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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

A Ministry of Justice and the rule of law

Within two years of its establishment, there is discussion over the future of the Department for Constitutional Affairs (DCA). This may, in the event, come to nothing but, meanwhile, Home Secretary John Reid is obtaining wide publicity for his idea of shifting responsibilities from his Home Office to the DCA. If this was encouraged as a way of taking scrutiny away from the actual performance of the Home Office, it has been rather successful. Debate has been relocated around the advantages for government as a whole of new departmental arrangements. However, missing from discussion has been much consideration from the point of view of the DCA.

From the vantage point of the rule of law (a theme of a number of contributions to this edition), the advantages of enlarging the DCA into a wider Ministry of Justice are two. First, there would be a ministry with a greater degree of comprehensive oversight of the criminal justice system, albeit that the residual Home Office and the Attorney General's department will also retain criminal justice responsibilities. Second, ministers in the new department will command greater resources and should, thereby, have greater weight within government. And, on balance, the proposal should be welcomed for these reasons.

However, there are matters of concern which remain, whatever the final form of departmental balance. These are highlighted by the statutory responsibilities assumed by the DCA when it was formed to take over from the Lord Chancellor's Department. The Constitutional Reform Act 2005 (CRA) passed through Parliament only after a protracted and contentious two-year period of debate. It attracted considerable antagonism in the House of Lords, which was reluctant to agree to the end of the role of the Lord Chancellor in the way that the government proposed. In the event, and as a consequence, the final version of the Act contains two provisions relating to the role of the Lord Chancellor/ Secretary of State for Constitutional Affairs. Section 1 provides that:

> *This Act does not adversely affect –*
> *(a) the existing constitutional principle of the rule of law;*
> *(b) the Lord Chancellor's existing constitutional role in relation to that principle.*

The meaning of this is somewhat cryptic since both the rule of law and the Lord Chancellor's constitutional role are left undefined. The second proposition in (b) cannot, in fact, be strictly true. A major purpose of the Act, welcomed by

JUSTICE, was to alter the Lord Chancellor's constitutional role in relation to the separation of powers by reforming judicial appointment and responsibilities. The Lord Chancellor passed many of the latter to the Lord Chief Justice. That affected his own constitutional role in relation to the rule of law to such extent that John Reid could make a proposal that would have previously been unthinkable under the old arrangements.

S17 CRA returns to the issue of the rule of law and amends the Lord Chancellor's oath of office so that the postholder swears to:

> *[r]espect the rule of law, defend the independence of the judiciary, and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts.*

This helps to identify both a constitutional and a political issue in relation to Dr Reid's proposal. The constitutional point is whether there is any conflict possible between the duty to uphold the rule of law and the independence of the judiciary, on the one hand, and the taking of lead responsibility for criminal justice, on the other, by the new Secretary of State. The political point is whether the enhanced criminal justice responsibilities will practically detract from the department's ability to obtain funds and attention for issues relating to the administration of justice and including the judiciary, courts and legal aid.

Any minister with the Home Secretary's current responsibility for criminal justice will find themselves in a media hot seat. One way in which this understandably, but regrettably, manifests is the intermittent urge to blame the judiciary when cases are lost in the courts. It is no accident that both David Blunkett and John Reid have done this. The former was quoted as calling Lord Woolf 'a muddled and confused old codger'.[1] John Reid, backed by the Prime Minister's spokesman, celebratedly attacked the judge sentencing Craig Sweeney as 'unduly lenient'. Embarrassingly, it emerged that the judge had been impeccably correct in following the government's own legislation and the current sentencing guidelines.[2] Charles Clarke bemoaned the fact that the judges would not meet him for explanations of government policy. Any holder of both the DCA and some of the current Home Office responsibilities will need to show rather more restraint than the last three Home Secretaries if they are to be the lead government minister on behalf of the independence of the judiciary.

The role of the DCA has been the subject of some controversy and the question of possible conflict has arisen previously – in the context of a proposal to transfer the Court Service to the Home Office. Lord Woolf, then Lord Chief Justice, has reported that 'there is a lack of appreciation of the significance of the judiciary in the corridors of government'. He has also recounted his successful

resistance, on the part of the judiciary, to the proposed transfer of the Court Service to the Home Office: 'it was not appreciated within government that it was inappropriate for the department that most frequently had to defend judicial review in the courts and that had lead responsibility for criminal justice policy to be in charge of what should be seen as an impartial Court Service'.[3]

Lord Woolf was pointing to the fact that the majority of judicial review applications are taken against the Home Secretary. This has, however, been largely because of the dominance of applications relating to immigration and asylum (3149 out of a total of 5381 applications in 2005).[4] His concern was presumably that a minister responsible for the administration of the court would face conflict if also a party to actions within it. An obvious way in which this might surface would be in terms of relative resources.

The present proposal would not encounter quite the same objection because asylum and immigration would be retained within another department, the residual Home Office. However, the new Secretary of State would face the same potential conflicts in relation to criminal matters, both within the criminal courts and in civil cases. 251 applications for permission for judicial review related to criminal matters. Nevertheless, this degree of conflict probably is manageable, primarily because the independence of the judiciary will not be affected by which ministry is responsible for court and judicial administration.

However, the likely practical consequence of any further responsibilities for the DCA will be that the Secretary of State must be a member of the House of Commons and not necessarily a lawyer of any kind. The CRA imposes statutory requirements on the Secretary of State for Constitutional Affairs, who must 'appear to the Prime Minister to be qualified by experience'[5] for which qualification as a practising or academic lawyer are statutorily provided as indications. But so may previous ministerial or Parliamentary experience as well as such 'other experience as the Prime Minister considers relevant'.[6]

The position is soon likely to be very different to that under which the relationship between government and the judiciary was managed through the post of the Lord Chancellor. That is desirable and JUSTICE supported the CRA during its passage through Parliament. However, some element of further protection may be required to safeguard the rule of law responsibilities that, until recently, were seen as central to a major office of state. In particular, the government should spell out its understanding of the obscurely worded obligation in s1 CRA and the statutory oath in relation to the rule of law. Some of this was contained in the concordat negotiated by Lords Woolf and Falconer. This set out the respective duties of the Lord Chancellor/Secretary of State and the Lord Chief Justice/President of the Courts of England and Wales. The

memorandum should be considered by the relevant Parliamentary committees and would provide a written statement of obligations to remind ministers of its content and their duty.

In the longer term, consideration should be given to greater separation of the responsibility for administration of the courts from that of criminal justice and it may be that the Court Service should become responsible to the judiciary through the Office of the President of the Courts of England and Wales and the Supreme Court.

Reform of the DCA may, or may not, proceed. The mere fact that the idea is being seriously debated within government indicates the inherent fluidity of the UK's constitutional arrangements at the present time. The office of Lord Chancellor could credibly trace its lineage from the appointment of Angmendus in 605 and thus can be traced in existence for well over a millennium. It looks unlikely that the Secretary of State for Constitutional Affairs will make it through a decade. This is not necessarily a bad thing. Reform was overdue and it is to the government's credit that it has acted. However, a time of very rapid change is precisely when we should be very careful about what we need to preserve and what can be safely discarded from our constitutional arrangements.

Notes

1 Sunday Times, 31 October 2004.
2 See eg BBC news website, 13 June 2006.
3 Lord Woolf, 'The Rule of Law and a Change in the Constitution', Squire Centenary Lecture, Cambridge University, 23 March 2004.
4 The Stationery Office, *Judicial Statistics 2005 (revised)*, Cm 6903.
5 S2(1) Constitutional Reform Act 2005.
6 S2(2) Constitutional Reform Act 2005.

Human rights beyond the hostile headlines: new developments in practice

Sir Henry Brooke

This is the text of the keynote speech given by Sir Henry Brooke at the eighth annual JUSTICE/Sweet and Maxwell Human Rights Law Conference on 26 October 2006.

The Human Rights Act became law in October 2000, just six years ago. At the end of August of that year I spoke at the annual conference of the Howard League for Penal Reform. They had asked me to say something of the impact I thought the Act might make in the field of prisoners' rights. That morning I had been involved in court with the early stages of the *Conjoined Twins* appeal,[1] and the following week we received submissions about the possible effect of Article 2 of the European Convention on Human Rights (ECHR) on the outcome of that case. These two events form quite a good starting point for what I want to say today.

In my Howard League talk I described the way in which through cases like *Golder*,[2] *Silver*[3] and *Campbell*[4] Strasbourg jurisprudence had altered the way in which we looked at prisoners' rights. For instance, it would have been unthinkable for the House of Lords in the early 1960s, when I started to practise law, to have made a pronouncement about prisoners' rights of the kind made by Lord Wilberforce in *Raymond v Honey*[5] in the early 1980s when he said that 'a convicted prisoner, in spite of his imprisonment, retains all his civil rights which are not taken away expressly or by necessary implication'.

After referring to the Articles of the Convention which had made a difference in the context of prisoners' rights, I went on to say that I was not one of those judges who believed that the Convention was not going to make very much difference to our law. It was bound to make a difference, because it would enable us in a great many cases to look very carefully at the reasons that were put forward by a public authority to justify the violation of a person's Convention rights. Such authorities would be bound to be much more careful in future to ensure that any restrictions of any of those rights did not go further than was necessary to satisfy the community interest that was being relied on as justification in any particular case.

I ended that talk by saying that a decision had now been made by our politicians that we should move from a freedom-based law to a rights-based law, because our freedom-based laws had not always proved very successful in protecting the rights of unpopular minorities. It was a fairly momentous step, and I believed that every senior English judge would be very conscious that the outside world would be watching carefully the way we undertook the new responsibilities Parliament had given us. I added that I hoped that the process would not lead to English judges being appointed or promoted for their perceived political biases and not for the quality of their judgment. If the Human Rights Act did have that effect, the cure might prove to have been worse than the disease. That would be a very great pity.

A week later we were confronted with arguments based on Article 2 of the Convention in the context of the *Conjoined Twins* case. In that case the inevitable consequence of the surgery that was to be conducted to save the life of the viable twin, Jodie, would have been to end the life of the non-viable twin, Mary. Mary drew her blood supply from a common aorta that originated in Jodie's heart, and it was common ground that at common law the surgery would have constituted the crime of murder – that is, if we were unable to identify a common law defence or justification whose application would mean that the act of severing the common aorta would not constitute an unlawful act. In the end we were able to identify the solution in a very obscure corner of the law, concerned with the common law defence of necessity. Indeed it is so obscure that, as I described in my judgment, at one stage the Law Commission left it out completely from one of their codifications of our criminal law, and they only replaced it following strong academic criticism.

The Human Rights Act was then about to come into force, and it was common sense that we should take account of its provisions. Article 2 contained no trace of the common law defence or justification we were seeking. It reads:

> *(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of the court following his conviction for a crime for which this penalty is provided by law.*
>
> *(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

I said in my judgment that I could not believe that it was intended that this language would criminalise a surgical operation of this kind performed anywhere in Europe even if it was to be conducted with the consent of the parents of twins who had a deep longing that at least one of their children might be saved. We found a solution to this dilemma by holding that the words 'no one shall be deprived of his life intentionally' had an autonomous Strasbourg meaning. They were not apt to cover those cases where a defendant does not desire to cause death although it is an inevitable result of his actions. Cases like *Nedrick*[6] and *Woollin*[7] showed that the English common law now treated those acts as murder, but we saw no reason to import this extended meaning into the language of Article 2 unless we were compelled to do so, and we knew of no Strasbourg case-law which compelled that conclusion.

This experience showed me that there could be squalls ahead. Great common law judges had often counselled caution about efforts to codify the common law lest the adoption of this process robbed the law of its vitality. Codifiers cannot foresee everything. In his Maccabbean lecture in the early 1980s Lord Goff said that the problem with codification is that it represents a still photograph of the law as it is (or how people would like it to be) at a fixed moment in time. The object of the photograph is not then allowed to develop and grow: in other words, the law is frozen.

On that occasion we found a solution to the dilemma, but such a ready solution would not always be available. This, I thought, would be likely to create difficulties with Parliament when it had to be explained to them that they would have no power to alter the codified law which the Convention represents. After all, one of the most powerful reasons for retaining an unwritten constitution, and for resisting the incorporation of a human rights convention into our law for most of the second half of the last century, was that if our constitution was not written down and if we resisted incorporation we would retain the flexibility of our institutions to adapt to change. Many experienced politicians and civil servants believed that this flexibility had helped to ensure that the last revolution in this country occurred more than 300 years ago. I remember my father, who served in Mr Macmillan's cabinet, talking to me along these lines forty years ago.

In those early days I detected one other source of possible trouble ahead. Lord Justice Sedley and I had been appointed the judicial members of a small departmental board which met from time to time during the two years that elapsed between July 1998, when the Human Rights Act received the Royal Assent, and October 2000, when it came into force. Our job was to prepare the courts and the judges for the possible impact of the Act on court business. We had to ensure that training was delivered to all who needed it, that judges and

magistrates had access to Strasbourg case-law and to relevant English case-law as swiftly and as painlessly as possible, and that there would be enough judges to absorb any strains on the system which the Act might create. On the whole, I think we did our job fairly well. The 'worst case scenarios' of courts unable to cope with an overwhelming flood of work were not realised in the result.

But I was conscious when I was doing that job that other government departments did not seem to be taking this task nearly so seriously. The Act seemed to require that anyone who was acting as an emanation of the state needed to be aware of the new human rights dimension when he or she took a decision affecting people's rights. I was very struck by the effect of these failures four years later when the case involving the schoolgirl and the jilbab[8] reached the Court of Appeal. We were shown all the contemporary guidance given to schools by the Department for Education and Skills. A lot of it was based on the pioneering work on teaching judges racial, cultural and religious awareness that I helped to pilot in the early 1990s. But there was nothing there to help a head-teacher or a governing body to plot a safe path through the rapids created by the Human Rights Act. I know that when that case reached the House of Lords[9] there was a certain ambivalence as to whether the girl at the centre of the case enjoyed any Article 9(1) rights at all. But if she did, the overall effect of the Lords' decision was that it did not give judicial endorsement to the need for structured thinking about minority rights which we had believed to be essential. This education must now come from other sources than the compulsive effect of court decisions, and it may take a very long time to filter through.

So where are we now? Over the last 18 months we seem to have peered into the abyss and we are now shrinking back. By the abyss I mean a scenario in which not only the tabloids but also leading members of more than one of our major parties have been openly critical of the judges – and sometimes of individual judges – when all they have been doing is to do their best to import into an English context elements of rights-based law which are not particularly familiar to us in England and which often give rise to problems in the course of transposition and interpretation.

The first case of *A*, involving the Belmarsh prisoners, provides a good example of the difficulties. For a very long time public international law had made a clear distinction between the rights available to someone who was a citizen of a country and the rights available to someone who had arrived uninvited on its shores. In the Court of Appeal[10] we believed that this distinction, which was evident on the face of many international treaties, still held good under the new regime of the Human Rights Act. We thought that to treat people in the second category differently from people in the first category involved no breach

of Article 14 because they were not in an analogous situation. I dare say our politicians thought the same.

The House of Lords[11] said that we were wrong. Whatever might have been the traditional position under public international law, the Convention gave the same rights to everyone, whether we wanted them in this country or not. It was inadmissible, they said, to use concepts derived from immigration law to water down this principle so as to justify differential treatment. If a 'preventive detention' regime was justifiable in a time of terror, it must be applied to everyone alike, not merely to unwanted visitors whom we could not remove.

I know of no evidence that the framers of the Convention appreciated in 1950 that a country might be constrained to keep unwanted alien visitors because they could not expel them on *Chahal* principles.[12] Nor do I know of any evidence to suggest that it was realised at that time that the well-known principles of public international law to which I have referred might be jettisoned by a side-wind. But this is the effect of the Convention, unless the Strasbourg judges tell us something different, and it has been the cause of a lot of the flak which English judges have been receiving when they have been interpreting the Convention as they feel they must in the post-*Chahal* world.

It seems that over the last three or four months the Lord Chancellor has succeeded in getting the message across to his cabinet colleagues that the rule of law will be imperilled if senior politicians make strident public criticism of individual English judges who are only doing their job. Since June of this year we are no longer being told by a senior member of the cabinet that the British people are surprised by the judges' decisions (as if the judges could do anything other than to apply the law as they find it). It now seems to be increasingly realised in high places that if there are features of Convention law that are politically unwelcome, it must be from Strasbourg, and not from the English courts, that relief must be sought.

The case of the Afghan hijackers posed other difficulties. It is well known that the decisions of a panel of immigration adjudicators and of Mr Justice Sullivan in the High Court[13] in that case gave rise to high profile criticism. Paradoxically problems arose in that difficult case for two diametrically opposed reasons. The first was the *Chahal* issue, coupled with the fact that Parliament had not yet given the Home Secretary the power to create the very special status for these immigrants which he considered to be appropriate.

The other, quite different, problem arose because Parliament has not yet adopted the strong advice of the Law Commission in 1994, and of very senior judges in the Court of Appeal in the years that followed. They had said that the

scope of the common law defence of duress was far too difficult to identify and understand, and that it must be codified in simple language. Because clarity was lacking in this very difficult corner of the law, the judge in the first criminal trial of the Afghan hijackers directed the jury (which could not agree) in a way which was probably too favourable to the defendants, and the judge in the second criminal trial (in which the jury convicted) directed the jury on a version of the applicable law which the Court of Appeal later found to be incorrect. And both were very experienced criminal judges.

In the last 12 months my division of the Court of Appeal was involved with two cases of a kind which I never dreamed that I might have to decide when I joined the court ten years ago. In both we gave leave to appeal to the House of Lords, which will probably hear them next year, but whether we were right or wrong in the decisions we reached I think it is worth saying a little about them.

In the case of *Al Skeini*[14] we were concerned with two quite different issues. The first was the question whether the Human Rights Act gave the English courts jurisdiction over Article 2 and Article 3 issues in the Baha Mousa case that was at the centre of the court-martial proceedings which started at Bulford last month. The other was the question whether the Human Rights Act conferred any rights that were enforceable in an English court on citizens of Basra who were killed by British troops when they were at liberty in the streets of Basra or in their homes as opposed to being compulsorily detained.

On the first point the Crown conceded that the Strasbourg court would have jurisdiction to entertain the detainees' complaints against the United Kingdom, but they denied that the English courts had any jurisdiction in the matter. In rejecting the Crown's stance, we decided to follow an earlier decision of a division of the Court of Appeal which included Lord Phillips and Lord Slynn, and a dictum of Lord Nicholls in the House of Lords, although neither was strictly binding on us, and to leave it to the House of Lords to decide whether there still exists a category of case in which human rights have not come home, and our national courts have no jurisdiction although Strasbourg has. In other words, in such a case did a complainant have to go all the way to Strasbourg to obtain relief because our courts had no jurisdiction to give it to him?

On the second point, we decided that the effect of recent Strasbourg case-law was that the writ of the ECHR did not run in the streets and in people's private homes in Basra, although Lord Justice Sedley, hesitating, wondered whether this was a decision which we should have reached if not tightly constrained by Strasbourg authority.

The more recent case of *Al Jeddah*[15] identified a tension between the language of international human rights treaties and the obligations created by the United Nations Charter. Because the appeal in *Al Skeini* had not yet been decided by the House of Lords, the Crown accepted for the purposes of the *Al Jeddah* appeal that Mr Al Jeddah, detained indefinitely without trial by the British authorities in South-East Iraq, would have enforceable rights under Article 5 ECHR if those rights were not over-ridden by some other source of law.

It was surprising to hear argument in a national court that touched, however delicately, on the question whether an Article VII resolution of the United Nations Security Council was ultra vires that council, although it was ultimately accepted that a national court had no jurisdiction to decide such a question. But it was being strenuously argued that although a Security Council resolution plainly authorised the kind of preventive detention that was authorised in a different context by the Fourth Geneva Convention, obligations that arose from other parts of the UN Charter (drafted as it was at the very start of the modern international human rights movement that saw its first clear articulation in the Universal Declaration of Human Rights three years later) nevertheless served to 'trump' the clear language of the resolution.

There was a subsidiary argument to the effect that because Mr Al Jeddah was detained in British custody in Iraq, the English courts had extra-territorial jurisdiction at common law and could apply English common law in determining the nature and extent of his rights. Some of the arguments that found favour with the majority of the US Supreme Court in *Rasul v Bush*[16] in the context of the extra-territorial application of the writ of habeas corpus were redeployed before us. We rejected these arguments by holding that Iraqi national law applied in relation to the rights of a prisoner held in custody in Iraq, and that that law incorporated the power of preventive detention that was authorised by the Security Council resolution. In this situation there was no legal black hole.

The correct legal answers to these conundrums must await the decisions of the House of Lords. They are of course of acute interest to the appellants, whose lawyers prepared and fought their cases on restricted budgets in the very finest traditions of the English legal profession. We also received valuable and scholarly written submissions from counsel instructed (no doubt pro bono) by interested NGOs, including JUSTICE in the second case. But for the purposes of this talk the answers do not matter very much. What matters is that the courts are now treading fairly firmly in territory which would have been very much out of bounds 20 years ago. I do not believe that the three arms of government, and the British people as a whole, have yet acclimatised themselves properly to these changes and their effect on our constitutional settlement and their mutual relations.

The need for our national courts to master complex issues of public international law, including the effect of Security Council resolutions, does not only stem from the Human Rights Act. Six years ago a division of the Court of Appeal in which I was sitting was concerned with the dispute between Kuwait Airways and Iraqi Airways[17] over the ten airliners that were seized by the Iraqis from Kuwait International Airport at the beginning of the First Gulf War. One of the issues of the case turned round the legality of an enactment passed by Saddam Hussein's governing council, which held sovereign power in Iraq at that time, in relation to the ownership of the airliners which were by now physically situated in Iraq.

We held – and the majority of the House of Lords upheld our finding – that as a national court we were able to treat this resolution of a sovereign power as having no effect because it was passed in the teeth of a relevant Security Council resolution. Iraq was a member of the United Nations, constrained, like all its other members, to give effect to Security Council resolutions and not to thwart their effect.

Before that case was decided, there had been only one previous occasion when an English court voiced doubts about the legal validity of a decree of a sovereign power affecting people within its frontiers. That was in *Oppenheimer v Cattermole*,[18] where Lord Cross said that a law of the Third Reich which deprived Jews of their property and their citizenship constituted so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

The excellent arguments in the *Al Jeddah* case showed that the tension between traditional principles of public international law (which tend to be binding only on nations) and the more prescriptive requirements of modern human rights instruments, which may confer enforceable rights on individuals, is becoming more and more apparent. We were shown contemporary resolutions of the European Parliament, and statements by the UN guardians of the International Covenant on Civil and Political Rights or of the Convention Against Torture, which revealed growing impatience about the limited impact which these instruments may have outside the world in which the Council of Europe's human rights convention does provide individual rights that are enforceable by a court.

It is not the judges that have created these tensions. So far as this country is concerned, they have been inevitable ever since the first Wilson government gave British citizens the right to implead the court at Strasbourg if all else failed. The arrival of the Human Rights Act has only served to accentuate the pressures.

What, then, can we do about it if the present uneasy truce between the politicians and the judges is to hold? A year ago, when I opened a full-day seminar organised by the Public Law Project, I said that in a hundred years' time legal historians might look back on this period of our history and say that the move to look at rights in a properly structured way turned out to be a move in advance of its time. Or they might hail it as one which bore rich fruit in creating a far more structured approach to our system of public law.

It seems to me that the answer lies in education, education and more education. It lies in human rights lawyers being more and more ready to come out of their bunkers and explain what human rights law is all about in language which everyone can understand, even if not everyone is willing to listen. And it lies in explaining to our politicians over and over again the constraints that are imposed by our membership of the Council of Europe (which we can hardly abandon). These constraints flow from our adherence to a human rights code that was drafted sixty years ago and which will necessarily not have covered all the eventualities which the politicians of today would have had it cover. At least we are lucky not to be governed by a Constitution that is over 200 years old. The US constitution still gives an inalienable right to jury trial in litigation where more than twenty dollars are in issue, an unqualified right to keep and bear arms, and unqualified protection against laws that abridge the freedom of speech in any way. Needless to say, some judicial tinkering has softened the rigidity of some of these provisions.

Other human rights influences have also been at work on the English common law during the 45 years in which I have been concerned with the development of that law. As a QC with some medical and mental health law experience, I remember vividly the battles over patients' rights in the 1980s. I was originally instructed for the defendants in the *Sidaway* case,[19] and the rights-based law around which that litigation revolved came from the United States and Canada, South Africa and New Zealand, and not from European Convention case-law.

Similarly, when Larry Gostin of MIND persuaded Parliament to create an island of rights-based statute law, governing the extent of the power of a doctor to treat a mental patient for his or her mental disorder without his or her consent, Section VI of the Mental Health Act 1983 had transatlantic, and not European, roots. The history of our mental health legislation over the last 40 years reveals, incidentally, the perils of piecemeal codification. First, it was decided in 1959 to do away with a wardship court's inherent parens patriae power to impose treatment on an adult mental patient without supplying a surrogate decision-maker in the place of the Crown. That was all very well over the next 20 years when the English common law treated a psychiatric consultant as having power to do what he or she considered to be in his or her incapacitated patient's

interests, perhaps after consulting the patient's next of kin (whose legal status in the matter was always a bit difficult to fathom).

Then a statutory scheme was introduced to provide protection relating to the treatment of the tiny minority of compulsory, as opposed to voluntary, mental patients, but only when that treatment was concerned with their mental, not their physical condition. In legislating for one set of problems, Parliament merely served to highlight two other sets of problems, for which it did not provide a statutory solution. Now that a spotlight was being shone on the patient's rights, as opposed to the doctor's rights, who was it that had power to give consent when the sterilisation of a mentally incapacitated adult patient was in issue, or when such a patient needed treatment for his or her physical, as opposed to her psychiatric, ailments? And even when that set of problems had been resolved, more or less, by the House of Lords' decisions in *re F*[20] (another case in which recourse was had to a very obscure corner of the common law: on this occasion the power of an agent of necessity), what about psychiatric treatment for voluntary in-patients? Did they have the same layers of protection as were available for compulsorily detained patients, even though Parliament had not provided for this? And if so, where did these protections come from?[21]

After the Human Rights Act came into force, I was concerned with the decision in *Wilkinson*,[22] in which we considered that the implementation of that Act had given the courts greater powers to scrutinise psychiatric treatment compulsorily given to sectioned patients than the 1983 Act had ever contemplated. But this decision in turn threw up questions of the appropriateness, or otherwise, of a judicial review court to police the legality of such treatment. All that was reasonably clear was that the spotlight shone by the Law Commission's work in the early 1990s on the importance of taking into account variations in the capacity of a patient to understand matters of different levels of importance meant that when considering that patient's rights under Article 8 ECHR, rather more sophisticated measures were needed than were contemplated in 1983. But the law had been on the move long before then.

One of the reasons why the implementation of the Human Rights Act did not create the tidal wave of cases that swept though the courts of Canada when Charter rights were introduced in the early 1980s was that much of our recent criminal justice legislation, as well as the Codes of Practice under PACE, had been drafted with the provisions of the ECHR well in mind. Another has been that English lawyers have increasingly tended to compartmentalise themselves. There are criminal lawyers and commercial lawyers and family lawyers and human rights lawyers and even more specialist subsets of lawyers, and too few

of them have the willingness or the time to master what seems to be specialist law with which they feel that are not directly concerned.

I will give you one example of what I mean. I was sitting with Lord Phillips and Lady Justice Hale a few years ago in the prisoners' babies case of *P and Q*.[23] An issue arose in that case about the tensions between the requirements of the Children Act and the sentencing policies of the criminal courts in cases where it is contemplated that a mother of young children will be sent to prison, with all the adverse effects on the children's welfare that such a sentence always brings with it.

In giving the judgment of the court, and after notifying the Lord Chief Justice of what we were intending to say, Lord Phillips said this:

> *It goes without saying that since 2 October 2000 sentencing courts have been public authorities within the meaning of section 6 of the Human Rights Act 1998. If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound by section 6(1) to carry out the balancing exercise identified by Hale LJ in* In re W and B (Children: Care Plan)[24] *… before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under section 6(1), ask for more. It will no longer be permissible, if it ever was, for a court to choose a custodial sentence merely because the mother's want of means and her commitments to her children appear to make a fine or community sentence inappropriate if the seriousness of the offence does not itself warrant a custodial sentence. In such circumstances it must ensure that the relevant statutory authorities and/or voluntary organisations provide a viable properly packaged solution designed to ensure that the mother can be punished adequately for her offence without the necessity of taking her into custody away from her children.*

I may have missed something, but I am not aware that this powerful dictum of the Court of Appeal has been given the serious attention it deserved by lawyers, magistrates and judges who specialise in criminal law.

It is time to draw the threads together. In this paper there have been four main themes. The first is that English law has been revitalised by human rights law during my professional lifetime. Over the last forty years our law has been growing incrementally as human rights principles, regarded as commonplace overseas, have been invading the nooks and crevices, much as Lord Denning

said more than thirty years ago that European Community law would stream up our estuaries and rivers. Only recently the decisions of the court at Strasbourg in the cases of *Princess Caroline of Monaco*[25] and *Wainwright*[26] have been forcing us to rewrite our privacy laws for the better.

The second is that the introduction of human rights law into our national law, whether through the Human Rights Act or by a less direct route through EU law, has also enriched our law by enabling our judges by calling in aid principles derived from international treaties, like the UN Convention on the Rights of the Child, and other sources of international law which were previously regarded as 'out of bounds' for our judges.

Next, there is always a time and place for codifying the law, particularly when common law developments have made the law so inaccessible that statutory medicine is needed to cure the disease. But without access to the genius of common law subtleties, like the common law concepts of necessity that came to the rescue in *F* and the *Conjoined Twins* case, codified law sometimes produces rigid solutions that bring politicians and judges into conflict when the politicians do not understand the problems and the judges cannot resolve them. This is at the root of some of our present difficulties.

And finally, education, education, education – of our public servants in both and local government, yes and of our politicians, too – if this brave experiment in our law is to long endure. There is work for all of us to do.

Sir Henry Brooke has been a member of JUSTICE for over 40 years. Before his retirement last September he was Vice-President of the Civil Division of the Court of Appeal.

