19th century, 'the freedom of this country may be measured by its immunity' from what he described as the 'baleful agency' of the kinds of 'espionage which forms part of the administrative system of continental despotisms'. If that were true, however, then the freedom of this country is in a very sorry state indeed. Because RIPA has not only failed to check a great deal of plainly excessive surveillance by public bodies over the last decade but also, in many cases, inadvertently encouraged it. Its poor drafting has allowed councils to snoop, phone hacking to flourish, privileged conversations to be illegally recorded, and CCTV to spread.

After all, the importance of clear, well-drafted legislation is not just that it helps to meet the foreseeability requirements of Article 8(2) ECHR but also that it is easier for people to follow and courts to apply. RIPA, by contrast, is poorly drafted and hopelessly lacking in clarity. As the President of the Investigatory Powers Tribunal (IPT) Lord Justice Mummery himself conceded in 2006:[3] 'The experience of the tribunal over the last five years has been that RIPA is a complex and difficult piece of legislation'. A degree of complexity is perhaps inevitable when dealing with an issue as complex as surveillance. Nonetheless the need for legislation to be as simple and as clear as possible was powerfully expressed by Baroness Hale in a lecture earlier this year:[4]

> *[T]he law – the content of it – needs to be accessible. To be accessible it ought to be clear and simple. This seems to be a vain hope in today's complicated society … A great deal of time, trouble and money is wasted when the law is complex and unclear. It is a mistake to think that most*

> *lawyers want the law to be complex and unclear. There may be some top advocates in the higher courts who relish the wriggle room that unclear law gives them. But surely most want to be able to give their clients clear advice. Their clients' lives are messy enough.* The law should not also be a mess.

RIPA is not only unclear in its language but also very poorly thought out; especially its inadequate definitions of surveillance, its provision of no less than three oversight commissioners and four different schemes for authorisation.

RIPA is also badly out of date. As JUSTICE noted in a report 40 years ago, the traditional protections of the common law against eavesdroppers and peeping toms were already inadequate at the beginning of the 1970s, at a time when the average computer was still the size of a refrigerator and Britain's streets were free of CCTV. Despite the fact that RIPA was enacted in 2000, at a time when the digital revolution was already well underway, it is plain that it is equally inadequate to cope with such developments as aerial surveillance drones, Automatic Number Plate Recognition, deep packet interception, and indeed the Internet itself.

Most of all, RIPA fails to provide adequate safeguards against unnecessary and disproportionate surveillance. Indeed, with the honourable exception of the work of the Surveillance Commissioners in authorising intrusive surveillance, RIPA offers something worse: an illusion that the law is compatible with fundamental rights, one that conceals the reality of widespread executive self-authorisation, limited oversight, and only the most remote prospect of any kind of redress.

Although the amendments currently put forward by the Protection of Freedoms Bill are welcome, they are nowhere near enough: they are piecemeal amendments and RIPA is already a piecemeal Act. Root-and-branch reform of the law on surveillance is needed to provide freedom from unreasonable suspicion, and put in place genuinely effective safeguards against the abuse of what are necessary powers. In particular, our recommendations summarised below follow a number of general principles that we have identified in the course of this report. These are:

Prior judicial authorisation for surveillance decisions. This is the best safeguard against unnecessary and disproportionate interference with individual privacy. No matter how conscientious or diligent senior police officers, intelligence officials, civil servants or government ministers may be, they lack the necessary independence from the executive to provide an effective safeguard. This is, of course, why English judges have been responsible for the making of search warrants for centuries: it reflects the importance that we

attach to respect for private property by requiring the executive to make its case before an independent and impartial judge.[5] This is what the European Court of Human Rights has consistently recognised in its case law. It is also, not incidentally, why the Surveillance Commissioners – who are all serving or retired judges – are responsible for authorising the use of intrusive surveillance by the police under Part 2 of RIPA. We have not recommended that surveillance warrants issued by a judge are necessary in *all* cases: in particular, there is a great deal of relatively 'low level' surveillance that is carried out by the police and the intelligence services that would be both unnecessary and impractical to seek judicial authorisation for: eg, following a suspect's movements in public over the period of a week. Rather, we recommend that the need for prior judicial authorisation should reflect two factors: (i) the intrusiveness of the surveillance (which should *not* be confused with the relatively narrow definition of 'intrusive surveillance' under Part 2 of RIPA); and (ii) the nature of the agency responsible for carrying out the surveillance. In our view, the police, law enforcement bodies, and intelligence services can generally be trusted to use low-level surveillance in their day-to-day work without seeking the authorisation of a judge. It is not appropriate for non-law enforcement bodies, eg, local councils or the NHS Care Standards Commission, to use even low-level surveillance powers without judicial supervision. By contrast, use of intrusive surveillance methods (including interceptions) must always be authorised by a judge, no matter how experienced the agency carrying out the surveillance. It is possible to have a system of self-authorisation in an emergency (as, indeed, Part 2 of RIPA provides even in the case of intrusive surveillance by police). More generally, prior judicial authorisation of surveillance is standard practice in every other European and common law jurisdiction. It is, therefore, impossible to see why it should not also be standard practice in the UK.

Ex post facto oversight of surveillance powers by commissioners is, by contrast, of very limited effectiveness and must be rationalised. One of the striking features of RIPA is the number of overlapping oversight commissioners: the Interception of Communications Commissioner (who has responsibility over interceptions but also communications data requests and some oversight of encryption notices), the Intelligence Services Commissioner (who oversees the use of surveillance under RIPA by the intelligence services under Parts 2 and 3, with the exception of interception under Part 1), and the Chief Surveillance Commissioner (who oversees the use of surveillance under Parts 2 and 3 of RIPA by the police, other law enforcement bodies and all other public bodies except the intelligence services). To this, the Protection of Freedoms Bill proposes to add a Surveillance Camera Commissioner. In addition, there is an important parallel oversight role played by the Information Commissioner in relation to data protection and other privacy concerns. This is, plainly speaking, a hopeless arrangement, involving the

unnecessary proliferation of entities. The second striking feature of the oversight arrangements under RIPA is how limited they are. Their most important function appears to be the provision of inspection regimes of the various agencies carrying out surveillance. However, the actual review of surveillance decisions appears to be extremely limited: the selection of a dip sample of authorisations or warrants whose size remains unknown but – as far as anyone can tell – may be less than five per cent. More generally, several of the commissioners have produced reports that have varied little in their content from year to year. It is ironic that in 2005, the Chief Surveillance Commissioner (whose own reports are a fortunate exception to this rule) criticised the quality of authorisations for directed surveillance made by public bodies, saying that they 'must be intelligently completed without recourse to cut-and-paste'.[6] It is a criticism that could equally be applied to the reports of the Intelligence Services Commissioner or the Interception of Communications Commissioner. More generally, it makes little sense to have the same activity (eg, the making of encryption key notices) subject to oversight by as many as three different commissioners, depending on the agency involved. We, therefore, recommend that the oversight regime be rationalised, with the Office of the Chief Surveillance Commissioner assuming responsibility for oversight of the overwhelming majority of surveillance activities, including interception and all surveillance carried out by the intelligence services within the jurisdiction of the UK. We also recommend that the supervisory role of the Information Commissioner, who has substantial experience of privacy issues in relation to his oversight role over data protection, be extended to include so-called business interceptions and 'unintentional' interceptions by communications service providers, as well as communications data requests by non-law enforcement bodies. This is because of the now-substantial overlap between data protection issues and the privacy concerns raised by digital communications that do not involve the investigation of serious crime and/or threats to national security.

An IPT that relies solely on complaints brought by members of the public based on their suspicions alone can never be an effective check against unnecessary or disproportionate surveillance decisions. As Lord Neuberger noted in *In Re McE* in 2009, the use of secret surveillance involves at least two inherent paradoxes. The first is that it involves an inevitable degree of self-justification in that the basis for invading someone's privacy is the suspicion that they are involved in some kind of wrongdoing, which suspicion cannot be verified without invading their privacy. The second paradox is that the most effective safeguard against the unnecessary invasion of a person's privacy by a public body – ie, giving that person prior notice and allowing them the opportunity to argue their case before an independent judge – is impossible because it would defeat the very purpose of the surveillance. In almost every

case, therefore, victims of the misuse or abuse of surveillance powers will never know their privacy has been unjustifiably violated. As the sorry record of the Tribunal over the past decade shows – about three million surveillance decisions, over a thousand complaints but only 10 upheld, five of which came from the same case – a mechanism that relies solely on members of the public bringing complaints based on their suspicion can never be an effective check against the abuse of surveillance powers.

The law on surveillance must be made as clear and transparent as possible. As we have already seen, poor drafting and unnecessary complexity gives rise to a host of problems: the law is uncertain, difficult for public servants to follow, and difficult for courts and tribunals to apply; it gives rise to an increased risk of errors and, worse, the possibility of loopholes being exploited: something which in turn is enormously difficult to detect given the secret nature of surveillance itself. We do not know, for instance, if the narrow definition of s1 RIPA adopted by the Metropolitan Police was used in other circumstances by the police or indeed other public authorities to sanction the interception of communications without a warrant. This, in turn, reduces the possibility of effective democratic oversight of the law on surveillance, something which is essential if the public are to meaningfully debate whether to change the law, and what changes should be made. For better or for worse, surveillance will always be a technical and complex area of the law, but that is surely no reason to make it any more technical and more complex than it needs to be.

A PDF of the full report is available for download from JUSTICE's recently revamped website: www.justice.org.uk. Hard copies can be obtained for £10.00 (£9.00 for members) from JUSTICE, 59 Carter Lane, London EC4V 5AQ.

Roger Smith OBE is Director of JUSTICE.

Notes

1 'Sun on Privacy: 'Get Over It'', by Polly Sprenger, *Wired,* 26 January 1999.
2 'Privacy no longer a social norm, says Facebook founder', the *Guardian,* 11 January 2010.
3 *C v the Police and Secretary of State for the Home Department* (IPT/03/32/H, 14 November 2006), para 22.
4 *Equal Access to Justice in the Big Society*, Sir Henry Hodge Memorial Lecture 2011, p3.
5 See also eg, the recent comments of the Lord Chief Justice Lord Judge on the value of independent judicial decisions at the Lord Mayor's Dinner for HM Judges, Mansion House, 13 July 2011: 'the country is in the middle of the crisis that has embroiled the press and the politicians and the police. Perhaps it is just worth noticing that there would not have been any crisis but for public revulsion at the breaches of the confidentiality involving the victims of crime and war. And now, notwithstanding the constant criticism of judges public revulsion has led to the public demand for a judge led inquiry. That is not because anyone assumes that judges are infallible, or that the conclusions of judges will always carry universal acclaim. It is rather because the public knows that judges are men and women

of independent mind, who can be relied to draw whatever conclusion from the evidence seems right and who, notwithstanding whatever pressures there may be, can be relied on to deliver a carefully considered, honest, but above all, an independent answer. The public understands that we are indeed independent. Not infallible certainly, but independent, always. It is a cherished quality'.

6 *Annual Report of the Chief Surveillance Commissioner 2004-2005* (HC 444, November 2005), para 8.10.

A critical account of the accession of the European Union to the European Convention on Human Rights

Tobias Lock

This paper was delivered as part of the Institute of Advanced Legal Studies conference It Takes Two to Tango: the Council of Europe and the European Union.

Introduction

The relationship between the European Union (EU)[1] and the European Convention on Human Rights (ECHR) has been the subject of much academic writing.[2] This intense academic interest stems from the peculiarity of that relationship. The EU is not a party to the Convention, but all of its Member States are. For the EU, there can thus be no direct obligations flowing from that relationship. But because of the Member States' duty to abide by the human rights guaranteed in the Convention, the EU cannot ignore it either. This situation has given rise to an intricate case law, which I will discuss in the next section. In order to clarify their relationship, an accession by the EU to the ECHR has been discussed for more than 30 years.[3] The discussion abated after the Court of Justice of the EU (ECJ) found in Opinion 2/94, which had been requested by the European Commission under Article 218 (11) TFEU, that the EU lacked a competence to accede.[4] The Court held that Article 352 TFEU could not serve as a legal basis since the accession would in effect constitute an amendment to the Treaties. This would have gone beyond the scope of Article 352 TFEU.[5] But even if the ECJ had found the EU in possession of a competence to accede, an accession would have failed since the ECHR was only open to states and not to international organisations. These obstacles to an accession have recently been removed. Article 6 (2) TEU as amended by the Lisbon Treaty gives the EU not only the competence to accede but also places it under a duty to do so by stating that the EU 'shall accede' to the ECHR. The question, of course, is what this duty means in practice. It is clearly binding on both the EU and the Member States. This means that a Member State does not have the right to principally oppose this step. However, the provision leaves room for dissent by one or more Member States as regards the content of the accession treaty. One example would be a dispute about the extent of an accession, ie, to which Protocols the EU would sign up. Member States are not

obliged to accept every conceivable accession treaty. This makes the duty to accede hardly enforceable before the EU's courts.

As far as the Convention system is concerned, Article 59 (2) ECHR as amended by Protocol 14 opens the ECHR to an accession by the EU. Negotiations between the Council of Europe and the EU started in 2010[6] and the 'informal working group' conducting the negotiations presented a first draft agreement in February 2011[7] and a revised version shortly after.[8] Once a final draft has been agreed upon, the agreement will have to be ratified according to the procedure laid down in Article 218 (8) TFEU. This provision requires a unanimous decision by the Council, the consent of the European Parliament and the approval of all Member States according to their constitutional requirements. In addition, all 47 parties to the Convention have to ratify the agreement, which, in light of the difficulties around the ratification of Protocol 14, may take a long time.[9] Apart from these potential political obstacles, an opinion by the ECJ under Article 218 (11) is looming. It is very likely that one of the EU's institutions or a Member State will want to seek the go-ahead from the ECJ before incurring obligations under the Convention. Since an accession would subject the EU to the scrutiny of an external court, the European Court of Human Rights (ECtHR), the outcome of such an opinion is hard to predict. The drafters have to perform an extremely difficult task in not having their efforts thwarted by the ECJ. The recent Opinion 1/09, in which the ECJ declared the long-hatched plan of a European patent agreement to be incompatible with EU law, serves as a warning.[10]

This contribution aims to give an overview on why an accession by the EU to the ECHR should take place and how it can be accomplished. To do so, it will first discuss how far the Member States can already be held responsible for violations of the Convention found in EU action. Having established why an accession is nonetheless worthy of being pursued, the article will provide a critical analysis of some of the more problematic provisions contained in the draft agreement.

The current relationship between the EU and the ECHR

Since the EU has not yet signed up to the ECHR, it cannot be held directly responsible before the ECtHR. An application directed against the EU is inadmissible ratione personae.[11] But since the EU's Member States are bound by the ECHR, and since the EU exercises delegated authority, the Member States can often be held responsible in its place. The ECtHR pointed out in *Matthews:*

> *The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.*[12]

Matthews concerned the right to vote in elections to the European Parliament, which had been denied to inhabitants of Gibraltar by the 1976 EC Act on Direct Elections even though the EU Treaties partly applied there.[13] The Court found this to be in violation of Article 3 of Protocol 1 to the ECHR, which guarantees the right to free elections. It held the United Kingdom responsible because it had freely entered into the commitments under the Act, which was concluded as a Treaty. The ECtHR specifically pointed out that the Act could not be challenged before the ECJ since it formed part of EU primary law.[14] *Matthews* thus established a general responsibility of Member States for violations of the Convention originating in EU law. The rationale behind it is that the Member States should not be able to escape their duties under the Convention by transferring sovereign rights onto international organisations.

In the *Bosphorus* case, the ECtHR had a chance to confirm its decision in *Matthews* and to refine its findings.[15] Bosphorus was a Turkish airline which had leased an aircraft from the Yugoslav National Airlines. That aircraft was impounded by Irish authorities at Dublin airport following a strict duty arising from an EU Regulation[16], which transposed a UN Security Council Resolution[17] inter alia demanding the impoundment of all aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. After domestic remedies, which included a reference to the ECJ[18], remained unsuccessful, Bosphorus took the case to Strasbourg and complained that the measures taken by the Irish authorities had violated its right to property guaranteed by Article 1 of Protocol 1 ECHR. Having re-affirmed the Member States' responsibility under the ECHR for EU action, the ECtHR went on to distinguish the case before it from *Matthews*. While *Matthews* dealt with Member State obligations flowing from primary EU law, *Bosphorus* was about an obligation under secondary law, ie, legislation passed by the EU's institutions, which is challengeable before the ECJ. The ECtHR then held that where a Member State has no discretion in implementing the obligations arising from EU legislation, there would be a rebuttable presumption that the EU had complied with the rights guaranteed in the Convention as long as the EU 'is considered to protect fundamental rights … in a manner which can be considered at least equivalent to that for which the Convention provides'. The presumption is rebutted where the protection in the particular case was 'manifestly deficient'. The ECtHR regarded the protection granted by the EU to be equivalent pointing to the development in the fundamental rights protection offered by EU law and the enforceability of these rights in the ECJ.[19] Moreover, the ECtHR did not regard the protection in the *Bosphorus* case to have been manifestly deficient.[20] The *Bosphorus* presumption means that the Court will not normally review EU legislation. Only where the Member States had discretion in implementing that legislation is a case declared admissible. This was for instance the case in *M.S.S.*[21] where the ECtHR pointed to the possibility of a Member State examining an application for asylum even where under the Dublin Convention

it was not obliged to do so. Since there was thus no strict duty incumbent on a Member State to send an asylum seeker back to the country through which she first entered the EU, the *Bosphorus* presumption did not apply.[22] The reason why the ECtHR engages in a review in such cases is that there is a chance that the violation was the fault of the Member State which may have implemented EU law in a manner which violates the Convention even where the legal basis for that implementation (EU legislation) did not.

The *Bosphorus* presumption has been the subject of much criticism.[23] But it is suggested that the presumption is justified since it is recognition of the unresolved legal relationship between the ECHR and the EU. While it would be against the spirit of the Convention to allow the Member States to rid themselves of their duty to obey Convention rights by transferring sovereignty on the EU, the ECtHR recognises that the EU is not a party to the Convention and thus does not fully scrutinise its actions. This means, however, that the presumption should be given up once the EU has officially become a party to the ECHR.[24]

Why accession?

The question then arises whether the EU should sign up to the Convention at all. As has just been demonstrated, the Member States can be held responsible in Strasbourg for violations of the Convention originating in the EU. Furthermore, the Lisbon Treaty has greatly increased the protection of fundamental rights in the EU since it declares the EU's Charter of Fundamental rights to be binding. This means that in addition to the fundamental rights previously existent as (unwritten) general principles of EU law, there is now a codified written bill of rights for the EU, which can be enforced before the ECJ and national courts.[25] What real difference would it make if the EU became a party to the ECHR?

It is argued here that there are good reasons for an accession of the EU to the ECHR. One can distinguish a substantive legal argument and policy-based reasons. The legal reason for an accession is that it would close an existing gap in the protection of fundamental rights in Europe. This gap became evident in the *Connolly* decision of the ECtHR.[26] *Connolly* was an official working for the EU Commission who was dismissed after having published a book entitled 'The rotten heart of Europe' without obtaining permission from the Commission. He instigated proceedings against his dismissal before the Courts of the EU, but was unsuccessful. He then took his case to the ECtHR, complaining that his right to a fair trial contained in Article 6 ECHR had been violated since he had not been given an opportunity to respond to the opinion delivered by the ECJ's Advocate General.[27] The ECtHR declared the application, which was directed against the then 15 Member States of the EU inadmissible ratione personae as the act complained of did not occur within the jurisdiction of the Member

States as is required by Article 1 ECHR. *Connolly* thus introduced an important redefinition of the *Matthews* case law. According to *Connolly*, the Member States are not responsible in all circumstances where an international organisation of which they are members has acted. They are only responsible where there was some implementing action by their authorities. This case law appears to be against the general spirit of the Matthews case according to which the reason for the Member States' responsibility was that they had transferred their own sovereign rights onto the EU. The EU was perceived to exercise only delegated authority. *Connolly* contradicted this reading of *Matthews* and created a gap in the protection against EU acts.[28] An accession of the EU to the ECHR would close this gap. If the EU had been a party to the ECHR, Mr Connolly's dismissal would have occurred within the EU's jurisdiction according to Article 1 ECHR and the EU would have been responsible in Strasbourg. *Connolly* shows that cases where there is currently no involvement of a Member State do not come within the jurisdiction of the Strasbourg court. Such cases include not only cases between the EU and its employees such as *Connolly*, but also EU administrative action, eg, by the European Commission in competition or anti-corruption law or by EU agencies such as Frontex.[29] Thus an accession by the EU to the ECHR would lead to a significant extension of the Convention.

