JUSTICE JOURNAL

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

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

Lord Alexander of Weedon QC
JUSTICE is deeply saddened by the death of Lord Alexander on 6 November 2005. He was an outstanding advocate, an enormous intellect and a generous man. He was chair of JUSTICE's council from 1990 to October 2005, leading a team which transformed JUSTICE in the mid-1990s. He will be greatly missed.

The editors thank Beverley Slaney for her assistance in the production of this issue.

JUSTICE, 59 Carter Lane, London EC4V 5AQ
Tel: +44 (0)20 7329 5100
Fax: +44 (0)20 7329 5055
E-mail: admin@justice.org.uk
www.justice.org.uk

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Editorial

The first five years of the Human Rights Act: a story too early to tell

As the autumn has progressed, so the air has become thick with retrospectives on the Human Rights Act, which came into force five years ago on 2 October 2000. Most informed legal opinion on the judicial response to the Act reports an uncertain start but gathering pace – culminating in the high water mark of the 'Belmarsh' judgment[1] in which the House of Lords declared the government's flagship anti-terrorism legislation to be incompatible with the European Convention. As yet, however, it may be too early to judge either the positive effects of the Human Rights Act or the extent to which it may be successfully challenged and its effect diminished.

The immediate threat emanates, ironically, from the same Prime Minister who introduced the Human Rights Act. Mr Blair grows ever more restive as the implications of the Act bite ever more deeply. Mr Blunkett may be no longer at the Home Office but his frustration foreshadowed that of his leader and is widely reflected by ministerial colleagues:

> *I'm personally fed up with having to deal with a situation where Parliament debates issues and the judges overturn them.*[2]

The Conservative party, meanwhile, have staked out a territory in which they wish to protect civil liberties but would repeal the Human Rights Act. A reasonable analysis of the current situation may well be that lawyers and judges are, by and large, a long way into the process of absorbing the Act into their jurisprudential approach. The public, politicians and media are, however, substantially behind. This creates an inherently unstable situation which JUSTICE's project on 'Changing the Rules', the public debate on which is reported within, is designed, in part, to address. It is why, along with the French Revolution, the full effect of the Act cannot properly be judged: it is too early to tell.

Few Acts of Parliament have arrived on the statute book with so much praise. A considerable amount of this came from its chief architect, Lord Irvine, who announced at the second reading of the Human Rights Bill in the House of Lords that:

> *Incorporation of the European Convention into our domestic law will deliver a modern reconciliation of the inevitable tension between the democratic*

> *right of the majority to exercise political power and the democratic need of individuals and minorities to have their rights secured.*

Lord Lester, long-time campaigner for incorporation, was happy to extol the virtues of Lord Irvine's Act:

> *A beautifully drafted and subtle measure, expressed in open-textured language appropriate to a constitutional charter.*[3]

One of the consequences of the form of the Act – which was entirely foreseen – is that its clarity of line and purity of form led to the need for litigation to establish much of the detail. A crucial issue has been the way in which the courts would interpret their core duty in section 3 of the Human Rights Act to construe legislation as compatible with the Convention 'so far as is possible to do so'. This now seems resolved in favour of 'a strong rebuttable presumption' in favour of such an interpretation that does not require ambiguity in the original text.[4] Thus, in the end, the House of Lords has taken what probably is the strongest possible position on this point. Interestingly, the alternative remedy, a declaration of incompatibility, which was designed to give the government flexibility in response to a judicial finding, has proved a more useful weapon than might have been expected. To its great credit, and on occasion through clenched teeth, the government has generally replied to a declaration with amending legislation designed to cure the defect identified by the court. Even the 'Belmarsh' defeat was followed by a new Prevention of Terrorism Act, albeit one of which JUSTICE was somewhat critical. There has been somewhat less satisfactory resolution of the definition of 'a public authority'. A trail of cases has led to a position that the Parliamentary Joint Committee on Human Rights called 'highly problematic'.[5] Such a pity that the courts did not accept the invitation in JUSTICE's intervention in the *Leonard Cheshire* case to adopt a strong 'functional test' – ie a public authority is to be defined by reference primarily to the public nature of its functions. Some uncertainty still hovers over this crucial definition.

The Act was intended to improve public services. The extent to which ordinary people have seen and appreciated the benefits is unclear. Most public authorities have certainly reviewed their adjudication procedures and ensured that they comply with the fair trial requirements of Article 6. The public's claims are probably being adjudicated through more independent processes. For example, undue delays in relation to mental health tribunals have been successfully challenged. The position on substantive benefits for ordinary people is more difficult to judge. Some gains have been obtained without litigation as authorities have settled. For example, Mrs Betty Clarke obtained the promise of the anti-cancer drug herceptin, in furtherance of her right to life, without having to resort to litigation – just exercise of its threat. It is difficult to judge the extent to which others have found a direct answer to their

need through the operation of the Act. An admittedly early study by Jenny Watson, commissioned by the British Institute of Human Rights, found:

> *Little serious attempt by any organisation … to use the Human Rights Act to create a human rights culture that could in turn lead to systemic change in the provision of services by public authorities.*[6]

It may well be that the Act has been less powerful than it would have been if backed with a strong Human Rights Commission – precisely Jenny Watson's argument. We need to ensure that the establishment of a strong Commission for Equality and Human Rights makes a priority of improving the provision of services.

The Act has proved a strong bulwark in defence of civil liberties. It is here – and in, particularly, the charged areas of asylum, criminal justice and anti-terrorism policy – that it has made a major difference. It is also where, of course, there has been the most tension with a government determined to show its populist credentials. The continuing nature of this battle is one reason why it is too early to tell the effect of the Act. It is entirely possible that the government will seek to legislate to overturn judicial restraint on its powers. Gains may yet be lost. Eric Metcalfe's article on torture discusses the debate on this crucial issue to date.

The Act has led to major consequential constitutional change. The Constitution Reform Act 2005 removed the long-standing powers of the Lord Chancellor; created a Supreme Court of the United Kingdom; set up a Judicial Appointments Committee; and radically changed the relationship between the executive and the judiciary. This is one of the subjects of our 'Changing the Rules' debate. In the short term, the difficulties in our constitution were probably more theoretical than practical. Indeed, in the short term, Lord Falconer's withdrawal from the role taken by his predecessors, such as Lord Mackay, in defending the rule of law within government may well have been a disadvantage.

The major change that has upset politicians is that judges appear to be making decisions on matters for which they regard themselves as democratically accountable. The judiciary have settled this issue to their own satisfaction by declaring 'discretionary areas of judgment' in which they acknowledge the priority of ministers. Tony Blair, for one, is not happy. This is a major issue on which progress needs to be made in encouraging a public understanding of the delicate balance between separate branches of government. There is unlikely to be peace until ministers accept that the concept of proportionality is valid and represents as reasonable a framework for decision-making as 'reasonableness' – a concept developed through judicial review and with which all parties now seem broadly content. Similarly, the judiciary will need to move with restraint.

This leads to the broader issue of whether the Human Rights Act has created a 'human rights culture'. Clearly, Mrs Clarke is an illustration of that culture. Jonathan Cooper's article in relation to corporate accountability indicates how little human rights have penetrated into the private sphere. The general public is probably still pretty distant from the Act and see it in much the same category as the European Union – it exists; pity there seems no way out of it. The second half of the Act's first decade will be a difficult time. JUSTICE hopes to play its part in helping the Act to bed down.

Notes

1 *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.
2 19 February 2003.
3 'The Human Rights Act 1998 – five years on' [2004] EHLR 259.
4 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, Lord Steyn.
5 *The Meaning of Public Authority under the Human Rights Act*, HL paper 39, 2004.
6 J Watson, '*Something for Everyone: the impact of the Human Rights Act and the Need for a Human Rights Commission'*, British Institute of Human Rights, 2002, p7.

Changing the rules: the judiciary, human rights and the constitution

This article takes its text from the JUSTICE/Tom Sargant memorial annual debate, held on 18 October 2005. The debate shares its title with a discussion paper, produced by JUSTICE as a prelude to a longer project, which aims to chart the changing balance of power between the judiciary, executive and legislature; to identify where problems and uncertainties are located; and to articulate a re-balancing of powers within the constitution to meet contemporary pressures.

The debate was chaired by Lord Steyn, who paid tribute to the towering role that Tom Sargant had played in JUSTICE over many years. Michael Beloff QC, Baroness Helena Kennedy QC, Professor Robert Hazell, and Roger Smith were the other speakers.

Lord Steyn:

The debate this evening has the title 'Changing the rules: the judiciary, human rights and the constitution'. Mercifully, it does not speak about changing the rules *of the game*. As my very first statement on behalf of JUSTICE I would wish to state without equivocation that the maintenance of the rule of law is *not a game*. It is about access to justice, fundamental human rights and democratic values.

I accept, of course, that in judging on such matters judges make mistakes. Fortunately, however, there are advantages: they do all their own work, they do their work in public, and they always make their true reasons public. If they make mistakes those mistakes are almost instantly correctable. For my part, as a lawyer who came from South Africa, I would want to say that England has, in comparison with other countries, a superb judiciary which is at all levels of high ability and dedicated only to the neutral and impartial examination of issues in the public interest.

Sometimes the criticisms aimed at judges are not well merited. Let me give you one example. Over the last 20 years there has been a flood of legislation about criminal justice. It is a political football. Almost every year there is a huge new Criminal Justice Act. Year after year half-baked ideas are adopted in haste, puffed up to be the ideal solution and routinely abandoned the next year. The quality of much of the legislation has been described by eminent textbook writers as scandalous. So, to the bewilderment of the public and judges, the

position in regard to criminal justice continues from year to year. It is a little unfair to blame it on the judges as politicians so frequently do.

Tonight it is my very special honour and privilege on behalf of JUSTICE to pay tribute to my predecessor, Lord Alexander of Weedon QC. His accomplishments and public services are legion and well known. His contribution to the development of JUSTICE over a long period has been enormous.

I propose, however, to single out as one of his greatest achievements his superb lecture of 2003 about the lawfulness of the Iraq war.[1] One knows, of course, that the government earnestly desires a closure on this issue, but that is not possible. While there are different views on this occasion even Mr Walter Wolfgang would be free to express the opinions for which he was charged under the Terrorism Act. Possibly his name will live on when the names of some now in charge of our affairs are long forgotten.

In his 2003 annual lecture Lord Alexander delivered a most devastating critique of the legality of the invasion of Iraq. He pointed out that there was no threat to the UK or US. He noted that there were *then* no current links between the odious Saddam Hussein regime and Al Qaeda. He analysed the constantly shifting grounds for intervention. Rightly he concluded that none of those grounds had the slightest plausibility.

He showed that the theory that the earlier Resolution 678, preceding the driving of Iraq from Kuwait 12 years earlier, had no relevance to the contemporary international position. The sole reason for harking back to it was that it was impossible to obtain Security Council approval for the intervention in Iraq.

For all arguments some support can be dredged up, and the Attorney-General had some limited support. But in my view Lord Alexander's view reflected the overwhelming view of international lawyers and was undoubtedly correct.

Lord Alexander was entitled to conclude as he did that in its search for a justification in law for war the government was driven to scrape the bottom of the legal barrel. I am in full agreement with everything Lord Alexander said.

While I have not discussed the matter with Lord Alexander I am inclined to think that he would agree with a passage in the 1988 Turin lecture 'Pursuit of the Ideal' by Isaiah Berlin. Earlier in his career Berlin adopted a rather relativist position: often he was sceptical even about the most fundamental universal values. But by 1988 he had changed somewhat: he described what he called the requirements of a decent society. He explained:

> *Priorities, never final and absolute, must be established. The first public obligation is to avoid extremes of suffering. Revolutions, wars, assassinations, extreme measures may in desperate situations be required. But history teaches us that their consequences are seldom what is anticipated; there is no guarantee, not even, at times, a high enough probability, that such acts will lead to improvement. We may take the risk of drastic action … but we must always be aware, never forget, that we may be mistaken, that certainty about the effect of such measures invariably leads to avoidable suffering of the innocent. So we must engage in what are called trade-offs – rules, values, principles must yield to each other in varying degrees in specific situations. Utilitarian solutions are sometimes wrong, but, I suspect, more often beneficent. The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices – that is the first requirement for a decent society; one that we can always strive for, in the light of the limited range of our knowledge … A certain humility in these matters is very necessary.*

It may be that without that quality of humility, which involves accepting the folly of the invasion of Iraq, the extrication from Iraq will prove extremely difficult.

About Iraq I would add only one matter. After the recent dreadful bombings in London we were asked to believe that the Iraq war did not make London and the world a more dangerous place. Surely, on top of everything else, we do not have to listen to a fairy tale.

Michael Beloff QC:

In a lecture which I delivered in 2003 I said this:

> *My thesis is that one of the most profound recent changes in the constitution results not from the designs, benign or brutal, of Thatcherite, Tory or New Labour, but from the activities of a third branch of government, the judiciary, which has itself not only to a substantial extent exercised control over the executive, but even infringed the sovereignty of Parliament, an impregnable given for those reared in the traditions of Blackstone and Dicey.*[2]

This passage was quoted by the then Home Secretary, before his fall from grace, in a speech to the Institute for the Study of Civil Society.[3] The purpose of David Blunkett in seizing upon my words was to adorn his third assault in as many weeks on the judiciary with the borrowed plumes of someone whom he optimistically identified as a credible academic. It was in the same speech that he memorably called for the rule of justice not of jurisprudence, so suggesting

that the latter, the creation of the judges, had somehow become divorced from the former.

The sound of thunder may have become more muted since David Blunkett was removed to the tranquil pastures of pensions, but the constitutional weather forecast remains unsettled. The Prime Minister tells the judges, as Lord Steyn reminds us, that 'the rules of the game have changed'. The incoming Lord Chief Justice feels compelled to emphasise in his first public words in that office that Her Majesty's judges are truly independent. Hence this debate, in which I suspect I am to be categorised as the captive conservative, the devil's advocate or the court jester, although I may be biting the hand that has fed me as a Queen's Counsel for more than a quarter of a century. Because I am concerned, for reasons that I will explain, that the judges may indeed be somewhat over-reaching themselves, and more importantly with the possible consequences if they do so, and this is not of course because I have any prejudices against the judiciary. Indeed I may fairly say that some of my best friends are judges. But if there is to be a debate, I believe it is useful that not everyone should speak on exactly the same side.

It is well known that the quiescence of the judiciary in the last old Labour government of Clement Atlee can be contrasted with their vigour in the time of New Labour and Tony Blair, not only in the question of the number and variety of applications for what we now call judicial review, but the type of issues that are dealt with by the judiciary. There are a number of reasons for that change: the growth of the regulated society, as I would call it; the rewards of public law litigation; an increasing awareness of the potentialities of public law to achieve policy aims; the manifest reduction in the role of parliament as an effective watchdog over the executive; the procedural reforms of the Rules of the Supreme Court in 1977; and to a lesser extent the Woolf reforms in the Civil Procedure code. And then of course two outstanding factors: first, the joinder of what we now term the European Union, and second the domestication of the European Convention on Human Rights via the Human Rights Act of 1998 (HRA). But equally important has, I suggest, been the personality of the judges.

The result has been an expansion into hitherto uncolonised areas of judicial review. One may instance, merely by way of example, over the exercise of prerogative powers in the 'GCHQ' case[4], and over bodies without any statutory foundation as in *Datafin*,[5] and concomitantly there has been an expansion of the principles by which the judges exercise that control. Lord Cooke once said, epigrammatically, that judicial review could be summed up as simply obliging the executive to act 'lawfully, fairly and reasonably': three adverbs that appear to make a mockery of the very substantial and erudite volumes on public law that pour from the presses of London, Oxford and Cambridge. Lord Diplock,

in the 'Fleet Street Casuals'[6] case in 1981, said that any decision of the courts in this area before 1950 could be regarded with suspicion; one might say in the year 2005 that any decision of the courts before 1981 could equally be regarded with suspicion. I do not wish to weary you with multiple examples, but there is a very powerful case for saying that the boundary between a merits appeal and judicial review has been substantially eroded, and an indisputable one for saying that a variety of new principles and new controls have developed. The principle of legality, which may be said to have been rediscovered;[7] the obligations in terms of fairness to provide reasons;[8] the mistake of fact rule which now has an autonomous existence;[9] legitimate expectation, in particular in the *Coughlan*[10] case, in which the judges have moved from treating fairness as a procedural to treating it as a substantive concept; and the erosion of the traditional boundaries between domestic and international law.[11] Then there is the impetus given by Community law, to which I have referred: principles such as transparency, legal certainty, equality, proportionality, and indeed giving the death blow, in the speeches of Lord Steyn and Lord Cooke to the Wednesbury canon in the *Daly*[12] case. But of course most important has been the power given to our judges in the EU area to invalidate domestic legislation, something upon which they have seized with a voracious appetite and, I would suggest, are beginning to transpose into areas in which it has application. And then finally the European Convention on Human Rights, the powerful interpretative rule in section 3 of the HRA and the ability to give a declaration of incompatibility in section 4 of the HRA, which is more than a nudge and a wink, to the executive, to command or propel, if it can with an adequate majority, the legislature to change the offending legislation.

All this may seem to be trite and all this may seem to be virtuous: so why am I concerned? I consider that there are examples where the judges have clearly used this machinery and developed the principles to an extent where, rather than identifying, they are contradicting the intention of the legislature. The classic areas of course where there has been controversy are in the field of immigration and asylum. You may remember the *JCWI*[13] case in the mid-1990s, in which delegated legislation was passed through parliament that effectively obliged asylum-seekers who could not establish a prospective right to remain here to quit the country or to find themselves without means of support. Distasteful, of course, in political terms, but clearly what the legislature and the relevant minister had in mind. The court overruled this on the basis that it could not be countenanced without primary legislation, which was of course inevitably introduced. At that stage the courts then discovered in legislation of 1948, the National Assistance Act, powers to give succour to the asylum-seekers,[14] which in Lord Steyn's phrase was a 'speaking statute', but speaking in a voice entirely different to that of the legislature which introduced it.

There has been the anti-terrorism legislation and the 'Belmarsh' case.[15] What is instructive about the anti-terrorist case is this: it is often forgotten that the argument was not in fact all one way. The Court of Appeal unanimously upheld the legislation; there was one dissenting voice in the House of Lords. It reminds one of that old phrase that the duty of a judge of first instance is to be swift, courteous and wrong, which is not to say that it is the duty of the Court of Appeal to be slow, rude and right, for that is the prerogative of the House of Lords.

There is a fundamental constitutional debate between those who suggest that in the area of statutory interpretation, which is the foundation of modern public law, the court's function is only to interpret the will of parliament and those who, like Lord Justice Laws for example, say that this is a fiction or a fig leaf and that on the contrary, this is an area where the judges impose values of their own.[16] This provokes the question: what is the basis upon which the judges are able to establish a power of that particular kind? In a series of lectures given coincidentally in 1994, some of the judges went even further. They suggested that a stage might be reached in our society in which, in theory, primary legislation would have to be invalidated as contravening some form of fundamental principle or natural law.[17] This has surfaced in the debate over the abandoned legislation to restrict appeals against decisions of immigration tribunals last year,[18] and it has resurfaced if I may say so with great eloquence of course by Lord Steyn in one of his last contributions in the debate over the Hunting Act in the House of Lords,[19] where he said the supremacy of parliament was:

> *still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this a constitutional fundamental which even a sovereign parliament acting at the behest of a complaisant House of Commons cannot abolish.*[20]

This hypothetical example, I understand from those present, was the consequence of his skilful provocation of the Attorney-General to assert the classic doctrine that if parliament wished to abolish judicial review, it could.

Now why do I say I am concerned? I am concerned about this concept as a matter of principle and I will return to that at the end of my address; but I am also concerned for two practical reasons: one, that there is indeed a risk

that if the judges continue in an area where, as any advocate or judge knows, there is always the possibility of choice, to push the boundaries too far, they may themselves be the victims of a reaction in which the legislature do seek to curtail their powers, and create a constitutional crisis. There are some of us old enough here to remember over the relatively trivial issue of retrospective charges for television licences in the famous *Congreve v Home Office*[21] case in the 1970s Roger Parker QC, then leading for the government, was said to have said that if the courts went on defying the executive there would be some form of redress. Lord Denning, an epitome of a courageous and independent judge, retorted that he hoped that those words were said without forethought because such redress was unthinkable. But nonetheless there are others – and Lord Steyn has referred to them – in high places, who are already hinting that the powers of the judiciary should be curtailed. The second, of greater concern to me, is that in future we may have the politicisation of judicial appointments. I was a voice that spoke out in a public lecture in the last decade in favour of a Judicial Appointments Commission[22] because I wanted a barrier to be created against those who believed that judges should be subject to the kind of questioning and the kind of process that we have seen vividly illustrated in the last few weeks in America where Harriet Miers, the personal lawyer of the President, is being hauled over the coals[23] in the same way as Robert Bork and Clarence Thomas were before her. That process would be abhorrent to anyone reared in British constitutional traditions and yet it is not now unthinkable that politicians might take such a step.

I end by saying this: it is often recollected that the purpose of the civil war and the Glorious Revolution that followed it was to establish the sovereignty of parliament and to remove from the monarch the suspending and dispensing powers that James I and II had previously claimed.[24] But equally at the start of that self same century, Sir Edward Coke, a very great judge, was talking in terms of the invalidation of legislation that he considered contradicted natural law.[25] I would suggest to you that the outcome of the Glorious Revolution although clearly directed against the former anachronism was equally inconsistent with the latter. It is not merely a practical question – Stalin asked 'How many divisions has the Pope?' One might equally ask 'how many divisions have judges got?' If they chose to put themselves in opposition to the legislature, what indeed would happen? It is more a question that there was a constitutional choice made in this country. It is perfectly plausible, perfectly proper, perfectly explicable, to have a constitution such as the United States of America in which the courts do in fact have the last word not only on executive action but also on legislative action. That is not the choice that was made in this country. And if our constitution is to be transformed in the way that some would like it transformed, I suggest that is a matter upon which there should be a public debate. One characteristic but fair criticism of judges who claim these larger powers is to focus upon the

fact that they are unelected. Where is the democratic legitimacy for them to take those powers unto themselves? The point about politicians is that, in a democracy, you can always chuck the rascals out.

Helena Kennedy QC:

Of course I am going to defend the judges, something that I have not always done. I spent a very large part of my life at the Bar giving a terrible time to our judges. I did not only do it in court; I went out and I went on television, and I wrote articles in newspapers, saying what a terrible lot they were, particularly when it came to the way in which they handled cases to do with women. I used to talk about how the judges felt that if women had short skirts they 'had it coming to them', and how they described 'contributory negligence' on the part of women in rape cases and how women and small boys told lies, and that was why you needed to have corroboration of everything they said (as though men were in a different category – little boys became men at some point and they became *truthful*). We used to have incredible debates about the judiciary: I remember a particular occasion when I went to an event and there was the chief justice, Lord Taylor. He took me to one side and said 'Helena, I have just passed the afternoon looking at a video in which you spent the whole time on a television programme saying terrible things about the judiciary' and I said 'No I didn't' and he said 'Yes, you did' and I said 'Well, they deserve it', and he said 'That's a different defence'.

It is therefore an interesting state of affairs that here I am going to defend the judiciary. I said not very long ago to a judge at the Old Bailey, 'The judges have changed'; he said 'No, Helena, you've got older'. That is of course true. Tonight I wanted to say a number of things about why you must not go around calling on the judges to exercise caution, because caution is already in the air. We need the judges to actually stand up at this very particular time, and be brave in the face of the pressure that they are going to be under.