Notes

1 *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147.
2 *Golder v UK* (1975) 1 EHRR 524.
3 *Silver v UK* (1983) 5 EHRR 347.
4 *Campbell and Fell v UK* (1985) 7 EHRR 165.
5 *Raymond v Honey* [1983] 1 AC 1.
6 *R v Nedrick* [1986] 1 WLR 1025.
7 *R v Woollin* [1999] 1 AC 82.
8 *R (SB) v Governors of Denbigh High School* [2005] EWCA Civ 2005; [2005] 1 WLR 3372.
9 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2006] 2 WLR 719.
10 *A v Home Secretary* [2002] EWCA Civ 1502; [2004] QB 335.
11 *A v Home Secretary* [2004] UKHL 56; [2005] 2 AC 68.
12 See *Chahal v UK* (1997) 23 EHRR 413.
13 *S v Home Secretary* [2006] EWHC 1111 (Admin).
14 *R (Al Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609.
15 *R (Al Jeddah) v Secretary of State for Defence* [2006] EWCA Civ 327.
16 *Rasul v Bush* 542 US 446 (2004).
17 *Kuwait Airways Corpn v Iraqi Airways Corpn* [2002] 2 AC 883.

18 *Oppenheimer v Cattermole* [1976] AC 249.
19 I appeared at the trial at first instance before Skinner J. The case was later reported in the House of Lords as *Sidaway v Governors of Bethlem Royal Hospital & the Maudsley Hospital* [1985] AC 871.
20 *In re F (Mental Patient Sterilisation)* [1990] 2 AC 1.
21 See *R v Bournewood Community and Mental Health NHS Trust ex p L* [1999] 1 AC 458.
22 *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545.
23 *R (P) v Home Secretary* [2001] EWCA Civ 1151; [2001] 1 WLR 2002.
24 [2001] EWCA Civ 757 at para 54.
25 *Von Hannover v Germany (Application no 59320/00)*; [2004] EHCR 294.
26 *Wainwright v UK (Application no 12350/04)*; [2006] ECHR 807.

The rule of law

Ross Cranston QC

Ross Cranston QC introduces the next three papers in this edition, which take their text from lectures in a recent series held by the LSE Law Department and Clifford Chance in conjunction with JUSTICE.

Ever since Dicey's account of the subject, the rule of law has attracted considerable comment. But in recent years there has been an explosion in use of the term, and government activity, both here and abroad, has been said to be either in accordance with, or in breach of, the rule of law. What follows are papers from the second bracket of public lectures designed to explore the topic 'The Rule of Law' held by the LSE Law Department in conjunction with JUSTICE, and sponsored by Clifford Chance. Papers from the first series have already been published in this journal.[1]

The current collection develops the theme in various ways. First is the definition of the concept itself. Concerned with the expansive approach adopted by some writers and the danger of devaluing the currency, Sir John Laws restricts the term to what he describes as an uncontentious minimum, a society where the exercise of power needs lawful authority and where citizens are law-abiding. In a challenging, and subtle, account Sir John suggests that used in its wide sense of democratic constitutionalism, the 'rule of law' cannot be an independent justification of the principles the phrase represents. He argues that the rule of law as a concept should express law's distinct virtue – the ordering of society by clear and patent rules which are broadly respected by society so as to maximise the prospect of people living in tranquillity with one another.

In her commentary on Sir John's paper Professor Carol Harlow agrees that we should not expect too much of the rule of law idea. Quoting Raz, she sees the danger that if it subsumed a whole social philosophy the idea would lose its usefulness. Nonetheless, she rightly warns against too thin a version of the rule of law because the totalitarian or apartheid regime could claim to comply, having done all in accordance with law. Professor Harlow also notes the relationship between the rule of law and human rights, the subject of another lecture in the series, by Cherie Booth QC.[2]

Turning to the international dimension of the rule of law, HE Judge Rosalyn Higgins (formerly Professor Rosalyn Higgins of the LSE) immediately identifies problems. Security Council resolutions do not always apply equally to all; review of Security Council decisions by the ICJ is an open question; and

although the operation of the court itself is in accordance with the rule of law, it is restricted in its jurisdiction (it cannot take cases from individuals; there is still the notion that states are only subject to it if they consent). More generally we see from Judge Higgins' authoritative paper that the idea of the rule of law is being applied so widely to United Nations activities as to be almost meaningless or, as she puts it more politely, that it is still work in progress.

Dr Chaloka Beyani agrees with Judge Higgins that the rule of law in the international context is an odd concept. That in his view partly reflects the complexity of the subject-matter. He suggests, however, that African states in using the International Court of Justice have contributed to the rule of law both domestically and on the continent more generally. The *DRC v Uganda* case has had a beneficial impact in relation to the use of force, and taking boundary disputes to the court contributes to African states' respect for dispute resolution according to law (as well as solving a tricky political issue).

The Director-General for Justice, Freedom and Security in the European Commission, Jonathan Faull, was in an ideal position to draw together important parts of the rule of law as it relates to the European Union. Article 6(1) of the EU Treaty says that the Union is founded on the rule of law as well as other values like the fundamental rights recognised by the European Court of Justice and also embodied in the EU Charter of Fundamental Rights and Freedoms. The rule of law is a pre-condition for accession states and is an aim sought in the Union's relations with neighbours and its distribution of development aid. Mr Faull set out the methodology for ensuring that the Commission complies with the rule of law in its own acts, and the framework for the new Fundamental Rights Agency.

In his challenging commentary Professor Damian Chalmers puts a number of glosses on this. One is that while the Union is too weak to maintain a sustained counter-majoritarian tendency in favour of fundamental rights, it can occasionally intervene in favour of progressive but unpopular initiatives. Another is that while the European Court of Justice has curbed fundamentalist excesses, the Union itself has legislated restrictively in areas such as immigration and asylum and has extended the capacity of member states to control their citizens by measures such as the European Arrest Warrant.

At the end of the two series we are better informed about a concept, the rule of law, which has a great deal of salience in modern policy debates. It is especially pleasing that JUSTICE was involved in the venture, given that it is celebrating its first 50 years of defending the rule of law. A great deal has been achieved over that 50 years, as is made clear in the lecture by Lord Bingham to which Sir John Laws and Professor Harlow refer.[3] But JUSTICE's vision, represented by the draft

manifesto it has recently released on the rule of law,[4] still requires a considerable effort if it is to be fulfilled.

Ross Cranston QC is Centennial Professor of Law at the London School of Economics and Political Science (2005-2007), and is a former Member of Parliament (1997-2005) and Solicitor General (1998-2001).

Notes

1 *JUSTICE Journal* Vol 3 No 2 (2006), pp7-47 (papers by Lord Goldsmith QC, the Attorney General; Roger Smith, director of JUSTICE; and Shami Chakrabarti, director of Liberty).
2 'The Rule of Law and Human Rights', lecture by Cherie Booth QC at the LSE, 8 November 2006.
3 'The Rule of Law: The Sixth Sir David Williams Lecture', 16 November 2006.
4 JUSTICE manifesto for the rule of law, published in *JUSTICE Annual Report 2006*.

The rule of law: form or substance?

Sir John Laws, with a comment by Professor Carol Harlow

This is the text of the public lecture given at the London School of Economics and Political Science on 22 November 2006 as part of the rule of law lecture series organised by the LSE Law Department and Clifford Chance in conjunction with JUSTICE. Professor Carol Harlow was the discussant on that date; her comments follow the text of the lecture.

I should not have qualified the title to this lecture by the phrase 'form or substance?' I have more to discuss than this dichotomy.

What is the rule of law? It is a very slippery question. It has excited legal thinkers to compose many learned disquisitions on the subject. There is an enormous corpus of academic writing. I shall refer in a moment to Professor Paul Craig's summation of some of the mainstream views in his distinguished work Administrative Law.[1] The literature was graced by the addition of the sixth Sir David Williams lecture, delivered by Lord Bingham on the very subject, the rule of law.[2]

The expression 'the rule of law' as a quasi-technical term first came to prominence through Dicey's great book, An Introduction to the Study of the Law of the Constitution. But you can find traces of the idea in Pericles' Funeral Speech in the second book of Thucydides' History, and in Aristotle and Cicero. Nowadays, outside the lecture rooms at least, the phrase is coupled with the word 'democracy', as a compendious name for a kind of ultimate political virtue: to live under democracy and the rule of law is a blessing contrasted with the curse of living under a dictatorship, totalitarianism or anarchy.

Democracy and the rule of law is not just a name. It is a piece of rhetoric, deployed to commend what it stands for. But I think the term 'the rule of law' is losing force, is in danger of becoming a wasted asset, in the advocacy of a free and tolerant society. There may be all sorts of reasons for such a state of affairs. Many of them are far away from any competence of mine to analyse or even discuss. However there are some theoretical points, philosophical if that is not too grand a term, which I would like to offer.

The first point I would like to make is perhaps an obvious one. It is that in asking what is the rule of law, it is all too easy to overlook a prior, but to my mind critical, enquiry. What does the question mean? What does it mean

to ask 'what is the rule of law'? This unease is connected with another point that troubles me. It concerns our rhetorical phrase, 'democracy and the rule of law'. I think that whether the phrase is intended to serve merely as the name of a political virtue, or as a commendation, it is glib and over-simplified. Since we are passing through a time when the values it is supposed to represent are increasingly challenged (sometimes unconsciously), this matters.

I will explain in due course the connection between these two points: the importance of what is meant by the question, 'what is the rule of law'?, and the shortcomings of democracy and the rule of law as the name or the advocate of a political virtue. That will lead on to my apprehension that the term the rule of law is losing force, is in danger of becoming a wasted asset, in the advocacy of a free and tolerant society. I will first embark upon my prior enquiry: what is meant by the very question, 'what is the rule of law'?

As a prelude I will look at some of the senses that have been attributed to the rule of law. Craig's discussion is introduced by these two sentences:[3]

> *Justification for some form of rights-based approach [to administrative law] might be founded on the rule of law. This however depends upon the meaning given to this constitutional concept.*

Craig proceeds to articulate four senses of the rule of law, but I will only describe the first two. The first is the rule of law as a *formal* concept. This requires only that:[4]

> *there should be lawful authority for the exercise of power* ***and*** *that individuals should be able to plan their lives on the basis of clear, open and general laws.*

This sense of the rule of law says nothing about the content, or the moral value, of any particular law. The second sense of the rule of law described by Craig is a *substantive* conception. On this view the rule of law requires that the law should articulate and uphold moral and political rights.[5]

Craig expounds the virtue of the first of these senses of the rule of law, the *formal* sense, as follows:[6]

> *The reason for restricting the concept in this way has been clearly articulated by Raz* [that is of course Professor Joseph Raz]*: if the Rule of Law is to be taken to demand certain substantive rights then it becomes tantamount to propounding a complete social and political philosophy and*

> *the concept would then no longer have a useful role independent of that political philosophy.*

The second sense of the rule of law described by Craig, the *substantive* sense, does indeed demand substantive rights. It is one in which, on Professor Dworkin's approach (as Craig puts it)[7]:[8]

> *the moral and political rights possessed by individuals are to be recognised in positive law ... This conception of the Rule of Law does not distinguish, as does the formal conception, between the Rule of Law and substantive justice: 'on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights'.*

This is the sense which Craig himself favours. He says:[9]

> *Provided that it is understood that this entails some vision of justice, which the courts should take into account when determining the rights which individuals currently have, then it can be the foundation for the development of a model of administrative law which is cast in terms of rights, legality and the abuse of power.*

It is interesting and instructive to compare Craig's description of these two contrasting senses of the rule of law, procedural and substantive, with the subject's treatment by Wade and Forsyth. They say:[10]

> *The British constitution is founded on the Rule of Law ... The Rule of Law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law ... Every act of governmental power ... must be shown to have a strict legal pedigree ... That is the principle of legality. But the Rule of Law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers ... The secondary meaning of the Rule of Law, therefore, is that government should be conducted within a framework of recognised rules and principles which restrict arbitrary power.*

One may also compare a use of the term by Jeffrey Jowell. In an interesting recent article – 'Parliamentary Sovereignty under the New Constitutional Hypothesis' – in which he discusses the *Jackson* case[11] (which of course concerned the legality of the Parliament Act 1949) Jowell says:[12]

> *I am in this article employing the term [the rule of law] as a principle of democratic constitutionalism, which in its practical implementation requires, eg access to justice, equal implementation of laws, no punishment without trial, etc.*

Jowell's expression, 'democratic constitutionalism', is a striking one. Though Jowell himself acknowledges[13] that there are 'principles constraining the state which cannot be fitted comfortably into the rule of law, such as a number of the rights enumerated in the European Convention on Human Rights', from time to time in this lecture I shall use his phrase as a shorthand for what I have so far been calling the substantive sense of the rule of law.

In dealing with Craig's second sense, the substantive sense, of the rule of law, I should refer also to Lord Bingham's Sir David Williams lecture.[14] Lord Bingham suggested that '[t]he core of the existing principle [of the rule of law] is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'. He considered that the implications of this formulation might conveniently be broken down into eight sub-rules. The fourth sub-rule was 'that the law must afford adequate protection of fundamental human rights'. This approach is firmly within the territory of democratic constitutionalism.

Now let me briefly collect these references together. It is apparent that Craig's first meaning of the rule of law – lawful authority for the exercise of power, and clear, open and general laws – has a correspondence with Wade's primary meaning – everything must be done according to law. There is also a correspondence between Craig's second meaning, the recognition of moral and political rights in positive law, Jowell's 'democratic constitutionalism', and Lord Bingham's core principle, certainly when read with his sub-rule incorporating the protection of fundamental human rights. Note also Lord Bingham's third sub-rule (no unjustified discrimination), and his sixth (public officials to act reasonably and in good faith). There is moreover an affinity, though not an identity, between these three – Craig/Jowell/Bingham, as it were – and Wade's second meaning of the rule of law, that government should be conducted within a framework of recognised rules and principles which restrict arbitrary power.

Very broadly, then, we have two senses, or groups of senses, of the rule of law. The contrast between them can indeed be described as a contrast between the *procedural* and *substantive*. The first states that the use of power must always be derived from clear, accessible law. The second states that the law in question must be good law: it must promote certain moral and political standards. However I think these pigeonholes, *procedural* and *substantive*, are unsatisfactory. The first sense, the procedural meaning, has more substance – more morals – to it than at first appears. The second sense, the substantive meaning, is extremely porous when it comes to deciding what are the principles or morals actually stored inside it.

This slippage in the form/substance dichotomy is connected with my reasons for suggesting that the term 'the rule of law' is losing force, is in danger of becoming a wasted asset, in the advocacy of a free and tolerant society, and to that I will return. Meantime what I have said about different approaches to the rule of law, though quite inadequate to encompass the whole subject, will suffice for the points I want to make, and I will embark on the prior enquiry: what is meant by the very question, 'what is the rule of law'?

The first step in this enquiry is rudimentary enough. It is to expel the metaphysics from the subject. To ask 'what is the rule of law' is not to seek some existential truth which, following John Bunyan's pilgrim, we may find if only we look hard enough. The question has to be translated into another question: what is the meaning of the expression 'the rule of law'? Not what is it, but what does the expression mean? That takes the metaphysics out of the subject. But it is only the beginning of the enquiry. The question 'what is meant by the rule of law' may itself mean at least two different things. It may first mean, 'in what sense is the term used in practice?' Or it may secondly mean, 'what sense *should* we attribute to it?'

The first of these meanings – how is the term used in practice? – merely promotes a linguistic, or perhaps sociological, enquiry. The second sense – what meaning *should* we attribute to the rule of law? – promotes an enquiry of a different kind: a *normative* enquiry. It asks: what are the ideals which the rule of law should be deployed to represent?

The formal or supposedly procedural sense of the rule of law, that there should be lawful authority for the exercise of power (Craig) or that everything must be done according to law (Wade), is an uncontentious minimum: the rule of law *at least* means this. It therefore constitutes an answer to the first sense of our question, 'what does the rule of law mean' – that is, 'how is the term used in practice'. Everyone would agree that the rule of law *at least* means this. It is used in practice in *at least* this sense.

But this is not true of the second or substantive sense of the term, namely that moral and political rights are to be recognised in positive law (Craig: compare Bingham) or that it is a principle of democratic constitutionalism (Jowell). (I leave aside for the moment Wade's formulation, that government should be conducted within a framework of recognised rules and principles which restrict arbitrary power.) There is no consensus that the rule of law *at least* means the elements of democratic constitutionalism. Some scholars expressly disavow such a use of the term, sometimes for reasons which, as Craig notes, are given by Joseph Raz. I repeat:[15]

> *if the Rule of Law is to be taken to demand certain substantive rights then it becomes tantamount to propounding a complete social and political philosophy and the concept would then no longer have a useful role independent of that political philosophy.*

This is relatively restrained compared with some academic criticism of the rule of law seen as a substantive principle, full of moral values. Lord Bingham cites observations of Judith Shklar, Jeremy Waldron and Brian Tamanaha which demonstrate as much. I will only quote, with thanks to Lord Bingham for the reference, Judith Shklar's polemic, which bristles with contempt:

> *It [the rule of law] may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.*

Since the substantive sense of the rule of law – democratic constitutionalism in Jowell's shorthand – is not an uncontentious usage of the term, the issue whether the term should in fact be used in that sense can only be decided by applying the second sense of our question, 'what does the rule of law mean' – that is the normative sense: how *should* we use the term the rule of law? It is a matter of choice: how should we *choose* to use the term? What – if any – are the ideals which the rule of law should be deployed to represent? Should it be deployed to represent democratic constitutionalism?

In making this choice we need to be very clearly aware of the limitations upon the utility of the term 'the rule of law'. The rule of law is at most an optional description or shorthand for democratic constitutionalism, or some constituent clutch of values grouped under that heading. It is an umbrella term. Just a name. It may or may not be a useful description or shorthand – and I will come to that – but the use of the name 'the rule of law' cannot constitute a substantive independent justification of the values which democratic constitutionalism represents. Democratic constitutionalism and its constituent values must be justified, if at all, by other, prior, considerations. The rule of law can only be the name you give it at the end of the argument. This must be so, since the values in question are worth having or not worth having, worth fighting for or not worth fighting for, in short good or bad, irrespective of the label: irrespective of whether you call them 'the rule of law'. Since the rule of law can be no more than an optional soubriquet for democratic constitutionalism, it cannot operate as a justification for democratic constitutionalism, or of any set of substantive values or virtues.

What are the consequences of this view that the rule of law in its substantive sense, being no more than an optional label for democratic constitutionalism, cannot afford any independent justification for the principles which that phrase represents? Recollect Professor Craig's observation, which I have already cited:[16]

> *Justification for some form of rights-based approach [to administrative law] might be founded on the rule of law. This however depends upon the meaning given to this constitutional concept.*

But the *justification* for Craig's rights-based approach to administrative law cannot be founded on the rule of law simpliciter. The rights-based approach is a species, or a part, of democratic constitutionalism, for which the rule of law is just an optional name. The justification for any species of democratic constitutionalism lies elsewhere. It lies in substantive arguments for the values in question: arguments, essentially, about individual liberty and good government. And I think Craig's second sentence – his statement that the rule of law justification 'depends upon the meaning given to this constitutional concept' – recognises, no doubt, that the justification of a substantive constitutional position (in this case, his rights-based approach to administrative law, but it may be any aspect of democratic constitutionalism) has to be found in the muscle and sinew of particular arguments, not in a formula called the rule of law.

I have said that the second, substantive sense of the rule of law is extremely porous when it comes to deciding what are the principles stored inside it: who are the individuals sheltering under the umbrella. It is useful to consider how big and how various is the possible range of candidates, large, small, right, left, and much in between. No doubt the rule of law in this second, substantive sense is most commonly understood as shorthand for a familiar clutch of liberal values which are expressed in the laws, generally the constitutional laws, of liberal states; and this is the ordinary sense of Jowell's democratic constitutionalism.

However the content and identity of these liberal values is very far from settled. They may range from the requirements of rationality and fairness in government decision-making through the political freedoms enshrined in Articles 8 to 11 of the European Convention on Human Rights[17] to the right to fair trial before an independent and impartial tribunal. Or the rule of law may be understood as embracing only some of these: perhaps rational decision-making by government and fair trial by the courts. In a work I have found only on the internet, *The Australian Achievement, from Bondage to Freedom*,[18] Dr Mark Cooray, having stated that the rule of law is 'fundamental to the western democratic order' lists[19] the rule of law's characteristics under nine heads: the supremacy of law, a particular concept of justice, restrictions on the exercise of discretionary power, the

doctrine of judicial precedent, the common law methodology, the rule against retrospective legislation, an independent judiciary, the legislative power to be in the hands of Parliament not the executive, and 'an underlying moral basis' for all law.

You can quarrel with Dr Cooray's list. I have difficulty seeing why the doctrine of judicial precedent should be included, or the common law methodology. It is surely not to be argued that civilian legal systems are excluded from membership of the rule of law club. Equally ideals of rationality and fairness in public decision-making might well be included: they are not very adequately represented merely by the reference to restrictions on the exercise of discretionary power. But the very fact that you can give some items and take others, and could do the same with many other attempts to list the elements of democratic constitutionalism, makes my point: the scope for variety makes it all the more unreal to propound the rule of law as a *justification* for any such collection of values – or even a unifying feature. How can it be said to justify conclusions, when you can choose which conclusions it is supposed to justify?

So we can see that the force of these ideals, or of any version of democratic constitutionalism, is not increased by giving them the label 'the rule of law'. My anxiety is that unless this is understood, the case for these ideals, these principles, may be sold short: it may be wrapped up in a rubric – the rule of law – which has no independent justifying force outside its basic meaning that everything must be done according to law. Here is the connection (which I mentioned at the outset) between the importance of what is meant by the very question 'what is the rule of law' on the one hand, and the shortcomings of the mantra 'democracy and the rule of law' on the other. The question is important because its answer shows that we have a choice how the expression 'the rule of law' is to be used. But if the choice we make is to use it as an umbrella term for democratic constitutionalism, then I think we opt for a vocabulary that cannot reflect the fullness of democratic constitutionalism's virtue.

Are we better off restricting the term 'the rule of law' to what I have called the uncontentious minimum, so that it refers only to the requirement of lawful authority for the exercise of power, and everything must be done according to law? Before offering an answer I should say that in my view this requirement does not represent the whole of the uncontentious minimum sense of the term. I think the uncontentious minimum possesses another element. It consists in the notion of a law-abiding society. The rule of law is not only about what is required of the state. It is also about what is required of the citizen. Not long ago I saw the movie *The Children of Men*, based on P D James' marvellous novel about a world in which no child had been born for nearly twenty years. It is set here in England. The legal, constitutional institutions were, I think,

portrayed as being more or less in place. But society had become lawless and violent. Authority had become more and more brutal in response. The rule of law had been destroyed. The rule of law, in the uncontentious minimum sense of the term, demands that by and large the people obey the law. It implies a culture of general, of course not universal, obedience to the law. Gangs of thugs carrying and using weapons in the streets are a threat to the rule of law, and properly described as such. If there are no-go areas in our towns and cities because of criminal violence, we would say the rule of law had broken down; and it would be just as true as if the local council in the same area was riddled with corruption.

Thus we can see that the extended, substantive sense of the rule of law – democratic constitutionalism – is too modest, for it fails (in all the versions I have seen) to reflect the vital requirement of a law-abiding society; and at the same time it is too overblown, for it claims (I think in any of its versions) to reflect the true richness of the family of liberal values, which the idea of law cannot reach on its own. My favourite character in Dumas' story *The Three Musketeers* is Athos, who was one of the three. The name Athos concealed his identity as a nobleman, the Comte de la Fère. Offered a captaincy in the King s Musketeers, he said 'For Athos it is too much; for the Comte de la Fère it is too little'. (At least that is the line in the excellent movie version with Oliver Reed as Athos. I keep hoping some TV channel will replay the 1940s version, with Paul Lukas as Athos, which led me as a teenager to read the novels.) So it is with the extended, substantive sense of the rule of law: at the same time too modest and too overblown.

We are, broadly speaking, on firmer ground with the uncontentious minimum sense of the rule of law. We can see now that it has two elements: firstly the requirement for a legal justification of public power, given by clear, published law, and secondly the requirement of a law-abiding society. Taking the rule of law in this sense focuses on the virtue of law itself, law's distinct virtue. And this, surely, is what we are looking for. How should we articulate law's *distinct* virtue?

I would offer a rough description as follows: the ordering of society by clear and patent rules which are broadly respected by society's members, so as to maximise the prospect of their living in tranquillity with one another. Now, I have said we are *broadly speaking* on firmer ground with the uncontentious minimum. But clearly this approach to the rule of law, following this rough description of law's distinct virtue, implies at least something as to the *content* of the law. It is not merely a procedural approach. A law (or supposed law) which merely provided that the ruler should have unfettered power to do anything he wished, or which allowed gross and unjustified discriminations between classes of persons, would

possess no virtue, certainly not the distinct virtue I have mentioned. But once we accept some requirement relating to the substance or content of the law, we begin – do we not? – to travel into the second, contentious sense of the rule of law, democratic constitutionalism.

However you can buy part only of the package; you do not have to sign up to the whole. I have suggested that the second sense of the rule of law, the supposed substantive meaning, is extremely porous when it comes to deciding what are the principles or morals actually stored inside it; and so it is. But I have said also that the first sense, the procedural meaning, has more substance – more morals – to it than at first appears. I would allow substance or content to qualify the meaning of the rule of law only to the extent necessary for the rule of law to deliver, or have some hope of delivering, law's distinct virtue: the ordering of society by clear and patent rules which are broadly respected by society's members, so as to maximise the prospect of their living in tranquillity with one another. To that end I prefer, if may say so, Wade to Craig or Jowell: Wade includes the requirement of 'a framework of recognised rules and principles which restrict arbitrary power'.[20] This points to ordered government under the rule of reason, and is closer to law's distinct virtue than is democratic constitutionalism writ larger.

I said earlier that in considering the second, supposed substantive sense of the rule of law, there is a choice to be made. How should we *choose* to use the term? In suggesting that it would be well restricted to the uncontentious minimum, including what I may call Wade's qualification, I am commending a particular choice. The choice is for the term's ordinary usage or something close to it, and therefore may lay a fair claim to form part of the uncontentious minimum. It is, I think, on the whole better to use words in their ordinary language sense, as much in any intellectual discourse as in ordinary speech. One cannot simply play fast and loose with established linguistic usages. It is worth recalling what J L Austin, the guru of Oxford ordinary language philosophy, had to say:[21]

> *Certainly, when we have discovered how a word is in fact used, that may not be the end of the matter; there is certainly no reason why, in general, things should be left exactly as we find them; we may wish to tidy the situation up a bit, revise the map here and there, draw the boundaries and distinctions rather differently. But still, it is advisable always to bear in mind (a) that the distinctions embodied in our vast and, for the most part, relatively ancient stock of ordinary words are neither few nor always very obvious, and almost never arbitrary; (b) that in any case, before indulging in any tampering on our own account, we need to find out what it is that we have to deal with; and (c) that tampering with words in what we*

> *take to be one little corner of the field is always liable to have unforeseen repercussions in the adjoining territory.*

This brings me to the more general points I would like to make, which I mentioned at the outset. Why should we be wary of ascribing the umbrella of the rule of law to the ideal of a free and tolerant society, which democratic constitutionalism represents? Because the rule of law is not a good enough advocate for democratic constitutionalism. Take a major issue, upon which, as I think, liberal thought has possibly lost its way. How are we to understand the core value of tolerance? Does it require the avoidance of offence? Does it mean that the symbols of one group (it may be a religious faith) should be discouraged or suppressed because they give offence to another? Does it mean that where a belief is fervently held, only moderate criticism of it should be allowed? Are the critics to be less tolerated than their targets? What tolerance is due to those who are themselves intolerant?

Today this is a very lively issue, or group of issues. Liberal thought – assuming that to be a coherent concept, which I sometimes doubt – speaks with an uncertain voice on the matter. I need not elaborate obvious recent examples. My point is only that the rule of law, as a distinct and autonomous ideal, has nothing to say about this issue of tolerance: at least nothing that is not much better said by reference to other ideals, in particular perhaps, the ideal of free expression. For the question must surely be, what in this field justifies interference with free expression? I cannot see that the rule of law of itself offers an answer. But this is one of the most pressing issues in our modern polity.

Where do we find an answer to this question about the limits of free expression? It is sometimes said that everyone's beliefs are entitled to respect. You cannot grapple with ideas like that by reference to the rule of law. The proposition must be tackled head on. By any reasonable measure of the meaning of *respect*, it is plainly false. It is obviously untrue that everyone's beliefs are entitled to respect. Some people believe the most horrendous things. Some people believe that children should be tortured or killed because that will exorcise an evil spirit. Some people believe – still believe – that a race, or a class, is so inferior to their own that its members should be treated as lower than the low: as untermensch. Some people believe that a person who abandons his religion for another should be killed for doing so. By the lights of any remotely civilised standard, these beliefs are repulsive. None of them is remotely entitled to be respected.

At the same time, anyone must be entitled to believe these things. That is a function of free thought. As Queen Elizabeth I said, we are not to 'make windows into men's souls'. And anyone is entitled to express these views – and to criticise and condemn them. That is a function of freedom of speech. It is

not the rule of law that tells you these things. The woolly notion of respect cannot justify any interference with free expression, and free expression must be stoutly defended in the face of it. The rule of law, as argument or as rhetoric or as advocacy is not up to the job. In the face of gathering storms which threaten to crush essential liberties, as I said at the beginning the term 'the rule of law' is losing force, is in danger of becoming a wasted asset.

Lord Bingham points out that s1 Constitutional Reform Act 2005 refers in terms to 'the existing constitutional principle of the rule of law', though the principle is not defined in the statute. No doubt we must respect the fact that Parliament has chosen to categorise the rule of law as a constitutional principle. But we are not, I think, required to embrace some over-arching sense of the term which asserts more than the term contains.

