JUSTICE JOURNAL

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

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Justice, JUSTICE and judgment

On the last day of October, the House of Lords handed down judgments in three linked cases on control orders.[1] One of the issues in these cases, and on which JUSTICE was an third party intervener, was the fair trial rights of those suspected by the Home Secretary of being terrorists. The implications are particularly relevant to a number of articles in this edition of the *JUSTICE Journal*. They are also germane to a theme of JUSTICE's 50th anniversary. JUSTICE was, after all, founded on a concern with fair trial rights. Its first two activities in 1957 and 1958 were to send delegations to trials in South Africa and Hungary to observe the protection of the rights of defendants characterised as terrorists by the ruling regimes in both countries. A number of articles in this issue take up the wider implications of the role and powers of the judiciary. What is the role of the judiciary in a democratic state? To what extent can, and should, the judiciary stand up to the executive? At what point may a judge accept the limit of 'thus far and no further' and leave a decision to a minister? And what authority and what document should give the judiciary their mandate?

These topics were confronted by Professor Conor Gearty in his JUSTICE Tom Sargant memorial annual lecture, provocatively entitled 'Are judges now out of their depth?' Geoff Budlender deals with somewhat the same issues in his contribution from the different circumstances of South Africa where the judiciary act as guardians of a democratically agreed constitution intended to be transformative. Colm O'Cinneide, Liz Curran and Eric Metcalfe look from different perspectives at the content of bills of rights. The first argues for greater protection of equality rights; the second at how the Australian states of Victoria and the Australian Capital Territory adopted human rights legislation and Eric Metcalfe fiercely opposes any attempt to add responsibilities into some ersatz bill of rights. Finally, Emma Douglas examines one of the far boundaries of judicial intervention on socio-economic rights by the House of Lords. In the exceptional circumstances of *R (Limbuela) v Secretary of State for the Home Department*,[2] the court was willing to extend the right against torture and ill-treatment to include destitution caused as the result of the statutory exclusion of an individual or class from state benefits otherwise receivable. These articles circle around a topic which will dominate domestic political debate until the next election – the judiciary and the extent of any rights in a bill of rights which might give them additional powers. On this subject, JUSTICE released a major report in November and it will be discussed in the next issue of the *Journal*.

The supremacy of Parliament over the judiciary has attracted heavyweight defenders from Albert Venn Dicey to Professor John Griffith. Professor Gearty is worthy of his LSE predecessor. He has expressed himself forcefully on the historical failure of the judiciary, as he sees it, to protect civil liberties. The conclusion of a book on civil liberties between 1914 and 1945 which he co-authored with Professor Keith Ewing concluded that 'there is not a single example throughout the entire period … of a judicial decision in Britain at High Court or appellate level which can be said to have served to protect and promote civil liberties against the hostile attentions of the state'.[3]

The interesting thing is just how inappropriate such a bleak assessment would be of the period from October 2000 after implementation of the Human Rights Act 1998. The control order cases make the point. The judges in *MB* were willing, in Lord Bingham's words, to stand up for 'the fundamental duty of procedural fairness'. A minimum requirement for defendants is to know as much of 'what was said against him' as is 'necessary to enable … [him] … effectively to challenge or rebut the case against him'.[4] The classic position in English common law, as Professors Gearty and Ewing pointed out in their book, was considerably different. Lord Atkins' famous declamation to the effect that among the clash of arms the law is not silent in *Liversidge v Anderson*[5] was very much a minority opinion and even he was only arguing that some minimal evidence might be required to justify a Home Secretary's belief that someone be interned without trial. Isolated in the House of Lords, Lord Atkins railed against listening to arguments 'which might have been addressed acceptably to the Court of King's Bench in the times of Charles 1'.[6] His brethren were 'more executive minded than the executive'.

The Court of King's Bench makes a reference, conscious or not, to the Bill of Rights 1689. Prominent among its grievances are 'prosecutions in the Court of King's Bench for matters and causes cognisable only in Parliament, and by divers other arbitrary and illegal courses.'[7] Of course, in the seventeenth century, the battle was for Parliament against the Crown. *MB* is but one recent case in which the judges have placed 'divers other arbitrary and illegal courses' under the searchlight of the European Convention on Human Rights (ECHR).

The guarantee of a fair trial is at the heart of any concept of civil liberties, human rights and, thereby, the role of a proper judiciary. Such a right is contained within all the major international treaties on civil and political rights. Article 6 ECHR was the provision at the heart of the argument in *MB*. The majority of the court were willing to read into statutory provisions allowing exclusion of evidence from the defendant qualifications such as 'except where to do so would be compatible with the right of the controlled person to a fair trial.'[8] However, a right to a fair trial can also be derived by a different route – from the common

law itself. This is, after all, how Lord Justice Laws decided that fees should not be set at levels that effectively exclude applicants from the courts.[9]

Judges understandably are quick to support the right to a fair trial: it directly affects their work. Even the Supreme Court of the United States finally asserted its concern at the process rights of those in Guantanamo Bay. In *Hamdan v Rumsfeld*[10] it held that legislation was unconstitutional to the extent that it sought to exclude its jurisdiction. On the same lines, the Canadian Supreme Court was unpersuaded of the value of closed hearings and special advocates in the case of aliens liable to detention and deportation on the ground of breach of national security.[11]

The US and Canadian courts based their arguments on the constitutional documents of which they are the acknowledged guardians. Domestically, of course, the position is different. It may well be that the decisions in the control order cases were as far as the House of Lords should go in terms of Professor Gearty's line of demarcation. The law lords insisted on a fair procedure for the determination of a control order: they asserted the need for deprivation of liberty under such an order to remain short of effectively being imprisonment; they left untouched the control order regime as such. The importance of this decision is perhaps only increased by the extent to which the Home Secretary declared it a victory: 'I am also pleased that the Lords did not find that the review process in these cases had been unfair'.[12] If that is the way she wishes to see it, then so be it. Actually, the review process will have to change significantly to accommodate greater transparency.

Both Geoff Budlender and Professor Gearty are right to press for some formulation of the line beyond which judges may not legitimately go. The position of that line may differ according to circumstance: it is not absolute. The South African constitution was drafted with the intention that the judges would be a motor for change. Thus, they act with a democratic mandate in making the kind of decisions discussed in Geoff Budlender's article. On the other hand, Professor Gearty is, of course, right to point out that our domestic judges have no such democratic cover. To make his case, he refers to the remarks made in *Jackson v Attorney-General*.[13] He quotes Lord Steyn who mused that judges might overrule Parliament 'in exceptional circumstances' such as an attempt 'to abolish judicial review or the ordinary role of the courts'.[14]

It would, indeed, be momentous if the judges actually came so to decide. More important perhaps, however, than the assertion of the power is the assertion of principle – with which Professor Gearty would surely agree. Lines should apply to Parliament too. It should not seek to remove fair trial rights. If we had a constitution, this is surely one of the things which it would say. After all, that

of both the United States and Canada protects fair trial and due process. So too does South Africa.[15]

Professor Gearty is clearly right to say that, beyond a certain point, judges should not go on their own. They need the democratic legitimacy that comes from a constitution, a statute or, in an extreme situation, popular support. We should rightly be nervous of any prospective over-extension of their power. Geoff Budlender gives the potent example of India. What judges giveth, they can all so easily take away. A later court may yet emerge to justify Professor Griffith's argument. On the other hand, we certainly also need a judiciary that will take up the tradition manifest by the feisty Lord Atkins. So, for all that we might beware caution of any claim for judicial supremacy, let's hear it for the substance of what Lords Brown, Carswell, Steyn and Lady Hale were saying in the control orders appeal cases. There should be limits to their power. So too there should be limits to that of any executive and supine Parliament that wants too easily to circumvent fundamental civil liberties. *MB* is but the latest of a number of major judgments in which the House of Lords may have redrawn slightly the line between the judiciary and Parliament. They have intervened to amend the control order procedure. They have surely not, however, trespassed outside their proper boundaries.

Notes

1 *MB and others v Secretary of State for the Home Department* [2007] UKHL 46, *JJ and others v Secretary of State for the Home Department* [2007] UKHL 45 and *Secretary of State for the Home Department v E and another* [2007] UKHL 47.
2 [2005] UKHL 66.
3 K Ewing and C Gearty, The Struggle for Civil Liberties: political freedom and the rule of law in Britain 1914-1945, Oxford University Press, 2000, p403.
4 Para 34, quoted in *Control Orders Appeal Briefing*, JUSTICE, October 2007, p4.
5 [1942] AC 206.
6 Ibid, p398.
7 Bill of Rights 1689.
8 Para 72.
9 *R v Lord Chancellor ex parte Witham* [1998] QB 575.
10 548 US (2006).
11 *Charkaoui v Minister of Citizenship* [2007] SCC9 23 February 2007.
12 Jacqui Smith, Home Office statement, 1 November 2007.
13 [2005] UKHL 56.
14 See p15.
15 S34, chapter two, Bill of Rights.
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Are judges now out of their depth?

Conor Gearty

This is the revised text of the JUSTICE Tom Sargant memorial annual lecture 2007 given on Wednesday 17 October 2007 at the Conference Centre, Freshfields Bruckhaus Deringer, London. The lecture was chaired by Lord Goodhart QC, chair of JUSTICE Council.

A member of the appellate committee of the House of Lords was thoughtful enough to send me an email last week, explaining that as this was the night of the law lords' annual dinner it was not likely that many of their lordships would be in the audience. The email was headed 'not waving but drowning': exactly raising the further question that lies under the title that Roger [Smith, Director of JUSTICE] and I concocted in order to lure you here this evening. If judges are indeed now out of their depth, does this matter? Can they swim? If they can, being out of their depth should come as a welcome chance to show off, to get fully into their amphibious stride.

The point wasn't one I had addressed when I had first woven a painfully elaborate and some might say endlessly recurring swimming pool metaphor into a book I did on the Human Rights Act 1998 (HRA) a few years ago.[1] My idea was that if the whole of the public sphere could be reduced to a swimming pool, then judges were best at engaging with those bits close to their own function that I said lay in the shallow end (criminal justice; fair proceedings; civil liberties; and the like) whilst being largely incapable when things drifted across to the deep water on the far side, the social, taxation, foreign and other policy stuff that judges did not come across in the course of their day-to-day work and on which, therefore, they should not be claiming any special expertise – even when tempted to do so by litigants. The point had been especially worth making in the context of human rights – the law in this realm is so abstract that many different kinds of arguments can potentially be made. My observation on the HRA case-law was that most of the litigation was about matters floating about in the middle, with judges being asked to decide to which end of the pool these questions truly belonged: I may even have written about judges being on their tip-toes striving to stay upright: I am afraid to check. It had never occurred to me to ask, why couldn't they swim?

I can see now that I was misled by mixing my metaphors, or rather by using one image in two different ways. To me in the book 'out of their depth' meant

unable to cope, not up to this particular task, being in the wrong job. I had brought the swimming pool into it because it seemed a clever way to make the same point, without realising that it spun the metaphor off in a whole new direction. But introducing this possibility of swimming adds a whole new depth (or perhaps I should say dimension). Giving the key note address at a recent conference in Oxford,[2] the founder of the modern women's shelter movement Erin Pizzey spoke in passing of how so few children she had come across in her work had been able to swim. Swimming required trust: trust in themselves, trust in others, and this was a trust that these children – many of whom had been abused by their fathers – had not had. Here perhaps is a way of bringing together the two strands of my metaphor: judges who are headed towards the deep end of policy need to be trusted – by themselves and by others – if they are to be able to turn the apparent difficulty of being out of their depth into a strength, not to drown in the inundation of broad policy before them but rather to wave confidently while resolving the difficulties before them with a few firm judicial strokes.

So the lecture this evening is about more than just deciding whether the judges are indeed now out of their depth. It is also about whether, if they are, they nevertheless enjoy sufficient trust to be able to swim on regardless, asserting their jurisdiction in areas that are historically far away from the sorts of things that they have traditionally done.

My answer to these questions tonight take the form of three propositions of which I hope to persuade you: first, that though the judges are not now out of their depth, they must be on their constant guard against becoming so and there is some evidence that the guard of at least some of them has been dropping of late; second, that if the judges do find themselves by accident or design out of their depth they must on no account swim – and this is the case *even if* they feel that they enjoy sufficient confidence on the part of the public to be able to do so: judges, in other words, have no business swimming even when they are able to – they belong in the shallow end; and third, a right understanding of the judicial role along these lines is essential if the integrity of the judicial function is to be assured into the future and now – a time of little social conflict and high trust in the judicial branch – is exactly when this understanding can be honed and refined to the benefit of future generations.

Let me begin, then, with the first of these propositions. It is directly concerned with the question of judicial competence. I have alluded earlier to what I feel is the central remit of the judge in our politico-legal culture. The core of his or her work is concerned with determining the facts of individual cases and applying the law to those facts: this is what judges have been mainly for and what they feel most confident about. Where the state is involved as prosecutor

we call this the criminal law; where it is private parties disputing the application to them of settled law or seeking (more ambitiously) to reinterpret that law to their advantage, the result are cases that we describe as falling within the common law. In the very old days the latter was constituted by judicial rulings uninfluenced by statute, but nowadays it is not thought contradictory to view a case between private litigants that turns on a particular statutory provision as fitting squarely within the common law. A third tier of judicial work is the control of government, the insistence that public authorities act lawfully. This legal control of administrative action, originally quite narrowly focused on issues of straightforward (or narrow) ultra vires, has grown in its reach in the decades since the early 1960s. The first expansionary device was to insist that disputes between the state and individuals should mimic the court-room through the adoption of various rules of natural justice that were either magicked out of the common law or confidently read into statutes that made no explicit allowance for them. This was followed by an increased propensity on the part of the higher courts to allow their view of this or that administrative action as unreasonable to mature into a ruling that it was 'so unreasonable that no reasonable authority could have done it' and was therefore also unlawful: thus did a throwaway judgment of the Court of Appeal in 1948 (the *Wednesbury* case)[3] come to be deployed as a quasi-constitutional control on not the *procedural correctness* but the *substance* of executive action.

We forget now quite how controversial these expansions of the judicial remit were when they were first being essayed in the late 1960s and through the 1970s: they were usefully recalled by my colleague and friend Professor Jeffrey Jowell at the start of his JUSTICE Tom Sargant memorial annual lecture last year.[4] In those days the discussion of quite what the judges should be allowed to do in a democracy was a lively one – John Griffith's famous Chorley lecture in 1978 did not come out of nowhere.[5] It is worth recalling now – and I will return to this point at the end of my talk – that what engendered the fireworks then were two factors that have been noticeably absent *so far* from today's discussion; the 1970s saw both a Labour administration determined to push ahead with an agenda that in the context of the status quo of the day was radical (comprehensive education; new race relations law; protection for trade unionists engaged in strike action). It was also a time when the judicial branch was widely perceived by democratic decision-makers and many members of the general public as reactionary and out-of-touch.

It may be the different mood of politics today that explains how it is that the vast empowerment of the judicial branch represented by the HRA should have generated nothing like the heat that the occasional deployment of *Wednesbury* unreasonableness did in the 1970s. That the powers are greater might perhaps be allowed to go unsaid and certainly unargued before an audience as

knowledgeable as this: s6(1) HRA with its overarching requirement that public authorities act compatibly with Convention rights; the introduction of a whole new array of open 'Convention rights' by which such authorities must thereafter be bound; the entrusting to the courts of the task of fleshing out what these rights mean and then insisting that the officials and others designated as public authorities must succumb to this new and necessarily definitive version of what the law entails. It is hard now to believe but it is only a few years ago that the refusal to allow a test of 'proportionality' into domestic law was confirmed by a unanimous ruling of law lords, not least on the basis that it would allow the judges too intrusive a role in the business of governing.[6]

Now as we know, via the opening allowed by the imperative of permitting exceptions to Convention rights ('necessary in a democratic society' and the like), proportionality is everywhere. It is a looser test than ever *Wednesbury* was, requiring analysis of means and ends, the assessment of the legitimacy of statutory objectives, and much else in a similar vein. How have the judges managed so far – despite all these statutory inducements to adventure – to stay in the shallow end?

I will come back to the overall political climate as possibly supplying an answer a bit later but some of the explanation surely lies in a subtle change in the way in which the judges have gone about their business in the HRA era. When everything is possible you have to work out what it is truly appropriate to do. In the old days, certain statutory terminology invited the judges in, whatever the context: 'if the Secretary of State is satisfied that'; 'If the authority has reasonable cause to believe' and phrases like these were cues for judicial oversight, with the question of whether the function under scrutiny was appropriate for judicial review being in the background rather than the foreground of the analysis. True the judicial scrutiny was more benign than under human rights law but it was also less function-sensitive, so that when it did bite it could do so in a way that appeared dangerously subversive of elected authority or of public policy: *Tameside*[7] is the locus classicus because under cover of the supposed logic of *Wednesbury* unreasonableness it appeared to do both. This test failed to appreciate that sometimes decision-makers are being deliberately irrational, with it being perfectly possible for policy makers to be driven by considerations that viewed from particular perspectives cannot be easily characterised as rational.

The judges have certainly avoided dragging the whole administrative process before them to test its rationality under cover of the supposed demands of the HRA: the *Tamesides* of the era of human rights are few and far between (I shall return to one or two of them shortly). This restraint has been achieved despite all the opportunities temptingly provided by the Act through a new emphasis on function, on which kinds of public actions require to be subjected to close

judicial scrutiny (via the language of rights, rationality and proportionality) and which do not. In other words, the judges have been feeling their way to something akin to the American concept of close scrutiny. Vague terms like 'margin of appreciation', 'discretionary area of judgment' and deference to the primary decision-maker – all question-begging in different ways – have been increasingly replaced by meaningful discussion of 'relative judicial competence', of whether the issue before the court is one which calls for careful rights-scrutiny.

The great success of the case-law under the HRA so far has been this foregrounding of function. Decisions on the burden of proof, the criminal process, the punishment of offenders, police powers and the like attract the rigorous application of human rights law. So too do those decisions concerning vulnerable persons (prisoners, terrorist suspects and asylum seekers for example) which carry quasi-penal consequences. But cases which could theoretically engage the Convention, on housing, on taxation, on planning, on welfare or on some other issues of public policy perceived to be outside what the judges have usually done, or to involve a whole array of potential litigants beyond the claimant before them, or to be in some other kind of way imaginative or distinctive – these are likely to be given short-shift, not because the argument cannot be made (under the HRA practically anything is possible) but because the judges choose not to open their eyes this wide.

To pick an example of such almost structural passivity, taken almost at random from last month in the Divisional Court,[8] neither the Federation of Tour Operators nor its counsel can have been too surprised to learn that Mr Justice Stanley Brunton had been unpersuaded by their argument that a doubling of air traffic duty at seven weeks notice was not a breach of the right to property of the federation's members – despite the fact that other laws had prevented them from passing the rise onto their customers (unlike commercial airlines). The Federation was up against not only opposing counsel from Her Majesty's Treasury but the judge's instinctive sense that he was being asked to stray a little far from what he was supposed to be doing. The same could be said of recent decisions on the privacy impact of the compulsory purchase order for the Olympic village,[9] on the attempt by parents to secure the school of their choice under cover of the Convention's right to an education,[10] and the desire of litigants to subject the commercial arbitration process to the rigours of Strasbourg-inspired due process.[11] The factors that induce this 'Pilate-moment' on the part of a judge are many: perceptions of right function are not only a consequence of rational reflection on the separation of powers but are the result as well of history, practice and the expectations of the legal culture within which the judge is situated. Barristers are paid not only for their brain-power but also for their judgment on where their client's case fits.