Just a couple of Sundays ago I spent the evening on the recommendation of a friend watching a film, 'Judgment at Nuremberg'. It is based very closely on the 'Justice' trial in post-war Germany, in which 16 judges were in fact put on trial for their complicity in terrible crimes against humanity, which took place, of course, under the Hitler regime. The events that made up the substance of the film really do not bear comparison with anything that is happening in our respective countries just now. The trial involved judges who sanctioned horrible atrocities, and who colluded in terrible events. The film leaves you of course with that question reverberating in your head about legal systems and about the role of judges and lawyers; the sort of questions that we should always have in our minds, reflecting on the point at which you can become co-opted when a

nation feels under threat. Spencer Tracey (who plays the presiding judge at the trial) has a great speech towards the end of the film. He says:

> *A decision must be made in the life of every nation at the very moment when the grasp of the enemy is at its throat; when it seems that the only way to survive is to use the means of the enemy. For most of us then it would be easier to look the other way for our own survival. But we have to ask ourselves the question: survival as what? The time to stand for something it is most difficult to do so. What we stand for is justice, truth and the value of a single human being.*

Here in Britain we have had our own experiences, as Lord Steyn said, and it has sent shockwaves through the system. Our Prime Minister has said that the rules of the game have to change, and by that of course he has in mind lowering standards of proof: the possibility of pre-emptive actions, which may mean that some of those fundamental principles that we feel are part and parcel of the system should be called into question. It is not new: he has been running with this theme in fact for a number of years, so let us not imagine that it is something completely new. But it is in times like this that it is very easy for people to end up being co-opted.

Parliament has of course the primary law-making function, giving democratic legitimacy to our legislation. But we should bear in mind that in the last few decades we have seen a great reduction in the number of people voting – governments being elected with large majorities, but an ever-reducing base of voters. The turnout is hovering at about 60 per cent in this country; in the last election the number of people who did not bother to vote was in fact larger than the number who voted for the government, by over a million.

The downside of large majorities, and we see it in the House, is that a government can push legislation through parliament with speed, particularly if there is a public panic. It means there is insufficient revising, as Lord Steyn has said: you get really appalling legislation pushed through. Scrutiny, reflection on the consequences of the law that has been cobbled together, is very meagre indeed. Such law making of course means that even democratic governments can get it wrong, and abuse of power can happen more readily. But we have introduced legislation a year ago that means that policemen and judges are now able to sit on juries. The whole point was, in the famous GK Chesterton discourse on the jury, that you did not have policemen, the arm of the state, on the jury – the idea was to have people who were *not* arms of the state on the jury. But, on a recent case at the Old Bailey, we had a policeman stand up and say 'I am a policeman in the murder squad' and yet he is able to stay on a jury because

we no longer have jury challenges in the UK. It is ridiculous, but brought in in order to increase convictions.

We have to ask ourselves what kind of law-making is currently taking place. Even democratically elected governments abuse their power. They don't need to have jackboots; authorisations come in Armani suits. The judges' task, as we all know, is to interpret the law; but not literally, like ciphers, but in a way that is meaningful and purposive to give effect to the basic objectives of the legislation. It should also be in the judge's mind, and it should be a reasonable assumption, that legislation is not intended to destroy fundamental rights. That means the right to due process; the right to be properly represented in the court by an advocate who actually will see the evidence against the client; the right not to be tortured or to have the product of torture used in any case that you may be involved in. Our system relies on mutual respect: the courts respect the executive within its lawful province, and the executive is supposed to respect the decisions of the courts as to what the executive's lawful province is. But of course we have been seeing increasingly, starting with Michael Howard, a shocking disregard for this constitutional convention, with Home Secretaries berating judges when they make decisions that the Home Office does not like. We had it particularly, of course, with David Blunkett, railing against the judiciary over the decision on the Bulger boys, or denouncing a particular judge for decisions on asylum cases, or raising cheap laughs against judges at police conferences. We had only the other day the business about Zimbabwe, with a minister in the Home Office being intemperate over the judicial decision.

There are of course areas where the courts should exercise a special caution, believing the matter is best left to the executive; we have had a number of our judges referring to the sorts of circumstances which those might be. The magic is knowing the difference, knowing which questions the judiciary should be positively answering and protecting. It has been written about extensively by Anthony Lester and David Pannick; about the wise exercise of judicial discretion to defer to parliament as a crucial recognition of the separation of powers; but also not forgetting their fundamental and important role, which is to protect human rights. They cannot abdicate their responsibilities by developing self-denying limits on their powers. The fear that we should have just now is not that judges are overstepping the mark, but that judges may actually end up being fearful about fulfilling the very role that is expected of them.

Our great chairman tonight, Lord Steyn, once spoke about the ways in which there can be, even in the protection of human rights, qualified escape routes – ways in which once the suggestion that there is national security at stake or public safety or public order or the prevention of crime, or the economic well-being of the country or the protection of health or the mores of our society, suddenly the

judges might feel that they have to go into retreat. We have to ensure that there is not a culture developing that makes the judges feel that they have to do that. That is precisely, I am afraid, what our politicians are setting up.

Many people have spoken about the difficulties and the problems about creating slippery slopes. As an experienced advocate in the criminal courts I know this well. There are occasions when judges make the mistake of thinking that somehow they have a responsibility to back up government. Lord Steyn said it in a lecture he gave recently where he said:

> *In troubled times there is an ever present danger of the seductive but misconceived judicial mindset that 'after all, we are all on the same side as the government'.*[26]

Some of our judges do think that. Indeed it was one of the problems that arose in the late seventies and into the eighties in terrorist trials. I was involved in some of them. When I was involved in the Guildford Four appeal, it was with sadness that we saw very clearly that sometimes judges did allow themselves to fall into that trap. It was not their behaviour that created miscarriages of justice, but they compounded them.

So what we have to be urging our judges to do today is in fact to remember that it is their democratic duty to stand up where necessary for individuals against the government. I sincerely hope that this week when hearing the case in relation to torture, that our judges will feel that that is what they can do, just as judges did in Israel in relation to torture.

An example was given by Alex Carlile yesterday that was a nonsense, which was that 'surely if someone called up from Algeria and told us that there were four men getting on a train in Luton and that they might blow up the centre of London, we have to be able to use that information; it would be a dereliction of the government not to use it'. Of course it would be a dereliction – but that is not what is being suggested: it is about using it in the courtrooms as evidence. Intelligence has always been the starting point in cases – every case that I have ever done in relation to terrorism started with a piece of intelligence. But it is not what is used in courts in order to take people's liberty away; it is not what is used in order to deport people. And that is the difference; that is the rub. If that is what a government wants to do, they have to legislate for it. They have to legislate to say – yes, we want to be able to use the products of torture. There is a legacy for Mr. Blair.

All I say to you today is that as lawyers and judges we all belong to a community, and it is a privileged community, but it carries special responsibilities. I say to

every lawyer in this hall tonight that we should feel proud to be part of it. I have loved my life in the law, but all I would say is that our responsibility is to stand up and be counted and to support the judges when they do the right thing, and to support lawyers who are trying to argue for a proper due process where we see that it isn't taking place. I am afraid that there are things taking place currently that are unacceptable in a democracy even faced with the threats that we are facing.

Professor Robert Hazell:

I am going to make five points, but first, let me applaud JUSTICE in its new initiative; we certainly live in interesting times, when the relative constitutional powers of the judiciary, the executive and the legislature are undoubtedly changing. My first point is to suggest to you that mainly, I think, they have been changing for the better, not the worse. That may sound counter-intuitive, but let me remind you of three big constitutional changes from the last five years or so.

First, the Human Rights Act of 1998: it imposed very important new disciplines on the executive and on parliament, and it has greatly strengthened the hand of the judiciary in keeping both the other branches of government up to the mark.

Secondly, reform of the House of Lords: it was a major achievement to have removed 90 per cent of the hereditary peers, and the House of Lords is a lot more effective and legitimate as a result. Let us not forget that there were five attempts to reform the House of Lords in the last century, and all of them failed.

As a result of the changed composition of the House of Lords no single party there has an overall majority and that situation is now accepted by all the political parties, who have agreed that it should continue. The significance of that I think is not yet fully understood: it means that no government will have an automatic majority in the House of Lords. One of the first to understand it was Lord Alexander, JUSTICE's chairman. In a lecture to the Constitution Unit in June 2000, he reminded the audience that the Blair government had never come close to being defeated in the House of Commons. In the 1997-2001 parliament the government never had a majority of less than 40 or 50 in the divisions in the Commons, but it had been defeated on three out of ten votes in the House of Lords. In Labour's second term the voting figures were broadly the same: the government still remains undefeated in the Commons after now over eight years in office, but in the Lords it is defeated in about 25 or 30 per cent of votes. The Lords is undoubtedly a very effective revising chamber.

The third bit of good news that I think we should applaud, despite the way it was introduced on the back of a cabinet reshuffle, is that the Constitutional Reform Act, now on the statute book, has brought in some changes for which JUSTICE has campaigned for years. It has ended the three hats of the Lord Chancellor; it has established a new Supreme Court; and it has brought into being the new Judicial Appointments Commission. JUSTICE was first in the field in arguing for the latter in particular, I think, a couple of decades ago. It has created a much sharper separation of powers; it will remove the Law Lords from the House of Lords, and introduce a much more professional, transparent and independent system for appointing judges.

While, understandably, being very concerned about some recent developments, therefore, let us not ignore these big constitutional developments which I would suggest have all been great improvements.

My second point is that we will always have tensions between the executive and the judiciary. It is not uniquely a British difficulty or phenomenon. They do in all countries. They certainly do in those countries in the common law world which I know relatively well, and which are very close to us constitutionally: Australia, Canada and New Zealand. They have all seen in recent years similar increases in judicial review matched by very similar concerns expressed by the executive at the encroachment on what previously was seen as executive areas of discretion. And in those countries they have also seen tabloid campaigns against liberal minded judges or judgments, and there has been a growing reluctance of the executive to defend the judges; sometimes even, the executive has joined in the attack. That is especially visible in Australia, where there have been some really ugly attacks on the judiciary, but almost every episode that we have seen in recent years in the UK you can play out in one or more of those countries, especially in Australia, where they have introduced almost identical panic legislation in response to the events of 9.11, not just in one wave, but in several, and there too the latest wave is just being rolled out.

Third point: in response to these inevitable tensions between the executive and the judiciary I would urge and plead that the judiciary should not just get in a huff or cite the mantra of judicial independence to try to ward away the evil spirits which from time to time emanate in their direction from the executive. The judiciary need to give a much stronger account of themselves and, if I may say so, I was really pleased to hear the introductory remarks this evening by Lord Steyn. That is exactly the kind of thing that our senior judges should be saying more often and publicly, because the present circumstances require the judiciary to be more accountable, not less, and it requires them to engage more with other branches of government – in particular, I want to suggest, with the legislature. All too often the tensions between the judges and government tend to be seen

in bipolar terms, between the judges and the executive, but parliament has a vital role to play in mediating those tensions and providing a forum in which the issues can get discussed and resolved and parliament can help facilitate a dialogue between the judges and the executive when they appear to be turning a deaf ear to each other. We have seen willingness of our senior judges to engage on occasion in such a dialogue with parliament; let me cite the example of the judges giving evidence last year to the House of Lords special committee set up to inquire into the Constitutional Reform Bill, or their willingness to appear before the new, as it then was, Parliamentary Joint Committee on Human Rights in its first year of operation or, more recently, the relatively new Select Committee on Constitutional Affairs. I applaud all those occasions when the judges went and had discussions with parliament, and I think there should be more of it.

My next point is a broader point about the accountability of the judiciary. That is a concept that is not always recognised by judges or indeed by lawyers more generally. We all talk very readily about the independence of the judiciary, although sometimes I think in terms of a relatively simplistic hands-off idea of what that means. Of course judges need to have a very high degree of autonomy in deciding individual cases; they need to be free from improper pressures and they need to have security of tenure. That goes without saying. But to counterbalance that independence they also need to be accountable. They need to be accountable in an individual sense, through the presence of effective complaints procedures, where necessary, disciplinary procedures, and where necessary in extreme cases, procedures for their dismissal. Those things are all in place. But they also need to be accountable in a collective sense in developing and implementing judicial policy.

Let me just illustrate what I mean by that in relation to the new Supreme Court. The account currently given by the Law Lords of how they carry out their judicial functions is sparse to say the least – you will find it buried in one or two short paragraphs in the annual report produced by the House of Lords as the second chamber of parliament. I very much hope that the new court will give a much better account through a proper annual report of their staffing; their expenditure; their delays, which gladly are not so far a serious problem, although they are in many other countries; how they decide on their caseload and their case mix; how they select panels for cases; and perhaps to reflect on some of the difficulties facing the court, and their strategy and their goals for the future.

There will also need to be, in the new scheme of things, greater judicial leadership. The head of the judiciary, formally, is to be in future not the Lord Chancellor but the Lord Chief Justice, under the new title President of the Courts

of England and Wales. He will be the public face and the leader of the judiciary. Up to now that leadership has largely been given and conducted behind the scenes. In future the head of the judiciary will be much more in demand from the media in giving the views of the judiciary on all sorts of legal and policy issues. It is going to be a demanding role, not least because the judiciary are not always of one mind on things. There will be a greater role for the Judges' Council, which represents all tiers of the judiciary from the magistrates upwards. The Lord Chief Justice will need to show leadership in working with the Judges' Council to arrive at agreed views and to represent those views to the outside world. He will also need to find sometimes a rather delicate balance with the other very senior judge, whom we currently know as the senior Law Lord but in future will be the President of the new Supreme Court. In future, therefore, we will be looking for a much wider range of qualities in the Lord Chief Justice than just being an outstanding lawyer and a wise judge, able to do the business and manage his court. We will be looking for essentially political qualities of public leadership as well.

My last remark in closing will be just to make one comment about Michael Beloff's closing comments about the British constitutional settlement that comes down to us from the seventeenth century and the Glorious Revolution. I would argue that the British constitution is more subtle than Michael depicts. We do not, of course, have a strict separation of powers, as they do in many other systems. We have what I like to call a balance of powers. It is a delicate balance and constantly evolving. The three branches of government in our balance of powers hold each other in check. There is nothing to my mind illegitimate about the judges becoming more activist, as Michael described. There is nothing to my mind illegitimate about the executive seeking to change the rules in relation to the law on terrorism or immigration and asylum. But what keeps each of those branches in check when they propose a change to the rules is the need to broker that change and discuss it with both the other branches of government. It is a very delicate tripartite balance between all three branches of government in which each branch has a really important and constitutionally valuable role to play. As Helena says, the system relies on mutual respect between all three branches and, I would suggest, a continuing dialogue between all three branches of government.

Roger Smith:

I want to pull together what the other speakers have said; to relate it to the discussion paper; and to the future. I have thought about a title. I have one that is fairly sedate – 'From crisis to change', and one that is more interesting – 'From Gladstone to Lenin via the Glorious Revolution'.

Why Gladstone? Because Gladstone remarked that the British constitution only worked with the goodwill of all those involved in it. JUSTICE starts with these questions: is the goodwill being stretched too far; is there is a crisis in our constitution at the moment; and, if so, how precisely would you define it? Our preliminary answer to whether there is a crisis is yes, but we need to tease out the analysis. I was very conscious when the Constitutional Reform Bill was going through parliament that it picked up, like a rolling stone, a whole series of other issues – including anger at partial reform of the House of Lords and a deep feeling within the surviving Lords that they were being marginalised.

If we are going to say that there is a constitutional crisis, then we must analyse quite precisely what it is and discount issues which may create unhappiness but which are, essentially, political – about government policy in various areas or threats to vested interests. We have just had the white paper on the legal profession. There are a number of reasons why lawyers, be they in practice or the judiciary, should be concerned about change. It is coming their way with unprecedented speed. So we have to winnow out what is political, and focus on what is genuinely constitutional.

There are a number of elements to be considered, many of which have been picked up by the speakers. The first is the international issue. It is surprising, perhaps, that an issue of foreign policy should be so present in British domestic politics as the Iraq war. You would probably have to go back to Suez, to which Lord Alexander referred in his 2003 lecture, to find an international issue with quite such a domestic resonance; that bit so hard into the body politic and raised such issues – about legitimacy, the rule of law and about our commitment to the international rule of law. These form part of a deep political unease that, I would argue, goes deep enough overall to amount to a constitutional crisis.

Michael raised the Glorious Revolution. That makes its contribution still to a constitution that might be largely unwritten but, nevertheless, certainly exists. If we went back to 1688 and wrote out a constitution that reflected how matters stood at that date, it would be very different from what we would say today. Similarly, if we stood at Dicey's shoulder as he wrote his great works extolling parliamentary sovereignty, we might note that he published some of his works before there was universal male suffrage and all of them before full female suffrage. The parliament that he was extolling had a very different representational nature than ours now. There are a number of things we take for granted with too little consideration. Children parrot the Diceyan notion of parliamentary sovereignty – we all do. But, actually, our constitution is more complicated than that; 1688 was more complicated than that. Our democracy vests in parliament through our vote but that does not mean that whatever a

government wants to do, it can. There are, and always were, checks on supreme power.

We must now ask: 'what actually is our current constitution; should it change?' Robert brought up a point which is crucial. The judiciary are in the front line. But it is not an issue just about the judiciary. He is quite right. It is a tri-polar issue, a question of the balance of powers. We need to go back from Dicey to Montesquieu who may offer a more subtle analysis. There are at least three powers in our constitution – the judiciary, executive and legislature. We must look at the links between them. These are complex and not simple. They are, and should be, more complex than any crude concept of parliamentary sovereignty.

One of the problems that we have is a collapse of executive and legislature. Much of the discussion paper is based on our lobbying experience. If you follow many crucial bills through parliament, you find inadequate legislative scrutiny. The Criminal Justice Act 2003, for example, made fundamental changes to our civil liberties. It has 300-odd sections and well over 30 schedules. There was no way that the greatest parliament in the world could not have coped adequately with that bill unless it had nothing else to do all year. By contrast, the Prevention of Terrorism Bill went through in 18 days: 30 six-hour sessions. That was an outrage in terms of lack of time.

There are a variety of other elements that we have to look at. The Constitutional Reform Act will change things in ways that we really need to consider because it breaks the link between executive and legislature. The Lord Chancellor's department was once called the hinge between the judiciary and the executive: the Act snaps that hinge. The Act makes it quite clear what happens on the judicial side of the divide but there are real issues in relation to the executive. Lord Falconer largely appears to have walked away from the role of being the champion of the rule of law within government that his predecessors would have taken. He has assumed the vastly different – and probably more exciting – role of being a Secretary of State for a big department with a large budget. By default, you can see the Attorney-General, Lord Goldsmith, taking on some of the role of defender of the rule of law, fighting battles which would have been fought in previous administrations by Lord Chancellors, like Lord Mackay and others.

The Human Rights Act precipitates out the issues. The spectacular illustration is of course the 'Belmarsh' case. But the 'Belmarsh' case can be explained in a number of ways. It is the high water mark of human rights but we do need to go back to Part 4 of the Anti-Terrorism, Crime and Security Act 2001, in relation to which the House of Lords issued a declaration of incompatibility. That bill was

rushed through parliament. Looked at just as a policy matter, it might have been an adequate response back in 2001 but it just was not a very adequate response by the time we got to 2004. The threat to the UK was manifestly from internal as well as external sources – a fact implicitly ignored by the legislation which differentiated sharply between different types of terrorist. The government was stalling on the Act's amendment or replacement until after an election. It was leaving people to rot in jail without sight of an end, some of whom lost their minds in the process and in consequence. This was pretty bad law-making in any event. We need to find ways of improving our legislation: that may need more power to parliament and away from government.

I end with Lenin, from whom I want only to take a title: 'What is to be done?' – one of the great titles of all time. We should move from our analysis of what is the problem to what should happen. The speeches today are real contributions to that process. I hope that you find the consultation paper a contribution as well. Hopefully, we will come up with a powerful case for reform in the couple of years to come.

Lord Steyn recently retired as a member of the Judicial Committee of the House of Lords. He is the new chairman of JUSTICE's Council.
Michael Beloff QC is the President of Trinity College, Oxford and a member of Blackstone Chambers. He is one of the UK's leading public lawyers.
Baroness Helena Kennedy QC is a Labour peeress and a member of Doughty Street Chambers.
Professor Robert Hazell is the Director of the Constitution Unit in the School of Public Policy at University College London.
Roger Smith is Director of JUSTICE.
Copies of the 'Changing the rules' discussion paper are available from our website.

Notes

1 'Iraq: the Pax Americana and the Law', JUSTICE/Tom Sargant Memorial Lecture 2003, published in *JUSTICE Journal*, Vol 1, No 1 (May 2004).
2 Unpublished.
3 David Blunkett, 'Renewing Democracy and Civil Society', a lecture presented to Civitas: the Institute for the Study of Civil Society, October 2001, www.civitas.org.uk/pdf/blunkett2510.pdf.
4 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
5 *R v Panel on Takeovers and Mergers, ex p Datafin plc and another* [1987] QB 815, CA.
6 *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617, HL.
7 *R v Secretary of State for the Home Department, ex p Simons* [2000] AC 115.
8 *R v Feggetter and another, ex p Wooder* [2002] EWCA Civ 554, [2002] 3 WLR 591.
9 *E v Secretary of State for the Home Department* [2004] EWCA Civ 49.
10 *R v North East Devon Health Authority, ex p Coughlan* [2001] QB 213, CA.
11 *R v Secretary of State for the Home Department, ex p Ahmed* [1999] COD 69.
12 *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26.

13 *R (Joint Council for the Welfare of Immigrants and another) v Secretary of State for Social Security* [1996] 4 All ER 385, CA.
14 See *R v Secretary of State for the Home Department, ex p Omah Jammeh and associated cases*, CA, 30 July 1998.
15 *A v Secretary of State for the Home Department* [2005] 2 AC 68.
16 Sir John Laws, 'Law and democracy', [1995] *Public Law* 72.
17 Ditto Lord Woolf 'Droit Public: English Style' [1995] *Public Law* 57; Sir Stephen Sedley 'Human Rights. A Twenty First century Agenda' [1995] *Public Law* 386.
18 Andrew Le Sueur, 'Three Strikes and You're Out' [2004] *Public Law* 225.
19 *Jackson and others v Attorney-General* [2005] UKHL 56.
20 Lord Steyn at para 102.
21 [1976] QB 629 at 652.
22 Atkin Lecture, Reform Club, 1999 'Neither Cloistered, nor Virtuous? Judges and their Independence in the New Millennium', [1999] *Denning Law Journal* 153.
23 The debate preceded the withdrawal of her candidacy.
24 *M v Home Office* [1994] AC 377.
25 *Dr Bonham's Case*, 8 Co Rep 113 at 118.
26 'Deference: a Tangled Story', 25 November 2004, Lord Steyn, 2004 Judicial Studies Board Lecture: Belfast. Available on the Administrative Law Bar Association website, www.adminlaw.org.uk.

Power and accountability: corporate responsibility in the age of human rights

Jonathan Cooper

This article provides a discussion of the issues, policies, law, procedures and practice relevant to corporations' human rights obligations and the extent to which such bodies can be held accountable for interferences with international human rights standards. The first section addresses the key issues relevant to corporate accountability. It defines the terms and examines how and why human rights are relevant to the exercise of corporate power. The second section explores existing mechanisms, including both legal and non-legal remedies, for holding corporations accountable for human rights violations at both a national and international level.

Introduction

On the night of 2 December 1984 the world's worst human rights disaster resulting from industrial and corporate activity took place. Thousands died outright and between 150,000 and 600,000 were injured. It is estimated that at least a further 15,000 later died from their injuries. The tragedy occurred because 40 metric tonnes of methyl isocyanate was leaked into the atmosphere in Bhopal, India, by a factory operated by Union Carbide, India Ltd. This was a joint venture between the US-based multinational parent company, Union Carbide, and a public-private consortium of Indian investors.

The consequences for the survivors are still lived today, physically, emotionally and financially. The site surrounding the chemical spill, it appears, remains contaminated. Twenty years after the accident, shocking advertisements, showing the face of a child buried in rubble, periodically appear in our newspapers calling for assistance to the living victims of that terrible night in Bhopal.[1] These requests for help are not limited to philanthropic gestures to ease the pain. Money and other assistance are still required to meet the needs of those affected.