In addition to this, it is hoped that an accession will bring in line the standard of fundamental rights protection in Europe. Divergences in the jurisprudence of the two European courts, which currently exist, would be removed in the long run.[30] From my point of view, this is a less pressing demand. First, there are not many divergences between the case law of the two European courts at the moment. The two courts routinely look to one another when deciding a case and draw inspiration from each other's decisions. Second, the danger of divergences in the case law of the two European courts has been overstated.[31] For one, the ECJ is free to grant greater protection of fundamental rights according to Article 52 (3) of the EU Charter of Fundamental Rights. This can naturally lead to different standards of protection. Furthermore, the Convention is not interpreted in a static manner but in the words of the ECtHR is 'a living instrument which must be interpreted in the light of present-day conditions'.[32] This means that the interpretation of one and the same provision can change over the years. It is axiomatic that even where the ECtHR has already decided on a matter, the ECJ may come to a different interpretation in a later case in view of improvements in the overall human rights protection in Europe.[33]

Apart from this legal argument, there is also a policy-based argument for an accession relating to the EU's credibility as a defender of human rights. It is well known that the EU pursues a human rights policy, has a Commissioner responsible for fundamental rights (currently Viviane Reding) and requires that applicant states respect human rights as a conditio since qua non for EU

membership.[34] The EU's credibility as a promoter of human rights throughout the world would, therefore, be honed if it signed up to the most successful human rights instrument in existence. Furthermore, if the EU did not sign up to the Convention it would join the undemocratic regimes of Belarus and the Vatican as the only entities in Europe not parties to it.

The draft accession treaty

While there seems to be a general consensus of both the EU and the Council of Europe that the EU should accede to the ECHR as soon as possible[35], the technical difficulties of effectuating this step must not be underestimated. This contribution focuses on a number of points which are apparent from the first draft accession treaty and which mainly concern the procedure before the ECtHR in cases involving the EU or EU law. Most notably, these are the co-respondent mechanism and the prior involvement of the ECJ in these matters. Other issues prove less problematic and will only be addressed briefly.

1. The co-respondent mechanism

The idea of introducing the procedural device of a co-respondent goes back to a 2002 report by the Council of Europe's Steering Committee on Human Rights[36] and has been revived by the informal working group on accession. The notion behind it is this: it is normally the Member States which implement EU legislation. This has become evident in *Bosphorus* where Ireland impounded the aircraft on the basis of an EU Regulation. Under the present case law of the ECtHR outlined above, the applicant can hold the Member State responsible in such cases even where the violation of the Convention can be traced back to the piece of EU legislation in question. In other words, the Member States are responsible for almost everything the EU does, with the exception of *Connolly* type cases. This situation would not change after an accession. But the difficulty would be that the EU could be held responsible either alternatively to or alongside the Member States. Where both the EU and a Member State are respondents in proceedings, the danger would be that one of them (or both) would raise a defence arguing that the violation fell within the competence of the other. In order to avoid burdening the ECtHR with the ungrateful task of deciding where exactly the responsibility lies in such cases, the co-respondent mechanism would give the applicant the possibility of holding both responsible at the same time. What is more important, however, is that the ECtHR's decision to join the EU and a Member State as co-respondents would not necessitate a determination of their competences under the EU Treaties. Such determination would fall foul of the requirement that an international agreement concluded by the EU preserves the autonomy of the EU legal order. The ECJ set out the requirements for that autonomy in its opinion 1/00:

> *… that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered*
>
> *… that the procedures for ensuring uniform interpretation of the rules of the … agreement and for resolving disputes will not have the effect of binding the Community and its institutions in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement.*[37]

While the co-respondent mechanism can be seen as a way of avoiding clashes with that autonomy, there is no guarantee that the actual draft might create new conflicts with that principle.

Turning to the current version of the draft, one can see that an applicant can bring the case against both as co-respondents from the outset. Alternatively, the ECtHR would be given the opportunity to invite the EU or a Member State to join proceedings as co-respondent where there is a connection with EU law. The current version of the revised draft treaty, amending Article 36 ECHR, states this:

> 4. Where an application is notified to the European Union or to a member state of the European Union, or to both of them, and it appears that an act or omission underlying an alleged violation notified could only have been avoided by disregarding an obligation under European Union law, [a High Contracting Party] / [either of the High Contracting Parties] may become a co-respondent to the proceedings by decision of the Court.
>
> 5. The co-respondent shall have the status of a party to the proceedings. Article 35, paragraph 1 shall not apply with regard to the co-respondent.
>
> 6. The decision by the Court referred in paragraph 4 shall be taken after having heard the views of all the parties concerned.
>
> 7. In cases involving co-respondents, the Court may hold the High Contracting Parties concerned jointly responsible for a violation of the Convention.[38]

According to the draft, the co-respondent mechanism would be applicable in three scenarios. The first is where a Member State is held initially responsible. The second is where the EU is initially held responsible, and the third is where Member State and EU are held responsible from the outset.

a. Member States as initial respondents

The EU can be added as a co-respondent to proceedings brought against a Member State where that Member State can only avoid a violation of the ECHR by violating EU law. In other words, the co-respondent mechanism presupposes the existence of a normative conflict between obligations incumbent on the Member State under the law of the EU and under the ECHR. The conditions for the mechanism are, therefore, quite strict. Only where a Member State had no way of (legally) avoiding a violation of the Convention due to its obligations under EU law, can the EU become a co-respondent. The conditions for the application of the mechanism are, therefore, similar to those for the application of the Bosphorus presumption. This is a remarkable deviation from the first draft, which foresaw that the mechanism would be applicable where there appeared to be a 'substantive link' with EU law.[39] The current version of the draft raises a number of constitutional and practical problems, which are briefly addressed here.

One problem with requiring a normative conflict is that it appears to grant the ECtHR jurisdiction to assess whether such a conflict exists. This requires an interpretation of EU law which might be in violation of the autonomy of the EU legal order.[40] As explained above, this autonomy is violated where an EU agreement gives another international court jurisdiction to interpret EU law.[41] The drafters seem to have been aware of this problem for the draft agreement provides that 'the Court shall assess whether the reasons stated by the High Contracting Parties concerned are not manifestly incomplete or inconsistent.' The ECtHR is only to conduct a superficial examination of a potential co-respondent's claim that the conflict required actually exists. It will remain to be seen whether this will satisfy the ECJ that the autonomy of EU law has not been violated. In particular, a conflict is sometimes difficult to establish especially where the ECJ has not yet ruled on the interpretation of EU law. Thus the older formulation requiring the appearance of a substantive link might prove more compatible with the requirements of EU law. It is also argued that the requirement of a substantive link would be easier for the ECtHR to establish since it could be presumed to exist wherever the parties refer to obligations under EU law.

This is further confirmed when looking at violations of the Convention brought about by omissions. The draft rightly distinguishes between violations brought about by actions and those brought about by omissions since the case law of the ECtHR shows that the failure to act can equally constitute a violation of the ECHR.[42] According to the draft,

the EU can only become a co-respondent where the omission could not be avoided without violating obligations under EU law. This would involve cases where the Member State could not act because it lacked the competence to do so under EU law. This would force the ECtHR to make its assessment based on the division of competences between the EU and the Member States, which would again be in violation of the autonomy of the EU legal order.[43]

The explanatory notes to the draft agreement reveal that the EU could become a co-respondent either at its own request or by invitation of the ECtHR. For the latter case, the report makes it clear that the EU could not be forced to become a co-respondent against its will.[44] In order for the Convention system to remain effective, it would, however, be necessary to ensure that where the EU refuses to be joined to the proceedings as a co-respondent, the respondent Member State would not be able to invoke a defence arguing that it was not responsible for the violation because of its obligations under EU law. The core of the Matthews decision, which established the general responsibility of the Member States, would have to be retained. Otherwise, Member States could escape their responsibility by transferring sovereignty onto the EU. Another point that remains opaque is whether the ECtHR's decision would be a purely formal one or whether the ECtHR would have a degree of discretion in this question.

In view of these issues, it is submitted that the conditions for the application of the co-respondent mechanism should be re-drafted. This author cannot see a convincing argument why the EU should have a right to refuse to be joined as a co-respondent. Where it is initially nominated as a respondent, it has no choice but to defend itself. Why should that not be the case when the EU is joined at a later stage? Furthermore, the criterion for triggering the mechanism could be altered as well. I would suggest that it should be up to the original respondent to ask the Court to join the EU as a co-respondent. This solution would shift the burden of assessing whether EU law could potentially be the source of a violation from the ECtHR to the respondent Member State. It is submitted that that Member State is in a much better position to make that assessment as it would have better information about its own legal obligations under EU law. Furthermore, this solution would remove the danger of violating the autonomy of EU law. Admittedly, cases are conceivable where a Member State might designate the EU as a co-respondent in a case which clearly has no relationship with EU law whatsoever. But such a designation would constitute an abuse of process and should be dismissed by the ECtHR for that very reason.

b. EU as the initial respondent

The alternative is that the EU is nominated as the initial respondent. In that case, one or more Member States can be designated as co-respondents where the violation could only have been avoided by disregarding EU law. Since the EU can avoid violations arising from EU legislation by amending legislation, this situation appears to be directed at cases where the violation is found in EU primary law, ie, mainly the Treaties.[45] Such a situation was present in the Matthews case where the violation could only be remedied by way of a Treaty change. The Treaties can only be changed according to the procedure laid down in Article 48 TEU, ie, by the Member States and by the EU itself. Thus, in these types of cases the involvement of the Member States as co-respondents is desirable. The draft is not quite clear as to which Member States would be designated. Since compliance with a judgment would necessitate a Treaty amendment for which the consensus of all Member States would be necessary, it would make sense to designate all of them as co-respondents. This again shows that leaving the decision to join proceedings as a co-respondent up to the co-respondent, in this case the Member States, is not desirable. It might well happen that some Member States would decide not to partake in proceedings which would result in them not being strictly bound by the ECtHR's decision as res judicata while others would.

c. EU and Member State from the outset

Where both EU and Member State are held responsible from the beginning, the Court would have to decide the same substantive questions. If the Court answers them in the negative, ie, comes to the conclusion that the conditions for co-respondent status do not exist, the EU and the Member State would have to be treated like respondents in cases where an application is brought against two or more parties to the Convention. In this author's opinion, the main difference would be that the applicant would have to exhaust domestic remedies in both jurisdictions in order to have an admissible claim against both. The case would be treated like two independent cases.

2. The prior involvement of the ECJ

A question related to the co-respondent mechanism is that of the prior involvement of the ECJ in such cases. The background is as follows: prior to instigating proceedings before the ECtHR, the applicant must exhaust all remedies at the domestic level according to Article 35 (1) ECHR. This is to ensure that the national courts are given an opportunity to remedy violations, which is

an expression of the subsidiary protection offered by the Court of Human Rights. In this respect, it is important to note that the question of domestic remedies would only become pertinent in the first alternative envisaged by the draft, ie, where a Member State is initially held responsible for having violated the Convention when implementing obligations arising from EU law. Conversely, where EU primary law violated the Convention, there is no domestic remedy under EU law or Member State law.

Where both a Member State and the EU are held to account as co-respondents, an applicant has usually exhausted remedies before the Member State's courts only. The reason is that the applicant will normally only have been in contact with national administrations and instigated judicial review proceedings against their decisions before the domestic courts. According to paragraph 5 of the draft, Article 35 (1) ECHR shall not apply to the co-respondent. This means that the domestic remedies under EU law would not have to be exhausted if the EU were to become co-respondent. This distinguishes the co-respondent mechanism from situations where the application is brought against multiple respondents.

A remedy under EU law would be available at least in some cases under Article 263 (4) TFEU, which allows individuals to challenge EU legislation under certain circumstances.[46] The co-respondent mechanism thus reduces the burden on the applicant who might otherwise be compelled to pursue two routes regarding domestic remedies. Given the fact that many applicants might not even be aware of the relevance of EU legislation to their complaint, this would seriously undermine the object and purpose of the accession, which is to improve the protection of fundamental rights for individuals.

But at the same time, dispensing with the requirement laid down in Article 35 (1) ECHR might deprive the ECJ of its opportunity to rule on whether EU legislation is in violation of the Convention. While the ECJ may be involved by the domestic courts via the preliminary reference procedure under Article 267 TFEU, there is no guarantee that this actually happens. Domestic courts of last instance are under a duty to make such a reference according to Article 267 (3) TFEU. The same goes for any domestic court, which is of the opinion that EU legislation is invalid.[47] However, there are exceptions. Courts of last instance need not make a reference where an interpretation by the ECJ is not necessary to enable the court to give judgment, where the interpretation is clear (acte clair) or where the ECJ has already pronounced on the question (acte éclairé).[48] Furthermore, a domestic court might wrongly assume that there is no duty to make a reference. There is no way for an individual to compel the court to refer a question to the ECJ. In such cases, there is a danger that in a subsequent application to the ECtHR, it would be asked to decide on a violation which has its origin in EU law but upon which the ECJ has not yet had a chance to decide.

This would be contrary to the spirit of the subsidiarity of the ECtHR's review. Thus, the drafters decided that the ECJ should be given an opportunity to remedy the violation where it has not yet had a chance to do so. The following provision is included in the draft:

> *Where the European Union is a co-respondent to the proceedings and where the Court of Justice of the European Union has not yet ruled on whether the act of the European Union ... conforms with the fundamental rights at issue, the Court of Justice of the European Union shall have the opportunity to do so [prior to the decision of the European Court of Human Rights on the merits of the case / during the examination of the case before the European Court of Human Rights]. The European Union shall ensure that such ruling is delivered quickly so that the proceedings before the European Court of Human Rights are not unduly delayed. The procedure of the European Court of Human Rights shall take into account the proceedings before the Court of Justice of the European Union.*[49]

It is noteworthy that the procedure only applies to the ECJ and not to the courts of Member States where a Member State is a co-respondent. The question is why the informal working group does not foresee the prior involvement of those courts. It is submitted that such involvement would not be necessary. Where the EU is the original respondent, the applicant would have exhausted his domestic remedies in the EU courts. The complaint would, therefore, be limited to a violation of the applicant's rights by EU actions or omissions and not by the law of the Member States. For such cases an involvement of the national courts would not be necessary since they do not have jurisdiction over the validity of EU measures. However, the main reason for the involvement of Member States as co-respondents would be violations found in primary law.50 In such cases all (currently) 27 Member States would be equally responsible for the violation and could thus be invited as co-respondents. Some highest courts of the Member States claim jurisdiction over the compatibility of the Treaties with their national constitutional requirements, so that a prior involvement of these courts would be possible.51 Yet there are good reasons not to involve them in the same manner as the ECJ. First, there is the practical dimension: if 27 highest courts had to deliver an opinion on the matter before the ECtHR could decide the case, the complaint would remain unresolved for a very long time. Second, the introduction of such a procedure would be an implicit acknowledgement of the superiority of national constitutional law over the Treaties, thereby contradicting the ECJ's case law on the primacy of EU law.52 Third, one main reason for the ECJ's prior involvement is to give the EU a chance to solve the issue internally without the embarrassment of being reprimanded by an external institution. This would not be avoided if one of the highest national courts were

to find an infringement. Therefore, there are good reasons not to introduce a similar prior involvement of national courts.

The draft provision provokes three questions. First, how the procedure is triggered; second, what procedure should be applied within the EU; and third, what the consequences of a decision by the ECJ would be.

a. Circumstances which trigger the procedure

The procedure is limited to cases in which the EU is a co-respondent. Where the EU is the main respondent, a prior involvement would not be necessary since the remedies to be exhausted are those before the ECJ. Yet the proposal makes no allowance for an involvement of the ECJ in the unlikely situation in which the EU decides not to join the proceedings as a co-respondent even where the case raises issues of EU law. This would mean that there would be no prior pronouncement by the ECJ while the ECtHR might find that EU legislation has violated the Convention. But it would be wrong to regard this as a deficit in the procedure on the prior involvement of the ECJ. Rather it is a consequence of the EU's freedom to choose whether it wishes to join proceedings as a co-respondent.[53] Arguably, if the EU chooses not to join the proceedings, it implicitly waives its right to have the EU measure reviewed internally.

Turning to more substantive questions, one practical issue arising from the draft is whether the ECtHR would have to formally request the ECJ to make a ruling or whether the EU's institutions would decide independently of the ECtHR. The wording of the draft is open in this respect in that it only speaks of the ECJ being given the opportunity to rule. It is not entirely clear whether a formal court order by the ECtHR would be needed in order to give the ECJ the opportunity to make a pronouncement. From the point of view of the Convention, the EU's institutions (including the ECJ) are free to examine the validity of EU legislation at any time. Thus, the first sentence of the draft would not have an independent meaning if it were only to be read as a re-statement of the ECJ's competence to review EU legislation. But it is unlikely that this was the intention of the drafters. It is, therefore, suggested to regard it at least as an internal instruction to the ECtHR to allow time for the ECJ to decide. This would require the ECtHR to at least inform the parties that it would give the ECJ such an opportunity. Further support for this argument can be found in the third sentence, which attaches legal consequences to the involvement of the ECJ by providing that the procedure before the ECtHR must take into account the proceedings before the ECJ. It seems that this consequence must be triggered by a decision of the ECtHR to give the ECJ the opportunity to make a ruling.

But the question remains under which circumstances the ECtHR should make such a decision. It is clear from the wording of the draft that this should either

be the case before the ECtHR addresses the merits or while the ECtHR examines the case. This implies that the ECJ would only get involved where the ECtHR has found the case admissible. This is a sensible solution as it would avoid unnecessary proceedings before the ECJ, eg, in cases where the ECtHR finds the application manifestly ill-founded. It is suggested here that the ECtHR should open up the opportunity to involve the ECJ in every admissible case, which the EU has joined as a co-respondent. It would then be up to the EU's institutions to decide whether they should instigate such a review. They might, for instance, decide not to do so where the ECJ has already found in unrelated proceedings that a piece of legislation is compatible with the EU's fundamental rights. This would avoid a complicated assessment by the ECtHR as to whether the ECJ has already pronounced on a question. This assessment would not always be easy to make since even where the ECJ has made a pronouncement in the case, it may not have addressed the violation of fundamental rights. Or it may have addressed fundamental rights but not all rights the violation of which is argued before the ECtHR.

b. What should be the procedure before the ECJ?

The draft does not address the procedure before the ECJ, which is advisable given the strict interpretation by the ECJ of the autonomy of the EU legal order. That autonomy requires inter alia that an agreement concluded by the EU must not lead to an amendment of the Treaties through the backdoor by conferring new powers onto the EU's institutions which are incompatible with the powers they have under the Treaties. Currently, the procedures available under the Treaties would be the preliminary reference provided for by Article 267 TFEU and the legality review under Article 263 TFEU. It is generally possible for courts which are not courts of the Member States to make preliminary reference to the ECJ if this is provided for by an EU agreement.[54] However, it must be clear that the ECJ's answers to those references would be binding to the referring court. Since the purpose of the procedure envisaged by the draft agreement is not to get an authoritative interpretation of EU law from the ECJ but to give the ECJ a chance to remedy alleged human rights violations contained in EU law, this case law does not seem to be applicable. But the EU Treaties do not foresee a procedure by which an international court can simply ask the ECJ for its interpretation of EU law. Thus, it would be difficult to reconcile a preliminary reference from the ECtHR to the ECJ with the Treaties as they currently stand.

As for a legality review, there would be fewer problems with the autonomy of EU law. However, the legality procedure can only be instigated by certain applicants, chief among them the EU's institutions. If this route were pursued, it would involve a two-step process. First, the ECtHR would decide which cases ought to be presented to the ECJ. Second, one of the EU's institutions would have to instigate proceedings according to Article 263 TFEU. I would suggest

that the European Commission should be entrusted with this task. The reason is that the European Commission would represent the EU before the Court of Human Rights anyway and would, therefore, be familiar with the proceedings in question. Since the Commission is also the 'guardian of the Treaties' this would be a fitting task for the Commission.

c. Consequences of a decision by the ECJ

The third sentence of the draft provides that the procedure before the ECtHR takes into account the proceedings before the ECJ. This provision refers to the procedural effect of proceedings being instigated in the ECJ. The ECtHR would normally wait for the ECJ to have decided in the matter before rendering its own decision.[55] Apart from that, the draft avoids any further pronouncements on what consequences the ECJ's involvement might have on the case pending before the ECtHR. Proceedings before the ECJ on the validity of legislation can have two possible outcomes. Either the ECJ declares the act not to be in conformity with fundamental rights, which renders it invalid, or the ECJ does not find a violation and the act continues to be good law. Where the ECJ does not find a violation, the ECtHR will have to engage with the case and proceed to make a pronouncement on its merits.

Where an act is declared invalid, the legal basis for the implementing action by the national authorities of the respondent Member State must be deemed to never have existed,[56] which renders their implementing action illegal (unless there are national rules in place to the same effect). The question is whether the ECtHR may take this into account as depriving the applicant of her victim status. According to Article 34 ECHR only persons claiming to be the victim of a violation of the Convention can file an admissible application. In proceedings before the ECtHR, an applicant loses their victim status where the violation is removed.[57] However, the situation would be more complicated here since the ECJ's declaration does not in principle affect the decisions of the domestic courts, which are now res judicata and can, therefore, be enforced in the Member State. An instructive parallel can be drawn to a situation where a provision of national law has been revoked after an applicant has been convicted on its basis. This was the case before the European Commission of Human Rights,[58] which decided that the applicant had lost his victim status not simply because the legislation had been revoked but because the court decisions had been quashed, too. In line with this reasoning I would argue that the applicant would remain a victim for as long as the decision affecting her has not officially been annulled by the national authorities.[59] If the national authorities do not react, the proceedings before the Court of Human Rights would have to be continued. The question then would be whether the ECtHR should be allowed to find a violation of the Convention without further investigation, which would in effect lead to the ECtHR being bound by the decision of the

ECJ. This, however, might challenge the ECtHR's role as the ultimate interpreter of the Convention. In addition, it must be borne in mind that the ECJ would not only apply the fundamental rights found in the ECHR but it would apply the EU's fundamental rights as laid down in the Charter of Fundamental Rights and as they exist as general principles of EU law. This is affirmed by Article 52 (3) of the Charter of Fundamental Rights, which provides that the Union may provide more extensive protection than that required by the ECHR. If the ECtHR were simply to follow the ECJ's assessment, it would risk overstepping its own jurisdiction as it is limited to decide on violations of the rights laid down in the Convention and in the Protocols by which the parties to the dispute are bound. Furthermore, there would be a danger of creating new case law, which domestic courts of parties to the Convention and even the ECtHR itself might rely upon in the future even though that case law is not fully attributable to the ECtHR. Thus the ECtHR should come to an independent decision.