What happens when the judges view that an area is right up their street and therefore calls for close judicial scrutiny, and yet it is one on which the legislature also feels strongly, and where it has legislated quite intentionally to achieve certain outcomes? A brilliant feature of the HRA is that it both anticipates and resolves this problem. The law can only be twisted so far to accord with Convention rights – beyond the realm of what is possible the judges need to defer to Parliament even in an area that they believe to be one on which they are particularly specialist. Unlike the US, Canada, South Africa, Ireland and many other places, the judges cannot impose their version of rights on the legislature even in those cases where they are sure that the subject matter of the litigation before them falls within their sphere of competence, and sure also that the provisions under scrutiny are irredeemably in breach of Convention rights. The only remedy available to them in such circumstances is the unenforceable declaration of incompatibility, a declaration not of defiance but of deference, a judicial observation rather than court order.

This is where the concept of judicial deference properly fits: whereas restraint is about a judge not drifting into the deep end, deference is about having to give way even when he or she is in the shallow end. Deference, in other words, is not some judicial gloss on the HRA, it is built into the structure of the Act itself. Restraint and deference are not the same: the first is about knowing your job, the second about knowing your place. 'Institutional self-consciousness' might be as good a way as any of describing them both in action.

After one or two false starts, the senior judiciary have shown an impressive collective awareness of where they fit in the new regime. In the famous Belmarsh detention case[12] for example, the matter – personal liberty – was held to be well within the 'relative judicial competence' of the judicial branch but the clarity and unequivocal nature of the provisions under scrutiny (the Anti-terrorism, Crime and Security Act 2001) meant that a declaration of incompatibility was the only available option. A rare bad decision by the law lords was, in contrast, the controversial rape shield ruling in *A v Secretary of State for the Home Department (No 2)*[13] in which a then recently enacted safeguard for complainant witnesses in rape trials was emasculated by aggressive judicial fiat when a declaration of incompatibility is what should have followed if the judges disliked the law as much as they evidently did – sure the issue (the conduct of a criminal trial) was bang in their zone of competence, but Parliament had taken a view of how the issue should have been dealt with and the judges should have deferred to that.

Or should they? Just under the surface of *A v Home* Secretary is a distaste for the deference required by the HRA, a hankering after a stronger judicial role. By deference here I mean acceptance that Parliament is the senior partner, not

the restraint that flows from a good understanding of function. As lawyers ourselves, we know better than most people how easy it is for lawyers to convince ourselves that we know best, and then to persuade ourselves that we have a duty to test all laws, even those passed by a democratic legislature, for consistency with what we know to be right. From this perspective the HRA, with its preservation of parliamentary sovereignty, its inbuilt judicial deference, was a huge disappointment. The European Union allows judicial override of legislation, as do most written constitutions: the 'why not here?' school of thought has not been eradicated by the clarity of the parliamentary language in the HRA.

And in *Jackson v Attorney General*[14] it may have got its second wind, a chance to launch a new campaign. This was the case in which the Hunting Act 2004 was challenged as beyond the powers of Parliament to enact – it will be remembered that the legislation, which banned hunting with dogs, had been achieved only in the face of the opposition of the House of Lords and had therefore only got to the Queen for signature through invocation of the procedures for bypassing the Lords set out in the Parliament Acts 1911-1949. Now the legal point in the case seemed entirely clear – the Parliament Acts set out a special way of bypassing the upper house, disallowing such a short-cut in just two situations (concerned with budgetary matters and avoiding elections) which unarguably did not arise here. But of course where you have a determined client and a very deep pocket you have important litigation.

Jackson commanded the attention of nine law lords and provoked a series of dicta on what exactly constituted an Act of Parliament. Eschewing the obvious – that the 2004 Act was legitimate because the process under which it had been enacted was legitimate, and that that process was legitimate because the Parliament Act 1949 had been a form of delegated legislation properly made under the 1911 Act, there being no additional constraints on the Commons' power under the parent statute that could be read into the 1911 Act so as to lead to any different conclusion than this – the law lords were left with the task of explaining what exactly the beast before them was.

The meaning of 'an Act of Parliament', previously so simple – Commons, Lords and Crown – had been complicated. Exactly how this played out in the hunting context is not my concern this evening: the 2004 measure emerged from the process unscathed, its (I would say misplaced) dignity as an act of the sovereign legislature upheld and so we do now have a hunting ban. But some of their lordships were worried that if they did not weave some new judicial controls into what Parliament could do under the Parliament Act, then it was possible that at some future point in time Parliament could use the legislation to do something truly dreadful, abolish elections perhaps (by cancelling out

the prohibition on postponing elections in one 'Act' and then indefinitely postponing them in the next) or moving the administration beyond the rule of law, or some such fundamentally authoritarian manoeuvre.

Together with those who look enviously at other places, a dread of some hypothetical horror in the future is one of the great driving forces in the argument for constitutional reform: 'look what might happen under our current system; we must act now to make it impossible'. The 'what if?' school is however even less coherent than the 'why not here?' crowd. Lawyers in general and judges in particular are deluded if they think that the constraints that they erect today can prevent such dreadful situations unfolding tomorrow. Hitler brushed aside a lot more than the few negative rulings of the Weimar judiciary that he encountered on his way to power and a Hitler figure in Britain would be unlikely to be any different. Restraints of this sort are far more likely to be successfully called in aid to defy democratic government than they are to prevent despotic takeover. That is why we should not succumb to the temptation to turn our fear of an unlikely and – if it were to materialise – legally unstoppable future into the driving force of our constitutional jurisprudence today.

In *Jackson*, Lord Bingham saw this and explicitly allows that Parliament could use the 1911 Act to extend its own life. Certain of his colleagues could not help but hedge their bets: Lord Brown of Eaton-under Heywood was not prepared to 'give such a ruling as would sanction in advance the use of the 1911 Act for all purposes, for example to abolish the House of Lords ... or to prolong the life of Parliament.'[15] The first of these examples shows how easily the content of what is extreme can vary: the end of civilisation to one set of (judicial) eyes is the final achievement of democracy to others. There have to be similar anxieties about Lord Carswell's refusal to commit himself where an Act under the 1911 procedure causes 'a fundamental disturbance of the building blocks of the constitution'[16] – were this the yardstick of judicial control of legislation, we would still be living in the age of Lord Liverpool, with neither a Catholic nor a middle (much less working) class voter in sight. Lord Steyn's certainty that the achievement of parliamentary sovereignty was the work of judges and not various political actors allowed him to assert that it was 'not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism,' but what this seemed to mean in practice should give its supporters pause: 'In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.[17] Would this include all the laws that already restrict judicial review or which change the ordinary role of

the courts, by for eg withdrawing jury trial? If not how do we know which is exceptional and which not? Even Baroness Hale's speech, replete though it was with evidence of democratic sensitivity, suggested that '[t]he courts [would be right to] treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.'[18]

Lord Hope sums up the underlying assumption of those of their lordships whose views on these rarefied constitutional matters we now have to hand, thanks to the determination of the Countryside Alliance to negate the will of the elected representatives of the people. To Lord Hope 'parliamentary sovereignty is no longer, if it ever was, absolute.' Instead, 'the 'rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'. Though he himself rows back from the implications of this ('the final exercise of judgment on these matters must be left to the House of Commons'), his concession so lacks an intellectual basis as to resemble a mere failure of nerve.[19]

Out of the waters muddied by the confusion over what an Act of Parliament is and by wild hypotheses about the future has re-emerged an old canard from our pre-democratic past, the claim that it is for the courts to assess whether a piece of paper in front of them is truly an Act of Parliament regardless of whether or not it has jumped the minimal hoops which assert that it clearly is. A fourth hoop, 'does it please the judges?', is once again hovering dangerously in the background, camouflaged by grandiose talk of the rule of law, principles of constitutionalism and disturbance to the constitutional order.

Many of the judges who subscribe to these views are widely admired in our society. Their supporters in the legal profession and in the academic world command authority and respect. But admirable individuals though they are, these men and women are judicial rather than political personalities. Their views as to what is an egregious human rights breach or as to what is right or wrong are just that – views. We might trust them, just as they trust themselves – but this does not make the jurisdiction they are claiming one that is right. That the judges believe they are able to cope with being out of their depth by dint of their swimming strength should not blind us to the fact that need to return – and return quickly – to the shallow end. A judge in the Court of Appeal reacted to my title by asking about life-jackets, but I don't think these are provided where judges embark on such aquatic constitutional voyages. I think the better further image is of the democratic lifeguard diving in to force these expert swimmers, against their protests, back where they belong, in the shallow end of a rule of law that defers to the wisdom of the crowd – even when convinced of its stupidity.

I end with some concluding observations on the third of the three points I wanted to make this evening, on why now is a good time to clarify the right role of the judiciary in Britain's system of government. It will be obvious from what I have already said that I believe the key to this to be a proper understanding of the judicial function, of the competence, or 'relative competence', of the judicial branch. A sense of what the judges ought to be doing flows out of a number of historical channels including the respect given to a long-standing theory about the separation of powers, and the judges' professional commitment to the primacy of the rule of law. The expectations of the bench as to right behaviour are also rooted in tradition, in the culture of legal practice in this country and in the caution that has been inbred into the system by the errors of the past.

The last of these must not be avoided: viewed historically, the judges' record in the field of the protection of civil liberties and what would today be called human rights is not a good one – nor have they often been in the van of social progress; rather the reverse in fact. We must be vigilant against the mistake of allowing our enjoyment of a particular generation of unusually progressive and thoughtful judges to mature into a theory that would give their successors, as well as the current incumbents, power over our democratic branch – arguably the trap into which the enthusiasts for the Warren Court allowed themselves to fall. But behind every Warren there may be first a Burger and then a Rehnquist; behind a Marshall there may lie a Clarence Thomas; behind a Brennan a Scalia and so on down the dismal line. In this regard there may now have been enough appointments for a proper sociological analysis to be made of the appointments to the bench for which the new Judicial Appointments Commission has responsibility: what kind of people are coming through? How diverse are they? Would we trust them to police our democratic system in a few years time on the look-out for 'fundamental disturbances' of which they disapproved?

If we were ever to have a truly social democratic government in the United Kingdom, some decisions – the renationalisation without market compensation of state assets sold off in the Thatcher/Major era; the abolition of private schools or at very least the denial of charitable status to them; a prohibition on second-home ownership; a ban on private vehicular transport in urban areas; a strengthening of union collective bargaining; and yes contra Lord Brown the abolition of the House of Lords – might seem quite mad to the kind of men (and women?) who may already have started their journey to high judicial office. But their version of what is mad should never on that account alone be described as bad or worse still unconstitutional and therefore unlawful. The deep end is for elected representatives: the people, not the judges, are their life-guards.

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Notes

1 Principles of Human Rights Adjudication, Oxford University Press, 2004.
2 The Relationship between Animal Abuse and Human Violence, Keble College, University of Oxford, 18 September 2007.
3 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] I KB 223 CA.
4 'Politics and the law: constitutional balance or institutional confusion?', *JUSTICE Journal*, (2006) Volume 3 Number 2, pp18-33.
5 'The Political Constitution'.
6 *R (Brind) v Secretary of State for the Home Department* [1991] 1 AC 696.
7 *Secretary of State for Education and Science v Tameside Metropolitan Council* [1977] AC 1014..
8 *R (Federation of Tour Operators) v H M Revenue and Customs and others* [2007] EWHC 2062 (Admin).
9 *Sole v Secretary of State for Trade and Industry and others* [2007] EWHC 1527 (Admin).
10 *A and Others v Essex County Council and others* [2007] EWHC 1652 (QB).
11 *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243.
12 *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
13 [2002] 1 AC 45.
14 [2005] UKHL 56.
15 At para 194.
16 At para 178.
17 At para 102.
18 At para 159.
19 At paras 104-128.

The place of equality in a bill of rights

Colm O'Cinneide

This article discusses equality clauses in bills of rights, analysing the specific examples of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, the Human Rights Act 1998 and subsequent UK jurisprudence, and contrasting these with the situation in the United States, Canada and South Africa.

Equality clauses in bills of rights

Equal rights clauses are commonplace in national bills of rights throughout the world. The oldest and perhaps best known is the equal protection clause of the Fourteenth Amendment to the US Constitution, enacted in 1868 following the US Civil War and the abolition of slavery: it simply provides that 'No state shall … deny to any person within its jurisdiction the equal protection of the laws'. Other examples include s15 Canadian Charter of Fundamental Rights and Freedoms, s9 of the South African Constitution, Article 40.1 of the Irish Constitution, and Articles 14-17 of the Indian Constitution. These national equality provisions have counterparts in international human rights instruments, such as Article 26 International Covenant on Civil and Political Rights (ICCPR), which provides that:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Similarly worded constitutional provisions are now common across Europe, Africa and South America.

The limits of Article 14

The best known equality clause to a UK legal audience is probably Article 14 European Convention on Human Rights (ECHR). However, this is a truncated and limited form of equality clause, as the protection it offers is confined to guaranteeing equality and non-discrimination in the enjoyment of the other Convention rights. This means that state action or inaction in areas such as employment, the provision of social security and the provision of access to services and facilities may not be covered by Article 14, which only applies

where the facts in question falls within the 'ambit' of one or more of the other rights of the Convention.[1]

In contrast, the equality right set out in Protocol 12 ECHR, which the UK has thus far refused to sign, let alone ratify, is much more similar to the equality clauses generally to be found in national bills of rights and in international instruments. As with the other equality clauses mentioned above, this type of 'free-standing' equality clause applies to every aspect of state activity which impacts upon individuals: it is not limited to guaranteeing equality only in the enjoyment of basic rights. However, it is clear that it will be some time before the majority of Council of Europe member states ratify this Protocol, and the UK government persists in its opposition to it.

What equality clauses do

Equality clauses give legal shape and form to the philosophical belief that all humans are entitled to equality of respect in how they are treated by the state. Their inclusion in national bills of rights and international human rights instruments serves two purposes. Firstly, equality clauses have a symbolic and rhetorical dimension: their presence in constitutional instruments establishes equality as a primary constitutional principle. Secondly, equality clauses can be useful legal tools: they provide an avenue for disadvantaged individuals and groups to challenge discriminatory policies and practices, and can also be used to compel public authorities to justify differential treatment.

The importance of equality clauses can be seen in how they have shaped and influenced important debates across a range of different jurisdictions. For example, the equal protection clause in the Fourteenth Amendment to the US Constitution was used to considerable effect by civil rights campaigners from the late 1940s onwards to attack segregation in the southern US states. S9 of the South African Constitution has been used to challenge discrimination against HIV positive individuals, and both it and the equivalent s15 of the Canadian Charter have paved the way for the legal recognition of equal rights for same-sex partners in both jurisdictions.

Interpreting equality clauses: the limits of formal equality

However, equality clauses in bills of rights can also be interpreted in a way that makes them empty vessels, lacking any significant legal impact or substance.[2] For many years, the US equal protection clause lay largely dormant, while the narrow and formalistic interpretation given by the Canadian judiciary to the equality clause contained in s1(b) of the original Canadian Bill of Rights was one of the reasons why the bill was subsequently replaced by the Canadian Charter in 1982. The equality right contained in Article 40.1 of the Irish Constitution

is widely seen as having yielded little substantive protection against unfair discrimination,[3] while Article 14 ECHR has been overshadowed by the protection offered by Article 8 ECHR and other provisions of the Convention.

The reason for this limited impact is often because equality clauses are interpreted as proving for 'formal equality', ie equality in the sense often attributed to Aristotle of treating like cases alike, while also treating unlike cases in an unlike manner. This concept of equality requires that individuals who are classified as being in a similar situation should be treated alike by the state. However, it provides no substantive account of how individuals should be classified, or what forms of classification are inappropriate or unfair.

The limits of this approach can be seen in the contrasting Canadian cases of *R v Drybones*[4] and *Canada (Attorney General) v Lavell*,[5] both of which were brought under the old s1(b) Canadian Bill of Rights 1960 rather than under the Canadian Charter. In *Drybones*, the Canadian Supreme Court decided that a provision of the Indian Acts that make it an offence for a Native American to be intoxicated off a reserve should no longer be applied: the legislation was singling out Native Americans for different treatment than that accorded to other intoxicated inhabitants of the territory in question, and therefore this violated the principle of formal equality. However, in *Lavell*, the Court upheld a provision of the Indian Acts that deprived a Native American woman of her status as a registered 'Indian' if she married a non-Native American man, while Native American men were not subject to the same rule. The majority of the Court held by a narrow margin that this distinction did not violate the s1(b) equality right, which required only the equal administration of the law: it did not require that the law should be equal as between different categories of person.

This type of 'formal equality' analysis is invariably limited in what it can achieve. Obvious unfairness may be capable of being addressed, as happened in *Drybones*. In contrast, it offers little guidance as to when the classification by the state of different groups as deserving different levels of treatment will be unfair or unjust, as *Lavell* demonstrates. Formal equality approaches often also lack any overarching standard of how citizens should be treated with equal respect: the emphasis is on securing equality in how law is made and applied, not in securing 'substantive equality' or 'equality of respect' as an ultimate good.

Equality clauses may also be limited by having too narrow a scope of application. For example, the truncated nature of Article 14 ECHR reflects the contemporary assumption at the time of the drafting of the Convention in 1950 that equality clauses should apply only to secure the equal status of individuals in enjoying basic rights. Now, free-standing equality clauses that apply across the full range of state activity, and sometimes even to the actions

of private individuals and institutions, are commonplace in national bills of rights. However, the ECHR remains stuck at present with the restricted scope of Article 14.[6] Admittedly, the European Court of Human Rights has been relatively generous in its interpretation of what is deemed to come within the ambit of the other Convention rights in cases such as *Sidabras and Dziautas v Lithuania*.[7] However, the ultimate limits of Article 14 are well illustrated by a case such as *Botta v Italy*,[8] where the inability of a disabled person to access beaches and other public facilities was deemed not to come within the ambit of a Convention right, and therefore Article 14 was not engaged.

The widening scope of equality clauses

However, there is a strong tendency now both at national and international levels to interpret equality clauses according to wider concepts of equality and non-discrimination. Courts are more ready to strike down differences in treatment which are linked to social patterns of disadvantage and the subordination of particular groups. More use is also made of concepts such as indirect discrimination that are increasingly carried over from anti-discrimination legislation: for example, the European Court of Human Rights has held that barring a Jehovah Witness from practicing as a chartered accountant because he had a criminal conviction for refusing to undergo national service constituted indirect discrimination on the grounds of belief contrary to Article 14 ECHR.[9] Equality clauses are also being applied across the full range of state activity, including areas as such as immigration control, education, housing and family law, and sometimes even being applied to the actions of private actors via the horizontal effect of rights instruments.

To a large extent, this shift has its origins in US constitutional law. The equal protection clause of the US Constitution had been originally interpreted by the US Supreme Court as restricted to ensuring equality of status in civil rights:[10] inequalities in other areas of social and economic life were not subject to the same degree of scrutiny, with the result that the Supreme Court upheld the practice of racial segregation in the case of *Plessey v Ferguson*[11] in 1896. However, in the seminal case of *Brown v Board of Education of Topeka*[12] in 1954, the US Supreme Court re-interpreted the equal protection clause as prohibiting racial segregation in education, thereby expanding its reach and impact. This famous decision was taken up by the civil rights movement and used as a tool to press for change, to considerable effect.