There appear, therefore, to have been at least two failings in relation to those events in Bhopal. The first was the accident itself, which can be characterised as one of the worst human rights violations to have occurred since World War Two. The second was the breakdown of the mechanisms of accountability to vindicate the rights of the victims. The irony of the sheer scale of the disaster appears to be that its victims were lost in the subsequent battles – legal,

political and diplomatic – to attempt to resolve the matter between the courts in the United States and India and the power struggles in both government and boardroom. The consequential settlement reached between the Indian Government and Union Carbide sought, to all intents and purposes, to lay the matter to rest, except of course for those still relying upon charity to survive. In 1989 Union Carbide agreed to pay $470 million. The original lawsuit was claiming compensation of $3 billion. The parent company, Union Carbide, was purchased in 2001 by the Dow Chemicals Company. In 1994, Union Carbide sold its Indian subsidiary.

Bhopal, after all these years, remains an iconic failure of the legal order, both domestic and international, adequately to address corporate violations of human rights standards. If the focus had remained solely upon the victims and the nature and scale of the human rights violations rather than questions of corporate governance and state and/or non-state actor accountability, the conclusion may have been both more transparent and more just. Victims in the former Yugoslavia, Rwanda and Sierra Leone, whose rights were violated by non-state actors in the form of paramilitary organisations, have benefited from international law mechanisms designed to ensure that justice is guaranteed to them and also to the broader community. In Bhopal, on the other hand, the international community only observed as the domestic laws of India and the United States and the corporate structure of Union Carbide resulted in a negotiated settlement which failed to satisfy even the most basic tests of accountability for human rights violations. Nor did it necessarily take into account the rights and needs of the victims themselves.

A simple direct comparison between international criminal law applicable to conflicts and the process of holding corporations accountable where they violate human rights does not necessarily provide a solution to the problems of corporate accountability. It is helpful, however, to the extent that a victim-centred approach emphasises the current failings within the international legal order adequately to address issues of corporate human rights violations. It should also not be forgotten that even within conflict corporations may play a pivotal role where they could act decisively in ensuring human rights are, or are not, violated.[2]

In many situations where corporations violate human rights the relevant domestic laws within a jurisdiction, whether they be public, tort, contract, employment, health and safety or criminal, can provide a remedy for actions or failures to act that could be characterised as human rights violations. The concern of this article is to examine the circumstances where human rights standards can or cannot fill the gap where domestic laws are non-existent, inadequate or fail to give a remedy. It will, therefore, examine the extent to which international

human rights standards, enforced and interpreted by international human rights courts and tribunals, may be able to protect individuals from human rights violations committed by corporations.

As this article will quickly identify, international human rights law currently provides only very inadequate and ad hoc mechanisms to hold corporations to account. Essentially, the only remedy that it provides victims is indirect – a claim against a state for failing to have in place either effective laws and/or systems of regulation and accountability, such as courts, tribunals and arbitration. This is unsatisfactory and also requires technical admissibility criteria to be satisfied, which of themselves can prove overly burdensome.

That said, in recent years the international community, including governments, corporations and non-government organisations (NGOs), have started to take corporate accountability more seriously and new systems are evolving. The United Nations in particular is grappling with this issue. This article will also examine these developments. In reality, however, these are primarily declaratory, or when they have a degree of binding force they are voluntary.

It will be a tentative conclusion of this article that non-binding voluntary codes need to be given the force of law both at a domestic level and at an international level. In the absence of rules being given the force of law, they can be ignored at worst and there is also a danger that such non-binding principles merely become the rhetoric of compliance. Whilst such principles can be appropriate in emerging corporate policy in relation to corporate social responsibility, if they are unenforceable they will be of little comfort to those victims of human rights violations who lack an available remedy.

The multinational enterprise Royal Dutch/Shell (Shell) is a good example of a corporation that appears to be genuinely seeking to root its policy and practice in human rights principles.[3] However, it, like many other corporations, remains unconvinced of the need for binding mechanisms of human rights accountability in international law. Shell believes in self-regulation. It could be argued that as a result Shell is missing an ideal opportunity genuinely to put its belief in human rights into practice and at the same time stave off criticism as well as create a level playing field between itself and its competitors.

Throughout the 1990s Shell suffered as a result of perceived or real human rights violations in the North Sea and in Ngoniland in Nigeria. As part of its recovery from these experiences, which at best were a public relations disaster, which severely damaged the Shell brand, Shell engaged with the value of human rights in its employment practices, the manner in which it carries out its businesses and the way in which it engages with the outside world. However,

those human rights principles, which are considered to be the guiding force of Shell's activities, remain to all intents and purposes unenforceable against the organisation.

As will be shown later in this report, it was the State of Nigeria which was found to have seriously violated a number of human rights guaranteed under the African Charter on Human and Peoples' Rights as a result of their failure to regulate properly the activities of Shell in Ngoniland where these violations occurred.[4] That said, Shell's apparent impunity in relation to its conduct in Ngoniland may be short-lived. As a result of either historical accident or good fortune, there is a US Federal statute,[5] which can be used to give a remedy in tort law for foreign victims of serious human rights violations. How this statute works will be explained in part two of this article. Proceedings have been issued in US Federal courts against Shell for their activities in Ngoniland.[6]

It is also worth reflecting upon the fact that the need for corporations to be properly regulated by law, particularly in relation to their potential to commit serious human rights violations, is not a new phenomenon. Ironically, it could be argued that the origins of the British Empire, as it came to be known, had their roots in the need to put into place effective laws to control the British East India Company as a result of the violations of human rights in India which that company permitted to occur.

What can be learned from the experiences of Shell in Ngoniland, and the East India Company, is the principle that power is exercised responsibly when it can be measured against fundamental criteria, regardless of who is exercising it. This article therefore challenges the notion that human rights standards can only be used to hold to account the state and its agents. It will argue that where there are gross and/or serious violations of human rights standards by non-state actors mechanisms need to evolve to hold the perpetrator to account and not just a state to which there is a tangential link. The perceived wisdom that human rights only engage an individual's relationship with the state needs to be challenged and discredited.

The value of imposing a human rights framework on all activities of corporations is that it creates a genuine level playing field whereby true principles of competition can flourish. The insidious and spiralling consequences of corruption are perhaps the best example of failure to regulate to ensure that level playing field. It must also be remembered that companies that are perceived to have violated human rights also damage their product(s) and brand. Shell, Nike and McDonald's are amongst the major brand corporations that have suffered as a result of a perception that they have violated human rights. If there were in place binding laws at the international level, those corporations could point

to their commitment and compliance, of necessity, with those rules. However, whether a corporation is ultimately held liable under domestic laws or a brand's reputation is tarnished or a company's performance on the Stock Exchange is poor or there is censure by shareholders, human rights are now an active part of the corporate landscape, and need to be taken seriously by corporations themselves.

Arguments have been made by corporations and their trade associations, that they are in the business of making profits and that it is the state's role, not theirs, to protect the human rights of those within its territory. Whilst the simplicity of this argument is tempting, it does not reflect the sheer scale of corporate power and what in fact corporations represent. In 2000, the Institute for Policy Studies reported that corporations made up 51 of the top 'economies' in the world and the top 200 transnational corporations had combined revenue in 2000 greater than the combined GDPs of all states excluding the top ten countries.[7] Considering the economic clout of corporations, and what they do, whether it is in the extraction industry, manufacturing, clothing or food and leisure, it is self-evident, therefore, that corporations are able both to violate and to safeguard, human rights, and should not be able simply to abnegate their responsibility in this area.

Part one: why human rights law should be applicable to corporations

Human rights or corporate social responsibility?

It is an established principle that human rights are an explicit and essential aspect of corporate social responsibility (CSR). However, this article is not concerned with the broad principles of CSR. This article defines CSR as that concept whereby companies, regardless of their size, combine social and environmental concerns in their business operations and their interaction with their stakeholders. CSR should provide the basis for an integrated approach that brings together economic, environmental and social interests to their mutual benefit. Companies with good social and environmental records should perform better and generate more profit and growth. CSR should, therefore, be seen as an investment, not a cost.

CSR is in essence good and sensible practice. It promotes sustainability and accountability and increases transparency in company practice. However, it is not necessarily designed to be legally enforceable. Human rights are. Therefore, even though respect for them is an integral aspect of CSR, human rights fall into a different category and one which deserves particular and separate attention. This is particularly the case in relation to multinational enterprises (MNEs)

where legal accountability for human rights violations may be relevant as a result of:

- an enterprise's complex corporate structure, or corporate veil, as was the case concerning the litigation surrounding the Amoco Cadiz environmental disaster;
- lack of an effective or comprehensive legal system in the place of the alleged violation of human rights, as was argued in the Bhopal litigation;
- the extensive and serious nature of the alleged human rights violations, as is a key factor in the Myanmar/Unocal litigation;

or, any combination of the above.

Corporations and the exercise of power

The extent to which companies can interfere with human rights may be limited. For example, it could never be lawful for a company to deprive someone of his or her liberty (bar exceptional circumstances, for a limited period of time and for a specific purpose) for any sustained period of time. Corporations can, and do, carry out security operations to protect their interests, which in turn may raise questions of the right to life and protection from torture. On a more day-to-day level, companies do have sufficient control over people's lives to regulate their private lives, their freedom of expression, their opportunities to manifest their religious beliefs and their rights of protest and association. Additionally, they can make decisions which impact upon family life and the broader principles of economic and social rights, particularly when they are in a position to guarantee those rights. This happens where, for example, a corporation (particularly an MNE) more or less steps into the shoes of the government in a particular region or area; the classic example being Shell in Ngoniland in Nigeria. Corporations can, therefore, end up building and running schools and hospitals for the lifetime of particular projects.

Corporations and the privatisation of public functions

Further impetus has been added to the notion of improving corporate accountability in relation to fundamental human rights standards with the increasing use of private companies to carry out what otherwise might be considered to be public functions. This is now a fact of life in the UK, where virtually all public utilities are now at least partly privately owned. Provision of the water supply, self-evidently essential for the maintenance of both public and private life, is now a function of private companies. Whilst this activity is regulated by public agencies, what happens when there is a conflict between the private interests of the water company and the realisation of those human rights for which water provision is essential?

This potential dilemma is currently being taken to an extreme in Bolivia. As a result of initiatives supported by the World Bank to privatise state enterprises, a local water company, managed at the time by a subsidiary of the MNE, Bechtel, increased water prices that resulted in massive demonstrations. The worst of which occurred in February 2000, when, following clashes with the police, a 17-year-old boy died and hundreds were injured. The government cancelled the contract. As a result proceedings have been brought against Bolivia before the International Centre for the Settlement of Investment Disputes (ICSID), the World Bank's international tribunal.[8]

A further example of the accepted use of private companies to carry out public functions is the rebuilding of Iraq after the Second Gulf War. Responsibility for the reconstruction of the infrastructure is now in the hands of private companies. It is not in doubt that they will not be able to fulfil those responsibilities, but it does raise fascinating questions of their accountability against human rights standards. In a country where the administration of justice is in the process of being redefined, how can those companies be held effectively to account in Iraq for their actions if there is a violation of fundamental rights principles? The position in Iraq offers a paradigm of the complexities and problems inherent in ensuring private corporations can be held fully accountable for their actions when acting in the pursuit of their own interests, especially where this is funded from the public purse.

Extending rights into the private sphere: how can human rights be used to hold corporations accountable?

Human rights may form part of a company's corporate social responsibility strategy, and whilst this is laudable, unless there are mechanisms of enforceability and an acknowledgement of their primacy, it may be meaningless. Because they are fundamental, human rights do not necessarily sit easily in relation to a balancing exercise between a company's profits on the one hand and the realisation and protection of human rights on the other. For example, if a company is complicit in using forced labour, as was asserted against Unocal in Myanmar-Burma, then regardless of its broader and long-term objectives (which might be the economic rejuvenation of a country) these can never justify subjecting individuals to a violation of their human rights. Protection from forced labour is an absolute right. In relation to those rights which permit qualification or are subject to notions of progressive realisation, such as the right to family life or the right to health care, if it is established that those rights will be violated as a consequence of a company's actions, the company should then desist in its activities, even if it can justify continuing them on other grounds. Corporations should, therefore, develop their own binding procedures whereby,

following such a human rights impact assessment, a project will, or will not, be continued or adapted to take into account human rights standards.

Self-regulation, as part of the process, is to be encouraged, but in and of itself and without binding external review through law it is inadequate. The essential question is the extent to which these guarantees can be enforced, and where they are enforced. As will be explained in part two, the Organisation for Economic Co-operation and Development (OECD) has developed quasi-judicial but non-binding procedures whereby companies' practices, wherever they take place, can be investigated. The United Nations and the International Labour Organisation have also clear guidelines requiring companies to respect human rights.

Piercing the corporate veil

Companies, and MNEs in particular, tend to have a complex structure. A corporation may be made up of many smaller companies, and those companies may have the responsibility for carrying out activities in other jurisdictions which in turn may violate human rights standards. Particular business projects may also be joint ventures involving a number of different partners. The question is, therefore, whether the corporation should be held accountable or the individual company. This issue was thrown into sharp relief in relation to the Union Carbide disaster in Bhopal. Whilst Union Carbide was a transnational umbrella corporation, worth billions of US dollars, responsibility for the Union Carbide plant in Bhopal was that of a separately constituted company, Union Carbide, India Limited.

The conundrum is self-evident. If the American-based corporation could be held accountable in law for the actions of its subsidiary company, compensation would be, to all intents and purposes, unlimited, whereas if responsibility was confined to the Indian subsidiary, compensation would be finite. The courts in the US held that they were the inappropriate forum to hold accountable the actions of the Indian subsidiary, which they considered to be ultimately responsible. The eventual settlement between the Indian government, the Indian subsidiary and the American corporation resulted in limited damages for the victims.

Piercing this corporate veil is perhaps one of the greatest legal challenges in relation to corporate accountability facing courts that have jurisdiction to hear such matters. In relation to the Unocal litigation concerning the use of forced labour amongst other things in Burma/Myanmar, the Californian courts took a robust approach. By adopting principles of complicity they held that Unocal could not hide behind the separately constituted company in Burma/Myanmar, and they could be brought to account before the domestic laws of California.

Forum non-conveniens: if corporations should be held to account, where should they be accountable?

Where issues of corporate accountability arise in relation to potential violations of human rights standards, a key question is which court or courts have jurisdiction over the claims. This issue is of significance for a number of reasons, including concerns over access to court in terms of availability of legal aid, as well as there being an effective legal infrastructure, and also corollary consequences of litigation, such as media interest with the potential impact upon a company's reputation and sales.[9] However, it is particularly relevant concerning the amounts of compensation available. The importance of this issue is perhaps best explained by reference to the South African asbestos claims.

In the Cape litigation,[10] South African workers sought to sue Cape plc, a company domiciled in the UK, through the English courts for compensation as a result of the alleged negligence of its subsidiary companies in South Africa which resulted in exposure to asbestos dust. Cape plc, however, sought to have the application stayed on the basis that as the injuries had occurred in South Africa, the appropriate forum to establish liability would be the South African courts. After protracted litigation, the House of Lords, agreeing with the claimants, held that the English courts were the appropriate forum to hear the case. In so doing, the English courts accepted that where claimants will face serious obstacles in conducting litigation in other jurisdictions, the parent company, where a duty of care to its subsidiaries and their employees is established, can be held to account for their actions under English law.

Human rights and non-state actors

The Universal Declaration of Human Rights (UDHR) is suffused with principles of human dignity. Economic and social rights are given an equivalent status to civil and political rights: the right to protection from torture and the right to a fair trial are placed on a par with the right to an adequate standard of health and rights in the workplace. Crucially, the UDHR envisages its application to actors beyond the state. The preamble affirms responsibility for the UDHR's recognition and observance falls on 'every individual and every organ of society'.

Human rights are designed principally to hold the state accountable for its actions, or failure to act, against basic and fundamental values. Who or what is the state is therefore a key concept in the delivery of human rights protection. This is an issue that has particularly taxed the courts responsible for interpreting the regional human rights treaties. From the case-law of those courts we can extrapolate certain universal principles about the nature of state accountability under international human rights treaties.

First, it is not in dispute that human rights standards apply to central and local government. They also apply to activities that fall within the exclusive powers of the state, such as policing and immigration control. Secondly, where the state has privatised state activity or the state permits that activity to be carried out in the private sector, the state can be held accountable for violation of human rights under those circumstances. So, for example, in a case involving the treatment of a child in an English private school, the European Court of Human Rights had no hesitation in finding that the UK could be held accountable for the actions of a private school, even though no state agency was involved in the possible violation, because the provision of education is an essential state activity, and the state cannot opt out of its responsibilities in ensuring its provision is guaranteed in compliance with human rights standards.[11]

In relation to private prisons, interestingly the US Supreme Court has adopted a different course of action. In a majority decision, they found that the treatment of prisoners in a private prison did not fall within the ambit from the protection of the US Constitution. By looking back at earlier English history of prisons and prisoners' rights, the court held that the act of incarcerating prisoners was not an essential state activity and that there was nothing inherently 'public' in providing a prison service. Although this result may appear surprising, certainly in the context of the decisions of the Strasbourg Court, the consequences of it were that the prisoners bringing the case had access to far more effective remedies in private law than they would have done under the Constitution.[12]

Thirdly, where a violation of human rights occurs between two private individuals, the state cannot escape its liability for those violations, if the laws governing the activity that caused the violation are inadequate.[13] For example, the UK government was found to have violated the protection from inhuman and degrading treatment because the then state of English law permitted the defence of lawful chastisement of children, even when the nature of that chastisement amounted to inhuman or degrading treatment, protection from which is an absolute right.[14]

Fourthly, the state cannot also hide behind its responsibilities by asserting the activities which violated an individual's rights were carried out by private parties, or non-state actors. In a case against Honduras the Inter-American Court of Human Rights held that Honduras had violated the American Convention of Human Rights in failing to investigate the disappearances which the state argued had been carried out by non-state actors. The Court found a failure on the part of Honduras to fulfil the duties it assumed under the convention, which obligated it to ensure the victim had the free and full exercise of his human rights.[15]

This principle has since been adopted by the African Commission on Human and Peoples' Rights in a case concerning the behaviour of an oil consortium between the state oil company and Shell in Nigeria.[16] In finding a number of violations of the African Charter of Human and Peoples' Rights, the Commission pointed to the positive obligation of states with regard to private actors. The Commission found that:

> *the Nigerian government has given the green light to private actors, and oil companies in particular, to devastatingly affect the well being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of the African Charter.*

In relation to the right to food, guaranteed by the African Charter, the Commission held that 'the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent people's efforts to feed themselves'.

The Strasbourg Court has also examined this notion of the state's positive obligations in relation to the failure to protect through proper regulation against a violation of the convention. Spain was found to have violated the right to private and family life when a local authority failed to regulate the operation of a waste treatment plant,[17] and Italy violated the right to private life where it failed to provide relevant information about pollution from a factory.[18] In a case that was declared inadmissible on other grounds, the Strasbourg Court had no difficulty in finding the law in the UK was inadequate to protect interferences with privacy by one private party over another.[19]

Finally, the Strasbourg Court has, however, held that the European Convention does not apply to quasi-public spaces. In a case involving campaigners who were not allowed to petition in a shopping centre in a town in the UK, the Court found that the convention could not regulate this conduct. The dissenting judgments in the case are forceful and stress, in an increasingly privatised world, the need to ensure proper and effective recognition of human rights standards.[20]

Human rights and the constraint of power

Human rights standards are designed to ensure that when decisions are made that engage with human rights, such processes are carried out in conformity with those standards. For the decision to be lawful, that is compatible with human rights values, those making the decision cannot act in an arbitrary or discriminatory way. At the very least, there must be a lawful basis to make the

decision and it must be a proportionate one. In relation to certain rights, such as torture, it will never be lawful to make a decision that would subject someone to that level of treatment.

Further, what is the value of human rights standards if they cannot be enforced against the entity responsible for their breach? This raises two questions in relation to corporate accountability. What if the state involvement is so remote and indirect that it cannot be linked to the violation of human rights standards? What if the structure of the corporation itself is so complex, it is impossible to identify which state or states should be held accountable and how?

A further conundrum is: if the traditional and orthodox view, that human rights bind states and not private entities, remains unchallengeable, yet it is recognised that corporations can wield significant power that may interfere with human rights which can go largely unchecked, can human rights be used by companies of their own accord to regulate themselves as a voluntary constraint on their power? If so, what is the value in this and how can human rights be enforced? Do these voluntary codes make a difference?

It is for this reason that human rights are acknowledged as being universal. Human dignity, without discrimination, is their objective and potentially rival goals, such as economic superiority or even national security, are considered secondary aims. Similarly, the economic well-being of a country is recognised as a justification, if proportionate, as grounds for interfering with certain rights. Yet, it is not, however, an aim in itself which can sanction the violation of individuals' rights.

This distinction is an extremely important one. The consequence of the post-Second World War human rights settlement, the implications of which continue to be felt today, is that the essential components that are required to ensure human dignity will trump all competing policy considerations. The emergence of internationally agreed and recognised human rights standards, therefore, have had a profound effect on public policy, which in turn has impacted upon the rules governing private, even commercial relationships.

The prioritisation of human rights standards affirms that there are no 'no go' areas where the state cannot enter to regulate those within its borders. Significantly, under certain circumstances, the state is also required by those human rights standards to ensure that those within the jurisdiction respect them and that one private party is not subjecting another person to a violation of his or her human rights.

Human rights as law: is there a judge over your shoulder?

The ultimate effective enforceability of human rights depends upon the extent to which they form part of the domestic law of a particular country or legal jurisdiction and whether they can be upheld by the courts. Depending upon the constitutional traditions of different countries, human rights standards may directly regulate the actions of private parties, or non-state actors. For example, in Ireland, the Constitution, which contains most of the human rights standards contained in the main international human rights treaties, is directly binding on private parties and therefore those rights can be enforced by the courts against the individual as well as the state.

Similarly the final Constitution of post-apartheid South Africa explicitly made sure that the provisions of the Constitution, and the rights contained therein, could be claimed against private persons. This is because during the apartheid years private parties could be as equally responsible for those crimes as the state. Other jurisdictions such as the USA require specific state involvement for the Constitution to be engaged, although there exists at state and federal level comprehensive statutory protection of human rights that regulates the activities of private parties.

A further method developed by the courts of giving constitutional protection is that they seek to determine disputes involving private parties in the light of fundamental human rights guarantees. In Germany the courts adopt this technique which they call *drittvierkung*. The approach developed by the UK courts for extending human rights protection to private parties will be dealt with in part two.

Human rights may also be given effect through legislative or other means. For example, the UK has had reasonably comprehensive race and sex discrimination legislation in place for over 20 years. Ironically, until recently these had limited application in the public sector[21] but were generally applicable to the private sector. Therefore, companies in the UK have always been bound, and ultimately accountable, to the framework protecting against discrimination on the grounds of sex and race.

The extent to which international human rights standards that have been ratified by a country can be relied upon in domestic law also depends upon the constitutional traditions of a country and whether they follow the monist or dualist model of ratifying international treaty obligations.

Part two: existing mechanisms

UK legal framework

The focus of this section will be the Human Rights Act 1998 (HRA) and its application in regulating the activities of corporations and MNEs based in the UK. It will also address the circumstances whereby English courts will assume jurisdiction over private law disputes arising in other jurisdictions.

Fundamental to the question of whether companies' activities outside the UK can be regulated by the HRA is the extent to which the ECHR itself is considered to have extra-jurisdictional scope. This issue will be dealt with in full below when considering the Council of Europe mechanisms for protecting human rights. Of pertinence to this section, all that needs to be acknowledged is that where the UK is assumed to have de facto control of an area to the extent that it has stepped into the shoes of government, it is likely that the convention will be applicable to activities carried out within that jurisdiction.[22]

Companies may be caught within the scope of the HRA by three means. First, legislation (either primary or secondary) that governs a dispute may be interpreted so as to comply with convention rights, such as was the case of the Consumer Credit Act 1974 where two private parties contested the compatibility or otherwise of that Act with convention rights.[23]

Secondly, a company may be deemed a 'public authority' for the purposes of the Act in relation to its performance of certain public functions. These functions must then be carried out compatibly with convention rights, in the absence of an incompatible requirement in primary legislation. At present the courts have adopted an uncertain, or relatively restrictive, definition of public function. This is despite the fact that during the parliamentary debates on the Human Rights Bill, ministers indicated the view that the test should be given a broad definition.[24] It may be, therefore, that the reach of the HRA is not as extensive as originally expected. However, victims may still have a claim in breach of contract against a company due to the implication of human rights guarantees into the contract.[25]

Finally, in relation to certain rights, the English courts have not doubted the application of the ECHR in private disputes. Therefore newspapers have been able to rely upon free speech guarantees in Article 10 ECHR and also face arguments of interference with privacy rights.[26]

Another, and arguably more familiar, mechanism of human rights accountability is the law of tort, particularly the tort of negligence. It was the negligence that

was used to hold Cape plc to account for asbestos poisoning in South Africa in the English courts.