3. Other issues

Furthermore, the EU will take part in the supervision of the execution of judgments by the Council of Europe's Committee of Ministers. The EU's participation in the Committee of Ministers is not automatic since the EU will not become a party to the Council of Europe. However, the accession agreement would amend Article 54 ECHR so as to give the EU full rights of participation in the Committee of Ministers where that Committee acts as an organ of the Convention.[60]

There are a number of other issues which an accession agreement will address. One of the most politically controversial points might prove to be the question to which Protocols the EU should accede. The revised draft agreement foresees an accession to Protocol 1 and 6 only. This solution represents a minimal compromise as Protocol 1 and 6 are the only ones containing substantive rights which all EU Member States have ratified so far. It is suggested that this is a pragmatic solution since otherwise some Member States might object to the EU's accession out of a fear that they might be obliged to follow a Protocol which they had deliberately avoided to ratify.

There also seems to be consensus that the EU should be represented by its own judge.[61] This of course would mean that one of the EU's Member States will have two of its nationals sitting on the ECtHR. However, this is nothing unusual since there is a long tradition of Liechtenstein nominating Swiss nationals as judges. The ECtHR's internal procedures should, however, have to make sure that the EU judge does not normally deal with cases against the Member State from which he or she originates to avoid two judges from the respondent state forming part of the Chamber which is called upon to decide the case.[62] The EU judge would be elected by the Parliamentary Assembly of the Council of

Europe according to the ordinary procedure laid down in Article 22 ECHR. For this purpose, the European Parliament would send a delegation to participate in the election.[63]

Article 3 of the revised draft gives the EU an explicit right to make reservations when acceding to the Convention. This mirrors the state parties' right under Article 57 ECHR and is, therefore, nothing unusual.[64] It is not expected that the EU will make use of this right since any reservation it may have could have been included in the draft accession agreement.

Conclusions

This short paper shows that there are good reasons for the EU to accede to the ECHR. However, it is also clear that such an accession is a difficult task to achieve. The negotiators are facing pressures from all sides: political and legal. While some technical solutions may seem politically desirable, there is a danger that the ECJ will declare them to be incompatible with the EU Treaties. This does not make it an easy task for the negotiators. The EU's representatives have been given strict negotiating directives[65] to achieve the EU's goals, chief of which is the involvement of the Court of Justice. The interests of the Council of Europe are different. Its representatives have the effectiveness of the Convention system in mind, which is a pressing issue before the background of the massive case load faced by the Court of Human Rights. Finally, the agreement will have to win the favour of the ECJ, whose possible rejection of the agreement hangs like a Damocles sword over the negotiating table. What is important is that the negotiators do not forget that the paramount aim of an accession is to improve the human rights protection of individuals in the EU. Any technical solution found should be checked as to whether it complies with this aim. If this is assured, the EU's accession to the ECHR will certainly become another milestone towards further European integration and at the same time towards more checks of the EU's powers.

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Notes

1 This contribution refers to the EU throughout even where the EU was called EC or EEC at the relevant time. Reference is also made to the current version of the EU's Treaties.

2 Examples are M Sørensen, *Berührungspunkte zwischen der europäischen Menschenrechtskonvention und dem Recht der Europäischen Gemeinschaften, Europäische Grundrechtezeitschrift 1978, 33; G C Rodríguez Iglesias, Cour de justice des Communautés européennes et Court européenne des Droits de l'Homme, in:P Mahoney, et al (eds), Protecting Human Rights: The European Dimension, Studies in memory of Rolv Ryssdal, Carl Heymanns Verlag, Cologne 2000, 19; Tridimas, The General Principles of EU Law, 2nd. ed., OUP, Oxford 2005, 342; P Craig/G de Búrca, EU Law, 4th edn, OUP, Oxford 2007, 385; C Grabenwarter, Europäische Menschenrechtskonvention, 3rd edn, Verlag C. H. Beck, Munich 2008, 27; S Douglas-Scott, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights*

Acquis, 43 Common Market Law Review (2006), 656; G Harpaz, The European Court of Justice and Its Relations With the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy, 46 Common Market Law Review (2009), 105.

3 Heribert Golsong, Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften, Europäische Grundrechtezeitschrift 1978, 346; European Commission, Memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bulletin of the European Communities, Supplement 2/79; for even earlier discussions in the context of the drafting of the European Political Community Treaty, cf. G de Búrca, The Evolution of EU Human Rights Law, in: Craig/de Búrca (eds), The Evolution of EU Law, 2nd edn., Oxford, OUP 2011, 467.

4 This article refers to the 'EU' and to the current version of the Treaties throughout.

5 Opinion 2/94, [1996] ECR I-1759, para 30.

6 Council of Europe, press release 545(2010), 7 July 2010; the Council gave the Commission a mandate for negotiation on 4 June 2010 with negotiation directives (Document 9689/10), which remain classified.

7 CDDH-UE(2011)04.

8 CDDH-UE(2011)06.

9 It is recalled that Russia refused to ratify Protocol No 14 for a number of years, cf. B. Bowring, The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR, Goettingen Journal of International Law 2 (2010) 2, 589 (605).

10 Opinion 1/09 of 8 March 2011, nyr.

11 *Confédération française du travail v European Communities, no 8030/77, D.R 13, 236.*

12 *Matthews v United Kingdom [GC], no 24833/94, ECHR 1999-I, para 33.*

13 *Matthews, para 11.*

14 *Matthews, para 33.*

15 *Bosphorus v Ireland, no 45036/98, 42 EHRR 1.*

16 Regulation 990/93/EEC [1993] OJ L 102/14.

17 SC Res 820 (1993).

18 Case C-84/95 *Bosphorus v Minister for Transport [1996] ECR I-3953.*

19 *Bosphorus v Ireland, no 45036/98, 42 EHRR 1, paras 159-165.*

20 *Bosphorus, para 166.*

21 *M.S.S. v Belgium and Greece, no 30696/09, nyr, 21 January 2011*

22 *M.S.S., para 338.*

23 Most notably in the Court itself, cf. joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova and concurring opinion of Judge Ress; A. Haratsch, Die Solange Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, 66 Zeitschrift für ausländisches und öffentliches Recht (2006), 929 (936).

24 A more detailed argument can be found in T Lock, EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg, European Law Review (2010), 777.

25 For the situations in which the Charter is applicable, cf. P Craig, *Lisbon Treaty, Oxford, OUP 2011, 206.*

26 *Connolly v 15 Member States of the EU, no 73274/01, 9 December 2008.*

27 This point had been the issue in the decision of *Emesa Sugar v Netherlands, no 62023/00, 13 January 2005 where it had been left open and was finally resolved in Kokkelvisserij v Netherlands, no 13645/05, 20 January 2009, nyr, where the ECtHR did not find a violation of the Convention.*

28 A more detailed analysis of the ECtHR's post-Bosphorus case law can be found in: T Lock, Beyond Bosphorus, Human Rights Law Review (2010) 10(3), 529.

29 On the responsibility of Member States for searches conducted as a consequence of a recommendation by OLAF, the EU's anti-fraud office, cf. *Tillack v Belgium (App no 20477/05) 27 November 2007 and the article by S White, The EU's Accession to the Convention on Human Rights, New Journal of European Criminal Law (2010), 433, 441.*

30 Examples can be found in J Callewaert, The European Convention on Human Rights and European Union law: a long way to harmony, European Human Rights Law Review (2009), 768.

31 On such divergences, cf. D Spielmann, Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities, in: Alston (ed), The EU and Human Rights, OUP, Oxford 1999, 757.

32 The Court first used this expression in *Tyrer v United Kingdom, no 5856/72, ECHR A26*.
33 On the consensus as a method for determining such changes, cf. A. Kovler/V. Zagrebelsky/L. Garlicki/D. Spielmann/R. Jaeger/R. Liddell, *The role of consensus in the system of the European Convention on Human Rights, in: Dialogue of Judges 2008, available at: http://www.echr.coe.int/NR/rdonlyres/D6DA05DA-8B1D-41C6-BC38-36CA6F864E6A/0/Dialogue_between_judges_2008.pdf*.
34 Articles 49 and 2 TEU, which reflect the so-called Copenhagen criteria, originally found in Conclusions of the Presidency, European Council June 21-22 1993, SN180/1/93 REV 1.
35 Cf. Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, doc. 17024/09, which argues for a 'rapid accession'.
36 Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2.
37 Opinion 1/00 *European Common Aviation Area [2002] ECR I-3493*.
38 Article 4 of the revised draft agreement, CDDH-UE(2011)06.
39 Article 4 of the first draft, CDDH-UE(2011)04.
40 At length on the autonomy of EU law: T Lock, EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg, European Law Review (2010), 777.
41 Opinion 1/91 [1991] ECR I-6079, para 41.
42 E.g. *Airey v Ireland, no. 6289/73, Series A 32; X and Y v The Netherlands, no. 8978/80 Series A 91; López Ostra v Spain, no. 16798/90, Series A303-C; Mosley v United Kingdom, no 48009/08, nyr, 10 May 2011*.
43 This is clear from Opinion 1/91, in which the ECJ declared it to be incompatible with the autonomy of the EU legal order if another Court is given jurisdiction to decide on the division of competences, Opinion 1/91 [1991] ECR I-6079, para 35.
44 Draft revised explanatory report, CDDH-UE(2011)08, para 41.
45 This seems to put an end to early proposals mooted by the French government that violations originating in primary law should be excluded from the ECtHR's jurisdiction, cf. French Senate, Communication de M. Robert Badinter sur le mandate de négociation (E 5248), 25 May 2010, at: http://www.senat.fr/europe/r25052010.pdf.
46 On the new wording of Article 263 (4) TFEU see: T Lock, EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg, European Law Review (2010), 777 (789).
47 Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125*.
48 Case 283/81 *CILFIT [1982] ECR 3415*.
49 Article 4 (6) of the revised draft agreement, CDDH-UE(2011)06.
50 Supra.
51 Most famously the German Federal Constitutional Court, cf. its latest decisions on the Lisbon Treaty (30 June 2009), joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 and in the Honeywell case 2 BvR 2661/06 (10 July 2010).
52 Case 6/64 *Costa/ENEL [1964] ECR 585; Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125*.
53 Cf. the criticism voiced supra.
54 Opinion 1/91, 1/92…
55 Cf. explanatory report, CDDH-UE(2011)05, para 68.
56 The ECJ's declaration has retroactive effect, cf. ECJ joined cases 97, 193, 99 and 215/86 *Asteris [1988] ECR 2181, para 30*.
57 Frowein/Peukert, *Europäische Menschenrechtskonvention, Art. 34, 3rd ed., (Kehl 2010), para 32*.
58 *Sert v Turkey, no 17598/90, 1 April 1992*.
59 A similar argument is made in the explanatory report, CDDH-UE(2011)05, para 66.
60 Article 8 Revised Draft Agreement, CDDH-UE(2011)06; in this respect fears of EU 'block voting' in the Council of Ministers have been raised, cf. speech by the President of the Parliamentary Assembly, Mevlüt Çavusoğu at the Izmir Conference, 26 April 2011, which can be found here: http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20PACE.pdf.
61 Draft revised explanatory report, CDDH-UE(2011)08, para 59.

62 Art 26 (4) ECHR provides that the judge representing the respondent state is an ex officio member of the Chamber deciding.

63 Art. 7 draft revised agreement, CDDH-UE(2011)006.

64 Draft revised explanatory report, CDDH-UE(2011)08, para 27.

65 Document 9689/10, which is largely classified.

The Parliamentary Ombudsman and administrative justice: shaping the next 50 years

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The 2011 JUSTICE/Tom Sargant memorial annual lecture was based on the text of this paper.

Introduction

Let me take you back 50 years to 1961. In 1961:

- The first edition of *Private Eye* was published;
- The farthing ceased to be legal tender in the UK; and
- Helen Shapiro was top of the charts with *Walking back to happiness*.

And it was 50 years ago this month – in October 1961 – that JUSTICE published a report by Sir John Whyatt QC, former Attorney-General of Kenya and Chief Justice of Singapore, entitled *The Citizen and Administration: The redress of grievances*.

It is, of course, a great privilege to give this annual Tom Sargant Lecture, especially in this anniversary year. I know that Tom Sargant was the Secretary of JUSTICE for 25 years, from its foundation in 1957 to his retirement in 1982. And that in 1961 he played an important part in the commissioning of the Whyatt Report.

It is also a privilege to follow in the footsteps this evening of such distinguished predecessors, many of them law lords, professors of public law or other senior legal practitioners.

I stand before you, however, as none of these things. I am not a lawyer by profession, although some of my predecessors as parliamentary ombudsman have been lawyers. Still less am I a member of the judiciary, although I am frequently called upon to make decisions that might easily have found their way to the administrative court.

One of my former ombudsman colleagues, Julian Farrand, himself a law professor and one-time Law Commissioner, once remarked that judges and

ombudsmen are like chalk and cheese: superficially similar but fundamentally different. I trust that what I have to say will not prove too indigestible for this distinguished legal audience.

Although it took a change of government in 1964 before Whyatt's recommendation of a UK parliamentary ombudsman was implemented in the Parliamentary Commissioner Act 1967, it was the Whyatt Report, nonetheless, that should be credited with bringing to this country not just the parliamentary ombudsman but also the ombudsman institution itself.

I want this evening, by glancing 50 years over my shoulder, to identify some themes that might help shape the ombudsman agenda in the years that lie ahead.

In doing so, I want in particular to reassert the institutional importance of the parliamentary ombudsman - its importance as a democratic institution, part of our constitutional landscape, as well as its importance as an agent of social justice and fairness, part of our administrative justice landscape. It is with this inter-relationship between democracy and justice that I am primarily concerned and on which I want to propose a vision for the ombudsman of the future.

Whyatt: 1961 and all that

It was Harold Wilson's Labour government that introduced the 1967 Act, and Harold Wilson too who famously said that a week is a long time in politics.

We can, I'm sure, agree that 50 years is a long time in civil and administrative justice, even if the wheels of reform have not always turned as quickly and as smoothly as we would have wished.

We can capture something of the degree of change that has occurred since 1961 by recalling the sort of grievances that commentators in the late 1950s and early 1960s thought a parliamentary ombudsman might deal with.

One such case was dubbed the 'battle of the pylons' by the tabloid press and led the local MP, Sir Lionel Heald QC, to condemn the Central Electricity Authority for displaying what he described as 'tyrannical bureaucracy of the worst degree' by placing an electricity pylon on the land of one of his farming constituents.

And then there was the case of 'the Carlisle Publicans'. Hard to imagine in these days of the shrinking state and an 'open all hours' drinking culture, but in 1961 there were actually 163 state-owned pubs in Carlisle, the residue of an experiment in nationalised alcohol regulation introduced by Lloyd George. When a dispute arose between the Carlisle Publicans and their employer, the

Home Office, their MP had to secure the appointment of a special tribunal to hear the case following an adjournment debate on 30 June 1959.

And of course there was Crichel Down, the compulsory purchase dispute that in 1954 became a byword for maladministration and the abuse of power by government officials, and that more than any other case was cited subsequently as the mischief that the ombudsman was designed to remedy.

As Lord Shawcross, then chair of JUSTICE, put it in his preface to the Whyatt report:

> *Too often the little man, the ordinary humble citizen, is incapable of asserting himself. The little farmer with four acres and a cow would never have attempted to force the battlements of Crichel Down.*

We might now, I trust, add 'the little woman' too, and expand on Lord Shawcross's somewhat rustic characterisation of the 'ordinary humble citizen', but we can, I think, still take his point.

Whyatt's chief innovation was to recommend some form of 'permanent machinery' to examine such cases and complete the work that had been commenced by the Franks Committee in its report on administrative tribunals and enquiries in 1957.

Sir Oliver Franks himself wrote the foreword to the Whyatt report, pointing out that even after his own inquiry there remained considerable areas of public administration where the aggrieved citizen still lacked redress against the State. The entire field of maladministration had, in fact, fallen outside Franks's remit.

His committee had, therefore, realised, he said, that 'here lay another and formidable task'. In Whyatt, that task had been carried through. As Franks put it, 'the gap has been filled'.

Whyatt's proposals for filling the gap had four features in particular to which I want to draw attention.

- The first was the constitutional position of the ombudsman.
- The second was the distinctive nature of this new ombudsman system of justice.
- The third was the creation of a coherent ombudsman system within a broader integrated 'system' of administrative justice.

- The fourth and final feature was the close relationship between the ombudsman and citizens' rights.

Let me say a little about each of those four features – starting with the constitutional position of the ombudsman.

The constitutional position of the ombudsman

Whyatt's substantive recommendation was the creation of what he called 'new machinery' to supplement, not supplant, Parliament as a channel for the airing of citizens' grievances against the state.

Neither 'watchdog of the public' nor 'apologist of the administration', this new ombudsman machinery would be 'the independent upholder of the highest standards of efficient and fair administration', a guardian of good practice rather than a mere judicial combatant.

The constitutional significance was all too clear according to Whyatt:

> *We consider, that a new institution, modified in the way we suggest, could be assimilated into our constitution and would be an important step forward in restoring the balance between the individual and the State, which, in this particular sphere of public administration, is still seriously disturbed.*

It is not surprising then that Lord Shawcross called the inquiry a 'really important constitutional exercise' and that Sir Oliver Franks located the advent of the ombudsman in what he described as that wider 'struggle between liberty and authority'.

It was in this broadly libertarian climate of the early 1960s that Whyatt emerged to articulate the need for a new institution, the institution of ombudsman.

A distinctive ombudsman system of justice

The second feature I want to note is Whyatt's recognition that this new institution was, critically, to be different from the courts, the most familiar institution at the time for resolving disputes. The ombudsman was to be a system of justice but a system modelled not on the domestic common law courts but on the inquisitorial approach adopted further afield. The chief characteristics of this new institution were to be 'impartiality' and 'informality'.

When it came to considering possible models for the ombudsman, Whyatt, quite naturally, turned his gaze to Scandinavia, where the ombudsman institution had existed in Sweden since 1809, in Finland since 1919, and where,

in Norway in October 1961, a bill was before the Parliament for the creation of an ombudsman office in Oslo.

Sandwiched between the Norwegian and Swedish models, and holding particular attraction for Whyatt, was the example of Denmark, where an ombudsman had been in existence since 1955 and whose practice had also shaped a Bill before the New Zealand Parliament during that summer of 1961.

As Whyatt noted, however, there was an important difference between the Swedish and the Danish models. Whereas the approach of the Swedish ombudsman was, in his own words, 'like that of a judge', applying objective legal standards to the grievance in hand, the Danish ombudsman was more flexible, less constrained by strictly legal norms and expectations.

It was the Danish model that Whyatt favoured and put forward for emulation, what he called a 'tribunus plebis' or 'representative of the people', impartial, open, informal, and of high reputation, guided by principles not rules and committed to norms based on what is fair and reasonable rather than a strict test of legality.

So attractive, in fact, was the Danish model, noted Whyatt, that in 1961 the Danish Ombudsman, Professor Stephan Hurwitz, was even receiving complaints from UK citizens who hoped that his remit extended across the North Sea.

It didn't.

A coherent ombudsman system within a broader integrated 'system' of administrative justice

The third feature I want to draw attention to is the recognition by Whyatt of the ombudsman as a comprehensive and coherent part of a broader integrated system of administrative justice.

As mentioned earlier, Sir Oliver Franks openly acknowledged that his own report covered only part of the administrative justice landscape. Whyatt was very conscious too of the function of his report as a complement to the Franks Committee Report and of the way in which the ombudsman was closely implicated in the development of the wider administrative justice system of which Franks had been the instigator.

In the Whyatt vision, the new ombudsman institution would itself lay claim to clearly-defined territory and comprehensive coverage. It would not only investigate complaints about central government departments, about the health service and about local government, but also about public-sector employee

relations and the discharge of public sector contracts. In the event, the 1967 Act was far more modest in its proposals, unfortunately leaving in its wake a legacy of fragmentation and at times downright incoherence – about which I will say more in a moment.

The close relationship between the ombudsman and citizens' rights

The fourth and final feature I want to mention is the explicit positioning of the ombudsman institution in the context of citizens' rights and entitlements.

It was Lord Denning, cited by Whyatt, who had first made the connection, in his maiden speech in the Lords in 1958. Like Franks himself, Denning had spotted a gap, 'the Crichel Down cases', where the grievance was 'abuse or misuse of power in the interests of the Department at the expense of the individual'.

This question of the misuse of power, or maladministration, could not, Lord Denning said, wait too long: it was after all, he said, the 'third chapter' of this 'new Bill of Rights', a necessary complement to Franks and an expression of his 'three principles of good administration', namely, openness, fairness and impartiality.

To speak these days of a 'new Bill of Rights' is of course to invite a somewhat different discussion. It is, however, significant to note that in 1961 the ombudsman idea was explicitly linked to that broader assertion of citizen entitlement of which the Franks Committee Report in 1957 and the establishment of the Council on Tribunals in 1958 had formed an important part.