The equal protection clause was extended to cover housing, education, and the myriad range of activities of federal and state government. This opened the path for the introduction of federal anti-discrimination legislation. It also in turn influenced the use of strategic litigation in other jurisdictions. In the wake of *Brown*, there has been a move away from formal equality approaches

and narrow interpretations of the scope of equality clauses. This can be seen in the expanded ECHR equality jurisprudence of the last decade, in the gradual strengthening of constitutional equality case-law across Europe (including the UK), and in particular the innovative 'substantive equality' approaches adopted in South Africa and Canada.

The difficulties of interpreting equality clauses

However, considerable uncertainties remain about how to interpret equality clauses. These problems all derive from a fundamental problem: it remains unclear as to what 'treating persons equally' actually involves. Certain types of discrimination may be necessary and appropriate: other types may be suspect or offensive. Distinguishing between 'acceptable' and 'unacceptable' forms of discrimination may thus be complex and controversial. It may also be unclear when it might be justified to give special advantages to some groups to compensate for past disadvantage, or when exceptions to a standard prohibition on a particular type of discrimination should be permitted. Often, this generates great political debate, as has occurred with the issues of equal partnership rights for same-sex couples, affirmative action measures and the wearing of religious symbols. Courts often are cautious in dealing with such difficult and politically charged questions.

Again, the US experience illustrates this well. Following *Brown*, the US Supreme Court developed an extensive equality jurisprudence based on the central principle that discrimination against 'discrete and insular minorities' should be subject to close judicial scrutiny.[13] The use of 'suspect' forms of classification, such as distinctions based on race, has to be shown to be necessary to achieve a 'compelling government interest'. Other forms of distinctions have to satisfy a less onerous standard of scrutiny to survive challenge. However, controversy has continued about the proper interpretation of the equal protection clause.

For example, it has not always been clear which level of scrutiny should apply to distinctions based on the grounds of gender, disability, age and sexual orientation, with the Court often taking a cautious approach to distinctions based upon these grounds.[14] Similar problems occur when it comes to affirmative action. The Supreme Court has in the main adopted an 'anti-classification' approach, whereby the use of 'suspect' distinctions such as colour or ethnic origin is treated as inherently unconstitutional, even where such distinctions are being used to identify groups in need of special assistance. At times, however, the Court has also veered towards an 'anti-subordination' approach, whereby the emphasis is placed on eliminating group disadvantage rather than on prohibiting the use of suspect characteristics.[15] The latter approach would permit greater use of affirmative action measures than the former: the Court has at

times oscillated between these two approaches, and currently has settled upon an uncomfortable and unconvincing compromise position.

Interpreting Article 14 ECHR

European courts have found themselves adopting similar positions and struggling with similar problems. Thus far, the European Court of Human Rights has maintained its historic preference for avoiding reliance upon Article 14 to settle cases where possible: it prefers to handle cases if possible by using other Convention rights.[16] However, where the Strasbourg court has addressed major equality cases using Article 14, discrimination on the basis of race, ethnic origin, gender, birth status and sexual orientation tends increasingly to attract the ECHR equivalent of 'strict scrutiny' review. In the European system, this translates into an intensive application of the standard proportionality test, with less and less room left to states to maintain a 'margin of appreciation'.[17]

Nevertheless, the Article 14 ECHR case-law remains underdeveloped. The Strasbourg court's position appears to adopt a relatively permissive attitude to the use of positive action measures.[18] However, it is unclear when it is willing to infer the existence of direct or indirect discrimination from statistical evidence.[19] In addition, its case-law at times still adheres to a cautious and often formalistic approach. For example, take the recent decision of the European Court of Human Rights in *D.H. and others v The Czech Republic*.[20] In this case, even though Roma children in the Czech Republic are effectively segregated by being placed for the most part within the system of Czech special schools and therefore kept outside from mainstream education, the Chamber of the Court hearing the case held that there was no clear evidence that discrimination contrary to Article 14 of the Convention taken with the right to education in Article 2 of Protocol 1 had taken place. The Court considered that there was no evidence that Roma children had been actively discriminated against or singled out for special treatment. However, the Court did not probe deeper and examine the legitimacy of the testing processes being used, the nature of the special schooling system or whether suitable anti-discrimination controls were in operation.

This caution may reflect the truncated and unsatisfactory scope of Article 14. It may also mirror the persistent uncertainties that surround the interpretation of equality clauses in general. However, the uncertainty in the ECHR case-law inevitably passes down into the approach of the UK courts applying Article 14 via the Human Rights Act 1998. Key decisions have seen Article 14 applied with other Convention rights to challenge alleged unequal treatment on the part of the UK government. For example, in *A v Secretary of State for the Home Department* (the Belmarsh case),[21] the detention of non-nationals without trial was held by the law lords to violate Article 14, as the distinction made in the relevant legislation between UK nationals and non-nationals was held

to be disproportionate and unjustified. In *Mendoza v Ghaidan*[22] the law lords interpreted the Rent Act 1977 to provide equal protection for homosexual couples as provided to married heterosexual couples, so as to ensure conformity with Article 14 taken together with Article 8. Other important decisions, such as *R v SS Home Department, ex p Carson and Reynolds*[23] and *Secretary of State for Work and Pensions v M*[24] have seen Article 14 arguments fail to overturn provisions of pension and social security legislation. Nevertheless, the frequency with which Article 14 has been invoked in litigation is striking, especially given the limited scope of Article 14 and the relative paucity of ECHR case-law in this area.

However, the same problems exist with the UK case-law that exist with the ECHR and US jurisprudence. It remains unclear whether Article 14 should be interpreted in the UK as providing for an 'anti-classification' or 'anti-subordination' approach. Uncertainty also exists as to how far the courts should go in striking down state action that contributes to the social exclusion or subordination of disadvantaged groups. Similar problems exist in many other European jurisdictions. It is clear that equality clauses are being interpreted to provide a degree of protection against discrimination, but the extent and scope of this protection remains uncertain.

The Canadian and South African approaches

This makes the Canadian and South African jurisprudence particularly interesting. In both countries, equality clauses were carefully worded to steer the institutions of the state towards a 'substantive equality' approach, where emphasis would be placed on eliminating policies and practices that adversely affect disadvantaged groups. As part of this approach, both country's equality clauses make explicit provision for the use of positive action to combat disadvantage. S15(1) of the Canadian Charter, in effect since April 1985, provides that:

> *Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

This clause was worded expressly for the purpose of encouraging the Canadian courts to depart from their previous highly criticised formal equality approach in cases such as *Lavell* (discussed above). S15(2) of the Charter proceeds to specify that this 'does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups …'. S9 of the South African Constitution is framed in similar terms.

As a result of this wording, both the Canadian Supreme Court and the South African Constitutional Court have defined the purpose of their equality

clauses as preventing the violation of human dignity by the imposition of disadvantage, stereotyping or prejudice. Differential treatment that adversely impacts upon disadvantaged groups, such as women, disabled groups or ethnic groups that have been subject to discrimination, is subject to close scrutiny: public authorities will need to show that such differences in treatment are clearly necessary and justified. In contrast, differences in treatment which are not linked to historic and persistent patterns of disadvantage, or which are not seen as involving a denial of human dignity, will usually be subject to a much weaker standard of review. Positive action designed to combat disadvantage will also not be subject to intensive review, and will be presumed in general to be constitutional.

This approach has resulted in the South African and Canadian courts developing an innovative and rigorous equality jurisprudence, which has given real substance to their constitutional equality guarantees. For example, in decisions such as *M v H*[25] and *Halpern v Canada (A.G.)*,[26] the Canadian courts have interpreted s15 of the Charter as requiring the state to recognise same-sex partnerships as equal to traditional heterosexual marriages. The South African Constitutional Court has taken a similar stance, and was instrumental in compelling the abolition of discriminatory anti-gay legislation.[27] In *Hoffmann v South African Airways*,[28] unjustified discrimination on the grounds of HIV status was prohibited. In *Eldridge v British Columbia (Attorney General)*,[29] the Canadian Supreme Court held that deaf persons were entitled to publicly-funded sign language interpretation to access medical services under s15, as the failure to provide access would otherwise deny deaf persons the equal benefit of the law. There are of course limits to what can be achieved through judicial application of equality clauses. Some of the recent Canadian equality jurisprudence has been criticised by activist groups as excessively cautious. Legal processes can only generate a certain degree of change, and rarely march far ahead of prevailing social attitudes, even in Canada and South Africa. Nevertheless, in both jurisdictions, the equality clause has acquired real substance and impact.

Conclusions: lessons for the UK

Equality clauses are important elements of bills of rights throughout the world. The UK at present is unusual in not having a free-standing equality clause as part of its domestic law: Article 14 is a truncated and limited guarantee. The ratification of Protocol 12 may change this. However, if bills of rights are to be drafted for Britain and Northern Ireland, the expectation will exist that they will contain their own free-standing equality clauses, just as similar bills of rights do elsewhere. In a recent speech, Trevor Phillips, the Chief Commissioner of the Commission for Equality and Human Rights, eloquently articulated this expectation:[30]

> *[I]f our Prime Minister is truly serious about the idea of a written constitution we know that one of its first clauses needs to be, perhaps only preceded by the security of the realm, a 'constitutional promise' of equality to the British people. We need a fundamental commitment that guarantees all citizens equality regardless of other factors, and provides an anchor to hold us firm in the storms created by rapid diversity and social change. We want equality to be elevated to the status of a constitutional principle, superior to all other pieces of legislation: a principle which is independent of the changing fortunes of politics, which conditions parliamentary sovereignty, and to which Parliament itself is subject.*

This call for a UK constitutional equality clause demonstrates how such clauses are increasingly seen as essential parts of a just and fair constitutional order. It also illustrates the belief that equality clauses can serve as important statements of principle, by formally committing a state to respect equality and non-discrimination principles. As discussed above, equality clauses can also serve as useful legal tools in helping to prevent unfair discrimination. However, interpreting and applying equality clauses tends to be an uncertain and complex process. The Canadian and South African experience shows that the more substance that can be injected in the text of an equality clause, the more effective and purposeful will be the judicial interpretation of such a clause, and the more it will have real legal teeth to complement its rhetorical force.

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Notes

1 *Belgian Linguistic Case* (1979-80) 1 EHRR 252.
2 See Aileen McColgan, Women Under The Law: The False Promise of Human Rights, Longman, 1999.
3 See eg the discussion in Oran Doyle, Constitutional Equality Law, Round Hall, 2004.
4 [1970] SCR 282.
5 [1974] SCR 1349.
6 See Luzius Wildhaber, 'Protection Against Discrimination under the European Convention on Human Rights: A Second-class Guarantee?', (2002) 2 *Baltic Yearbook of International Law* 71.
7 (2004) 42 EHRR 104.
8 (1998) 26 EHRR 241.
9 See *Thlimmenos v Greece* [2000] ECHR 162 (6 April 2000).
10 The equal protection clause had been introduced in the aftermath of the US Civil War and was designed to prevent states from denying the equal protection of the law and equal citizenship rights to Afro-Americans.
11 163 U.S. 537 (1896).
12 (1954) 347 U.S. 483.
13 This phrase was originally used by Justice Stone in footnote 4 of his judgment in *United States v Carolene Products Company* [1938] 304 U.S. 144.
14 See *Craig v Boren* (1976) 429 US 190.
15 See Owen Fiss, 'Groups and the Equal Protection Clause', in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), Equality and Preferential Treatment, Princeton University Press, 1977, 85; see also Jack Balkin and Reva Siegel, 'The American Civil Rights Tradition:

Anticlassification or Antisubordination?', 58 *U. Miami L. Rev.* 9 (2004).
16 For example, the bulk of the Court's key decisions on sexual orientation have been decided mainly on the basis of the privacy right in Art 8 ECHR.
17 See the comments of Lord Hoffmann in *R v SS Home Department, ex p Carson and Reynolds* [2005] UKHL 37.
18 *Belgian Linguistic Case* (1979-80) 1 EHRR 252.
19 *Nachova v Bulgaria* [2005] ECHR 465.
20 No 57325/00, judgment of 7 February 2006.
21 [2004] UKHL 56.
22 [2004] UKHL 30.
23 [2005] UKHL 37.
24 [2006] UKHL 11.
25 (1999) 171 DLR (4th) 577.
26 (2003) 225 DLR. (4th) 529.
27 See *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1999] (1) SA 6.
28 (2001) 1 SA 1 (CC).
29 [1997] 3 SCR 624.
30 Trevor Phillips, Annual Lecture, Bevan Foundation, 23 October 2007: see http://www.equalityhumanrights.com/en/newsandcomment/mediacentre/pages/callforrepresentativeactions.aspx.

Transforming the judiciary: the politics of the judiciary in a democratic South Africa

Geoff Budlender

This article is the revised text of the Alan Paton memorial lecture, given at the University of KwaZulu-Natal, Pietermaritzburg on 25 July 2005. The article analyses the role of the judiciary in South Africa following the introduction of the Constitution of the Republic of South Africa, 1996, which was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 2007.

The South African Constitution differs from many others in a fundamental respect. Most constitutions reflect the outcome of a change which has already taken place, and lay down the framework for the new society. A key theme of *our* Constitution is the change which is yet to come – the transformation which is yet to come. All three of our post-apartheid Chief Justices have told us this.

In the *Makwanyane* case Justice Ismail Mahomed said:[1]

> *In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different … The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.*

In the *Soobramoney* case Justice Arthur Chaskalson said:[2]

> *We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.*

And our present Chief Justice, Justice Pius Langa, has expressed it as follows:[3]

> *The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.*

Transformation is therefore at the heart of our constitutional enterprise. I have to say that I despair of politicians who should know better, and who say repeatedly that the word 'transformation' does not appear in our Constitution. True, it does not – but the theme of transformation is a fundamental premise, probably *the* fundamental premise, of the entire document.

This must mean that the judiciary too must change. The call for transformation of the judiciary is therefore correct. What we need is to clarify is what we mean by that call. One can think of three meanings:

1 The judiciary must be transformed in demographic terms – it must be more representative of the nation which it serves;
2 The judiciary must be transformed in its underlying attitudes – it must embrace and enforce the principles of a fundamentally new legal order;
3 The judiciary must be responsive to the goals of the democratically elected government.

Let me start with demographic transformation.

A judge or magistrate who presides in a case does so on our behalf. He or she gives judgment on behalf of all of us. In the 21st century, in a democratic South Africa, there is something utterly incongruous about this being done overwhelmingly by white men. If we are all to have confidence in the judicial system, we need to feel that it belongs to all of us. We need to identify with the judiciary, *and* to feel that it identifies with us.

This is not just a matter of numbers. We have to face what I think is the inescapable fact that in general, black judges are more likely than white judges to understand and have some connectedness with the life experiences and concerns of the people who constitute the majority of our country's people.

Let me give you a real-life example of this. A few years ago I was involved in a case in which the local municipality was seeking the eviction of a group of

homeless people from municipal land. The advocate for the municipality, a white man, was speaking with some passion about the unlawfulness of what these people had done, in moving onto land that was not theirs. The judge, an African from a humble background, then interjected: 'But we know how this happens – we all have family or friends who find themselves in this position'. The advocate was rendered literally speechless: he found this an astonishing statement. The judge thought that he was simply stating the obvious – because he had a natural understanding of, and identification with, the dilemma of the people who were involved.

That, at least, is the position for the current generation. As we move towards a more clearly class-based society, there will be a growing class of people who are black, but have no lived experience of deprivation or of being discriminated against, and who have only limited contact with people who do have that lived experience. It is not obvious that when that happens, they will be significantly better able than their white colleagues to understand and have some connectedness with the life experiences and concerns of those who are poor or otherwise marginalised. However, even when that happens the purely demographic issue will remain – namely whether the judiciary is a fully South African judiciary, speaking for the whole nation.

There is a widespread perception that race *does* count in judging. A survey asked two thousand respondents in the seven metropolitan areas of South Africa whether the race of a judge has an influence over how he or she judges a case. 52 per cent of respondents – with no difference between racial groups – agreed with the proposition that race does have an influence. Only just under a third, 31 per cent, disagreed.[4] That perception is another reason why we need a judiciary which is not demographically skewed towards one part of our population.

Public confidence in the judiciary is essential if the courts are to succeed in their critical constitutional functions. As Justice John Evans of the Canadian Federal Court of Appeal has put it:[5]

> *Courts require public confidence to perform the delicate task of balancing rights. Judicial independence is a necessary condition for obtaining and maintaining this confidence, without which the courts' legitimacy … will rapidly erode, and with it human rights and the rule of law.*

Those who care deeply about human rights and the rule of law should be amongst the leaders of the call for demographic transformation of the judiciary.

There is no need for us to feel any squeamishness about the proposition that the judiciary should more clearly reflect who we are. Those considerations are

and always will be very significant. In the United Kingdom serious work is now being done to attempt to achieve a more 'representative' judiciary. The need for a broadly representative judiciary is underlined in a society such as ours, which is still so deeply divided on racial grounds. This means a judiciary which broadly reflects who we are, and who all of us are, both majorities and minorities.

The second meaning of transformation to which I referred, is transformation of underlying attitudes – embracing the principles of a fundamentally new legal order.

Courts tend to be conservative in nature. A core part of their function is to determine what the existing rights are, and to protect and enforce them. Part of the legend of South African law is the story of how the courts on occasion resisted the introduction of racially discriminatory measures, including the removal of 'coloured' people from the common voters' roll. It seems to me that the proper way to understand this is that apartheid was a radical programme for the restructuring of South Africa. The judges on occasion resisted radical changes which impacted on existing rights. In this manner, they obstructed a radical social programme.

In those instances, the attack on existing rights was from the right. One can readily find examples from the other side. Much of the continuing left-wing suspicion in the United Kingdom of granting extensive powers of judicial review – typified by the sustained writing of Professor John Griffith in successive editions of his book The Politics of the Judiciary – rests on a concern that judges, as a result of their class and professional background, will resist and obstruct redistributive social change by these sorts of techniques. One has to say that the evidence from the UK, where Griffith is writing, has provided significant support for this concern. In the 1925 case of *Roberts v Hopwood*,[6] the House of Lords famously held that it was not 'reasonable' for a local council to adopt a policy of paying all of its employees at least a minimum wage, and that it was not entitled to do so. The council, said Lord Atkinson, was not entitled to make decisions based on 'eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages …'.[7] In 1955 the Court of Appeal invalidated the Birmingham Town Council's concession to old-age pensioners, entitling them to travel free on the council's buses and trams.[8] And in the 'Fares Fair' case in 1983, the House of Lords quashed a property rate which the Greater London Council had levied in order to subsidise passenger transport in London.[9]

Roger Smith, the Director of JUSTICE, has argued that for a variety of reasons, in more recent times the argument of Professor Griffith has 'become increasingly

difficult to maintain'.[10] The fundamental point remains valid, however: we do need to ensure that social transformation is not obstructed by the judiciary. What, then, do we need to do to ensure that?