If tort law is being relied upon, the law of human rights can be used to inform and develop that law. However, negligence has its limits, particularly in relation to available remedies. The compensatory nature of tort law is also not necessarily appropriate for human rights violations, where the victim may consider further and more punitive action ought to be taken. Negligence cases will also inevitably settle, which – as was seen in the Bhopal settlement – can be particularly unsatisfactory.

The application of both tort law and human rights to corporate accountability is in its infancy in the UK. However, there are other mechanisms for holding corporations to account where human rights standards can be relied upon. Regulators, for example, could be challenged under public and administrative law principles of judicial review. This happened in relation to the granting of aid for the building of the Pergau Dam in Malaysia, when the World Development Movement successfully challenged the decision to provide funding.[27]

USA legal framework

As a broad principle, the protection of the Constitution of the United States of America (USA) is only engaged when the actions of a public body are involved. However, there exists comprehensive federal and state protection concerning civil rights that regulates the conduct of all parties, including corporations. What marks the US out as unique in discussing corporations' compliance with international human rights standards is the curious resurrection of the Alien Tort Claims Act (ATCA) 1789.

This federal statute grants original jurisdiction to the US federal court for any civil action brought by an alien for a tort committed in violation of international law. As such, foreign victims of serious human rights abuses abroad can sue the alleged perpetrators in US courts. The legislation, one of the first laws of the new American republic, had lain more or less dormant until 1979 when a New York appeals court granted the family of a young Paraguayan who had been tortured to death, the right to sue his alleged torturer who had since emigrated to the US.[28] In accepting jurisdiction, the court held that '[f]or the purposes of civil liability, the torturer, has become, like the pirate and slave trader before him, hostis humani generis, an enemy of all mankind'.

The court held that the claimants satisfied three basic requirements to bring a claim under the Act: first, they were aliens; secondly, that they were alleging a tort; and thirdly, they were asserting damage which resulted from a breach of the law of nations or a treaty of the US. The 'law of nations' as used in ATCA is

understood to refer to customary international law. The court found that 'an act of torture committed by a state official against one held in detention violated established norms of the international law of human rights, and hence the law of nations'. Whether involvement by a 'state official' is required for reliance on ATCA remains in dispute. The cases that followed, including such notorious defendants as Karadzic and Noriega, tended to involve former government officials or people acting in a quasi-governmental capacity.[29]

More recently, however, the reach of the ATCA has been extended. In a case against the energy and oil MNE, Unocal, the Californian Appeal Court accepted the right of villagers from Myanmar/Burma to sue the corporation for alleged serious violations of their human rights.[30] The claimants asserted that the corporation was complicit with the military regime in Myanmar in claims of slave labour, torture, rape and executions during the construction of an oil pipeline.

The court held that the substantive hearing on the merits of the claim should go ahead and that Unocal could be held liable for 'aiding and abetting' the military in its violations in that they could have contributed 'knowing practical assistance, encouragement or moral support which has a substantial effect on the perpetration' of the abuse.[31] The court left open the extent to which negligence could be sufficient to link violations of a state actor to a private corporation. This Unocal litigation has now settled and will therefore not go to a final decision on the merits.[32] However, it would seem to have established that, at least in principle, a corporation may be held liable for gross human rights violations under ATCA.

Although there have been attempts to limit the application of ATCA, the US Supreme Court has recently re-affirmed its scope. In a case concerning the arbitrary arrest and detention of a Mexican citizen, who was abducted in Mexico and unlawfully brought to the United States, the Supreme Court, although finding no violation on the facts, did uphold the use of ATCA.[33] No violation was found since the court held that the type of arbitrary detention complained of was not a violation of the 'law of nations'.

This case is significant for two reasons. First, ATCA emerged from the litigation unscathed. The US courts remain open to those foreigners who suffer serious human rights violations abroad. Secondly, its extent is clarified. Only serious human rights violations are within its scheme. Therefore, reading *Unocal* with *Alvarez-Machain*, it is clear that a corporation could be held to account in civil law, and pay damages, for complicity in serious violations of human rights abroad.

EU legal framework

Corporate social responsibility is being taken increasingly seriously at the European Union (EU) level. The Commission, the Council and the Parliament have all produced communications, resolutions or reports on the subject. At the general institutional level of the EU, it is widely acknowledged that identified and binding international human rights standards form part of CSR. The European Parliament has recently reported on the Commission's communication concerning Corporate Social Responsibility: a Business Contribution to Sustainable Development.[34]

The tension at the EU institutional level would appear to be how to balance the need for standards for accountability with the principle that these should be voluntary. However, it is clear that future measures on CSR will emerge from the EU. Whether this will be sufficient to ensure genuine corporate accountability remains to be seen. Arguably, the EU should go further still and adopt a regulation akin to the USA's ATCA that could hold corporations effectively to account for human rights violations within the EU and ultimately before the European Court of Justice (ECJ).

The EU also has a raft of existing measures on corporate good governance. These include a legal framework regulating both corporate and social policy, intended to take effect at the national level.

Of particular relevance is the EU Charter of Fundamental Rights and Freedoms. The charter, which spells out a comprehensive set of both civil and political and economic and social rights articulated within existing EU law, was originally agreed as a non-binding document. It will, however, be relevant wherever EU law practice or procedures are being implemented.

The rights and freedoms in the charter that may be relevant to corporate accountability are broad-ranging, and include a prohibition on eugenic practices, cloning and the making of the human body and its parts as a source of financial gain, the right to the protection of personal data, the right to engage in work and to pursue a freely chosen or accepted occupation, a very broad free-standing non-discrimination provision, detailed provisions on the rights of workers, including the right to collective bargaining, the right to protection against unjustified dismissal, the right to working conditions which respect health, safety and dignity, and the right to an effective remedy and a fair trial for anyone whose rights and freedoms under EU law have been violated.

Charter articles are subject to lawful interference only where the principles of necessity and proportionality are genuinely met. Article 51 of the charter

limits its scope, stating that the provisions of the charter are 'addressed to' the institutions and bodies of the EU, and to the member states 'only when they are implementing Union law'. When, or if, the charter is given full legal effect, the relevant acts of the institutions and bodies of the EU and of member states will be vulnerable to judicial review by the ECJ for compatibility with the charter. Those found incompatible could be declared void to the extent of the incompatibility. Clearly, this would go beyond the interpretative obligation in s3 Human Rights Act.

The explanatory text accompanying the charter suggests how its rights may be interpreted. This text was prepared at the instigation of the Praesidium of the Convention that drafted the charter.[35] The explanations were originally stated to have 'no legal value'. However, they relate each charter provision to its underlying legal source, and thus reduce greatly the scope for misinterpretation. The legislative intention appears to be that the protection provided by the charter should in all respects be at least as extensive as that provided by the ECHR, as interpreted by the Strasbourg court, but in certain important respects, more so.

Council of Europe legal framework

Beyond diplomatic pressure on states, the Council of Europe has two mechanisms by which it can hold companies accountable for their actions against human rights standards. As a result of its inter-governmental nature, it can regulate corporations only indirectly; member states may be held accountable for failure to properly protect those within their jurisdiction from the abuse of power by companies.

The European Convention on Human Rights, and the Council of Europe Social Charter and Revised Social Charter (protecting social and economic rights) form the second method by which the Council of Europe can regulate corporate conduct. They will be dealt with in turn.

The European Convention on Human Rights

As has already been discussed, it is an established principle of convention jurisprudence that there are circumstances whereby the state must put in place mechanisms to protect one private party from the excesses and abuse of power of another private party. The question is, therefore, what is the jurisdictional scope of these positive obligations upon the state?

The Strasbourg Court has affirmed that where a state has de facto control of an area, under those circumstances the member state's convention obligations will extend to those regions of control. These principles were perhaps best clarified in two cases decided by the European Court of Human Rights. The first, *Loizidou*

v Turkey,[36] held that Turkey was in de facto control of the Turkish Republic of Northern Cyprus and therefore was responsible for the applicant's loss of her property rights.

In *Bankovic v Belgium & Others*,[37] the applicant represented the interests of those killed in the bombing of the television station in Belgrade during the 1998 Kosovo conflict. A case was brought against the 16 members of the Council of Europe who were also members of NATO, and they argued that at the time of the bombing NATO's control of Belgrade was comparable to that of Turkish control of Northern Cyprus. The Court disagreed and held that the jurisdiction of the convention did not extend to the activities of the respondent states during that conflict.

At a domestic level, it has recently been decided that the reach of the ECHR/HRA extends beyond the UK's geographic territory.[38] Assuming the case has been correctly decided, and that sufficient control is established to engage the convention, the UK government could under certain circumstances be held to account for convention violations of non-state actors in, for example, southern Iraq, including private parties such as corporations.[39]

The European Social Charter and Revised Social Charter

Social and economic rights are those most likely to be engaged in the everyday conduct of companies. The system to protect these rights in the Council of Europe has recently been reinvigorated[40] and there now exist mechanisms whereby individual complaints can be brought.[41]

In the context of corporate accountability, it is regrettable that the UK has not to date signed up to these procedures. The UK did ratify the original European Social Charter and therefore as a matter of international law is required to maintain those standards. Principally, the only mechanism of accountability for the UK is a reporting requirement to the European Committee of Social Experts.

United Nations legal framework

The UN is in the ideal position to protect against corporate violations of human rights, particularly as the UDHR is the source for the notion that corporations can be held accountable against human rights standards. Similarly, both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) specifically anticipate that protection from discrimination is aimed at private as well as public bodies.

However, the enforcement mechanisms for the UN treaties are weak. There is only a limited right of petition, and where that right exists, such as in the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), states have to opt into the procedure. The findings of the Human Rights Committee (HRC) in relation to individual petition matters are also limited to recommendations only.

However, the UN Charter systems are proving to be far more creative in relation to corporate accountability. The UN is increasingly taking seriously the need to develop relevant standards. As a result of the acknowledged weaknesses of the UN treaty system, particularly in relation to corporations, the Sub-Commission on the Promotion and Protection of Human Rights has adopted Norms on the Responsibilities of Transnational Corporations with Regard to Human Rights.[42] As a general rule, it is through the sub-commission that binding treaties eventually emerge. The adoption of the norms is an extremely significant development in the evolution of standard setting and procedures at the UN. They have resulted in significant disagreement between the relevant stakeholders: governments, business and the NGO/civil society community. At present it seems unlikely that the Commission will adopt them. However, their existence as a benchmark is a remarkable development. They are a comprehensive set of standards which identify how and why human rights are relevant to corporations, attempting to draw together all existing standards in one document.

Norms on the Responsibilities of Transnational Corporations with Regard to Human Rights

The norms start by acknowledging that it is the state which has primary responsibility in relation to the promotion and protection of human rights, and that the state also has responsibilities to ensure that corporations respect human rights. As we have seen, these are standard principles of international human rights law. But they go on to affirm that within their:

> *respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous people and other vulnerable groups.*[43]

By making this assertion the norms effectively settle the dispute as to whether or not human rights standards can be applied against corporations. They then spell out certain particular areas of human rights protection where business enterprises have particular responsibility. These are general obligations and include the right to equal opportunity and non-discriminatory treatment, the right to security of persons, the rights of workers, respect for national

sovereignty and human rights, obligations with regard to consumer protection, and obligations with regard to environmental protection.

The norms can only be considered at best as soft law, and have no enforcement mechanism. However, in recognition of this, the norms themselves propose methods of implementation including the adoption, dissemination and implementation of internal rules that comply with the norms.

As a result of the lack of agreement surrounding the norms, the Human Rights Commission took a further initiative in relation to corporate accountability during its 2005 session, adopting a Resolution on Human Rights and Transnational Corporations and other Business Enterprises.[44] The resolution requests that the UN Secretary-General appoints a High Level Special Representative on the issue of human rights and transnational corporations and other business enterprises. That representative must report within two years, and their mandate is broad, offering a genuine opportunity for the highest levels of the UN to grapple with the issues of corporate accountability where human rights standards are violated. There may be risks; the representative could adopt a lower level of standard setting than currently exists. However, the process represents an ideal opportunity to seek to influence standards.

UN Global Compact

The norms should also be read alongside the Global Compact which was announced in 1999 by Kofi Annan, the UN General Secretary. The Global Compact is not about standard-setting as such, but the nine principles contained within it include asking world business to 'support and respect the protection of international human rights within their sphere of influence', and to 'make sure that their own corporations are not complicit in human rights abuses'.

International Labour Organisation legal framework

The ILO, the oldest international human rights treaty body, has adopted over 180 treaties that regulate workers' rights and the labour movement. Its governing principle is that decisions are made by representatives of government, workers and employers. ILO member states are required to report to the ILO on measures taken to bring conventions and recommendations to the attention of competent national authorities with a view to ratification or other action. In case of ratified conventions, this involves reporting on their implementation; in case of conventions not ratified, they must report on their intentions in that regard. For 'priority' conventions detailed reports are requested every two years, for others reports are requested every five years.

An example of the power of the ILO in relation to the protection of human rights was the response to a complaint, in 1996, by worker's representatives

into the use of forced labour in Burma/Myanmar in breach of the ILO's Forced Labour Convention (no 29). A highly critical report from the Commission of Inquiry led, in November 2000, to the ILO Governing Body calling for sanctions against Burma/Myanmar.

The ILO is in many ways an orthodox international organisation. Treaties are adopted under its auspices and these are then ratified by member states. The ILO in turn is concerned with the regulation of the conduct of states. It has not as yet adopted any form of binding treaty regulating corporate activity by reference to human rights standards, although it considers that it is within its remit to engage with social issues related to the activities of multinational enterprises. As such, they have adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[45] Although, non-binding, this affirmation of principles is overseen by the International Labour Office, the secretariat of the ILO.

Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

Parts of the declaration are concerned with more straightforward issues relating to labour rights within the workplace, such as grievance procedures, collective bargaining rights and the right to freedom of association. Working conditions are also considered, including health and safety issues. Notably, it also explicitly requires that the UDHR and further UN human rights treaties be taken into account. The declaration is not a treaty and therefore it is non-binding. It also does not have a rigorous enforcement mechanism. There is a procedure for bringing disputes to the Sub-Committee on Multinational Enterprises. The composition of that sub-committee follows the tripartite formula of the ILO, thus government, workers and employers are represented. All the sub-committee can do is make a non-binding interpretation of the declaration.

International criminal law

Since the entry into force of the Rome Statute on the International Criminal Court (ICC) there has been a clearly defined international criminal law system to deal with genocide, war crimes and crimes against humanity. By definition such crimes are also human rights violations. During the negotiations for the ICC an attempt to include corporations within the definition of those who can be tried before the court was rejected. The jurisdiction of the ICC is engaged when member states are either unwilling or unable to prosecute individuals who are suspected of crimes within the court's jurisdiction.

Even though corporations were explicitly excluded it is possible that individuals could be subject to the jurisdiction of the ICC if they aid and abet corporate crimes. Issues of complicity may therefore arise if company directors knowingly

engage with or facilitate genocide, war crimes or crimes against humanity. This situation arose during the Nuremberg Trials where two industrialists were sentenced to death for supplying Zyklon B poisonous gas to the concentration camps, knowing that these would be used in mass murder.

Role of human rights before non-human rights specific international organisations

The World Bank

In tandem with the drafting of the UDHR there was also a move to promote global economic liberalism through the World Bank. The Bank loans money to governments in order for developing countries to work towards economic development. The design and success of these projects is investigated by an independent Inspection Panel, against the Bank's own guidelines. These guidelines include broad human rights principles such as gender equality, protection of indigenous people and environmental protection.

The Inspection Panel can scrutinise all aspects of World Bank funded projects, including on-site investigations. The Panel can be petitioned by a local organisation if that organisation can show that harm has been suffered as a direct result of an act or omission by the Bank. The Panel can recommend to the Executive Directors of the Bank to authorise an investigation. It is important to stress that the Panel is a review procedure; it is not an enforcement mechanism. The Panel cannot act without first receiving a complaint and all it can do is make a recommendation to the Bank's Board of Executive Directors. That said, the World Bank Inspection Panel is an important aspect of corporate accountability where World Bank funding is involved.

The World Trade Organisation (WTO)

At the same time that the UN Human Rights Commission was assembling to draft the UDHR, the General Agreement of Tariffs and Trade (GATT) was established. In 1995 GATT was renamed and, to an extent, redesigned to become the WTO.

Member states of the WTO are required to observe international agreements of trade. If they fail to do so they may be brought before the WTO dispute mechanisms. These are quasi-judicial and are able to impose trade sanctions on states that can have significant economic consequences. A state that believes another state has an unfair trading advantage can refer the dispute to the WTO's Dispute Settlement Body. The Dispute Settlement Body can set up a panel to investigate disputes, and these panels can make rulings. The parties to the dispute present lengthy briefings and there is a hearing before the panel. The panel can also permit third party interventions by NGOs with a particular

interest in the outcome of the dispute. It is possible to appeal from the panel to the WTO's appellate body.

Failure to comply with the finding of a panel (or appellate body) means that the aggrieved state can impose trade sanctions. A justification for non-compliance with free trade rules can be: the protection of public morals; protecting human, animal or plant life or health; and to conserve exhaustible natural resources.[46] By relying upon these justifications it may be possible to factor in certain human rights considerations.

At least since 1999, there have been calls for WTO agreements to be modified in order to take into account their implications on human rights. The inadequate protection of human rights by the WTO is significant because, although on its face the WTO is concerned with disputes between member states, in reality it may be that corporations are using the WTO to promote their own interests. For example, the US banana industry was behind the US complaint in the WTO about EU protected trade agreements with former colonies.

A chief concern regarding the WTO system is the lack of transparency of its procedures. There is nominal engagement with civil society.

The Organisation for Economic Co-operation and Development

The mechanism that currently has most potential for holding corporations to account for human rights violations is a procedure adopted through the Organisation for Economic Co-operation and Development (OECD). The mandate of the OECD is to promote policies that achieve the highest sustainable economic growth for its members, sound economic expansion globally and an expansion of free trade. That institution, the 30 members of which are primarily the leading northern industrial nations,[47] has adopted voluntary guidelines concerning the regulation of multinational enterprises. Originally adopted in 1976, these were revised in 2000, and now state that enterprises should 'respect the human rights of those affected by their activities, consistent with the host government's international obligations and commitments'.

The guidelines form a clear statement of public policy that corporations are to be held to account for their activities when those activities violate human rights principles. Even though they are voluntary and non-binding they include a complaints procedure that is binding upon member states.

The guidelines require that member states set up a National Contact Point (NCP) who has the domestic responsibility for the guidelines' implementation. The UK's NCP is based at the Department for Trade and Industry. The NCP is expected to promote the guidelines and make them accessible to all with an

interest in them. The NCP is also expected to carry out his or her duties in a transparent and accountable manner.

The NCP can receive complaints from other member states, business and workers' organisations that believe that the guidelines are being violated by a multinational enterprise. At the same time, complaints can also be received from other parties concerned. Therefore, NGOs can and do complain to the NCP about the activities of a multinational enterprise which is within the NCP's jurisdiction. What is particularly striking about this complaints process is that the complaint can arise from the activities of the multinational enterprise in other countries. For example, the NCPs in both the UK and Australia were petitioned by NGOs and the World Wildlife Fund in particular in relation to the activities of the shipping company P & O in India and the potential environmental consequences of its activities there.

Once the NCP has formed a view that the complaint raises issues under the guidelines, she or he acts as a mediator between the corporation and the complainant, and they seek to find a resolution. It must be stressed that the guidelines are non-binding and therefore the NCP's powers are limited. The process ought also to be confidential, thus seeking to preserve a company's reputation from frivolous or malicious complaints. In reality those making the complaint may seek to generate publicity about the issues under review.

If the NCP is unable to resolve the matter it is possible for him or her to refer it to the OECD's Committee on International Investment and Multinational Enterprises (CIIME). CIIME has ultimate responsibility for the guidelines and it is empowered to clarify the guidelines' meaning.

As there has only been a specific reference to human rights within the guidelines since 2000, how effective they will be in preventing human rights violations by corporations remains to be seen. Their non-binding nature may also in the long term affect their ability to regulate properly the activities of multinational enterprises.

That said, from a UK domestic perspective the NCP would be subject to judicial review if there were grounds to challenge his or her activities or omissions. The guidelines are also a clear affirmation that, as a matter of international policy, if not law, corporations are held to account against internationally accepted human rights principles.

FTSE4Good

An interesting development in promoting corporate social responsibility and in turn corporate accountability has been the establishment of the FTSE4Good

Human Rights Indices. Thanks to these it is now possible to measure a company's performance on the Stock Exchange against human rights standards, and therefore from an investment perspective it is possible to invest in companies with a good human rights record.

The FTSE4Good human rights criteria are principally drawn from the UDHR, but they also refer to the OECD Guidelines, the ILO Tripartite Declaration, the UN Norms and the UN Global Compact.

Voluntary codes: examples of good practice

Companies and industry bodies have also developed their own codes of conduct in relation to their activities and the human rights obligations that they owe. Some make specific reference to the UDHR.

The enforceability of these codes is limited; however they are a welcome starting point in that they acknowledge the potential for companies' activities to interfere with human rights standards. Amnesty International's Business Group has produced helpful guidelines for companies on what should be included within such voluntary codes. This includes adopting a human rights policy based upon the UDHR, addressing specific concerns about security, protecting against slavery, freedom from discrimination and working with the local community. All of their guidelines are rooted in established human rights principles. Many of them are based on UN guidelines, such as the UN Basic Principles on the Use of Firearms by Law Enforcement Officials.

Conclusion

This review of the issues relevant to corporate accountability for human rights violations has identified that the current legal framework, both domestically and internationally, is unsatisfactory. Questions of accountability can be lost in complex legal battles concerning a corporation's structure and governance and whether the corporate veil can be pierced. Additionally, issues can be obfuscated over where challenges to a corporation's activities should take place and which part of a corporation should be held to account. Furthermore there remains scepticism that human rights standards should be used to hold to account private corporations at all.

Of particular concern is the ad hoc nature of the procedures. Depending upon the domestic framework in each jurisdiction, a corporation may or may not be held responsible for human rights violations. This problem is not remedied at the international level, where the framework concerning corporations and human rights compliance is weak and non-binding. This can be compared with the situation of states parties where they may be held to account for a corporation's violations of human rights standards.

There is, therefore, self-evidently a lacuna at the international law level. This is particularly challenging when the scale of the problem is considered. From just the few examples identified in this report, corporations can be responsible for some of the severest forms of human rights violations and yet there is no straightforward mechanism of holding them to account. Guidance and leadership must therefore be offered from the UN, and a coherent set of standards at the international level, which should be applied domestically, needs to be adopted. The fact that a High Level Special Representative will be considering these issues over the next few years offers a unique opportunity to call for such developments.

There are a number of suggestions that could be proposed to improve corporate accountability for human rights violations. These include: extending the jurisdiction of the International Criminal Court to make clear that corporations, and their management boards, can commit the most serious of crimes; designing a specific human rights treaty for corporations with enforcement mechanisms and an individual complaints system, with an obligation to implement the treaty into domestic law; the establishment of a UN Special Rapporteur on corporations who could name and shame; and turning the UN Norms into a treaty and also making the OECD Guidelines binding in international law.

Any or all of these mechanisms could be adopted which would dramatically improve the nature of accountability. The adoption of such legally binding standards need not prevent industries developing their own codes. However, these codes, if they are to have any value, must have effective monitoring and compliance systems, which need to be transparent and open to public scrutiny.