At the end of his Sir David Williams lecture Lord Bingham says this:[22]

> *There has been much debate whether the rule of law can exist without democracy. Some have argued that it can. But it seems to me that the rule of law does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy. The individual living in society implicitly accepts … the constraints imposed by laws properly made because of the benefits which, on balance, they confer. The state for its part accepts that it may not do, at home or abroad, all that it has the power to do but only that which laws binding upon it authorise it to do.*

This variety of the social contract, powerful as it is, can be stated without commitment to a substantive, 'democratic constitutionalism', meaning for the rule of law. I think that Lord Bingham's argument assumes, but does not demonstrate, such a substantive meaning. With respect I prefer a more modest approach to the rule of law. Let it express law's distinct virtue. Other virtues, for whose service laws are made, will have their own language, in particular the language of freedom and tolerance. They are not the handmaids of the law: on the contrary the law is their servant, or should be. We do well to recognise that law can serve a bad master. Our best defence against its doing so is to see the difference between what law is, and what it may serve. We must not treat law, and the ends of law, as if they were one and the same. The rule of law should be seen as a necessary, but not sufficient condition of other, vital, civic virtues – freedom, tolerance, and justice itself. Only thus can the true arguments in favour of those very virtues be roundly and plainly asserted.

The views I have expressed may be thought to owe something to positivism. I dislike the term positivism, despite its pervasive currency in legal literature, for it means nothing to the general educated member of the public and the academics have used it with reckless abandon in a hundred different meanings.[23] But so far as it refers a point of view which separates law from the law's moral content, I would subscribe to it with qualifications: as I have said I think the rule of law should be taken as encompassing Wade's 'framework of recognised rules and principles which restrict arbitrary power', and that goes to the content of the law. In his recent article to which I have referred, Jowell expresses his surprise[24] at an earlier comment of mine, that 'I suppose I would count myself a positivist'.[25] If I am a positivist, it is not because the substance of the law in some sense does not matter, it is because it does. The meaning of the rule of law is like the human heart: the bigger it gets, the weaker it gets. But if it is kept in its place, it will know no bounds, and we will much better confront its enemies.

A comment following Sir John Laws by Carol Harlow

In its ultra-thin meaning, the rule of law can be traced back to Aristotle's vision of a government of 'laws not men'. In other words, both government and governed are subject to the law and no one is above it. This is a formal and fairly neutral definition; it is hardly substantive but nor is it strongly procedural.[26] It is unlikely to provoke much disagreement. It is simply the basic premise of the liberal-democratic political order in which we currently live: what John Griffith likes to call 'the set up'.[27]

As the starting point for his lecture, however, Sir John Laws takes a slightly different definition couched in terms of legality. According to Craig, the rule of law requires that there be 'lawful authority for the exercise of power and that individuals should be able to plan their lives on the basis of clear, open and general laws.'[28] This is not quite the same thing. The definition in fact owes much to Hayek, for whom the rule of law 'stripped of all technicalities' simply meant that government 'in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.'[29] This anti-socialistic dogma, with its bias against discretionary power, has become the credo of economic liberalism. But economic liberals, even if they prefer thin definitions of the rule of law, are not content to stop there. In the global market, the key requirement of the rule of law is a legal order with fixed and stable general principles – together with formal rights of access to courts for the resolution of disputes. An ancillary requirement, considered vital for the protection of the rule of law itself, has been latched on.[30] Our ultra-thin definition has become procedural. In other words, the 'set up' must include courts. Even in the unwritten British

constitution, the right of access to a court has been described by Sir John Laws as a constitutional right.[31]

On this occasion, however, Sir John declares for the rule of law as defined by Sir William Wade, the distinguished administrative lawyer. Perhaps this is because Sir William qualifies his initial explanation that 'everything must be done according to law' by quickly adding that 'the law must not give the government too much power.'[32] With this addition, Sir William comes near to crossing the classical boundary between formal and substantive; in other words, he has qualified his thin definition with a slightly thicker 'substantive' one, in which a value judgment is arguably incorporated. Here he is following closely in Dicey's footsteps. Dicey's version of the rule of law is normally described as 'procedural' and is said by critics to degenerate into a 'rule of the law courts' but it too undoubtedly implies value judgments. In Dicey's formulation, the basic ideal of subjection of the government to the law of the land and 'the ordinary courts' is preceded by the statement that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.' It is this procedural protection – a right incidentally traceable to Magna Carta – that distinguishes the rule of law state: 'In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.'[33]

Here Dicey has put his finger on a significant paradox, which motors the case for a thick or substantive definition of the rule of law. The paradox lies in the fact that a state which fails to observe the rule of law may still call itself a democracy if it is directly elected by the people, though the claim would probably be dismissed by liberal democrats, who demand something more of democracy. Similarly, with the thin and procedural definitions we have been using, a state (such as Nazi Germany or the apartheid regime in South Africa) that observes the rule of law may claim to be democratic simply because there are functioning courts and the law is made in regular fashion. Surely the notion of arbitrariness means something more than irregularity? Surely the rule of law must mean something better than this?

Certainly the International Commission of Jurists thought so, when they met together in New Delhi in 1959 in the shadow of the Second World War and the close of British colonialism. Here a declaration was signed by lawyers from 53 countries, many from the developing world, which firmly situated the rule of law principle at the heart of a social democratic political agenda.[34] The declaration expressly recognised the need for strong executive and effective government capable of ensuring law and order and ensuring effective economic and social development; on the other hand, it demanded that the machinery of

governance be democratic and subject to limitations on its lawmaking powers, calling for discriminatory laws or laws curtailing civil and political freedoms to be outlawed. There is a significant link here with the human rights movement, then in its infancy. The link is still stronger in the European Convention on Human Rights, signed in 1950, where the rule of law is enshrined as a human right in Article 6(1).

In a recent lecture, to which Sir John makes reference,[35] Lord Bingham takes a similar line, the rule of law on eight 'sub-rules'. The majority simply replicate principles discussed above, are largely procedural in character, though some are greatly 'thickened'. In sub-rule 4, Lord Bingham, for example, insists that the adjudicative system should provided for resolving, '*without prohibitive cost or inordinate delay*, bona fide civil disputes which the parties themselves are unable to resolve' (emphasis added.) A reference to legal aid might be implied. And sub-rule 6, which is said to express 'what many would, with reason, regard as the core of the rule of law principle', encapsulates the essential principles of judicial review in common law systems: 'that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.' This formulation, though capable of almost infinite expansion, remains largely procedural. The same may or may not be true of sub-rule 8, which seeks to incorporate into the 'existing rule of law principle' the totality of international law, requiring 'compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.' This dogma, which entrenches deeply into national legal orders, is to say the least, politically controversial. What marks Lord Bingham's formulation as 'substantive' is, however, sub-rule 4, where it is asserted that 'the law must afford adequate protection of fundamental human rights'. The case for this is clear: lawyers – or at least lawyers of a liberal persuasion – cannot countenance a legal order devoid of moral values. They cannot face the fact that they may find themselves disarmed in face of rules that, though regularly made inside the framework of a democratic system, are quite patently unjust. The danger, as Raz so cogently observes, is that in seeking to absorb within the ambit of a single principle, 'a complete social and political philosophy', the rule of law 'would then no longer have a useful role independent of that philosophy'.[36]

Perhaps surprisingly, in view of his previous writings,[37] Sir John opts for a formal or at least a procedural definition of the rule of law. We should not allow a thin version of the rule of law to become a front behind which governments take arbitrary action or economic liberalism colonises the world but extensions to the rule of law must be ancillary to it: access to independent courts are, for example, necessary to ensure that governors observe the law. To go further is to

expect too much of a single concept. Too many eggs should not be put into one basket. With this conclusion, I can only agree.

Lord Justice Laws has been a lord justice of appeal since 1999. Prior to this, he was a judge of the High Court of Justice of England and Wales, Queen's Bench Division.

Carol Harlow is Professor Emeritus of Public Law at the London School of Economics and Political Science.

Notes

1 Craig, Administrative Law, 5th edn, Sweet & Maxwell, 2003.
2 Given at the Cambridge Centre for Public Law, 16 November 2006.
3 See n1 above, p25.
4 Ibid.
5 Craig, n1 above, pp26 – 27. As Craig makes plain this view owes much to Dworkin's work (see in particular A Matter of Principle, Harvard University Press, 1985).
6 Craig, n1 above, p26.
7 Ibid.
8 A Matter of Principle, pp11-12.
9 Craig, n1 above, p27.
10 Wade & Forsyth, Administrative Law, 9th edn, Oxford University Press, 2004, Ch2 p20.
11 [2006] 1 AC 262.
12 [2006] PL 562, footnote 2.
13 Ibid.
14 See n2 above.
15 See n6 above.
16See n3 above.
17 Respectively the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.
18 www.ourcivilisation.com/cooray/index.htm.
19 At chapter 18.
20 See n12 above.
21 Sense and Sensibilia, Oxford, 1962 pp62–63. Austin died untimely, and Sense and Sensibilia was a posthumous reconstruction by G J Warnock from notes of lectures he had given.
22 See n2 above.
23 If there is any doubt about this, it will be at once dispelled by a glance at the Notes (p302) to the second (posthumously published) edition of Hart's great work The Concept of Law.
24 Footnote 7.
25 'Who shall be Master? Or, Constitutional Law and Rules of Recognition', Clifford Chance Lecture, February 2006.
26 P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467.
27 J Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159, 165.
28 P Craig, Administrative Law, 5th edn, Sweet & Maxwell, 2003, p25.
29 FA Hayek, The Road to Serfdom, Routledge, 1944, p55.
30 E-U Petersmann, 'European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO', in G de Burca and J Scott (eds), The EU and the WTO, Hart Publishing, 2001.
31 *R v Lord Chancellor ex p Witham* [1998] QB 575.
32 H W R Wade, Administrative Law, Clarendon, 1961, p6. Sir John in fact cites H W R Wade and C Forsyth, Administrative Law, 9th edn, Oxford University Press, 2004, p20.

33 A V Dicey, Introduction to the Study of the Law of the Constitution, 10th edn, Macmillan, by E Wade, 1959, pp187-196.
34 International Commission of Jurists, *The Rule of Law and Human Rights – Principles and Definitions* (1966).
35 Lord Bingham, 'The Rule of Law', unpublished lecture for the Cambridge Centre for Public Law, 16 November 2006.
36 J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195. See also J Raz, 'The Politics of the Rule of Law' (1990) 3 *Ratio Juris* 331.
37 J Laws, 'Law and Democracy' [1995] PL 72; 'The Constitution: Morals and Rights' [1996] PL 622; 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] PL 59. But see J Laws, 'The Limitations of Human Rights' [1998] PL 254.

The ICJ, the United Nations system and the rule of law

HE Judge Rosalyn Higgins, with a comment by Dr Chaloka Beyani

This is the text of the public lecture given at the London School of Economics and Political Science on 13 November 2006 as part of the rule of law lecture series organised by the LSE Law Department and Clifford Chance in conjunction with JUSTICE. Dr Chaloka Beyani was the discussant on that date; his comments follow the text of the lecture.

Dicey famously identified three principles which together establish the rule of law:[1]

> *(1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.*

How then, in this national model, should an 'international rule of law' look? There should be an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially reviewable for constitutionality, laws known to all, applied equally to all, and independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent manner.

One has only to state this set of propositions to see the problems. There is manifestly no world government system into which the model could most easily fit. (Interestingly, there existed, in the 1950s, an 'international rule of law' movement, which saw the recently established United Nations system as a precursor to a world government and the achievement of an 'international rule of law'). The UN General Assembly is indeed representative of the international community, with each state having one vote. But the 'executive' of the UN consists of 15 members, five of whom are 'permanent' and hold a veto, and ten of whom are broadly representative of the membership as a whole. These latter serve a rotating two-year term. Kofi Annan, among others, has pushed for a restructuring of the Security Council (for broadly 'rule of law' reasons), but the many difficulties in achieving this are not yet resolved.

The realities of power, coupled with the promotion of their own interests and the protection of other favoured states, means that the decisions of the Security Council, while striving for a principled application based on UN Charter requirements, are subject to 'the achievement of the possible'. That in turn means that Security Council decision-making is not always regarded as 'applicable equally to all'. Arguments about consistency in the application of sanctions to different states said to be violating the Charter illustrate the point.

Are these decisions judicially reviewable for non-arbitrariness and for constitutionality? This is one of the great unanswered questions: the International Court of Justice (ICJ or International Court) is a main organ of the UN and its principal judicial organ. Whether it may judicially review the decisions of other organs, taken within the field of their allocated competence, is not yet fully determined. The issue came to the forefront in the *Lockerbie* cases,[2] where Libya asked the court to find invalid certain Security Council decisions regarding sanctions in the face of a refusal to hand over to the United States or the UK the persons indicted for the downing of Pan Am Flight 103. The case was withdrawn by Libya (when the matter moved instead to a 'Scottish Trial' of these persons in the Netherlands) before the matter could be resolved by the International Court.

The law that the ICJ applies is certainly known to all to whom it is applicable, being international law generally (with all the treaties, judicial decisions, and international customary law that that entails), with, of course, the Charter in centre stage. The court is indeed both independent and representative – judges being nominated nationally but elected by the General Assembly and the Security Council, under terms whereby their conditions of service may not be altered during their tenure. Although the court reports annually to the General Assembly on its year's work, the judicial decisions are subject to no comment (still less rebuke) by the Assembly or its members. There is a proper separation of powers, and the judges of the ICJ are mercifully free of any pressures from their national governments. That the court applies the law consistently and impartially is doubted nowhere.

Looking to another 'rule of law test', the International Court can, and does, resolve disputes between the member states. The court contributes to preventing conflicts arising in the first place, to addressing post-conflict situations, and to aiding reconciliation, depending on the circumstances of the case in question. Since 1946, the ICJ has, through its judgments, helped maintain and restore friendly relations between countries and prevent tensions from degenerating into military conflict. We have helped stop good inter-state relations deteriorating with decisions in cases such as *Kasikili/Sedudu Island (Botswana/Namibia)*[3] and *Pulp Mills on the River Uruguay (Argentina* v *Uruguay)*.[4] In other cases, there

was already fighting on the ground at the time the case was brought to the International Court. This was the situation in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*.[5] Given that 1800 kilometres of land frontier, the vast Bakassi Peninsula, and the entire maritime delimitation offshore were all under litigation, the political and economic issues at stake for both of the states were enormous. With some assistance from the Secretary-General, the court's judgment – in which the Bakassi Peninsula was stated to belong to Cameroon – is being implemented step by step. Good relations are resumed and the military have stepped back. Then there is the situation where a case comes to the court too late for it to assist in stopping the fighting, but in time, perhaps, for judicial input to contribute to the process of conflict resolution. This occurred with the case concerning *Armed activities on the territory of the Congo (Democratic Republic of Congo v Uganda)*.[6] The judgment on the merits issued last December contains detailed and objective findings which helped resolve at least some of the intractable issues of fact and law in the Great Lakes region. We will see, after the Congo elections, if they are able to use the court's favourable findings to negotiate a settlement that assists in drawing a line under the Congo-Uganda hostilities of a few years ago.

Contrary to a widespread misconception, the court's judgments are both binding and almost invariably complied with. Out of the 91 contentious cases that the court has dealt with since 1946, only four have in fact presented problems of compliance and, of these, most problems have turned out to be temporary.

But the court is restricted, by its statute, to inter-state disputes. The criminal behaviour of individuals (that is, criminal under international law, being war crimes, crimes against humanity or even genocide) is beyond the competence of the ICJ. It is for that reason that we have seen in recent years the establishment of the international criminal courts and tribunals. The international criminal tribunals for the former Yugoslavia and for Rwanda were set up by the Security Council to render accountable those individuals charged with violating the laws of war and humanitarian law in those countries. They are subsidiary organs of the Security Council and are doing important work, but they have now entered their end game and in a few years will be wound up. There is also the permanent International Criminal Court, which has jurisdiction to prosecute individuals responsible for the 'most serious crimes of international concern'. It is currently investigating alleged crimes in the Democratic Republic of the Congo, Uganda, and Sudan. The ICC is established by treaty and is technically not a UN court at all, though it is in a close relationship with the UN and with the Security Council in particular.

If the international rule of law requires a consistency in the application of the law, do these different courts present the risk of 'fragmentation' – ie

different courts applying the law differently? Of course in a national system there are many different courts, so that risk is always present – but there is a hierarchical structure, which is lacking in international relations. Even though the ICJ is generally regarded as being 'at the apex' as the only court of universal jurisdiction and as the UN's principal judicial organ, it is not 'the final court of appeal' for all the others. In my view, the risk of fragmentation is manageable and can largely be avoided by forming cordial relationships with the various international courts and tribunals involving the regular exchange of information and open lines of communication. To date, the general picture has been one of these courts seeing the necessity of locating themselves within the embrace of international law, and desiring to follow the judgments and advisory opinions of the International Court of Justice.

A more disturbing element, in my view, is the ease with which it is accepted by states as a 'given' that recourse to the International Court by states to settle their disputes must always continue to be based on consent. The statute of the court is annexed to the Charter and each of the 192 Member States of the United Nations is thereby a party to the statute. Of these, 67 states have accepted the compulsory jurisdiction of the court in accordance with Article 36, paragraph 2, of the statute. Furthermore, approximately 300 treaties refer to the court in relation to the settlement of disputes arising from their application or interpretation. States can also come to the court by agreement, ad hoc. Thus the 'consent' requirement is mitigated and, in these ways, the court does play a significant role in international judicial settlement. But the absence of a compulsory recourse to the court falls short of a recognisable 'rule of law' model. There is no hint of change here in all the UN reform documents.[7] We could draw a comparison with the European Court of Human Rights and the European Court of Justice.

All in all, it is clear that the domestic rule of law model does not easily transpose to international relations in the world we live in.

What is interesting, however, is that the *phrase* 'rule of law' is today very much in vogue in international relations, though it is far removed from what we have been talking about thus far.

Speaking on the international rule of law, the representative of India recently observed during a debate in the Sixth Committee of the General Assembly:[8]

> *The rule of law is often advanced nowadays as a solution to abusive governmental power, economic stagnation and corruption. It is considered fundamental in promoting democracy and human rights, free and fair markets and fighting international crimes and terrorism. It is also seen as*

> *an essential component of promoting peace in post-conflict societies. The rule of law may therefore have a different meaning and a different content depending on the objective it is seeking to achieve.*

The EU representative stated that 'the respect for the rule of law is a cornerstone for the peaceful coexistence of nations'. It seems that the expression 'peaceful coexistence' has gained currency beyond its classic usage in Communist phraseology and has been adopted by the broader diplomatic world. And Switzerland, for its part, noted that there was a risk of 'mere rhetorical declarations' about the international rule of law and could only suggest that the task of definition be turned over to the UN Secretariat.

We get a sense of the enormity of the scope of the concept of the international rule of law when reading the Outcome Document that resulted from the meeting of more than 170 Heads of State and Government at United Nations headquarters during the 2005 World Summit.[9] This document is essentially a statement on everything that the representatives of the international community can agree on. In that light, it is rather impressive. It covers topics as broad-ranging as domestic resource mobilisation, debt, education, HIV/AIDS, migration, terrorism, refugee protection, and reform of the UN Secretariat. There is a specific section on rule of law in which the heads of state and government recognise the need for universal adherence to and implementation of the rule of law at both the national and international levels by, inter alia, supporting the establishment of a Rule of Law Assistance Unit within the UN Secretariat. This unit would strengthen UN activities to promote the rule of law, including through technical assistance and capacity-building. It was expected to adopt concrete measures such as establishing independent national human rights commissions, reintegrating displaced civilians and former fighters, and increasing the presence of law enforcement officials. You can readily see how conceptually dispersed is the idea of 'the rule of law'. More than one year after this specific request, the unit still does not exist and there have been recent calls by a number of states for the Secretariat to take action to create the unit as soon as possible. For once, the delay seems to be with the UN rather than with the member states, and just perhaps reflects a professional scepticism.

Within the discrete Rule of Law section of the Outcome Document there is also explicit recognition of the International Court's role in adjudicating disputes between states and calls on states to consider accepting the court's jurisdiction and to consider means of strengthening its work. This raises the question whether the International Court is expected to do something different from that which it regularly does within the rule of law framework. Or is it simply that the Court's normal work is seen as rule-of-law-supporting? At this stage of the debate, the latter view is dominant.

The Outcome Document strongly makes the point that the attainment of the international rule of law is dependent also upon a *national* rule of law situation. I can readily agree that effective national rule of law is necessary for implementing international norms, but in my view it is not sufficient to that end. A stronger rule of law at the national level will result in a greater degree of compliance with the international legal order, but it will not strengthen the international legal order per se. Action to strengthen international institutions and to promulgate publicly international law, enforce it equally and adjudicate international law independently is also essential.

I have mentioned the specific part of the Outcome Document dedicated to the idea of the rule of law. But the concept of the rule of law permeates the Outcome Document as a whole and is closely linked to sections on human rights and democracy. The Heads of State and Government stated:[10]

> *We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognise that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.*

A direct result of this commitment was the decision to create a Human Rights Council, on which I will say a few words. In April 2006, the General Assembly passed a resolution replacing the Commission on Human Rights with the Human Rights Council. The Council is to perform a regular periodic examination of *all* states, regardless of their human rights record. As a former member of the Human Rights Committee, it has immediately struck me that this is precisely what the Committee does. The difference is that the Human Rights Committee is composed of 18 independent experts acting in their personal capacity. The Human Rights Council, in contrast, is composed of 47 state representatives. I am somewhat concerned that the Human Rights Council which necessarily will remain a political body – will detract from the – dare I say it – more serious work done by the Human Rights Committee. There is a risk that states will now say that it is enough that they are being examined by the Human Rights Council, and that they will take the examination by the Committee more lightly – an examination that is likely to be deeper and more serious, and less politicised. I have always thought that, as well as engaging in necessary reforms of what does not work well, the UN should nurture that which does work well. I would put periodic examinations by the Human Rights Committee (and indeed, its work more generally) into the latter category.

It may be seen that the Outcome Document reflects the various tensions within the UN membership. Just as we have been through an era in which cultural and regional particularities of human rights have been contested, it seems that we are now entering into debates as to whether democracy is a universal value or not. The Outcome Document affirms that democracy is a 'universal value' and insists upon its importance for the rule of law. It presents democracy not as a form of government, but as a value 'based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.[11] The document is careful to note, however, that there is no single model of democracy and observes that it does not belong to any country or region.

The Outcome Document has also needed carefully to balance the authority of a state over its own citizens, which it articulates as a *duty* to protect, with a duty of the international community to act if the state fails in this most fundamental of duties. Thus:[12]

> *Each individual State has the responsibility to protect its populations from [such crimes]. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.*

So far as the international community is concerned:[13]

> *[It], through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII,* ***on a case-by-case basis and in cooperation with relevant regional organisations as appropriate****.*

The realities behind these carefully chosen words lie in an understanding of the issues that divide the UN membership. Thus, 'on a case-by-case basis' means that the Security Council will still decide ad hoc which situations to act on, with the veto power of the permanent five members in place. This, definitionally, falls short of the rule of law principle of 'the law being equally applied to all', which is not always achievable in Security Council decision-making.

The phrase 'in cooperation with regional organisations' alludes to some recent history in the realm of peacekeeping. Over time peacekeeping has taken on a multitude of forms and has been directed towards a multitude of purposes.

Some operations have been enormously successful, some have foundered. Under Secretary-General Boutros Ghali, there began an era of seeking to use regional organisations as an aid to UN action. This idea finds its basis in Article 53 of the Charter, which provides that '[t]he Security Council should, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority'. In fact, the first body turned to for this assistance was a body that has never described itself as a regional organisation. NATO has always insisted that it is a collective self-defence organisation, but in the Balkans NATO became an international peacekeeper acting, as it itself clearly stated, within the parameter of agreements forged with the UN and essentially under its authority. There continue to be attempts by the UN to utilise, or at least to bless, the use of regional organisations. We have seen ECOWAS involved in peacekeeping efforts in Liberia since 1990 and the African Union, with the full support of the UN, doing what it can in Darfur.

In the height of the Cold War, the Security Council could agree on little. Now, there is a great deal of common interest within the Security Council, which often meets privately in order to avoid having debates that are largely directed at the domestic audiences of the members. It has sought tools aimed at strengthening the rule of law in conflict and post-conflict situations, both thematically and in country-specific situations. It has engaged in the fight against impunity for international crimes by setting up various ad hoc criminal tribunals. And it has been working to enhance the efficiency and fairness of the sanctions regime. States that are not represented on the 15 member Council may view this range of activities with apprehension and emphasise that the General Assembly is the chief deliberative, normative, policy-making and representative organ. Last month in the Sixth Committee, there were a number of statements by delegations about the need to delineate the responsibilities of the General Assembly and the Security Council as well as comments about the Council itself needing to respect international law. Thus South Africa noted that the binding nature of the decision of the Council when acting under Chapter VII requires that it pay due attention to the rule of law, and always comply with legal norms itself. Others said that the Council should not seek to usurp the Assembly's role particularly in relation to lawmaking. India, for example, firmly stated that the development of international law is a function of the General Assembly and not the Security Council. Yet the recently highly active Security Council is engaged in much 'law-making' – whether in relation to international criminal tribunals (including the new arrangements under preparation for Lebanon) or otherwise.

There are publicly diverse perspectives also on the implications of the rule of law for the principle of the equal sovereignty of states. South Africa, for instance, urged the Sixth Committee to consider the extent to which international law is respected equally by all states and the 'impact of power on the equal application

of international law'. In contrast, China argued for distinct approaches at the international and national levels. It said that the 'democratisation of international relations should be promoted as a prerequisite and basis for the rule of international law' and the 'uniform application' of international law should be ensured. But when it turned to the rule of law at the *national* level, particularly in post-conflict situations, China emphasised 'full respect for the sovereignty of the countries concerned and no interference in their internal affairs'. It stated that the rule of law at the national level should be developed on the basis of a country's particular situation rather than a 'one size fits all' formula.

In addition to these rather abstract discussions, very concrete measures to strengthen the rule of law were proposed during the Sixth Committee debate. There was considerable support for the idea of an annual treaty event involving not only the signing of treaties, but presentations on best practices and lessons learned regarding the implementation of key treaties under a specific theme each year. It was suggested that the UN Secretariat could produce model legislation or, as Malaysia suggested, create a database of national implementation laws. There was also a general call for the regular dissemination of information on activities of the General Assembly, international courts and tribunals and the International Law Commission.

As you can tell from this overview of recent developments, there is general agreement about the importance of the subject of the rule of law at the UN these days, but the breadth of the subject is such that it could end up meaning 'all things to all people'. There is already a gap emerging between the objectives of different delegations. The sponsors of the agenda item, Liechtenstein and Mexico, have been pursuing the idea of promoting cooperation and coordination on the implementation of the rule of law at national and international levels. They emphasise the need to consider the rule of law in a comprehensive manner and would like to have a report by the Secretary-General describing all the activities of the UN in this field, including good offices, mediation and dispute settlement, efforts to facilitate access to international justice and compliance with judgments rendered by international courts and all related capacity-building activities. They are focused on making linkages between the different activities to build the coherent global framework that they perceive as necessary for the rule of law.[14] The United Kingdom, on the other hand, prefers to focus on the re-establishment of the rule of law in post-conflict situations. The EU delegate noted that during times when the need for justice is greatest, the structures for its deliverance may have collapsed or lost their legitimacy. Canada, Australia and New Zealand have identified as a key rule of law element the altogether rather narrower but undoubtedly real topic of the 'residual' or

'legacy' issues that will arise as the International Criminal Tribunals for the Former Yugoslavia and Rwanda complete their work around the year 2010.

As the debate on the rule of law in the United Nations develops, it will hopefully become more focused. The topic is broad and the interests of various states are diverse. The difficulties of transposing the national rule of law model to the international context are also apparent. The concept of the 'international rule of law' is still a work in progress.

Comments by Dr Chaloka Beyani

The rule of law in international affairs is a useful but somewhat odd concept. Its application to the international sphere is qualitatively different from national legal systems. For a start, the international rule of law applies amongst a diverse community of equal and sovereign states with common as well as different interests, and with their own systems of law in which the rule of law applies, more so in some than others. The attitude of states towards the rule of law in international affairs is sometimes characterised by their attitude towards their own rule of law at national level.

A major factor pertaining to the term 'the rule of law in international affairs' is that the nature of rule finding and rule application is a complex process, based on a variety of sources which have a dynamic relationship, eg between treaties, custom, and general principles of law. In most cases, the sources do not singularly give rise to the applicable rules. A further aspect of the rule of law corresponds to the organic structure of the UN as an international or global organisation, with the Security Council as the executive organ, the General Assembly as the deliberative organ, and the ICJ as the principal judicial organ. In national legal systems, the separation of powers between the executive, the legislature, and the judiciary is the hallmark of the system of checks and balances which underlies the rule of law.

But there the analogy ends, at least in some respects. The Security Council makes binding decisions in a wide range of international affairs concerning peace and security, and takes enforcement action; its decisions and actions are not counterbalanced or checked by the General Assembly. The General Assembly largely makes recommendations but it may not deliberate on any matter which is formally on the agenda of the Security Council. The ICJ as the principal judicial organ does not exercise a check and balance function as do domestic courts. In jurisdictional terms, the *Lockerbie* case is the closest that the court came to examining the relationship between the Security Council and the court.

Unlike national courts, each of the decisions of the ICJ applies different facts of the law to complicated issues: eg *DRC v Uganda* involved the use of force, international humanitarian law and occupation, human rights, diplomatic relations, and the illegal exploitation of natural resources. Judge Higgins has referred to the ongoing issues arising from the decision of the court in the land and maritime boundary between Cameroon and Nigeria. The area of territorial disputes is one which African states have mostly submitted to the jurisdiction of the court. One reason for this may be that no one wants to go down in history as having surrendered a portion of the territory of their state to another state; judicial settlement may then be seen as a 'safe' bet – after all, the decision will have been made by the court. An outstanding issue in the *Cameroon v Nigeria* case concerns the status of the Nigerian population inhabiting territory that the court has apportioned to Cameroon.

The court's decision in *DRC v Uganda* was particularly significant in that the case marked the first time that one state in Africa commenced proceedings against another on the issue of the use of force. The decision had an impact on the Great Lakes peace process in that it restored a parity of esteem between the DRC and the other states involved in the process, given that the DRC had the weight of law behind it.

HE Judge Rosalyn Higgins is President of the International Court of Justice.

Dr Chaloka Beyani is a Senior Lecturer in Law at the London School of Economics and Political Science.