The key is to ensure that our courts are firmly rooted in a transformative jurisprudence. Judge Robert Bork, not one of my judicial heroes, has suggested that one of the reasons courts can swing so greatly from one extreme to the other, is that they do not have a unifying theory of what they do. In South Africa we have a Constitution which is very explicit on this subject. Justice Langa has explained it clearly:[11]

> *… all statutes must be interpreted through the prism of the Bill of Rights … The purport and objects of the Constitution find expression in sec 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.*

What we need is a transformative jurisprudence which is firmly anchored in the fundamental constitutional values – human dignity, the achievement of equality, and the advancement of human rights and freedoms. Judge Bork is unfortunately right in pointing to the extreme way in which the pendulum can sometimes swing. India provides an example which should give us cause for reflection. The Indian Supreme Court of the 1980s was the great human rights court of our time. After a somewhat dismal showing during Indira Gandhi's state of emergency, in the 1980s the Court swept aside procedural obstructions to justice and embraced a pro-poor human rights jurisprudence with an insight and passion which were truly inspiring, and which taught and energised lawyers and judges in many parts of the world. The emblematic judgment of the time was the 1985 *Olga Tellis* case,[12] in which the Court wrote movingly and empathetically of the plight of the homeless. Yet only fifteen years later, in the *Almitra Patel* case, the Court rejected an argument that slum-dwellers should not be evicted unless alternative land was made available, with the comment that 'Rewarding an encroacher on public land with free alternative site is like giving a reward to a pickpocket'.[13]

How does this happen? Part of the explanation may be the variability which inevitably comes from generally having only two judges, taken from a very large bench, sit in each case. But Usha Ramanathan has shown that this case was not an eccentric deviation: it reflects a broader trend.[14] What *Almitra Patel* and other Indian cases demonstrate, I think, is that if the process of judicial appointment is not substantially insulated from the consequences of short-term and ephemeral changes of political mood or allegiance, courts are very vulnerable to those changes. It demonstrates, too, the necessity to

work unremittingly at establishing a jurisprudence which is firmly anchored in transformational principle. This has implications for the appointment of judges, which I will address a bit later.

Today we call for a purposive approach in the interpretation of the Constitution, the statutes and the common law – to promote the underlying purpose of the law. But one can immediately see the risk: a 'purposive' approach begs the question 'whose purpose?' How do we decide what that purpose is?

That raises the third possible meaning of transformation, which I described earlier as the proposition that we need a judiciary which is responsive to the goals of the democratically elected government. A version of this meaning was expressed as follows by the Minister of Justice:[15]

> *We do need very good judicial officers that are truly sensitive to the environment, understand and try to move away from their orientation of the past and begin to understand what we seek to do in the new dispensation.*

It seems to me that in principle the Minister is right, subject to one reservation. It seems to me that she is entirely correct in contending that we need a judiciary which will 'try to move away from their orientation of the past and begin to understand what we seek to do in the new dispensation' – if by 'what we seek to do in the new dispensation' she means what *the nation* seeks to do in the dispensation *created by our Constitution*, not what the *ruling party* seeks to do from time to time. It is legitimate to require that the judiciary be committed to the new national ethos, to the social transformation which the Constitution requires and promises, and to the new society which we are building. This is a profound commitment, which goes beyond a commitment to reading words carefully. All of us, and that includes the government, are entitled to insist that our judges meet this standard. It is what the Constitution requires.

In appointing judges we therefore need to make a fundamental issue the assessment of whether they are seriously committed to the profound social transformation which is required by the Constitution. We can judge that from an analysis of their work both during and since apartheid, from what they have said and from what they have done. In this context, blackness is not enough.

The reservation about the possible implications of the Minister's statement is that this commitment should not mean a commitment to the ruling party, or to ignoring the failure of the government to act in accordance with the requirements of the law. What has to be guarded against is any explicit or implicit suggestion that judges or magistrates should ignore or bend the law

in order to comply with either the new national ethos, or with what the government will find convenient. That is not a transformed judiciary. It is a depressingly familiar judiciary.

Again, there are lessons to be learnt from India. After independence, the government of India embarked on a programme of land reform. The Supreme Court of India resisted mightily. In a series of cases[16] it read the Constitution of India in a strained and highly restrictive manner in order to promote the interests of property-owners. When the Parliament amended the Constitution, the Court continued to attempt to circumvent the plain words of the Constitution.

The judgment of history is that the attempts by the Indian Supreme Court of the 1950s to obstruct land reform and preserve existing property rights, in the face of clear constitutional injunctions to the contrary, were illegitimate. Ultimately, they were also destructive of the public legitimacy and authority of the Court. They led to calls for a 'committed' judiciary, which before long became a demand for a submissive and subservient judiciary, and the introduction by government of various devices to attempt to secure this.[17]

We do need our judges to be committed to the transformation which the Constitution requires. That transformative approach has to permeate everything the judges do – not just the great constitutional cases, but also the 'routine' cases involving everything from contractual disputes to maintenance claims to sentencing in criminal cases. We can no longer automatically rely on the authority of cases decided in an entirely different dispensation. We have to learn continually to test whether that authority is still valid in a country which has changed and has still to change fundamentally. This is a very difficult task, requiring insight and imagination.

Governments which have been disappointed by a judicial decision are sometimes tempted to argue that the decision is undemocratic, because it goes against the wishes of the democratically elected government. But the transformed society contemplated by the Constitution is a society in which the judges are genuinely independent, and hold us to our highest values and promises to each other. That is the fundamental majoritarian commitment. I have no doubt that South Africans overwhelmingly want a judiciary which is genuinely independent, and which will hold the government to account on their behalf. The Constitutional Court has emphasised that the accountability of those who exercise public power is one of the founding values of our Constitution.[18] We need to be clear on this. Genuine and fearless independence is a basic element of the transformation of the judiciary. Judges who are supine or who back off because they do not want to annoy an elected government are unfaithful to the Constitution. Appointing such people is constitutionally impermissible.

No government likes it when a court holds that it has acted unlawfully, or that it has not done what the law requires it to do. We have seen this in the United Kingdom, where the response of government at high level has been very discouraging. Decisions by an experienced High Court judge on the obligations of the National Asylum Support Service met with an angry response from the then Home Secretary, Mr David Blunkett:[19]

> *Frankly, I'm personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them. I don't want any mixed messages going out so I am making it absolutely clear that we don't accept what Justice Collins has said …. Parliament did debate this, we were aware of the circumstances, we did mean what we said and, on behalf of the British people, we are going to implement it. We will continue operating a policy which we think is perfectly reasonable and fair.*

In a newspaper article, Mr Blunkett said that it was 'time for judges to learn their place'.[20] In an interview, he said:[21]

> *If public policy can always be overridden by individual challenge through the courts, then democracy itself is under threat.*

The then Prime Minister, Tony Blair, himself 'warned' judges who were 'blocking' deportations and other features of his anti-terrorist legislation that he will have 'lots of battles' with judges if they continue to block the deportation of terrorists.[22]

One of the sources of this tension in the relationship between government and the judiciary seems to be the decision of the House of Lords in the Belmarsh case.[23] In that case, the law lords held that internment or detention without trial measures introduced by a recent statute were irrational and discriminatory because they applied only to foreigners. Understandably, the government did not like that. But the correctness of the view of the House of Lords was shown by the London bombings in July 2005, in which the bombers were apparently all British citizens. This demonstrates the importance, even in a question of such high policy, of oversight by independent people who enforce the constitutional rules which we have agreed are to apply to everyone, and who are less susceptible to the pressures of short-term popularity.

Our government has by contrast been remarkably restrained when judges have decided that it has acted unlawfully. The tone set by President Mandela's response after the Constitutional Court had set aside a decision made by him,[24] namely that if the Constitutional Court had said he was wrong then he must have been wrong, has by and large been followed. We have not seen

intemperate attacks by ministers such as Mr Blunkett, and neither have we had the spectacle of a government leader 'warning' the courts, in advance of cases which will undoubtedly reach them, of the consequences of their failing to decide the cases in a manner consistent with the government's wishes.

What is also important, I believe, is that there is not significant evidence of deliberate non-compliance with orders made by our courts. Such non-compliance as we have seen has for the most part been the result of simple incompetence, as in some cases involving the Eastern Cape Department of Welfare. The failure of effective compliance with the requirements of the Constitution as explained in the *Grootboom*[25] case raises questions of a lack of attentiveness and a lack of competence in some areas, but I do not think it can fairly be described as deliberate non-compliance. While contempt proceedings had to be brought to compel the Mpumalanga government to comply with the judgment in the *Treatment Action Campaign* case,[26] by and large there has been compliance with the judgment, even if not always with great enthusiasm.

With the exception of the Minister of Health, who was reported as having said that the *TAC* judgment required her to poison people,[27] by and large the response of government to unfavourable judgments has been exemplary. This is not something to be taken for granted, and the government is entitled to very substantial credit in this regard.

However, it is difficult to avoid the uncomfortable feeling that the response of some is not directly to attack the judiciary, but instead to try to see to it that judges are appointed who will not rock the boat, and who will be deferential when a case involves what they regard as 'policy' questions which are the exclusive preserve of the executive and the legislature – in effect, of the ruling party.[28] There is a risk that the need for transformation may be manipulated by those who in fact seek a compliant judiciary.

The judiciary *is* changing, and much more rapidly than some people are willing to acknowledge. Of the 53 judges appointed between 1995 and June 2004, 89 per cent were black.[29] There have certainly been some bad appointments – and here I am not referring to race – which burden and weaken the system. But that is not surprising: the more surprising thing, for those brought up in the old school, is how many people who previously would never have been considered qualified for appointment have done very well indeed. It is clear that some of what were previously considered prerequisites for competent judges are not prerequisites at all. To be a good judge, you do not need to have been a senior counsel with extensive experience of private practice. That has been a liberating discovery, because it opens up our range of choices, and facilitates the construction of a high-quality and broadly representative judiciary.

We do need to take great care that the appointment process does not generate either the reality or the perception that white males, however well qualified, need not apply – either because they will never be appointed at all, or because they will never be appointed in the face of even a remotely credible opposing black or female candidate. If that happens, the judiciary will be very seriously weakened, at a high cost to all of us.

There are some worrying signs of a more general unwillingness on the part of well qualified candidates to make themselves available for appointment. One reason, I suspect, is a sense that those involved in the appointment process are insufficiently open-minded, and too easily committed to anterior decisions about who is to be appointed to a particular post, even before candidates have been interviewed. We have seen the Judicial Service Commission re-open the nomination process after the closing date, because insufficient candidates had been nominated. That should worry all of us, and particularly those who are responsible for making appointments.

Another worrying matter is what I sense is a growing concern among members of the judiciary that the executive, in its legitimate concern about transformation and the efficiency of the courts, is now inclined to micro-manage many aspects of the judiciary – to the extent of wanting to take on the power to decide when judges may take leave, to regulate the hours when the judges must be physically present at the seat of the court, and to make the rules of court. Many judges experience this as a sign of a lack of confidence in them and in their integrity. It is frankly demoralising. It will further discourage suitable people, black and white, from making themselves available for appointment. In this regard we need to remember that while judges are paid well, and receive very significant fringe benefits, most skilled and experienced lawyers are very much better paid. They also have a very significant degree of independence in their professional lives. Most of them will take a very significant income drop on appointment as judges. They nevertheless make themselves available for appointment for a variety of reasons, one of which is the status, respect and independence accorded to judges. If they feel that they will be treated disrespectfully, and that they will become civil servants, many of the best of them will simply choose not to make that career change.

If many of the best qualified people – by which I do not mean just white men – decline to make themselves available for appointment, the quality of our judiciary will be diminished. With that, our ability to achieve our constitutional ideals will be undermined.

The Constitution requires that government have the self-confidence and courage to appoint people who will read the law honestly and independently, within the

framework of a commitment to the transformational goals of the Constitution. The result will, on occasion, be judgments which the government finds uncomfortable or annoying. That is part of the commitment to accountable democratic government. The point was well expressed in an editorial in a leading newspaper in Thailand:[30]

> *There are those who say democracy is the free election of a government, but that is barely the beginning. The true test of democracy is the accountability of those privileged enough to serve the voters. Almost every nation holds elections. Those that are truly democratic hold the elected officials responsible for carrying out legal policy.*

That is really the challenge to the new generation of judges, most of whom quite rightly are black. It is whether they will be able to transcend the purely racial dimension of transformation, which is important in itself, but is not enough. And it is also the challenge to the government and the African National Congress (ANC). When the constitutional negotiations took place, the ANC displayed great courage and confidence in opting for a constitution with a bill of rights which placed substantial power in the hands of the judiciary. It was not an obvious outcome that democratic government should be constrained in a way that undemocratic government never was. But that choice was made, and I believe that the past ten years have vindicated and justified the courage and confidence which the ANC showed in this regard. The challenge now is whether they will have the courage which is required for a sustained commitment to the true and fundamental transformation of the judiciary, which is necessary if we are to achieve the social, political and economic transformation which our Constitution demands – and promises.

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Notes

1 *S v Makwanyane* 1995 (3) SA 391 (CC) at [262].
2 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at [8].
3 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at [21].
4 *Do South Africans trust the judiciary?*, Research Surveys, Press release 17 July 2005.
5 John M Evans, 'Judicial Independence, Human Rights and the "War on Terror"', in Access to Justice in a Changing World, Interights, 2004, p56.

6 *Roberts v Hopwood* [1925] AC 578.
7 Ibid at 594.
8 *Prescott v Birmingham Corporation* [1955] Ch 210.
9 *Bromley LBC v Greater London Council* [1983] 1 AC 768.
10 Editorial 'The fertility of human rights', *JUSTICE Journal*, (2005) Volume 2 Number 1, pp5-6.
11 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at [21] to [22].
12 *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SACC 545.
13 *Almitra Patel v Union of India* (2000) 2 SCC 679 at 685; 2000 SOL case 90 p5.
14 Usha Ramanathan, *'Illegality and Exclusion – Law in the lives of slum dwellers',* International Environmental Law Working Paper 2004 - 2.
15 http://www.sabcnews.co.za/politics/government, 29 June 2005, accessed 30 June 2005.
16 The history and the cases are conveniently summarised by Matthew Chaskalson, 'The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth', 9 SAJHR (1993) 388 at pp389-394.
17 For a penetrating account of this history see Granville Austin, Working a Democratic Constitution: A History of the Indian Experience, Oxford India Paperbacks, 2003.
18 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) [74]-[76].
19 The *Independent* 20 February 2003, The *Times* 20 February 2003, quoted in Anthony Bradley, 'Judicial Independence Under Attack' [2003] *Public Law* 397 at p400.
20 Quoted in Bradley, ibid, p402.
21 The *Daily Telegraph* 21 February 2003 quoted in Bradley, n19 above, p402.
22 The *Guardian* 27 July 2005; The *Times* 27 July 2005; The *Independent Online* 16 August 2005.
23 *A and others v Secretary of State for the Home Department* [2004] UKHL 30.
24 *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC).
25 *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).
26 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).
27 She subsequently denied having made that statement: 'Tshabalala-Msimang denies "poison my people" comment', http://www.sabcnews.com/south_africa/health, 9 July 2005.
28 Cf the remarkable submission on behalf of the government in the TAC case that the courts did not even have jurisdiction to pronounce on the lawfulness of the government's policy with regard to the provision of anti-retroviral medicine to prevent mother-to-child transmission of HIV.
29 *South African Yearbook 2004/5*, Government Communication and Information Services, p385.
30 *Bangkok Post*, 5 July 2004, p48, quoted in Michael Kirby, 'Upholding Human Rights after September 11:The Empire Strikes Back' in Access to Justice in a Changing World, Interights, 2004, p49.

Rights and responsibilities

Eric Metcalfe

This article examines the proposal to include reference to responsibilities in a forthcoming British bill of rights. It looks at the political background to arguments for greater emphasis on responsibility in discussions of rights, sets out the philosophical relationship between rights and duties, asks whether in fact there is any evidence to show that the public currently fail to understand this relationship, and concludes by considering the case for including reference to responsibilities in a bill of rights by reference to other human rights instruments.

The claim that rights are not well understood in the UK may seem a surprising one, not least to anyone who has ever read a book on political philosophy. For if you had to pick which modern liberal democracy could boast the most robust political tradition of arguing about and defending rights over the centuries, the country that gave the world John Locke, Jeremy Bentham, and John Stuart Mill would seem a pretty safe bet.

According to some of our most senior politicians, however, a lack of popular understanding about the relationship between rights and responsibilities, together with a disproportionate emphasis on the former at the expense of the latter, would seem to be at least partly to blame for many of our social ills. Failure to stress responsibility in the context of rights has been blamed for everything from anti-social behaviour and claims for compensation by the undeserving, to serious crime and the actions of terrorists. Over four centuries since the Glorious Revolution and the 1689 Bill of Rights, and less than a decade since the Human Rights Act 1998 (HRA), representatives of the UK's two largest political parties now vie to outdo one another with talk of a new British bill of rights and responsibilities, to restore a country swung out of balance by excessive talk of rights.

Leaving aside the larger question of whether there is reasonable case for a UK bill of rights – either in addition to or in place of the HRA – talk of including responsibilities or duties in a bill of rights raises its own series of questions. First, what is the actual relationship between rights and responsibilities, or rights and duties?[1] Secondly, is there in fact a general lack of understanding about this relationship in the UK? Thirdly, is this lack of understanding a cause of any of the problems that have been attributed to it by politicians and others? Fourthly, is including reference to responsibilities or duties in a bill of rights a proper way to address such apparent problems? Before considering these questions, however, it is worth considering in more detail how the issue has arisen.

The call for responsibility

'Rights and responsibilities have always been at the heart of my politics' declared Tony Blair in 2002,[2] and he made clear the relationship between the two as central to his 'respect' agenda:[3]

> *Respect is at the heart of a belief in society. It is what makes us a community, not merely a group of isolated individuals. It makes real a new contract between citizen and state, a contract that says* ***that with rights and opportunities come responsibilities and obligations. The theme of rights and responsibilities will be central to the Queen's Speech.***

In particular, Blair was keen to stress the importance of personal responsibility as an antidote to what he saw as the excessive individualism of earlier social policy:[4]

> *Social democrats in Britain and the US who held a liberal view of the 'permissive society' divorced fairness from personal responsibility. They believed that the state had an unconditional obligation to provide welfare and security. The logic was that the individual owed nothing in return. By the early 1970s* ***this language of rights was corroding civic duty and undermining the fight-back against crime and social decay.*** *It led Robert Kennedy to lament of America, 'the destruction of the sense, and often the fact, of community, of human dialogue, the thousand invisible strands of common experience and purpose, affection and respect, which tie men to their fellows'.*

Defending his government's introduction of anti-social behaviour orders, Blair again cited the importance of balancing rights and responsibilities, even to the extent of rebalancing the criminal justice system:[5]

> *[I]t wasn't just a question of matching legal rights with legal responsibilities. It was about changing the legal processes by which such rights and responsibilities are determined. Traditional court processes and laws simply could not and did not protect people against the random violence and low-level disorder that affected their lives.*

This irritation at 'traditional court processes and laws' was not confined to anti-social behaviour. In the 2004 case of *Youseff v Home Office*, Blair chaffed at the exchange of letters between UK officials seeking assurances from the Egyptian government against the ill-treatment of three suspected terrorists that the UK proposed to deport to Cairo:[6]

> *This letter was read by the Prime Minister who wrote across the top of it 'Get them back [to Egypt]'. He also wrote next to the paragraph that set out the assurances objected to by the Interior Minister 'This is a bit much. Why do we need all these things?'*

Similarly in May 2006, Blair famously described a decision by Mr Justice Sullivan related to the immigration status of nine Afghan hijackers as an 'abuse of common sense':[7]

> *We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this.*

In Blair's view, whether the conduct in question was anti-social behaviour or terrorism, it was unbalanced for the courts to protect the rights of those whom he saw as having failed in their own duty to observe the rights of others. A month after Blair's remarks in the Afghan hijackers case, the same theme was taken up by the Conservative leader David Cameron in an explicit attack on the HRA:[8]

> *The Human Rights Act has made it harder to protect our security. And it's done little to protect some of our liberties. It is hampering the fight against crime and terrorism.* ***And it has helped to create a culture of rights without responsibilities.***

Although a July 2006 review by the Department for Constitutional Affairs concluded that the Act had 'not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration, and has not led to the public being exposed to additional or unnecessary risks',[9] it nonetheless claimed that:[10]

> *Deficiencies in training and guidance [to public officials concerning the HRA] have led to an imbalance whereby* ***too much attention has been paid to individual rights at the expense of the interests of the wider community.***

Shortly before his retirement as Prime Minister, Blair again attacked what he saw as the priority given to the rights of terrorist suspects ahead of the rights of the general public: 'We have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first. I happen to believe this is misguided and wrong'.[11] Just as Blair saw 'the language of rights' in the 1970s as 'corroding civic duty and undermining the fight-back against crime', he saw the courts'

emphasis on the rights of suspects in the 21st century as endangering the rights of the law-abiding British public.