We live in a world where corporations take an increasingly important role in the running of all our lives. It is therefore appropriate that those corporations should stand accountable in relation to the exercise of that power, in the way that all exercise of power should be accountable. With the appointment of the UN Special Representative we are at the start of a process, and this article, by providing an introductory framework to the issues, should be helpful in developing ideas regarding the ways in which matters could progress.

The benefits of such corporate accountability are self-evident. With legality comes clarity and therefore corporations should in theory be taking the lead in calling for such mechanisms. In the absence of such a clearly defined system of law, corporations, and NMEs in particular, can become victims of the whim of pressure groups and the fickleness of the media, without any effective mechanism, outside of the intricacies and frustrations of libel law, of proving their human rights credibility.

Turning briefly to comment on how the UK might respond to the improvement of corporate accountability for human rights violations, the most straightforward method to ensure effective accountability would be to amend the HRA and to give it clear horizontal effect, as is the case, as we have seen, in Ireland and South Africa. In the absence of such a move, it would be open to those in government to intervene in cases involving the definition of public authorities under the HRA and for the government to argue for a broad definition of public authority, as called for by the Houses of Parliament's Joint Committee on Human Rights. If the definition of public authority were to be extended under the HRA, this would open up its scope, which in turn may have a knock-on effect on corporate accountability.

As far as the UK's international human rights treaty obligations are concerned, the government's failure to ratify the Council of Europe's revised Social Charter and collective complaints procedure sends out a message that it will not be held to account for breaches of economic and social rights. As such, therefore, why should corporations? If the collective complaints procedure were to be ratified this would be a clear signal that these rights are important and should be taken seriously, even if it is only the United Kingdom that could be held to account for their violation.

The UK should also look to the inspiration of the ATCA and seek to find EU consensus for such a provision within Union law, thus ensuring that the scope of such protection is widened beyond the jurisdiction of US Federal courts.

There are countless examples from a UK perspective that prove the rule that, to be effective, rights have to be translated into enforceable law at both the domestic and international level. The best example being the Human Rights Act itself, where prior to its enactment internationally recognised human rights standards could be and were ignored. Other examples include the weak and ineffective Code of Practice on Access to Government Information (1994) in comparison to the Freedom of Information Act (2000).

As governments would appear to have to consistently re-learn, human rights are ignored at their peril. This is not just because courts can now vitiate government policy, but policy that ignores human rights is bad policy, which in turn creates far greater problems for government than it solves. There are no short cuts in relation to human rights. Policies evolved to ignore or avoid human rights come with consequential human cost. From a government perspective this can be seen from Belmarsh to Abu Graib. The same principle applies also to corporations. From Bhopal to Burma/Myanmar and Shell to Cape plc, we have seen the human cost of avoidance of human rights standards.

Human rights are part of the solution. When at the close of the 1940s this was recognised by Eleanor Roosevelt and the collective international wisdom that gathered around her for the drafting of the UDHR, a silent revolution began. The consequence of this revolution, which continues today, established that for power to be used effectively, it must be exercised in accordance with human rights principles. It should not matter who holds power, whether it is a corporation, public authority or a nation state. What matters is how it is put into practice.

Jonathan Cooper is a member of Doughty Street Chambers and a former assistant director of JUSTICE.

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Notes

1 See www.bhopal.net.
2 See, for example *The Curse of Gold*, Human Rights Watch 2005.
3 www.shell.com (see in particular the Statement of General Business Principles).
4 *The Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v Nigeria (2001),* Communication No. 155/96, African Commission on Human and Peoples' Rights.
5 Alien Tort Claims Act (ATCA) 1789.
6 *Wiwa v Royal Dutch Petroleum Company (Shell)*, S.D.N.Y. No. 96-civ-8386, Feb. 28 2002.
7 Joseph, S, *Corporations and Transnational Human Rights Litigation*, Hart Publications, 2004.
8 See for example www.earthjustice.org.
9 From a UK/EU perspective the Law Reform (Miscellaneous Provisions) Act 1995 and the Brussels Regulation (Council Regulation 44/2001) are relevant to this issue.
10 *Lubbe v Cape PLC* [2000] 4 All ER 268 (HL).
11 *Costello Roberts v UK* (1993) 25 EHRR 112.
12 *Richardson v McKnight,* 117 S Ct 2100 (1997).
13 *MC v Bulgaria,* case No 39272/98, ECtHR (First Section), judgment of 4 December 2003.
14 *A v UK* (1998) 27 EHRR 611.
15 *Velásquez Rodríguez Case,* Judgment of July 29,1988, Inter-Am C. HR (Ser. C) No 4 (1988).
16 *The Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v Nigeria (2001),* Communication No. 155/96, African Commission on Human and Peoples' Rights.
17 *Lopez Ostra v Spain* (1995) 20 EHRR 277.
18 *Guerra v Italy* (1998) 26 EHRR 357.
19 *Spencer v UK* (1998) 25 EHRR CD 105.
20 *Appleby v UK* (2003) 37 EHRR 38.
21 Until the Race Relations (Amendment) Act 2000.
22 *R (Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin).
23 *Wilson v First County Trust Ltd (No 2)* [2003] 3 WLR 568.
24 See for example, *Hansard*, House of Commons, 16 February 1998 vol 307, col 775 and *Hansard*, House of Lords, 24 November 1997, vol 583, col 810.
25 *Callin and Others v Leonard Cheshire Foundation* [2002] EWCA Civ 595; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; but also see the critical report of the approach of the courts by parliament's Joint Committee on Human Rights, Seventh Report, *The Meaning of Public Authority under the Human Rights Act*, 2004.
26 *Campbell v Mirror Group Newspapers* [2003] 2 WLR 80; *Ashdown v Telegraph Group Ltd* [2002] QB 546.

27 *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement* [1995] 1 WLR 386.
28 *Filártiga v Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).
29 For general information on ATCA see www.nosafehaven.org.
30 *Doe v Unocal* 2003 WL 359787 (9th Cir 14 Feb 2003).
31 See E Schrage, *Emerging Threat*, Harvard Business Review, August 2003.
32 See www.laborrights.org.
33 *Sosa v Alvarez-Machain et al,* 124 S.Ct. 2739 (2004).
34 COM(2002) 347-2002/2261 (INI).
35 CHARTE 4487/00 CONVENT 50.
36 Case no 15318/89, ECtHR (Grand Chamber), judgment of 23 March 1995 (Preliminary Objections).
37 Case no 52207/99, ECtHR (Grand Chamber), admissibility decision of 12 December 2001.
38 *R (Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin).
39 Under ATCA, there has been a case already brought against two major defence contractors (Titan and CACI) for their alleged involvement in prison abuses in Iraq. See www.humanrightsfirst.org/Issues/ATCA/qs_atca_biel_080404.htm.
40 The Revised Social Charter.
41 A collective complaints procedure adopted by protocol in 1995 permits certain categories of organisation to bring collective complaints against a state party. The UK has not ratified the collective complaints procedure. Three categories of organisation have rights in this respect: (1) International organisations of employers and trade unions which are otherwise entitled to participate as observers in the work of the Governmental Committee (2) Other international non-governmental organisations having consultative status with the Council of Europe and which have been placed upon a list for this purpose by the Governing Committee (3) Representative national organisations of employers and trade unions within the jurisdiction of the party against which they have lodged a complaint.
42 55th Session, 13 August 2003.
43 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
44 Adopted on 20 April 2005.
45 Declaration adopted by the Governing Body of the ILO at its 204th Session (Geneva, November 1977).
46 Article XX General Agreement on Tariffs and Trade 1994.
47 Along with Argentina, Brazil and Chile, who are not full members.

Old wine in new bottles: human rights, legal aid and the new Europe

Roger Smith

This paper considers the role of the European Union in developing systems of legal aid in the countries of central and eastern Europe which have just acceded to the Union or who hope to do so. It notes, on the one hand, the compromises that have been made as part of this process and, on the other, the extent to which it has been the institutions of the Union that have achieved significant progress.[1]

The forgetfulness of the old

Legal aid in England and Wales faces a major crisis. Yet, there is no serious dispute that its provision, particularly in criminal cases, is a necessary part of a government's duty to provide adequate access to justice. Indeed, one very real danger is that legal aid is so entrenched that its ultimate purpose is taken for granted. Thus, a post-election statement of priorities by the Department of Constitutional Affairs stated, indistinctly if rather menacingly: 'Legal aid will be reformed so that it responds to what the public wants and justice requires'.[2] This turned out to herald unprecedented cuts. For the countries of central and eastern Europe, however, the position is different. In the early 1990s, as the power of the Soviet Union crumbled, they signed up to the European Convention on Human Rights. Then, little more than a decade later, eight of them joined the European Union (together with Malta and Cyprus) and a further two – Romania and Bulgaria – will do so in 2007. Legal aid provides a small, but fascinating, window on the process by which these countries made their way towards meeting the standards set by the European Convention; the role of the European Union, as distinct from the Council of Europe or the European Court of Human Rights, in encouraging this move; and the compromises made in the process.

Legal aid and human rights

The right to legal aid is implicit in Article 6.1 and express in Article 6.2 of the European Convention on Human Rights:

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …*
> *2. Everyone charged with a criminal offence has the following rights: …*

> *c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require.*

The European Convention distinguishes criminal legal aid – where the obligation is specific – from legal aid in civil proceedings. In the latter, the state must provide a 'fair and public hearing', an obligation which might – in the words of one commentator – 'sparingly' be construed as requiring legal aid.[3] In the celebrated 'McLibel case', the European Court of Human Rights re-stated the principles on which legal aid might, exceptionally, be available in civil proceedings:

> *The question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended inter alia upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.*[4]

Thus, countries which have signed and ratified the European Convention (now 45 in total) should provide legal aid in criminal proceedings as required by Article 6.2 of the convention and also, exceptionally, in civil proceedings. The European Court has been clear that this right should be 'practical and effective' and not 'theoretical or illusory'.[5] The story of the ex-communist countries reveals that these rights were precisely theoretical and illusory for the decade in which enforcement was left to the institutions of the Council of Europe. The European Court of Human Rights plays a major role in determining the duties of those states that accept the convention. However, on this occasion, it was the political power of the European Commission and the European Union that was more important in giving 'practical and effective' force to obligations about access to justice.

The EU and human rights

As would be expected from an organisation that progressed slowly from the economic to the political sphere, the European Community was slow to identify a concern with human rights. The Single European Act, signed in 1986, started the process by a reference in its preamble to member states that are:

> *DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.*

By 1997, the reference to the European Convention and its principles had migrated into the body of the text agreed in the Amsterdam Treaty that came into force two years later:

> *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.*[6]

It specifically tied the Union to the standards of the European Convention:

> *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.*[7]

'A serious and persistent breach' of the principles by any member state could lead to suspension of rights under the treaty.[8]

The proposed new constitution for the EU, currently stalled by the lost referenda in the Netherlands and France, would have given the Union a separate legal identity (hitherto seen as a barrier to signing the convention); required it to accede to the European Convention directly; and set out in its second part the European Charter of Fundamental Rights and Freedoms that incorporates, but goes beyond, the European Convention.[9] The constitution stated:

> *1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.*
> *2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms …*
> *3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

By this means, the circle was intended to be complete. The Union's member states have all accepted the provisions of the European Convention – despite the restiveness by such as Mr Blair in relation to some of its detail. The Union would join them and, in time, the jurisprudence of the two European Courts in Strasbourg (Council of Europe) and Luxembourg (European Union) would happily converge. In addition, members of the EU would take on board the additional, if legally limited, obligations of the European Charter of Fundamental Rights and Freedoms. It might be noted that this charter, currently not legally binding on member states, includes the most fulsome protection for legal aid in any human rights treaty.

> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*[10]

This is a reasonable summary of convention jurisprudence but it rather benefits from its brevity and clarity. This is because it makes, unlike the European Convention, no evident distinction between the right to legal aid in different proceedings, whether they be criminal, civil or administrative.

The accession process

Countries wishing to accede to the European Union are required to undertake a process that requires meeting a set of conditions published in some length in an acquis communitaire. The general principles for accession of the post-communist countries wishing to join the Union after the fall of the Soviet Union were agreed at a 1993 European Council meeting in Copenhagen and included, as one of three 'Copenhagen criteria':[11]

- *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*.

The acquis sets no specific conditions in relation to legal aid and access to justice but candidate countries were subject to monitoring on their performance as against the criteria for membership. The reports covered legal aid and access to justice in the context of reporting on performance against the third criteria. For the new entrants in 2004, annual reports culminated in a 'Comprehensive Monitoring Report' published in the previous year. These are important because they represent a 'signing off' of the state's performance at the moment that they joined the EU. Once members, the reports ceased. Members of the EU are not subject to such intrusive monitoring. Some of the comprehensive monitoring reports were highly critical – raising the question of whether governments have made any further response or whether the position remains poor. For example, the comprehensive report on Poland stated that:

> *The system of legal aid is still under-developed and organised in a non-transparent way, with the result that citizens are not informed as to their rights.*[12]

One of the legacies of the countries which were formerly part of the Soviet Union has been the ex officio system of legal aid which most incorporated into their new post-Soviet constitutions.[13] Legal aid was seen as a professional duty of lawyers, largely unpaid. There is a deeply ingrained culture of seeing legal aid as a procedural requirement concerned with formality rather than anything more substantial.

Countries under the sway of the Soviet Union tended to have no general statement of principle that was equivalent to the general requirement of 'equality of arms' that underlies Article 6 of the European Convention on Human Rights or the principle that free legal aid should be supplied by the state where 'the interests of justice' require and the defendant has insufficient means to pay. The relevant provisions tended to be specific and without reference to the underlying reason why legal aid might be desirable. Some cases required the mandatory appointment of a defence lawyer, albeit generally free to the client – primarily where the minimum sentence was above a certain level. No account, however, was taken of maximum or likely lengths of sentence so a degree of arbitrariness was unavoidable. 'Other criteria for determining if legal representation is mandatory,' reported one study, 'include the defendant's mental or physical condition, age and ability to speak the official language used in court, whether the defendant was subject to pre-trial detention and whether the trial was in absentia'.[14]

The method of appointment of lawyers varied, as did provisions as to payment. One study reported:

> *In fact, virtually any lawyer can be appointed no matter what his or her field of specialisation, practice or experience is. The prosecuting authorities may either directly appoint a lawyer from a list provided by the local bar or refer the case to the local bar, leaving bar officials to designate the attorney. In either case, once the lawyer has been chosen, no mechanisms exist for initial or ongoing supervision of the attorney.*[15]

A Hungarian study in 1996 revealed the consequence – a massive disparity in service between privately hired and ex officio lawyers. This was illustrated by statistics as to interview – 44 per cent of a sample of detainees had yet to meet their ex officio lawyer; only eight per cent of the sample with privately hired lawyers had yet to meet them. Few or no statistics were kept in any country on the ex officio lawyers. Representation tended to be formal rather than real. Fully overcoming this tradition probably remains to be achieved.

The scrutiny of the European Union caused the candidate states of central and eastern Europe to reconsider their legal aid arrangements – at least in form. Other forces were working in the same direction. The Public Interest Law Initiative (PILI) of Columbia University has a base in Budapest and, now, Moscow. The Open Society Justice Initiative (OSJI) is also based in Budapest. Both have been active in encouraging legal aid in central and eastern Europe. Both have collaborated on two conferences – in 2002 and 2005 – that brought together people from countries in the region. PILI joined with three other human rights groups to produce a two-volume study of access to justice in central and eastern

Europe, published in 2003[16]. OSJI has been extremely active and has funded two pilot public defender projects – one in Lithuania and the other in Bulgaria. It has facilitated the movement of officials between different European states to examine the operation of different legal aid systems – particularly, in Europe, the English and the Dutch. The Lithuanian and Bulgarian projects have allowed the OSJI an inside experience of the working of the legal system in those countries and it has striven to raise standards – a drive which was the major theme of the 2005 access to justice conference.

The current state of play

The EU provided an audit trail of the state of play in relation to legal aid in the eight states from central and eastern Europe that have just joined the Union and the two hoping to join in 2007. A summary of each is set out below.

Bulgaria

The country was criticised in its 2003 monitoring report for the state of its legal aid. Bulgaria has a new law on attorneys, published on 25 June 2004. This requires that an attorney must act for a client if selected by the local Bar Council – a provision taken from earlier Acts. The Open Society Institute has set up a pilot Public Defender Office in Veliko Turnovo with five lawyers. A joint working party of the Ministry of Justice and the Open Society Justice Initiative developed a joint concept paper on legal aid and then a draft bill in late 2004. This proposes the establishment of an independent Legal Aid Board; would extend legal aid to civil and administrative matters in addition to crime; and requires registration and itemised billing by lawyers acting on legal aid. It is not yet in force.[17] The EU considers that more should be done, stating in its 2004 report on progress to accession:

> *Regarding legal aid, studies show limited improvements in access to legal assistance during trial. A significant number of defendants are still being tried without a defence counsel. The situation regarding the pre-trial detention phase has not improved over the reporting period but the adoption of the law on lawyers in June 2004 should guarantee some improvement in the access to justice for all citizens. A legal aid fund, separate to the budget of the judiciary, has not yet been established.*[18]

Czech Republic

A draft law on legal aid exists; was approved by the Legislative Council of the Czech Government in 2003; but only the part relating to cross-border legal aid has been submitted to parliament. In the interim, legal aid is administered under a number of different provisions.[19]

The final monitoring report was rather favourable:

> *Access to justice is satisfactory, however not all citizens may be fully aware of their entitlement. Legal aid is available both in criminal and civil cases, either by virtue of the code of criminal procedure (free legal representation for defendants and victims) or by request to the Chamber of Advocates under the Act on Attorneys.*[20]

Estonia

A State Legal Aid Act entered into force on 1 March 2005. This considerably broadened the types of case in which legal aid can be granted – either to natural or legal persons. Only advocates can receive legal aid remuneration, a somewhat contentious limitation. Controversy has also arisen over the requirement that forms must be submitted in Estonian – the county has inherited a large Russian-speaking minority. Significantly, the rate of expenditure on legal aid is budgeted to rise: from €1.7m in 2004-5 to €2.8m in 2005-6.[21]

The final monitoring report's comment was:

> *Concerning legal aid, the draft Legal Services Act, which was submitted to Parliament at the end of 2001, has yet to be adopted and may not enter into force before 2005. It is possible to be granted free legal aid by submitting an application to the court for the appointment of a lawyer at the expense of the state. This is provided for in the codes of criminal, civil and administrative procedure and also in connection with administrative offences. However, while free legal aid is routinely granted in criminal cases, its availability in civil and administrative cases seems to remain rather limited.*[22]

Hungary

Hungary passed a Legal Aid Law in 2003 – coming into effect in a first phase from April 2004 and a second in January 2006. This introduces state-funded legal advice and services other than for criminal suspects and defendants; in contrast to Estonia, it welcomes in non-attorney providers such as NGOs. Hourly rates for advice remain somewhat unattractive – the equivalent of €9.93 an hour. A new Code of Criminal Procedure in 2003 at last required the state to provide the cost of legal aid if the defendant was exempted from payment by the court. No change has been made to the ex officio system for criminal proceedings.[23]

The final comprehensive monitoring report stated:

> *Legal aid is currently rather restricted. In criminal cases, the state is obliged to provide defence counsel only in limited cases (e.g. if the offence is*

punishable with more than 5 years' imprisonment), and a defence counsel may be provided as a matter of discretion in other cases. In general, if the defendant is convicted, he must pay all costs. In civil cases, legal aid tends to be restricted to the very poor and to pensioners. Although there is a network of offices offering free legal information, these offices do not represent citizens in trials. The government has undertaken to submit a bill to Parliament to significantly improve the legal aid system before the end of 2003.[24]

Latvia

Latvia has drawn up a very broad draft law on legal aid but it is not yet in force. The budget for mandatory legal aid in 2005 is only €648,535.[25]

Latvia got an admonition from its final monitoring report:

In the field of legal aid, planned legislative measures have been delayed. It is important to complete the legal framework to improve citizens' access to justice and to ensure adequate funding of legal aid.[26]

Lithuania

In legal aid terms, Lithuania can claim to be the beacon of the Baltic. This is a country in which the Open Society Justice Initiative has been particularly active. As a result, Lithuania passed a new law on legal aid in January 2005 covering legal advice (primary legal aid) and aid (secondary legal aid). The budget for both is projected to rise steeply – in relation to legal aid, from €1.5m to €2.1m from 2004 to 2005 and advice, from €103,000 to €760,000.[27] It did not escape criticism in the final monitoring report:

The situation regarding access to legal aid, particularly in civil and administrative cases, is still unsatisfactory, due to the complexity of the procedure. The new Law on Bailiffs, which entered into force in January 2003, is expected to significantly improve the effective enforcement of judgments.[28]

Poland

The Minister of Justice established a working group on a new draft legal aid law in October 2004 and it proposed a new draft law in February 2005.[29] A comment of the final comprehensive pre-accession report is given above. Overall, the report was damning:

The access of the public to the judicial system remains limited, especially access to general information on procedures, legal aid and the state of play of an individual's own pending case. In general, the level of public trust

> *in the efficiency and fairness of the judicial system remains low and the perception of corruption by the public is high.*[30]

Romania

Legal aid in Romania remains pretty rudimentary. The Bucharest Bar Association runs a legal aid office with the help of fees from its members. State payment is late and somewhat low – ranging lump sums of between €5 and €15 from criminal ex officio matters.[31] The 2004 annual monitoring report called for more action on legal aid:

> *There are shortcomings in the implementation of the legal aid system and effective defence for the accused is not systematically guaranteed. The lack of precise definitions of the criteria for receiving assistance may lead to arbitrary and non-uniform application of the rules. Better remuneration of lawyers providing legal aid should be ensured to encourage the lawyers to provide such assistance.*[32]

Slovakia

The government has committed itself to produce a Law on Free Legal Aid in April 2005.[33]

The final monitoring report was critical of the legal system though seems not to have considered legal aid specifically:

> *The level of public trust in the efficiency and fairness of the judicial system remains low.*[34]

Slovenia

Slovenia introduced a new Legal Aid Act in 2001 which was amended in 2004. Expenditure rose from €371,006 in 2003 (itself well over budget) to a budgeted €521,000 in 2004 which was overspent 'by the end of the summer'.[35]

The result was a ticking off about court delays but a pass on legal aid, if somewhat perfunctory, in the final monitoring report:

> *Free legal aid is available to socially vulnerable people. It covers both civil and criminal cases.*[36]

Lessons from the EU's role in the accession process

Overall, the EU reports provide a sobering catalogue that illustrates just how ambitious was the undertaking of bringing the accession states from central and eastern Europe up to standards that are reasonably compatible with those of the 15 existing member states of the Union by March 2004. Legal aid is just

one part of a justice system and, for a number of states, the specific observation on Slovakia has resonance: there is a lack of public trust in the integrity and competence of the court structure. Read these reports and you understand why. Decades of satellite status to a foreign power overwhelmingly depleted confidence in the institutions of government. From any realistic perspective, the European Union played a remarkable role in the transformation of societies where progress to full national independence only occurred in the aftermath of the dramatic events of 1989, of which the most celebrated image was the fall of the Berlin Wall. It has to be remembered that Russian troops completed their withdrawal from countries now in the European Union only on 31 August 1994 – and not without, as in Lithuania and Latvia, a degree of bloodshed in attempted Russian counter-coups as late as 1991.[37] Within two years of the final Russian withdrawal, the three Baltic states, together with all the other accession states of central and eastern Europe, had signed, ratified and brought into force the European Convention on Human Rights.

There was no way in which accession to the convention such a short time after effective independence could be more than a statement of aspiration. Practically, there was bound to be a distance between the theoretical position of adherence to convention standards and the need for a reasonable transition time to bring standards up to scratch. However, this dissonance was also bound to cause a problem. It clashes with the assertion of the European Court of Human Rights that the convention is more than an aspirational statement of values, specifically in relation to access to justice:

> *The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.*[38]

It is clear, however, that for this group of countries, the convention represented only an aspirational set of values. The states did not comply with convention principles: realistically, they could not reasonably have done so in so short a space of time since they achieved true independence. It was left to the European Commission to press home the need for the necessary reforms.