Notes

1 A V Dicey, Introduction to the Study of the Law of the Constitution, Elibron Classics, Ch 4.
2 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident and Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (1992-2003); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (1992-2003).
3 *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports* 1999 (II), p1045.
4 *Pulp Mills on the River Uruguay (Argentina v Uruguay), Request for the Indication of Provisional Measures, Order*, 13 July 2006.
5 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports* 2002, p303.
6 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment*, 19 December 2005.
7 See, for example, 'In larger freedom: towards development, security and human rights for all', Report of the Secretary-General, UN doc. A/59/2005.
8 Statement by the Hon Tariq Anwar, Sixth Committee, 61st Session, 17 October 2006.
9 UN doc. A/RES/60/1 (24 October 2005).
10 Ibid, para 119.
11 Ibid, para 135.
12 Ibid, para 138.
13 Ibid, para. 139 (emphasis added).
14 UN doc. A/61/142.

The rule of law: the European dimension

Jonathan Faull, with a comment by Professor Damian Chalmers

This is the text of the public lecture given at the London School of Economics and Political Science on 29 November 2006 as part of the rule of law lecture series organised by the LSE Law Department and Clifford Chance in conjunction with JUSTICE. Professor Damian Chalmers was the discussant on that date; his comments follow the text of the lecture.

When discussing the rule of law, sometimes lawyers tend to refer only to national or international matters. The EU dimension seems to be somewhat neglected. The EU legal order fully recognises the importance of the rule of law. Indeed, I will argue that the rule of law and fundamental rights are at the core of the Union's identity.

European law makes the EU what it is. Its founding treaties are not gathering dust on foreign ministry shelves, but are living, breathing documents argued about in courts the length and breadth of the EU. They are also the subject of heated political controversy and are responsible for many of the differences between our lives today and those of our younger selves and our forebears in 1958 or 1973. What brings those treaties to life is the rule of law. Rights and obligations of states, individuals and companies can be enforced and so are taken seriously by all concerned.

Rule of law as a founding principle of the European Union

Article 6(1) of the EU Treaty

Article 6(1) of the EU Treaty states (emphasis added):

> *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.*

These fundamental principles are closely linked and interdependent. In particular, the relation between the rule of law and respect for fundamental rights is of great importance. In a democratic society the rule of law, introducing pre-established rights and duties, creates a secure area of autonomy and settled expectations of individuals, which is a crucial prerequisite for an effective enjoyment of fundamental rights. That is why talking about the rule of law

within the European Union inevitably involves the question of respect for fundamental rights, and it is from this perspective that I will address the issue.

ECJ case-law

The importance of both the rule of law and fundamental rights as general values of the Community was recognised by the European Court of Justice (ECJ) even before they were solemnly proclaimed in the EU Treaty. The ECJ held first – as early as 1969 – that fundamental rights form an integral part of the general principles of Community law, protected by the court. Since then, the ECJ has confirmed and extended this case-law, identifying a long list of fundamental rights which have to be respected by the EU institutions and by the member states when implementing Union law.

Later on, in a judgment given in 1986, the ECJ emphasised that the Community is based on the rule of law, and neither its member states nor its institutions can avoid review of the measures they adopt to assess their compliance with the Treaty.[1]

Subsequently, the ECJ made the link between the rule of law and fundamental rights even more explicit by extending the scope of the review of the acts of the Institutions required by the rule of law to include compatibility with fundamental rights:[2]

> *The European Community is … a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.*

In other words, the rule of law necessarily involves compliance with fundamental rights.

The ECJ refers to the rule of law in the context of legal remedies, that is to say the fundamental rights to effective judicial protection and access to court. An example of the importance attached by the ECJ to the right to an effective remedy can be found in a recent judgment given on 19 September 2006 in the case of *Graham J Wilson v Ordre des avocats du barreau de Luxembourg*.[3] The case concerned a refusal of the Luxembourg Bar Council to register Mr Wilson, a British national. The ECJ stressed the independence of the courts in holding that, since the appeal against a decision refusing registration at the Bar had to be challenged at first instance before a body composed exclusively of lawyers practising in Luxembourg (and on appeal before a body composed for the most part of such lawyers, while the appeal before the Luxembourg Supreme Court

permitted judicial review on points of law only), the condition of impartiality required by the Community definition of 'court or tribunal' was not satisfied.

Charter of Fundamental Rights of the EU

In its preamble, the Charter highlights democracy and *the rule of law* as the principles on which the Union is based, alongside the indivisible, universal values of human dignity, freedom, equality and solidarity.[4] It reaffirms the rights arising out of the constitutional traditions and the international obligations common to the member states, in particular the European Convention on Human Rights which applies to EU institutions and member states when they are implementing Union law.

A main purpose of the Charter was to make fundamental rights, which are referred to in Article 6 of the EU Treaty and in the case law of the European Court of Justice, more visible to EU citizens. While the Charter is not a legally binding instrument, it brings together the fundamental principles resulting from the constitutional traditions of our member states, many of which are binding general principles of law in national law and following judgments of the ECJ.

The Court of Justice has recently upheld the relevance of the Charter in a case concerning *Directive 2003/86/EC on the right to family reunification*.[5] While recognising that the Charter is not a legally binding instrument, the Court emphasised that the Community legislature itself acknowledged its importance by referring to it, alongside the European Convention on Human Rights, in the preamble of the directive in question. Considering the argument that the Charter does not constitute a source of Community law, the Court held that the Charter reaffirms:[6]

> *rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights.*

External dimension

The Union believes that adherence to the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law constitute a foundation and prerequisite for peace, stability and prosperity in any society. It therefore comes as no surprise that respect for the rule of law and for fundamental rights is one of the conditions for joining the Union. Article 49 of the EU Treaty provides that only those European States which respect the principles set out in Article 6(1) may apply to become a member of the Union.

The accession criteria defined in 1993 at the Copenhagen European Council (the so-called Copenhagen criteria),[7] require in particular that the candidate country show stability of institutions guaranteeing democracy, *the rule of law*, human rights and respect for and protection of minorities.[8] In addition, a new chapter (23) has been included in the enlargement negotiations for future accessions, which will allow for screening of the acquis communautaire for fundamental rights.

Developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms, are also among the main objectives of Union and Community policies directed at countries outside the EU.[9] In the framework of the European Neighbourhood Policy, for example, the Union offers its neighbours a privileged relationship, building upon a mutual commitment to common values such as democracy and human rights, rule of law and good governance.

Similarly, Community policy in the sphere of development cooperation must contribute to the general objective of developing and consolidating democracy and the rule of law, and to respecting human rights and fundamental freedoms.[10] Respect for human rights also plays an important role in agreements concluded by the Community in the field of development policy.

Ensuring effectiveness of the rule of law in the Community legal order

The Union continues to develop mechanisms necessary to ensure that the rule of law is fully effective. Alongside the specific mechanism envisaged by the EU Treaty, recent initiatives include a methodology for monitoring compliance of Commission legislative proposals with fundamental rights and the planned establishment of the Fundamental Rights Agency.

Article 7 of the EU Treaty – safeguarding compliance with the founding principles by the member states

The Union attaches great importance to the observance of the principles listed in Article 6(1) of the EU Treaty. Serious and persistent breaches of the common values such as the rule of law and fundamental rights by a member state would radically shake the very foundations of the Union. For that reason Article 7 provides a mechanism for ensuring that all member states respect the common values specified in Article 6(1).

Article 7 provides for two scenarios. The first arises when there is a clear risk of a serious breach of one of the principles mentioned in Article 6(1) by a member state; in this case Article 7(1) establishes a procedure which could lead the Council to address recommendations to that state. The second concerns

a serious and persistent breach of the principles set out in Article 6(1); the procedure could lead the Council to suspend rights deriving from the Treaty to the member state in question. The purpose of these procedures is to punish and remedy a serious and persistent breach of our common values. Above all, they are intended to prevent such a situation arising by giving the Union the capacity to react as soon as a clear risk of a breach is identified in a member state.

Article 7 is analysed in the Commission's Communication *Respect for and promotion of the values on which the Union is based*.[11] It stresses the importance of prevention and that the procedure is intended to remedy a general breach through a comprehensive political approach, as opposed to any individual breaches, which must be dealt with through the relevant judicial proceedings. The risk or breach identified must therefore go beyond specific situations and concern a more systematic problem.

Methodology for an a priori check of the Commission's legislative proposals for compliance with fundamental rights

The compliance of EU legislation with fundamental rights has always been, as a condition of its legality, of great significance. This is, for example, essential in my own work on asylum, immigration and the fight against terrorism.

It is settled case-law of the European Court of Justice that acts of the institutions, including those adopted in the fields of police and judicial cooperation in criminal matters,[12] must comply with fundamental rights. However, judicial review is by definition an ex post remedy, which may identify any shortcomings in law only once they have produced effects in an individual case.

To develop a more comprehensive approach focused on prevention, in April 2005 the Commission adopted a Communication on compliance with the Charter of Fundamental Rights in Commission legislative proposals, called *Methodology for systematic and rigorous monitoring*.[13] The Commission checks all legislative proposals systematically and rigorously to ensure that they respect fundamental rights.

The methodology has four main objectives:

1) to allow Commission departments to check systematically and thoroughly that fundamental rights are respected in all draft proposals;
2) to enable Members of the Commission, and the Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in particular, to react accordingly;
3) to promote a 'fundamental rights culture' throughout the institution;

4) to make the results of the Commission's monitoring of fundamental rights more visible to other institutions and to the general public.

In November 2005 the House of Lords Select Committee on the European Union published a report entitled *Human Rights Proofing EU Legislation*,[14] which examined the Communication. It made a number of recommendations as to how the European Parliament and national Parliaments might contribute to raising the standard of compliance of legislation with fundamental rights. In particular, the Committee considered whether legislative proposals should be further reviewed when they are amended during the course of negotiations in the Council and the Parliament.

Fundamental Rights Agency (FRA)

In the light of the growing importance of fundamental rights issues, the Commission proposed to set up an agency to cover the Union's institutions and member states when they implement Community law. Its task should be to strengthen the protection of fundamental rights, whose effective observance is essential in a Union governed by the rule of law.

In December 2003 the European Council decided to establish a Fundamental Rights Agency for the European Union, by extending the mandate of the European Monitoring Centre for Racism and Xenophobia (EUMC). The Commission therefore proposed a Council Regulation (EC, first pillar) and a Council Decision (EU, third pillar) to establish the agency.

Agreement was finally reached on 15 February 2007, to create the FRA. It will be inaugurated in Vienna on 1 March 2007. The FRA will be a centre of expertise on fundamental rights, providing the relevant institutions, bodies, offices and agencies of the Community and its member states when implementing Community law with assistance and expertise relating to fundamental rights. It will support them when they take measures or initiatives within their respective fields of responsibility to secure respect for fundamental rights. It will collect, analyse and disseminate data on fundamental rights when implementing Community law. It will continue the work of the EUMC on racism, xenophobia and anti-Semitism and publish an annual report on the state of fundamental rights in the Union.

The FRA will have the right to formulate opinions to the institutions and to the member states when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission. It will take measures to raise the awareness of the general public about their fundamental rights, and about possibilities and different mechanisms for enforcing them in general, without, however, dealing itself with individual

complaints. The FRA will work closely with the Council of Europe and with civil society. A special body, the Fundamental Rights Platform, will be set up to act as a link between the agency and NGOs.

The ugly mallard that would want to be a swan – the European Union and fundamental rights

Damian Chalmers

Introduction

Evaluations of the European Union's contribution to the protection of fundamental rights must proceed from a certain starting point, namely that if the European Union were to disappear, there would still be substantial legal protection of fundamental rights across the Union. The Union enjoys no exclusive monopoly over these. They preceded it, and could survive quite well and even prosper without it. The Union's contribution has to be seen as just that, no more than a contribution. Its worth lies in the 'added value' it brings to the table that is not otherwise immediately available to national governments – be this institutional resources or capacities, new forms of legal discourse or critical reflexivity. However, the contingency of EU legal worth cuts both ways with interventions by EU law being counterproductive or negative in terms of fundamental protection. In considering how EU law measures up, a couple of assumptions have to be made. One is that it is a good thing for a core of liberal values to hold sway over our continent. There may be limited disagreement about the parameters of these, but, if this is denied, then there is not even a starting point for measuring any positive contribution of the Union. The other is that, as a machinery of government with its own legal system, it makes more sense to ask about the propensities of the Union to make decisions of a particular type: its qualities as a political and legal system that lead it to push certain values and not others.

This short piece will suggest that, on these terms, the central qualities of the EU legal and political systems are that they are fragmented and weak but, aware of their unpopularity, extremely anxious to legitimate themselves to their subjects. This is most usually done by reference to the European ideal being a liberal one at whose heart sits fundamental rights. What does this all mean? The fragmented and disparate nature of the Union decision-making procedures results in its being impossible to identify the Union, other than at the most general level, with a particular view of fundamental rights. Instead, its receptiveness to fundamental rights questions depend upon the particular institutional settings within which they arise, with some being more receptive than others. This piece will suggest five broad positions are most commonly taken. In most cases, these develop relatively autonomously from one another because of this institutional fragmentation. In cases where they collide, it will be

suggested that the political weaknesses of the Union's institutions result in more restrictive positions being taken at moments of great tension. I will conclude by arguing that this should not be decried. To desire otherwise would be a desire for strong European Union government, and this is probably something that most of its citizens do not want. Furthermore, the presence of the European ideal, which reminds the Union both of its own unpopularity and its commitment to liberal ideals, acts as a powerful point of reminder, debate and critique, both about the limitations of the Union institutions and, more generally, about government in Europe.

The structural capacities of the European Union to protect fundamental rights

In terms of institutional capacity, the Union institutions do not have the resources of national administrations. The Union system of administration of justice relies on national courts' cooperation for its effect. It has no police force of its own, and, as a system of government, it is staffed by a very limited number of officials. It is, moreover, subject to pressures to which national administrations are not. There is a more crowded institutional space in which other political institutions are always looking over the Union's shoulder – be it national governments, courts, or powerful industries or NGOs – to contest not just the alignment of any decision but also its legitimacy. There is, finally, the question of pedigree. EU institutions do not have the same taken-for-granted authority that many national institutions possess. A polity as weak as the Union cannot be expected to sustain a radical counter-majoritarian jurisprudence in the name of fundamental rights. There are too many roadblocks to application, too many powerful voices arguing before the institutions against it, and too many siren voices within the institutions warning of the follies of such a path.

The Union's institutional advantages derive from this seemingly fragile predicament. It is not subject to the pressures of majoritarian politics or an active public sphere in the same way as nation states. This allows it to put forward policies unpopular with or not supported by political majorities, and to act on behalf of structurally disadvantaged constituencies whose voice is not heard with sufficient force in the domestic pressure. Furthermore, tomorrow, in one sense, always belongs to the Union. The absence of sunset clauses means that a proposal which is unpopular 99 per cent of the time still has every chance of being adopted at that moment when circumstances coalesce to bring a temporary coalition in its favour. In terms of pushing forward progressive but unpopular initiatives, this is invaluable.

Discursively, the Union suffers from two weaknesses. The first is an absence of tradition. It cannot compete with either the constitutional legacies or cultural traditions of many member states. Its claims to tell national constitutional

courts about the meaning of constitutional reason have all the authority of the drunken stumblings of a parvenu on his first outing at a party of aristocratic toffs rambling on about the heredity principle. The second is the scale of the Union. It is too big to be a community that can act as the repository for communitarian values, but too small to speak universal truths. Its rights jurisprudence is caught in the web of Euro-centrism, unable to speak for either non-Europeans or communities within the Union who dissent from 'pan Union' values. These weaknesses also give EU law a unique voice. Europe, as a symbol and an association, is always simultaneously the place where we are and the outlook beyond the horizon. I am currently in Europe and I am not, in that I am in a place called London which is surrounded by other European places. In these terms, Europe is construed as both a point of origin – I cannot deny my Europeanness however much I try – and a point of self-questioning and striving for improvement. The European idea therefore, famously, calls to lift our horizons and to consider the interests and values of others that we have not traditionally taken into account. It calls for a continual requestioning of the idea of political community: an ideal that fits well with a dynamic interpretation of fundamental rights in which we are to be incessantly attentive to the singularity of others.

The fundamental rights traditions of European Union law

These competing tensions pan out in European Union law through five leading leitmotivs. First, there is the liberal leitmotiv of European Union fundamental rights laws acting as a corrective to illiberal national traditions. This is to be found most explicitly in the case-law of the European Court of Justice (ECJ) holding national administrations to account for actions falling within the field of EC law and the Commission's administration of the Copenhagen criteria that accession and pre-accession States respect fundamental rights. Both have not sought to supplant national traditions with pan Union values but have, rather, called upon states to rethink the most fundamentalist excesses, be this homophobia in Romania, Irish or Polish abortion laws, adultery laws in Turkey or the treatment of various ethno-cultural minorities across the Union. Only in the most extreme cases, such as the treatment of the Russian minority in Estonia or Croatian non-cooperation with The Hague tribunal, are the ethical premises of the laws challenged. More usual, it is the dogmatic application of contentious laws in individual cases where human suffering is particular evident (eg the denial of abortion to rape victims or prosecutions brought against journalists or writers for violation of official versions of Turkish political identity).

The second is that of the Union as a laboratory for the development of the new standards and new fundamental rights across the Union. The history of the Union is replete with examples. There is the exploitation of the

preliminary reference procedure by various NGOs and quangos to promote equal opportunities law. There is the Convention establishing the European Union on Fundamental Rights and Freedoms, perhaps the most wide-ranging international human rights document of all and one that could only have been drafted if the limits of its enforceability remained obscure. Finally, there are the institutional innovations. These include the now independent Network of Independent Experts monitoring and comparing human rights practice in the different member states and, most innovatively and recently, the new Fundamental Rights Agency. Established on 1 January 2007, the most important functions of this body will be to act as a meeting point for civil society and to pass opinions on the compatibility of EC legislative proposals with European fundamental rights norms. The status of these opinions is unsure. In other fields, such as food safety, the legislator can only depart from the opinion if it can find an opposing opinion given by a body of equal authority and can provide reasons for why it has chosen the opinion of the latter. Even if the opinions of the Fundamental Rights Agency do not have that legal force, there will be a political price to pay for the legislature adopting legislation that it thinks violates fundamental rights. To that extent, fundamental rights has been placed at the heart of government in a manner that compares very favourably with other international organisations and the national governments of the member states. To be sure, some will declare the bottle less than half full, and that all of these innovations could go further, but the fact that there is a bottle there at all can only be seen as an achievement.

The third goes to the Union's capacity to mitigate some of the effects of the free movement of factors of production and information on national sovereignty. By clubbing together, national governments have sought to recapture this by dictating the terms of these global movements through pan Union financial, trade, migration and informational technology laws. What do we mean by 'sovereignty' here? It certainly includes territorial sovereignty, but also extends to goods that citizens expect to be delivered by their government. These include law and order, stable markets and reasonable welfare provision. To this end, the Union has delivered a series of restrictive laws to protect these in areas such as immigration and asylum, financial services, counterfeiting and organised crime. It also established networks of law-enforcement agencies and information banks to share intelligence, develop common modi operandi, and build law enforcement capacity, through arrangements such as the Europol and the Schengen Information System. These are reinforced through information-sharing agreements with third states, and, in the fields of information technology, transport and financial services, with private parties, and have been further entrenched through the establishment of pan Union agencies, such as Europol, Eurojust and the Frontiers Agency, who, whilst having no direct enforcement powers of their own, exist to stimulate, correct and

monitor national performance. The fundamental rights challenges are multiple. Accountability is diffused within these networks. The links between information, evidence and proof, and between information gathering and enforcement action become so dissolved that it becomes difficult to tell where one starts and the other finishes, and which agency is responsible for which action. Focus is also shifted away from solving pathological acts to the identification of pathogenic situations. The worse thing to happen in this netherworld of suspended legality is to be an object of suspicion – be it a suspicious migrant, engaging in suspicious financial transactions or murky behaviour on the internet. The exact nature of the act ceases to matter, as suspicion alone engages a series of sanctions, which are, in practice, insusceptible to judicial review. Finally, and perhaps most invidiously, the full force of these sanctions applies not merely to those engaging in or threatening to engage in criminal behaviour or irregular migration, but to any perceived as threatening received notions of order, the welfare state or labour markets. To be an asylum seeker, an economic migrant, hold illiberal views, be engaged exclusively in the cash economy or be a hacker is to be subject to often ill-defined and unlimited sanctions in which the notion of any commensurability between the ill of the egregious act and the response is completely obliterated.

The fourth leitmotiv is that European Union has been used to reconfigure the monopoly of violence held by each state over its territory. Law and order has traditionally been configured by national boundaries. The United Kingdom punishes those within its jurisdiction. France does the same in French territory, and so on. No longer, the European Union has provided a new quid pro quo where member states have ceded some of their power to determine laws in their territory in return for a power to punish people beyond their territories. National sovereignty has not been reduced but reconfigured without a proper reconfiguration of the safeguards. This is most visible with the European Arrest Warrant, which, for a large number of offences, gives member states a long arm reach over persons in other states which it believes have committed crimes in its territory, even if these are not crimes in the surrendering state. In corollary fashion, the European Evidence Warrant expands this power to punish by making it easier for member states to co-opt other authorities into acquiring evidence for them in their respective territories. All this inevitably raises concerns of due process but also broader questions about the responsibilities of surrendering or cooperating states, who have, in traditional human rights law, been equally responsible for egregious behaviour by the requesting state. If a person is surrendered back to degrading prison conditions, excessive pre-trial detention or for an offence (eg procuring an abortion) that would be regarded as absurd in many member states, can a surrendering state can just wash its hands of him and claim no responsibility for his subsequent treatment?

The final leitmotiv is the development in EU law of an inchoate notion of European-ness. This is not a replacement of national with European values, but rather a sense that there are a set of common values and traits that all Europeans should share. This is most evident in the 'integration' requirements now emerging in EU immigration and asylum law, which allow member states to make residence conditional upon the claimant showing that they have integrated into the host state. This integration may have to be demonstrated through knowledge of that country's history or language, but in some cases a commitment to certain political values is required. In the Netherlands, for example, individuals are required to view scenes of nudist beaches and homosexual kissing, and express their reactions on this. The conformities imposed by these integration requirements could, if expanded, become deeply repressive and exclusionary. A feature of them is that they take no account of the situation of the claimant and look purely at her assimilation. One thus has the paradox where migrant children as young as 12 years old can be subject to these integration in EU law, and, thereby taking the Dutch case, required to view graphic scenes of a sexual nature, but would be precluded from watching these scenes in local cinemas on account of their age.

Conclusion

There is thus a mixed picture in which the liberal political system of the first two leitmotivs contrasts with the more illiberal one of the last three. The diversity of institutional settings within the European Union legal system entails that these images, however, rarely come together. We find, therefore, activists pursuing an expansive equal opportunities agenda before the European courts on the one hand, whilst, elsewhere, quite uninterrupted, national policing agencies are developing a restrictive internal security agenda. This provides a sense of dysfunction, and, also, the oscillation between euphoria and despair in many fundamental rights activists' views of the Union. Occasionally, a meeting does take place, particularly most obviously with the current challenges to the European Arrest Warrant before both various national constitutional courts and the ECJ. Optimists point to the possibility of a constitutional dialogue in such circumstances. If Union institutions falter in such circumstances, national constitutional courts intervene, and vice versa, with each learning from the other. In the real world, there is little evidence of such dialogue or even coordination. In the last three years, the Polish Constitutional Court, the French Conseil Constitutionel and, most explicitly, the Italian Constitutional Court have all made it clear that they have a monopoly of interpretation over their respective constitutions. By contrast, there is little evidence by the ECJ of deferral to their opinions. A more accurate picture is that where tensions arise the Union takes the position which is least protective of fundamental rights. It is difficult to find an instance where significant Union or national legislation has been struck down for violation for fundamental rights. For there are none. Indeed,

could it be any other way? The Union is a weak political system that would have difficulty facing down entrenched national positions. More generally, it is doubtful that we would want it otherwise. Fundamental rights claims are non-majoritarian claims, and, as such, should only be invoked exceptionally to prevent abuse. They cannot be the central DNA of any government, as if they were, there would be no reason to be sceptical of government, and that is probably the greatest resource that any democratic political system can have. A weak political system that occasionally and erratically protects fundamental rights but of whose general liberal qualities we are sceptical but nevertheless wants to persuade us that it is liberal may be not only the best that we can hope for, but also the best that we would want.

Jonathan Faull is the Director-General for Justice, Freedom and Security, European Commission. He expresses his personal views in this paper.

Damian Chalmers is Professor of European Law at the London School of Economics and Political Science.

Notes

1 Case 294/83 *Les Verts,* para 23.
2 C-50/00 *Unión de Pequeños Agricultores,* para 38.
3 C-506/04.
4 Emphasis added.
5 C-540/03 *EP v Council,* judgment of 27 June 2006.
6 At para 38.
7 http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm
8 Emphasis added.
9 Article 11 of the EU Treaty.
10 Article 177(2) of the EC Treaty.
11 October 2003 (COM (2003) 606).
12 See Case C-105/03 *Pupino*.
13 COM (2005) 172 final.
14 Sixteenth Report of Session 2005-2006.

Paying lip-service to Article 10: legality and the right to protest

Sally Ireland

Being unfree, republicans argue, does not consist in being subject to restraint, but only in being subject to the arbitrary will of another.[1]

Six years after the implementation of the Human Rights Act 1998 (HRA), this article will consider its effectiveness in protecting political protest. It will be argued that while the incorporation of the HRA has led to the use of different language and tools in considering legislative and common law restrictions upon protest, it has failed to prevent excessive restrictions from taking place. In the context of modern legislative drafting techniques and executive approaches, it is suggested that the best opportunity for the protection of protest lies in a strong interpretation of the guarantee of legality in the European Convention on Human Rights (ECHR) – one that focuses on the need substantively to protect protestors from arbitrary interference, rather than merely on the form of restrictions. So far, however, the courts have not taken this approach. Instead, they have concentrated excessively upon the mere existence of the HRA as a safeguard,[2] without interpreting specifically what its requirements are in particular cases. This has left the discretion of police and other decision-makers excessively broad and ill-defined.

Democracy, legality and protest

The place of democracy as a good in its own right, and as the ideal for the social organisation of states, is now almost universally recognised, as is its interdependence with human rights.[3] As Loughlin explains, for republicans 'rights operate to ensure the realization of the conditions for an authentic deliberative democracy.'[4] Those he terms 'liberals' would recognise democratic rights – voting, free speech, assembly – as 'goods' in their own right, to be guaranteed by the law.

Loughlin's phrase, '*authentic deliberative* democracy',[5] is key in deciding which rights should be protected. It is notable that the Freedom House criteria for determining whether a state is an electoral democracy include, in addition to secret ballots, universal suffrage, etc, a 'competitive multi-party political system' (freedom of association for political parties) and 'significant public access of major political parties to the electorate through the media and through generally open political campaigning'[6] (freedom of expression for major parties) but do not include any other civil/political rights criteria. This type of democracy,

however, guarantees no more than that 'the people merely select from amongst the [main] competitors those who will take the political decisions.'[7] Only the major parties are guaranteed a place in political discourse.

The 'authentic, deliberative' democracy, however, requires a more open society where those both inside and outside political parties (major and minor) can compete for the public's attention. As Gearty has observed, to maintain democracy (in this sense), the rights that he groups as 'civil liberties' – including freedom of expression, association, and assembly, as well as the right to vote – are needed universally.[8] He also notes the necessity of the enforcement of legality[9] – the purpose of which, in his definition, is confined to requiring 'that all legal authority come only from the elected branch'.[10]

Gearty contrasts his view of legality with that of Allan, who regards 'the rule of law' (his preferred term) as 'not the faithful application of whatever rules emerge from the political battle, regardless of content, but rather the subjection of government (and other significant sources of power) to principles of justice and fairness which express the community's enduring commitment to fundamental ideas of human freedom and human dignity.'[11] These approaches are clearly very different: one focuses on judicial constraint of legislative zeal, the other upon what occurs in the legislative process.[12]

However, even a perfectly constituted democracy can pass legislation repressive of civil liberties such as political expression. When this occurs, democracy is evidently compromised since it weakens the ability of the 'defeated factions … [to] … try to undo this work and win authority from the crowd for their own brand of truth.'[13] Future legislation therefore lacks democratic legitimacy. For this reason, proponents of both schools of thought support controls – even judicial controls – being placed upon the legislature's ability to compromise the quality of future democracy. For Allan, political freedom of information and expression are justified as 'integral features of the constitutional interpretation of the rule of law … along with the associated liberties of conscience and association, [they] both protect and foster rational criticism of government and enable the citizen to determine the moral justification for compliance with its rules or orders.'[14]

On both views of the extent of legality, therefore, one of its important functions is to protect freedom of expression, association, etc in order to ameliorate the democratic condition of the state. Jackman's approach,[15] which favours the assistance of vulnerable groups to participate fully in social and political life, also supports this. The mechanisms with which to protect civil liberties in order to protect democracy, however, cannot be determined in the abstract, as Loughlin has said: 'they are specific to the 'institutional, political and cultural

factors concerning a specific regime at a particular time.'[16] It will be suggested that in the context of present-day England and Wales, the best tool for this task is the application, in 'civil liberties' cases, of a strong conception of the guarantee of legality in the ECHR.

The right to protest in England and Wales

In modern-day England and Wales, it is submitted, street protest is a form of political expression that is particularly vulnerable: protestors are often ordinary citizens with no strong bonds of alliance or powerful associations to protect their interests,[17] and, unlike some media companies, with little lobbying or electoral influence over politicians. Because protest will also be the only, or the most powerful, politically expressive medium open to some citizens or groups, protection of protest can therefore be seen as the litmus test for the 'authentic, deliberative' democracy in the UK context.