Summary

In summary then:

- the constitutional position of the ombudsman;
- the distinctive ombudsman system of justice along the lines of the Danish model;
- the recognition of the ombudsman as a comprehensive and coherent part of a broader integrated system of administrative justice; and
- the close relationship between the ombudsman and citizens' rights.

These four broad aspects of Whyatt's thinking continue to resonate 50 years later and, I suggest, should continue to provide essential bearings for our future vision and direction.

Administrative justice: why it matters

Before I go any further, let me remind you why any of this matters. Administrative justice can sometimes seem the poor relation by comparison

with the civil, criminal and family justice regimes. Yet citizens are just as likely, if not more likely, to come across administrative justice issues in their ordinary lives than civil or even family justice issues. The outcomes of decision making by a wide-range of public bodies on a daily basis affect family incomes, jobs, healthcare, housing, education and much, much more.

To illustrate the point – in 2010 in England and Wales:

- there were around 63,000 hearings/trials dealing with civil justice matters;
- there were more than 200,000 criminal justice hearings/trials;
- there were more than 650,000 administrative justice hearings – of which over 275,000 were about social security and child support.

In the circumstances it is inexplicable – some might even say perverse - that the government has seen fit to seek to abolish the Administrative Justice and Tribunals Council whilst retaining the Civil Justice Council and the Family Justice Council. But Parliament has yet to take a final decision on that matter, so I will limit what I say about it here.

What I will say is that, based on my experience of the last nine years, the task of humanising the bureaucracy, first articulated by the incoming Wilson government in 1964, remains as critical as ever.

Let me give you an example from my recent caseload of how the State bureaucracy can still conspire to rob an ordinary citizen of any sense of empowerment.

The case of Ms M and 'the system' out of control

This is a case that neatly involves three of my most regular customers. Ms M's address details were held by a number of different government agencies, including, unsurprisingly, HM Revenue & Customs, the Child Support Agency and the Department for Work and Pensions. In 2006, her personal details were wrongly changed on one government agency's computer system to show her living at her former partner's address. In fact, she had never lived there.

With alarming efficiency, these false personal details instantaneously spread across an entire network of government computer systems and before long had fallen into the hands of her former partner. As a result, her child support entitlement was incorrectly reassessed and reduced without her knowledge.

When my office investigated Ms M's complaint, we found it likely that her details had been incorrectly changed by the Tax Credit Office and then passed to other agencies' computer systems by the linked-in computer network.

But none of the bodies involved would accept responsibility, preferring instead to pass the buck to one another and, somewhat chillingly, arguing that since the mistake had been made by 'the system' there was nothing they could do about it.

We disagreed and recommended that HMRC pay her £2,000 compensation and correct the false entry on 'the system'.

Just as importantly, we also recommended that the three agencies concerned work with the Cabinet Office to decide how to respond in future to complaints of this sort which cross organisational boundaries. And that the Cabinet Office takes steps to ensure that lessons are learned from Ms M's experience and that appropriate guidance is disseminated to all government departments.

What was especially disturbing about this case, however, was the disempowerment of the citizen, the sense of helplessness induced by the knowledge that the bureaucratic machine, now enhanced by a form of technology scarcely imagined in 1961, was out of human control.

It was striking too that in this instance the complainant's MP, not for want of trying, proved quite unable to sort it all out, thus providing an apt illustration of why, as Whyatt foresaw, there is a need for 'permanent machinery', to assist Parliamentarians in holding the Executive to account.

It would be consoling to think that this was an exceptional case. But there is plenty of evidence from the ombudsman's casebook that this sort of disempowerment remains a common fact of public administration.

'Pre-democratic' administration

Despite lots of attempts over the years to make public services more responsive and accountable to the citizens they serve, it is clear that too many people still feel helpless when pitched against 'the great juggernaut of the State'; and that what we might call 'pre-democratic' patterns of administration still persist.

As one commentator concluded in 1961, but in words that still resonate 50 years later, it is sometimes 'difficult to feel that the spirit of democracy has been very deeply or widely learned'.

And that I suspect is still a big part of the problem. We may have learned the basics of customer service, at least to the extent that our public administration as often as not now comes packaged with the veneer of client care and customer focus. And that is certainly progress of a sort.

Too often, however, we still seem to miss the connection between public administration and democratic practice, the recognition that it is in their encounters with officialdom that most citizens get a sense of what the democratic state is like; of whether they will be listened to and how much their voice and their experience counts; and of what it means to participate in democratic society.

When we talk about the 'democratic deficit', we should not forget that the tone in which public life is conducted is largely set by the personal experience we share of public service delivery, whether in the job centre, the council offices, or the hospital ward.

We are, I fear, to a large extent still locked in to those 'pre-democratic' patterns that were all too evident even 50 years ago.

And whilst the language may be somewhat different, it seems to me that it is those 'pre-democratic patterns' of public service that the recent Open Public Services White Paper – which talks about 'choice', 'localism', 'diversity' and 'fairness' - is still seeking to tackle.

All this is by way of reminding ourselves why administrative justice matters, why it is not some arcane discipline best left in the shadows, but something that is fundamental to ordinary daily life with much wider implications for the ever-contested territory between state and society, the central and the local, the individual citizen and officialdom.

And it is because administrative justice matters that we must remain vigilant, alert to the implications of the changes that we make - and just as importantly - of the changes we fail to make.

The legacy of Whyatt today

Let me return to Wyatt and its aftermath, to its legacy for today and for our attempts to chart a way forward for the ombudsman and for administrative justice more generally.

It is sometimes said that the 1967 Act was an attempt to translate the ombudsman idea into what was described at the time as an *'English idiom'*.

I want to suggest that something important was lost in translation, something important in respect of each of those four essential features to which I have drawn attention: the constitutional position of the ombudsman; the distinctive nature of the ombudsman system of justice; the ombudsman as a comprehensive and coherent part of a broader integrated administrative justice

system; and the close relationship between the ombudsman and the protection of citizens' rights.

The constitutional position: the ombudsman and Parliament

As I have said, the Whyatt Report was written very much in the spirit of constitutional reform, with the constitutional implications of what was being suggested central to the ensuing debate.

At the heart of that debate was the relationship between the ombudsman and Parliament, and the role of MPs in mediating that relationship. It was, for example, variously stated that the ombudsman should have 'Officer of Parliament' status and report to a dedicated Select Committee; that complaints should be put to the ombudsman by MPs on behalf of those with grievances, at least for a period of five years; and that the role of the ombudsman was in essence to serve as a check on the Executive branch, to assist Parliament in the task of holding the Executive to account.

That task and the challenge of discharging it effectively have become more, not less, acute with the passage of time. An abiding theme of political commentary in the last two decades has been the decline of Parliamentary sovereignty and the advance of untrammelled Executive power. Yet the constitutional position of the ombudsman has, at the same time, been downplayed and denied the prominence it deserves.

Too often debate about the ombudsman, especially in the wake of the civil justice reforms of Lord Woolf, has been about the ability to provide 'alternative dispute resolution' as a way of relieving the burden on the court system. This is, however, to sell short the ombudsman's potential and to deny it the important function of transcending the inherent individualism of dispute resolution, with all the limitations that entails.

It is, after all, one of the unique selling points of any ombudsman scheme that, unlike the courts, it has the inbuilt ability to get beyond the individual case, to spot patterns of deficiency and to make recommendations for systemic change that go much further than redressing the failings of a single individual's adverse encounter with an organ of the state – important as that remains.

More than that, the parliamentary ombudsman in particular has a place at the heart of the constitution, holding to account the Executive in its day-to-day encounters with citizens. The absorption, and success, of the ombudsman model within the framework of consumer redress tends to obscure that recognition, leading instead to the characterisation of all ombudsmen as a type of small claims court, and nothing more.

The ombudsman's ability to make recommendations for systemic as well as individual remedy, to report directly to Parliament drawing attention to examples of poor administration and unremedied injustice, make it a much more significant player than that.

The ombudsman system of justice: towards a 'public institution'

This leads me nicely to the question of what we have made of Whyatt's insight that the Ombudsman comprises a different, non-judicial, system of justice; that within the administrative justice landscape the parliamentary ombudsman has a distinctive role to play.

The fact that the ombudsman is free from the constraints of the court system means that ease of access and flexibility of process should be its hallmarks, that its method of fact-finding should be inquisitorial not adversarial, and that its findings should lead to recommendations rather than to binding judgments in the judicial style.

There is much of this that has survived the test of time, notwithstanding occasional calls for legally enforceable recommendations, conformity of process to judicial expectations and for the testing of oral evidence in an adversarial forum, none of which would significantly enhance the ability of the ombudsman to fulfil its distinctive mandate.

The issue of access, however, remains a sore point. Much of the campaign for an ombudsman in the late 1950s and early 1960s stemmed from the fact that MPs were becoming what were described as 'grievance chasers' on behalf of their constituents, not in any systematic way but on an entirely haphazard and ad hoc basis. The adjournment debate, preceded by sustained MP investigation, had become the last resort for taking up certain sorts of citizen grievance. As already indicated, it was largely to provide some permanent 'machinery' to discharge this potentially burdensome function that the ombudsman idea gained currency.

Yet, when it came to the business of putting that ombudsman idea into statutory form, what we ended up with was might be described as a 'research and reporting' office at the service of MPs, with MPs as the only route of referral and, on the face of it, with the sole entitlement to future involvement with the investigative and reporting process.

The citizen with a grievance was in danger of being air-brushed out of the process entirely.

The result was to make the ombudsman what Douglas Houghton MP referred to at the time as a 'Parliamentary and not a public institution', somewhat remote from Joe or Jane public and of interest mainly to the Westminster and Whitehall elite, to politicians, bureaucrats and the occasional academic lawyer or political scientist – a challenge that is still with us today.

Whereas in places like New Zealand, and more recently South Africa, the ombudsman was developing outreach programmes to target marginalised communities, going out into those communities to raise awareness and receive complaints, in the UK the citizen with a grievance had to make do with a copy of the ombudsman's final report, the original having been sent to the referring MP.

When I was appointed in 2002 the practice was still to send a copy of the parliamentary ombudsman's report on a case to the referring MP – and rely on them to send it on to the complainant. And my then legal adviser was counselling me against departing from this long-established practice.

To their credit, at the time the office was created, JUSTICE and Whyatt argued that this so-called MP filter should be tried for a test period of five years and then, all being well, abandoned.

Here we are 50 years later with the MP filter still in place, albeit perhaps more precariously so than for some time. The Law Commission's report in July recommended its abolition and my own recent consultation on the subject confirms almost universal disenchantment with it – other than with MPs themselves.

More than anything else, the morbid after-life of the MP filter constitutes a derogation from what I take to be the original Whyatt vision of the ombudsman as an institution that is both public and parliamentary.

The parliamentary credentials of the ombudsman do not rest on an MP filter that looks increasingly out of place in the 21st century UK. And, indeed, always looked out of place from pretty much anywhere else in the world.

As I have said, my office recently carried out a consultation on whether the MP filter should be removed – and citizens given direct access to the parliamentary ombudsman.

This is a quote from the response to that consultation from the European Ombudsman, Nikiforos Diamandouros. Nikiforos is a distinguished political scientist – and was the first Greek Ombudsman.

He said:

> *My colleagues from Sweden, Finland and Denmark, who represent the most long-established Ombudsman offices in the world – dating respectively from 1809, 1919 and 1955 – are quintessentially parliamentary ombudsmen. All of them would regard as, frankly, bizarre the idea that members of parliament should decide whether or not the Ombudsman may deal with a complaint.*

He went on to say:

> *More generally, I am not aware of any democratic country, other than the United Kingdom, which places a political obstacle in the way of citizens who wish to complain to the Ombudsman.*

And neither am I.

The ombudsman and administrative justice: an integrated 'system'?

Turning to the third limb of the Whyatt legacy, what do we find has become of the recognition that the ombudsman would form a coherent and comprehensive part of a broader and inter-related set of functions, of, in other words, something that might credibly call itself a 'system' of administrative justice, with all the trappings of coherence and co-ordination that implies?

In the event, all the proposed parts of the ombudsman's remit were in fact excluded in 1967, except for the investigation of complaints about central government departments - the other pieces in the administrative justice jigsaw being left to a process of ad hoc self-assembly over the next two decades.

Bit by bit the landscape has been populated: by the local government ombudsman; by employment and other specialist tribunals; by the Health Service Ombudsman; by the Northern Ireland Ombudsman and, more recently, by the Housing Ombudsman in England and by separate Public Sector Ombudsmen in the devolved administrations in Scotland and Wales.

This incremental development, accompanied in the last decade by the emergence of a plethora of intermediate complaint-handlers and reviewers, has produced a fragmented and incoherent system for dealing with complaints about public administration.

At best, arm's length bodies, such as the Department for Work and Pensions' Independent Complaints Examiner, provide a specialist forum for resolving disputes – an independent voice within the system if you like. But there is a wide

range of different models, introduced by separate government departments, at different times, for different reasons – offering differential rights of access to dispute resolution – and so various in their remits that the citizen can hardly know where to start or what to expect.

At worst, the Ministry of Justice – which of all government departments should know better – sponsors the Prisons and Probation Ombudsman, which brands itself as an ombudsman, whilst remaining in the parliamentary ombudsman's jurisdiction – and for that reason alone (although I could cite others) failing to meet the British and Irish Ombudsman Association's criteria for recognition of a bona fide ombudsman scheme.

No wonder the punters are confused.

It is salutary to recall also that the most significant review of public sector ombudsmen in this country was that conducted on behalf of the Cabinet Office by Colcutt in the year 2000. The Colcutt review called for, amongst other things, an integrated public sector ombudsman for England. In the event, these proposals were overtaken by the devolution settlement – and the concept of an integrated public service ombudsman scheme was taken up enthusiastically on their creation by the Scottish Parliament and the Welsh Assembly - but not the Westminster Parliament.

The result is a one-stop shop for complaints about public bodies in Scotland and in Wales but not in England, where the separate jurisdictions of Health Service Ombudsman and local government ombudsman still exist, albeit modified by the possibility of joint investigation, for example, where a complaint crosses the boundary between health and social care.

This arrangement was put in place some years ago by way of a Regulatory Reform Order - which my local government ombudsman colleagues and I try womanfully to operate in the best interests of our mutual complainants – but which I can only describe in polite company as 'challenging'.

In Scotland, Wales and Northern Ireland, the UK Parliamentary Ombudsman retains responsibility for complaints about 'reserved functions', and in England for most public authority functions other than those in local government and the National Health Service. In practice, the same person has always held the offices of Health Service Ombudsman for England and UK Parliamentary Ombudsman, but there is no statutory requirement to that effect.

In addition, we have Housing Ombudsman in England who is a hybrid of public and private remit; in England and Wales we have an Independent Police

Complaints Commission, which is a sort of ombudsman but doesn't call itself one; and a Prisons and Probation Ombudsman, who is not an ombudsman at all.

So the public service ombudsman system has developed in an incremental and incoherent way, to the extent that it might now be considered part of the problem rather than its solution.

The process of fragmentation has not, however, been confined to ombudsmen. The ambition of an integrated administrative justice system has also faded. Administrative justice in the round has been prey to incremental change which has failed to recognise the inter-relationship between ombudsmen, the courts, other forms of dispute resolution and first-instance decision-making.

It is telling in this context to note again that one of the proposed victims of the Public Bodies Bill is the Administrative Justice and Tribunals Council, created in 2007 to amplify the work undertaken since 1958 by its predecessor the Council on Tribunals. The creation of the AJTC in response to the 2004 *Transforming Public Services: Complaints, Redress and Tribunals White Paper* seemed at last to reaffirm Whyatt's vision of an integrated administrative justice system. If it is abolished, any such hope can only evaporate.

The supposition that the Ministry of Justice, with its historic emphasis on civil justice and its current preoccupation with criminal justice, might fill the gap is surely fanciful. The reality sadly is that with the disappearance of the AJTC the prospect of an administrative justice system worthy of the name is as remote as ever.

Citizens' rights: achieving a change of 'culture'

Let me turn finally to the fourth feature of Whyatt to which I want to draw attention - citizens' rights.

Despite the pointer provided by Whyatt, the language of rights is not the first language of ombudsmen, at least not in the Anglo-Saxon world.

In Eastern Europe and the Hispanic countries, where my ombudsman colleagues glory in the title of Defensor del Pueblo, the protection of human rights is frequently an explicit part of the job. The South African Public Protector, with whom my office has established strong links, operates with a broad concept of 'humanity' or 'Ubuntu' that comes close to human rights principle, and entails a constitutional right to good administration that is firmly within the human rights orbit.

Closer to home, the Danish Ombudsman, the model for Whyatt, was recommending as long ago as 1962 that prisoners' rights be extended to include the right to vote in parliamentary elections.

I like to think that here in the UK we have at least absorbed the underlying sentiment of Whyatt in this regard. The *Principles of Good Administration* that I published in 2007 gave concrete expression to the fundamental human rights principles of fairness, respect, equality, dignity, and autonomy.

As an example of the application of those human rights principles I would point to the policies and illustrative cases described in the report I published this week on complaints about disability issues.

Whilst making it clear that it is not my job to make findings of law, that report demonstrates the commitment to ensuring that public bodies within the ombudsman's remit recognise and respond to the rights and individual needs of disabled people. This is an approach that is informed by, but distinct from, the legal enforcement of those disability rights contained in the Equality Act 2010 and formerly enshrined in the Disability Discrimination Acts.

The examples cited in that report, offering a snapshot across the whole spectrum of public service delivery from the NHS to the Children and Family Court Advisory and Support Service, to the UK Border Agency, demonstrate that it is also an approach capable of delivering not just meaningful individual redress but the potential for systemic reform, frequently in ways that are simply not available within the remedial straitjacket of the judicial process.

Let me share one of those stories with you. This is Mr R's story.

Mr R has learning disabilities and a mental health condition. He went overseas on holiday to stay with some family friends. His parents had intended to travel with him but were unable to do so because of his father's ill health. This was the first time that Mr R had travelled abroad alone.

On his return, he was stopped at his local airport by two trainee customs officers because he was carrying a large amount of tobacco. He was then interviewed about his trip abroad, how it had been funded, and the tobacco.

Contrary to the UK Border Agency's own guidance, the customs officers did not check at the start of the interview whether Mr R was fit and well, or whether he had any medical condition they needed to be aware of. Nor did they ask him to read and sign the notes of the interview. If they had done, they would have discovered that Mr R could not read or write.

The officers strip-searched Mr R - at one point leaving him naked.

One of the reasons given for the strip-search was that Mr R appeared 'nervous' and 'evasive' when questioned. Although Mr R referred to his disabilities and one of the officers wrote 'mental health problems, disability' in his notebook, the officers simply continued with the interview and the search.

No drugs were found. Mr R was eventually allowed to leave, but the tobacco he had been carrying was seized.

My investigation found that the UK Border Agency had no regard for Mr R's disability rights in the way that it carried out its functions. As soon as Mr R referred to his disabilities, the customs officers should have stopped the interview and re-arranged it so that an appropriate adult could be present. Instead, they pressed on regardless, and, in doing so, failed to follow the Agency's own interviewing protocols, which might have helped them to identify Mr R's disabilities and deal with him appropriately as a vulnerable adult.

An appropriate adult would have been able to explain that Mr R's difficulties in answering questions were due to his learning disabilities and not evidence of evasive behaviour. Not only was it unlikely that the encounter would have progressed so far as a strip search, but Mr R would have had the support and protection he was entitled to in what for him was a terrifying situation. Not surprisingly, he never wanted to go near an airport again.

We upheld the complaint. The UK Border Agency apologised to Mr R and paid him £5,000 compensation for the distress, humiliation and anxiety they had caused him. In an attempt at restorative justice, we asked the Agency to explore with Mr R and his mother what they might do to enable Mr R to feel comfortable using his local airport in future.

The Agency also agreed to review the disability awareness training provided to their customs officers, with a particular emphasis on identifying non-visible disabilities such as learning disabilities and mental health conditions.

This is a good example of the ombudsman providing redress for the individual – and also recommending systemic improvements for a wider public benefit.

But also a salutary reminder of Whyatt's observation all those years ago about the need to redress the balance between the individual and the State – which from my experience is still too often 'seriously disturbed'.

Back in 2006, I was asked to address an international ombudsman conference on the issue of human rights, but from what the organisers described as a 'negative perspective'. The assumption of my international colleagues at that time was that a UK ombudsman would be highly sceptical about the value of human rights in the conduct of investigations. I objected then and would object again now, and would vigorously rebut the assumption that an ombudsman here or anywhere in the world for that matter could reasonably remain a stranger to the protection and promotion of human rights.

Even so, I must concede that by and large we in this country (not just ombudsmen but most other people as well) do not seem to speak the language of human rights with any degree of confidence or fluency – or indeed any knowledge of why and how they came into being.

Despite Lord Denning's prophetic intervention in 1958, the subsequent discussion of the ombudsman has rarely been couched explicitly in terms of 'rights' or social justice.

Yet the advent of the domestic Human Rights Act and the desire of the Council of Europe to engage ombudsmen in the protection of human rights have, I believe, generated fresh interest even in this country about the potential role of public service ombudsmen in upholding rights. Much still remains to be done to articulate that interest in compelling terms and to make human rights promotion and protection an accepted part of ombudsman practice as well as of ombudsman theory. But it is an aspect of the Whyatt legacy that has not been wholly ignored either.