In July 2007, the government of the new Prime Minister Gordon Brown was no less keen to emphasise the link between rights and responsibilities: the phrase 'rights and responsibilities' appears at least 12 times in its *Governance of Britain* paper with 'rights and duties' being used a further five times.[12] Although the paper readily acknowledged that the HRA itself 'enunciate[d] principles of decency, respect, dignity of the individual and the balance of rights and responsibilities that are now common to most of the democratic world' and that 'most of the individual rights in the Human Rights Act are balanced with the need to protect the rights of others and the common good',[13] the paper raised the prospect of making the relationship between rights and responsibilities more explicit:[14]

> *A Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations.*

David Cameron meanwhile renewed his attack on the HRA in August 2007, following the decision of an immigration tribunal not to deport Learco Chindamo, an Italian national who at the age of 15 had murdered headmaster Philip Lawrence, partly on the basis that to do so would violate Chindamo's right to family life (he had lived in the UK since he was six and had no relatives in Italy). Cameron called for the HRA to be abolished and replaced with:[15]

> *a British Bill of Rights, which sets out rights* ***and responsibilities****. The fact that the murderer of Philip Lawrence cannot be deported flies in the face of common sense. It is a glaring example of what is going wrong in our country. What about the rights of Mrs Lawrence? The problem for this Government is that the Human Rights Act is their legislation and they appear to be blind to its failings.*

In late October 2007, Minister of Justice Jack Straw further elaborated on proposals for a British bill of rights, stressing that '[a] Bill of Rights and responsibilities imposes obligations on government: but it also makes clear that the citizen has mutual obligations'.[16] He added:

> *Over many years there has been debate about the idea of developing a list of the rights and obligations that go with being a member of our society. A Bill of Rights and Responsibilities could give people a clearer idea of what we*

> *can expect from the state and from each other, and a framework for giving practical effect to our common values.*

If this seems vaguely familiar, however, it is worth recalling what Jack Straw, then Home Secretary, said in May 1999 announcing the date for the implementation of the HRA:[17]

> *Human Rights Day – 2 October 2000 – should not be seen as a field day for lawyers.* ***It will mark instead, a major step-change in the creation of a culture of rights and responsibilities in our society. The Human Rights Act is a two way street. Rights flow from duties - not the other way round. One person's freedom is another person's responsibility.*** *And the Convention – and the Act – contains many rights which have carefully to be balanced, one with another.*

And again in March 2000:[18]

> *The Human Rights Act will help us rediscover and renew the basic common values that hold us all together. And those are also the values which inform the duties of the good citizen. I believe that in time, the Human Rights Act will help bring about* ***a culture of rights and responsibilities across the UK.***

In other words, it can hardly be said that the HRA was brought into being without reference or regard to the idea of responsibilities or duties. On the contrary, it was introduced on very much the same basis as the proposed British bill of rights is currently being sold. If there has been a problem with a lack of understanding about the relationship between rights and responsibilities in the last ten years, it can hardly be said to be due to a lack of public statements by senior government ministers on the matter.

The relationship between rights and duties

On most accounts, the relationship between rights and duties is a fairly straightforward one. Rights protect interests that belong to persons.[19] They do so by imposing duties upon other people to promote or serve those interests. As Raz puts it, 'rights are grounds of duties in others'.[20] However, not all the interests that people have are protected by rights – only those goods or interests that are of sufficient moral importance to justify the imposition of duties upon others. We use the shorthand of 'rights', then, to describe those claims that some person's interest is important enough to justify placing other people under a duty to promote or protect it.[21]

It is not necessary for present purposes to go into the lengthy and frequently sterile jurisprudential debate over whether rights are strictly *correlative* to duties. It suffices to say that although rights inevitably give rise to duties upon others, it does not follow from this that all duties are therefore referable to some or other individual right. In particular, it would be a serious mistake to assume that every *legal* duty is correlative to someone's *moral* interest somewhere.[22] As useful as Hohfeldian analysis is in the context of *legal* rights,[23] it works poorly in the context of *moral* rights and, indeed, political arguments over human rights.[24]

At this point, it is also worth clarifying the difference between duties and responsibilities in the context of rights. It is simple enough to describe the relationship between rights and duties: as noted above, rights are a source of duties in others. The idea of responsibility, by contrast, is broader and more abstract, and one that in many cases may have only an indirect relationship to another's *rights* (unless, of course, we resolve to use 'responsibility' purely as a synonym for 'duty' or 'obligation').[25] In particular, 'responsibility' is not synonymous with 'legal liability' for, as Cane points out, it is entirely possible for there to be 'responsibility without legal liability and legal liability without responsibility'.[26] As an example, my right to free expression puts other people under a duty to respect it.[27] I am nonetheless morally responsible for what I say.[28] What I am legally liable for is a different matter, and I may be liable for things that I am not wholly responsible for (eg I may be liable for repeating defamatory remarks made by another) and accountable for things I am not liable for (eg even if my claim of qualified privilege succeeds, I am still responsible for helping to spread the defamatory remarks).

The idea of responsibility in general is, to be sure, a fundamental part of both our legal and moral reasoning and – in that sense, at least – it is easy to appreciate its broader relationship with human rights for both are premised on the idea of human beings as autonomous moral agents. Having the freedom to act also means taking responsibility for one's actions. But the standard complaint made by politicians concerning rights and responsibilities misses the point for at least two reasons. First, responsibility under the criminal law follows moral agency: people who are guilty (rather than merely suspected) of terrorism or hijacking or anti-social criminal conduct are liable to be punished precisely because they are considered by the law to be responsible. For this reason, the criminal law does not punish those who acted under duress, for example, or as unconscious automatons or by reason of insanity, on the basis that they were not genuinely responsible for their actions. Far from showing that rights and responsibilities are out of balance, therefore, the criminal law is a mark of how seriously we take individual responsibility.

Secondly, although many legal rights may be contingent on a certain status or relationship (eg as a party to a contract, a beneficiary of a trust, or as a citizen of a country),[29] human rights protect certain fundamental moral interests that people have simply by virtue of being human, rather than as consequence of being law-abiding or having a British passport.[30] Failure to respect the rights of others can, in the most serious of cases, lead to punishment that includes loss of liberty. So too are some rights tied to conditions, eg you need to be of marriageable age before you can exercise your right to marry. But a person's right to be free from torture, for example, does not depend on their previous good conduct nor is their right to a fair trial contingent upon their nationality. Particularly incoherent in this regard is the government's suggestion that human rights 'must be exercised in a way that respects the human rights of others'. Since it is axiomatic that each individual's rights are limited by equal protection for the rights of others,[31] it would be impossible to exercise human rights in any other way. Far from affirming this self-evident truth, though, the government's proposal to make this injunction explicit in a bill of rights would have the effect of undermining it by implying that it is possible to violate the rights of others by the exercise of one's own rights.[32]

More generally, the relationship between rights and responsibilities desperately needs to be put in its proper legislative context. For it is not only the criminal law that gives rise to duties or attaches responsibility to individual actions. The law in general grants few rights but abounds with duties, prohibitions, penalties and the like. A glance at the Queen's Speech in 2007, for example, shows a legislative programme of 44 bills and six draft bills.[33] While most are undoubtedly for the benefit of the common good, the great majority grant no formal legal rights of any kind to individuals (cf the Crossrail Bill, the Olympics Bill, the Marine Navigation and Port Safety Bill, the Regulatory Reform Bill) nor would we expect them to. Even those whose title suggests the grant of further rights, eg the Parental Rights Bill, are likely on a purely Hohfeldian analysis to contain more duties than rights for individuals.[34] On any sensible analysis, therefore, UK law is overflowing with duties and responsibilities while the number of genuine legal rights referable to individuals is relatively small. Certainly the HRA has made Convention rights justiciable in our courts and the statutory duty upon public authorities to act compatibly with them has given those rights a wide-ranging effect. But it would be foolish to claim that the entire scheme of duties and rights under UK law has been unbalanced as a result of adding a mere 17 or so rights.[35]

The public understanding of rights

Having set out the relationship between rights and duties, the next question is whether this relationship is widely understood among the general public.

At first glance, it may be tempting to agree that rights are poorly understood. First, despite its long tradition of liberal political thought, the UK's lack of a written constitution has meant that the legal protection of rights has historically depended on the relatively weak mechanism of the common law rather than by explicit constitutional guarantee. As Dicey explained:[36]

> *We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of a public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.*

Secondly, there is evidence that the particular mechanism of the HRA is not especially well understood, either among some public officials, the media, or the public at large. A review of the implementation of the HRA in 2006 by the then Department for Constitutional Affairs found, for instance, that the Act 'has been widely misunderstood by the public' and that 'a number of damaging myths about human rights … have taken root in the popular imagination'.[37] The report concluded:[38]

> *There is an urgent need for the public as well as the wider public sector to be better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights and the way they have been applied, both domestically and in Strasbourg. The European Convention and Court of Human Rights occupy a proud place in the new order which followed the Second World War, and the UK played a leading role in their creation.*

The 'leading role' played by the UK in establishing the Council of Europe and the European Convention on Human Rights (ECHR) is a useful case in point, the Convention having been 'drafted substantially' by Sir David Maxwell Fyfe QC.[39] It is, however, a safe bet that most readers of the Daily Mail are unaware that the ECHR was drafted by a one-time Tory Home Secretary[40] for, like most tabloids and even some broadsheets, its journalists regularly confuse the Council of Europe with the European Union:[41]

> *Indeed there can be no greater proof of the subservience of British law to* ***a Brussels-inspired Act*** *than the fact that our future King, who represents hundreds of years of British sovereignty, has to resort to the Human Rights Act to justify his marriage.*

None of this shows, however, that either the *concept* of rights or their relationship with duties is poorly understood by the public at large. At worst, it shows only that the particular legislation protecting human rights is not well understood. And while this is certainly unfortunate given the constitutional significance of the HRA,[42] the same could equally be said for the provisions of the European Communities Act 1972, or either of the Parliament Acts, for example. Although it is essential in a democracy governed by the rule of law for the participants in that democracy to understand and, indeed, deliberate upon the nature of the constitutional arrangements that govern their decision making, we should not make the mistake of confusing that kind of understanding with a detailed legal knowledge of particular statutes. Improving public awareness of the HRA is undoubtedly an important goal, but we should not confuse familiarity of its core concepts with an ability to recite its first schedule chapter and verse (or Article and paragraph).

In fact, there is every reason to believe that the public at large have an excellent understanding of the relationship between rights and duties. The UK is, after all, home to the world's oldest human rights organisation (Anti-Slavery International, founded in 1839) as well as its largest (Amnesty International, headquartered in London with over 2.2 million members worldwide). Nor is the UK's tradition of liberal political thought confined to dry works on political philosophy: instruments such as the Magna Carta (the so-called 'Great Charter of the Liberties of England'), the 1628 Petition of Right, and the 1689 Bill of Rights all speak to an well-established political tradition of respect for rights and liberty. Indeed, it would be impossible for such a tradition – what the Prime Minister describes as this country's 'passion for liberty'[43] – to exist unless there were an implicit general understanding of the relationship between freedom and responsibility, rights and duties. In this light, the claim that the HRA has somehow contributed a 'culture of rights without responsibilities' is revealed as both patronising and offensive for it implies that at least some people were either credulous enough or stupid enough to suppose that the enactment of the HRA in some way relieved them of their obligation to obey the law.

We come, then, to answer the third question posed at the outset of this article: is a lack of public understanding of rights and responsibilities a cause of any of the problems that have been attributed to it by politicians and others? No, since there is no serious evidence that the relationship is not well-understood. There is, however, at least one group among whom apparent lack of understanding of rights has given rise serious problems and that is politicians. Statements by senior members of both parties frequently reveal serious misunderstandings about how rights work, as the complaint of John Denham MP concerning the non-removal of Mustaf Jemma on Article 3 ECHR grounds illustrates:[44]

> *The Mustaf Jamma case, though not directly determined by the courts, leaves many people asking whose rights should take priority. It is an interesting test case. His original offences, though highly unpleasant, were not among the worst the courts see, and Somalia is a very dangerous country. On the other hand, he had sought sanctuary in this country, and had been given it. Surely, most people would say, that brings its own responsibilities. The problem is that the interpretation of human rights law seems to focus almost entirely on the risks to the individual at the expense of the wider concerns for public safety.*

Here, then, is the same complaint as that made by Tony Blair: that the courts give priority to the rights of dangerous criminals and terrorists at the rights of the safety of law-abiding public.[45] But the one of the core features of human rights is that they protect the fundamental moral interests of individuals, including freedom from torture, from being overridden by majoritarian decision-making.[46] The idea that there could be or ought to be some utilitarian trade-off between public safety and exposing a suspect to torture abroad runs contrary to this basic principle. Although rights can and do conflict, posing difficult questions as to their resolution, the apparent 'conflict' between torture and public safety is not one of them. It is true that the collective weight of each person's individual moral interest in their own physical well-being and property, etc, gives rise to a more general public interest in the prevention of crime, and that this in turn imposes certain positive obligations on government including, among other things, to have a system of laws criminalising things like murder, rape and burglary, etc, as well as responsibilities for policing, and so forth.[47] But nobody could seriously claim, for instance, that there is some individualised *right* held by members of the public that entails that foreign nationals who have committed criminal offences must be deported following the conclusion of their sentence, regardless of the consequences. Indeed, taken to its logical extreme, such an argument would require the suspect in each case to be under a moral duty to deport themselves.

Neither is the supposed 'conflict' as described by Blair between the rights of suspected terrorists and those of the general public a genuine clash of rights. For the idea that a suspect's rights could be diminished simply because he or she is accused or suspected of a crime flies in the face of one of the essential guarantees of a fair trial: that individuals are presumed innocent until proven guilty.[48] Insofar as there is problem with public misunderstanding of the HRA, therefore, it is one for which government ministers have been largely responsible. As the Joint Committee on Human Rights reported in 2006:[49]

> *We must … draw to Parliament's attention the extent to which the Government itself was responsible for creating the public impression that*

> *in relation to each of the … highly contentious issues under consideration it was either the Human Rights Act itself or misinterpretations of that Act by officials which caused the problems. In each case, very senior ministers, from the Prime Minister down, made assertions that the Human Rights Act, or judges or officials interpreting it, were responsible for certain unpopular events when … in each case these assertions were unfounded. Moreover, when those assertions were demonstrated to be unfounded, there was no acknowledgment of the error, or withdrawal of the comment, or any other attempt to inform the public of the mistake … [P]ublic misunderstandings of the effect of the Act will continue so long as very senior ministers fail to retract unfortunate comments already made and continue to make unfounded assertions about the Act and to use it as a scapegoat for administrative failings in their departments.*

The role of duties in a bill of rights

Having considered the relationship between rights and duties, and apparent problems concerning the public understanding of rights, we come to the fourth and final question: is there a need to make duties or responsibilities explicit in a bill of rights?

Having already dismissed the argument that the public do not understand the general relationship between rights and duties, it is nonetheless worth considering the other arguments in favour of making duties explicit in a bill of rights. The core of these seems to be something like as follows: (i) public understanding of human rights could always stand to be improved; (ii) bills of rights are more than ordinary legislation, they are constitutional documents and as such perform an important symbolic function; (iii) there is therefore no harm in making the relationship explicit, for the avoidance of doubt.

Proponents of making duties explicit in a bill of rights can find some comfort in the fact that some human rights instruments *do* make reference to duties. For instance, the 1948 American Declaration of the Rights and Duties of Man,[50] which predated the UN's own Universal Declaration on Human Rights by over seven months, includes in its preamble the statement that:

> *The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.*

The drafters of the Universal Declaration, despite being aware of this formulation, nonetheless eschewed it. The travaux préparatoires suggests that the reason for this was that the drafters felt that spelling out the relationship between

rights and duties was too obvious to bear mentioning.[51] Instead, the Universal Declaration settled for the admonition in Article 1 that:[52]

> *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and* ***should act towards one another in a spirit of brotherhood.***

In addition, Article 29(1) offered the observation that:

> *Everyone has duties to the community in which alone the free and full development of his personality is possible.*

Similarly, the International Covenants on Civil and Political Rights[53] and Economic Social and Cultural Rights both confined reference to 'duties' to the preamble, with the exhortation that:

> *the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.*

Interestingly, the sole reference to duties among the actual Articles of both the International Covenant on Civil and Political Rights and the European Convention on Human Rights is a qualification on the right to freedom of expression, which is stated to carry with it 'duties and responsibilities'.[54] This reference was explained by the UN Special Rapporteur on Freedom of Opinion and Expression in the following terms:[55]

> *The issue of duties and responsibilities was subject to some debate during the* travaux préparatoires. *Those who opposed proposals stipulating that the right to freedom of expression carries with it duties and responsibilities contended that the general purpose of the Covenant was to set forth civil and political rights and to guarantee and protect them rather than to lay down duties and responsibilities and to impose these upon individuals. It was furthermore contended that since each right carried with it a corresponding duty and since in no other article was this corresponding duty of any right set out, article 19 should not be an exception to this rule. It was principally upon the argument that the modern media could exert a powerful influence on the exercise and enjoyment of freedom of expression that those supporting proposals to include a reference to duties and responsibilities in the article maintained their position. It was for these reasons that in the ultimately adopted text of article 19 the word 'special' was included before the words 'duties and responsibilities'.*

Although some regional human rights instruments also make reference to duties,[56] proponents of including duties in bills of rights must confront the fact that – other than the exceptions noted here – almost all bills of rights in common law countries contain no reference to the duties, responsibilities or obligations of individuals. Magna Carta makes no reference to them (unless one counts the many and various obligations on the hapless King John). Neither does the 1689 Bill of Rights or the 1787 US Bill of Rights and indeed, the only duty contained in the US Declaration of Independence is the duty of the people to 'throw off' despotic governments. There is no reference to duties or responsibilities in the Canadian Charter of Rights and Freedoms 1982, or the New Zealand Bill of Rights Act 1990 and the only substantive reference in the South African Bill of Rights is the duty of the state to legislate to implement the right to just administrative action under Article 33. Similarly, the only mention of 'duty' in the provisions on fundamental rights in the 1937 Irish Constitution is a reference to the 'right and duty' of parents to provide an education for their children.[57]

The sole exception to this common law tradition of referring to rights without duties is legislation in the Australian state of Victoria, the Charter of Human Rights and Responsibilities Act 2006. Although the 1900 Australian Constitution makes no provision for constitutional rights, the Victorian Charter seeks to provide rights at the state level, and its preamble includes the principle that:

> *human rights come with responsibilities and must be exercised in a way that respects the human rights of others.*

For a common law country without human rights legislation, one hates to criticise progress and the Victorian Charter is in all other respects a sound and worthy human rights instrument. But its clumsy[58] reference to 'responsibilities' is testament to two things: first, the relative immaturity of the Australian debate over human rights; and secondly, the fact that it is possible to get legislation, even human rights legislation, wrong (by way of contrast, the Australian Capital Territories Human Rights Act 2004 makes a much more sensible reference to responsibility, showing perhaps that there is slightly more wisdom in Canberra than there is in Melbourne).[59]

The reference to responsibilities brings us back to the argument that bills of rights (i) perform a symbolic function and (ii) there is no harm in making the relationship between rights and duties explicit. It is certainly true that bills of rights have a symbolism above and beyond their legal functions, and commentators are keen to point to the success of the US Bill of Rights, the Canadian Charter and the South African Bill of Rights in helping to provide the kind of sense of shared identity that helps to foster mutual respect. Certainly

this seems to explain much of the appeal of a British bill of rights to the current Prime Minister. It is also fair to say that, kept to a preamble, references to duties or responsibilities are largely harmless and anodyne and therefore unlikely to cause much confusion for the courts.