Further, it is also a litmus test for the efficacy of the HRA and the extent of the 'constitutional shift'[18] that it has provided. The common law provided little protection:[19]

> *English law does not recognize any special right of public meeting for political or other purposes.*

Several commentators have detailed that historically protest has been given scant legal protection in the UK – in contrast to other forms of political expression.[20] A review of the literature reveals that the effects of the 'war on terror' on the right to protest[21] are the latest manifestation of an historic problem:[22] the lack of legal protection for protestors has both contributed to, and been informed by, a public, official and political view of protest as associated with violence and anti-democratic activity rather than an important part of democratic debate.[23] The power of such labelling to restrain authentic democracy has been recognised by some of the world's less democratic governments in the context of the war on terror;[24] it has also been used closer to home to marginalise the activities of protestors by failing to differentiate between the peaceful campaigner and the violent activist.[25]

Any mechanism for protecting protest in England and Wales, therefore, must not only be able to protect it as well as any other form of political participation, but must also be able to distinguish it from conduct not deserving of such protection. This task, however, has been acknowledged to be difficult.[26] Any simple dichotomy between 'peaceful' (persuasive) protest on the one hand and activity that seeks to intimidate or to coerce on the other breaks down on the facts in many cases: is a placard bearing the image of a dead soldier in an anti-war protest designed to intimidate or to persuade? In other cases, different

participants in the same protest will be carrying out different types of act.[27] Fenwick also highlights the duality in some forms of 'direct action', emphasising the primarily persuasive purpose of some obstructive activity 'not intended to bring about the object in question, but to draw attention to a cause. Of course, some direct action must exemplify both purposes.'[28]

Modern legislation and the right to protest

The types of legislation most directly affecting protest in the UK in recent years have been statutes governing counter-terrorism, crime and anti-social behaviour. The prevailing characteristics of this legislation are overbreadth and ill-defined terminology, particularly in the definitions of both criminal offences, and discretions given to police and the courts. As Fenwick says:[29]

> *[t]hese statutes are littered with imprecise terms such as 'disorderly' or 'insulting' or 'disruptive', all objectionable under rule of law notions since protestors cannot predict when a protest may lead to criminal liability.*

The literature regarding the history of 'breach of the peace' or the public order legislation of the 1980s and early 1990s shows that this is neither a new phenomenon nor uniquely a New Labour one.[30] For example, the Public Order Act 1986 (POA) is still a very important part of the regulation of speech, and much of the recent legislation complained of by protestors takes its language from that Act: for example, the phrase 'harassment, alarm or distress', which is now the foundation of the definitions of both harassment in the Protection from Harassment Act 1997 (PFHA), as amended by the Serious Organised Crime and Police Act 2005 (SOCPA), and of anti-social behaviour in the Crime and Disorder Act 1998 (CDA) and the Anti-Social Behaviour Act 2003 (ASBA).

However, what is newer is an almost complete rejection, noted by Macdonald,[31] of the need for constraints upon the power to regulate conduct. Macdonald quotes a minister's remarks on anti-social behaviour during the passage of the Crime and Disorder Act 1998:[32]

> *It is wise to recognise an elephant on the doorstep. That is why we are not trying in the order to define the elephant on the doorstep too narrowly.*

Macdonald has posited how, in the field of anti-social behaviour, the legislation is deliberately very broadly drafted – in order to catch a wide variety of different problematic behaviours and to give decision-makers at ground level a wide scope to deal with different problems according to a 'benevolent view of state power.'[33]

The new approach – and its rejection of a strong interpretation of legality – was exemplified in a Commons debate in 2005 on the Violent Crime Reduction Bill, when an opposition home affairs spokesperson repeatedly questioned the inclusion of 'disorderly' behaviour in the considerations that could trigger a drinking banning order (similar to an ASBO), asking what would constitute 'disorder' that was not criminal but not merely high spirits. A Labour MP replied:[34]

> *[a]nyone can be a clever lawyer – there are too many in this place – but the point is that this Government are trying to tackle disorder on estates.*

This remark demonstrates that the 'benevolent view of state power' is connected to what Gearty describes as one of the dangers inherent in the incorporation of human rights: the 'difficulty' for politicians 'in seeing the rule of law as something different from the other 'vested interests' which they feel they have to take on and destroy for the good of the public.'[35]

The attitude of legislation to protest appears to be hardening, with SOCPA representing a new high in the degree of regulation.[36] The journalist and commentator George Monbiot has noted the loss of the defence of reasonableness – common to previous potentially repressive provisions such as s5 POA, s1 CDA and s1 PFHA – in the new SOCPA offence of harassment of a person in his home.[37] Reasonableness had previously been used successfully by protestors as a defence to s5 POA.[38] The omission of a requirement of reasonableness in the SOCPA offence will make it more difficult to impute to Parliament an intention that persuasive protest was intended to be excluded by the section. A similar problem is raised by ss132-138 SOCPA, which will be discussed below: the power to impose conditions on protests in the interests of preventing 'disruption to the life of the community' goes further than previous regulatory powers which referred to *serious* disruption. An amendment to require serious disruption was specifically rejected by the government in the Lords.[39] The courts will therefore have to adopt a strong approach to legality in order to prevent these powers being used arbitrarily since 'the concept of disruption is vague; any large-scale protest will inevitably cause some disruption'.[40]

SOCPA also extends the potential to use the law of trespass against protest: while the Criminal Justice and Public Order Act 1994 criminalised 'aggravated trespass', under SOCPA the Home Secretary can designate any site on the grounds of 'national security' as one where *simple* trespass becomes a criminal offence.[41] It also continues the trend of allowing draconian police directions – effectively giving police the discretion to ban a person from protesting outside a particular dwelling for three months.[42]

In the face of these legislative trends, it is necessary that the mechanism used to protect protest is capable of adopting a strong approach to statutory interpretation, in order both effectively to protect protestors from arbitrariness and to read down statutes that might otherwise limit democracy.

The context of the Human Rights Act

Gearty has described the effects of bills of rights on the process of legislation as the 'legalisation of politics'.[43] In addition to, as he describes, fettering the range of considerations applied to legislation by the legislature, this phenomenon has resulted in a reliance on the ECHR to provide implied limits upon otherwise overbroad legislation. Opposition to the breadth of provisions can be neutralised by a reminder that they may only be exercised in compliance with Convention rights.[44]

Post-HRA legislation affecting protest often creates broad executive discretionary powers, where the discretion is structured by language echoing the qualified rights in the ECHR: to be applied when 'necessary' to prevent one of a range of bad outcomes, or to protect one of a range of societal interests. For example, the new law of arrest in new s24 Police and Criminal Evidence Act 1984 (PACE) and the new Code G to PACE, the former inserted by SOCPA,[45] allows arrest for any offence, no matter how minor, subject to its being 'necessary' for one of a range of interests. Code G explicitly structures the constable's decision-making in human rights terms:[46]

> *The right to liberty is a key principle of the Human Rights Act 1998. The exercise of the power of arrest represents an obvious and significant interference with that right.*
>
> *The use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used … When the power of arrest is exercised it is essential that it is exercised in a non-discriminatory and proportionate manner.*

It is very easy, if this approach is adopted, to say that the legislation is Convention-compliant without any assessment of whether it gives scope for arbitrary action in practice.[47] The reliance on the HRA to provide all the safeguards against arbitrary interferences with rights means that individual decision-makers may be by no means certain of the legality of their actions. The status of the ECHR as a 'living instrument' also means that the legality of their actions under s6 HRA is often both vague and rapidly evolving. While this is true of all judicially interpreted bills of rights, the ECHR/HRA have added complications: the ECHR jurisprudence may concern legal systems very different from our own, and is

influential but no more under s2 HRA. The domestic courts may not yet have made a decision on point. In the recent case of *Price and others v Leeds City Council*,[48] the House of Lords held that the UK courts should follow domestic authority in the face of subsequent and conflicting Strasbourg jurisprudence.

Further, as Gearty has noted, legislation in the HRA scheme always awaits testing by the courts;[49] a s19 statement will be made by a minister on being legally advised that it is more likely than not to be found Convention compliant.[50] It is therefore necessary for the courts to impose clear limits on the powers rather than waiting for gradual clarification through the jurisprudence.

In the context of this approach to legislation and official guidance, therefore, a strong, pro-democratic conception of legality is required in order to protect protest effectively. The jurisprudence of the European Court of Human Rights (ECtHR) has enunciated the requirements of a such an approach: the criteria in *Sunday Times v UK*[51] of adequate accessibility and 'sufficient precision to enable the citizen to regulate his conduct … if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'[52] are supplemented by the emphasis in *Malone v UK*[53] that the criterion 'implies … that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded [by the Convention]'.

However, the subsequent ECtHR jurisprudence on legality has been disappointing. Feldman observes that the ECtHR has been slow to find that interferences with rights are not 'in accordance with the law'/ 'prescribed by law': he notes that the tendency of the ECtHR is only to find violations of rights on this ground when there is no real legal regime in place.[54] In *Huvig v France*, the French arrangements for interception of communications were criticised on the basis that:[55]

> *only some of these safeguards are expressly provided for in … the Code of Criminal Procedure. Others have been laid down piecemeal in judgments … Some have not yet been expressly laid down in the case-law at all, at least according to the information gathered by the Court; the Government appear to infer them … such 'extrapolation' does not provide sufficient legal certainty in the present context.*

However, in that case the ECtHR did say that the factor '[a]bove all' was that 'the system does not for the time being afford adequate safeguards against various possible abuses.'[56]

The need for adequate safeguards against abuse is, it is suggested, key to the protection of protest in the United Kingdom legal context. S3 HRA allows the courts to impose such safeguards in primary legislation so long as they 'go with the grain of the legislation' and so long as the courts are equipped to do so.[57] In protest cases such a reading is justified in order to impose safeguards that have not been included on the face of the legislation itself.

The protection of legality in recent cases on protest in the domestic courts

Almost six years after the HRA came into force in England and Wales, many challenges to the exercise of police powers against protest have been considered under its provisions. The cases deal with statutory powers under the CDA, PFHA, SOCPA, Terrorism Act 2000 (TA 2000) and ASBA, as well as common law powers relating to breach of the peace. Legality has been a primary consideration in several of the leading cases, but the extent of the discretion granted to officials in each case has not been found to infringe the requirement of legality in the HRA. Despite the opportunities offered by s3 and s6 HRA to ensure that the exercise of the powers is subject to appropriate safeguards, the courts have preferred not to utilise s3 in terms, nor to employ a strong and pro-democratic approach to legality considerations in protest cases.

The recent case of *R (Laporte) v Chief Constable of Gloucestershire*[58] (*Laporte*) seems to offer hope for the promotion of legality in relation to police powers affecting the right to protest. However, this case will not assist in relation to overbroad statutory powers, since the powers claimed by the Chief Constable – relating to breach of the peace – failed to satisfy the first *Sunday Times* criterion, there being no basis in existing law for their exercise.

The leading case on the interaction between legality and protest in the statutory context remains the judgment of the Lords in *R (Gillan) v Commissioner of Police for the Metropolis and another*[59] (*Gillan*). The factual and legal matrix in *Gillan* is in several respects typical of the problems facing protestors in post-HRA England and Wales. Firstly, the case concerned the exercise of a power – that of stop and search without reasonable suspicion under the Terrorism Act 2000 (TA 2000) – not overtly intended to be used against protest.[60] An authorisation to allow stop and search within a particular area can only be made if the authorising officer considers it 'expedient for the prevention of acts of terrorism';[61] expression can only fall within the s1 TA 2000 definition of terrorism if, inter alia, it involves a threat of 'serious violence against a person … serious damage to property' etc. The stop and search power itself, in s45 TA 2000, can only be exercised 'for the purpose of searching for articles of a kind which could be used in connection with terrorism.'

Secondly, the power in question potentially engages a cluster of rights protected in the ECHR and its protocols, not merely the obvious 'protest' rights of expression and assembly. Indeed, the rights most directly engaged, on the face of the legislation, are freedom of movement, privacy and (possibly) liberty. Article 2 of Protocol 4 to the ECHR right of freedom of movement is not incorporated, but the rights under Articles 5 and 8 ECHR were the primary rights considered by the Lords. Articles 10 and 11 are not directly interfered with by the legislation itself, but can be affected by the manner in which it is enforced (and the perception in the minds of potential protestors of how it may be enforced against them).[62] Legality therefore should be a key consideration for a court considering the impact of this legislation on protest.

Legality becomes a prime consideration because of the third characteristic dimension of this case: the provisions grant a very broad discretion to executive decision-makers. The discretion to authorise is only structured in the legislation by s44(3) TA 2000, above. The Secretary of State's participation is governed by s46 TA 2000, which does not give any criteria at all for his exercise of the powers therein (to confirm, cancel, substitute a date or time). The stop and search power itself is limited by its purpose, but 'may be exercised whether or not the constable has grounds for suspecting the presence of articles … [of a kind which could be used in connection with terrorism]'.[63] It is also governed by a Code of Practice, which stated, inter alia, that:[64]

> *The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism.*

Coupled with – and furthering – the breadth of the official discretion is the fourth characteristic – the phenomenon at which the legislation is aimed is broadly defined. 'Terrorism' in s1 TA 2000 has been given a much more detailed statutory definition than other phenomena – such as anti-social behaviour and harassment – at which legislation affecting protest is directed. Purely persuasive protest cannot amount on the face of the legislation to terrorism, while it can amount to anti-social behaviour on the face of the CDA and to harassment on the face of the PFHA. However, the breadth of the definition of terrorism has been criticised on the grounds that it can include conduct such as 'crop protestors destroying a warehouse containing GM seeds in circumstances which made clear that their intention was only to destroy the seeds themselves but not to risk any other kind of harm to those involved in GM crops'.[65] While the threat of such conduct would be coercive rather than persuasive, it is clear that its inclusion within the definition of 'terrorism' will increase the ease with which counter-terrorism powers can be used against protestors who are engaging

in purely persuasive behaviour. Metcalfe also refers to the impact of the extra-territorial extent of the definition of terrorism; the inclusion of the threat of 'attacks by non-state actors against totalitarian or authoritarian regimes'[66] may also make it easier to use counter-terrorist powers against peaceful pro-democracy protestors who merely oppose those regimes.[67]

The fifth characteristic is that the power is designed to prevent violence – in this case terrorist violence. *Gillan* has a particular national security context (since any ruling on the powers in ss44-46 TA 2000 would affect counter-terrorist policing) that is lacking from some of the other recent cases in which the higher courts have considered the right to protest and the HRA. Even in other cases, however, the potential justification often being considered for the exercise of a power against protestors is the prevention of violence, since:[68]

> *[w]hen … [the police] … do lose control of a crowd there is the consequential risk of personal injuries or death, and damage to property.*

Frequently, the complaint of claimants/applicants focuses on the failure of police to make distinctions in the treatment of those bringing the application – who claim to be peaceful – and others, present or theoretical – who use or threaten violence. In its intervention in the Court of Appeal in *Laporte*, for example, Liberty complained of:[69]

> *the 'blanket' approach of the Defendant in the present case, and the endorsement of that approach by the DC [Divisional Court] on the grounds that it was 'impractical' to differentiate between individuals … The DC has effectively placed a burden on individuals in the position of the Claimant to satisfy the police that they should be permitted to exercise their Article 11 rights, by persuading the police of their peaceful intentions.*

Gillan is also characteristic of the case-law in terms of result; the court found that the powers in question were compatible with ECHR rights, while accepting that if exercised unlawfully the individual exercise of the powers could violate those rights. Lord Bingham said:[70]

> *The power to stop and search under sections 44-45 may, if misused, infringe the Convention rights to free expression and free assembly … as would be the case, for example, if the power were used to silence a heckler at a political meeting.*

Several reasons can be put forward for the loss of the case by Mr Gillan and Ms Quinton (the other appellant). Firstly, the Lords were sceptical as to whether the rights incorporated by the HRA were engaged *at all*. They decided that stop and

search did not engage Article 5 because, inter alia, of the limited duration of the procedure. They also found that the interference with privacy did not reach a sufficient level of severity to engage Article 8.

Secondly, the case was brought as a public law challenge by way of judicial review of police decision-making. Any claim that the exercise of the powers in the individual cases of Mr Gillan and Ms Quinton were, for example, outside the scope of the statute was therefore reserved to separate county court proceedings.[71] To be successful, the appellants would have to persuade the court to find that the power required 'reading down' under s3 HRA to be compatible with the ECHR rights, or that the provisions were incompatible under s4. Furthermore, the rights potentially engaged were qualified rights; the national security context[72] and the limited nature of the intrusions upon the rights occasioned by most exercises of stop and search powers meant that the requirement of proportionality was unlikely to assist the appellants.[73]

For all these reasons, the requirement of legality was most likely to assist the appellants in this case. It was argued, therefore, that the enormous potential for intrusion into the freedom of individuals meant that the requirement that the authorising officer 'considers it expedient' to make the authorisation should be read down so as to require 'reasonable grounds for considering that the powers are necessary and suitable, in all the circumstances, for the prevention of terrorism.'[74] Lord Bingham, however, rejected this, saying:[75]

> *The principle of legality has no application in this context, since even if these sections are accepted as infringing a fundamental human right, itself a debatable proposition, they do not do so by general words but by provisions of a detailed, specific and unambiguous character.*

This passage indicates, with respect, a weak approach to legality. Even if the authorisation process only indirectly interferes with fundamental rights, it is nonetheless the legal foundation for the exercise of the s45 power in individual cases. If s44 does not conform with the requirements of legality under the HRA, then a search under s45 cannot either as the whole legal regime is tainted.

Further, the approach concentrates too much on foreseeability at the expense of substantive protection against arbitrary interferences with Convention rights. While foreseeability may be necessarily compromised in the exercise of powers with a national security dimension,[76] the protection from arbitrary power should not be compromised. The ECtHR in *Malone* said that '[e]specially where a power of the executive is exercised in secret, the risks of arbitrariness are evident'.[77]

If the authorising officer has based his decision to make a secret authorisation on entirely erroneous information, then judicial challenge will not be possible. The only safeguard against such a situation is the Secretary of State's ability to refuse to confirm the authorisation (or to make amendments to it) in s46 TA 2000. However, the Secretary of State's discretion in this regard is not structured *at all* by the section, and may also be exercised in secret. There is no requirement that the Secretary of State refuse to confirm an authorisation if, for example, he considers it to have been made unnecessarily or on the basis of inaccurate information.

Further, Liberty's argument was that proper safeguards against the disproportionate or arbitrary use of authorisations would offer one of the most effective safeguards against the arbitrary use of the power.[78] Provided that searches themselves were exercised in good faith and proportionately to the threat, a degree of flexibility would be tolerated, both because of the value of surprise and because operational and tactical considerations might militate in favour of, for example, stopping more or fewer people or stopping people of a particular description matching police intelligence.[79]

In assessing the legality of the power to stop and search under s45, the Lords stressed the need to protect people from arbitrary interferences with their rights: Lord Brown emphasised that for the requirements of legality to be satisfied, there 'must … be sufficient safeguards to avoid the risk of the power being abused or exercised arbitrarily'.[80] Lord Bingham in turn stated that the 'public must not be vulnerable to public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred.'[81] However, they considered that appropriate safeguards were in place:[82]

> *[i]n exercising the power the constable is not free to act arbitrarily, and will be open to civil suit if he does. It is true that he need have no suspicion … This cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion.*

The court therefore relied upon the formal safeguards in the legislation rather than considering the court's substantive duty to prevent arbitrary interference with Convention rights. The only substantive safeguard relied upon was the ability of the individual to challenge by way of civil claim an unlawful exercise of the power. However, as Lord Hope said:[83]

> *these are remedies of last resort. Prevention of any abuse of the power in the first place, and a tighter control over its use from the top, must be the first priority.*

Further, Gask has observed that an individual decision to stop and search without reasonable suspicion is, by its nature, almost impossible to review:[84]

> *… as long as the officer in question was searching for articles connected with terrorism (something which could only be disproved with the help of a very clumsy admission by the officer) he does not need to justify why he chose a particular person.*

Individual officers are unlikely therefore to be overly concerned about the possibility of litigation. In *Silver v UK*, while recognising that judicial remedies may form part of the guarantee of legality, the ECtHR referred to '*effective* remedies'.[85] While the use of ten or eleven searches against a single person in one day, as was alleged by a member of the Fairford protests,[86] might be relatively difficult to justify, its use on one or two occasions against the same person will be extremely easy to. Furthermore, while some activists and campaign groups may be among the more litigious members of society, restrictions upon legal aid and the protracted nature of litigation may deter all but the most hardy.[87] It should also be remembered that ex post facto remedies are particularly unsatisfactory in the context of protest, since, like expression in news media, the right is often time-sensitive.

The approach to legality in *Gillan* therefore did not, it is suggested, place sufficient emphasis on the need for substantive safeguards against arbitrary interferences with the right to protest. A stronger, pro-democratic approach to legality in this context could – as Liberty suggested – have used s3 HRA to read in the requirement that obedience to the Home Office guidance on authorisations (which required necessity) was included in the requirements of lawfulness under s6 HRA. The Secretary of State's discretion under s46 could also have been structured under s3 by reading in the requirement that he refuse to confirm an authorisation which is not justified by the threat in the area concerned, or simply by reading in criteria for him to take into account (proportionality of the authorisation; the level of threat, etc). Code A could have been found not to satisfy the requirements of legality because it did not place sufficient limits on the exercise of s44 powers.

The analysis in *Gillan* has inevitably influenced subsequent case-law on analogous powers, even in cases where national security considerations are not engaged by the case in question. *R (Singh) v Chief Constable of West Midlands Police*[88] (*Singh*) concerned the use of a police power with a very similar structure

to ss44-46 TA 2000: an authorisation granted for a purpose unrelated to protest followed by the use of a power contingent on the authorisation to control protest. The power in question, contained in s30 ASBA, allowed a senior officer to authorise the use of other powers in the section within a particular locality. The powers authorised included the use of dispersal directions to groups under s30(4), and the power to 'remove' under-16s out between 9am and 6am to their homes under s30(6).

The authorisation power in s30 ASBA is more circumscribed than that under s44 TA 2000, requiring 'reasonable grounds' for the belief that groups had intimidated, harassed, alarmed or distressed people in a locality, and that anti-social behaviour is a significant and persistent problem in the area; the consent of the local authority must also be obtained before the authorisation is made. However, legal certainty as to when an authorisation can be made is compromised by the extreme breadth of the definition of 'anti-social behaviour'. The requirements of the authorisation criteria could, it is envisaged, be satisfied in many urban shopping and entertainment districts, as well as inner-city residential areas, simply because of the number of different types of behaviour that can be classed 'anti-social'.

The powers contingent on the authorisation, however, are, potentially, draconian. That with which the court was concerned in *Singh* was the power to issue a dispersal direction to a group of two or more people, requiring them to disperse, leave the locality if they do not live there, and (in the latter case) stay away for up to 24 hours. More is required of the constable than under s45 TA 2000, however: he must have reasonable grounds for believing that the presence or behaviour of the group in any public place in the relevant locality has resulted, or is likely to result, in any members of the public being intimidated, harassed, alarmed or distressed.

The potential application to protest is obvious – and was foreseen by Parliament. As Monbiot has pointed out in another context,[89] the lack of any requirement that the 'harassment, alarm or distress' felt by members of the public is reasonable is of great concern. ASBA specifically excludes some types of protest from its ambit – in particular, marches regulated by the Public Order Act 1986. It is silent on the question, however, of static assemblies.

As in *Gillan*, the court did not consider that the requirements of lawfulness necessitated its placing limitations on the exercise of the right. Instead, Hallett LJ said:[90]

> *[o]ne or two particularly sensitive members of the public may be alarmed or distressed by conduct that would not or should not offend others. All of*

> *us who have the privilege of living in a free and democratic society must on occasions suffer some inconvenience caused by protests and protestors. Whether or not a group's behaviour on any particular occasion warrants a dispersal direction will depend on the circumstances. Police officers must act proportionately and sensibly …*
>
> *They cannot act on a whim. Both authorisations and dispersal directions must be justified on an objective basis. If used improperly or disproportionately they may be challenged. Articles 10 and 11 are there to protect the peaceful and lawful protest.*

This analysis, while emphasising the importance of protest and the role of Articles 10 and 11, does relatively little to ensure that substantive safeguards are in place. The duties to act proportionately and in accordance with Convention rights were of course already present as restrictions upon the officers' exercise of their powers by virtue of s6 HRA. Hallett LJ's approach sets the correct theoretical limits on the discretion but then passes the assessment of when Articles 10 and 11 will be complied with back to the individual officer on the ground, who is not best placed to make this judgment.

Wall LJ, who considered legality more expressly, said:[91]

> *… the powers given by section 30(4) of the Act are not arbitrary and should not be exercised arbitrarily. They can only be exercised in the circumstances identified in section 30(3). Furthermore, they must be exercised proportionately, and any improper exercise is open to challenge on public law grounds. In my judgment, these are sufficient safeguards …*

A preferable approach, it is submitted, would have been for the court to read into the section an express limitation that protest (which, it is suggested, is not incapable of definition), without more, *could not constitute anti-social behaviour* for the purposes of the section. The example given by Hallett LJ (a protest against the use of dispersal itself by people who had been acting anti-socially) would not be affected since valid grounds for dispersal would already have been provided before the dispersal direction was given. This, it is suggested, would have provided a pro-democratic approach to legality: any violent or threatening conduct could be dealt with under existing powers (including the power to prevent breaches of the peace, to remove trespassers, etc).

Singh demonstrates the importance of the requirements of legality, as opposed to proportionality, in protecting protest. A common feature of the case-law, present in *Singh*, is that the level of interference with Convention rights itself could easily be perceived as a proportionate response to the situation in

which the police found themselves. There was evidence before the court that individuals within the protest had acted in a violent and threatening manner, and had made remarks suggesting that their purpose was threatening or coercive rather than persuasive and was an attempt to prevent others from exercising their Convention rights. It is unsurprising on the facts that, once a finding of legality was made in relation to s30, its use on that occasion was not found to be disproportionate.

The focus of the proportionality inquiry on the individual interference rather than on the provisions as a whole can also made a finding of unlawfulness under s6 less likely. There was evidence in *Singh* that the police had made efforts to act proportionately, attempting to diffuse the situation through mediation between those responsible for the play and those concerned about it, and considering the proportionality of their actions on the day: the dispersal direction was chosen as a less intrusive option than the making of arrests. The potential volatility of the situation was, on the evidence, clear. There was also the dimension in this case that the duration of the dispersal direction was limited and the play's run ongoing: the protest was less time-sensitive, therefore, than in some other cases.

A focus on legality might also have concentrated the court's consideration towards the focus on the legislation upon groups. Mr Singh was unable to order his conduct so as to prevent his protest from being interfered with: as Fenwick notes, in *Ezelin v France* the analogous punishment of a peaceful protestor because of the activities of others was deemed illegitimate.[92] Arguably, the legislation does not satisfy the requirements of foreseeability.

Compare the Divisional Court's approach in this case to that of the US Supreme Court's decision in *Chicago v Morales*,[93] which considered a similar dispersal power in a Chicago city ordinance:[94]

> *the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang membe[r]." Second, the persons must be "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance …*

The ordinance was found to be contrary to the 14th amendment since it was 'unconstitutionally vague'.

Under US constitutional law, the provision in *Singh* (unlike that in *Morales*) would also be vulnerable to the 'overbreadth doctrine', which 'permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep'.[95] The *Morales* assessment of legality was, it is suggested, open to the Court of Appeal to adopt. This would have provided substantive protection for the right to protest. Part of the court's analysis was predicated on an interpretation that Parliament had intended the section to apply to protest by virtue of failing to include static assemblies in those categories of conduct specifically excluded from its ambit. However:[96]

> *… the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.*

Because of the approach in *Singh*, limitation will now have to take place on a piecemeal basis: for example, in the case of *Bucknall v DPP*[97] May LJ stated that mere presence should normally be considered insufficient for the exercise of the power. The mere fact that 15-20 youths had congregated together was insufficient in that case since their behaviour was harmless. Such litigation could be prevented by the express articulation of limitations upon provisions stemming from the principle of legality in the first test cases to come before the courts.

Legality, in the context of the criminal law, has also been considered in a case relating to ss132-138 SOCPA. These sections of the Act were introduced largely in response to Brian Haw's long-term demonstration in Parliament Square against the Iraq war. David Blunkett, then Home Secretary, justified the introduction of the law in terms of the need to enable 'people, including protesters, to be able to go about their business, and for people coming to our capital city to be able to enjoy the environment surrounding the Palace of Westminster'.[98] Earlier versions of the provisions required those wishing to demonstrate in the vicinity to give six days' notice to the Metropolitan police. Following political opposition, allowance was made for 24 hours' notice to be given, if six days was not practical. The provisions required the Commissioner to authorise demonstrations if written notice in the requisite form was received; however, they allow conditions to be placed on the demonstration as to matters such as time, location, number of participants, number and size of placards etc.[99] The conditions are triggered by their necessity to prevent, for example,

'hindrance to the proper operation of Parliament', 'risk to the safety of members of the public (including any taking part in the demonstration)' and 'disruption to the life of the community'.

Phillipson and Fenwick have noted that even in relation to 'serious disruption to the life of the community', which appears in the Public Order Act 1986:[100]

> *it has been pointed out that this vague and ambiguous phrase, 'would appear to subsume and indeed go beyond the criteria for restricting public protest laid down in Article 11(2)' of the Convention.*

In most cases, because the Commissioner's decision is issued in advance, judicial challenge will be available under Articles 10 and 11 against the imposition of conditions under the section.

A pro-democratic perspective would pay particular attention to the regulation of protests around the legislature (the area governed by the sections in fact includes the streets surrounding many government offices as well).[101] In *Edwards v South Carolina*,[102] the US Supreme Court also considered the arrest of peaceful protestors outside a legislature (for breach of the peace). The court quoted the earlier case of *Stromberg v California*:[103]

> *[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which, upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment …*

Brian Haw was the claimant in the first case challenging the legislation, *R (Haw) v Secretary of State for the Home Department and another*[104] (*Haw*). The argument in *Haw* concerned whether ss132-138 SOCPA in fact applied to Mr Haw's demonstration, since he had been in Parliament Square since before the commencement date of the sections, and since they had referred to demonstrations requiring authorisation by the time the demonstration 'starts'. The government had made a commencement order that stated that in this context starting meant 'starting or continuing'. The court necessarily, therefore, had to consider the requirements of certainty in the criminal law.