The vision: towards democracy and social justice

Which brings me to the vision for the future.

If we accept that in important ways we have in the last 50 years failed to deliver fully on Whyatt's legacy, can we now seek redemption by redefining our vision for the future by reference to those four central insights: the constitutional position of the ombudsman; the distinctive, coherent and comprehensive ombudsman system of justice and its place within a broader, integrated administrative justice system; and the notion of citizens' rights?

Can the twin goals of democracy and social justice still provide the basis for an institution that can see us well into the 21st century rather than founder as the expression of the misconceived idealism of the 1960s?

The constitutional position of the ombudsman

The constitutional position of the ombudsman is not a bad place to launch a reconstruction of the vision. If a national ombudsman is about anything it is

about the relationship between citizen and State, and more particularly about the humanising of that relationship in the face of ever-increasing complexity, bureaucracy and technology.

At the heart of any ombudsman vision for the future must be the reinforcement of the link between the ombudsman and Parliament as a means of holding the Executive to account on behalf of individual citizens, of drawing upon the empirical experience of individual citizens to shape public debate and deliberation as part of the democratic process, and of doing so with effective independence from the Executive itself.

By way of illustration, I have in mind in particular a sequence of reports I published on the tax credit system, which brought together in a strategic way the individual experience of aggrieved citizens and the ramifications of a government policy which, through maladministration, had, frankly, misfired. When translated to the constitutional arena, this generic feature of ombudsman practice means that the parliamentary ombudsman becomes a potentially key source of intelligence about the impact of government policy on ordinary citizens and a source too of potential remedy that has a longer life than monetary compensation.

To fulfil that potential, the ombudsman must have a voice in Parliament, not directly, of course, but indirectly, through the dissemination of her reports and where necessary through debate of those reports on the floor of the House.

The Public Administration Select Committee, although lacking the dedicated ombudsman focus enjoyed by its predecessor in the 1960s and 1970s, has proved over the years a staunch ally in the task of giving voice and adding weight to the ombudsman's findings.

There remains even now considerable scope for enhancing the role of the ombudsman, for example, by ensuring that time is found for consideration by Parliament of key reports, and by acknowledging that the most important sign of the ombudsman's constitutional role is not the continuance of the MP filter but the active engagement of Parliament with the office and its work.

When we talk about the empowerment of citizens we should bear in mind that administrative justice provides privileged access to – and a rich source of evidence about - the daily encounters between individual and state and the opportunity to soften and smooth the rougher edges that so often blight those encounters.

The ombudsman system of justice

The second component of the vision is a distinctive, informal ombudsman system of justice that continues to resist the onslaught of judicialisation - and in fact conducts that campaign of resistance by going on the offensive.

It is hardly surprising, given the continued existence of the MP filter, that the far more radical power of 'own initiative' investigations, possessed by many national ombudsmen, including in the Republic of Ireland, has so far been ruled out here in the UK. Yet if the ombudsman is to extend its reach to all citizens and to adopt a genuinely inquisitorial approach, the ability to respond to public outcry on behalf of the most vulnerable will sometimes prove invaluable.

Without it, those for whom mounting an individual complaint is all but impossible - and I am thinking here, for example, of people detained in prisons or in psychiatric hospitals, of children in immigration custody - will remain beyond the pale. No doubt any such own initiative power would need to be used sparingly if it were to avoid falling foul of the law of diminishing returns. An 'own initiative' investigation would be an event, not something to be undertaken lightly and certainly not for the sake of self-aggrandisement - not that ombudsmen go in for that sort of thing.

In the meantime, the ombudsman system of justice would continue to distinguish itself by its ease of access, flexibility of process, inquisitorial method, deliberative ethos and resolution by recommendation rather than by direction.

Of particular urgency, however, is the need for continuing vigilance in respect of matters of substance as well as of process. Ombudsmen have for a long time said that they are not tied down to legal precedent or to the strict application of a set of inflexible rules. Instead, it has been their boast that like the original justices of equity they cut through the legalistic mire to the bright uplands of fairness and reason.

Sometimes, however, such aspirations have appeared to lack substance, leaving the onlooker to wonder if this was not a case of the emperor's new clothes, the ombudsman body of principle left looking embarrassingly naked in the face of sustained scrutiny.

I am pleased to say that the last few years have witnessed serious attempts to clothe the ombudsman boast and to create the foundations of what might be described as a form of 'ombudsprudence' in which principles not rules are normative.

In my own office, this development has taken the form of publication of the Ombudsman's Principles trilogy:

- Principles of Good Administration;
- Principles of Good Complaint Handling; and
- Principles for Remedy.

When I first published and distributed my Principles for Remedy, I was encouraged to receive a thank you letter from Lord Justice Sedley, no less, who told me that he was:

> *very much interested in the interface between judicial and extra-judicial remedies for shortfalls in proper standards of government and that initiatives like yours give substance to the enterprise.*

Lord Woolf also wrote to me to say that he regarded the Ombudsman Principles as 'admirable'.

'Ombudsprudence' is, therefore, getting recognition in some important places.

Whilst on the subject of principles, the AJTC has produced its own Principles for Administrative Justice, aimed not so much at ombudsmen in particular – although they resonate strongly with the Ombudsman's Principles - but at all four pillars of the administrative justice system as the Law Commission has described them: at ombudsmen, yes, but at tribunals, the administrative court and at first-instance decision-makers too.

If the ombudsman system of justice is to contribute to a compelling vision for the future it must build on such foundations of principle and take seriously the aspiration of establishing a form of ombudsprudence that is both intellectually compelling and pragmatic, capable of satisfying at both the theoretical and practical levels. Without it, the ombudsman system will remain prey to criticisms of inconsistency, vagueness and subjectivism.

A strong sense of what is 'fair and reasonable in all the circumstances' will only take us so far.

Administrative justice system

But a distinctive ombudsman system of justice on its own is not enough. The vision for the future must include not only the prospect of integration and coherence across the ombudsman landscape, but also the recognition of the ombudsman's place within a coherent and co-ordinated administrative justice system of wider scope and ambition.

As I have already said, the number of ombudsmen and other complaint handlers has developed incrementally over the five decades since Whyatt.

Even in the public sector alone that development has lacked strategic oversight within government, with changes to the reach and remit of individual ombudsman schemes emerging from a range of separate departmental policy objectives over the years – in health, in social care, in education – but with no visible strategic policy objective relating to access to justice.

Added to which, the grasp within government of what constitutes the non-negotiable core of ombudsman characteristics has frequently proven shaky - especially so in the Ministry of Justice where we might reasonably have expected it to be most tenacious.

With the establishment of a comprehensive set of Principles by the AJTC, an essential building-block for the structural reinforcement of administrative justice as a system is finally in place.

Beyond that, we must look for other unifying forces. The concept of alternative dispute resolution is an old friend and was central to the Woolf reforms of the civil justice system. In some contexts, ombudsmen themselves are, understandably and not without some misgivings, described as forms of alternative dispute resolution, to the extent that they constitute an alternative to the courts.

More urgent now, however, is the need for forms of dispute resolution that are not merely alternatives to the courts but which are appropriate and proportionate to the dispute in hand. In other words, as the jargon would have it, 'let the forum follow the fuss'.

Whereas the language of alternative dispute resolution implies a huge gulf between that which is orthodox and that which is 'alternative', the language of proportionate dispute resolution is more inclusive, an instrument of potential integration without the surrender of difference.

Appropriate and proportionate – rather than alternative - dispute resolution is, I suggest, a concept with which we can achieve systemic reach without the abandonment of that which is distinctive about our different styles of resolution.

And then there is the individual, lost amid the maze that is the current administrative justice environment. It is, of course, all too easy to lose sight of the user of any system, to let process and professional priorities take centre

stage to the extent they become the only show in town. The courts are not alone in falling victim to this vice. They have, however, in the past been especially conspicuous offenders against the principle that the system exists for users - not users for the system.

Ombudsmen have certainly tried to be an 'alternative' in this sense, aiming to adopt procedures that are relatively flexible, informal and free of cost to the user.

In upholding the vision of an integrated administrative justice system, we must remain alert to the user perspective, put in place devices for capturing it and techniques for translating it into practical solutions, not least as a means of keeping in touch with the ever more bewildering consequences of globalised demographic and technological change.

It will invariably be the user who can tell us where we have gone wrong and applaud us when we get it right. We must court the user - not use the court - as the only benchmark of acceptable adjudicatory practice.

Citizens' rights

And finally, there is the ever contentious issue of rights. I have already pointed to some encouraging developments. We live, nevertheless, here in the UK in a climate of suspicion about rights, whether human or otherwise. The native suspicion seems to be that to assert a right is to try to get away with something, to sneak some specious entitlement through the backdoor of privilege.

I recall Albie Sachs, the South African activist and constitutional court judge, describing his astonishment that the country that had given him refuge in the 1970s was the same country that had newspaper headlines running scared of 'human rights'. Yet surely the tide of history will be with the concept of rights, so long as any sense of shared human destiny survives. The vision for the ombudsman of the future entails keeping faith with the rights agenda, regardless of the shifting sands of political and journalistic fashion.

The language of rights, of course, returns me to the place where I started this lecture, to the freedom of the individual and the civil rights agenda of the 1960s. The original libertarian strain of thinking lives on. Yet the language of rights reaches beyond the civil rights agenda. The South African experience reminds us that a right to good administration need not be a stranger to a modern democracy, nor should the right to basic social goods such as adequate healthcare, education and housing.

Closer to home, the establishment of the NHS Constitution on a 'rights' foundation demonstrates that, even in the absence of 'justiciable' social rights, the underlying principle of entitlement increasingly permeates our expectations of public service delivery and public administration. This then is a rights agenda that transcends the individualism of much civil rights talk and brings with it instead a social dimension that requires more than conventional legal protection to give it force.

It is here that the institution of ombudsman can play a decisive part in upholding the rights of citizens, and of others, in their dealings with the state. When the Human Rights Act was first introduced it was prefaced by the government's stated desire to embed a 'human rights culture'. The prospects of such a culture emerging were no doubt severely shaken by the events of 9/11 and 7/7, by the wars in Iraq and Afghanistan, and by atrocities across the globe from Bali to Madrid. If anything, we appear further away from an acceptance of human rights as the bedrock of public administration than at any stage in the last decade.

The Bill of Rights Commission may yet advance the debate. It is notable for the ombudsman vision that one of the Commission's specific terms of reference is to take account of the Interlaken Declaration, which is the successor to the discussions within the Council of Europe in 2006 that in turn led to the designation of national ombudsman institutions as part of a nation's human rights 'structure' alongside the relevant national human rights institution, in our case the Equality and Human Rights Commission.

In the meantime, the Principles of Good Administration which my office has established as normative stand as proxy for the more legalistic formulation contained in the European Convention and adopted domestically through the Human Rights Act.

In developing the Ombudsman's Principles, it was deliberate policy on my part to shift attention from the ill-defined concept of 'maladministration' to the more positive notion of good administration, to a genuine sense of what 'getting it right' and 'acting fairly and proportionately' might mean. In making that shift, we can more readily see that an organisation that is practising good administration will invariably be promoting and protecting the rights of those it serves.

The Ombudsman's remit of investigating complaints of maladministration can then be seen for what it is, another way of upholding the rights of complainants, not the same as the judicial process of deciding questions of human rights

and equality law but effective nonetheless in giving force to human rights principle.

Our vision for the future, then, pitches the activities of the ombudsman within this broad framework of human rights principle and in so doing links the work of the ombudsman to a much broader field of fair play, not just domestically but internationally too.

Making the vision a reality

What I have described in outline is an ombudsman journey spanning half a century from individual liberty to a broader notion of social justice, a path that has run in parallel with the evolution of administrative justice more generally, a process of evolution that has, however, too often lacked any sign of intelligent design.

In the course of that 50-year journey we have at times lost sight of the basic insights that shaped the Whyatt Report and, indeed, the Franks Report before it. In particular, we have failed to remember, that the parliamentary ombudsman has a constitutional role that cannot simply be confined to the function of dispute resolution, important though that is; that the ombudsman system of justice is distinctive yet integral to a broader administrative justice system as a whole; and that the framework of values within which the work of the ombudsman can be located is that of the protection and promotion of citizens' rights.

From that recognition we can extrapolate a number of more concrete proposals.

First, I would echo the recommendations of the Law Commission that the MP filter as sole gateway to the ombudsman, and other barriers to access such as the need to put complaints in writing, must go - especially in an era of rapid technological and demographic change that constantly demands that we rethink the way we do things. There are better ways than the MP filter to ensure the serious engagement of Parliament with the ombudsman.

Second, I propose that the time has finally come to acknowledge the power of own initiative investigation, to accept that, in the absence of a specific individual complaint, the ombudsman should not stand idly by. The ability from time to time, not all the time, to seize the initiative, to catch the whiff of a scandal and run with it, is now a necessity not a luxury, especially if social justice is to reach some of the most vulnerable and marginalised people in society.

Third, we must accept that if we are to achieve a genuine 'system' of administrative justice, with ombudsmen as an integrated and coherent part, we must pay close attention to the currently fragmented structures of regulation, inspection and accountability throughout the UK and across the devolved administrations, protecting the ombudsman 'brand' whenever necessary and making sense of the disparate and disjointed structures that so frustrate aggrieved citizens and at times defy all logic.

And that means, incidentally, that we cannot wait any longer for a genuine focal point within government to oversee the development of 'ombudsman policy' across the public and private sectors, to replace the notional oversight exercised from time to time by the Cabinet Office, the abdication of any real responsibility by the Ministry of Justice and the departmental 'ad hoccery' that is, therefore, allowed to prevail.

And finally, if we are to maintain the distinctive qualities of the ombudsman system of justice within that broader administrative justice landscape, we must resist any temptation to model the ombudsman process on that of the courts.

And resist also those changes that would reduce the ombudsman function to just a form of dispute resolution, a mechanism of consumer redress devoid of systemic and structural bite.

What matters is that the ombudsman is a just alternative - not just an alternative.

In short, we must recognise that the origins of the ombudsman system in the contested territory between individual and State are especially salient at a time when the boundaries of the State itself - and of the public services delivered in its name - are under daily scrutiny.

Both the Law Commission's report on Public Sector Ombudsmen and the government's Open Public Services White Paper, published in July, go some way towards that recognition.

The need for a fundamental review of ombudsmen in this country, to match Sir Andrew Leggatt's review of tribunals, is more urgent than ever.

I suggest we get on with it.

Conclusion

And finally then, if we are to continue the task of humanising the bureaucracy, of maintaining public relationships that bear the stamp of democratic values,

and of protecting the entitlement of ordinary citizens to dignity and respect, we should acknowledge the insight of *Whyatt* and remain protective of its legacy, not just now but in the future, and if necessary, for the next 50 years.

I do not expect to be here to witness it, but I would like to think that in the centenary year of *Whyatt* my then successor will come before an audience like this, at JUSTICE'S invitation, and that she will still find much to admire in the vision of those who in 1961 inaugurated a new chapter in the history of democratic participation and of social justice in these islands.

I am pleased here tonight to acknowledge my own debt to those people – and this organisation – and to commend to you the example of your predecessor members of JUSTICE in taking seriously the ombudsman idea.

Ann Abraham is the UK Parliamentary Ombudsman.

Accession of the European Union to the European Convention on Human Rights

Simone White

This paper was delivered as part of the Institute of Advanced Legal Studies conference It Takes Two to Tango: the Council of Europe and the European Union.

Introduction

In the not too distant future, European Union (EU) accession to the European Convention on Human Rights and Fundamental Freedoms (ECHR) will mean that individual applications against the EU are treated in the same way as applications against any other State Party to the ECHR. Accession of the EU to the ECHR will not modify the existing system of judicial remedies under EU law. Exhaustion of such remedies (see 2.1 below) will be a pre-condition for bringing a case to the European Court of Human Rights (ECtHR) in Strasbourg.

It has been argued that this should not dramatically increase the (already excessive) workload of the ECtHR, because the Court of Justice of the EU in Luxembourg (CJEU)[1] has always sought to follow Strasbourg case-law carefully.[2] Accession will encourage the CJEU to pursue this practice, since the EU will be directly bound by the ECHR. There should not, therefore, be an avalanche of EU cases going to the Strasbourg Court once accession has taken place.[3] This author believes that cases will emerge, but how fast they reach the ECtHR will in part depend on whether procedures can be put in place which do not unduly delay such cases.

The symbolic and long-term political benefits of accession have been argued over since the 1970s. Accession will strengthen the protection of human rights because the EU's legal system will be subject to independent external control, thus bringing the EU in the same position as the EU Member States. Dogan sees 'a potential to secure a higher degree of legal certainty, ensuring a uniform application of human rights' norms in Europe and instituting an additional scrutiny mechanism guarding human rights against possible infringements by EU institutions'.[4] UK commentary highlights the way in which accession will resolve an uncertainty about the extent to which Member States are answerable to the Strasbourg Court for the actions of the EU.

> *As the law stands, when individuals consider that the actions of the EU have breached their fundamental rights, they may in some circumstances bring a claim in the Strasbourg Court against one or more Member States. The ECtHR has held that when EU law results in a breach of the ECHR, the Member States can be held responsible for that breach, because they enabled the EU to act in the way that it did. For example, in Matthews v UK [1999] 28 EHRR 361, the UK was held responsible for a violation arising from the EU's primary legislation on the grounds that the UK had freely entered into the relevant EU obligations … The EU's accession to the ECHR will resolve this uncertainty. Once the EU is a party to the ECHR, there will be no doubt that individuals will be able to bring proceedings against the EU in the Strasbourg Court on the grounds that the acts of the EU institutions have breached their Convention rights.*[5]

In 2002, Working Group II of the EU Convention[6] opined that accession would also bring a number of other political benefits, including the achievement of a coherent system of fundamental rights' protection across (greater) Europe. This will strengthen the protection of human rights in the EU by submitting the EU's legal system to independent external control, thus bringing the EU in the same position as the EU Member States. Accession also heralds a new era of close cooperation between the Council of Europe and the EU, as I have argued elsewhere,[7] potentially bringing in benefits of scale, which should be palatable in the present financial/economic crisis.

Accession of the EU to the ECHR became a legal obligation with the entry into force of the Lisbon Treaty on 1 December 2009. Article 6(2) provides that the Union 'shall accede to the Convention' and that 'this accession is not to affect the Union's competence' as defined in the treaties. Article 6(2) TEU together with Protocol 14, which entered into force in 2010, created the necessary legal pre-conditions for accession by amending Article 59 ECHR. As a result, Article 59(2) ECHR will read that the EU may accede to the Convention.

Protocol 8 annexed to the Lisbon Treaty[8] sets out a number of requirements for the conclusion of the Accession Agreement. The Agreement must preserve the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; and (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2 of Protocol 8 puts forwards two conditions to be respected in the Agreement. First, accession of the Union should not affect the competences of the Union or the powers of its institutions. Second, nothing should affect

the situation of Member States in relation to the European Convention, with particular regard to derogations from and reservations to the Protocols. Finally, Article 3 of Protocol 8 requires that nothing in the Accession Agreement should affect Article 344 TFEU, which requires Member States not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those in the EU Treaties.

Accession will entail a number of changes, including amendments to the Convention; supplementary interpretative provisions; adaptations of the procedure before the (ECtHR) taking into account the characteristics of the EU legal order and, in particular, the specific relationship between an EU Member State's legal order and that of the EU itself; and other technical and administrative issues not directly related to the text of the Convention, but for which a legal basis is required. An Accession Agreement will simultaneously amend the Convention and include the EU among its Parties, without the EU needing to deposit a further instrument of accession.

The modalities for accession were set out in a draft Accession Agreement in July 2011,[9] which outlines the scope of accession, procedures after accession and deals with institutional issues such as cooperation between the Luxembourg and Strasbourg Courts. These issues are addressed in turn below.

Scope of the accession

Although a Commission Memorandum of 1979[10] debated the pros and the cons of accession, the scope of EU accession to the ECHR was not debated until 2002 in one of the European Convention Working Groups. In its proposals for accession, Working Group II had argued that accession to the ECHR could be gradual, starting with the Convention and Protocols 1 and 6, which have been ratified by all EU Member States.[11] This thinking was adopted in 2010, as the start of the accession negotiations between the Council of Europe and the Commission. The legal situation of Member States which have not ratified a particular protocol would therefore remain unaffected insofar as their national law and practice are concerned. Reservations would continue to apply with respect to national law and practice even if the EU were to ratify the Convention without any reservations.[12]

Article 2 of the Agreement makes it possible for the EU to make reservations in respect of any particular provision of the Convention, to the extent that any law of the EU then in force is not in conformity with the provision. Reservations of a general character are not allowed. Yet one cannot help wondering whether such reservations to ECHR might be in line with the EU Charter.[13] And how could the EU ask for reservations, when it insists that ECHR only constitutes 'minimum

standards'? One could also argue that any EU law not in conformity with ECHR should not attract a reservation, but should be re-cast to comply with ECHR.

As in the case of the Convention itself, the EU will accede to the protocols only to the extent of its existing competencies. The Agreement provides that 'accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the Protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.'[14]

Accession to the ECHR does not mean that the EU will automatically be bound by the additional protocols[15] to the Convention. In the Agreement, Protocols 1 and 6, which are ratified by all the Member States, have been included for access together with the Convention. Protocols 4,7,12 and 13 are excluded from EU ratification at this stage. Subsequent accession by the EU to these additional Protocols will require separate accession instruments.