But the fact that something is probably harmless is hardly an excellent reason for its inclusion in a constitutional document. Legislation sometimes has a symbolic function but it must not be at the expense of its actual function, which in this case is the protection of fundamental rights. We should be especially wary of references to 'duty' or 'responsibility' in the current political context, in which politicians from both parties are only too keen to suggest that human rights are to blame for weakening public safety, or that 'responsibility' must somehow factor into decisions about deporting people to ill-treatment and torture.

Similarly, the argument that bills of rights have a symbolic function is in fact one of the best arguments *against* including reference to duties or responsibilities in a bill of rights. For the importance of rights is long-fought and hard won, the product not only of centuries of tradition but also of hardship and genuine sacrifice. We have a responsibility to that tradition and that inheritance to ensure that it is not qualified or watered down to the level of a press release, part of a government communications strategy that takes its place alongside focus groups and the targeting of key demographics. And if we are serious about rights, if our talk of them is to be not just talk, then we can surely do better than stating the obvious and the banal.

The last word on this issue can be left to Thomas Paine, the English writer and pamphleteer who did so much to popularise rights at the time of the American Revolution. In his recent speech in Cambridge, the Minister of Justice Jack Straw quoted Paine's observation that:[60]

> *A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another, and it becomes my duty to guarantee as well as to possess.*

What Straw shrewdly (or perhaps cynically) left out of his quotation was the fullness of Paine's remarks:[61]

> *While the Declaration of Rights was before the National Assembly some of its members remarked that if a declaration of rights were published it should be accompanied by a Declaration of Duties.* ***The observation discovered a mind that reflected, and it only erred by not reflecting far enough.*** *A Declaration of Rights is, by reciprocity, a Declaration of Duties*

> *also. Whatever is my right as a man is also the right of another; and it becomes my duty to guarantee as well as to possess.*

In other words, the sometime author of *Common Sense* was not arguing for the link between rights and duties to be spelt out in a bill of rights, but explaining why reference to duties would be plainly redundant. To Paine's contemporaries also, Jefferson, Adams, Hamilton and Madison, the relationship between rights and duties was too obvious to bear mentioning, too self-evident even for a document meant to declare self-evident truths. Like the drafters of the Magna Carta, the 1689 Bill of Rights or the post-Apartheid Constitution of South Africa, they understood themselves as heirs to an ancient tradition of liberty in which such reference was plainly unnecessary. To introduce the language of duties and responsibilities into a new British bill of rights would not, therefore, be a sign of maturity. At best, it would, in Paine's words, show only a lack of reflection among British politicians. At worst, it would be a mark that the UK had, at long last, lost its natural understanding of rights.

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Notes

1 I use the terms 'duties' and 'responsibilities' interchangeably for the moment, although – as we will see below – they are not synonymous.
2 'My vision for Britain', The *Observer*, 10 November 2002.
3 Ibid, emphasis added. See also Blair's speech, '*Our Nation's Future - multiculturalism and integration*', Downing Street, 8 December 2006: 'Being British carries rights. It also carries duties'.
4 Ibid.
5 'Our citizens should not live in fear', Tony Blair, The *Observer*, 11 December 2005.
6 [2004] EWHC 1884, para 15.
7 See eg BBC, 'Blair dismay over hijack Afghans', 10 May 2006. In fact, the judgment of Sullivan J did not concern the Art 3 issue but related instead to the Home Office's failure to grant the appellants leave to remain: see *R (S) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin).
8 Speech to the Centre for Policy Studies, London, 26 June 2006. Emphasis added.
9 *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006, p4.
10 Ibid, p29.
11 'Blair accuses courts of putting rights of terror suspects first', Nigel Morris, The *Independent*, 28 May 2007.
12 *The Governance of Britain*, Cm 7170, July 2007.
13 Ibid, para 206.
14 Ibid, para 210.
15 'David Cameron: Scrap the Human Rights Act', Christopher Hope and Caroline Gammell, The *Daily Telegraph*, 24 August 2007. Emphasis added.
16 Mackenzie-Stuart lecture, University of Cambridge Faculty of Law, 25 October 2007.
17 Home Office press release, 'Jack Straw Announces Implementation Date for the Human Rights Act', 18 May 1999. Emphasis added.
18 29 March 2000, cited in Harvey, Human Rights in the Community, Hart Publishing, 2005, p65. Emphasis added.
19 This account follows – broadly speaking - the interest theory of rights; see Raz, The Morality of Freedom, Clarendon Press, 1986 and MacCormick, Legal Right and Social

Democracy: Essays in Legal and Political Philosophy, Clarendon Press, 1982 and 'Rights in Legislation', in Hacker and Raz (eds), Law, Morality and Society: Essays in Honour of HLA Hart, Clarendon Press, 1982. Another traditional school of thought is that rights protect choices – the choice theory of rights; see eg HLA Hart, 'Are There Any Natural Rights?' in Waldron (ed), Theories of Rights, Oxford University Press, 1984. As Hartney suggests, 'these two views can be reconciled if one recognizes that autonomy or possibility of choice is a good, and that it is in one's interest (in the broad sense that it contributes to one's well-being) to have such a possibility' ('Some Confusions Concerning Collective Rights' in Kymlicka (ed), The Rights of Minority Cultures, Oxford University Press, 1995, p225). See also the discussion in Waldron, The Right to Private Property, Clarendon Press, 1988 at pp79-100.

20 Raz, Morality of Freedom, n19 above, p167.

21 See ibid. See also Waldron, Liberal Rights: Collected papers 1981-1991, Cambridge University Press, 1993 at p212.

22 A legal right may protect, or help protect, a specific moral right. It need not do this directly, however. Just as rights aren't strictly correlative with duties, legal rights may protect moral rights indirectly: for example, parents may have a legal right to child support, but the moral right in question (the interest served) arguably belongs to their children. Equally, the existence of a duty or prohibition doesn't entail the existence of a corresponding *legal* right per se. For example, we would say that the legal prohibition against damaging a traffic sign gives rise to duties, but it seems implausible to claim that there are legal *rights* that correspond with these duties. As Hartney points out, 'it is one of the weaknesses of the Hohfeldian analysis of rights that all duties must correlate with rights and therefore be owed *to* someone [original emphasis]' (n19 above, p225).

23 Hohfeld (Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays, WW Cooke (ed), Yale University Press, 1919) distinguishes four main senses of the term 'right' in *legal* discourse: 'claims', 'liberties', 'powers' and 'immunities'.

24 Just as moral rights 'are unlikely to stand in a simple one-to-one relation with duties' (Waldron, Liberal Rights, p212), they are just as unlikely to stand in a simple one-to-one relation with *legal* rights, immunities, privileges, claims, etc.

25 See eg Cane, Responsibility in Law and Morality, Hart Publishing, 2002; Gardner, 'The Mark of Responsibility' (2003) *Oxford Journal of Legal Studies* 23 pp 157-171. Gardner describes 'responsibility' as 'the value of being able to offer an account of oneself as a rational being' (167) or 'the ability to offer justifications and excuses' (161).

26 Cane, ibid, p5.

27 I do not address here the point that can be made about lack of horizontality under the HRA, ie that Convention rights are held first and foremost against the state rather than against other individuals (but see the developments in relation to a possible tort of privacy under Art 8 ECHR following *Campbell v MGN Ltd* [2004] 2 AC 457). Although it is true that private individuals do not by-and-large owe a direct legal duty to respect another's Convention rights qua Convention rights, they are typically under a wide range of statutory and common law duties and prohibitions, etc, that are broadly coextensive with Convention rights. For example, although the prohibition against ill-treatment under Art 3 ECHR only applies to public authorities under the HRA, there is nonetheless criminal and tortious liability for acts of torture under UK law.

28 See eg Waldron, 'A Right to Do Wrong', in Liberal Rights, n19 above, pp65-66: 'There is no paradox in the suggestion that a person may have a *legal* right to do an act which is morally wrong. Just as individuals may have legal duties that require them to perform wrong acts (for example, serve in unjust wars), so they may have legal rights that entitle them to perform actions that are wrong from the moral point of view … I may be legally at liberty to perform a certain act even though that act is not permissible from a moral point of view; or, others may have a legal duty to me to refrain from interfering with my performance of a certain act, even though the act is morally wrong and their interference morally permissible'.

29 See eg HLA Hart, 'Are There Any Natural Rights?', n19 above, on the difference between general rights and special rights at p84: '(1) General rights do not rise out of any special relationship or transaction between men. (2) They are not rights which are peculiar to those who have them but are rights which all men capable of choice have in absence of those special conditions which give rise to special rights. (3) General rights

have as correlatives obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship or transaction'. Waldron (Private Property, n19 above, at p107) suggests that Hart runs together the distinction between special and general rights with that between rights in personam and rights in rem. Rights in personam are held against some individuals and not others; rights in rem are held against all the world. Hart thought that special rights were necessarily in personam, general rights in rem. However, Waldron points out that property rights are an obvious class of special rights (contingent upon a particular relationship or transaction) that are held to the exclusion of all others (rights in rem).

30 See Waldron, Private Property, n19 above, referring to the idea that each person has certain 'morally crucial' interests that 'are not to be sacrificed merely for the sake of the greatest happiness or the prosperity of society in general' (p14).

31 See eg Art 4, 1789 Déclaration des Droits de l Homme et du Citoyen: La liberté consiste à faire tout ce qui ne nuit pas à autrui: ainsi l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits (Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights'). See also Mill, On Liberty, Oxford University Press, 1966: 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'. See also Nozick's discussion of rights as side-constraints in Anarchy, State, and Utopia, Blackwell, 1974.

32 By contrast, Art 17 ECHR offers the sound negative formulation that '[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'. Since Article 17 is already part of Schedule 1 of the Human Rights Act, any further statutory provision on the issue would seem otiose.

33 http://www.number-10.gov.uk/output/Page13709.asp.

34 In Hohfeldian terms, of course, each of these duties, etc correlate to rights, privileges, immunities, permissions, etc in others but the key point is that most of these are enjoyed by the *state* or particular office holders, rather than the ordinary subject of the law.

35 See Schedule 1 HRA containing inter alia Arts 2-12, 14, and the rights under the First and Third Protocols.

36 Dicey, Introduction to the Study of the Law of the Constitution, 8th edn, MacMillan, 1927 at p191.

37 *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006, p29.

38 Ibid, p42.

39 Ibid, p8.

40 Maxwell Fyfe was Home Secretary under Churchill from 1951 to 1954 and Lord Chancellor in the governments of Churchill, Eden and Macmillan until 1962.

41 'Common sense and human rights', The *Daily Mail*, 5 March 2006 [emphasis added]. See also eg 'Human rights is merely a sweetner for rapists, murderers and violent criminals', Alison Pearson, The *Daily Mail*, 6 November 2007, referring to 'Article 8 of the EU Convention on Human Rights [sic]'.

42 See eg *Thoburn v Sunderland City Council* [2002] EWHC 195 per Laws LJ at para 62: 'The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The [European Communities Act] clearly belongs in this family'. See also Vernon Bogdanor, '*The Human Rights Act: cornerstone of a new Constitution*', Gresham College, 25 January 2005; or the speech of Lord Steyn in *Jackson v Attorney General* [2005] UKHL 56 at para 102: 'We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts … [T]he European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order … a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of

the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom'.
43 Gordon Brown, '*On Liberty*', University of Westminster, 25 October 2007, http://www.number10.gov.uk/output/Page13630.asp.
44 John Denham MP, 'Human rights and wrongs', The *Guardian*, 8 May 2006. Denham was at that time chair of the Commons Home Affairs Committee. In fact, as Denham acknowledges, the decision not to deport Jamma was made by the Home Office and not the courts.
45 See eg n11 above.
46 Nor does the HRA prevent Parliament from legislating in a way that is incompatible with Convention rights - see s4(6) of the Act: '[a] declaration … of incompatibility … does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'.
47 See eg the judgment of the European Court of Human Rights in *Osman v United Kingdom* [1998] ECHR 101 (28 October 1998), para 115, noting that the right to life under Art 2(1) ECHR 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction … It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.
48 See eg Art 6(2) ECHR: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.
49 Joint Committee on Human Rights, *The Human Rights Act: DCA and Home Office Reviews*, 14 November 2006, HL 278/HC 1716, para 21.
50 O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948).
51 See eg Brems, Human Rights: Universality and Diversity, Martinus Nijhoff, 2001, p426. See also UN Doc A/2929, 10 GAOR, Annexes, Agenda Item 29, Part II (1955), annotating the role of the Human Rights Commission in helping to draft the Universal Declaration; and the memoirs of John Humphrey, director of the Division of Human Rights within the UN Secretariat (Human Rights and the United Nations: A Great Adventure, Transnational Publishers, 1983) describing the drafting in pp10-78.
52 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Emphasis added.
53 Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.
54 Cf Art 10(2) ECHR: 'The exercise of these freedoms, *since it carries with it duties and responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'; Art 19(3) ICCPR: 'The exercise of the rights provided for in paragraph 2 of this article *carries with it special duties and responsibilities*. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary'.
55 UN Doc. E/CN.4/1995/32, para 37.
56 See eg the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
57 Arts 42(1) and (5).
58 Cf the discussion of the government's proposal in the *Governance of Britain* paper, n12 above.
59 The ACT Act's preamble includes the exhortation to individuals 'to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others'.
60 Paine, *The Rights of Man*, 1791, p98.
61 See n16 above. Emphasis added.

Adjudicating positive obligations under Article 3 in relation to asylum seekers: 'mission creep' of the European Convention on Human Rights?

Emma Douglas

*This article considers **Limbuela v Secretary of State for the Home Department**, addressing whether the case marks a shift towards judicial decision-making in the welfare sphere or whether the greater tension lies with the state's discriminatory allocation of resources between citizens and non-citizens.*

The legal regime governing claims to asylum in the United Kingdom has undergone numerous legislative face-lifts in recent years. Driven by government efforts to restrict numbers and regain 'control' over the system, there has been a marked shift in executive policy and in the priority accorded to previously recognised legal rights which hinder these policy goals.[1]

In early 2006 the House of Lords dealt a severe blow to the government's policy of refusing support to asylum seekers who had not lodged their claims to asylum 'at the first available opportunity'. Its landmark ruling in *R (Limbuela) v Secretary of State for the Home Department*[2] found the government to have a positive obligation under Article 3 European Convention on Human Rights (ECHR) not to leave asylum seekers destitute, sleeping rough with no access to food or shelter.

In *Limbuela*, the inhuman and degrading 'treatment' under Article 3 dealt to a number of asylum seekers was their enforced destitution. The obligation was incumbent on government to provide shelter and sustenance for the duration of the process of claiming asylum.

Article 3 allows the courts to frame the legal entitlements of asylum seekers in terms of extreme suffering. Thus, the judges can stay safely within recognised parameters of the ECHR, since no-one is excepted from Article 3. While the positive obligations entailed by their lordships' ruling can be viewed as a logical extension of Article 3, there is also a case for classing the issues at stake in

the social and cultural rights arena. The provision of shelter, food and water belongs in the welfare sphere rather than the sphere of civil and political rights traditionally occupied by the ECHR. *Limbuela* might thus be interpreted as stretching the parameters of Article 3 into new territory and establishing an onerous (and controversial) adjudicative burden on judges.

In a state of equality, or rather a state of inequality in which the legal framework guards against discrimination and the political system recognises the need for a basic standard of living, it seems intuitively right that all individuals should be entitled to economic, social and cultural rights, which the UK government has recognised as indivisible with civil and political rights.[3] As a matter of political reality, resources attached to these rights (and, to an extent, civil and political rights) must be limited in some way if the state is not to be left open to demands from those outside the UK which it cannot fulfil. Government therefore seeks ways of discriminating between those who make a claim to these resources. In the context of asylum, the government has effectively chosen the basis of nationality as a tool of discrimination.

Indeed, the analysis which centres on the justiciability of socio-economic rights masks a different controversy, relating specifically to asylum seekers. That is the difference between the *universal* human rights principles laid down in the ECHR, with its egalitarian vision of democracy, and the concerns of the UK government to prioritise resources for its own citizens on the basis of their *nationality,* over and above resource allocation to non-citizens. Public pressures aside, the government must draw the line in a way which does not infringe the fundamental rights of those within its jurisdiction but which allows for distinction between, for example, the entitlements of citizens to limited healthcare resources, and the health needs of asylum seekers which may exceed the capacity of national institutions if catered for in every case.[4]

Limbuela affirms that Article 3, interpreted as entailing positive obligations on the part of the state, cannot be constrained to citizens and must extend to non-citizens. Legislation concerning asylum seekers must develop so that it is legally coherent and non-discriminatory in terms of fundamental rights. At the same time, case law permits government to discriminate on issues such as the right to medical treatment.[5]

If one accepts the egalitarian approach which underpins the ECHR, guaranteeing the rights of all humans by virtue of their human existence, and accepts further that positive obligations are inherent in its provisions as part and parcel of the responsibilities incumbent on government, then there cannot be said to be a 'mission creep' of the ECHR since *Limbuela*.

As to concerns that increased focus on positive obligations will progress towards judicial recognition of socio-economic entitlements of asylum seekers (and of individual rights-holders more generally), then one can point to case-law which shows that judicial interpretation has thus far stayed within limits appropriate to the relative institutional competence of the judiciary. This is illustrated by morally difficult cases which have denied the right to medical treatment for severe and life-threatening conditions, even in instances where individuals will face death on return to their countries following deportation.