Neither the Divisional Court nor the Court of Appeal in this case considered the ECHR or HRA in their judgments – neither in terms of Article 7 ECHR nor the general guarantee of legality in the Convention. They both, however, considered the 'principle of legal policy that a person should not be penalised except under clear law' and whether the reading contended for by Mr Haw would render the statute absurd.[105] In the DC, Lady Justice Smith found that s132 construed to exclude continuing demonstrations gave 'effect to a perfectly sensible purpose' and that the 'fact that this is a penal statute makes the position even clearer.'[106] McCombe J, concurring, said that if 'Parliament wishes to require formal authorisation of lawful activity, which otherwise might be seen as no more than merely embarrassing to Government, it should say so expressly.'[107] Simon J, dissenting, seems to have been heavily influenced by the security concerns, or possibly the potential for disruption to Parliament, cited as reasons for the imposition of the restrictions. He went so far as to say that the section was passed 'because of Parliament's concern that the unrestricted exercise of freedom of expression close to the centre of Government and Parliament posed a threat to democratic freedom.'[108] The Court of Appeal overturned the judgment of the majority of the Divisional Court, finding that Parliamentary intention was clear – in part because SOCPA specifically excluded the application of s14 POA to demonstrations in the designated area, which would leave his demonstration unregulated.

A pro-democratic analysis of the sections would involve examination of the legislature's intentions in this case but would not regard them as determinative. The court, however, was being asked to determine a narrow question and not to consider generally whether the sections satisfied the Convention's legality requirements.

Conclusions

In recent protest cases, therefore, the courts have not fully taken advantage of the legality guarantee in the ECHR/HRA to restrict arbitrary interferences with the right to protest. There is a tendency to rely upon the form of safeguards rather than their efficacy in practice to restrict interference. This is coupled with two other tendencies: firstly, a failure to provide clear limits on powers by Convention-compliant readings under s3 HRA. Instead, the relevant Convention articles have been cited as implied limits on the powers (which is, of course, already the case under s6 HRA), but the police are frequently not given guidance by the courts as to when these articles will be infringed. The determination of the limits permitted by the HRA is therefore left to the executive (which is far from ideal). Secondly, there is a tendency to rely on subsequent judicial challenges, rather than prior restraint, to establish limits on powers. While there are examples of this occurring - such as *Bucknall v DPP*[109] – the higher courts miss the opportunity to lay down limits in advance

to provide clear guidance to courts in future and to official decision-makers, and to themselves contribute to the guarantee of legality by enhancing foreseeability as to when powers may lawfully be exercised.

Sally Ireland is Senior Legal Officer (Criminal Justice) at JUSTICE.

Notes

1 M Loughlin, 'Rights, Democracy and Law', T Campbell, KD Ewing, and A Tomkins (eds), Sceptical Essays on Human Rights, Oxford University Press, 2001, pp41-60, at p44.
2 See Gearty's discussion of 'standards that are merely mirages' and 'using rights to attack the realisation of rights' in CA Gearty, 'Is the idea of Human Rights now doing more harm than good?', speech at LSE, 12 October 2004.
3 See K Annan, Nobel lecture, 11 Dec 2001: '*From this vision of the role of the United Nations in the next century flow three key priorities for the future: eradicating poverty, preventing conflict, and promoting democracy. Only in a world that is rid of poverty can all men and women make the most of their abilities. Only where individual rights are respected can differences be channelled politically and resolved peacefully. Only in a democratic environment, based on respect for diversity and dialogue, can individual self-expression and self-government be secured, and freedom of association be upheld.*'
4 M Loughlin, n1 above, p44.
5 Ibid, emphasis added.
6 A Puddington, *Freedom in the World 2006: Middle East Progress amid Global Gains*, www.freedomhouse.org, p2.
7 M Loughlin, n1 above, p51.
8 See CA Gearty, 'Reflections on civil liberties in an age of counter-terrorism' (2003) 41 *Osgoode Hall Law Journal* 185, p9 of 23: '*civil liberties are those freedoms which are necessary to the proper functioning of a democratic assembly designed on the representative principle (the right to vote, the freedoms of speech, assembly, association etc)*'.
9 See CA Gearty, Principles of Human Rights Adjudication, Oxford University Press, 2004, p60: 'there can be no civil liberties without a commitment to legality: the concept is as basic to civil liberties as is the right to vote'.
10 Ibid.
11 Ibid, p62, quoting TRS Allan, 'Fairness, Equality, Rationality: Constitutional Theory and Judicial Review', CF Forsyth, and I Hare (eds), The Golden Metwand and the Crooked Cord, Clarendon Press, 1998, p15.
12 Ibid, p64.
13 Ibid.
14 TRS Allan (1999), 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 22, 238.
15 M Jackman, 'Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the Charter', (1996) 34 *Osgoode Hall Law Journal* , pp661-680.
16 M Loughlin, n1 above, p50.
17 See H Fenwick, Civil Liberties and Human Rights, 3rd edn, Routledge Cavendish, 2004, p422. Some will belong to the human rights/civil liberties organisations. For discussion of their role, see CA Gearty, 'Reflections on civil liberties in an age of counter-terrorism' (2003) 41 *Osgoode Hall Law Journal* 185.
18 *Redmond-Bate v DPP* (1999) 7 BHRC 375, DC.
19 Lord Hewart CJ, *Duncan v Jones* [1936] 1 KB 218, 222.
20 See eg CA Gearty, n8 above; H Fenwick, n17, above; G Phillipson and H Fenwick, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression', *Public Law*, 2000, Winter, pp627-650.
21 CA Gearty, n17 above.
22 See H Fenwick, n17 above, pp424-430.
23 Ibid, p429: 'a continued perception that radical views could find no place within mainstream politics'.
24 See CA Gearty, n17 above; see also examples in Human Rights Watch, *Opportunism in the Face of Tragedy: Repression in the name of counter-terrorism*, www.hrw.org.

25 For example, the use of the term 'armed anarchists' to describe those protesting against the Iraq war at the Fairford airbase, 2 May 2003, Liberty, *Casualty of War: 8 weeks of counter-terrorism in rural England* (July 2003), p17, citing the *Guardian*. See also the evidence of BUAV as to the effect of being named in court orders prohibiting harassment in *Huntingdon Life Sciences v Curtin and others*, Times, December 11 1997, QBD.
26 See H Fenwick, n17 above, pp424-426.
27 Ibid, p425 n38 re the Newbury bypass protests: '*Between 1994 and 1998 every form of protest was used, from non-violent direct action to criminal damage*'.
28 Ibid; see also *Steel and others v UK*, App No 24838/94, (1999) 28 EHRR 603.
29 H Fenwick, n17 above, p430.
30 See eg D Feldman, Civil Liberties and Human Rights in England and Wales, 2nd edn, Oxford University Press, 2002, pp1017-1036ff.
31 S Macdonald, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour', (2006) 69(2) MLR 183-213.
32 Ibid, 190.
33 Ibid.
34 *Hansard*, 14 Nov 2005, Col 717.
35 CA Gearty, 'The crisis of legalism' in Can Human Rights Survive?, Cambridge University Press, 2006, p91.
36 See S Ireland, 'Protestors and Parliaments', *Counsel* (2005) October, pp26-28.
37 G Monbiot, 'Protest as harassment', *Guardian*, 22 February 2005; see s126 SOCPA.
38 *Percy v DPP* (2002) Crim LR 835; for criticism of this case see A Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? – "Insulting Expression" and section 5 of the Public Order Act 1986', *Public Law*, 2004, Winter, pp853-874.
39 See *Hansard*, 5 April 2005 col 686-687, Baroness Scotland of Asthal: '*we must be able to ensure that those who work around Parliament are able to carry on their business without disruption and that the commissioner is able to place conditions on demonstrations to prevent this disruption. The Government believe that serious disruption is too high a threshold for demonstrations around Parliament and, given the importance of this area, the police need to have the ability to control all disruptive demonstrations.*'
40 JUSTICE, *Serious Organised Crime and Police Bill Parts 3-6 (not including cl. 124): Briefing for House of Lords Second Reading* (March 2005), para 54.
41 See ss128-131 SOCPA. See also the Serious Organised Crime and Police Act 2005 (Designated Sites) Order 2005 SI 2005/3447, in which various military sites were so designated, including RAF Fairford.
42 S127 SOCPA; see also R Smith, and S Ireland, 'Due process and social justice – time to re-examine the relationship' in Social Justice: Criminal Justice (Smith Institute, 2006), pp131-142, at p137.
43 CA Gearty, Can Human Rights Survive?, Cambridge University Press, 2006, p86.
44 See M Koskenniemi, 'The Effect of Rights on Political Culture' in P Alston , The EU and Human Rights, 1999, pp99-117, 100: the '*banal administrative recourse to rights language in order to buttress one's political priorities*'.
45 S110 SOCPA.
46 PACE, Code G, paras 1.2-1.3; cf R Smith and S Ireland, n42 above, p138: *'the Police and Criminal Evidence Act 1984 codes of practice, for example, now make specific reference to the European Convention. While admirable, this approach provides little protection for due process in policing.*'
47 See *Hansard*, 14 March 2005 col 1087-1088, Baroness Anelay of St. Johns: '*Essentially, this is a Human Rights Act assessment of the use of the powers in each case…Expecting officers to make that kind of judgment on the spot is hardly making life easier for them'.*
48 [2006] UKHL 10.
49 CA Gearty, n43 above, 80ff.
50 See D Feldman, 'The Impact of Human Rights on the UK Legislative Process', Stat Law 2004.25 (91); P Goldsmith, 'Government and the Rule of Law in the Modern Age', *JUSTICE Journal*, Vol 3 Issue 1 (2006), pp10-21.
51 App no. 6538/74, judgment 26 April 1979.
52 At para 49.
53 (1997) 24 EHRR 523.
54 D Feldman, n30 above.

55 App No. 11105/84, 24 April 1990, at para 33.
56 At para 34.
57 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at para 33.
58 [2006] UKHL 55, on appeal from [2004] EWCA Civ 1639.
59 [2006] UKHL 12, on appeal from [2004] EWCA Civ 1067.
60 See *Hansard*, 14 Dec 1999, col 154: '*The Bill is not intended to threaten in any way the right to demonstrate peacefully – nor will it do so. It is not designed to be used in situations where demonstrations unaccountably turn ugly. Should any unlawful activities occur in such circumstances, the powers available under the ordinary criminal law will, as now, suffice.*'
61 S44(3) TA 2000.
62 A Gask, 'Section 44 of the Terrorism act 2000 and the right to protest', notes of talk to Human Rights Lawyers Association, 22 February 2006; see also Liberty, *Can you spot the difference?*, www.liberty-human-rights.org.uk.
63 S45(1)(b).
64 *Gillan*, para 11, quoting Police and Criminal Evidence Act 2003 Code A (version in force September 2003), para 2.25.
65 E Metcalfe, 'The definition of terrorism in UK law', *JUSTICE Journal*, vol 3 issue 1 (2006), pp62-84, at p74.
66 Ibid, p75.
67 See *R v F* [2007] EWCA Crim 243.
68 *Austin and another v Commissioner of Police for the Metropolis*, [2005] EWHC 480 (QB), Tugendhat J, 10.
69 J Coppel, *R (Laporte v Chief Constable of Gloucestershire Constabulary)*: written submissions on behalf of Liberty, www.liberty-human-rights.org.uk, para 15.
70 At para 30.
71 See para 36.
72 Gearty cites the effect of the 'global war on terror' on this case: see n44 above.
73 On deference in national security cases see R Edwards, 'Judicial deference under the Human Rights Act', (2002) MLR 65(6), pp859-882.
74 At para 13. See also A Gask, 'Section 44 of the Terrorism Act 2000 and the Right to Protest', notes of talk to Human Rights Lawyers' Association on 22 February 2006.
75 At para 15.
76 Cf *Malone v UK*, para 67.
77 Ibid.
78 Cf A Gask, (Liberty), 'Section 44 of the Terrorism Act 2000 and the right to protest', notes of talk to Human Rights Lawyers' Association, 22 February 2006, www.hrla.org.uk.
79 See ibid: Gask suggests that such searches should be 'random'.
80 At para 75.
81 At para 33.
82 At para 35.
83 At para 57.
84 A Gask, 'Section 44 of the Terrorism Act 2000 and the Right to Protest', notes of talk to Human Rights Lawyers' Association on 22 February 2006, www.hrla.org.uk.
85 (1983) 5 EHRR 347, para 90, emphasis added.
86 See Gask, n25 above, and Liberty, *Casualty of War: 8 weeks of counter-terrorism in rural England* (July 2003), p9.
87 See R Smith and S Ireland, n49 above, p138: 'although the existence of the Independent Police Complaints Commission has to an extent improved matters, most judicial remedies will still rely upon an individual taking the case to court – which is likely to exclude those for whom social justice is most needed'.
88 [2006] EWCA Civ 1888.
89 G Monbiot, 'Protest as harassment', *Guardian*, 22 February 2005; see also R Smith, and S Ireland, n49 above, p137.
90 Paras 89-90.
91 At para 134.
92 A 202 (1991); cf H Fenwick, n17 above, pp445-456.
93 527 US 41, 10 June 1999.
94 R Smith and S Ireland, n49 above, pp131-142, pp138-139.
95 *Morales*, quoting (in part) *Broadrick v Oklahoma*, 413 US 601, 612-615 (1973).

96 *R v Home Secretary ex p Simms* [2000] 2 AC 115 at 131.
97 [2006] EWHC 1888 (Admin).
98 Commons *Hansard*, 7 Dec 2004 Col 1059.
99 See s134(4).
100 G Phillipson, and H Fenwick, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression', *Public Law*, 2000, Winter, pp627-650, at pp648-649, quoting *DPP v Jones* [1999] 2 AC 240 (HL)
101 See JUSTICE, *The Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005, Briefing for House of Lords debate* (July 2005).
102 372 US 229, 25 February 1963.
103 283 US 359, 369.
104 [2006] EWCA Civ 532, [2005] EWHC 2061 (Admin).
105 [2005] EWHC 2061 (Admin) at para 52, quoting *R v Bristol Magistrates' Court ex p E* [1998] 3 All ER 798 at 804.
106 At para 58.
107 At para 63.
108 At para 71.
109 See n29 above.

Incorporating socio-economic rights in a British bill of rights: pragmatic progression or a step too far?

Emma Douglas

This article discusses the prospects for incorporating socio-economic rights in a British bill of rights. In examining the role of the courts, it points to comparative experience and evidence from recent domestic case-law to argue that incorporation might both avoid the negative consequences raised by sceptics, and enhance, rather than undermine, democratic principles. Moreover, establishing a rights-based approach to socio-economic entitlements could arguably constitute an exercise in judicial pragmatism, in addition to satisfying arguments from principle.

Introduction

The British public, it appears, wants a change in the way its fundamental rights are protected. Not only does it favour a home-grown 'British bill of rights', but it favours one with a strong cohort of economic and social rights, protecting such rights as free NHS hospital treatment within a reasonable time, the right to join a trade union and strike without losing a job, and the right of the homeless to be housed.[1] Such a model departs significantly from the Human Rights Act 1998 (HRA), which incorporates into domestic law the civil and political rights of the European Convention on Human Rights (ECHR). It is a matter for speculation whether the members of the public polled last year were versed in the constitutional implications of incorporating rights which – in the Western liberal tradition – have been classed as 'aspirational' policy objectives. Regardless, the results show that economic and social rights are viewed in modern Britain as key to the enjoyment of a basic quality of life.

The UK government's position is that: 'all human rights are universal, indivisible, interdependent and interrelated. Economic, social and cultural rights therefore have equal status with civil and political rights'.[2] However, it qualifies this in that 'whereas the latter do not depend on significant resources, the former can only be realised progressively, within the limitations imposed by the availability of public resources.'[3]

Incorporating socio-economic entitlements in a bill of rights would see certain guarantees previously found in the political sphere (often as part of the welfare state), relocated in the legal sphere (in rights adjudication). Increasingly, however, case-law is challenging the distinction between civil and political rights (associated with a negative concept of liberty which restrains the state), and socio-economic rights (associated with a positive concept of liberty which 'enables' the rights-holder). There is now explicit recognition that the 'negative' and 'positive' obligations contained in rights provisions are 'false dichotomies'.[4] This analysis, it is submitted, reflects the interconnectedness of civil and political rights on the one hand, and economic and social rights on the other.[5] The implication is that socio-economic guarantees perceived as matters of political responsibility can be drawn into the realm of rights adjudication without conceptual difficulty.[6]

This article is divided into three parts. The first part outlines the current legal arrangements for protecting social and economic rights in Britain and sets out arguments for incorporating them in a British bill of rights. The second part draws from three models of comparative experience to assess the feasibility of British courts adjudicating such rights. The third part highlights recent domestic case-law indicating a judicial willingness to engage with socio-economic rights. It is argued in conclusion that, while any move to incorporate socio-economic rights into a British bill of rights will require a change in approach from all branches of the constitution (reflecting their joint responsibility for the protection of these rights), there is a serious case for making this step in order to adopt a comprehensive and consistent approach to adjudicating rights.

Economic and social rights in Britain

The existing legal framework

The existing legal protection for economic and social rights (ES rights) reveals a disparate collection of international obligations and domestic legal provisions. As a result, protection of these rights has tended to be subject to the policies of the government of the day, unless the courts have indirectly protected them through a creative and purposive approach in their decisions.

ES rights are guaranteed first by EU laws and directives, with the European Court of Justice (ECJ) as the final arbiter on their effect in Britain. Other international obligations are contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), European Social Charter, ILO Conventions and the EU Charter on Fundamental Rights. These have only a marginal impact in practice[7] and require enacting legislation to render their provisions legally binding in domestic law. However, as with other unincorporated treaties, the courts will assume that Parliament does not intend to pass laws that are incompatible with government's international treaty obligations. They will

interpret them consistently wherever possible and apply the same approach in decisions where there is a gap in the common law. They also carry out judicial review of public bodies in light of these international obligations.[8]

An extensive range of domestic legislation also safeguards socio-economic entitlements. Though not protected as rights, their substance is guaranteed under duties imposed on public bodies, for example in relation to housing, education, healthcare, employment relations and discrimination. Specific legislation (much of it inspired by EU directives) protects citizens from discrimination on grounds of race, sex, and religion and belief in employment, and guarantees rights of access to social services, education and social security. Again, courts may judicially review policies and actions of public bodies under this legislation. In doing so, they may (implicitly) be adjudicating rights guaranteed under the ICESCR and European Social Charter, but only in the context of their obligations to give effect to EU law and obligations in domestic law, including under the HRA.

Thus, the level to which ES rights are protected is established by government and Parliament and overseen by public bodies responsible for social provision. Yet anyone falling outside the scope of legislation has no overriding ES right on which to rely, apart from whatever protection may be found under the HRA. Marginalised groups or individuals may therefore be left vulnerable since they cannot challenge the limits of legislation in protecting their ES rights.[9]

Finally, the HRA enables courts to apply ECHR standards to bodies performing public functions at all levels of government. Yet deference to the executive and Parliament remains key in determining the outcome of decisions. Courts are conscious of scarce resources, and the budgetary repercussions of their rulings for other public services and provisions. They are further inhibited by lack of expertise on policy decisions. Even mandatory obligations on public authorities have been ignored where lack of resources has been pleaded.

The HRA does offer opportunities for judicial intervention in socio-economic issues to the extent that they are covered by the ECHR. Since the HRA binds courts themselves to act compatibly with ECHR rights, they must do so while developing the common law. Further, s2 HRA requires them to take account of decisions of the European Court of Human Rights (ECtHR), which may itself have referred to international treaties guaranteeing ES rights. Importantly, the HRA has also moved judicial scrutiny away from the traditional textual approach towards the use of the proportionality doctrine, which is more conducive to addressing economic and social guarantees.

Reasons for incorporating ES rights

A British bill of rights could adopt ES rights in a number of ways. Those provided for in international treaties (the ILO Conventions, Revised European Social Charter 1996, EU Charter of Fundamental Rights, or the ICESCR) could be partly or wholly incorporated (as with the ECHR in relation to civil and political rights) or a 'home-grown' list of rights drawn up. Different models show varying levels of justiciability. Under the ICESCR, for example, the obligation is for states to take steps to facilitate the 'progressive realisation' of ES rights. While it is important not to stray too far from the culture of domestic law, there are persuasive arguments to support at least a degree of justiciability.[10]

The argument from principle starts with the simple fact that the longstanding distinction between civil and political (CP) rights on one hand and ES rights on other is rooted in history rather than any intellectual coherence.[11] If it is correct that ES rights have the same importance as CP rights, and the fundamental nature of ECHR rights (qua CP rights) was the justification for their incorporation in UK law, then there is a logical case for incorporation of ES rights.

Second, the argument that the vague nature of ES rights renders them unsuitable for adjudication is not convincing. Indeed, it is difficult to see how vaguely framed rights such as the right to 'respect for family life' under Article 8 ECHR is more readily justiciable than the 'right to education' under Article 13 ICESCR, which guarantees available and accessible secondary education for all.

Third, Britain is a wealthy country and thus should not proffer arguments against ES rights which are more appropriate to developing economies. Despite a robust economy, however, the country faces serious problems of poverty and homelessness. In the absence of other effective means of ensuring basic entitlements, a rights-based judicial process could facilitate their enforcement. As recognised by the Parliamentary Joint Committee on Human Rights (JCHR), commitment to ES rights requires 'government, Parliament and the courts to make efforts to ensure the fullest possible compliance with the terms of the Covenant'. This assertion of joint responsibility confirms that courts have a role to play, in conjunction with the other branches of government, in protecting ES rights. Moreover, a rights-based approach in the courts can be crucial to combating these problems and ES rights standards provide an appropriate yardstick by which such exclusion can be measured and addressed.

Fourth, though concerns are expressed at the power of overseas courts in relation to ES rights, there are a variety of ways in which ES rights may be protected by the courts, which do not necessarily entail broad powers of review. Justiciability of rights may even be a matter to be determined on a case-by-case basis. Problematically, UK law currently does not (in any meaningful

sense) even acknowledge ES rights as human rights, let alone provide for their protection in the same way that the HRA protects ECHR rights. It may be that not all ES rights are suitable for incorporation as justiciable provisions, but it does not follow that none of them are. This argument is strengthened when viewed against areas where lack of guarantees has led to lack of protection for ES rights in UK law, such as in asylum cases of non-provision of support, though this has to a significant extent been remedied by *Limbuela v Secretary of State for the Home Department* (*Limbuela*).[12]

Finally, even though *Limbuela* confirmed the state's positive obligations under Article 3 EHCR, the right to be free from inhuman and degrading treatment is clearly not the only right that was engaged by the destitute condition of the asylum seekers. The refusal of the Secretary of State to provide support surely engaged Articles 9 (social security), 11 (standard of living), and 12 (physical and mental health) ICESCR. It seems inadequate that positive obligations under Article 3 ECHR should be the only safeguard against ill-treatment in such cases. Moreover, the engagement of CP rights (here, Arts 3 and 8 ECHR) can become distorted to accommodate socio-economic values where their legal recognition is lacking. Nor is asylum the only area which illustrates the existing gaps.[13]

As to the means of adjudicating ES rights, the next section examines a variety of models which demonstrate workable approaches and which do not impinge too far on relative spheres of institutional competence.

Social and economic rights in the courts – overstepping the judicial line?

Comparative approaches

There are three major models of adjudication, adopted by South Africa, India and Canada respectively:

1. Reasonableness

South Africa employs an approach which departs from the original model of guaranteeing 'core minimum obligations' in the ICESCR. Its constitution explicitly provides for a range of economic, social and cultural rights, in relation to which the Constitutional Court has adopted the standard of 'reasonableness' as its primary adjudicative tool. This goes beyond bare 'rationality' review and has substantive content, as confirmed in *Khosa and Mahlaule v Minister for Social Development*[14] (*Khosa*).

The reasonableness standard originates from the famous case of *Republic of South Africa and others v Grootboom and others*[15] (*Grootboom*), which concerned the right of access to adequate housing. The case is acclaimed for its contribution towards achieving the transformative goals of the South African constitution through

its recognition of the inter-relationship between all the rights in the Bill of Rights. *Grootboom* illustrates how the presence of ES rights in a bill of rights can fundamentally alter the ways in which judicial rights discourse is articulated, both concerning the interpretation and understanding of these rights themselves and the ways in which they influence the interpretation and content of other rights. The impact of the case itself should not be overestimated, however.[16] The court reached its decision on the basis that the housing plan failed to meet the test of reasonableness in that it did not cater for those in desperate need. An order was eventually made requiring the state to devise a plan to ensure the right to access to adequate housing within available resources, taking into account needs of those living in crisis situation. The court clearly accepted that it was not in a position to usurp the state's role in allocating resources, but was there as a neutral arbiter. Indeed, the court can still adopt a narrow and deferential approach to interpreting 'available resources' and will be slow to interfere with policy choices made for their allocation.[17]

2. Directive Principles of State Policy

India has used the Directive Principles of State Policy (DPSP) in its constitution as powerful interpretative devices. Originally non-justiciable, the Indian Supreme Court has used them to redefine fundamental rights in the constitution to impose positive duties on the state. The principal means by which the court has amalgamated CP rights and ES rights has been Article 21 (guaranteeing the right to life) which, deriving its force from the DPSP, has produced a stream of positive duties. Thus, it entails the right to livelihood, 'since no one can live without the means of living'.[18] Similarly, a worker's right to health is an 'integral facet of meaningful right to life'.[19]

The guiding principle is that fundamental rights cannot be enjoyed without basic ES rights. Indeed, the court has consistently held the state under constitutional mandate to create conditions in which CP rights guaranteed in the constitution could be enjoyed by all. It sees rights as including active empowerment, specifically through education, which itself has been held to be an enforceable right.[20] The approach is progressive, but the court has been highly controversial, particularly where its activism has taken it into areas usually viewed as the preserve of the executive. Detailed court orders have not always met with co-operation from state officials and have been criticised for inconsistency with existing statutes, despite the court's insistence that their implementation to safeguard rights should override statutory provisions.[21]

The inclusion of ES rights in the DPSP framework in India was influenced by a similar format in the Irish constitution, and has since been emulated in other jurisdictions, including the African jurisdictions of Namibia and Uganda. It has had particular impact in the South Asian region, for example

in Bangladesh, where the Supreme Court recognised that artificial divisions between 'fundamental rights' and DPSP should not prevent it acting to safeguard public health (linked to the right to life) in a case concerning contaminated imports of powdered milk.[22]

A notable difference can be observed between the approach of South Africa's Constitutional Court, which tends to judge the policy within the framework of rights, and that of India's Supreme Court, which tends to start from the premise that individuals have rights in certain circumstances which are capable of adjudication; its decision may then be determined within the framework of an end policy goal.

3. Equality

In the absence of express provision protecting ES rights, further creative judicial approaches have been adopted. In Canada the Supreme Court has used the equality provision under s15 Canadian Charter of Rights and Freedoms to protect ES rights on the basis that similar treatment may not always guarantee substantive equality. What has been sought, according to former Supreme Court Justice L'Heureux Dube, is a 'contextual and empathetic approach to ensuring each person's human dignity'.[23] The approach the courts have taken is that whilst s15 does not impose upon governments the obligation to act to remedy the symptoms of systematic inequality, it does require that the government should not create further inequality. Thus, in the context of healthcare, a group of deaf individuals succeeded in challenging the failure of a provincial government to provide sign-language interpreters as part of its publicly funded healthcare system.[24] This was discriminatory on the basis that government should ensure, in providing general benefits to the population, that disadvantaged members of society are able to take full advantage of these benefits. Here, effective communication was integral to the delivery of medical services and the court's interpretation thus avoided a 'thin and impoverished view … of equality'.[25]

Judicial competence in socio-economic issues

Traditionally, ES rights have been regarded as belonging to the realm of political rather than judicial assessment, owing to the need for accountability to the electorate for the way in which competing claims on resources are administered. There are exceptions however, rendering the principle inapplicable where those affected by a decision do not have a voice in the political process. Asylum seekers are the paradigm case, which is why the insistence in *Limbuela* on the state's core responsibility for destitute asylum seekers can be viewed as a necessary intervention by the courts to further, rather than counter, democracy. Moreover, even those who formally have a vote may not be able to participate fully in citizenship without state action to further social rights to education and

health, for example. In this sense, judicial supervision of ES rights can enhance, rather than undermine democracy.

Judges are also thought to lack the relevant expertise to make decisions on duties with complex polycentric implications requiring a more circumspect approach. However, this does not mean that judges can have no role at all in supervising positive duties of public authorities in relation to ES rights. In the *Gosselin v Quebec (Attorney General)*[26] case in Canada the court concluded that there was a right to welfare sufficient to meet one's basic needs, without addressing how much expenditure by the state was necessary in order to secure that right. Indeed, in advanced welfare states there will frequently be express statutory guidance, as there was in this case. Moreover, as the UN Committee on Economic, Social and Cultural Rights has noted, '[w]hile the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications'.[27]

Ultimately, the extent to which courts should be prepared to go in deciding questions with budgetary consequences is a crucial determinant of the justiciability of ES rights. However, a model embodying some obligation for the 'progressive realisation' of ES rights, should not vindicate the fears of those who oppose their incorporation in a British bill of rights. As the *Grootboom* case showed, judges do not have to engage in policy decisions and wholesale re-allocation of resources, and would in all likelihood remain sensitive to their sphere of competence.

Case-law and the potential for a rights-based approach

Recent cases laying the groundwork

In addition to arguments from principle, recent practice in British courts has signalled some willingness to engage with rights which are properly regarded as socio-economic. Though a pattern is only just emerging, it is argued that their incorporation in a British bill of rights and oversight by judges would facilitate an extension of what courts are already starting to do.

A crucial development is the case of *Limbuela*.[28] The question facing the court was whether the government was in breach of Article 3 ECHR if destitute asylum seekers sleeping rough were at risk of 'inhuman and degrading' conditions or if they had first to suffer the degrading effects of destitution to reach the requisite threshold of suffering. The Lords ruled against the 'wait and see' approach, setting aside the notion of deference to the executive to consider how far the ECHR should protect people's most basic ES entitlements. In so doing, they subjected UK legislation to review according to standards set out by the ECtHR,

even despite the considerable resource implications. Their Lordships did not discuss ES rights, though the case clearly engaged Articles 9, 11 and 12 ICESCR. Of course, Article 3 ECHR has positive and negative obligations, but there is a risk of stretching the scope of what is commonly viewed as the most crucial and absolute right of all those guaranteed in the ECHR to the point of distortion. Explicitly recognising a duty for progressive realisation of (at least certain) economic and social rights could thus be viewed as a logical extension of the acknowledged positive obligations under Article 3 ECHR.