Protocol 4 secures certain rights and freedoms other that those already included in the Convention and in the first Protocol thereto. This includes the prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, and prohibition of the collective expulsion of aliens. The corresponding ECHR provisions are Article 19 and 45 ECHR, which provide for the protection in the event of removal, expulsion or extradition and the freedom of movement and of residence respectively. Protocol 4 is not yet ratified by the UK and Bulgaria in the EU.

Protocol 7, which opened for signature in 1984, covers the right of aliens to procedural guarantees in the event of expulsion from the territory of a state; the right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal; the right to compensation in the event of a miscarriage of justice; the right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted (*ne bis in idem);* and the equality of rights and responsibilities as between spouses. Corresponding ECHR provisions are Articles 50 on the right not to be tried twice or punished twice in criminal proceedings and Article 23 on equality between women and men. Protocol 7 has entered into force in all EU Member States except Belgium, Germany, The Netherlands and the United Kingdom.

Protocol 12 contains a general prohibition of discrimination.[16] The current non-discrimination provision of the Convention (Article 14) is of a limited

kind because it only prohibits discrimination in the enjoyment of one or the other rights guaranteed by the Convention. Protocol 12 removes this limitation and guarantees that no-one shall be discriminated against on any ground by any public authority. The corresponding ECHR provision is Article 21 on non-discrimination. The Protocol has only entered into force in seven of the EU Member States.[17]

Protocol 13 bans the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war.[18] No reservations under Article 57 ECHR or derogations under Article 15 ECHR are possible. The corresponding ECHR provision is Article 2 on the right to life. It has entered into force in all EU Member States except Poland, which became a signatory in 2002 but did not ratify.

The issue here is of knowing whether the EU should wait for all the EU Member States to ratify the protocols before it starts the accession negotiations for each additional protocol. Judging by the situation in Protocol 12, where progress has been uneven, this could take a long time. The European Trade Union Confederation[19] has argued that all Protocols should be included in the initial accession. This is because the EU should not be considered from its Member States' perspective but on its own merit. This echoes an earlier European Parliament Resolution.[20]

> *The European Parliament observes that the ECHR system has been supplemented by a series of additional protocols concerning the protection of rights which are not covered by the ECHR and recommends that the Commission be mandated also to negotiate accession to all the protocols concerning rights corresponding to the Charter of Fundamental Rights, regardless of whether they have been ratified by the Member States of the Union.*

Another consideration is that Article 52(3) of the EU Charter[21] confirms that the rights in the ECHR have precisely the same meaning in EU law. It provides that insofar as Charter rights correspond to rights in the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. It could be argued, therefore, that the Member States are in any case already bound to the Protocols, as they are reflected in the EU Charter of Fundamental Rights.

Procedure

Several aspects of procedure are summarised here, which include the exhaustion of domestic remedies, the co-respondent, third party and inter-party mechanisms.

Exhaustion of domestic remedies and admissibility

Article 35(1) ECHR states that the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

After EU accession, it will be necessary to distinguish between direct and indirect actions.[22] In direct actions, when individual applications are directed against measures adopted by EU institutions, the condition relating to exhaustion of domestic remedies imposed under Article 35(1) of the Convention will oblige applicants wishing to apply to the ECHR to refer the matter first to the EU Courts, in accordance with the conditions laid down by EU law.

In indirect actions, when individual applications are directed against acts adopted by the authorities of EU Member States for the application of EU law, the situation will be more complex. First. the applicant will have to refer the matter to the courts of the Member State concerned, in accordance with Article 267 TFEU. Second, the applicant may, or in some cases have to, refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the provisions of EU law at issue. However if, for whatever reason, such a reference for a preliminary ruling were not made, the ECHR would be required to adjudicate on an application, calling into question provisions of EU law, without the CJEU having the opportunity to review the consistency of that law with the fundamental rights guaranteed by the Charter.

The reason why the reference for a preliminary ruling does not equate to 'a legal remedy to be exhausted by the applicant' before referring the matter to the ECtHR is that this procedure may be launched by national courts or tribunals only, to the exclusion of the parties, who do not have any power to request a preliminary ruling.

In an exchange of views between the Presidents of the ECtHR and the CJEU, subsidiarity was taken into account.[23]

> *In order that the principle of subsidiarity may be respected … a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review. The implementation of such a procedure, which does not require an amendment to the Convention, should take account of the characteristics of the judicial review which are specific to the two courts. In that regard, it is important that the types of cases which may be brought before the CJEU are clearly defined. Similarly, the examination of the consistency of the act*

> *at issue with the Convention should not resume before the interested parties have had the opportunity properly to assess the possible consequences of the position adopted by the CJEU and, where appropriate, to submit observations in that regard to the ECHR, within a time-limit to be prescribed for that purpose in accordance with the provisions governing procedure before the ECHR. In order to prevent proceedings before the ECHR being postponed unreasonably, the CJEU might be led to give a ruling under an accelerated procedure.*

The exhaustion of domestic remedies principle will mean that the road to an ECtHR ruling will necessarily be longer for EU-related matters.

Article 5 of the Agreement states that 'Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35(2)(b) of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention'. CJEU proceedings are not assimilated to 'procedures of international investigation or settlement': the ECtHR will not therefore be able to find a matter inadmissible solely on the basis that it is substantially the same or that it has already been submitted to the CJEU.

Additionally, in a recent judgment,[24] the ECtHR clarified that proceedings before the European Commission under Article 258 TFEU[25] are not to be understood as constituting procedures of international investigation or settlement within the meaning of Article 35(2)(b) ECHR.

Proceedings before the CJEU or before the European Commission do not constitute other means of dispute settlements concerning the interpretation or application of ECHR within the meaning of Article 55 ECHR. CJEU rulings or Commission findings will not disqualify from the means of settlement provided by ECHR.

Co-respondent mechanism

Article 1b of Protocol 8 to the Treaty of Lisbon requires the Accession Agreement to provide for the mechanisms necessary to ensure that 'individual applications are correctly addressed to Member States and/or the European Union, as appropriate'. The introduction of a co-respondent mechanism is in line with this requirement. It is also a way of dealing with the situation where a legal act is enacted by one High Contracting Party (HCP) to the Convention and implemented by another.

A co-respondent will become a party to the case only at its own request and by decision of the Court.[26] Only HCPs can become co-respondents. Article

36(4) ECHR states that a co-respondent has the status of party to the case. This arrangement raises the issue of what happens when a HCP refuses to join a respondent. It would then become impossible for the respondent to argue that responsibility lies with the co-respondent. As a result, the respondent would also be prevented from raising the objection of incompatibility *ratione personae*.[27] Guidelines could perhaps clarify this situation; or should clearer rules of engagement be contained in the Accession Agreement?

A prior involvement of the ECtHR is foreseen. The ECtHR will seek the views of the parties to the proceedings and assess whether the conditions are met (see 'tests' below). No deadline is set at present in Article 3(5) of the Agreement and this procedure, if retained, may well render the procedure burdensome, as Lock[28] rightly pointed out. If the ECtHR finds a violation of the Convention, the co-respondent will be bound by the obligations under Article 46 ECHR, which relates to the binding force and execution of decisions.

A group of non-governmental organisations (NGOs) gave their perspective on the co-respondent mechanism.[29] These NGOs[30] felt that (a) applicants should be promptly notified when potential co-respondents are alerted to a case as well as when the mechanism is formally triggered; (b) prior to the joining of a co-respondent, applicants should have an opportunity to make their views known and have adequate time to do so; (c) the applicant's views and interests should be given due consideration by the Court in deciding whether to join a co-respondent; and (d) time limits should be sufficient and should be longer than the four weeks for applicants and eight weeks for potential co-respondents that were initially mentioned during negotiations. In addition, the NGOs advocated that further consideration should be given to requiring the applicant's consent before joining the EU or one of its Member States as a party. They also recommended that Rule 36(2) of the rules of the Court should be amended, to ensure that an applicant is represented by a lawyer at the time that the co-respondent mechanism is triggered and that all deadlines are adjusted to ensure that applicants have been able to benefit from legal advice before responding to the Court.

The European Group of National Human Rights Institutions expressed concerns with regard to the procedural and financial burdens and delay which may result from the EU joining as a co-respondent. For this reason, they suggested that the application of this mechanism should be limited to cases in which there is a genuine question of EU liability. In cases where the EU and the EU Member States shared a competence, but where the EU has not legislated in the area and where there is no question of EU liability, it should be unnecessary for the EU to join in as a co-respondent. In such cases, the EU could be invited to make third-party submissions, in order to explain any relevant points of law.[31]

To accommodate the EU as a new party to the Convention alongside its own Member States, Article 3(2) states that the EU can become a co-respondent whenever an application is directed against one or more Member States of the EU, when the allegation calls into question the compatibility with the Convention rights at issue of a provision of EU law, notably where that violation could have been avoided only by disregarding an obligation under EU law. This means that the EU could become a co-respondent to cases in which the applicant has directed an application only against one or more Member States. The Accession Agreement does not provide that the EU must become a co-respondent in specific circumstances.

Article 3(3) states that EU Member States may become co-respondents whenever the application is directed against the EU and when the allegation calls into question the compatibility with the Convention rights at issue of a provision of the EU Treaties, notably where an alleged violation could have been avoided by disregarding an obligation under those instruments. In such cases, EU Member States will be able to request to become co-respondents to cases in which the applicant has directed an application only against the EU.

Where an application is directed against both the EU and an EU Member State, the mechanisms would also apply if the EU or its Member State was not the party that acted or omitted to act in respect of an applicant, but was instead the party that provided the legal basis for that act or omission. This would allow the application not to be declared inadmissible in respect of that party, on the basis of incompatibility *ratione personae*.

In a case where the applicant alleges different violations by the EU and one or more of its Member States, the co-respondent mechanism will not apply.

Both respondents and co-respondents may be jointly responsible for the alleged violation. Should the Court find this violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent. There would otherwise be a risk that the Court would assess the distribution of competences between the EU and its Member States. The respondent and the co-respondent may make joint submissions to the Court that responsibility for any given alleged violation should be attributed only to one of them.

Inter-party cases

Article 29(2) of ECHR will be amended to read as follows:

> *A Chamber shall decide on the admissibility and merits of inter-Party applications[32] submitted under Article 33.*

This means that all State Parties to the Convention will be able to bring a case against the EU and vice versa under Article 33. This raises an issue in EU law. Article 344 of TFEU states that EU Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the Treaties.

Third-party interventions

Third-party interventions (not to be confused with the co-respondent mechanism) are already provided by Article 36(2) of the Convention:

The President of the Court may, in the interests of the proper administration of justice, invite any HCP which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Yet it has been argued that this mechanism should be reinforced, as interventions by NGOs increasingly contribute to the development of case-law by the ECtHR.[33] The European Trade Union Confederation[34] suggested that the decision of the Court in respect of the co-respondent mechanism should not be taken without the opportunity of prior observations coming also from third-party interveners. A group of NGOs recommended that there should be a mechanism for potential third parties to request permission to intervene in cases where the co-respondent mechanism has been triggered. This would involve notifying the public clearly through the Court's website, when the mechanism has been triggered and also changing Rule 44(b) of the rules of the Court. This would ensure a longer period for requesting permission to intervene once the co-respondent mechanism has been triggered. The process for adding a co-respondent would have to take place before normal communication of the case.[35]

It was argued that a third-party intervention may often be the most appropriate way to involve the EU in a case.[36] Given the choice, the EU may indeed prefer this to being a co-respondent. We may, therefore, see more cases with the EU intervening as third party than as co-respondent.

Institutional issues

The Agreement lays down rules for a delegation of the European Parliament to have the right to vote whenever the Parliamentary Assembly of the Council of Europe (PACE) exercises its functions related to the election of judges in accordance with Article 22 of the ECHR.[37] Article 22 of the ECHR provides that judges shall be elected by the Parliamentary Assembly by a majority of votes cast from a list of three candidates nominated by the HCP. This means that the EU, as a HCP will be entitled to a judge, who will have the same status and duties as the other judges of the ECtHR.

Furthermore, the EU will be entitled to vote in the Committee of Ministers of the Council of Europe when the latter takes decisions on the adoption or implementation of instruments related to ECHR and on matters related to the number of judges in the Plenary Court,[38] the execution of friendly settlements,[39] the supervision of the execution of judgments[40] and advisory opinions.[41]

The Agreement clarifies expectations in terms of coordination between the EU and its Member States.

When the Committee of Ministers supervises the fulfilment of obligations by a HCP other than the EU or one of its Member States, the EU and its Member States are not expected to vote in a coordinated manner. Whenever the Committee of Ministers supervises the fulfilment of obligations by a Member State of the EU, the EU will be precluded from expressing a position or voting. Finally, where the Committee of Ministers supervises the fulfilment of obligations by the EU alone, or by the EU and one or more of its Member States jointly, then the EU and its Member States will be expected to vote in a coordinated manner. The Agreement states that the Rules of the Committee of Ministers will be amended to reflect this.

Conclusion

The Steering Group on Human Rights is to be congratulated in having addressed key issues within the requested one-year period, finishing in July 2011. This includes respect of the autonomy of the EU legal order, the setting up of a co-respondent mechanism, and mechanisms for participation of the EU in the Council or Europe. The Agreement provides that the EU will have one judge in the ECtHR and will participate with full voting rights in the Political Assembly of the Council of Europe. We seem to have come a long way in a very short time, with a document that is ready for scrutiny by European institutions and by Member States. There remain some loose ends and opportunities for improvement.

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Notes

1 Currently consisting of the Court of Justice, the General Court and the Civil Service Tribunal.

2 European Commission, Accession of the European Union to the European Convention on Human Rights, Answers to frequently asked questions, 1 June 2010.

3 Ibid.

4 Y Doğan, The fundamental rights jurisprudence of the European Court of Justice: protection for human rights within the European Union legal order, Ankara Law Review, Vol 6 No 1, 2009, pp53-81.
5 UK House of Commons Library, EU Accession to the European Convention on Human Rights Standard Note SN/IA/5914, 22 March 2011.
6 The European Convention (2002) Working Group II Proposals for accession of the EU to the European Convention on Human Rights WGII – WD 015.
7 White, S, The EU's accession to the Convention on Human Rights: A new era of closer cooperation between the Council of Europe and the EU? NJECL, Vol 1, 2010, pp433–446.
8 Protocol no 8 relating to Art 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (2007).
9 CDDH—UE (2001)16, 8th Working meeting of the CDDH Informal Working Group on the accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission – Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, 19 July 2011.
10 COM(79)210 Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.
11 European Convention WGII-WD015 Proposals for Accession of the EU to the European Convention on Human Rights.
12 Ibid.
13 Charter of Fundamental Rights of the European Union 2010/C 83/02 OJ (2010) C 83/389.
14 CDDH-UE(2011)16, page 3.
15 Several protocols were integrated into ECHR. They are Protocols 2, 3, 5, 8, 11 (replacing earlier ones). Protocol 9 was repealed and Protocol 10 lost its purpose. Protocols 11 and 14 now amend the 2010 version of ECHR.
16 Opened for signature on 4 November 2000.
17 Cyprus, Finland, Luxembourg, The Netherlands, Romania, Slovenia and Spain.
18 Opened for signature on 3 May 2002.
19 ETUC (2011) Observations and proposals submitted by the European Union Confederation (ETUC) to the CDDH-UE Working Group for the consultation of 21 June 2011.
20 European Parliament Resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human rights and fundamental Freedoms (2009/2241(INI)) A7-144/2010.
21 Charter of Fundamental Rights of the European Union 2010/C 83/02 OJ (2010) C 83/389.
22 See ECHR Joint Communication from Presidents Costa and Skouris, undated.
23 Ibid.
24 Karoussiotis v Portugal appl no 2305/08, ECHR judgment of 1 February 2011.
25 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'
26 Art 1(5) of the draft Agreement.
27 T Lock (2010) Walking on a tightrope: the draft Accession Agreement and the autonomy of the EU legal order, Centre for Law and Governance in Europe Working Paper Series 12/2011, London, June 1 2011.
28 Ibid.
29 NGOs' perspective on the EU accession to the ECHR: the proposed co-respondent procedure and consultation with civil society.
30 NGOs included Human Rights Watch, Amnesty International, Liberty, the AIRE Centre, JUSTICE, the European Human Rights Advocacy Centre and the International Commission of Jurists.
31 Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR CDDH-UE March 15-18 2011;
32 Previously 'inter-state' applications.

33 ETUC, op.cit.
34 Ibid.
35 NGOs' perspective, op.cit.
36 CDDH-UE(2011)05, para.41.
37 Art 6 of the Agreement.
38 Art 26(2) ECHR.
39 Art 39(4) ECHR.
40 Art 46 (2-5).
41 Art 47 ECHR.

Prospects for enhanced cooperation between the Council of Europe's Group of States against Corruption and the European Union

Wolfgang Rau

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Introduction

The Group of States against Corruption (GRECO) was established in 1999 as an enlarged partial agreement by 17 of the Council of Europe Member States. Currently, GRECO comprises 49 members, including the USA and Belarus. All European Union (EU) Member States are now members; Italy being the last to have joined in June 2007.

GRECO's objective is to improve the ability of its members to fight corruption by monitoring - through mutual evaluation and peer pressure - their compliance with Council of Europe anti-corruption instruments, including the Twenty Guiding Principles for the fight against corruption and the Criminal and Civil Law Conventions on Corruption. GRECO thus helps to identify shortcomings in national anti-corruption policies, laws and regulations as well as institutional set-ups with a view to prompting the necessary reforms.

GRECO's monitoring comprises an evaluation procedure which is based on on-site visits and followed up by an impact assessment ('compliance procedure') designed to appraise the measures taken by its members to implement the recommendations emanating from country evaluations.

The current Third Evaluation Round, launched on 1 January 2007, is devoted to two distinct themes, namely the transparency of party and election campaign funding (as understood by reference to Recommendation Rec (2003)4 on common rules against corruption in the funding of political parties and electoral campaigns) and the incriminations provided for by relevant articles of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191).

In its previous rounds, GRECO dealt with a wide range of issues, such as anti-corruption bodies, immunities of public officials as possible obstacles in the fight against corruption, the protection of individuals who report their suspicions of corruption ('whistleblowers') and the confiscation of corruption proceeds.

The approach taken by GRECO is widely accepted as being exemplary: GRECO's modus operandi, its expert appraisals of the anti-corruption policies of its members, the constructive nature of its country-specific recommendations and the impact assessment designed to evaluate their implementation are considered to be model elements of a successful monitoring mechanism.

Close cooperation with other international key players, such as the United Nations and the Organisation for Economic Co-operation and Development – who enjoy observer status with GRECO – as well as the relevant bodies of the EU, is given high priority in order to further enhance the effectiveness of the Council of Europe's anti-corruption endeavours and to avoid overlap and duplication.

The work carried out by GRECO over more than 11 years has led to the adoption of a considerable number of reports that contain a tremendous wealth of factual information on anti-corruption policies in Europe and the United States, with a focus on both achievements and shortcomings. These reports evidence the undeniable progress made by many GRECO members in the fight against corruption. But they also point to the difficulties encountered by some of our member states in following up in a constructive manner on certain recommendations which have emanated from GRECO's peer review process. Let me just mention in this respect that during the current Third Evaluation Round, five of our member states have been subjected to a so-called noncompliance procedure. GRECO does not pussyfoot around, it is an intergovernmental structure that takes its job seriously.

GRECO and the EU – historic background and legal basis for cooperation

The Commission of the European Communities was an active participant in the Council of Europe's Multidisciplinary Group on Corruption (GMC) which prepared a detailed programme of action adopted by the Council of Europe's Committee of Ministers in 1996 as the basis on which all subsequent anti-corruption initiatives of the organisation rest. It gave rise not only to the drawing up of a series of six anti-corruption, standard-setting instruments but also to the setting up of GRECO in 1999.

In addition to GRECO's statute, two of the six instruments adopted by the Committee of Ministers in pursuance of the programme of action explicitly refer to accession of the European Community (EC) to GRECO.

GRECO's statute of 1 May 1999 establishes in Article 5: 'The European Community may be invited by the Committee of Ministers to participate in the work of … GRECO. The modalities of its participation shall be determined in the resolution inviting it to participate.' Pursuant to Article 8, paragraph 4, of the statute 'Any State of the European Community, when becoming a member of … GRECO, shall be deemed to have accepted the Statute and the Rules of Procedures of … GRECO.'

In addition to the statute, both the Criminal and the Civil Law Conventions on Corruption provide, in Articles 33(1) and 15(1) respectively, for the possibility for the EC to accede to the conventions (in the case of the Criminal Law Convention, this would be upon invitation by the Committee of Ministers).

The relevant provisions of the two conventions (ETS 173: Article 32, paragraphs 3 and 4 and Article 33, paragraph 2; ETS 174: Article 15, paragraphs 3 and 4) entail automatic and compulsory membership in GRECO of contracting parties that were not members of the monitoring body at the time of ratification.

What action was taken at EU level in light of these provisions and the EC's involvement in the GMC?

In September 1998, the president of the EC wrote to the secretary general of the Council of Europe that there was no reason, at that stage, for the EC to participate in GRECO. I understand that this reaction was perceived by many GRECO people as a disappointment.

That said, an important milestone at EU level concerning possible accession to GRECO was clearly the Commission's *Communication to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption* of 28 May 2003. In this document, the EC expressed its intention to prepare the accession of the community to the Council of Europe conventions on corruption and to ask the Council for authorisation to negotiate with the Council of Europe the terms and modalities of the EC's participation in GRECO.