Asylum in the UK: legal and political framework

A survey of UK asylum legislation since the beginning of the 1990s reveals an increasing tendency to remove rather than provide legal and welfare protection to asylum seekers, even to the point where under s55 Immigration and Asylum Act 2002 the government reduced benefits to the point of starving asylum seekers out. The legislative pattern has unfolded in the context of public, political and media attitudes, all of which appear to fuel each other, often in the absence of concrete evidence to justify fears and negative opinion.[6]

Six major pieces of legislation on immigration and asylum have been implemented in the past fifteen years. The legislation illustrates a system characterised by divergence between the universal 'human rights' principles (and those rights accorded to citizens based on such principles) and the lower standards accorded to asylum seekers who lack status as UK nationals.

The Asylum and Immigration Appeals Act 1993 was enacted to address the backlog of applications and slow decision-making procedures. Prior to this legislation, refugees and asylum seekers had access to local authority accommodation, education and healthcare and could receive social security benefits at the same level as British citizens.

The Immigration and Asylum Act 1996 facilitated further removal of asylum seekers from mainstream welfare provision, ending benefits for in-country and on-appeal asylum seekers and transferring budgetary responsibility to local authorities in reaction to growing public hostility.[7]

New Labour's Immigration and Asylum Act 1999 introduced vouchers instead of cash benefits at lower levels than existing welfare provision, a system of forcible dispersal of asylum seekers outside of London, and a large increase in detentions and deportations. It also established a 'One-Stop Appeal', at which all grounds for appeal (including human rights grounds) would be considered.

The Nationality, Immigration and Asylum Act 2002 aimed to reduce numbers of asylum seekers entering Britain and to ensure removal of those deemed to

have no right to remain.[8] Amongst other developments, s55 of the 2002 Act provided support only for those asylum seekers deemed to have claimed asylum 'immediately' on arrival. The then Home Secretary David Blunkett wished to send a 'signal to people through the world that the United Kingdom is not a soft touch'.[9]

The Asylum and Immigration (Treatment of Claimants etc) Act 2004 reinforced the government's aim to process applications speedily and to detail and remove more asylum seekers. There was an attempt, which failed, to include an ouster clause which would exclude the right of appeal for failed asylum applications. New criminal offences appeared to prosecute those travelling with forged documents or without passports and who could give no satisfactory explanation. S9 of the Act, a pilot scheme denying support to families who failed to leave the UK 'voluntarily' on refusal of their asylum application, has been acknowledged a failure by government.[10]

The Immigration, Asylum and Nationality Act 2006 further increases the complexity of the law, imposing new restrictions on the right to appeal against adverse Home Office asylum or immigration decisions. It increases the powers of immigration officers, customs and police to obtain information, including fingerprints and other biometric information, and to search arriving passengers. Some provisions of the 2006 Act specifically exclude certain categories of persons from the protection of the 1951 Convention on the Status of Refugees, under which UN signatory states, including the UK, consider applications for asylum.[11] There are also new provisions on deprivation of citizenship, prompted by the case of Abu Hamza, a naturalised British citizen convicted of offences related to terrorism and by the case of Australian terrorist suspect David Hicks.[12]

In the international law context, the Refugee Convention 1951 defines who is a refugee,[13] their rights and the legal obligations of states. In combination with its 1967 Protocol (removing geographical and temporal restrictions) the Convention applies to refugees and those seeking asylum whose claims have yet to be determined. State signatories are prohibited from imposing penalties on asylum seekers present in the state without prior authorisation, provided they present themselves to the authorities 'without delay' (Article 31). Judges have tended to interpret the 1951 Convention broadly, providing protection for vulnerable applicants who constitute an unpopular minority and infusing a human rights element into existing refugee law.[14]

Limbuela: the case and the issues concerning Article 3 ECHR

In the legal and political context outlined above, the question is whether interpretation of Article 3 in *Limbuela* has nudged judicial responsibility

into territory more appropriately occupied by judges in jurisdictions which (to varying extents) openly submit economic, social and cultural rights to adjudication.

R (on the application of Limbuela) v Secretary of State for the Home Department[15]

The case concerned three conjoined appeals over the provision of asylum support, a system established under the Immigration and Asylum Act 1999, and amended by the Nationality, Immigration and Asylum Act 2002. The system establishes the entitlement of asylum seekers to accommodation and essential living needs by the National Asylum Service (NASS) for which the Home Secretary is responsible. All three respondents were asylum seekers, brought into the UK by agents who had made all the travel arrangements, and who at the material time had not claimed asylum on arrival. Each was destitute according to s95(3) of the 1999 Act.[16] A condition of receiving support under s55 of the 2002 Act required lodging an asylum claim 'as soon as reasonably possible', which the Home Secretary deemed the claimants not to have done. If not satisfied with the immediacy of the claim, the Home Secretary was prohibited from providing support, except for the purpose of avoiding breach of an individual's ECHR rights (s55(5)(a)). The three claimants survived in varied states of destitution, sleeping rough while suffering mental and physical health problems and the 'humiliation' of their state of existence. For the Court of Appeal, having dealt with the issue of 'immediate' claims on arrival, the question remained whether the Home Secretary was, regardless, obliged by s55(5)(a) to provide support to the respondents who, like all asylum seekers were prohibited from working and faced little prospect of charitable help.

Lord Bingham considered it clear that the statutory provisions gave rise to 'treatment' within the meaning of Article 3. Lord Scott acknowledged that mere failure to provide a minimum level of social support could not engage Article 3 but saw it as:[17]

> *quite different if a statutory regime is imposed on an individual or on a class to which the individual belongs, barring that individual from basic social security and other state benefits to which he or she would, were it not for that statutory regime, be entitled.*

Since the respondents were barred from working, the legislative framework itself brought about not merely a failure to supply support, but the deliberate exclusion of the asylum seekers from obtaining support (just as if an individual had been barred from treatment under the NHS to which they were otherwise entitled).[18]

The threshold for assessing whether non-deliberate treatment was inhuman or degrading was set high, but Lord Bingham commented that 'the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'. He judged the Home Secretary's s55(5)(a) duty to arise:[19]

> *When ... an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life ... [I]f there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and forseeably finite period or was seriously hungry or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.*

At such a point, the Home Secretary's power to provide support under s55 became a positive duty.

The judgment confirmed the absolute nature of Article 3 and rejected Laws LJ's attempts in the Court of Appeal ostensibly to render it a qualified right capable of a 'spectrum analysis', whereby the state might be entitled to inflict inhuman or degrading treatment as long as it did not constitute deliberate violence and arose in the course of a legitimate policy.[20] The essential enquiry was the practical one of who holds responsibility for the harm in question.[21]

Ultimately, the combination of measures and their effect is to be considered in establishing a breach of Article 3 ECHR based on particular 'treatment'. The state cannot simply rely on a general principle that the provision of state benefits is a political rather than a judicial issue. The effect of the legislation must be considered against the consequence that individuals suffering physical and mental health conditions (mirroring the experience of hundreds of others) were obliged to sleep rough while their asylum claims were decided because they had failed to apply immediately on arrival (leaving delays of several hours or at most one day). Their lordships noted the irrelevance of the short time delay to the merits of the applications, since at least two of the respondents had been granted refugee status by the date of their judgment and in any case late applicants were statistically no more likely to fail in their applications.[22] In short, the goal of the legislation (to deter individuals from claiming asylum at the end of their stay in the UK merely as a way of delaying their departure or obtaining welfare benefits) was at odds with its effects, which were to bring about the enforced destitution of those within its reach.

Positive and negative obligations: re-conceptualising Article 3 ECHR

The European Court of Human Rights (ECtHR) has led in recognising and employing the principle of positive obligations and dispelling the distinction between positive and negative obligations incumbent on the state. *Limbuela* highlights the adoption by the House of Lords of this more perspicacious approach in adjudicating ECHR rights.

Positive obligations under the ECHR

The ECtHR continues to develop the doctrine of positive obligations, which thus far has been defined simply as 'requiring member states to ... take action'.[23] Such action may be the investigation of a killing[24] or the protection of vulnerable persons from serious ill-treatment at the hands of others.[25]

Keir Starmer[26] proposes that the theoretical basis of such obligations combines three inter-related principles: the requirement under Article 1 ECHR that states should secure ECHR rights to all within their jurisdiction; the principle that ECHR rights must be practical and effective; and, in light of Article 13, the principle that effective domestic remedies should be provided for arguable breaches of ECHR rights. He cites various 'categories' of duty incumbent on member states in this context, including the duty to create a national legal framework which provides effective protection for ECHR rights; a duty to prevent breaches of ECHR rights where they cannot be effectively protected by the legal framework; and the duty to provide resources to individuals to prevent breaches of ECHR rights. This approach is comparable to that of Professor Shue who disputed the dichotomy of positive rights/duties and negative rights/duties, asserting that every basic right correlated broadly with the state's duty to *avoid* depriving; to *protect* from deprivation; and to *aid* the deprived.[27] The number of duties could be imprecise however. As Jeremy Waldron put it there may be 'successive waves of duty'.[28] Whilst the specific balance between negative and positive obligations will vary according to the particular right at issue, all basic rights will to some extent involve positive obligations.

The nature of the negative and positive obligations under Article 3

Article 3 requires the absolute negative duty to refrain from subjecting a person to torture or inhuman or degrading treatment. Thus, the ECHR protects the individual against direct abuse of power by the state. The positive obligation has been developed by the ECtHR, whose jurisprudence has confirmed the obligations incumbent on the state to take all reasonable steps to secure respect for those rights and freedoms to everyone in its jurisdiction, as set out in Article 1 ECHR.

In concluding that depriving late applicant asylum seekers of any support is inhuman or degrading treatment under Article 3, the House of Lords discussed the nature of the positive and negative obligations arising from it. Lord Hope asserted that the public authority had intentionally created, and was thus 'directly responsible' for, the legislative regime leading to a real risk of destitution, which may require doing something to remedy the situation. Lord Scott doubted the implication of a minimum level of security support being established by Article 3, but distinguished the situation where the state regime imposed the destitution upon the asylum seekers.[29]

Limbuela confirms that a positive aspect of a negative duty may trigger an obligation on the state to protect individuals against foreseeable threats of harm culminating in treatment prohibited by Article 3. Once the treatment or punishment is found to be inhuman or degrading then the conduct is prohibited and the obligation is absolute.[30] It follows from this that if a positive obligation arises under Article 3, it is an absolute right. Lord Hope commented that where positive obligations arise they are not absolute, but critics have pointed to the misleading nature of this statement.[31] The *scope* of the positive obligation is limited by what can be reasonably expected from the government, which will turn on the particular circumstances of each case. The absolute nature of Article 3 is unaffected, however, and the issue of proportionality is irrelevant. Once it has been decided that a positive obligation arises and the severity threshold has been reached, no public authority can justify infringing Article 3. Of course, the problem here is the definition of what is 'reasonably expected'. If the government is to set the standard, there is a risk of it setting the bar too low; if it is the judiciary, there is doubt as to whether its determination can be any more informed.

The ECtHR has never permitted any ill-treatment that would fall within the scope of Article 3, even in circumstances of pressing public concern[32] and regardless of the victim's conduct.[33] The consequences of finding a negative or positive obligation should not be different. *Limbuela* has confirmed that the distinction between the two types of obligation is illusory. Where the requisite high threshold of severity is reached and state responsibility is engaged, the single question to be asked is: what must the state do to avoid breach of these rights?

Positive obligations in *Limbuela*: beyond the remit of Article 3 ECHR?

There are clear parallels between distinctions as to negative and positive obligations on the one hand, and civil and political (CP) rights and economic, social and cultural (ESC) rights on the other. The implication on one analysis is that the blurring of the first distinction in *Limbuela* and the consequent

obligation upon the state to provide social security support to destitute asylum seekers, takes Article 3 into socio-economic territory and with it the judicial responsibility to determine the parameters of positive obligations under the ECHR.[34]

Across the divide – evolving concepts of rights and duties

The ECHR traditionally occupies the territory of CP rights, viewed as readily justiciable owing to their reflection of negative duties of restraint which prevent the government from encroaching on rights. Positive action or obligation on the part of the state to protect against deprivation is traditionally framed in terms of executive policy choice, based on appropriate socio-economic resource allocation. These distinctions mirror alternate concepts of liberty, which may be identified as 'liberty as freedom from state interference; and liberty as freedom from want and fear'.[35] The inextricable links between and inter-dependence of these concepts of rights, duties and freedoms has long been established, at least in theory,[36] and is supported by recognition that all basic rights of whatever origin can engender positive as well as negative duties for the state. As outlined above, there are broadly three types of duty inherent in all rights, which the International Covenant of Economic, Social and Cultural Rights (ICESCR) characterises as the duties to 'respect, protect and fulfil'.

Limbuela reinforces the doctrine of positive obligations under Article 3 ECHR but the judiciary have not shied away from applying it under other articles which raise socio-economic implications.[37] Thus far, however, the duty to 'fulfil' has not extended explicitly to judicial guarantees of welfare provision, as confirmed, for example, in *Chapman v UK*:[38]

> *… Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right … Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.*

Positive duties to provide and negative duties to refrain from interfering are approached in a number of different ways in comparative jurisdictions and under international human rights law. The ICESCR obliges signatories 'to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation' of the rights in the Covenant.[39] As to whether the individual can make an automatic claim to such benefits, the Committee for the ICESCR has stipulated (General Comment 3) that, though states need not achieve full realisation in the short term, they must put in place the means to achieve the duty; all signatories have a 'minimum core obligation' to ensure minimum levels of food, health care, shelter and housing, and basic education.

Limbuela: adjudicating socio-economic rights?

The House of Lords in *Limbuela* subjected UK legislation to review according to standards set out by the ECtHR, despite the considerable resource implications of determining rights to social security. Its finding that the UK government had breached its positive obligations under Article 3 not to subject individuals to inhuman or degrading treatment arguably ventured into the territory of other international human rights instruments. For example, the refusal of the Secretary of State to provide support to asylum seekers might engage Articles 9 (social security), 11 (standard of living), and 12 (physical and mental health) ICESCR. From this point of view, *Limbuela* could signify a mission creep of Article 3 ECHR. The court's approach might more appropriately be classed as an explicit recognition of certain – crucial – ESC rights. Indeed, such an explicit approach might constitute a logical extension of the acknowledged positive obligations under Article 3 ECHR.

There are similarities between their lordships' reasoning in *Limbuela* and the approach in jurisdictions which establish a judicial mandate to interpret positive obligations carrying socio-economic implications.

The Indian approach, which employs Directive Principles of State Policy to interpret legislation in line with socio-economic concerns, has enabled the judiciary to translate fundamental constitutional rights into positive duties, most notably under the judicially expanded 'right to life' provision. This approach emphasises the interrelatedness of fundamental rights and socio-economic entitlements and may reflect a potential development in the UK, since the principles in the EU Charter on Fundamental Rights are becoming a tool of interpretation for the European Court of Justice and will thus impact directly on domestic law.[40] Similarly, the UK's common law contains unwritten principles articulated by the Lords in *Limbuela*, such as that destitution in our society, whether from direct state violence or from circumstances for which the state can be held responsible, is to be prevented at all costs.

South Africa's constitution provides for positive state obligation in relation to ESC rights but makes their 'progressive realisation' subject to a 'reasonableness' requirement. This requirement has a substantive content and seeks to 'affirm to values of human dignity, equality and freedom'. These are basic principles which the state must observe in implementing its positive obligations and dicta from the case-law recalls the domestic House of Lords approach in *Limbuela*.[41]

While reasonableness review is still a far cry from the UK domestic courts' steady emergence from '*Wednesbury* unreasonableness',[42] it nonetheless reflects certain shifts in constitutional relations in the UK, by opening up the potential

for continuing constitutional 'dialogue' between the branches of government, as well as between the individual and the state. Sandra Liebenberg advocates an approach which centres on the impact of the deprivation on the ability of the group fully to participate in society, which resonates with their lordships' priorities in *Limbuela*.[43]

The third model is the Canadian 'equality' model, also employed to an extent in the European context under Article 14 ECHR. This is dealt with below.

Without explicit tools of interpretation for positive obligations under the ECHR, the law lords in *Limbuela* stipulated the obligation within rule of law principles to provide for the basic welfare of all individuals within the UK's jurisdiction. This obligation was just as incumbent on the state as explicit duties not to infringe traditional civil liberties.

As to whether the judiciary have facilitated a 'mission creep' beyond the traditional remit of the ECHR, it is established that judges should ensure that individuals who bring a claim do not continue in a state of deprivation. However, the high threshold set out by the law lords in *Limbuela* sheds doubt on whether their guarantee of food, shelter and housing in fact entered into, rather than merely touched on, the socio-economic arena. Effectively, the type of deprivation featured in their lordships' reasoning keeps them on 'safe' Article 3 ground and in the realm of fundamental constitutional principle, as opposed to policy issues which risk encroaching on the sphere of executive decision making, apart from when that decision making fuels practices which can only be regarded as state oppression.

Asylum and equality: universal rights or citizens' privileges?

Equality and human rights

Underpinning the issue of judicial responsibility for determining the scope of positive obligations under the ECHR is a further dichotomy. This dichotomy is less conducive to 'merger' than those discussed above, due to the political implications and the issue of public and media attitudes. It is the *universality* of 'human rights' on the one hand, and, on the other, the entitlement of citizens to certain resources on account of their *nationality*. The elected branches of government (and, to a lesser extent, the judicial branch) must deal with finite resources. Yet a legislative and normative system based on the ECHR and consolidated by the Human Rights Act 1998 (HRA) is premised on core principles which must be applied to all individuals equally.

The basis of the legislation in *Limbuela* appears to have been a concerted effort by government to provide an incentive to asylum seekers to leave the UK.[44]

However, even placing aside such motives, the government of the day must make resource-based decisions and, in so doing, effectively discriminate in some form as between societal groups. In the context of asylum seekers, it chooses the basis of nationality. Problematically, this leaves the law in a state which fails to address the more pressing and logical priority of resource allocation on the basis of need.

Ronald Dworkin distinguishes between majoritarian and egalitarian democracy,[45] arguing that a majoritarian concept of democracy[46] is defective since it denies the equal importance of all human beings. An egalitarian model of democracy, however, recognises the principle of equal importance and seeks to entrench people's rights in a constitution so as to protect fundamental right against majority opinion.[47] The model of democracy envisaged in the ECHR and the HRA tends towards egalitarianism rather than majoritarianism (even despite the allowances made for limiting certain rights in the interests for eg of 'public safety and morals'). The ECHR and HRA marked a development in traditional understandings of democracy in the UK.[48] Egalitarian democracy is built on the commitment to respect the basic needs of each individual within its jurisdiction, guarding against the situation in which an electoral majority favours an abrogation of rights for a (frequently unpopular) minority group. Asylum seekers, who lack any real voice in the democratic process (apart from their ability to form interest groups for lobbying purposes) on account of the absence of a right to vote, have become largely dependent on a judiciary which upholds the rule of law and the rights of minorities in an increasingly 'rights-based' democracy.[49]

It is this rights-based democracy within which the law and politics of detention, destitution and deterrence in immigration and asylum policy are best challenged. This is because human rights law imposes duties on states towards *all* individuals, based not on their nationality (or status as non-nationals) but on their humanity or 'personhood'.[50] The 1951 Refugee Convention provides protection for asylum seekers under international law. In interpreting the Convention the UK courts have in some cases relied on human rights principles in seeking to widen the Convention's protection. The ECHR's conception of egalitarian democracy, explicitly recognising the equal importance of all human beings, must confront the problem of national interest and a sovereign government's policy choices.