It is interesting to draw comparisons between *Limbuela* and judicial approaches in jurisdictions which recognise ES rights.[29] The guiding principle that the degradation of destitution in our society must be prevented, whether arising from direct state violence or circumstances for which the state can be said to be responsible, arguably emulates the Indian approach to 'principles' extraneous to the core provisions of the constitution. Likewise, Makgoro J stated in *Khosa* that '[a] society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational'.[30] The South African understanding of 'reasonableness' thus encapsulates the approach of the Lords in *Limbuela* – that in holding the balance, the guiding principle was the impact of deprivation on the ability of the group to participate fully in society. Finally, *Limbuela* also resembles an 'equality' claim in that it concerned the withdrawal of support from a particular group of destitute individuals which the court classified as 'treatment' for the purposes of Article 3. Thus, while domestic jurisprudence demonstrates substantive engagement with ES rights through positive rights, it is the absence of a legal framework which prevents implicit principles from being made explicit.

More generally, recent domestic case law shows that individuals are increasingly willing to test the extent to which courts will hold government bodies to account for failing to provide satisfactory access to health, education, housing and welfare services or to press claims of marginal groups or individuals for more priority in allocation of scarce resources. The experience is somewhat mixed overall, but there are signs that the courts may be willing to use a wider proportionality test to review policies of government and public bodies in relation to ES rights.

The court have used principles of judicial review to give effect to positive enforceable ES rights, as seen in cases like *R v East Sussex County Council, ex p Tandy*[31] (in which the House of Lords refused to downgrade mandatory duties to provide a sick child with a suitable education to discretionary obligations) and *Coughlan v North and East Devon Health Authority*[32] (in which the Court of Appeal decided the closure of a nursing home breached the disabled residents' legitimate expectations that this would be their 'home for life' and their rights

under Article 8 ECHR). Notably, however, these cases did not involve large resource allocations.

In the context of medical treatment, Mr Justice Laws in the *Child B* case (*R v Cambridge Health Authority, ex p B*)[33] famously said that public authorities must do 'more than toll the bell of tight resources' when a life was at stake. The Court of Appeal overruled his decision, stating that 'difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients'. However, this reticence to intervene might fade if people were given socio-economic rights, since the courts could begin to review policies within the wider perspective of the principle of 'progressive realisation',[34] a principle which, argue Stuart Weir and Ellie Palmer, 'offers an escape from the rigidities of the current impasse'.[35]

In the context of destitution through non-provision of asylum support, it is clear that human rights include a right to a minimum standard of living. In *Matthews v Ministry of Defence*[36] Lord Hoffman stated that human rights are rights:[37]

> *essential to life and dignity of an individual in a democratic society. The exact limits of such rights are debatable and although there is not much trace of economic rights in [the ECHR], it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery.*

The seminal case of *Limbuela* did not require recourse to explicit arguments of economic and social guarantees. However, other cases continue to illustrate the harsh consequences for claimants of not being able to argue ES rights which have either been incorporated into domestic law or constitutionally entrenched. For example, the UK was ruled not to have breached Article 3 ECHR by deporting a failed asylum seeker with terminal HIV/AIDS back to Uganda, where effective treatment would cease.[38] If this claimant did not reach the threshold for Article 3 protection, it is questionable who would in the future. The scope of the protection offered to seriously ill people who have no legal right to remain but face illness and death on expulsion appears narrow indeed. Yet the decision might have differed if the claimant could have argued a right to receive treatment as part of a right to health under domestic law and that, given her serious condition, it was unreasonable to deport her.[39]

What standard of review for ES rights?

The British courts have grown increasingly familiar with the proportionality standard of review imported through the ECHR, which works on the basis that that the limitation of human rights must meet a pressing need within democratic society and be proportionate to a legitimate aim being pursued. The

high threshold of *Wednesbury* unreasonableness has been largely discarded in favour of the more rigorous proportionality test, under which courts will assess the balance struck by a public authority and consider how much weight the authority gave to competing interests and issues.[40]

This approach has been tempered, however, by some judges, especially in cases raising socio-economic rights. Lord Hope has spoken of the need, in some ECHR cases:[41]

> *to recognise that difficult choices might have to be made by the executive or legislature between the rights of individuals and the needs of society. In some circumstances it will be appropriate for courts to recognise an area of judgment within which judiciary will defer on democratic grounds to the considered opinion of the elected body.*

The difficulty is that human rights are multi-faceted and difficult to categorise. Furthermore, consistency of constitutional review would dictate that all cases involving ECHR rights be analysed in the same way. Murray Hunt has argued that 'proportionality is not so much a test or a standard as a whole new type of approach to adjudication' and 'a major landmark on the road to a true culture of justification implicit in all human rights adjudication'.[42] Other judges have demonstrated support for this perspective. Lord Brown, while agreeing that a high degree of deference was owed to Parliament, has argued that 'courts cannot subjugate their role as guardians of human rights to the authority of Parliament and must interfere where Parliament has over-stepped the limits of what is justifiable'.[43]

Were ES rights to be incorporated in domestic law, the judiciary would have to adjust their thinking and processes to adjudicate upon cases where these rights were engaged. One consequence would be that courts would have to modify their reluctance to enquire into the facts of cases where having to rule on the broad question of whether government was bringing about 'progressive realisation' of ES rights. More generally, they would be required to approach the processes of evaluation in a more wide-ranging fashion. The HRA has begun to shift judicial attitudes away from traditional and narrow statutory construction and deference to the executive. Courts are still cautious about venturing beyond the reach of statute but increasingly they are required to look to the spirit rather than the letter of the law.

Conclusion

A rights-based approach to economic and social guarantees presents a compelling model for Britain. However, the pathway is strewn with obstacles, most notably the need for public consensus on any new British bill of rights. Indeed, the

ongoing Northern Ireland bill of rights process demonstrates the difficulties of securing agreement on more adventurous rights provisions.[44] Moreover, incorporation of ES rights in a bill of rights and a newly defined role for the courts cannot alone bring about social justice. Human rights are the joint responsibility of all branches of government, which necessitates a comprehensive and joint approach ensuring that economic and social entitlements penetrate executive policy decisions and the Parliamentary process, as well as judicial deliberation. Adjustment to a new legal framework both inside and outside the courts could be facilitated by the new Commission for Equality and Human Rights.

Incorporating ES rights in a bill of rights as part of a new constitutional settlement would mark significant advances in Britain. Stuart Weir suggests adopting the HRA model, setting the ICESCR or EU Charter of Fundamental Rights (or parts thereof) within the framework of domestic British law.[45] With retention of Parliamentary sovereignty, as under the HRA, ES rights would ultimately be determined by democratic debate and decision, not judicial arbitration. Yet a degree of judicial adjudication of ES rights could further democracy where those affected had no effective voice in the political process (being outsiders, or without the economic security and independence to exercise their CP rights fully). Moreover, the courts need not be taken out of their sphere of competence – they could uphold a duty to make particular provision without specifying how much expenditure would be necessary to fulfil it. It must be remembered that, regardless of the model of justiciability, courts in any jurisdiction will need to be wary of the extent of their intervention in determining cases with major resource and policy implications, not to mention significant moral dilemmas.

There are ways short of incorporation to increase protection of ES rights, such as through s2 HRA (requiring courts to have regard to Strasbourg jurisprudence, which itself refers to international treaties like the European Social Charter to help construe the ECHR). This would help to expand the scope of ECHR rights which overlap with ES rights.[46] However, it is questionable whether facilitating an extension of the ECHR would be desirable or whether it would simply distort application of the ECHR rights. If Britain is to take its international obligations seriously and give more than lip service to the idea that CP rights and ES rights are indivisible and mutually contingent, then ensuring a common approach to their guarantee and application by the courts would be a positive move to consolidate the protection afforded by the HRA.

Of course, extraneous factors will have an influence. Much depends on political will (reflecting opinion from such fields as industry and commerce and their concerns over increased workers' entitlements) and cultural acceptance (as learnt from the experience of the HRA). However, setting the debate in context – internationally in terms of Britain's treaty obligations and domestically in terms

of what British courts have arguably been doing in case-law – incorporation of ES rights in any proposed British bill of rights can be seen as an exercise in progressive, yet pragmatic development of human rights protection.

Britain has long safeguarded fundamental rights, whether through the common law, domestic legislation or international and European human rights instruments. The rule of law requires government to realise these commitments. In order for the courts to exercise their supervisory role in this regard, the current legal context dictates the need for a creative and purposive judicial approach. With an extended and explicit remit of ES rights, however, the task of the courts might well be made easier and the protection of basic entitlements more readily achievable.

Emma Douglas is Legal Officer (Constitutional Law) at JUSTICE.

Notes

1 ICM/Joseph Rowntree *State of the Nation* Poll 2006 (89 per cent of those polled were in favour of a right to NHS treatment, 77 per cent a right to strike without losing a job, 65 per cent a right of housing for the homeless).
2 Foreign and Commonwealth Office, *Human Rights Annual Report 2006*, p233.
3 Ibid.
4 Lord Brown in *Limbuela v Secretary of State for the Home Department* [2005] UKHL 66, at para 92.
5 This notion is explored in depth in TH Marshall's collection of essays, TH Marshall and T Bottomore (eds), Citizenship and Social Class, (Pluto,1992) – under formal juridical equality, the market prevents an individual exercising his civic rights to the full, which engenders the need for social rights, executed through positive action by the state to ensure all citizens enjoy basic economic welfare and security and can participate meaningfully in society.
6 Sandra Fredman has expanded this idea in relation to positive obligations and the re-conceptualisation of the welfare state in 'Human Rights Transformed: Positive Duties and Positive Rights' PL [2006] 498.
7 See Joint Committee on Human Rights, *Twenty-First Report* (2003-2004), HL 183/HC 1188, p3: The Covenant has a very limited impact in UK domestic law.
8 Notably, there is no external guardian of the full range of ES rights, as with civil and political rights (CP rights), where the ECtHR acts as the final court for individual citizens who believe that their rights have been violated and the UK courts have failed them. The Foreign and Commonwealth Office, n2 above, states reluctance on the part of the UK to sign an Optional Protocol giving individuals the right to petition the UN Committee on Economic Social and Cultural Rights if they believed their rights as set out in the ICESCR had been violated: see p234.
9 Asylum seekers deprived of benefits under the Nationality and Immigration Act 2002 cannot claim redress for breach of their rights to social security under Article 9 ICESCR, nor can a claimant go to court under Article 9 to challenge the level of benefit they receive because they consider it to be insufficient to live on.
10 These reasons are largely drawn from JUSTICE's report *Inquiry into the Concluding Observations of the UN Committee on Economic Social and Cultural rights – Joint Committee on Human Rights,* June 2003.
11 The view is that the philosophical division between civil and political rights and economic, social and cultural rights derives from the competing ideologies of the West and the Soviet Union post-WWII when the International Covenant on Civil and Political Rights (ICCPR) and International covenant on Economic, Social and Cultural Rights

(ICESCR) were created.
12 [2005] UKHL 66.
13 A rights-based approach to the adequacy of housing provides a useful illustration for justiciability of ES rights. While courts are ill-placed to adjudicate general policy decisions as to allocation of resources for housing, they are well-placed to determine factual questions such as whether particular accommodation is unfit for human habitation. Given their experience of balancing relevant considerations in other rights based areas, eg qualified ECHR rights under the HRA, it is unlikely that UK courts would not be competent to carry out a similar balancing exercise in relation to a right to adequate housing. See also *Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC).
14 2004 (6) BCLR 569, para 67.
15 2000 (11) BCLR (CC).
16 S Jagwanth, 'The South African Experience of Judicial Rights Discourse: A Critical Appraisal', in Campbell, Ewing and Tomkins (eds), Sceptical Essays on Human Rights, Oxford University Press, 2003, Ch 16, p12.
17 *Soobramoney v Minister of Health KwaZulu Natal* 1997 (12) BCLR 1696.
18 *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180.
19 *Parmanand Katara v Union of India* (1989) 4 SCC 286.
20 *Mohini Jain v State of Karnataka* AIR 1992 SC 1858.
21 *Mehta v Union of India* (1999) 6 SCC 9.
22 *Dr Mohiuddin Farooque v Bangladesh and others (No 1)* 48 DLR (1996) HCD 438.
23 See for example decisions such as *Corbiere v Canada* [1999] 2 SCR 203 and *M v H* [1999] 2 SCR 203. However, this approach has been noted for its potential to cause confusion to claimants (P Hogg, Constitutional Law of Canada, Carswell, 2002, p1059).
24 *Eldridge v British Columbia* [1997] 3 SCR 624.
25 Ibid, para 73. Taken from Iain Byrne, 'Making the Right to Health a Reality: Legal Strategies for Effective Implementation', Commonwealth Law Conference, London, September 2005.
26 [2002] 4 SCR 429, 2002 SCC 84.
27 IM Doc E/1999/22, Annex IV. For example, the right to a fair trial necessitates significant financial investments in court systems and legal aid (see *Airey v Ireland* [1979] 2 EHRR 305).
28 [2005] UKHL 66.
29 S Fredman, see n5 above, pp513-517.
30 2004 (6) BCLR 569, para 52.
31 [1998] ELR 251.
32 CA [2000] 2 WLR 622.
33 [1995] 2 All ER 129.
34 S Weir and E Palmer, 'Socio-economic rights in court', in S Weir, Unequal Britain, Politico's Publishing Ltd, 2006, pp51-73, at p66.
35 Ibid.
36 [2003] UKHL 4.
37 Ibid, at para 26.
38 *N v Secretary of State for the Home Department* [2005] UKHL 31.
39 Ian Byrne, 'Making the Right to Health a Reality: Legal Strategies for Effective Implementation', see n22 above.
40 This principle was confirmed by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at pp546-548.
41 *R v Director of Public Prosecutions, Ex p Kebilene*[2000] 2 AC 326, para 381.
42 M Hunt, 'Why Contemporary Public Law Needs a Concept of Due Deference' in N Bamford and P Leyland (eds), Public Law in a Multi-Layered Constitution, Hart Publishing, 2003 – quoted from S Weir, Unequal Britain, n34 above.
43 *International Transport Roth GmbH and Others v SSHD* [2002] EWCA Civ 158 (dissenting).
44 For critical accounts see Christopher McCrudden, 'Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission's Consultation Document on a Bill of Rights for Northern Ireland', 52 N Ireland Legal Q 372 (2002); Stephen Livingstone, 'The Need for a Bill of Rights in Northern Ireland', 52 N Ireland Legal Q 269 (2002).
45 S Weir, Unequal Britain, n34 above, p106. In the case of the former, government would

be obliged 'to take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means … particularly the adoption of legislative measures', (Art 2.1 ICESCR).

46 For example, Article 11 ECHR would be enriched if construed in accordance with international labour standards – Keith Ewing, 'The Unbalanced Constitution', in Campbell, Ewing and Tomkins (eds), Sceptical Essays on Human Rights, Oxford University Press, 2003, Ch 6, p113.

The punishment of not voting

Eric Metcalfe

This article examines the issue of disqualification from voting as a lawful punishment, in light of the recent consultation by the Department for Constitutional Affairs on whether prisoners serving custodial sentences should be permitted to vote. The consultation follows the decision of the Grand Chamber of the European Court of Human Rights in Hirst v United Kingdom*, in which it was held that the ban on prisoners' voting imposed by s3 Representation of the People Act 1983 breached the right to vote under Article 3 of Protocol 1 of the European Convention on Human Rights. JUSTICE responded to the consultation in March 2007.*

Introduction

In the last general election in 2005, only 61 per cent of eligible voters in the UK actually voted.[1] This compares favourably with the even less impressive 59 per cent turnout in 2001, but was still significantly down from the 71 per cent who voted in 1997.[2] Indeed, it has been nearly thirty years since voter turnout last exceeded 75 per cent.[3] On average, over than a third of eligible voters – somewhere between 13 to 17 million people – simply do not bother to vote in Parliamentary elections.[4]

In light of such continuously poor voter turnout, it may seem surprising that disqualification from voting is still considered by some to be an effective punishment for criminal offending. Nonetheless, as the Lord Chancellor recently argued:[5]

> *the right to vote forms part of the social contract between individuals and the State, and that loss of the right to vote, reflected in the current law, is a proper and proportionate punishment for breaches of the social contract that resulted in imprisonment.*

Specifically, s3(1) Representation of the People Act 1983 prohibits a convicted person serving a custodial sentence from voting in any parliamentary or local election. The prohibition does not extend to prisoners released on licence or those detained on remand.[6] In other words, as many as 56,000 prisoners are currently barred from voting for the duration of their imprisonment.[7]

It was this blanket prohibition on prisoners' voting that the Grand Chamber of the European Court of Human Rights (ECtHR) held to be incompatible

with the right to free elections under Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) in the October 2005 decision of *Hirst v United Kingdom*.[8] The Grand Chamber found that the application of a blanket prohibition was disproportionate as it applied to all serving custodial sentences, irrespective of the length of their sentence or the severity of their offence.[9] Given the importance of the right to vote, moreover, it could not be said that the UK policy on prisoners voting was within its margin of appreciation under the Convention.[10] The court's ruling in *Hirst* has prompted the government to consult on changing the law in order to bring it into conformity with its Convention obligations. However, there remains considerable disagreement over the extent to which *any* interference with the right to vote is permissible: whether disenfranchisement can ever be a legitimate punishment for law-breaking.

Are restrictions on voting legitimate?

On the one hand, there is a long tradition in liberal political philosophy that underlines the importance of democratic participation by reference to the severity of the sanctions that may be imposed on those who break the democratic compact. Locke wrote that:[11]

> *each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender give him cause to repent, and terrify others from doing the like.*

Rousseau similarly wrote of 'the punishment of the wicked, the sanctity of the social contact and its laws' as among the central precepts of civic virtue.[12] Certainly, the democracy of Periclean Athens – the model for most classical liberal political thought – had little difficulty with applying disenfranchisement ('atima') as a sanction for law-breaking, albeit as one of a band of punishments ranging from fines in minor cases to exile or the burning down of one's house for the most serious crimes.[13] Even JS Mill – one of the strongest proponents of democratic participation – appeared to consider disqualification a reasonable sanction for lawbreakers:[14]

> *[I]t is a personal injustice to withhold from any one,* ***unless for the prevention of greater evils****, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth, though not at more than its worth. There ought to be no pariahs in a full-grown and civilised nation;* ***no persons disqualified, except through their own default.***

On the other hand, the most significant developments in democratic governance across the 19th and 20th centuries have involved the enfranchisement of groups that even classical liberals thought beyond the pale, eg the poor, women, slaves. The concept of the right to vote as a *human* right and not just a civic one (cf Article 21 of the Universal Declaration of Human Rights,[15] Article 25 of the International Covenant on Civil and Political Rights[16]) and the importance of universal enfranchisement as the basis for democratic legitimacy has led to an ever increasing scrutiny of the remaining restrictions upon voting. In virtually all modern democracies, the limits on the universal franchise fall more or less predictably into four categories:

(a) citizenship or residence;
(b) age;
(c) mental capacity; and
(d) punishment.

Of these four types of qualification, both (b) and (c) arise from the idea that a person must possess a certain *minimal* degree of mental competence in order to vote, whereas (a) and (d) both derive from the idea of voters being members of a particular political community.[17]

It should hardly need saying that the right to vote is the very basis of democracy, what has been called the 'right of rights'.[18] But although it seems to be generally accepted that *any* interference with the right to vote must be both justified and proportionate, there seems to be far less intellectual discomfort with restrictions on voting based on age or mental capacity or even residence, than those premised upon the application of a lawful punishment.

At least three reasons can be offered for this. First, there is a concern at the potentially oppressive effect of disqualification as a punishment, in circumstances where the law-making power of majoritarian institutions is otherwise unchecked: a 'tyranny of the majority' in which the minority are not only outvoted but rendered unable to vote. (Of course, such a scenario is predicated on the minority not only opposing the laws in question but breaking them as well). Secondly, there is the more sociological concern that disqualification tends in fact to have a disproportionate effect on historically disenfranchised minority groups (because, it is suggested, they tend to be disproportionately represented in the prison population).[19] Thirdly, there is a more general unease about the very justification for punishment itself. As Rawls notes:[20]

> *[t]he subject of punishment has always been a troubling moral question. The trouble about it has not been that people disagree as to whether or not*

> *punishment is justifiable … only a few have rejected punishment entirely … The difficulty is with the justification of punishment: various arguments for it have been given by moral philosophers but so far none of them has won any sort of general acceptance; no justification is without those who detest it.*

In the case of disqualification, however, the disagreement extends beyond *who* deserves disqualification to whether *anyone* deserves it. There is ongoing debate about whether prison is an effective punishment for many crimes but most people accept that there are, at least, a category of serious offenders who merit imprisonment in the short term if only for the sake of protecting the public. With disqualification, by contrast, there is often bitter scepticism over whether it even should be levied as a punishment at all.

Is disqualification a legitimate punishment? *Sauvé v Canada (No 2)*

The strongest expression of the sceptical view can be found in the majority decision of the Canadian Supreme Court in *Sauvé v Attorney General of Canada (No 2).*[21] In *Sauvé,* the court was asked to consider whether the prohibition in s51(e) Canada Elections Act 1985 (which denied the right to vote to 'every person who is imprisoned in a correctional institution serving a sentence of two years or more') contravened ss3 (the right to vote) and 15 (the right to equality) Canadian Charter of Rights and Freedoms 1982.

As with interference with a qualified Convention right under the ECHR, it was well established that the Canadian government was obliged to show that its interference with prisoners' right to vote was both justified (ie for a legitimate aim) and proportionate or, to use the language of the Canadian test, that 'the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified'.[22] For its part, the Canadian government argued that the ban on prisoners' voting was sustainable on the basis that it was intended to 'enhance civic responsibility and respect for the rule of law', and 'provide additional punishment' or 'enhance the general purposes of the criminal sanction'.[23]

The majority, however, was unimpressed. Not only did it doubt whether the 'objectives of enhancing respect for law and appropriate punishment' were sufficiently precise to pass constitutional muster,[24] but it found no rational connection between those objectives and the punishment of disenfranchisement. In essence, the majority found that disenfranchisement itself was irrational as a punishment:[25]

> *Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.*

In particular, the majority took issue with the use of disenfranchisement as a symbolic (rather than a practical) deterrent to others:[26]

> *Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values.*

For all the various consequentialist arguments raised on both sides (eg voting by prisoners would pervert the electoral process; disqualifying prisoners from voting would undermine democratic legitimacy), the core issue in *Sauvé* is a disagreement between the federal Parliament and the Supreme Court about the *message* sent by disenfranchisement. On the one hand, Parliament claimed that disenfranchisement serves a positive educative purpose, communicating society's disapproval of those who breach the democratic compact. On the other, the Supreme Court claimed that disenfranchisement is 'bad pedagogy'[27] because it suggests that 'those who commit serious breaches are no longer valued as members of the community'.[28]

What is striking about the judgment in *Sauvé* – at least from a UK perspective – was this willingness of the majority of the Supreme Court to substitute their own interpretation of the message for that of the federal Parliament's. In determining the 'message' sent by disenfranchisement, the court did not ask itself what Parliament intended or even what those subject to the penalty may have understood.[29] It did not even pause to consider whether the disagreement involved (what the minority of the court described as) 'competing social or political philosophies',[30] and, accordingly, the weight that should be accorded to the *democratic* competence of Parliament to determine such disagreements.

For, although there are many sensible policy arguments that can be mounted against using disqualification as a punishment, it is far from clear why it is *irrational* for a democracy, founded on respect for fundamental rights and the

importance of universal participation, to nevertheless agree to punish certain kinds of law-breaking with disenfranchisement to mark out its particular disapproval of those who break the democratic compact. The mere fact that someone is disenfranchised from voting for a limited period does not necessarily mean that they are 'no longer valued as [a] member of the community' or that 'democratic values are less important than punitive measures ostensibly designed to promote order', any more than using deprivation of liberty as a punishment sends the message that liberty is somehow less important than the interests of public protection. On the contrary, it may be equally argued that disqualification underscores the importance that society attaches to the right of democratic participation, just as deprivation of liberty underscores the value that a free society places on being free. Unlike such absolute rights as the prohibition against torture, it is far from clear why a temporary limitation on the right to vote as a lawful punishment should *necessarily* have the meaning contended for it by the majority in *Sauvé*.

Indeed, far from being inherently undemocratic, the punishment of disqualification is unique to the extent that – of all the punishments that may be levied against an individual – it is the one form of punishment that is *predicated* on the importance of democratic rule:[31] disqualification would, after all, have little significance under an autocracy or a tyranny. All forms of government, save anarchy, punish law-breaking but only under a democracy is there a compelling moral reason for the individual to obey the law in the first place. The legitimacy of disqualification as a punishment flows directly, therefore, from the breach of this democratic compact: voters participate in making laws and, in turn, are bound to respect the laws which they have helped make.[32] It would seem strange, therefore, if a democracy were only able to punish its members by restricting their liberty but not their continued participation in the system itself. Far from disqualification being a symbol of 'enforced conformity to the law' at the expense of 'our core democratic values', disqualification is arguably a more fitting sanction for breaking democratically made laws than imprisonment. For those who take democracy seriously, the very value of democratic participation is the source of the punishment.

This is not to suggest that either *Sauvé* or *Hirst* were wrongly decided. It may be reasonable to object that the severe nature of disenfranchisement means that its use as a punishment should be as limited as possible and – as we will see – both cases involved the sweeping use of disqualification as a punishment irrespective of the nature of the crime. The fundamental point here is that the question in *Sauvé* (whether a democratic government may legitimately apply disenfranchisement as a lawful punishment) is a question of *value*, something upon which reasonable people can and do disagree, rather than a simply a matter of logical error as the majority suggests. Moreover, it is a

disagreement that obtains not simply between those who believe the right to vote is a universal right and their opponents, but also between *supporters* of an inclusive, universal democratic franchise. In other words, what is at stake is not 'democratic government vs less democratic government' but instead *rival conceptions* of how democracy works and, in particular, what punishments are consistent with its values.[33] Assuming that the members of the federal Parliament deliberated sincerely over this question of principle when enacting the disqualification provisions of the 1985 Act, it seems fair to ask why the views of five Supreme Court justices should prevail over the views of the democratic majority? The decision of the majority in *Sauvé* that disenfranchisement was not only disproportionate but, in essence, irrational tends to bear out the complaint made by Jeremy Waldron that such judicial review is itself:[34]

> *politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.*

The point is not that the courts should have *nothing* to say about disqualification. The concern expressed by the Supreme Court in *Sauvé* that the power to disqualify could be used to undermine democratic rule is a reasonable one and the case for strong judicial review would be strengthened in the event that a parliament ever proposed disqualification by reference to wholly arbitrary characteristics, eg by ethnicity or gender. But the questionable reasoning and disdainful tone of the majority in *Sauvé* raises the prospect of a different kind of disenfranchisement: one in which democratic institutions are themselves prevented from deciding important issues of principle.

Is disqualification of prisoners proportionate?

A much more sustainable complaint about disqualification as a punishment is not its democratic legitimacy but the hopelessly broad-brush way in which it is applied in most democracies. As the Court in *Sauvé* noted, the disqualification of all prisoners serving custodial sentences longer than two years:[35]

> *bears little relation to the offender's particular crime. It makes no attempt to differentiate among inmates serving sentences of two years and those serving sentences of twenty. It is true that those serving shorter sentences will be deprived of the right to vote for a shorter time. Yet the correlation of the denial with the crime remains weak.*

Similarly in *Hirst*, the Grand Chamber concluded:[36]

> *The severe measure of disenfranchisement must … not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.*

Using the length of a custodial sentence as a threshold for enfranchisement or disenfranchisement is unsatisfactory for a number of reasons. First, there is nothing necessary about it. Indeed, it is a basic principle of English law that 'a convicted prisoner, in spite of his imprisonment, retains all his civil rights which are not taken away expressly or by necessary implication'.[37] It is clear that the removal of the right to vote is not a necessary feature of the deprivation of liberty. Were this otherwise, the express statutory bar contained in s3 Representation of the People Act 1983 would be otiose.

Secondly, both the decision to impose a custodial sentence and its length are determined by reference to a wide variety of factors, both general in nature (eg deterrence, rehabilitation, protection of the public, etc) and those specific to the offence (eg provocation, vulnerability of the victim, etc). Although it seems true to say that the length of the sentence tends to reflect the severity of the offence, many of the considerations that attach to determining whether, and for how long, a person should be deprived of their liberty have little or no bearing on the question of whether a person should be liable to be disqualified from voting.

For example, not everyone who is found guilty of theft will necessarily receive a custodial sentence. All other things being equal, the person who steals £1000 is more likely to be imprisoned than the person who steals £100, and the person who steals £1 million is likely to be imprisoned for longer than the person who stole £1000. Whereas the value of the property stolen may be a relevant consideration in determining whether – and for how long – to impose a custodial sentence for the sake of protecting the public, it would seem to have very little bearing on whether someone guilty of theft ought to be deprived of the right to vote. If we assume that the justification for disqualification from voting in such cases is to punish those who break the democratic compact against stealing another's property, the egregiousness of any particular theft seems less significant than the fact of the law-breaking itself.

In truth, disqualification from voting is a punishment wholly different in kind to the deprivation of liberty. It is therefore deeply problematic that it is being imposed as a punishment without any consideration of whether it is justified in the particular case, separately from the question of whether or not a custodial sentence is justified. At the very least, it requires at the very least

some assessment of the *proportionality* of the punishment in light of the specific offence, ie whether it is just and lawful that the individual be disqualified from voting given the nature of their offence. Understood in this way, there seems no obvious reason why the penalty of disqualification should be tied to the imposition of a custodial sentence. Instead, it is necessary to understand disqualification as a separate and distinct punishment, one that must be justified on its own terms.