The dream of accession within the countries seeking to join the European Union provided the European Commission with a method of enforcement that was lacking for the Council of Europe. This provided a framework within which legal aid, access to justice and, more widely, elements of the rule of law have been scrutinised; reported upon; and responded to, as can be seen above. It is, however, manifestly clear from the cautious observations of the monitors that questions arise as to the final state of equality of arms within the legal systems

of these accession countries. Indeed, it would be quite remarkable if it were otherwise.

There is more

The EU's engagement in legal aid standards has gone farther than the harmonisation of its human rights' commitment with that of the European Convention. From the Maastricht Treaty onward, the Union conceived itself as based on three pillars – the third of which was co-operation in judicial and home affairs. Reflecting the political sensitivity of decisions in this area, they were to be taken unanimously and movement has been cautious. Underpinning this movement were provisions that, as expressed in the Amsterdam Treaty (agreed in 1997 and coming into force in 1999) to the effect that:

> *The council shall, acting unanimously … issue directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly effect the establishment or functioning of the common market.*[39]

Two forces – one internal and one external – took the processes of approximation, mutual recognition and co-operation further and faster than might have been expected: the EU itself through decisions taken at the Tampere European Council in October 1999 and the consequences of the events of 11 September 2001. Tampere advanced the idea of a 'union of freedom, security and justice' and, in a phrase that probably sounds better in the French 'a European judicial space'. Tampere set out an ambitious programme which specifically included a section on access to justice. This, in turn, contained a commitment for 'user' guides on judicial co-operation and the legal systems of member states and called for:

> *minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should be created by Member States.*[40]

Tampere led to a number of uncontroversial developments. For example, the Commission is co-operating with the Council of Europe to produce legal aid information sheets on the countries of Europe and appropriate websites are under construction.[41] A directive was agreed on cross-border legal aid in civil cases – basically giving non-nationals the same rights to legal aid as nationals in such cases.[42]

9/11 intruded on the future of legal aid in the European Union through a side wind. Tampere had called for the replacement of extradition proceedings with 'simple transfer'.[43] By 20 September 2001, the Council of Members, keen to display solidarity with the US, had agreed a 'Road Map on Terrorism' in response to include a fast-track extradition procedure, the European Arrest Warrant. Such was the political drive for agreement that this was forthcoming in record time at a Justice and Home Affairs meeting in early December. A Framework Decision was approved by the Council on 13 June 2002.[44] To move with such speed, full safeguards for suspects and defendants were left to a separate process. Crucial to these is, of course, legal aid. A suspect facing transfer has relatively few rights but the whole process is subject to the principles of the European Convention (and, thereby, in the UK expressly the provisions of the Human Rights Act 1998).[45] This allows a judge to consider whether a person subject to a request for transfer would receive a fair trial in the requesting country. The UK implemented the warrant relatively unproblematically. Other countries had more difficulty and some had to amend their constitutions, generally in relation to the removal of any distinction between nationals and non-nationals.

The existence of the warrant makes more urgent the need for the implementation of agreed minimum standards throughout the Union. The Commission has pressed on with plans for minimum standards to cover five specific areas:

- legal advice;
- interpretation and translation;
- vulnerable suspects and defendants;
- consular access;
- a letter of rights.

The process has now reached the stage of a Proposal for a Framework Decision.[46] A framework decision requires implementation by member states within a specified time – in this case, it is hoped, by 1 January 2006.

In this context, let us look only at the provisions relating to legal advice – governed by Articles 2-5. These propose that:

> *A person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.*[47]
> *Member States shall ensure that legal advice is available to any suspected person who:*
> - *is remanded in custody prior to trial;*
> - *is formally accused of having committed a criminal offence which involves a complex factual or legal situation, or which is subject to*

> *severe punishment, in particular where in a Member State, there is a mandatory sentence of more than one year's imprisonment …;*
> - *is the subject of a European Arrest Warrant or extradition request or other surrender procedure;*
> - *is a minor; or*
> - *appears not to be able to understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition.*[48]

> *Member States shall ensure that only lawyers … are entitled to give legal advice …*[49]
> *… the costs of legal advice shall be borne in whole or in part by the Member States if those costs would cause undue financial hardship to the suspected person or his dependents.*[50]

These provisions raise the issue of compatibility with the wording of the European Convention – quoted earlier. In the accompanying explanatory memorandum, the Commission makes the following assertion – the truth of the first sentence surely being somewhat questionable in the light of the pre-accession monitoring noted above:

> *All the Member States have criminal justice systems that meet the requirements of Articles 5 … and 6 … of the ECHR. The intention here is not to duplicate what is in the ECHR, but rather to promote compliance at a consistent standard. This can be done by orchestrating agreement between the Member States on a Union wide approach to a 'fair trial'.*[51]

The problem with the Commission's proposed wording is that, in two material ways, it does not duplicate the ECHR. It sets a lower standard. The Commission's provisions all refer to 'legal advice' not 'assistance'. And the obligation to provide free legal advice occurs neither on the general grounds of 'the interests of justice' but only in specified circumstances, removing any individual discretion, nor on a test of insufficient means but 'undue financial hardship'. The issue of the definition was taken up by the UK House of Lords European Union Committee which called for clarification.[52] Assurances exist in written correspondence from UK ministers that 'The reference to "legal advice" would implicitly include legal representation'.[53] However, domestic English legal aid legislation has traditionally characterised advice, assistance and representation as three separate functions. It is not clear that a broad interpretation would, in fact, be taken either domestically in the UK or elsewhere.

The proposed framework decision contains a non-regression clause, prohibiting member states from lowering their standards in consequence.[54] This should not be a problem in relation to the UK which is largely compliant with Article 6, albeit that existing duty solicitor arrangements would need – as the House of Lords committee accepted – additional provisions so that services could be delivered by lawyers and accredited non-lawyer representatives. The problem will arise in relation to standards within other countries of the European Union because, prima facie, it looks as if the member states have watered down the proposals of the Commission, which were originally stronger, to an extent that they are now at a lower level than those of the convention. The European Union, having played a very creditable role in raising the quality of justice and legal aid in the accession countries, has had practically to accept that standards are not unified over the Union; that some states (and they may include long established members of the Union) do not meet the fair trial rights of Article 6 ECHR and do not have adequate legal aid. There are many other demands on money and time, however, and there are effective limits to what can be done in so short a time. The problem is that the Union has also progressed measures that are based precisely upon uniform standards. Thus, the European Arrest Warrant, in essence a desirable development, may well prove to be based on sand if it ever attracted the same level of media and political concern as has been manifest in the cases related to the United States.

A final assessment

The subject of legal aid provides a window through which we can see the working of the European Union and the Council of Europe in relation to one small, if important, area of policy which formed part of the enormous project of bringing in the countries on Europe's eastern frontier that had formerly been part of the Soviet Empire. Overall, the achievement of absorbing these countries within the institution of the European Union is enormous and, surely on balance, highly desirable in terms of stabilising a series of countries on Europe's eastern frontier. However, the process was so fast that corners were cut. Signatories to the European Convention manifestly did not comply with its provisions. That was regrettable, if understandable. Crucially, we must now ensure that standards for the rest of Europe do not suffer in consequence. The Union must avoid joining in any backdoor way of loosening the provisions of the European Convention. Citizens of the United Kingdom are among those that will lose most if this occurs because the standards which have been fought for here and which, despite all legal aid's well-publicised problems, still prevail will not be available to them if needed in other countries of the Union.

Roger Smith is director of JUSTICE.

Notes

1 The original version of this paper was given at a conference of the International Legal Aid Group, 'Legal aid in the Global Era', held in Killarney, Ireland in June 2005.
2 www.dca.gov.uk/dept/dcaprioritiesmay2005.pdf.
3 C Harlow, 'Access to Justice as a Human Right', in P Alston et al (ed) *The EU and Human Rights*, OUP, 1999; *Steel and Morris v UK*, chamber judgment, 15 February 2005, application number 68416/01.
4 As above.
5 *Airy v Ireland* ECHR (1979) 2 EHRR 305, para 24.
6 Art 6.1.
7 Art 6.2.
8 Art 7.
9 Art 1-9.
10 Art 47.
11 http://europa.eu.int/comm/enlargement/intro/criteria.htm.
12 Public Interest Law Initiative 'EU Access Reports Highlight Legal Aid Deficiencies', http://pili.org/features/PublicationLaunch/.
13 The following description is largely taken from E Rekosh, K Buchko, D Manning and V Terzieva 'Access to Justice: legal aid for the unrepresented' in *Access to Justice in central and eastern Europe: source book*, 2003, Public Interest Law Initiative, Bulgarian Helsinki Committee, Polish Helsinki Foundation for Human Rights and Interights.
14 P6 n13.
15 P9 n13.
16 N13.
17 From M Gramatikov 'Legal aid developments: country update on Bulgaria' in Public Interest Law Initiative and Open Society Justice Initiative *2*nd *European Forum on Access to Justice: background materials.*
18 European Commission *2004 Regular Report on Bulgaria's Progress to Accession*, Com (2004) 657 final, p22. All the monitoring reports can be accessed through the European Union's website: http://europa.eu.int/comm/enlargement/report_2003/.
19 B Bukovska 'Legal aid developments: country update on the Czech Republic', n18.
20 European Commission *Comprehensive Monitoring Report on the Czech Republic's preparations for Membership*, 2003, p13.
21 T Evas 'Legal aid developments: country update on Estonia', n18.
22 P13 ibid.
23 M Pardavi 'Legal aid developments; country update on Hungary', n18.
24 European Commission *Comprehensive Monitoring report on Hungary's preparations for membership,* 2003, p12, n18.
25 K Jarinovska 'Legal aid developments: country update on Latvia', n18.
26 P13 ibid.
27 P Koverovas 'The goals and process of the institutional legal aid reform in Lithuania', n18.
28 European Commission *Comprehensive monitoring report on Lithuania's preparations for membership*, 2003, p13, n18.
29 L Bojarski 'Legal aid developments: country update on Poland', n18.
30 European Commission *Comprehensive Monitoring Report on Poland's preparations for membership,* 2003, p14, n18.
31 G Iorgulescu and N Popescu 'Legal aid developments: country update on Romania', n18.
32 European Commission *2004 Regular Report on Romania's Progress to Accession*, Com (2204) 657 final, p25.
33 J Hrubula 'Legal aid developments: country update on Slovakia', n18.
34 p12 European Commission *Comprehensive Monitoring Report on Slovakia's Preparations for membership*, 2003.
35 M Anclin 'Legal aid developments: country update on Slovenia', n18.
36 European Commission *Comprehensive Monitoring Report on Slovenia's Preparations for Membership*, 2003 p13.
37 http://www.balticsww.com/timeline.htm.
38 *Airey v Ireland* ECHR (1979), Series A, No 32, 2 EHRR 305, para 24.
39 Art 94.
40 Para 30.

41 See http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to _justice_and_legal_aid/
42 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
43 Para 35.
44 See S Alegre and M Leaf *European Arrest Warrant: a solution ahead of its time?* JUSTICE, 2003.
45 S21 Extradition Act 2003.
46 COM (2204) 328 final (28 April 2004).
47 Art 2.
48 Art 3.
49 Art 4.
50 Art 5.
51 Para 9.
52 House of Lords European Committee *Procedural Rights in Criminal Proceedings*, HL Paper 28, 2004-5.
53 Lord Bassam of Brighton to Roger Smith, JUSTICE, 22 February 2005.
54 Art 17.

Juries on trial

Sir Louis Blom-Cooper QC was unpersuaded by Sally Ireland's article in the autumn 2005 edition of the JUSTICE Bulletin. She outlined JUSTICE's opposition to the government's proposal to activate section 43 of the Criminal Justice Act 2003, which restricts the right to jury trial in serious fraud cases. In a speech to the Bar Conference in October 2005, Sir Louis sets out his views. These are that the focus should not be on whether there is a 'right' to trial by jury, but on what system provides the higher quality of justice. He considers that the jury system lacks some of the elements of a fair trial; in particular, juries do not give reasons for their verdicts, and the degree of interference with jury verdicts on appeal is limited. He concludes by calling for the merits of the jury system to be tested, proposing that an independent committee should be set up to consider alternative methods of trial for serious criminal cases.

The starting point for testing civil liberties in criminal justice is Article 6 of the European Convention on Human Rights. That Article, which accurately declares the common law of England, states that everyone charged with a criminal offence has the right to a fair trial in public before an independent and impartial tribunal. There is nothing in that Article that enshrines the concept of trial by jury as the exclusive mode of trial, even for the most serious of criminal offences. Trial by jury would, on the face of it, qualify as an acceptable mode of criminal trial in a democratic society, as an option for member states to adopt, so long as it complies with the provisions of Article 6. Were it not optional, the Dutch (for example) would be in permanent breach, since their system has never, apart from the Napoleonic days of annexation of the Netherlands from 1803-1813, known trial by non-professionals. The Dutch did not care for a jury system. They rejected its use, partly because it was French, but predominantly because they felt it was unnecessary. Since 1813 criminal trials have been conducted by 'objectively-trained lawyers', and this adherence to professionalism persists to this day.

The question is thus, not whether trial by jury is a constitutionally guaranteed right – incidentally, it is odd to talk about a civil liberty when the individual is obliged to undergo trial by jury, even if he or she would desire to be tried by some other, recognised mode of trial – but is a question of justice. Is the system

of trial by jury (strictly speaking, unlike the United States, in England it is trial by judge and jury, the alchemy of which we are not entirely knowledgeable) at least as good as any other acceptable method of trying offenders? The quality of criminal justice as between different modes of trial is the crucial issue.

The trouble about finding an answer to the question is that we know so little about how juries work, since research into juries has been statutorily proscribed since 1981, and what research has been conducted in the Anglo-Saxon systems is sparse. All of us, I suspect, may have our instinctive, impressionistic response. I venture to think it will be mostly anecdotal; for some of us it will be based on some forensic experiences. But it will be based on little more than that, and will certainly be insufficient for the purpose of answering a question of social policy. Without proper research we should declare that the jury is still out on the propriety of an institution that I venture to think has served this country well, over the last century at least, and may well have maintained the public confidence, until recent times when some instances have occurred to demand some questioning. For us, now well into the 21st century, we should not assume that trial by jury does indeed provide a quality of criminal justice suitable for the modern world of increasing complexities in science and technological matters that permeate so many of the criminal events that find their way into the courtrooms of the Crown Court. (I mention not merely complex fraud cases but issues of medical knowledge in relation to sudden infant deaths as only two examples.) Before I indicate my starting point for coming to any conclusion about the quality of justice in jury trials, I should indicate my credentials for speaking with any degree of authority on this subject. I claim nothing more than some slight acquaintance with perceived assessment of the system, some of it anecdotal.

Until I took silk in 1970, I had not practised in the criminal courts, other than very occasionally. I was a budding public lawyer, reared and nurtured in the old prerogative order system of certiorari, mandamus, and prohibition, and the bourgeoning of judicial review. Criminality was no specialty for me, until, like most QCs who were not high fliers earning a million pounds a year, whether on legal aid or from private payers, I began to do some criminal defence work (almost all at the Old Bailey) for the next decade. It may be that my personality makes me unsuitable to assess either the world of the adversarial nature of our criminal process or the acclaimed virtues of cross-examination of witnesses (inaptly described as the ability to see the whites of the witness's eyes). But I was unimpressed. Personally I did not relish the advocate's role of addressing twelve dumb men or women. The forensic process for me has always been dialogue between Bench and Bar. Hence I start with a preconception or prejudice in favour of the professional tribunal. I am reminded of the wise words of Jerome Frank, a notable member of that extraordinary court in the mid-20th-century,

the US Second Circuit Court of Appeals, containing also the two famous Hands – Learned and Augustus. Frank said that if preconception and prejudice (attitudes which we all undergo) are equivalent to bias, then nobody has ever had a fair trial, nor will they in the future. I am not biased against the jury system. I simply recognise an initial prejudice which I seek to put to the test of objective and rational judgment.

I have two other observations about my experience. First, I was conscious in appearing for defendants how essential it was to succeed at trial. Often, having failed to achieve an acquittal for a client whose conviction I thought was wrong, I was oppressed by the thought that the function of the Court of Appeal (Criminal Division) was too limited. If I could find no misdirection in the trial judge's instructions to the jury on the law and no palpable misstatement of the factual evidence, and if there was no procedural irregularity to fasten on to, I was helpless. Any review of the case was out of the question; the jury was the exclusive determinator of the facts. It was not for appellate judges to say that they would have to come to a different verdict, unless the jury's decision was so unreasonable as to be unsustainable. I will revert to this aspect of the jury system. A distinguished colleague, who had been one of the Treasury team at the Old Bailey, referred to the Court of Appeal (Criminal Division) in the 1970s and 80s as 'the court of no criminal appeal'. A reasoned verdict from a judge-alone court can be subjected to a fully appellate process.

My second observation is my experience, not as counsel but on the Bench. From 1966 to 1981 I was a lay magistrate, first in Greenwich and Woolwich, and from 1969 onwards in the City of London. That experience led me to conclude that the magistracy, which tries 98 per cent of all criminal prosecutions, does provide a quality of justice of a high order – not always, but as a general rule, in a system that allows for an appeal (a real re-hearing) to the Crown Court where a professional sits with two magistrates. I would point out that the lay magistrates, while not normally having any legal qualification, are anything but amateurs. Since 1966 appointments are conditional on undergoing training (with continuing training and education during the period of being a magistrate) and sitting regularly, not less than 26 days a year. Magistrates acquire a skill and judgment of those required to assess witnesses and evaluate evidence.

An experience (once repeated) has some relevance to what I have to say about non-jury trial. With two non-legal colleagues I tried two cases of conspiracy under the now-defunct Exchange Control Act 1947. Both cases involved what was called the revolving fund fraud, in which participants sent money whizzing around the world's financial markets picking up the dollar premium at each port of call. There was an odd provision in the Act that allowed for summary trial for a statutory conspiracy, if the parties agreed to trial by the City Magistrates.

They did so agree. (Is that a pointer to the introduction of choice recommended by Sir Robin Auld that was not accepted by the government when legislating in 2003?)

We sat for 30 days (the fact that I received an allowance of £9 per day was a prime reason for my giving up the magisterial bench). We gave a reasoned, 45-page judgment and fined the two defendant stockbrokers £0.5million. There was no appeal. We were told by counsel for the prosecution that if the case had been committed for trial to the Old Bailey, the estimate was a trial lasting 4-6 months. The case was mentioned approvingly by the Roskill Committee on Fraud Trials as an example of a successful mode of trial for a complicated fraud in exchange control (see para 8.49/50).

So, back to Article 6. Without being possessed of any hard evidence to make good the assertion that the jury provides (or does not provide) a high, never mind a better quality of criminal justice, I must develop a case for claiming that intrinsically the system lacks some basic elements of 'a fair trial'. A prime requirement of a fair trial in the Strasbourg jurisprudence is a reasoned verdict of the court of trial. Palpably, the jury does not, and probably is incapable of supplying reasons for its decision, even if it were permitted to articulate its verdict. Its verdict is hardly more than monosyllabic and remains oracular. I do not dwell on the examination of the case-law on reasons for supplying reasons. You may find it in the text of an address I gave to the British Academy of Forensic Science in October 2003 (Medicine, Science and the Law). It is conceivable that if and when Strasbourg is seized of the problem, a jury from an Anglo-Saxon system (England or Ireland) which in delivering its verdict answers a series of questions in a written questionnaire provided at the end of the judge's summing-up, might pass muster. While I am aware that questionnaires have been used where they were thought to be appropriate, I suspect that there is no enthusiasm for such a procedure to be copied generally, the worry being of internally inconsistent answers. In a recent case, a jury returned a verdict of murder on one count and manslaughter on another count, where the accused in a single movement of his vehicle had killed two policemen separately positioned alongside their police car in a lay-by and flashing its lights. The case had to be re-tried after a successful appeal, with the result that only the manslaughter verdict could stand.[1]

The corollary of an unreasoned verdict of the exclusive decision-maker renders the appellate system of limited application. Even if the appeal court might come to a different conclusion on reading the transcript of evidence, it cannot properly replace the verdict of the jury. And if the jury acquits, that is the end of the matter. Justice cannot be achieved, even against a perverse verdict. Sir Robin Auld recommended, sensibly in my view, that that rule should no longer stand,

but his view did not find favour with the government. Those who support the current law point instinctively to the jury's 'mini-parliamentary' role, so beloved of Lord Devlin, or, as some describe it less hyperbolically, as 'jury equity' that they do not flinch at the thought of a verdict that stands in defiance of the evidence. They do not appear at all fussed at the notion that the jurors will have been in breach of their oath 'faithfully to try the several issues joined between our Sovereign Lady the Queen and the prisoner(s) at the bar and give a true verdict according to the evidence' heard in the courtroom.

The so-called 'jury equity' – ie the freedom to ignore the law and resort to their consciences in defiance of the evidence – is both unfair and irrational. Mr Justice Willes once said: 'I admit the jury have the power of finding a verdict against the law and so they have of finding a verdict against evidence, but I deny that they have the right to do so'. Another main argument advanced by the proponents of trial by jury is that the system is more democratically legitimate than trial by a professional tribunal. I find this a strange argument. I do not suggest for a moment that trial by jury is an undemocratic institution. Nor, of course, is a trial by professionals undemocratic. But a mode of trial, which reposes the final decision-making on twelve people drawn randomly, by bureaucrats, from the electoral role (and hence are unelected by their fellow citizens) and who are unaccountable and unanswerable for their decisions affecting the liberties of accused persons, does seem faintly curious in a modern democratic society which places increasing stress on transparency and accountability. In short, the claim for legitimacy in the jury system is an outcrop of populism – direct rule by the people, as opposed to representative government.

But I come back to the main thrust of my talk. At the very least, we must authenticate the functioning of juries. It is no longer tolerable that a vital institution of our society should continue in a state of almost total ignorance of whether it works effectively and efficiently. It is clear that recent events in serious fraud cases indicate the need to make a change in a dozen or so cases a year. Hence the proposed activation of section 43 of the Criminal Justice Act 2003 in January 2006 to provide for judge-alone trial in serious fraud cases.

In January 1965, a Departmental Committee on Jury Service under the chairmanship of Lord Morris of Borth-y-Gest, reported to the Home Secretary. In its opening paragraphs the committee members expressed the need to maintain the system of trial by jury as one that both merited and commanded public respect. They concluded:

> *It is vitally important that it should be a fair, sensible and workable system for ensuring that law and order are maintained, that justice is done, and that liberties are prescribed. In saying this we would not wish to prejudice*

> *any future inquiry into the merits of the jury system, as to which we realise that there is room for divergent views.*[2]

That was hardly the language of a constitutionally guaranteed right, such as had been grandiloquently proclaimed a decade earlier by Lord Devlin in his reference to the luminosity of the jury in its maintenance of the citizen's freedom. Lord Devlin's description of the jury as a mini-parliament suggested that the juror's oath to try the defendant according to the evidence had some extra-dimensional function, but the observer of this mode of criminal trial might ask whether trial by jury is not worth the candle. The Morris Committee, wisely, did not espouse the Devlin dictum. Forty years on, the time has come for testing the jury's merits, to which the Morris Committee alluded. An independent committee should be set up to inquire into alternative modes of criminal trial for categories of serious criminal events listed in the criminal calendar (including those crimes recognised under the laws of the European Union).

Sir Louis Blom-Cooper QC has been a leading silk in the public law field for many years. He is an associate member of Doughty Street Chambers.

Notes

1 See *R v Leayon Davi Dudley* [2004] EWCA Crim 3336.
2 At para 14.

Torture and the boundaries of English Law

International law imposes an unconditional prohibition upon torture and inhuman and degrading treatment. However, recent actions and statements of the UK government have sought to undermine this prohibition by first, seeking to use 'memoranda of understanding' to deport terror suspects to countries known for their use of such methods, and secondly, by using evidence that may have been obtained through torture by foreign agents in national security cases. In this article, Eric Metcalf assesses the government's policy against the international and European instruments and jurisprudence, finding it wanting in both legal and moral terms.