A later Council resolution concerning a comprehensive EU policy against corruption, adopted in April 2005, then set out two options for anti-corruption monitoring: either participation in GRECO or the setting up of a mechanism to evaluate only the EU instruments. At the 17th Consultation meeting between the Troïka of the Article 36 Committee of the EU, including the Luxembourg

Presidency, and the Council of Europe (Strasbourg, 29 April 2005) the representative of the EC indicated that the Commission had made a declaration at the time of the adoption of this resolution in which it had called for the possibility to examine other options, for instance, participation in a possible monitoring system under the UN Convention against Corruption. He also indicated that, as matters stood, there was no legal basis for the community to join GRECO until the entry into force of the EU Constitution.

I am not in a position to give a full account of the various initiatives and reflections at EU level regarding the follow-up given to the Commission's 2003 communication. What seems clear is that, until recently, accession to GRECO by the Union had not been high on the Commission's agenda.

Moreover, numerous GRECO members felt that the possible setting-up under the auspices of the EU of a separate anti-corruption monitoring mechanism, perhaps also covering the UN Convention against Corruption, which the EC signed on 14 September 2005, could potentially exacerbate monitoring fatigue in Europe, make it difficult to avoid duplication in country reviews and involve additional costs for national budgets.

The prospects for EU participation in GRECO started to brighten as the Council of Europe and the EU deepened their relations over recent years.

Very promisingly, a Memorandum of Understanding (MoU) between the Council of Europe and the EU, providing a new framework for enhanced cooperation and political dialogue between the two organisations, was concluded in 2007. It commits both organisations to intensifying cooperation and to ensuring coordination of action on issues of mutual interest. Rule of law, legal cooperation and the fight against corruption are included among the areas of mutual interest (paragraph 26). In paragraph 48, the MoU furthermore states the necessity of using the opportunities provided by the existing partial agreements of the Council of Europe, of which GRECO is one.

Already in 2006, the Juncker Report[1] had strongly advocated EU accession to GRECO. A 2008 report of the Committee of Ministers on follow-up to the Juncker Report reaffirmed this need, indicating that under the MoU it had become possible to give some form of effect to the proposals of the Juncker report for intensifying cooperation between the EU and partial agreements such as GRECO.

One positive result of these initiatives is that there is now good ongoing cooperation between GRECO and various services of the Union. For example, GRECO's work provides input to consultation meetings with the EC for the

preparation of EU Enlargement and Neighbourhood Policy progress review reports. In 2010, the group was also represented at a number of events organised by the EU, including a workshop on 'Ethics in society at all levels: political, civil society, media and business', organised within the framework of the European Commission Technical Assistance Information Exchange Instrument (TAIEX) in Budva (Montenegro) in April 2010 and at an international conference on 'Corruption prevention in the midst of crisis?' organised by the dbb akademie in cooperation with the European Anti-Fraud Office in Cologne (Germany) in November 2010.

The 2009 Stockholm Programme and GRECO's response

The Stockholm Programme was well received by GRECO. At its meeting in December 2009, it expressed its willingness to contribute to the development of a comprehensive anti-corruption policy of the EU, in line with the invitation addressed by the European Council to the Commission in the Stockholm Programme. It welcomed, in particular, the invitation by the European Council to the Commission to submit a report to the Council on the modalities for the Union to accede to GRECO. In this connection, GRECO expressed its willingness to discuss such modalities with the competent services of the EU in light of GRECO's statute, the Criminal Law Convention on Corruption (ETS 173) and the Civil Law Convention on Corruption (ETS 174), which – as mentioned above – already provide for the possibility of the EU to participate in GRECO.

Later, in 2010, some concerns emerged in light of the Commission's action plan relating to the Stockholm Programme.

After a constructive and open exchange of views with representatives of the Secretariats of the EC and the Council of the EU on latest developments concerning EU anti-corruption initiatives and perspectives of enhanced cooperation between the EU and GRECO during its plenary meeting in June 2010, GRECO held a further debate on the matter. It took note of the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme' (COM(2010) 171 final) and of the conclusions concerning the action plan adopted at the 3018th Council meeting – Justice and Home Affairs – of 3-4 June 2010. The Council of the EU's conclusions concerning the Commission's action plan indicated some reservations as regards a perceived departure by the Commission from the framework for EU action in the anti-corruption field as laid down in the Stockholm Programme. In this context, GRECO noted in particular the Council's statement that 'the Stockholm Programme is the only guiding frame

of reference for the political and operational agenda of the European Union in the Area of Justice, Security and Freedom'.

In addition, GRECO stressed that it would not be in favour of the establishment of a new monitoring mechanism, highlighting the risk of incompatible standards being set and of ultimately weakening anti-corruption efforts that would accompany a further proliferation of mechanisms. GRECO considered, however, that an EU evaluation process to measure anti-corruption efforts in its member states, in particular, in areas of the acquis, would serve anti-corruption policies provided it clearly avoided duplication with GRECO's work, relied on its monitoring process and findings and produced added value by facilitating the effective implementation of its recommendations.

Some GRECO delegations expressed the view that the collection of data under EU auspices (eg, extent and trends of corruption, cases dealt with by the [criminal] justice systems, etc.) might provide useful guidance to both domestic and international policy makers and represent a valuable complement to the existing monitoring mechanisms.[2]

Recent developments

Since June 2010, a number of constructive consultations between the competent services of the Union and GRECO and its secretariat have taken place. The main focus has been possible 'modalities of accession' to GRECO – to use the wording of the Stockholm Programme. In other words, in which ways would the EU become involved in and benefit from GRECO's work? What exactly would be its rights and obligations as a participant in, or a member of, GRECO?

In order to avoid complicated and perhaps not very helpful discussions at this stage, I should like to stress that both legal services concerned, ie, that of my own organisation and of the EU, have misgivings about the notion of 'accession', at least at the current stage of discussions. I, therefore, refer in the following to 'participation of the Union in GRECO'.

Giving a succinct account of the state and results of the ongoing discussions is not an easy task. That said, a common understanding of the purpose and the practicalities of EU participation in GRECO is emerging. And the principal critical issues are on the table.

Let me start with the purpose and the expected benefits of EU participation in GRECO before addressing possible modalities of such participation in greater detail.

In general terms, there can be no doubt that strengthened co-operation – through EU participation – would ensure greater impact and visibility of anti-corruption endeavours for the EU, GRECO and the Council of Europe as a whole.

More particularly, the most obvious and uncontentious objectives of such participation would be four-fold, namely:

1) To promote sound and co-ordinated anti-corruption policies in Europe and to strengthen the impact of the EU's and GRECO's respective anti-corruption endeavours; this is mainly about pooling resources and competences - and should have the 'collateral' benefit of minimising the risk of issuing conflicting standards and performance benchmarks.

2) To establish a formal basis for identifying courses of action which assist the effective implementation of recommendations emanating from anti-corruption monitoring by GRECO and relevant activities of the EU. Let me stress en passant in this context that a number of domestic and international experts share the view that standards have lowered in some countries since they joined the EU. They are said to have eagerly implemented early GRECO recommendations to obtain positive assessments during the accession process and have since been less committed to taking on those who flout the rules of the game. Stepping up pressure on the countries concerned by joining forces might, therefore, make a lot of sense.

3) To strive to avoid duplication of effort, generate synergies and ensure the coherence of the anti-corruption work undertaken by the two organisations.

4) To engage in regular exchanges concerning matters of mutual interest, including the identification of successful practices in the prevention of, and the fight against, corruption.

While it is comparatively easy to agree on common objectives, it is a little more challenging to hammer out a feasible framework for the practical modalities of EU participation.

The key-question is: to what extent the EU can or ought to be treated like an 'ordinary' GRECO member. A basic principle stated in the preamble of GRECO's statute is that 'full membership of … GRECO should … be reserved to those which participate without restrictions in mutual evaluation procedures and accept to be evaluated through them'.

While it is also clear that Article 5 and Article 8, paragraph 4, of GRECO's statute allows for the design of certain arrangements adapted to the situation of the EU, its participation in GRECO would nevertheless, as far as possible, need to be in line with the rules and conditions which apply to other members. A la carte participation might be difficult to arrange; the dish of the day might need to do.

Further, at its 50th plenary session, GRECO made it clear that the EU's participation should, from the start, be construed in such a way as to keep the door open for future evaluation by GRECO of EU institutions. When exactly and how such an evaluation would take place, which institutions would be concerned and which concrete standards and norms would underlie such an evaluation could be clarified at a later stage. What GRECO certainly does not want is a blanket and total exemption from its peer review process for the EU.

The way in which this matter is resolved will have an impact on a number of other practical issues related to EU participation in GRECO as will become clear from the following six points I would like to raise:

1) It goes without saying that the EU would be entitled to appoint a delegation to GRECO which would participate in plenary meetings and debates. Whether this delegation would be entitled to vote (and participate in the election of the president, vice-president and bureau), will depend on whether the EU is to submit itself to mutual evaluation procedures or not. What does seem clear at this point is that the EU would be satisfied with having only one vote in any voting or election procedure.

2) It is also clear that representation of the EU in its relations with GRECO by the EC (which would almost certainly be GRECO's 'interlocutor') would not affect the direct representation of individual EU member states themselves nor their right to participate in an individual capacity in any vote and to express their views during GRECO plenary sessions. This approach would exclude any block-voting or the formulation of common positions in connection with the adoption of evaluation and compliance reports by GRECO. It must be recalled in this context that the principle according to which all members are to be treated on an equal footing and are to participate without restrictions in evaluation and compliance procedures forms the indispensible basis of the whole GRECO process.

3) Regarding participation of the EU in GRECO evaluation teams – in which the Union is particularly interested – the existing rules and conditions which apply to GRECO member states need to be borne in mind. In light of these rules, participation in an evaluation team and thus in an on-site

visit would need to be subject to consent being given by the member state under evaluation, whether it is an EU member, a candidate country or a potential candidate country (or whether it is a country with no specific relationship with the EU, such as the USA, the Russian Federation or Belarus).

It can be assumed that this legal situation would not prevent the '27' from taking a decision at EU level that they would always accept the participation of an EU expert in GRECO evaluation visits to their respective countries. Further, the precise rights and obligations of EU representatives in GRECO evaluation teams will need to be clarified in light of the arrangements to be found regarding the submission of EU institutions to GRECO evaluation procedures.

4) Another important practical matter concerns GRECO's contribution to the EU's planned anti-corruption reporting/evaluation mechanism. With regard to this, GRECO has emphasised that it should have some form of institutional representation (going beyond representation at secretariat level) in order to ensure well-balanced cooperation between both bodies. Also, the kind of substantive input the EC would expect GRECO to make to its planned periodic anti-corruption report will need to be defined.

   A potentially appropriate option might be that a horizontal review of GRECO's findings and pronouncements is produced. In a first stage, such a review could focus on two main thematic areas, namely: 1) reducing corruption risks in public administration and supporting the integrity of public officials; and 2) enhancing transparency, oversight and rule enforcement in political financing. All of these are at the heart of citizens' concerns – and not just in the EU. There is, in any case, no doubt that GRECO is willing to contribute to, and be involved in, the planned EU reporting/evaluation mechanism.

5) The establishment of such a mechanism 'to assess the anti-corruption efforts in the EU' is referred to in the Commission's Work Programme 2011 (COM(2010) 623 final Vol. II) in response to which GRECO has stressed that it must not entail overlap with GRECO's work. The group has also made it clear that EU participation in GRECO must not lead to duality in evaluation procedures within GRECO itself.

6) Finally, participation of the EU in GRECO will also presuppose some form of financial contribution. Whether the EU will be a so-called *major contributor* to GRECO's budget (as are France, Germany, Italy, the United Kingdom and the

United States) is currently – as I understand – subject to discussions within the EC.

It is obvious to me that the EU's participation in GRECO will generate additional costs. That said, we are not talking about millions of Euros. GRECO's current budget is in the range of 2.2 million euros – and this total covers both operational and staff costs.

Conclusion

From my point of view, the crucial issues of the EU's participation have been named and debated in some depth. There is a fairly precise common understanding of what such participation means or could mean. The closer EU participation comes to being genuine membership in GRECO, the easier it will be to resolve all the above matters.

I do not believe that the greatest challenges for a meaningful and mutually beneficial participation of the EU in GRECO are of a legal nature. Where there is a will, there is a way!

Wolfgang Rau is Executive Secretary of GRECO.

Notes

1 Council of Europe – European Union: "A sole ambition for the European continent". Report by Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxemburg, to the attention of the Heads of State or Government of the Member States of the Council of Europe.

2 47th Plenary Meeting of GRECO (Strasbourg, 7 – 11 June 2010) Summary Report.

The press, privacy and the practical values of the Human Rights Act

Francesca Klug

This is the speech that Professor Klug gave to JUSTICE's joint fringe meeting with the Society of Labour Lawyers at the Labour Party Conference in September 2011. This was one of three meetings at each of the conferences of the major national political parties.

Introduction

Responsibility is the word of the moment, isn't it? The well-worn phrase of preference under New Labour used to be 'rights and responsibilities' but lately these words have been decoupled. 'A decline in responsibility' was to blame for the riots, David Cameron told us. 'The twisting and misrepresenting of human rights … has undermined personal responsibility,' he said.[1] Was the Human Rights Act (HRA) responsible for the riots? It gives a whole new meaning to the phrase 'reading the riot act', doesn't it? Ed Miliband has also concurred that it was 'greed, selfishness, immorality and, above all, gross irresponsibility,' that drove the riots.[2]

Now there is nothing wrong with labouring the importance of responsibility. I personally *agree* that emphasising personal responsibility is *vital* in a fair and just society - provided that it is not license for punishing *most* those who have the *least*. The tabloids and Tory-supporting press also emphasise the theme of responsibility of course. In fact, they make a living out of it! They are particularly prone to do so to hammer the HRA as the source of a rights-obsessed, selfish, alien litigation culture. They do this every day in fact.

Responsibilities

What you can virtually guarantee they will *omit*, of course, is that the theme of responsibility is woven into the European Convention on Human Rights (ECHR), most of whose rights were incorporated into our law through the HRA. Whilst a few of these rights are absolute (like freedom from torture and slavery), most are qualified or limited. This is usually to protect the rights of others and the common good.

As the late, great former Lord Chief Justice Lord Bingham put it: there is 'inherent in the whole of the ECHR … a search for balance between the rights of the individual and the rights of the wider society.'[3] For the press to mention this inherent approach would not only spoil a good story, it could draw attention

to an inconvenient truth: that Article 10 ECHR, the right to free expression, explicitly states that free speech comes with 'duties and responsibilities'. This is not a very popular statement with many journalists. But, I suppose - with notable exceptions - the press is hardly alone in thinking that responsibilities apply to everyone but themselves.

Media hostility to HRA

We all cherish a free press and people all over the world risk prison, torture and even death to be able to speak their minds and criticise their governments. These days, many newspapers in *our* country are feeling the pinch as the new media and digital revolution threaten their long-term survival – something that should concern us all.

In light of this, perhaps it's not surprising that even before the HRA was introduced some sections of the press – and the tabloids in particular - opposed it vehemently. (I mean it when I say *not all* the press – the *Guardian* campaigned *for* the HRA for years).

The now relentless campaign by the right wing and tabloid press to *repeal* the HRA cannot be understood outside their commercial vested interests. Why?

The answer lies in the legal framework that existed before the Act came into force in October 2000. At that time, our only legal remedy against press intrusion were torts such as breach of confidence, libel or malicious falsehood, none of which protected us from long-lens cameras or door-stepping journalists. They were pretty much free to be as feral as they liked.

Right to privacy

Despite the sometimes inflated boasts about the wonders of the common law, privacy was *not* a so-called 'basic interest' recognised by the common law before the HRA. The impact of this hit home in 1991 when the actor Gordon Kaye, star of the TV series *Allo Allo,* was involved in a car accident. Whilst recovering in hospital with head injuries, two journalists from the *Sunday Sport* entered his room without permission, photographed and interviewed him. Because of his injuries, Kaye had no recollection of this afterwards, but the journalists' article gave the impression he'd consented. Kaye tried unsuccessfully to get an injunction to stop publication. As Lord Justice Bingham stated in his judgment, the case highlighted 'yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.'[4]

Interception of communications

In reality, the *practica*l value of the HRA goes far deeper than introducing a gradually developing right to sue for breach of privacy. It is not an exaggeration

to say that the entire phone hacking scandal would not have come to light were it not for a combination of the ECHR and the HRA. Without them, hacking would probably have remained legal, if not moral, and there would have arguably been no scandal to exploit.

'Was it human rights wot won the phone hacking scandal?' the lawyer Adam Wagner asked on his blog last July? He concluded that 'in a way it *was* the HRA which won a right of redress for the general public.' So, what's the back story? It is often forgotten now that there was no statutory regulation of interceptions of communications at all until the mid-1980s – the state could tap our phones and we had no means of stopping it. [5]

Regulation was only introduced by Margaret Thatcher's government because the UK fell foul of the ECHR. A few years earlier, antique dealer James Malone learnt his phone had been tapped when he was wrongly suspected of handling stolen goods. He had to take his case to the European Court of Human Rights (ECtHR) in Strasbourg where the court ruled that the lack of *any* legal regulation of state interceptions of communications in the UK was a breach of the right to respect for private life under Article 8 ECHR.[6]

As a result, the UK passed the *Interception of Communications Act 1985,* regulating mail and phone interceptions. As was not unusual following Strasbourg judgments - then and now - this was a *minimal* response by the government to the court's findings. The 1985 Act only covered communications made on the *public* telecommunications system. So, in 1997, the UK government was found in breach of s8 once again when the calls of Assistant Chief Constable, Merseyside Police, Alison Halford were hacked on the *internal* phone system at her place of work; an interception which was not covered by the 1985 Act.[7]

By then, Labour was in power and pledging to introduce the HRA. As part of the preparation for its implementation, and following the *Halford* case, the government introduced the Regulation of Investigatory Powers Act (RIPA) shortly before the HRA came into force in October 2000.

RIPA and phone hacking

RIPA went well beyond the requirement in *Halford* to regulate interception of internal phones at work. It regulated interception of communications on *all* private networks, including mobile phones.

I cannot envisage any government doing *more* than Strasbourg requires now, but this was before 9/11 and the heyday of New Labour's support for constitutional reform, of which the HRA was a central part.

Although the HRA does not bind our courts to follow ECtHR case law (whatever you read in the press), they must now take Strasbourg rulings into account. RIPA was passed in anticipation that our courts would declare the unregulated mobile phone networks in breach of the ECHR.

So without the HRA and without the Labour government introducing RIPA to comply with it and the ECHR:

- there would have been no conviction of private investigator Glenn Mulcaire;
- no demise of the *News of the World*;
- no Murdochs appearing before British parliamentary select committees;
- no discovery that Hugh Grant is not just a pretty face; and
- no Leveson Inquiry.

Protecting sources

The importance of the HRA in this story doesn't end there. When the Metropolitan Police tried to use the Police and Criminal Evidence Act (PACE) and the Official Secrets Act (of all measures) to require *Guardian* journalists to disclose the confidential sources they used to expose the hacking scandal - unbelievably the only attempted prosecution in the scandal so far - Geoffrey Robertson QC, former *Times* editor Harry Evans and the chief executive of the Society of Editors all queued up to argue that the Met would fall foul of the HRA.

Whilst it would be an overstatement to claim that it was the HRA that won it again, the protection of journalists' sources is another area where the HRA and ECHR have transformed UK law. The common law again failed to provide special protection for journalists and their sources. When an investigative journalist was recently under pressure to reveal the source of a *Mirror* story about the moors murderer Ian Brady, the Court of Appeal used the HRA to protect him.[8]

Though you wouldn't know it (unless you're a *Guardian* or *Independent* reader), this is far from the only free speech protection made possible through the HRA. Others include:

- journalists' public interest defence in libel cases has been bolstered;[9]
- the media has been granted access to court of protection[10] hearings[11];
- anonymity orders under terrorism legislation have been set aside;[12] and
- the right to receive information under Article 10 has also been expanded.[13]

Wakeham and s12 HRA

In fact, the HRA contains a section which goes further than the free speech protections in the ECHR, and was a direct result of press lobbying. As the Human Rights Bill was passing through Parliament, Lord Wakeham, then chair of the Press Complaints Commission, proposed an unsuccessful amendment to exclude the media from the HRA altogether. Following detailed negotiations with the then Home Secretary, Jack Straw, s12 HRA was inserted to require the courts to 'have particular regard to the *importance* of … freedom of expression' when considering granting a remedy, such as an injunction.[14] This free speech provision is illustrative as to why the HRA is *itself* a *British* bill of rights; it does *not* just incorporate the ECHR lock stock and barrel into our law.

Injunctions

For months and months, if you can remember that far back - before Libya, before the riots and before the phone hacking scandal - we were reading on a daily basis about 'super-injunctions' issued by courts hell bent on destroying our freedom of speech. Super injunctions are undoubtedly problematic. Not only do they prevent publication of information which is claimed to be private, but also the injunction itself is subject to secrecy. Lord Justice Sedley has fairly described them as 'anathema not only to the press but to any system of open justice' but he has also explained that the courts only developed them because the press kept thwarting less restrictive injunctions.[15]

The now infamous - and thoroughly discredited - super-injunction preventing the *Guardian* from publishing details about Trafigura dumping toxic waste in the Ivory Coast, was, thankfully, a rarity. There have been no more than a dozen in five years[16] and the outrage they inspired may well have killed them off. Super-injunctions are often confused with the less restrictive 'anonymised injunction', which keeps the *names* of one or both of the parties secret, but doesn't prevent reporting of the *fact* of the injunction. Some of these should also never have been made.