Similarly, although there is a principled case for disqualification as a lawful punishment, its gravity suggests that even a conviction for a very serious criminal offence would not ordinarily be enough to displace an individual's right (and, indeed, their duty) to vote. Instead, disqualification would only seem to be a proportionate punishment where an individual has committed a grave abuse against the democratic order, such that it would be perverse to allow their continued participation in the short term. As the Grand Chamber in *Hirst* held, the fundamental nature of the right to vote:[38]

> *does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.*

Specifically, disqualification seems most appropriate as a punishment in cases involving serious breaches of electoral law, corruption, misconduct in public office, treason, terrorism, or other serious offences that seek to attack or undermine democratic institutions. Even within this category, however, there is no obvious reason why conviction should automatically involve disqualification or be coextensive with a custodial sentence.

For example, it is an offence under s75(2) Political Parties, Elections and Referendums Act 2000 to incur campaign expenditure on behalf of a political party without the authority of the treasurer or deputy treasurer of that party. Although disqualification could be considered a proportionate punishment in extreme cases, it is doubtful whether most conduct contrary to s75(2) would be sufficiently serious to justify removal of voting rights. A sensible test to adopt would be whether the conduct involved a grave abuse against the democratic order.

The complaint raised in the DCA consultation paper that this would involve an unjustifiable burden on sentencers[39] is misconceived. If a punishment is deemed just, then it must be applied justly. It would be grossly unfair if a punishment were applied automatically (or, indeed, not at all) simply because it would otherwise be too burdensome for sentencers to determine its application to particular cases.

An associated problem with the automatic disqualification of prisoners is its extremely arbitrary impact: disqualification tied to a custodial sentence runs for a fixed term, whereas elections are held periodically. Accordingly, someone imprisoned for four years in the UK may serve their entire sentence without a general election being held, whereas someone detained for only six weeks may be denied the right to vote so long as their detention overlaps with an election. A punishment whose impact varies entirely according to the coincidence of calendar dates can hardly be described as proportionate or just. If disenfranchisement were administered as an entirely separate punishment, however, uncoupled from the question of custody, there would be no difficulty in setting a period of disqualification to last until following the next election. Given the symbolic function of disenfranchisement as a punishment, it is also difficult to see how it could be proportionate to disqualify a person for more than a single general election.

Conclusion

Disqualification from voting highlights a series of apparent paradoxes and contradictions. Although democracy is a very old idea, it is only relatively recently that most self-described democracies have achieved something approaching universal suffrage. Similarly, although there are more people living under democratic governments than any time previously in human history, in the UK – one of the older democratic countries in the world – voter participation continues to fall to new lows. Disqualification itself has a long history as a uniquely democratic punishment and yet its legitimacy is increasingly challenged by judicial review, undertaken by unelected officials, citing the importance of democratic values.

It would, however, be simplistic to suppose that the relatively low levels of voter turnout mean that the right to vote is itself nugatory. For a start, having a right to do something does not require actually doing it. Neither is it true that the validity of disqualification as a punishment depends on its ability to actually deter offending or reoffending. If one accepts that punishment can serve non-consequentialist ends as well as consequentialist ones, then there is nothing inconsistent between the removal of voting rights and the state's obligation to treat those it punishes as responsible moral agents. The disagreement about the *legitimacy* of disqualification as a punishment is not, therefore, simply about

democratic values vs undemocratic ones. It is one that, at its base, involves competing conceptions of the democratic compact and is, therefore, one which courts (as unelected officials) are deeply ill-suited to resolve.

By contrast, the question of whether the general and automatic disqualification of convicted prisoners is a proportionate interference with the right to vote *is* something which courts are well-placed to determine. For it is readily apparent that there is little rational connection between the imposition of a custodial sentence *per se* and the issue of whether a person should be disqualified from voting. The blanket disqualification of large numbers of prisoners simply on the basis that they have received a custodial sentence appears unsustainable. If disqualification is to be imposed as a lawful and legitimate sentence, it seems imperative that it should only be imposed in the most exceptional category of cases, rather than as an automatic and reflexive penalty attaching to imprisonment.

The debate over disenfranchisement of prisoners therefore illustrates two things. The first is that taking democracy seriously means that any restriction on the right to vote must be drawn by Parliament as narrowly as possible. The second is that, where serious disagreements arise over the content of fundamental rights, courts must be careful to separate out those disagreements involving issues of necessity and proportionality from those which involve deeper questions of disagreement over values. The consequences of failure, it is submitted, are the same in both cases: to paraphrase Waldron, 'a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights'.[40]

Eric Metcalfe is Director of Human Rights Policy at JUSTICE.

Notes

1 *Election 2005: turnout – How many, who and why?* (Electoral Commission, October 2005), Table 2 (2005 general election results), p17.
2 Ibid, Table 3 (General election turnouts 1918-2005), p20.
3 Ibid – turnout in the 1979 general election was 76 per cent.
4 The actual extent of non-participation may be even higher, as the Electoral Commission's calculation (n1 above) is based on dividing the total number of registered voters by the total number of valid votes cast. In other words, it does not include those who do not even bother to register.
5 *Voting Rights of Convicted Prisoners Detained within the United Kingdom,* Consultation Paper CP29/06 (Department for Constitutional Affairs, December 2006).
6 See s5 Representation of the People Act 2000.
7 The total prison population as of 2 March 2007 was 79,700 (see *Prison Population & Accommodation Briefing For 2*nd *March 2007*, National Offender Management Service). However, this figure includes approximately 16% on remand (who remain eligible to vote) and approximately 13% foreign prisoners (who would be ineligible to vote in any event).
8 App No 74025/01, judgment of 6 October 2005. The Grand Chamber upheld the court's earlier decision of 30 March 2004 (see *Hirst v United Kingdom* (2004) 38 EHRR 40).
9 Ibid, paras 76-81.

10 See eg para 82: 'while the Court reiterates that the margin of appreciation is wide, it is not all-embracing'.
11 See eg John Locke, 2nd Treatise of Government (1690), Ch 2, section 12: 'each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender give him cause to repent, and terrify others from doing the like'.
12 Jean-Jacques Rousseau, The Social Contract, trans GDH Cole (Everyman, 1993), Bk 4, Ch 9, p304.
13 Danielle Allen, 'Punishment in Ancient Athens', *Démos*, March 2003.
14 JS Mill, Representative Government, Ch 8. Emphasis added. Mill went on to argue that the universal franchise should nonetheless exclude those unable 'to read, write, and… perform the common operations of arithmetic', as well as 'those who pay no taxes', those 'in receipt of parish relief', and 'uncertified bankrupts'.
15 Art 21(1): 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.
16 Art 25: 'Every citizen shall have the right and the opportunity…without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'.
17 Indeed, one of the frequently overlooked aspects of the right to vote is that – while the right itself is a *human* one (ie not limited according to nationality) – entitlement to vote is closely tied to citizenship. In other words, while it is expressed as a universal right, it finds its expression only through geographically limited political units, membership of which is not open to everyone.
18 'The great right of every man, the right of rights, is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit', William Cobbett, *Advice to Young Men and Women, Advice to a Citizen* (1829) cited in J Waldron, Law and Disagreement, Oxford University Press, 1999, p232.
19 See eg Miles, 'Felon Disenfranchisement and Voter Turnout', *Journal of Legal Studies*, volume 33 (2004), pp85–129, discussing the impact of permanent disenfranchisement provisions in many US states on African-American voter turnout.
20 John Rawls, 'Two Concepts of Rules' (1955) 64 Philosophical Review pp3-32.
21 [2002] 3 SCR 519 (hereafter 'Sauvé', notwithstanding that it was actually the second time the Supreme Court considered voting restrictions in Sauvé's case: see *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438).
22 Ibid, para 7 per McLachlin CJ.
23 Ibid, para 21.
24 See eg ibid, para 24: 'The rhetorical nature of the government objectives advanced in this case renders them suspect'.
25 Ibid, para 32.
26 Ibid, para 40.
27 Ibid, para 30.
28 Ibid, para 40. Ironically, the majority cited JS Mill in support of its conclusions that voting itself performed an educative function.
29 In presenting its case, the government apparently accepted that 'a causal relationship between disenfranchising prisoners and the objectives approved of above is not empirically demonstrable' (ibid, para 150).
30 Ibid, paras 90-99.
31 See eg JS Mill, Representative Government, Ch 10: 'In whatever way we define or understand the idea of a right, no person can have a right…to power over others: every such power, which he is allowed to possess, is morally, in the fullest force of the term, a trust. But the exercise of any political function, either as an elector or as a representative, is power over others. Those who say that the suffrage is not a trust but a right will scarcely accept the conclusions to which their doctrine leads. If it is a right, if it belongs to the voter for his own sake, on what ground can we blame him for selling it, or using it to recommend himself to any one whom it is his interest to please? A person is not expected to consult exclusively the public benefit in the use he makes of his house, or his three per cent stock, or anything else to which he really has a right. The suffrage is indeed due to

him, among other reasons, as a means to his own protection, but only against treatment from which he is equally bound, so far as depends on his vote, to protect every one of his fellow-citizens. His vote is not a thing in which he has an option; it has no more to do with his personal wishes than the verdict of a juryman. It is strictly a matter of duty; he is bound to give it according to his best and most conscientious opinion of the public good. *Whoever has any other idea of it is unfit to have the suffrage*; its effect on him is to pervert, not to elevate his mind' [emphasis added].

32 See eg Rousseau, The Social Contract, n12 above, pp274-275: 'The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them'. See also the speech of Lord Hoffman in *R v Jones* [2006] UKHL 16: 'the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it' (para 84). Similarly, Lord Hoffman held that civil disobedience could not raise a lawful defence in 'the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process' (ibid, para 94).

33 See eg J Waldron, 'The Core of the Case Against Judicial Review', (2006) 155 *Yale Law Journal*, 1346-1406 at 1406: 'Disagreement about rights is not unreasonable, and people can disagree about rights while still taking rights seriously. In these circumstances, they need to adopt procedures for resolving their disagreements that respect the voices and opinions of the persons—in their millions—whose rights are at stake in these disagreements and treat them as equals in the process. At the same time, they must ensure that these procedures address, in a responsible and deliberative fashion, the tough and complex issues that rights-disagreements raise'.

34 Ibid at 1353. Emphasis added.

35 *Sauvé*, n21 above, para 48.

36 *Hirst v United Kingdom* (2004) 38 EHRR 40, para 71.

37 *Raymond v Honey* [1983] 1 AC 1 per Lord Wilberforce. See also Lord Bingham in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at para 5: 'Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights'.

38 *Hirst,* n36 above, para 71.

39 *Voting Rights of Convicted Prisoners Detained within the United Kingdom,* n5 above, para 64.

40 Waldron, n33 above. Waldron is, of course, referring only to disenfranchisement by way of judicial review, but it also serves as a fair description of the kind of unnecessary disenfranchisement that results when prisoners are automatically disqualified from voting.

41 *Election 2005: turnout – How many, who and why?* (Electoral Commission, October 2005), Table 2 (2005 general election results), p17.

42 Ibid, Table 3 (General election turnouts 1918-2005), p20.

43 Ibid – turnout in the 1979 general election was 76 per cent.

44 The actual extent of non-participation may be even higher, as the Electoral Commission's calculation (n1 above) is based on dividing the total number of registered voters by the total number of valid votes cast. In other words, it does not include those who do not even bother to register.

45 *Voting Rights of Convicted Prisoners Detained within the United Kingdom,* Consultation Paper CP29/06 (Department for Constitutional Affairs, December 2006).

46 See s5 Representation of the People Act 2000.

47 The total prison population as of 2 March 2007 was 79,700 (see *Prison Population & Accommodation Briefing For 2*nd *March 2007*, National Offender Management Service). However, this figure includes approximately 16% on remand (who remain eligible to vote) and approximately 13% foreign prisoners (who would be ineligible to vote in any event).

48 App No 74025/01, judgment of 6 October 2005. The Grand Chamber upheld the court's earlier decision of 30 March 2004 (see *Hirst v United Kingdom* (2004) 38 EHRR 40).
49 Ibid, paras 76-81.
50 See eg para 82: 'while the Court reiterates that the margin of appreciation is wide, it is not all-embracing'.
51 See eg John Locke, 2nd Treatise of Government, 1690, Ch 2, section 12: 'each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender give him cause to repent, and terrify others from doing the like'.
52 Jean-Jacques Rousseau, The Social Contract, trans GDH Cole (Everyman, 1993), Bk 4, Ch 9, p304.
53 Danielle Allen, 'Punishment in Ancient Athens', *Démos*, March 2003.
54 JS Mill, Representative Government, Ch 8. Emphasis added. Mill went on to argue that the universal franchise should nonetheless exclude those unable 'to read, write, and… perform the common operations of arithmetic', as well as 'those who pay no taxes', those 'in receipt of parish relief', and 'uncertified bankrup ts'.
55 Art 21(1): 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.
56 Art 25: 'Every citizen shall have the right and the opportunity…without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'.
57 Indeed, one of the frequently overlooked aspects of the right to vote is that – while the right itself is a *human* one (ie not limited according to nationality) – entitlement to vote is closely tied to citizenship. In other words, while it is expressed as a universal right, it finds its expression only through geographically limited political units, membership of which is not open to everyone.
58 'The great right of every man, the right of rights, is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit', William Cobbett, *Advice to Young Men and Women, Advice to a Citizen* (1829) cited in J Waldron, Law and Disagreement, Oxford University Press, 1999, p232.
59 See eg Miles, 'Felon Disenfranchisement and Voter Turnout', *Journal of Legal Studies*, volume 33 (2004), pp85–129, discussing the impact of permanent disenfranchisement provisions in many US states on African-American voter turnout.
60 John Rawls, '*Two Concepts of Rules*' (1955) 64 Philosophical Review pp3-32.
61 [2002] 3 SCR 519 (hereafter '*Sauvé*', notwithstanding that it was actually the second time the Supreme Court considered voting restrictions in Sauvé's case: see *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438).
62 Ibid, para 7 per McLachlin CJ.
63 Ibid, para 21.
64 See eg ibid, para 24: 'The rhetorical nature of the government objectives advanced in this case renders them suspect'.
65 Ibid, para 32.
66 Ibid, para 40.
67 Ibid, para 30.
68 Ibid, para 40. Ironically, the majority cited JS Mill in support of its conclusions that voting itself performed an educative function.
69 In presenting its case, the government apparently accepted that 'a causal relationship between disenfranchising prisoners and the objectives approved of above is not empirically demonstrable' (ibid, para 150).
70 Ibid, paras 90-99.
71 See eg JS Mill, Representative Government, Ch 10: 'In whatever way we define or understand the idea of a right, no person can have a right…to power over others: every such power, which he is allowed to possess, is morally, in the fullest force of the term, a trust. But the exercise of any political function, either as an elector or as a representative, is power over others. Those who say that the suffrage is not a trust but a right will scarcely accept the conclusions to which their doctrine leads. If it is a right, if it belongs to the voter for his own sake, on what ground can we blame him for selling it, or using it to

recommend himself to any one whom it is his interest to please? A person is not expected to consult exclusively the public benefit in the use he makes of his house, or his three per cent stock, or anything else to which he really has a right. The suffrage is indeed due to him, among other reasons, as a means to his own protection, but only against treatment from which he is equally bound, so far as depends on his vote, to protect every one of his fellow-citizens. His vote is not a thing in which he has an option; it has no more to do with his personal wishes than the verdict of a juryman. It is strictly a matter of duty; he is bound to give it according to his best and most conscientious opinion of the public good. *Whoever has any other idea of it is unfit to have the suffrage*; its effect on him is to pervert, not to elevate his mind' [emphasis added].

72 See eg Rousseau, The Social Contract, n12 above, 274-275: 'The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them'. See also the speech of Lord Hoffman in *R v Jones* [2006] UKHL 16: 'the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it' (para 84). Similarly, Lord Hoffman held that civil disobedience could not raise a lawful defence in 'the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process' (ibid, para 94).

73 See eg J Waldron, 'The Core of the Case Against Judicial Review', (2006) 155 *Yale Law Journal*, 1346-1406 at 1406: 'Disagreement about rights is not unreasonable, and people can disagree about rights while still taking rights seriously. In these circumstances, they need to adopt procedures for resolving their disagreements that respect the voices and opinions of the persons—in their millions—whose rights are at stake in these disagreements and treat them as equals in the process. At the same time, they must ensure that these procedures address, in a responsible and deliberative fashion, the tough and complex issues that rights-disagreements raise'.

74 Ibid at 1353. Emphasis added.

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80 Waldron, n33 above. Waldron is, of course, referring only to disenfranchisement by way of judicial review, but it also serves as a fair description of the kind of unnecessary disenfranchisement that results when prisoners are automatically disqualified from voting.

Book reviews

Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe

Anneliese Baldaccini and Elspeth Guild (eds)
Martinus Nijhoff Publishers, 2006
xxii, 434pp €135

This book, an edited collection of essays, examines the legal status of asylum seekers and migrants and how that legal status has been modified on the grounds of security-related measures adopted at two points in time: firstly during the first Gulf War, and secondly following the 11 September 2001 attacks. The book examines whether the security measures could be in conflict with fundamental human rights principles. This is achieved by tracing the developments in the law and the practices of the EU and five of its member states: the UK, Germany, France, the Netherlands and Italy.

Chapter one describes the security measures which were adopted during the first Gulf War of 1991, and provides a comparative description of the EU policy and legislation related to the immigration and asylum fields post-11 September 2001. The chapter reveals that the terrorist threat and attacks at the time of the first Gulf War provoked a reflex reaction towards migration control comparable to that which occurred after 9/11. Although the European Community did not have competence in the fields of immigration and asylum policy at the time of the Gulf War, security measures were not alien to European immigration and asylum policy and legislation prior to the attacks on the US on 11 September 2001.

Chapter two provides a broader overview of EU policy by examining the relevant major case-law of the European Court of Human Rights (ECtHR), and emphasises the need for the ECtHR to elaborate and establish coherent binding principles for the protection of rights of aliens subject to prosecution or removal by European states on terrorism or security related grounds. The analysis provided by the ECtHR case-law shows that the European system of human rights protection, as developed so far in the context of the interpretation and application of the European Convention on Human Rights (ECHR), has real potential to act as a strong counter-balance to the elaboration and application of over-reactive legislation and administrative anti-terrorism measures that contravene the fundamentals of European human rights protection for aliens.

Chapter three examines in detail the impact of terrorism on the law of immigration and asylum in the UK in respect of the two 'wars' (the first Gulf war and the 'war on terror'). The study reveals, in both immigration and asylum law, the vital importance of international standards and enforcement machinery, given the extent of governmental power in the national security area, and the need to move away from the arguably undue degree of deference United Kingdom judges have traditionally accorded to executive opinion.

Chapter four traces the transformation of Germany's response to both the

Gulf War and the 11 September 2001 terrorist attacks in the fields of immigration and asylum law. This chapter illustrates that in the early 1990s, measures combating terrorism did not directly relate to immigration and asylum law. Rather, they were primarily connected to criminal law. In the aftermath of the attacks of 11 September 2001, measures against terrorism and changes in immigration law were intrinsically entwined. This chapter provides details of the wide-ranging measures which were enacted after 11 September 2001.

Chapter five depicts the changes in asylum and immigration laws in France, which have traditionally focused around the concept of national security and public order. This chapter outlines the development in French law and jurisprudence of the public order concept in the areas of entry, residence permits, expulsion and asylum in the four years after the 1990 Gulf crisis, and analyses the changes to legislation. This approach is also applied to the period from 2001 to 2005 in the context of the 'war on terror'. A comparison is then drawn between these two periods, and the chapter concludes by revealing that two parallel tendencies exist in France. On the one hand there is the fight against terrorism, which has involved the development of an autonomous criminal law; on the other there is the permanent struggle against immigration and the slow criminalisation of migration since 1980.

Chapter six discusses the impact of terrorism on immigration and asylum law in the Netherlands, and argues that Dutch political and social life has been highly stratified throughout the 20th century. Three central themes emerge from the study of the Netherlands, namely nationality politics and the question of belonging; religious politics; and gender politics.

Chapter seven focuses on terrorism, asylum and immigration laws in Italy. In contrast with other member states, terrorism in Italy has almost always been perpetrated by one of the numerous Italian criminal organisations, composed of Italian citizens with opposing political views. This comprehensive chapter outlines in detail the treatment of terrorism in legislation and in Italian immigration and asylum practices since 1990. It provides a general overview of Italian criminal legislation and the law of procedure as it relates to international terrorism after 2001; and also the developments in the police investigation of, and criminal proceedings against, foreigners investigated for crimes of terrorism.

This book provides a detailed account of the development of security policy at both national and European level, especially in the aftermath of the events on 11 September 2001, and of its impact on the cohesion of European societies. This book is particularly effective in analysing the changes which have occurred in the field of immigration and asylum laws, and provides a comprehensive overview of the challenges facing the member states. The comparisons drawn between the security threats during the time of the Gulf War and after the 11 September 2001 are particularly interesting.

Arezou Yavarianfar, human rights intern, winter 2007, JUSTICE.

Discrimination Law Handbook (Second edition)

Aileen McColgan (ed)
Legal Action Group, 2007
968pp £55

Since the publication of the first edition of the LAG *Discrimination Law Handbook* in 2002 the legal landscape has changed in a significant number of ways, with key developments in both substantive and procedural areas of discrimination law.

The *Handbook* continues to serve a range of readers, from law students and even non-lawyers wishing to understand various aspects of this field, to specialist practitioners. Human resources managers and trades union officials will find the textbook equally useful, as it offers practical advice for caseworkers representing both employers and workers.

Regardless of the type of work the reader of the *Handbook* undertakes, it clearly functions effectively both as a specialist guide and as a first port of call for highlighting issues which do not fall within the in-depth analysis of discrimination law. So with regard to the latter, the topic of statutory grievance procedures is addressed in the chapter on procedure in straightforward summary form, without going into the realms of swiftly developing case-law. In contrast, the ever-complex area of disability discrimination has one chapter covering the general principles of disability related discrimination and the duty to make reasonable adjustments (direct discrimination has its own chapter focusing on the tests across the discrimination legislation) and another devoted to non-employment disability discrimination. This latter chapter deals in detail with areas including education and transport as well as goods, facilities and services.

The authors have not chosen solely to group chapters by particular areas of prohibited discrimination but instead cover specific areas such as direct and indirect discrimination, harassment and victimisation, and discrimination in recruitment, employment and dismissal, as these are relevant to more than one form of discrimination law. This means one has to take advantage of the useful cross-referencing. However a textbook of this size by its very nature requires a degree of 'jumping around' and is not designed to be read from cover to cover. The index is particularly good, making it easy to locate topics under examination.

The summary of key points which is put at the front of each chapter helps gather together the strands of discrimination law which are not made simpler by their position in a mixture of statute, regulations, EU directives and voluntary codes of practice. The chapter on human rights and EU law provides a clear introduction to this area, although those running cases with these legal points would want to consult specialist texts containing more detail than the *Handbook* has room for.

As well as chapters benefiting from updating and enlarging, such as that on harassment, there are entirely new chapters. Age discrimination now has its own chapter and sets out the background to the 2006 legislation as well as analysing recent important cases such as *Mangold v Helm*. The remit of the Age Regulations 2006 is expounded and a further chapter discusses age discrimination in occupational pension schemes.

The authors have in certain cases chosen not to repeat practical advice where they would simply be mirroring what is set out elsewhere. So whilst the chapter on discrimination in occupational pension schemes explains the EU law background to the prohibition on such discrimination, the remedies chapter has a concise section covering pension loss as an element of compensation with a reference to the 2003 tribunal guidance *Compensation for Loss of Pension Rights*.

Whilst some of the new chapters are necessarily descriptive rather than analytic, such as those about statutory equality duties of public authorities and the equality commissions, the emphasis is always on practical advice, and even if the text does not complete one's research it is a constructive overview.

The *Handbook*'s appendices are particularly helpful for caseworkers; there is a useful specimen letter of instruction to a doctor in a Disability Discrimination Act case for example, as well as sample questions for questionnaires under the Age Regulations 2006.

Rachel Crasnow, barrister specialising in employment and discrimination law at Cloisters, the Chambers of Robin Allen QC.

Blackstone's Criminal Practice 2007

Peter Murphy (editor-in-chief)
Oxford University Press, 2006
3424pp £165

This work is the most recent edition of the single volume criminal practitioner's 'bible'. An impressive roll-call of authors and advisory editors have been assembled, including Professor David Ormerod, Tim Owen QC, David Perry QC, Diane Birch and Keir Starmer QC, to name but a few. In recent years, the pace and volume of legislative change in the field of criminal law and procedure has provided the main challenge with which any criminal law practitioner text must seek to cope. This volume includes coverage of statutory material as recent as the Terrorism Act 2006, the Racial and Religious Hatred Act 2006, and the Fraud Bill (as was). A quarterly updating bulletin is available, and there is also a companion website to alert practitioners to key developments taking place during the life-cycle of the edition – this latter is particularly welcome, since the pace of change is now such that it is very difficult for paper supplements alone clearly to present the effect of changes.

Blackstone's Criminal Practice 2007 is divided into six parts: criminal law [general principles], offences, road traffic offences, procedure, sentencing, and evidence; plus useful appendices including, inter alia, the Criminal Procedure Rules 2005; PACE Codes of Practice; the Code for Crown Prosecutors; human rights provisions; and SGC guidelines. There follows the index – one of the most crucial parts of a practitioner text, as it can assist or frustrate the rapid reference so often needed in the few minutes before a hearing or conference, or in the court-room itself. Some experimental searches, using the index, on topics of recent interest to JUSTICE were largely successful: the offence of demonstrating without authorisation in the designated area under the Serious Organised Crime and Police Act 2005 (SOCPA), for example, was found at the first attempt under 'Demonstrations/without authorisation in designated area'. Reporting restrictions in the youth court were also found very quickly under

'Youth court/press restrictions'. It was a little more surprising in the index section on 'Harassment', however, that while 'Harassment/of person in his home' (under SOCPA) was indexed there, to find the elements of the simple offence under s2 Prevention of Harassment Act 1997 one had to go to 'Public order offences/harassment'.

Tables are also vital for practitioner reference: the six main parts of this work are preceded by a table of cases, which includes ECHR cases; and tables of statutes, statutory instruments, and codes of practice and practice directions. This latter table also, confusingly, includes international instruments, which might better have been the subject of a separate table. In all three tables of legislative material, it is helpfully indicated when the relevant material is reproduced in the text of the volume.

One litmus test for clarity in a work of this type is in how it deals with the now common situation where the courts are applying both old and new laws on a topic from case to case, often depending on the date of commission of the alleged offence. Section B5 of this work, 'Deception, fraud and blackmail', provides one instance of this – at the time the work was written, the Fraud Bill had not received Royal Assent but had largely completed its passage through Parliament. The old Theft Act offences will, however, remain relevant for some time. The book's approach is to set out the situation in an introduction to the section, including discussion regarding how transitional cases will be dealt with, and then to set out the old offences, followed by the new offences. This is a simple and clear way of proceeding. The explanatory text around the new Bill's provisions indicates the differences from and continuities with the old law, and includes reference to Law Commission reports.

Any modern criminal practitioner text is incomplete without discussion of human rights. Section A7 of this work provides explanation of general ECHR principles, particularly useful for the non-specialist, in addition to setting out specific obligations relevant to criminal cases. These are arranged thematically, for example dealing with 'evidence' and 'appeals'. The section deals not only with the classic fair trial rights but also matters such as the duty to investigate crime effectively. Appendix 7 to the volume, which sets out human rights provisions, is somewhat brief – it is surprising, for example, in a criminal law text that Article 3 ECHR is omitted here, and it would have been pleasing to see not only parts of the ECHR and HRA but also other relevant international instruments to which the UK is signatory but which are less frequently cited in court proceedings, such as the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child, both of which set standards for criminal justice systems.

At £165, with a discount rate available for students and newly qualified practitioners, this is an extremely reasonably priced, comprehensive and clear practitioner text. *Blackstone's* is particularly attractive to those who practise in both the Crown Court and the magistrates' court, as both are dealt with in one manageable volume, but it also has much to offer the student, academic or NGO needing regularly to unravel the complexities of the modern criminal law.

Sally Ireland, Senior Legal Officer (Criminal Justice), JUSTICE

JUSTICE briefings and submissions

1 November 2006 – 28 February 2007

Available at www.justice.org.uk

1. Letter to MPs regarding extradition amendments to the Police and Justice Bill, jointly with Liberty, November 2006.
2. Letter to Peers regarding extradition amendments to the Police and Justice Bill, jointly with Liberty, November 2006.
3. Suggested Private Members Bill, protection of peaceful protest, jointly with Liberty, November 2006.
4. Briefing on the Mental Health Bill for second reading in the House of Lords, November 2006.
5. Briefing on the Fraud (Trials without a Jury) Bill for second reading in the House of Commons, November 2006.
6. Suggested amendments for the Corporate Manslaughter and Corporate Homicide Bill for report stage in the House of Commons, November 2006.
7. Briefing on multiple discrimination for the Discrimination Law Review, November 2006.
8. JUSTICE Student Human Rights Network Autumn electronic bulletin, November 2006.
9. Response to the consultation on judges returning to practice, December 2006.
10. Briefing on the Corporate Manslaughter and Corporate Homicide Bill for second reading in the House of Lords, December 2006.
11. Response to OJCR consultation on quashing convictions, December 2006.
12. Suggested amendments to the Corporate Manslaughter and Corporate Homicide Bill for House of Lords Grand Committee, December 2006.
13. Response to Nuffield Council on Bioethics consultation, *Forensic use of bioinformation: ethical issues*, (including DNA retention on police database), January 2007.
14. Response to the Home Office consultation, *Making Sentencing Clearer: A consultation and report of a review by the Home Secretary, Lord Chancellor and Attorney General*, January 2007.
15. Suggested amendments to the Fraud (Trials without a Jury) Bill for report stage in the House of Commons, January 2007.
16. Suggested amendments to the Corporate Manslaughter and Corporate Homicide Bill regarding deaths in custody for report stage in the House of Lords, jointly with Liberty, Prison Reform Trust and INQUEST, January 2007.

17. Submission on the draft Coroners Bill to the Joint Committee on Human Rights, January 2007.
18. Briefing on the Serious Crime Bill Part I for second reading in the House of Lords, January 2007.
19. JUSTICE Student Human Rights Network New Year electronic bulletin, January 2007.
20. JUSTICE briefing for the House of Commons debate on the renewal of control order legislation, February 2007.
21. Discussion paper of JUSTICE's constitutional project, *A Bill of Rights for Britain?* electronic version, February 2007.

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