The UK government takes a clear position on torture, at least in its public statements. On 12 October, the Lord Chancellor Lord Falconer told parliament, 'we as a Government, a state and a nation unreservedly condemn the use of torture'.[1] According to the Foreign and Commonwealth Office's 2005 Annual Human Rights Report, torture 'is one of the worst human rights abuses'.[2] Accordingly, 'when governments condone it, they risk losing their legitimacy and provoking terrorism'.[3]

The UK itself has ratified both the 1984 UN Convention Against Torture (UNCAT or Torture Convention)[4] and the 1987 European Convention Against Torture.[5] In order to implement some of its obligations under these treaties, it passed legislation to make torture a criminal offence.[6] More recently, it has been at the forefront of a world-wide campaign to secure the implementation of the 2002 Optional Protocol to UNCAT which would require national governments to set up domestic machinery to monitor detention facilities and to enable the UN Committee Against Torture itself to conduct site visits.[7]

Perhaps the most prominent instance of this avowed commitment to fighting torture at the international level was the successful July 2005 conviction of Faryadi Sarwar Zardad, a former Afghan warlord accused of widespread acts of torture in Afghanistan between 1992 and 1996, by an English court.[8] Zardad's prosecution was led personally by the Attorney-General Lord Goldsmith and is understood to be the first successful extra-territorial prosecution for torture as

a crime of universal jurisdiction. As the Attorney-General told the jury in that case, 'there are some crimes that are so heinous, such an affront to justice, that they can be tried in any country'.[9]

But following the terrorist attacks of 11 September 2001 and – more recently – the London bombings of 7 July, the government's commitment to 'oppose and condemn the use of torture all across the world'[10] seems something less than absolute. In August 2004, the government successfully argued that evidence obtained by torture by non-UK officials in foreign countries should be admissible in proceedings before the Special Immigration Appeals Commission (SIAC).[11] In July 2005, the Home Secretary announced the conclusion of a memorandum of understanding with Jordan to seek the return of suspected terrorists notwithstanding abundant evidence of the use of torture by the Jordanian authorities. And in October 2005, the government made known that it would shortly intervene in the case of *Ramzy v The Netherlands* before the European Court of Human Rights in order to argue that the Court's 1997 decision of *Chahal v United Kingdom* (which prohibits the return of persons on national security grounds to countries where they face a real risk of torture) was wrongly decided. These developments taken together appear to suggest that, although the government maintains its condemnation of torture at the international level, it is content to downplay – and in some cases benefit from – the use of torture by foreign governments where it serves the interests of national security. This article therefore looks at these developments in more detail and considers how they sit with the government's obligations under international law and its stated view that torture is 'an affront to human dignity … a crime which degrades the victim and debases and corrupts the torturer', one which 'corrodes every political system in which it is used [and] damages the will and the coherence of any community in which it is practised'.[12]

The UK's international obligations

The prohibition against torture is a rare instance of an absolute in international law. It admits of no exceptions, qualifications or even derogation in time of emergency. The prohibition, moroever, is ius cogens – a peremptory norm overriding any rule of customary international law or conflicting treaty obligation.[13]

Most importantly in the present context, the prohibition extends beyond forbidding torture by the state itself. Specifically, it precludes states from removing or deporting persons or allowing their extradition to countries where they would face a real risk of torture, inhuman or degrading treatment upon their return. Although the concept of non-refoulement extends more broadly under the Refugee Convention to prevent the return of refugees to any country where they would be persecuted, it applies equally to any person – refugee or

otherwise – who would face torture on his or her return. Indeed, although Article 35 of the Refugee Convention provides an exception to non-refoulement on national security grounds,[14] the prohibition against refoulement in cases involving torture affords no such exception. Accordingly, Article 3(1) of the Torture Convention provides in terms:

> *No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

Similarly, the prohibition against torture and ill-treatment under Article 3 ECHR ('no one shall be subjected to torture or to inhuman or degrading treatment or punishment') was held by the European Court of Human Rights in the 1989 case of *Soering v United Kingdom* to prevent the removal or extradition of persons to countries where they would face such treatment:[15]

> *It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.*

In the 1997 case of *Chahal v United Kingdom,* the Court similarly rejected the submission that deportation on national security considerations could trump the prohibition against torture:[16]

> *Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment,* ***irrespective of the victim's conduct*** *… The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting*

> *State to safeguard him or her against such treatment is engaged in the event of expulsion … In these circumstances, the activities of the individual in question,* ***however undesirable or dangerous****, cannot be a material consideration [emphasis added].*

As the Court itself noted, 'the protection afforded by Article 3 is thus wider' than that provided by the Refugee Convention.[17] And whereas the obligation under Article 3 of the Torture Convention is not incorporated into UK law, Article 3 ECHR is of course given direct effect through the provisions of the Human Rights Act 1998. It is also worth noting that even the most recent Council of Europe Convention on the Prevention of Terrorism concluded in May 2005 restates the prohibition against refoulement to torture as follows:[18]

> *Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment.*

The use of diplomatic assurances

In the wake of the Belmarsh judgment in December 2004 which held the indefinite detention of foreign nationals to be incompatible with Articles 5 and 14 EHCR, the Home Secretary Charles Clarke announced that the government was seeking:

> *to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key Middle-Eastern and North African countries.*[19]

Following the London bombings, Mr Clarke announced on 27 July that agreement had been already reached in principle with Jordan.[20] The formal memorandum was concluded on 10 August.[21] It has also been reported that similar memoranda of understanding are being negotiated with Algeria and Egypt, among others.[22] Deportation orders have now been made against ten foreign nationals, at least nine of whom were those previously detained in Belmarsh.[23]

Merely to seek diplomatic assurances against ill-treatment is not, of course, directly contrary to any international obligation. The purpose of such assurances is purely evidential, ie to satisfy a court that the person being removed would not in fact be subject to ill-treatment upon his or her return. However legitimate the principle of seeking assurances, though, the practice of negotiating them with regimes known to practise torture is surely a shameful one. For countries

such as Jordan, Egypt and Algeria are all party to the Torture Convention,[24] and yet the annual US State Department Human Rights country reports for each country makes clear the extent to which they continue to breach their own obligations under that convention. The most recent report for Egypt states:

> *The security forces continued to mistreat and torture prisoners, arbitrarily arrest and detain persons, hold detainees in prolonged pretrial detention, and occasionally engage in mass arrests. Local police killed, tortured, and otherwise abused both criminal suspects and other persons.*[25]

The 2005 Amnesty International report for Algeria similarly notes that '[a]llegations of torture continued to be reported, particularly in cases involving what the government described as "terrorist" activities',[26] and the 2004 State Department report for Jordan refers to 'police abuse and mistreatment of detainees, allegations of torture, arbitrary arrest and detention, lack of transparent investigations and of accountability within the security services resulting in a climate of impunity'.[27] The point is not simply that these are countries known to torture people. It is that diplomatic assurances rest on the supposition that countries which have no compunction about being in breach of an international convention against torture will somehow prove themselves willing to abide by a non-binding bilateral agreement with a returning country.

The fatuousness of this reasoning is made clear by the evident lack of any protection for those returned under such assurances. Specifically, the memorandum concluded between the UK and Jordan provides no mechanism for enforcement of its terms in the event of any breach. (Nor could it, one supposes, without ultimately requiring Jordan to cede custody of its repatriated national back to the UK.) Under the terms of the agreement, either government may withdraw from the agreement giving six months' notice and, where such withdrawal takes place, the memorandum provides that 'the terms of this arrangement will continue to apply to anyone who has been returned in accordance with its provisions'. However, the memorandum is utterly silent on what would happen in the event that Jordan simply decided to withdraw without giving notice, or elected to simply stop applying the terms of the memorandum to a returned person.

Such an outcome is more than merely an academic possibility. In May 2005, the UN Committee Against Torture condemned the use of diplomatic assurances in the case of *Agiza v Sweden* in which the Swedish government relied on diplomatic assurances from the Egyptian government to return an asylum-seeker to Egypt where he was subsequently tortured.[28] As a consequence of relying upon assurances in circumstances where the risk of torture by the receiving state was

clear, the Swedish government was found to be in breach of its obligations under Article 3 UNCAT. Specifically, the Committee found that:

> *at the outset that it was known, or should have been known, to the [Swedish] authorities … that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.*[29]

The Committee ruled, moreover, that obtaining assurances from the Egypt government against the suspect's ill-treatment 'did not suffice to protect against this manifest risk'.[30] Indeed, as several commentators have already noted, the mere fact that assurances are thought to be necessary is itself evidence that there is already 'an acknowledged risk of torture or ill-treatment'.[31] At best, the practice of seeking assurances against torture from such countries displays an uncommon naïvete on the part of government. At worst, it shows significant bad faith on the part of the UK towards its own absolute duty to ensure non-refoulement where there is a risk of torture.

Fortunately, it seems unlikely that a British court following *Chahal* would accept diplomatic assurances from a country that tortures its own citizens as evidence sufficient to offset otherwise compelling evidence of a real risk of torture upon return. It is worth recalling that assurances were also put forward by the Indian government in the *Chahal* case but rejected as insufficient by the court: [32]

> *Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above … it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem … Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.*

However, if it is unlikely that diplomatic assurances themselves will be accepted by the courts, there still remains considerable cause for concern. On 5 August, the Prime Minister referred to the use of diplomatic assurances and stated that, '[s]hould legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights'. Although it remains unclear how or whether the government plans to amend the Human Rights Act, it has already been granted permission to intervene in the forthcoming case of *Ramzy v The Netherlands* on the basis that it wishes to challenge the 'reasoning

and conclusions' of the Court's judgment in *Chahal*.[33] In other words, the government seeks to argue that the position taken by the minority in *Chahal* should be preferred, ie that:[34]

> *a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance.*

However, it is doubtful whether the reasoning of the minority in Chahal discloses a difference in legal reasoning so much as a factual disagreement over whether the evidence before the Court had 'substantiated that there is a real risk' to Mr Chahal. Nor has the UK government yet disclosed the grounds upon which it hopes to convince the Court in *Ramzy* that *Chahal* was wrongly decided. In any event, it seems deeply unlikely that the Court would elect to reverse such a widely-followed decision as that in *Chahal*. What is far more troubling is the government's own efforts to undermine that jurisprudence and the more general obligation under Article 3 ECHR against non-refoulement. If acts of torture committed in other countries are 'so heinous' as to admit of universal jurisdiction for their punishment, then what does it say that the UK government is actively seeking to weaken the universal prohibition upon states not to send persons back to countries where they would be at real risk of falling victim to such crimes?

The use of evidence obtained under torture

Article 15 of the Torture Convention provides that:

> *Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*

However, Article 15 has not been incorporated into domestic UK law. Accordingly, although it is a principle of statutory construction that parliament will be presumed not to pass legislation contrary to the Crown's international obligations,[35] the UK courts have no power to apply directly the provisions of an unincorporated treaty.[36] In August 2004, the Court of Appeal held that evidence obtained by means of torture inflicted by non-UK officials abroad is admissible in proceedings before SIAC.[37] The matter is currently under appeal before the

House of Lords and judgment is expected before the end of 2005. A number of arguments have been raised by the appellants and intervenors (including JUSTICE and the International Commission of Jurists), including the argument that Article 15 is part of customary international law and hence a common law rule. However, the purpose of this article has been to consider the consistency of the government's position with that of its international obligations under the Torture Convention. Even if one were to assume for the sake of argument that the exclusionary rule contained in Article 15 was not part of English law, the UK is still bound to give effect to its provisions.[38] And while the government has denied that any of the material admitted into evidence before SIAC was actually obtained under torture, what is significant is that it has actively sought to defend the permissibility of using such evidence in SIAC proceedings and elsewhere.[39]

Indeed, a central argument raised by the government has been (i) the utility of information received from foreign countries, particularly foreign intelligence services, in combating the threat of terrorist attack in the UK, combined with (ii) the practical difficulty with assessing whether the information received was in fact obtained under torture or inhuman or degrading treatment (compounded by the fact that the Home Secretary apparently receives a significant volume of material that is provided from such foreign sources). As Pill LJ remarked in his judgment: [40]

> *It would be … unrealistic to expect the Secretary of State to investigate each statement with a view to deciding whether the circumstances in which it were obtained involved a breach of Article 3. It would involve investigation into the conduct of friendly governments with whom the Government is under an obligation to co-operate.*

Supporting this argument in its submissions before the House of Lords, the government introduced a witness statement from Dame Eliza Manningham-Buller, the Director of MI5.[41] Referring to the recent prosecution in *R v Bourgass and others* (the so-called 'Ricin plot' trial),[42] Dame Eliza discussed the intelligence received from the Algerian authorities as a consequence of their interrogation of Mohammed Meguerba:

> *In those circumstances, no inquiries were made of [the Algerian authorities] about the precise circumstances that attended the questioning of Meguerba. In any event, any questioning of the [Algerian authorities] about their methods would have almost certainly have been rebuffed and at the same time would have damaged the relationship [between the UK and Algerian governments] to the detriment of our ability to counter international terrorism … There has subsequently been press speculation about the*

> *circumstances in which Megeurba was interviewed in Algeria. Unusually in this case, because of the central importance of what he was saying, British police officers sought direct access to him but that was not permitted by the Algerian authorities. Instead, questions were provided to the judicial authorities in Algeria through a formal letter of request, and Meguerba was formally examined on them at length by the Chief Examining Magistrate in Algiers … The Megeurba case provides an example of full co-operation with our Algerian partners.*

In other words, the government is unable to determine whether any material received by the UK from countries such as Algeria has been obtained under torture because the UK government itself does not know and quite plainly is not about to ask. It is particularly striking to compare this to the position taken by the Canadian government in respect of the similar material that it receives from foreign governments and intelligence agencies:[43]

> *[Canadian Security and Intelligence Service (CSIS)] foreign arrangements are … managed by Ministerial Direction. When entering into such arrangements, serious consideration is given both to how the arrangement would benefit CSIS's national security mandate and to the reliability and professionalism of the foreign entity. When seeking to implement a new foreign arrangement, CSIS also assesses the human rights issues pertaining specifically to the foreign entity in question. It is important to point out that if there are allegations of human rights abuses, CSIS always undertakes a prudent approach that takes privacy and human rights into consideration when liaising with, or travelling to, that foreign agency. This is done to ensure that none of the security intelligence information exchanged with the foreign agency is used in the commission of,* ***or obtained from the foreign agency as a result of****, acts that would be regarded as human rights violations … [t]he 2003/2004 SIRC report found that 'the (foreign arrangements) documentation we reviewed indicated that* ***the Service was diligent in ensuring that no information provided to or received from these countries agencies was associated with human rights abuses****' [emphasis added].*

It seems difficult to see how, if the Canadian intelligence service is capable of conducting effective assessment of the material it receives from foreign intelligence services, such an assessment should be beyond the ken of MI5 and MI6. It is similarly difficult to understand how, if it would be an 'affront to justice' to allow the admission of evidence obtained under torture obtained in the UK or by UK officials aboard, it is not similarly an affront when material obtained by torture by non-UK officials abroad *is* willingly admitted.

Conclusion

Although none of the developments outlined above directly challenge the core proposition that torture is unacceptable, individually and collectively they represent a serious weakening of the UK's obligation to uphold the absolute prohibition against torture and non-refoulement under international law. Contrary to the government's stated commitment to fighting torture, it would appear that there are some heinous crimes, certain affronts to justice, that the government seems willing to tolerate in the name of national security so long as the UK is not directly complicit in their commission. As Lord Archer of Sandwell QC said in a recent parliamentary debate:[44]

> *The anxiety is not that our Government would perpetrate torture but that they may turn their backs on the victims of torture perpetrated by others. The offence of the priest and the Levite on the Jericho road was not that they inflicted the injuries that the victim suffered but that they were indifferent to his sufferings.*

With respect to the UK government's obligations under the Torture Convention, however, the analogy with the parable of the Good Samaritan does not seem to go quite far enough. To use diplomatic assurances is to deliver more victims into the hands of torturers; and to use evidence obtained under torture is to share in the proceeds of the crime. If the government is to 'continue to uphold the example the United Kingdom has set for the rest of the world for nearly 300 years' in the fight against torture,[45] it needs to spend less time making public statements of hollow virtue and pay closer attention to the example it is actually setting.

Eric Metcalfe is director of human rights policy at JUSTICE.

Notes

1 *Hansard*, HL Debates, 12 October 2005: Col 372.
2 Foreign and Commonwealth Office, *Human Rights Annual Report 2005* (July 2005: Cm 6606), p194.
3 Ibid.
4 Ratified 8 December 1988.
5 Ratified 24 June 1988.
6 S134 Criminal Justice Act 1988.
7 See 2005 Report, n2 above, p194.
8 See eg 'Afghan Warlord convicted by Old Bailey Jury' by Sally Pook, *Daily Telegraph*, 19 July 2005. An earlier trial in late 2004 ended after jurors were unable to reach a verdict.
9 Ibid.
10 Lord Falconer, n1 above.
11 *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 540 (Court of Appeal).
12 Lord Falconer, n1 above.
13 See, eg Art 53 of the Vienna Convention on Treaties 1969: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.

14 Art 35(1) of 1951 Convention Relating to the Status of Refugees prohibits the return of a refugee to persecution but Art 35(2) allows for the return of refugees 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'.
15 11 EHRR 439 at para 88.
16 23 EHRR 413, paras 79-80.
17 Ibid.
18 Art 21(2).
19 *Hansard*, HC Debates, 26 January 2005, Col 307.
20 *Hansard* HC Debates 27 June 2005, Col 1256.
21 See Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation, 10 August 2005.
22 See, eg BBC Online, 'UN expert criticises terror plans', 23 August 2005.
23 See, eg Times Online, 'Terror suspects "too dangerous for bail"', 26 September 2005.
24 Jordan acceded to the Convention on 13 November 1991, Egypt acceded on 25 June 1986, and Algeria ratified the Convention on 12 September 1989.
25 US State Department Country Reports on Human Rights Practices, February 28, 2005.
26 Amnesty International Report 2005: Algeria covering events January-December 2004.
27 See n24 above.
28 CAT/C/34/D/233/2003, 20 May 2005.
29 Ibid, para 13.4.
30 Ibid.
31 See, eg Council of Europe Commissioner for Human Rights Alvaro Gil-Robles, July 2004; UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, para 56.
32 See n16 above, paras 110-111.
33 See, eg 'Terror suspects may be deported' by Joshua Rozenberg, *Daily Telegraph*, 3 October 2005.
34 See n16 above, Joint partly dissenting opinion of Judges Golcuklu, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev And Levits, para 1.
35 See, eg *R v Lyons* [2003] 1 AC 76 at para 13 per Lord Bingham: 'rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law'.
36 Ibid, para 27 per Lord Hoffman: 'It is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them'.
37 See *A and others v Secretary for the Home Department* , n11 above.
38 See also Art 2 UNCAT: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.
39 Since the repeal of Part 4 of the Anti-Terrorism Crime and Security Act 2001, SIAC has resumed its original function of reviewing deportation decisions on grounds of national security. Prevention of Terrorism Act 2005 allows the High Court to hold closed proceedings on a similar basis to SIAC hearings which would, in principle, allow for the use of the same kind of material used to justify indefinite detention under Part 4 of ATCSA.
40 See n11 above, para 129.
41 Witness statement of Eliza Manningham-Buller, Director of the Security Service dated 20 September 2005.
42 Unreported, 13 April 2005.
43 Letter of the Deputy Prime Minister of Canada, Anne McLellan, to Alex Neve, Secretary General of Amnesty International Canada dated 12 September 2005.
44 *Hansard*, HL Debates, 12 Oct 2005, Col 359.
45 Lord Falconer, n1 above.

Does Canadian Equality Law have lessons for the UK Discrimination Law Review?

Gay Moon reports from a research trip to Canada, a country which provides interesting lessons for equality law in general, and specifically for the current discrimination law review in the United Kingdom.

Background

Our equality laws have become a nightmare of complexity. At some stage we will have to simplify them, particularly now that the government is moving towards setting up a single Commission for Equality and Human Rights. Canada provides some interesting lessons for this future process. It has unified Commissions and unified equality law which was transformed by the passage of the Canadian Charter of Rights and Freedoms in 1982. This provided much the same stimulus for reform as European Union legislation has done for the United Kingdom.

Currently, the key issues for the UK concern the form that any such single consolidated equality legislation should have and what should be its content. The government has just announced the establishment of an Equalities Review to investigate the causes of, and remedies for, persistent discrimination in British society, and a Discrimination Law Review in order to make recommendations on the way in which the law should be modernised to fit the needs of Britain in the 21st century.

In order to contribute further to this debate JUSTICE wished to examine in more detail the working of the equality and discrimination provisions that operate in Canada, since in some ways their use and experience of equality law is more advanced than ours. JUSTICE believes that it is likely that Canadian law could provide material assistance on the key questions. In particular, we will argue that the concept of 'reasonable adjustment' could be used for other grounds of discrimination and not limited to the field of disability, and that the assessment of the impact on a person's dignity would be of assistance both for considering the reasonable adjustment that needs to be made and for dealing with clashes between equality rights.

Canadian law

Canadian law operates at both a federal and a provincial level. It operates federally through the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act. The Canadian Human Rights Act is a federal anti-discrimination law which applies to federal institutions and federally governed institutions, such as the federal government, banks, airlines and the Canadian Armed Forces. Additionally, each province has its own Human Rights Act and/or Charter which specifically deals with equality law, albeit with slightly different provisions from province to province. All human rights laws must be interpreted in a manner that is consistent with the Charter[1], the most important articles of which are Articles 1 and 15.

> *Article 1:*
> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

> *Article 15(1):*
> *(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
> (*2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*.

Thus, Article 15, while particularising some grounds, is an open-ended equality guarantee; so far there are eleven recognised grounds of discrimination. The grounds that are additional to our current grounds are those of age, marital status, family status and conviction for an offence for which a pardon has been granted (this last only applies to employment cases).

The same provisions and defences apply to each ground for discrimination; this includes a duty to make reasonable accommodation for the person in question (to the point of undue hardship). Bona fide occupational requirements or bona fide justifications can be taken into account, although, in practice, the application varies depending on the discriminatory practice in question. In Canada, as in the UK, race discrimination cases have been the most difficult to prove.

Operating under the Charter are the Canadian Human Rights Act 1985, which applies to all public authorities, and the various provincial Human Rights Acts and Charters. Human rights legislation is recognised as having a fundamental nature which gives it primacy over other legislation. This quasi-constitutional status has led the courts to say that this legislation must be interpreted in a 'purposive' way.

The Canadian Human Rights Act 1985 sets out its purpose and scope in Article 2:

> *The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.*

Direct or indirect discrimination?

One major judge-based change has been to ensure that there is no gap between direct and indirect discrimination. The distinction between direct and indirect discrimination can sometimes be difficult to see clearly. For example, when part-time workers are subjected to less favourable treatment which is alleged to be sex discrimination, is this because the requirement to work full-time hours indirectly discriminates against women? Or is it direct discrimination against women? The distinction appears to lie at the point at which there is a commonly held assumption that a particular requirement will have a particular effect on women (or people of a particular race, religion or belief, disability or sexuality).

Canadian equality law has developed so as to avoid arid distinctions between direct and indirect discrimination that they have come to regard as unhelpful. This in part reflects the fact that in all cases not only is there a duty not to discriminate, but there is also a duty to accommodate [to the point of undue hardship. The scope of the defence had become a driver for this change]. The Supreme Court of Canada has explained why these distinctions do not work well:

> *First, the distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify: few cases can be so neatly characterized. Second, it is disconcerting*

> *that different remedies are available depending on the stream into which a malleable initial inquiry shunts the analysis. Third, the assumption that leaving an ostensibly neutral standard in place is appropriate so long as its adverse effects are felt only by a numerical minority is questionable: the standard itself is discriminatory because it treats some individuals differently from others on the basis of a prohibited ground, the size of the 'affected group' is easily manipulable, and the affected group can actually constitute a majority of the workforce. Fourth, the distinctions between the elements an employer must establish to rebut a prima facie case of direct or adverse effect discrimination are difficult to apply in practice. Fifth, the conventional analysis may serve to legitimize systemic discrimination. Sixth, a bifurcated approach may compromise both the broad purposes and the specific terms of the Human Rights Code. Finally, the focus by the conventional analysis on the mode of discrimination differs in substance from the approach taken to s. 15(1) of the Canadian Charter of Rights and Freedoms.*[2]

Hence, in investigating a potential discrimination case the court's test for discrimination now is:

> Does the law impose differential treatment between the claimant and others, in purpose or effect?
> Are one or more enumerated or analogous grounds of discrimination the basis for the differential treatment?
> Does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?[3]

The last of these has provoked the most interest and indeed controversy. It was explained as asking the following question: does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?[4] This has been interpreted as depending on whether a person's dignity has been imperilled by the action in question.