The anonymised injunction that Sir Fred (the shred) Goodwin obtained to prevent disclosure about an affair with a colleague at RBS, was obviously wrong in most people's eyes. But if the courts hadn't partly rectified this mistake we wouldn't be talking about it now.[17]

It is very difficult to obtain accurate data, but excluding injunctions to protect children or vulnerable adults, reports suggest there have been only 69 anonymised injunctions in five years. Some of these were to prevent criminal trials collapsing, as in the recently re-opened Stephen Lawrence murder trial. Others concerned blackmail. Only 28 are said to concern men involved in extra-marital affairs - the main source of controversy.[18]

Is it necessarily wrong that the courts have ruled time and again that the rights of wives and children should be considered when a privacy injunction by a philandering husband is applied for?

Is it a breach of free expression when a mistress loses her chance to kiss and tell? I've never known the tabloids to champion the rights of women as doggedly as they have when former mistresses (and it *is* usually mistresses) have been prevented from selling their stories by the courts.

It's a perfectly sensible *business* decision to try to sell papers on the back of such stories of course – especially when your very survival is at stake. Waging a relentless campaign against the HRA and its privacy rights is a logical extension of this self-interest. But, pretending that this is in the name of a noble cause like free expression? John Milton's campaign for free speech in the name of 'God's partially revealed truth' it is not!

The ECtHR has long distinguished between political speech and gossip. The first is given far more protection than the second. The limits of acceptable criticism of politicians in their public life are far wider than those applying to the rest of us.[19] But tawdry and lurid allegations about an individual's private life - even politicians - aimed more at titillation than education, do *not* attract the same robust protection under Article 10, the right to free expression.[20] If politicians of all parties approve of this distinction, the next time they attack the European Convention on Human Rights they should be careful what they wish for!

Useful for everyone

Part of the prosecution case against the HRA is that it's only celebrities who've benefitted from privacy rights. Obviously they have the funds to take these cases and the decimation of civil legal aid will only make matters worse. But this 'privacy for pin-ups only' claim is an exaggeration.

Injunctions have been granted to protect a member of the public who didn't want the press to report his sex change[21] and to protect a couple from defamatory statements about misappropriating money from a family trust fund.[22] Mr Peck was certainly not a celebrity when he found his suicide bid, which had been unknowingly captured on CCTV, reported in the *Brentwood Weekly News* in a feature on the benefits of CCTV! Mr Peck took his case to the ECtHR and won.[23]

Only this month we learnt that the High Court is to hear a civil claim for breach of privacy from a number of alleged phone hacking victims, including Sheila Henry, whose son was killed in the 7/7 bombings. This 'test case' would be a

new development of privacy law, to award the victims 'exemplary damages', to deter future hackers.

The privacy rights in the HRA have also protected:

- a mother and her children who were 'snooped' on by their council to determine whether they lived within a school catchment area;[24]
- a media co-ordinator for Campaign Against the Arms Trade photographed by the police leaving a meeting;[25] and
- the bereaved family of a 12-year-old boy when a coroner refused to read out his suicide note, citing his mother's right to privacy under the HRA.[26]

Conclusion

In this age of responsibility all *most* of us want, of course, is not injunctions and court cases but responsible journalism. All that *many* of us want is responsible and ethical leadership from our politicians, not the Prime Minister condemning the 'twisting and misrepresenting of human rights' one day,[27] and giving misleading information himself another day, for example, that the HRA prevents publication of pictures of riot suspects to bring them to justice.[28]

Perhaps one of the most irresponsible things New Labour ever did was to take this massive step of passing a bill of rights called the HRA and then wishing it would go away, taking almost no steps to explain or promote it. Is Nick Clegg going to remain the only leader of a political party to defend it?

As the *Guardian* journalist Jackie Ashley wrote last week, the Conservatives aren't joking when they say the HRA has to go. Perhaps it's time we all took some responsibility to explain and defend it.

Francesca Klug OBE is Professorial Research Fellow at the London School of Economics (LSE) and Director of the LSE's Human Rights Futures Project. With special thanks to Helen Wildbore, Research Officer for the LSE's Human Rights Futures Project, who provided most of the background research for this speech.

Notes

1 'I want to reclaim our society and restore people's pride in Britain', the *Sunday Express*, 21 August 2011.
2 Ed Milliband, 'National Conversation', speech at Haverstock School, 15 August 2011.
3 *Leeds City Council v Price and others*, [2006] UKHL 10.
4 *Kaye v Robertson* (1991) FSR 62.
5 Except for some specific offences relating to postal employees and interference with mail.

6 *Malone v UK* ECtHR, 1984.
7 *Halford v UK* ECtHR, 1997.
8 *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.
9 *Jameel v Wall Street Journal Europe* [2006] UKHL 44.
10 Which adjudicates about people who lack mental capacity to make decisions themselves.
11 *A v Independent News* [2009] EWHC 2858 (Fam).
12 *Ahmed et al v HM Treasury* [2010] UKSC 1.
13 *Szabadságjogokért v. Hungary* ECtHR, 2009.
14 And that temporary injunctions to restrain publication before trial should not be granted unless the court is satisfied that the applicant 'is likely to establish that publication should not be allowed'.
15 'The Goodwin and Giggs Show', Stephen Sedley, the *London Review of Books*, Vol. 33, No. 12, 16 June 2011. See also Hugh Tomlinson, evidence to the PM Privacy Commission, BBC Radio 4, 13 June 2011.
16 According to figures cited in the *Daily Telegraph*, 14 May 2011 and the *Independent*, 25 May 2011. See also 'Report of the Committee on Super-injunctions', Lord Neuberger et al, 2011.
17 *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB).
18 According to figures cited in the *Independent*, 25 May 2011.
19 *Lingens v Austria* 1986.
20 *Von Hannover v Germany* 2004; *Société Prisma Presse v. France* 2003.
21 The *Independent*, 25 May 2011
22 *ZAM v CFW* [2011] EWHC 476.
23 *Peck v UK*, 2003.
24 Paton v Poole Borough Council, decided by the Investigatory Powers Tribunal, 2 August 2010.
25 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414.
26 Reported in the *York Press*, 10 June 2011.
27 Speech following the riots, Oxfordshire, 15 August 2011.
28 Statement following riots, Downing Street, 10 August 2011.

Book reviews

Account Rendered: Extraordinary Rendition and Britain's Role

A Tyrie MP, R Gough, S McCracken

Biteback Publishing, 2011

400pp £19.99

The remarkable thing about this book is that copyright rests with the All Party Parliamentary Group on Extraordinary Rendition. The first chapter is written by Andrew Tyrie, the conservative MP. Tyrie is an unlikely rebel, having been senior economist at the European Bank for Reconstruction and Development immediately before his election as a member of parliament. His experience is of a broader nature than most MPs and it shows in the outrage and sheer bloody mindedness with which he writes on the subject of rendition. For those jaded by the posturing and the venality of MPs, Tyrie is a shining light and his all party group has done sterling work in uncovering the information contained in the book.

The book's 400 pages are split between text and sources. Both make riveting – if chilling – reading. The basic story is, of course, well known. The US started rendition as a way of spiriting away people in foreign states so that they could encounter justice in the US. There were some precedents for this activity by other states from the snatching of Eichmann to that of the 'Jackal'. The US started regularly spiriting away those that it wanted in third countries under President Clinton in the mid-90s. But the purpose was to bring miscreants to justice and not, at least primarily, to gain intelligence. Then, under President George W Bush, the process took off. In Europe, snatches were carried out in Sweden and Italy. Outside Europe, the procedure became endemic. People were spirited away to 'black site' prisons or out-housed for treatment to the security services of places like Egypt, Syria and Jordan. Inevitably, the UK was drawn in both because of what looks pretty much like collusion by UK officials and because the CIA needed airports like Diego Garcia and Prestwick to transport their targets around the world. The protestations of ignorance, and later hurried acceptances of partial knowledge, of senior members of the Labour government sound as hollow when repeated in the book as they did when they were originally uttered. In particular, Foreign Secretary Jack Straw found remarkably little evidence in his trawling of the FCO's files of any evidence of our involvement. It was a shameless episode that will taint key members of the Blair government and the book nails it.

The value of the book is enhanced, rather unusually, by the documentation reproduced at the end. Often, a book with more appendices than text raises a suspicion in the sceptical reader's mind about whether it is being padded out. However, dry government memoranda, in some ways, speak louder than any description and analysis ever could. Inevitably, the worst documents are from the Americans. The truth is that the UK is revealed, in this episode as in others, as little more than a lackey state conniving with what its all-powerful ally wants to do.

Few of the documents have not been previously disclosed elsewhere but they still retain a capacity to shock. Typical is the advice of the Office of Legal Counsel at the US Department of Justice on exactly how Abu Zubaydah, a detainee, can be treated in a way which is blatantly torture. This is notorious as the 'Bybee memorandum'. Its author, Jay Bybee, sees no problem with 'walling' – throwing the detainee backwards against a flexible false wall. Bybee is heartened to hear that: 'the head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash. To further reduce the probability of injury, the individual is allowed to rebound from the flexible wall'. Bybee is also fine with 'walling', standing in a stress position against a wall; sleep deprivation; use of insects (of which the detainee has a phobia) let lose in a confined space (reminiscent here of the rats in George Orwell's Room 101); and waterboarding which 'triggers an automatic physiological sensation of drowning'. Waterboarding inflicts, in his opinion, 'no pain or actual harm whatsoever'. Though there were calls for his impeachment, his advice did little to harm his career. In fact, he was rewarded with a place on the Ninth Circuit of the Federal Court of Appeals.

Tyrie and his co-authors have no need to make historical comparisons. Their story is powerful enough. But, frankly, it is not that fanciful to equate Bybee's cool rephrasing of torture to the euphemisms of another age. When Eichmann – later the subject of Israeli rendition - was asked whether it was difficult to send so many Jews to their death, he is reported to have replied, 'To tell you the truth, it was easy. Our language made it easy'. Bybee is a disgrace to his profession, as others have pointed out. It is outrageous that he is now a federal judge. It is similarly outrageous that major British politicians, some of them also lawyers, appear to have connived at torture and the arrangements for it. It is to the credit of the book that it has no need to express such emotion: it tells a story that is damning enough.

Roger Smith, Director, JUSTICE

Fine Lines and Distinctions: Murder, Manslaughter and the Unlawful Taking of Human Life

T Morris, L Blom-Cooper

Waterside Press, 2011

480pp £35.00

Fine Lines and Distinctions: Murder, Manslaughter and the Unlawful Taking of Human Life is a coherent, thought-provoking tour of the law of homicide: that is, unlawfully cutting short the life of another human being. Its authors' suggestions are worthy of serious consideration by anyone interested in the future of this area of law. They argue compellingly that the current law is a 'moral maze' that is in need of fundamental, root-and-branch reform.

Morris and Blom-Cooper engage in extensive historical and legal analysis, from Coke's famous definition of 'malice aforethought', to the abolition of the death penalty in 1969, to the recent modifications to the partial defences to murder in the Coroners and Justice Act 2009. Throughout the book, interspersed with historical discussion and an outline of the substantive law, the authors develop and defend proposals for reform, particularly (in chapter 9) against the criticisms of the Law Commission in

its 2006 Report, *Murder, Manslaughter and Infanticide*, Law Com No 304. In chapters 10-12, they discuss specific instances of homicide: on the road, by corporations, and familial. Finally, they address the relationship between homicide and specific aspects of the criminal justice process, such as juries.

Their key proposal is that murder, manslaughter, and other homicide offences ought to be subsumed within a single offence of criminal homicide. Thus they advocate the abolition of what Lord Parker CJ termed 'fine lines and technical distinctions' between murder and manslaughter. They identify the main stumbling block to reform to be the mandatory sentence of life imprisonment for murder, the crime singled out as the most heinous of unlawful killings. Nevertheless, the authors attempt to debunk the supposed moral uniqueness of deliberative or intentional homicide, eg, is the 'mercy killer' of a beloved spouse really more worthy of moral opprobrium than a highly reckless drunk driver? They question the need for mens rea in its current form, governed by convoluted case-law on the defendant's intention at the time of the killing. The comprehensive homicide offence would remove considerations of intention altogether from determining criminal liability for an act or omission which leads to the death of another.

After proof that the defendant had committed the act that caused the victim's death, the two essential elements of criminal homicide would be: a) knowledge of the act/omission which resulted in the killing; and b) reasonable foresight of the consequences of that act. The authors claim that these two elements suffice to establish the actor's criminal responsibility and his or her liability to punishment, saying that: '[m]oral culpability, on the other hand, reflects punishment and is a matter for judicial sentencing in each individual case.' They contend that the determination of whether a person is legally responsible for a death should be divorced from questions of the immorality of his or her actions. Although the Law Commission's principal objection was that this offence would lack a fault element, the authors contest this. Knowledge by the accused that his or her act involved killing the victim with foresight of consequences clearly involves blameworthiness, and excludes accidents. The authors query why intention, 'that elusive element of the accused's innermost thought', is retained, without explanation, as a crucial element in the Law Commission's own proposals.

Alongside these provocative suggestions, the authors persuasively critique the use of vague concepts such as the 'sanctity of life', instead defining homicide as a violation of the right to life enshrined in Article 2 of the European Convention on Human Rights. They stress that merging the various homicide offences into one need not signal that they are all of the same severity: indeed, they query whether the current law recognises the fundamentally equal value of every human life, given the far shorter maximum sentence for someone convicted of causing death by dangerous driving as opposed to causing death in a bar fight. Judges would have a great deal of discretion to reflect the degree of culpability in the sentence. Justifications or excuses for the defendant's actions would also be dealt with at the sentencing stage. This

would remove the complex defences changing the offence from murder to manslaughter, which at present 'demand so much forensic attention'. In this way, the judge could tailor the proportionality of the penalty to the specific nature of the criminal event.

There is much interest in this book. Many people are dissatisfied with what the authors refer to as the one-size-fits-all approach, and agree that 'the mandatory life sentence for murder has no place in the penal system of a civilised country'. Yet political reality means it is unlikely to change any time soon, and it is debatable whether legislators, the legal community or the public could embrace the eradication of murder as a separate offence.

Rachel Sheperd, policy intern
JUSTICE, summer 2011

Blackstone's Criminal Practice 2011

Rt Hon Lord Justice Hooper and D Ormerod (eds)

Oxford University Press, 2011

3056pp and supplement £265.00

The 21st edition of Blackstone's Criminal Practice continues the success of previous editions while providing readers with an ever greater understanding of criminal law.

Most significantly, this edition covers all new legislation, particularly the Bribery Act 2010, the Crime and Security Act 2010, the Coroners and Justice Act 2009, and the Policing and Crime Act 2009. It also examines the changes to the Magistrates' Court Sentencing Guidelines and provides a revision of the Criminal Procedure Rules 2010. It offers practitioners an up-to-date legal analysis of each of these statutes, guidelines and rules and, impressively, considers the prospective application and interaction of new legislation, even where provisions have not yet come into force. Practitioners are, therefore, made aware of future developments in the law, meaning that they can keep one step ahead of the game.

This new edition also includes a discussion on the impact of the Lisbon Treaty and retains the important examination of the European arrest warrant. While the legal analysis regarding both is not particularly expansive, it does provide a practical guide to their effect on criminal law.

In terms of case law, the publication offers an examination of a huge number of new cases, including the first cases from the Supreme Court such as *Ahmed v HM Treasury* on asset freezing and money laundering, *Horncastle* on hearsay and *Norris v USA* on extradition. Leading decisions from the Court of Appeal are covered including *Mendez* on joint enterprise liability, *Sheppard and Whittle* on jurisdiction, *Jones* on incitement and entrapment, *Mohammed* and *AY* on terrorism, *CPS v LR* on disclosure, *NT* on prosecution appeals, *CII* on preparatory hearings, *Reed* on DNA evidence, and *Barker* on children's evidence. Also, a number of the Court of Appeal's decisions concerning sentencing are analysed particularly *Appleby* on sentencing for manslaughter, *Wilkinson* on sentencing in firearms offences and *Greaves* on sentencing for money laundering.

The main volume helpfully retains the same detailed sections: general principles of criminal law, offences, road traffic offences, procedure,

sentencing and evidence. It also retains the same appendices as the 2010 edition, namely, the Codes of Practice under PACE, the Attorney-General's Guidelines, the Code for Crown Prosecutors, the Codes, Guidelines and Protocols on Disclosure and the Consolidated Criminal Practice Direction. The main volume also includes an updated and easy-to-use tables section, including not only the necessary cases, statutes, statutory instruments and practice directions but also codes of conduct, guidelines, protocols, circulars, international treaties and conventions and European legislation. Maintaining the same format and detail of these sections means that practitioners can continue to use the latest edition in the same way as the last with ease and without re-learning the layout.

Despite the significant increase in the material provided and with an even larger and more detailed index of 133 pages, the editors have been careful to limit the size of the volume. At 3,056 pages, the 21st edition of Blackstone's Criminal Practice is shorter than the last and thus remains portable and readily accessible in a single volume.

A supplement containing both the Criminal Procedure Rules and the Sentencing Guidelines is again published with this edition, thereby building on the recent restructuring of the publication and continuing the practical usefulness of having one accompanying source. The two additional cumulative supplements, quarterly bulletins and monthly on-line updating service ensure that Blackstone's Criminal Practice is constantly up-to-date with the latest developments in the law. The online updates also provide users with an easily-accessible resource of new law.

The panel of contributing authors goes from strength to strength in this edition. The panel has been joined by Alison Levitt QC, the principal legal advisor to the CPS, and Professor Valsamis Mitsilegas, Professor of European Criminal Law at Queen Mary University and a regular consultant to Parliaments, EU institutions and international organisations. Not only do these two individuals bring great expertise to the panel but four of the contributing authors took silk in 2010, creating an impressive contributing body.

Overall, the substantive additions and the continued use of the single volume with an easy-to-use supplement make a practical and up-to-date reference publication essential for any criminal practitioner.

Samantha Jones, criminal justice intern, JUSTICE, summer 2011

JUSTICE briefings and submissions

1 May 2011 – 31 October 2011

Available at *www.justice.org.uk*

1. Response to Advocate General's consultation on role of Supreme Court, May 2011;
2. Response to Home Office consultation on CCTV Code of Practice, May 2011;
3. Response to Home Office consultation on anti-social behaviour, May 2011;
4. Briefing on the Police Reform and Social Responsibility Bill for House of Lords Committee Stage, May 2011;
5. Response to Lord Justice Gross's review of disclosure in criminal proceedings, May 2011;
6. Response to the Carloway Review, June 2011;
7. Response to Ministry of Justice consultation on the Draft Defamation Bill, June 2011;
8. Briefing on the Terrorism Prevention and Investigative Measures Bill for Second Reading in the House of Commons, June 2011;
9. Response to the Government Equalities Office consultation on the Equality and Human Rights Commission, June 2011;
10. Police Reform and Social Responsibility Bill, joint briefing on clause 154 for House of Lords Committee Stage, with Aegis Trust, Human Rights Watch and Redress, June 2011;
11. Briefing on Legal Aid, Sentencing and Punishment of Offenders Bill for House of Commons Second Reading (sentencing provisions), June 2011;
12. Briefing on Legal Aid, Sentencing and Punishment of Offenders Bill for House of Commons Second Reading (legal aid), June 2011;
13. Briefing and suggested amendments for Police Reform and Social Responsibility Bill for House of Lords Report Stage, June 2011;
14. Response to Ministry of Justice civil justice consultation, June 2011;
15. Briefing on the European Commission proposal for a directive on the right of access to a lawyer, July 2011;
16. Police (Detention and bail) Bill, briefing for all stages, House of Commons, July 2011;

17. Briefing on the proposal for an EU regulation on mutual recognition of protection measures in civil matters, July 2011;
18. Submission to Nominet on domain suspensions, July 2011;
19. Briefing on Legal Aid, Sentencing and Punishment of Offenders Bill for House of Commons Public Bill Committee (Legal aid provisions), July 2011;
20. Briefing on Legal Aid, Sentencing and Punishment of Offenders Bill for House of Commons Public Bill Committee (Sentencing provisions), July 2011;
21. Briefing on the European Investigation Order, Partial general approach, July 2011;
22. Joint JUSTICE and CBA response to the European Directive on Victims Rights consultation, July 2011;
23. Briefing on Public Bodies Bill for House of Commons Public Bill Committee, August 2011;
24. Response to the McCluskey review on the Supreme Court, August 2011;
25. Response to Ministry of Justice consultation on the Public Bodies Bill, September 2011;
26. Public Bill Committee briefing on the Public Bodies Bill, September 2011;
27. Scotland Bill briefing for the Holyrood Committee, September 2011;
28. Briefing on Legal Aid, Sentencing and Punishment of Offenders Bill (New sentencing provisions) for House of Commons Report Stage, October 2011;
29. Briefing on the Terrorism Prevention and Investigative Measures Bill for House of Lords, Committee Stage, October 2011;
30. Briefing on the Legal Aid, Sentencing and Punishment of Offenders Bill for House of Commons Report Stage (Legal aid and sentencing), October 2011.

Cumulative Index 2004-11

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