The European Equality Directives specify that discrimination shall be classified as direct and indirect hence it would be hard for the UK to move away from these concepts. On the other hand, they make provision for similar defences and do treat some dignity impairing treatment as harassment, so less emphasis on a case being either direct or indirect might be possible. Is there an advantage

to this? It would mean moving away from a comparative approach to one nearer to a harassment concept.

However, the rules relating to direct and indirect discrimination are principally rules of formal equality and do not necessarily bring substantive equality. The directives *do* offer an opportunity for 'positive action' in order to achieve 'full equality in practice'. This could be used to open out the concept of 'reasonable accommodation' to a wider range of grounds.

As rights begin to impinge on one another an analysis of whether there is full equality in practice will become ever more important.

Is dignity a useful concept here?

We need to consider the extent to which the concept of 'dignity' could become a useful tool in this equation. Dignity is already used in the directives; it is a non-comparable concept: whilst having a subjective element, it is built on society's view as to when someone is treated sufficiently badly on one of the protected grounds, thus it is an objective/subjective test.

The Canadian courts have ruled in the key case of *Law v Canada (Minister of Employment and Immigration)*[5] that the concept of human dignity should be placed at the centre of any equality rights analysis:

> *the overarching purpose of s. 15(1) as being 'to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance'… differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner*

> *in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? … The equality guarantee in s. 15(1) of the Charter must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.*

The merit of a dignity test is that it does not require a comparison to be made. Properly applied it has the capacity to entrench social solidarity. A well-worded and wise judicial statement of what is unacceptable behaviour will re-enforce social mores. So *provided* that it is accepted that judges are to be trusted to treat dignity properly – this could be a powerful tool.

It also helps to resolve conflicts of rights. The impact on dignity is a useful touchstone for determining how far one person should be entitled to advance his or her rights in relation to another in such a way that impacts on the protected rights of that other.

Its benefits have been described by the Chief Justice of Ontario as permitting distinctions that are based on merit to escape the equality provisions and as binding together the different grounds for discrimination.

However, it is clear from the Canadian experience that the use of dignity in this way is not without pitfalls. An objective assessment of what dignity means in the subjective experience of a particular individual has been the approach taken by the Canadian courts.[6] It is widely argued that the Canadian Federal jurisprudence has at times taken a wrong turn by placing too much emphasis on a subjective assessment of what is dignified in a particular situation.

Reasonable accommodation

Canadian equality law uses a concept of accommodation. Accommodation is the adjustment of a rule, practice, condition or requirement to take into account the specific needs of an individual or group. Individuals have the right to have their needs 'accommodated' to the point of undue hardship. Thus section 15(2) of the Canadian Human Rights Act 1985 expressly requires that in order to establish the defences of Bona Fide Occupational Requirement and Bona Fide Justification it must be established that accommodation of the needs of the individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs.

Its utility is exemplified by the leading case on reasonable adjustments *British Columbia (Public Service Employee Relations Commission) v British Columbia*

Government and Service Employees' Union.[7] It concerned a woman who had worked as a fire-fighter for three years when a new aerobic standard for fire-fighters was imposed (the ability to run 2.5 kilometers in 11 minutes which she could only run in 11 minutes and 49.4 seconds). These new aerobic requirements for fire-fighters were shown to be sex discriminatory as a woman could not physically achieve the same aerobic rating as a man. As the aerobic rules could not be shown to be a genuine occupational requirement they had to be altered to accommodate this difference.

This case set out the test for establishing whether a particular requirement is a bona fide occupational requirement. The employer has to show that the requirement was adopted for a purpose rationally connected to the performance of the job, that this standard was adopted in an honest and good faith belief that it was necessary for that work-related purpose and that the standard is reasonably necessary for the achievement of a legitimate work-related purpose. So an employer has to show that the accommodation of the individual in question is impossible without imposing undue hardship on the employer.

This principle also applies to cases concerning the provision of goods, facilities and services. This can be seen in the case of *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (also known as Grismer)*.[8] This case concerned the application for a driving licence from a man who had limited peripheral vision. The adjustment required was that he should be tested to see whether this affected his ability to drive safely, rather than automatically refusing him a driving licence.

The assessment of reasonable accommodation has been very important in Canada. It started in relation to religious discrimination but it now applies to all the prohibited grounds of discrimination. Although cases are most frequently found in the fields of disability and religious discrimination there are a few cases where it has been used in a gender or race context.

The Discrimination Law Review could usefully consider how far these concepts could be utilised in a new single Equality Act to ensure that the appropriate adjustments are made for all grounds of discrimination. It is worth noting that the current provisions for pregnant women actually amount to a statutory reasonable adjustment and provisions in relation to genuine occupational requirements are already in place for all grounds except disability where because of its asymmetric structure it is not necessary.

The impact on a person's dignity has been a measure of how far a right can be pressed.

Clashes between equality rights

Canadian courts have addressed clashes between equality rights where a balance between them needs to be reached. For example, one recent case considered the situation when a print shop owned by an evangelical Christian refused to print letterheads and business cards for the local lesbian and gay centre on the grounds that the printer believed that he should not assist in the dissemination of information that conflicted with his religious beliefs. The court ordered that the print shop should provide these services; however, there was a limit. The print shop could not be asked to print *'material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious belief ...'*[9]

The Canadian courts have also experienced cases where a Muslim owned restaurant refused admission to a guide dog on the ground that dogs are not permitted. This parallels the experience of the Disability Rights Commission in Great Britain, which negotiated an accommodation for guide dogs through guidance from Muslim faith leaders. Another example that has surfaced in the UK recently is the case of a disabled woman who wants to have certain intimate services only delivered to her by a woman. The service provider says that this would entail their discriminating on grounds of sex and that it is impossible to work the rotas so as to ensure that she is always treated by a woman. Such examples could also apply in the case of women from particular religions and they would clearly impact on the gender equality policies of health service providers.

There are many more potential clashes which will have to be addressed in the coming years both in Canada and the UK where the need for a balance between conflicting human rights will be required. Measuring and assessing the effect on each person's dignity may be a good way to address this and achieve the right balance.

Cross–strand or intersectional approaches to discrimination law

As the Canadians have worked with common provisions for each ground of discrimination for some time there is an increasing awareness of the need for an intersectional approach to discrimination in order to address multiple grounds for discrimination. It is highly likely that a similar trend will emerge once the new Commission for Equality and Human Rights is up and running.

The Ontario Human Rights Commission estimated that between April 1997 and December 2000 48 per cent of the complaints that they received included more than one ground. They argue that in cases of discrimination on multiple grounds the discrimination experienced is different from that experienced on any of the

individual grounds. So that, for example, the experience of discrimination suffered by a black woman is intrinsically different from that suffered by a black man, or a white woman. This has been described as 'intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone …'[10]

Such an approach permits the particular experience to be both acknowledged and remedied. They have pin-pointed difficulties suffered by older people with disabilities, people with disabilities from ethnic minority groups, ethnic minority people who have a particular religion, for example. They argue that taking an intersectional approach leads to a greater focus on society's response to the individual and a lesser focus on what category the person may fit into.

I suspect that this approach would be very attractive to those working with people with disabilities who seek to move away from an over-medicalised definition of disability. The Ontario Human Rights Commission has said:

> *… within the Commission, there is a growing recognition that we can improve our understanding of the impact when grounds of discrimination intersect and that tools for applying an intersectional analysis will be very helpful in the handling of complaints, from inquiries through to litigation, and in our policy work.*[11]

However, all too often a pragmatic decision is made to proceed on one or the other ground, sometimes based on the availability of evidence, sometimes on the strength of the law in that particular area.

Professor Carasco, who wished to take a discrimination case provided an example of the first, said:

> *Providing systemic discrimination based on gender in my case was made possible by the availability of research and statistics relating to women in Canadian universities. Proving systemic discrimination based on the combination of race and gender would have been a lot more difficult simply because of the paucity of women of colour in Canadian universities and the corresponding lack of salary data … As a woman of colour, I could not help wondering if it was indeed necessary to prove that other women of colour had been treated in a similar fashion before my own treatment, as a woman of colour, could be acknowledged.*[12]

An example of the second was provided in the case of *Canada (AG) v Mossop*[13] when a gay man failed in his claim for bereavement leave in order to attend his partner's father's funeral. At the time that the case was heard sexual orientation

was not a prohibited ground for a discrimination claim so it could not be used, however 'family status' was a recognised ground. The case was therefore argued on this ground and lost because the evidence of discrimination on grounds of 'family status' was insufficiently strong. However, Madame Justice L'Heureux Dubé gave a powerful minority judgment saying:

> *... categories of discrimination may overlap, and ... individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.*[14]

This has proved to be a highly influential judgment.

It may be that each of the categories for discrimination are individually insufficient to establish a case of discrimination; however, taken together the discrimination is easier to establish.

Administration of justice

There are a number of areas in which the administration of justice differs from ours. Particularly noteworthy is the number of women represented on the bench. In the current Supreme Court of Canada four of the nine judges, including the Chief Justice, are women. However, ethnic minority judges do not appear to have achieved such widespread representation. A much wider use is made of interventions with most major cases having a number of interveners; additionally judgments make much greater use of academic materials and other articles as well as previous case-law.

Conclusions

There are a number of lessons that can be learnt from the Canadian experience. In the coming years it will be particularly important that the UK focuses not only on the effect of discrimination on multiple grounds but also that we learn how to deal with clashes between equality rights.

Gay Moon is head of the equality project at JUSTICE.

Notes

1 See *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.
2 *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.
3 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.
4 Ibid.
5 [1999] 1 SCR 497, quotation from paras 48-54.
6 See ibid paras 59-61.
7 [1999] 3 SCR.
8 [1993] 3 SCR 868.
9 *Scott Brockie and Imaging Excellence Inc v Ray Brillinger & ors (no 2)* (2002) 43 CHRR D/90 (Ontario Supreme Court).
10 M Eaton 'Patently confused, complex inequality and *Canada v Mossop'* (1994) 1 Rev. Cons. Stud.203 at 229.
11 See An Intersectional Approach to Discrimination: Discussion paper, Ontario Human Rights Commission, 2001.
12 E Carasco 'A case of double jeopardy: Race and Gender' (1993) 6 CJWL 142 at p 152.
13 [1993] 1 SCR 554.
14 *Canada (A.G.) v Mossop* [1993] 1 SCR 554 at p 645.

Book reviews

The 'War on Terror' and the Framework of International Law

Helen Duffy
Cambridge University Press, 2005
488pp £28.99

Nine days after the terrorist attacks on New York in 2001, in an address to a Joint Session of Congress and the American people, President Bush remarked:

> *Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated*[1]

Twenty-nine days after the terrorist attacks in London in 2005, in a press briefing, Tony Blair announced:

> *Let no one be in any doubt that the rules of the games are changing.*[2]

Governments have a responsibility to react to major terrorist events, but must do so proportionately and with regard to fundamental rights and the rule of law. A major challenge occurs when such reactions are seen to take place outside the boundaries of legality. *The 'War on Terror' and the Framework of International Law* is an excellent publication, providing a detailed, interesting and much needed analysis of the structure of applicable international law to the 'war on terror' which has followed the events of 11 September 2001.

The book questions if there is an identifiable framework of international law capable of addressing the attacks in New York and the subsequent reactions and asserts that the 'legitimacy of measures taken in the name of the counter terrorist struggle depends on their consistency with international law'. The book is directed at practitioners and scholars but does not assume prior understanding of international law, while remaining engaging for those who have such knowledge.

The book is split into three main sections. The first discusses terrorism in international law, a major issue being that there is no universally accepted definition of what constitutes international terrorism. This is a continuing challenge that the United Nations has faced for some time, but the author notes that the lack of an accepted definition does not necessarily leave a huge gap in the international legal order. Instead the threat to international law arises from the detailed and comprehensive obligations which are imposed on states from such an indefinite concept.

The second section details reactions to the events of 11 September 2001 by reference to two areas of international law: criminal law and the law governing peaceful settlement of disputes and resort to armed force. There is criticism of the lack of resort to the international court system, the low priority afforded to criminal justice, and the disregard for the normal processes and safeguards of the law. The use of force in Afghanistan and Iraq are discussed in detail, and the failure to engage the collective security system criticised. The third section details the scope and effect of

international human rights law and international humanitarian law, stressing the importance of complying with such rights, and uses the detentions at Guantanamo Bay as a case study of the application (or lack thereof) of these two areas of international law.

Helen Duffy's work provides an excellent foundation for discussion and study of the legality of responses to terrorism, concluding that the main challenge stems not from the inadequacy of existing legal standards but from the lack of respect for them. The purpose, scope and impact of international law need to be recognised, for a framework does exist and needs to be both understood and valued. The rules of the 'game' deserve nothing less.

Rachel Brailsford, research assistant, JUSTICE

Judge For Yourself How Many Are Innocent

L A Naylor
Roots Books, 2004
285 pp £12.95

Following three years of research into 'miscarriage of justice' cases in Britain, L A Naylor presents an insightful account into how a system designed to achieve justice can in fact create tragic injustice for certain individuals. In her introduction, Naylor quotes the Home Office estimate that miscarriages of justice create around 3,000 new 'victims' of the system every year. A wrongful conviction, as Paddy Hill emphasises in his foreword, could happen to any one of us.

Drawing on interviews with prisoners, government representatives, lawyers, academics and various research studies, Naylor examines the criminal justice system from a lay perspective, exploring the processes which too often fail to put the guilty in jail and keep the innocent out.

Her account makes compelling, if uncomfortable, reading. While the sometimes incendiary tone can be distracting, it is nonetheless in keeping with Naylor's desire to highlight the distress suffered by victims of the system and her exasperation at the seemingly futile reforms brought in to reduce the incidence of miscarriages of justice.

In Chapters 1 – 4, Naylor subjects each stage of the criminal justice process to examination. She starts by highlighting the incidence of police corruption, challenging the success of legislative measures such as PACE, designed to increase suspects' rights and render more transparent the investigative process. Naylor cites research to show that these new measures are flouted as frequently as were the old Judges' Rules. More alarming are failures to safeguard the lives of detainees. Between 1969 and 1999, she says, 1,000 people died while in custody, yet not one officer has been successfully prosecuted in relation to any of these deaths.

The CPS comes in for stringent criticism, with the author citing a major cause of miscarriages of justice as non-disclosure of evidence. The problem appears to have been only compounded by the inefficient operation of the Criminal Procedure and Investigation Act 1996, with which the majority of the judiciary is reportedly dissatisfied. A further obstacle in the way of justice is the poor quality and subjective nature of forensic evidence, which is commonly – and wrongly – perceived as an infinitely reliable source of analysis.

Naylor recounts how systemic faults can be perpetuated through the role of the Court of Appeal and Criminal Cases Review Commission. Recently over 71,000 cases were disposed of by way of a Crown Court trial. Of those, more than 2,000 applications for leave to appeal were made; 150 convictions were eventually overturned. Naylor questions the conclusion to be drawn from these figures – that the system got it right 99.8 per cent of the time. Furthermore, while the CCRC has the power to refer back to the Court of Appeal, 50 per cent of applicants to the CCRC have no legal representation and, at the time of her writing, not one unrepresented applicant had had his or her case referred. Naylor cites the worrying statistic that a mere 0.02 per cent of all cases dealt with by the Crown Court are referred back to the appeal court.

Wrongfully convicted prisoners, particularly in life sentence cases, have a final procedural struggle against the parole system, with its strong emphasis on admission of guilt. Naylor reports that 'Idoms' (prisoners 'in denial of murder') have consistently been refused parole whilst they maintain their innocence.

Chapters 5 – 6 deal powerfully with the stories of six individuals of differing age, background, gender and ethnicity, all at different stages of the criminal justice process. Their often harrowing testimonies are a clear reminder of the seemingly insurmountable odds stacked against wrongfully convicted prisoners and of the sheer strength of will required to continue fighting their cases. Chapter 7 deals with the post-release period, which can be far from the freedom dreamt of and more often is a continuation of the years of pain already suffered. Assessments of Paddy Hill's psychological state ten years on from his release illustrate the effects of PTSD and the lack of support received by released 'miscarriage of justice' prisoners, who are not the priority of a 'get-tough-on-crime' society.

Naylor concludes with a call to 'responsible action' and a plea for systemic reform. Though her text is never short of political opinion and emotive spirit, the very serious point underpins her writing that future miscarriages of justice can only be prevented with greater institutional integrity, independence and transparency.

Naylor's direct style makes the book a highly accessible read and, despite her partisan stance, she makes a concrete case for reform of the current criminal justice process. It is also a timely publication, given current debate over limitations upon trial by jury and other measures that threaten to increase rather than reduce wrongful convictions in the British justice system.

Emma Douglas completed an internship in the criminal justice programme at JUSTICE in summer 2005

Rougher Justice: Anti-social Behaviour and Young People

Peter Squires and Dawn E Stephen
Willan Publishing, 2005
232pp £18.99

'Anti-social behaviour' (ASB) has become the number one concern of the British people; canvassing for the 2004 elections confirmed this.[3] Although reported and recorded crime has fallen during the Labour governments,

increasing percentages of people appear to believe that crime is on the rise – a problem for a party wanting to appear to deliver on law and order. People's concerns about ASB of young people seem to be connected to wider preoccupations about deteriorating standards of living or their perceptions of declining neighbourhoods, but where have these preoccupations come from and what has driven government response to these concerns?[4]

This book approaches these questions and the problem of responding to youth offending and 'tackling' ASB through the perspective of a perceived enforcement deficit. It traces the history and emergence of this new discourse on ASB; for the authors, anti-social behaviour is not uniquely a late modern behavioural phenomenon. For both practitioners and researchers of youth justice, this is an invaluable study of this area, although the terminology is at times somewhat opaque for those without a background in sociology.

The core argument of the work is that ASB management, prevention and enforcement activities have now become central and indispensable features of contemporary youth justice. The authors relate this interpretation of ASB to the more general changes occurring within the youth justice field, and place it within the context of the series of relatively new and emerging commentaries attempting to describe, explain and evaluate recent changes in youth justice.

The authors examine the wider significance of the 'dispersal of discipline' mobilised by the new machineries of 'community safety' policy and practice, ASB prevention and enforcement and youth justice management. They draw on the findings arising from two distinct research projects exploring aspects of youth justice and ASB management. The first is a project that analyses the establishment and enforcement of Acceptable Behaviour Contracts by a community safety team and compares the views of the community safety team with that of the families and young people who are the subjects of the ABCs. The second study takes issue with one of the central objectives of the reformed youth justice system: the supposed severing of the link between ASB and more serious and persistent patterns of offending. The project was directly concerned with the motivations of young people and their involvement in vehicle taking. It explored the reasons given for their initial involvement, and looked at the factors that proved influential in their persistence.

Criminological concerns are addressed and this work critiques the 'nipping in the bud' thesis upon which 'anti-social behaviour' measures are founded by offering a challenge to 'risk management' in contemporary youth justice. Squires and Stephen believe that this approach should be developed by returning young offenders to centre stage, since social reaction and 'labelling' approaches are weak. Instead of collaboration with young people and a belief that things can change, contemporary criminology, they believe, produces a situation of mutual stereotypes and confrontation between the administration and young people.

The book argues for a more humane, fair and civilised system of youth justice. It recommends a system which 'does more than create and circulate a species of "politically and economically

useful" delinquency wherein the most marginalized of young people are misspent in the pursuit of electoral advantage and a given conception of social order'.[5] Young people currently have the misfortune of being constructed as potentially dangerous, meaning that they will be caught up at an ever younger age in the expansion of the criminal justice system, at the expense of both their rights and the principles of criminal law.

Squires and Stephen conclude that as a society we have acknowledged a putative 'justice gap' but sought to fill it with enforcement practices based upon a dubious precautionary principle in which 'due process' and the 'rule of law' become sidelined by political and administrative priorities; in their view the most likely outcome therefore is not justice at all, but the reinforcement of social exclusion and greater social injustice. The Queen's speech of 2004 announced the government's intention to publish a draft bill to tackle juvenile crime through more effective rehabilitation and sentencing, building on responses to the September 2003 consultation 'Youth Justice. The Next Steps'. We await the publication of the proposed bill to see whether the thesis of this work will be further borne out by the effects of the new legislation.

Louise Ridgwick completed an internship in the human rights programme at JUSTICE in summer 2005

Notes

1 http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html
2 http://www.number-10.gov.uk/output/Page8041.asp
3 *Rougher Justice: Anti-social behaviour and young people*; Squires and Stephen; p14.
4 Ibid, p15.
5 Ibid, p13.

JUSTICE briefings and submissions

1 March 2005 – 31 October 2005

Available at www.justice.org.uk

1. Joint briefing with the ICJ on the Prevention of Terrorism Bill for the second reading in the House of Lords, March 2005.
2. Briefing on the incitement to religious hatred provisions of the Serious Organised Crime and Police Bill for the second reading in the House of Lords, March 2005.
3. Briefing on Parts 1-2 (SOCA and matters relating to investigations and prosecutions) of the Serious Organised Crime and Police Bill for the second reading in the House of Lords, March 2005.
4. Briefing on Parts 3-6 (police powers and public order) of the Serious Organised Crime and Police Bill for the second reading in the House of Lords, March 2005.
5. Briefing on the Identity Cards Bill for the second reading in the House of Lords, March 2005.
6. Briefing on the Drugs Bill for the second reading in the House of Lords, March 2005.
7. Civil Justice and Civil Legal Aid, for Scottish Consumer Council seminar, Edinburgh, 2 March 2005.
8. Paper on jury trial and serious and complex cases, for meeting at Kingsley Napley, Sally Ireland and Kay Everett (volunteer), 7 March 2005.
9. The Poverty of Social Exclusion, paper for Socio-Legal Studies Conference, Liverpool, 29-31 March 2005.
10. Lessons from the English Experience with Quality Assurance in criminal legal aid in England and Wales, April 2005.
11. Amendments to the Drugs Bill for the committee stage and third reading in the House of Lords, April 2005.
12. Response to the Department for Constitutional Affairs consultation paper on jury research and impropriety, April 2005.
13. Response to the Home Office consultation on the European proposal on certain procedural rights in criminal proceedings throughout the European Union, May 2005.
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15. Response to ACPO Retention Guideline Proposal (DNA and Fingerprint Retention Project), May 2005.
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19. Briefing on the Equality Bill for the second reading in the House of Lords, June 2005.
20. Response to the Home Office consultation on the Draft Corporate Manslaughter Bill, June 2005.
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23. Briefing on the Identity Cards Bill for the second reading in the House of Commons, June 2005.
24. Briefing on the Racial and Religious Hatred Bill for the second reading in the House of Commons, June 2005.
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26. Briefing on the Immigration, Asylum and Nationality Bill for the second reading in the House of Commons, July 2005.
27. Briefing on the Racial and Religious Hatred Bill for the report stage in the House of Commons, July 2005.
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29. Briefing on the Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005, July 2005.
30. Letter to Charles Clarke concerning recent counter-terrorism proposals made in the wake of the London bombings, 27 July 2005.
31. Response to the Home Office consultation on Exclusion or Deportation from the UK on Non-Conducive Grounds, August 2005.
32. Preliminary briefing on the Draft Terrorism Bill, September 2005.
33. Joint JUSTICE and Liberty submission to the JCHR inquiry into the UK's compliance with the UN Convention Against Torture, September 2005.
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35. Oral evidence to the Home Affairs Select Committee on terrorism, 13 October 2005.
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41. Briefing on the Terrorism Bill for the second reading in the House of Commons, October 2005.
42. Amendments to the Terrorism Bill for the committee stage in the House of Commons, October 2005.

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