The principle of equal treatment is inherent in the common law.[51] The corollary of this is the requirement not to discriminate either directly or indirectly without objective and reasonable justification. The Joint Committee on Human Rights (JCHR) has recently placed these principles at the centre of the asylum debate in its report on the treatment of asylum seekers.[52] While a state's entitlement to

treat nationals and non-nationals differently is acknowledged, this entitlement must be subject to state obligations under international human rights law.[53] The Convention protects against unjustified discrimination in relation to the application of other ECHR rights. Article 2(2) ICESCR performs a similar task in relation to the Covenant. The overarching principle relevant to all ECHR rights is contained in Article 14 ECHR, which states:

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,* ***national*** *or social origin, association with a national minority, property, birth or other status. (emphasis added)*

Discriminating against non-nationals

Both the ECHR and the International Covenant on Civil and Political Rights (with its free-standing guarantee of equality) expressly prohibit against discrimination. In its General Comment 15: The position of aliens under the Covenant (adopted in 1986) the UN Human Rights Committee states:

> *Each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant [Art 2]. This guarantee applies to aliens and citizens alike.*[54]
>
> *... aliens are entitled to equal protection by the law.*[55]

The House of Lords applied this prohibition on nationality discrimination in *A v Secretary of State for the Home Department*[56] in relation to a challenge by foreign nationals to their indefinite detention under the Anti-Terrorism Crime and Security Act (2001). It was held that the men had been treated differently on account of their nationality or immigration status and this discrimination had no rational basis. The Court was explicit in basing its ruling firmly on the principle of equality, Lord Hope commenting that 'A state is not permitted to discriminate against an unpopular minority for the good of the majority'.[57] Baroness Hale stated that: 'Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities'.[58]

The JCHR points out that particularly severe discrimination 'can constitute inhuman and degrading treatment and therefore breach Article 3 ECHR'.[59] The fact that such breach would require positive state action by way of remedy brings

us back to judicial responsibility in interpreting positive obligations. In addition to approaches to review based on directive principles and reasonableness, there is also the (arguably more pertinent) 'equality'-based approach. It is important to consider this in the context of asylum and whether, on this analysis, there is any sign of 'mission creep' of Article 3 ECHR into territory best occupied by politicians rather than judges.

Adjudicating positive obligations using an 'equality' approach

Courts in a number of jurisdictions have come to adopt equality as a standard of review of the obligation to provide. On this approach, the court can adjudicate on the ways in which the state has chosen to provide benefits, rather than insisting on provision in the first place.[60] Lords Brown and Scott in *Limbuela* stressed that the state had decided to deny rights to asylum seekers which they had previously had and which were available to other members of the community.[61] Generally, their lordships seem to have been concerned at the discriminatory nature of the abrogation of rights to a particular group, although they did not invoke Article 14 in their judgments.

The structure of the ECHR dictates an equality based approach to review. Article 14 provides that there shall be no discrimination in the enjoyment of ECHR rights, though it is triggered only when it is proved to be 'engaged' rather than where there has been a breach of another right.[62] The court potentially has a broad role in supervising the state's duty to make welfare provisions because welfare inevitably targets benefits at particular groups depending on need or capacity. There is a legal obstacle here, however, in that the right must come within the parameters of the ECHR, under which the jurisprudence tends to confirm that no 'right to welfare' can be claimed under its provisions.

Limbuela also fits with an equality claim in featuring the withdrawal of support from a particular group of destitute individuals which the court classified as 'treatment' for the purposes of Article 3. Lord Scott, building on *Ghaidan*,[63] emphasised that there was no ECHR right to be provided with a minimum standard of living. But where a legislative regime did make provision for destitute asylum seekers, the exclusion of late applicants constitutes 'treatment' under Article 3. Likewise, no duty exists to provide healthcare (except in emergency situations), but the fact that there is a health service to which all have access, means that removal of this right from asylum seekers would be 'treatment' under Article 3.[64]

Equality, however, is commonly divided into formal or substantive equality, both of which can have very different permutations. In the context of provisions, if equality merely signifies consistent treatment, this could be fulfilled by no provision to anyone, which is of no help to the destitute.[65]

The solution is for the equality right to engage a substantive right. In her dissenting judgment in *Gosselin v Quebec (Attorney General)*[66] Arbour J stressed that the claim of under-inclusion was more than just an equality claim: the exclusion from the statutory right to adequate welfare was a breach of the stand-alone rights to life and security. Similarly, emphasising the substantive rather than formal nature of Article 3 in *Limbuela*, Lord Brown acknowledged the risk of rendering Article 3 a mere standard of consistency and stated:[67]

> *It seems to me one thing to say, as the ECtHR did in Chapman, that within the contracting states there are unfortunately many homeless people and whether to provide funds for them is a political not judicial issue; quite another for a comparatively rich … country like the UK to single out a particular group to be left utterly destitute on the streets as a matter of policy.*

The employment of the equality right provides a measure by which to judge the state's criteria for exclusion. While bearing in mind to need to allocate benefits and ensure efficient provision of social services, there must nevertheless be a 'rational connection' between the differentiating law and the legitimate government purpose at which it is aimed.[68] This test, similar to that of Article 14, is designed to give the test practical effect. In *Limbuela*, the government failed the test on its argument based on cost. Nor did the court accept that exclusion from benefits acted as an incentive to this group to become self-sufficient.

The equality approach to assessing positive obligations poses similar concerns over judicial responsibility. However, as to whether *Limbuela* illustrates a mission creep of the ECHR in terms of stretching beyond Article 3 the ambit of judicial responsibility in the context of obligations – the answer to this is surely in the negative. In fact, given that it is the ECHR itself which lays down the concept of an egalitarian democratic approach which values all equally and to which the notion of discrimination is offensive, the approach to judicial review based on equality may present a particularly appropriate means of determining positive obligation. However, the line must be drawn somewhere in the adjudication of positive obligations under the ECHR in relation to asylum seekers.

Adjudicating Article 3 after *Limbuela*: implications and limitations

Judicial determination of 'treatment' coming within Article 3

Acknowledging judicial competence in relation to positive obligations may lay the ground for judicial confidence in relation to more overtly socio-economic rights. However, in relation to the destitution of asylum seekers, the courts are perhaps more likely to keep their reasoning within the bounds of Article

3 in determining these claims. This is because the 'treatment' alleged under must pass a certain level of severity to come within Article 3, even though the definition of 'torture, inhuman or degrading treatment' continue to evolve.[69] The determination of whether treatment is degrading will also depend on the particular facts of the case.[70]

Violation of Article 3 usually requires actual or threatened physical or psychological ill-treatment which is deliberately applied. There must be 'treatment', in that an omission will not breach the Article. Thus, in *R (Q) v Secretary of State for the Home Department*, the imposition by the legislature of a regime prohibiting asylum-seekers from working and further prohibiting the grant to them, when they were destitute, of support amounted to 'positive action directed against asylum-seekers and not to mere inaction'.[71]

The denial of benefits as 'treatment' for the purposes of Article 3 was endorsed by the law lords in *Limbuela*. Notably, where an asylum seeker has through their own means obtained shelter, sanitary facilities and some money for food, the denial of benefit does not reach the threshold regarded as degrading.[72] Lord Hope in *Limbuela* explored individual circumstances to assess whether the threshold for a breach of Article 3 had been reached:[73]

> *S55 asylum seekers ... are not only forced to sleep rough but are not allowed to work to earn money and have no access to financial support by the state. The rough sleeping which they are forced to endure cannot be detached from the degradation and humiliation that results from the circumstances that give rise to it.*

Adjudicators are brought into very sensitive areas where they have to compare living standards of asylum seekers in their home country. In *N (Burundi)*[74] the claimant said that the ravages of civil war in her country were such that it would be inhuman to return her. The standards in her country were general state-wide and not specific to her. The Tribunal did not accept her claim but the implication for judicial responsibility is clearly the controversy over whether human rights law can or should be used to equalise living standards and queries over which standards from the country of origin the Convention country is prepared to deem acceptable.

Establishing limitations – healthcare for refused asylum seekers

Where a case concerns torture or other severe physical or psychological ill-treatment, the treatment will clear the high threshold necessary to amount to a breach of Article 3. Other kinds of ill-treatment are more difficult. It is particularly in the area of medical treatment for ill-health in relation to Article 3 that judges continue to exercise restraint over their intervention, since the rights

in question may verge into socio-economic territory on the one hand, and issues of much-needed national resource implications in respect of non-nationals. In addition, some of the claims against ill-treatment in this field must be put in the context of deportation. Thus, often the overriding consideration will be that the seriously ill claimant has no right to be in the UK but will deteriorate further if sent back to their country of origin where there is (often a dramatically) lower standard of healthcare. The line of cases in this area establish that it is not ill-treatment under Article 3 for the UK government to deport a seriously ill person back to a country with a lower standard of healthcare.

Provision of healthcare may engage Articles 2, 3 and 8 ECHR. In the socio-economic sphere, the ICESCR protects the 'enjoyment of the highest attainable standard of physical and mental health' (Article 12). On the point of equality, it is noted that an issue may arise under Article 2 where the state puts an individual's life at risk through the denial of health care which is available to the general population.[75] Further, the state has a positive duty to take steps to safeguard the lives of those within the jurisdiction.[76]

The case of *D v UK*[77] remains distinct and may fail to reassure those seeking to rely on it. The Home Secretary sought to deport D after he had served a long prison for supplying prohibited drugs. D was in an advanced stage of AIDS and receiving terminal care in a hospice. His treatment had slowed the progress of the disease and relieved his symptoms and he was receiving support as he faced death. He was not expected to live long, but if he was deported the treatment upon which he depended would not be available at all and he lacked any supportive family or social network. The end of his life would be marked by severely distressing circumstances. The ECtHR deemed that his return would breach Article 3. The parameters of Article 3 are set out by *Bensaid v UK,*[78] where the court stressed the high threshold of treatment amounting to Article 3 and found no violation in deporting to Algeria a schizophrenic suffering from a psychotic illness.

The limits of judicial responsibility have been further marked out by a controversial case which touches on the context of socio-economic entitlements and, more controversially, decisions over limiting health resources which hold funding back from asylum seekers who have failed in their application. The case of *N (FC) v SSHD*[79] involved a Ugandan asylum seeking woman suffering from advanced HIV / AIDS. The House of Lords found that Article 3 did not impose an obligation on the government to provide medical care. This was so even though in the absence of medical treatment, the life of the woman would be significantly shortened. Barring exceptional circumstances, such as where the fatal illness had reached a critical stage, foreign nationals subject to expulsion could not claim any entitlement to remain in the territory of a state in order to

continue to benefit from medical, social or other forms of assistance provided by the expelling state. This was so even if during the determination of her asylum claim the individual received medical treatment which resulted in an improvement in her condition, such as receiving anti-retroviral treatment.

Their lordships were deeply sympathetic with N. Lord Brown verged on suggesting that the Home Secretary should exercise discretion to let N stay.[80] Social policy considerations had to be overt in order to rationalise this case. Ultimately, their lordships saw the issue as being outside their capacity to resolve. The problem stemmed from 'Uganda's lack of medical resources compared with those available in the UK'.[81] The better answer than migration and human rights claims was, said Lord Hope, 'for states to continue to concentrate their efforts on the steps which are currently being taken, with the assistance of the drugs companies, to make the necessary medical care universally and freely available.[82]

With regard to relative institutional competence or judicial restraint the signal from the case is clear. It illustrates the argument that sometimes it will be right for the judge 'to hesitate, to say – against his or her own moral intuitions – that bad though the case is it does not call for his or her intervention'.[83]

There have been calls, including from the Joint Committee on Human Rights and legal academics[84] for such policy to be overruled in favour of complete and non-discriminatory equality in such matters as healthcare. However, from a judicial point of view, and in the context of a 'mission creep' suggested by *Limbuela*, the social policy concerns relating to the above-mentioned healthcare cases mark out a rational (if morally difficult) basis for discrimination and demarcation of judicial responsibility. In exceptional circumstances judges may decide differently but the above examples delineate the bounds of positive obligations under the Article 3 ECHR and more generally, though a shifting dynamic in case law following *Limbuela* may yet forge a new path in judicial adjudication of such issues.

Conclusion

Limbuela marked a fresh judicial approach in relation to destitute asylum seekers and any future legislation which aims oppressively to discourage – ultimately through starvation – the entry of asylum seekers who have a right to be in the UK to apply for refugee status. In denying asylum seekers all lawful opportunity to maintain themselves, the government offended their dignity and worth as human beings. It violated their human rights, even before it reached the level of personal degradation which the Courts identified as the threshold of responsibility.

On one analysis there is a gradual move toward justiciable positive obligations which entail provision of welfare and thus are more accurately labelled 'socio-economic rights'. However, the threshold of Article 3 remains high and it is likely that the courts can continue within its bounds in cases of this nature.

The more interesting concept at issue is the universality of human rights obligations, compared to the discriminatory social policy goals and legislation of the government, along with the sub-category of human rights, 'citizens' rights'. The ECHR represents an egalitarian vision of democracy, yet the state persists in drawing boundaries as to some of the resources claimed by people within its jurisdiction. Equality and non-discrimination are fundamental concepts within international human rights law, but the importance of a citizen's democracy in the allocation of resources is also a key factor to be taken into account by government in its decision making. Yet, it is clear that equality is also a fundamental basis of the common law and this must inform the judicial approach and any future legislation so that it is coherent and non-discriminatory in terms of the fundamental requirements under Article 3.

Though tragic cases of severely ill people being sent back to their country of origin are occurring, there is a line to be deciphered between supervising positive obligations in relation to the core Article 3 rights and more peripheral socio-economic issues which ultimately are better decided upon by those elected to do so.

Much of the recent history of asylum law may appear to paint a bleak picture, but there are causes for optimism[85] as well as a need to engage with the morality of our legal framework. The Chief Executive of the Refugee Council has urged a renewed understanding of the *ethical* basis for the legal rights of the 1951 Refugee Convention.[86] A further important and pragmatic consideration is the process of globalisation, which has significant and, as yet, unexplored implications for our moral landscape. The simple idea underpinning this perspective is that, in a global economy, it is no longer possible to use the boundaries of nationality to draw the boundaries of the duties we owe each other. It is ambitious to suppose that government will embrace this perspective. However, there is a strong argument that any differentiation in the socio-economic sphere as between citizens and non-citizens (and in particular asylum seekers) should be openly clarified, rationalised and justified in the context of the egalitarian legal regime established by the ECHR and the HRA. The developing doctrine of positive obligations under the ECHR, in particular since *Limbuela*, will set progressive yet contentious parameters for such an exercise.

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Notes

1 The most recent legislative development saw the removal of the right of appeal against refusal of entry clearance brought in the Immigration Asylum and Nationality Act 2006. New technology facilitates a system whereby legal authority to enter the UK is ascertained through online applications from overseas. Developments point to an integrated European Community approach, through which disputes over authority to enter are dealt with bureaucratically abroad rather than as part of the domestic judicial process. Gina Clayton, Textbook on Immigration and Asylum Law, Oxford University Press, 2006, XI.

2 [2005] UKHL 66.

3 *Foreign and Commonwealth Human Rights Report 2003*, p366.

4 Contrast, however, dicta by Hoffman LJ in *Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956, 'There was a time when the welfare state did not look at your passport or ask why you were here', at para 19.

5 See, for example, *D v UK* (1997) 24 EHRR 425; *N v SSHD* [2005] UKHL 31.

6 Liza Schuster, 'Common Sense or Racism? The Treatment of Asylum Seekers in Europe', *Patterns of Prejudice*, (2003b) Vol 37 (3); Alice Bloch, 'A New Era or More of the Same? Asylum Policy in the UK', *Journal of Refugee Studies* (2002) Vol 13 (1) p39; Margaret Malloch and Elizabeth Stanley, 'The Detention of Asylum Seekers in the UK: Representing Risk, Managing the Dangerous', *Punishment and Society*, Vol 7 No 1, (2005), pp53-71, at p56; Arun Kundnani 'In a Foreign Land: The New Popular Racism', *Race & Class* 2001 43, pp41-60, at p52; Liza Schuster and John Solomos, 'Race, immigration and asylum: New Labour's agenda and its consequences', *Ethinicities* (2004), Vol 4 (2), p277; *UNHRC Magazine* No 142, 'Victims of Intolerance'; *Treatment of Asylum Seekers*, Joint Committee on Human Rights, 2006-2007, HL 81-I. Notably, Home Office figures show the number of asylum applications in the UK to have fluctuated over the last decade, dropping to a new low in 2006. Applications rose from 32,505 in 1997, peaking at 84,130 in 2002 and dropping to 23,610 applications in 2006 (Home Offfice Statstical Bulletin 14/07, *Asylum Statistices in the UK,* 21 August 2007). Despite the clear anxiety in Britain over immigration and asylum, the (actual and perceived) conflicts of interest over resources are accompanied by strong economic growth in the UK and the by the benefits the UK population derives from globalisation and the inevitable shift in migration patterns as new opportunities arise in work, travel and family life.

7 Then Minister of State for the Home Office (Baroness Blatch) articulated the purposes of the 1996 Act thus: 'The Bill has three objectives: first, to strengthen our asylum procedures so that bogus claims and appeals can be dealt with more quickly; secondly, to combat immigration racketeering through stronger powers, new offences and higher penalties; and thirdly, to reduce economic incentives which attract people to come to this country in breach of our immigration laws.' HC Debates col 959, 11 December 1995.

8 *Secure Borders, Safe haven: Integration with Diversity in Modern Britain*, Home Office, 2002.

9 HC Debates col 627, 29 October 2001.

10 *Government Response to 'Treatment of Asylum Seekers'*, JCHR, 2006-2007, HL 134.

11 S55 of the 2006 Act empowers the Home Secretary to issue a certificate stating that the appellant is not entitled to the protection of Art 33(1) of the Convention (non-refoulement) because one of the exclusions (concerning threat to national security) applies.

12 S40(2) British Nationality Act 1981 empowers the Home Secretary to deprive a person of British citizenship if he is satisfied that that person has done something prejudicial to the vital interests of the UK. The 2006 Act amends the wording so that the Home Secretary must be satisfied that deprivation of citizenship (and / or the right to abode with a view to deportation) is 'conducive to the public good'. This expression is used in immigration law to deal with deportation of suspected terrorists.

13 Art 1 1951 Convention relating to the status of Refugees (Refugee Convention) defines a 'refugee' as a person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable to or owing to such fear , is unwilling to avail himself of the protection of that country. An 'asylum seeker' is a person who has applied for recognition as a refugee in another country and waits a decision on their application. 'Economic migrants' are those who leave their country voluntarily to search for a better quality of life. The important distinctions between

these categories continue to be blurred in public and political discussion.
14 Eg *R (Shah) v Secretary of State for the Home Department* [1999] 2 All ER 545. For detailed discussion of this (pre-HRA 1998) approach see Colin Harvey, Seeking Asylum in the UK: problems and prospects, London, Butterworths, 2000.
15 See n2 above.
16 Having no 'adequate accommodation or any means of obtaining it (whether or not ... other essential living needs are met)', or having 'adequate accommodation or the means of obtaining it, but [being unable to meet] other essential living needs'.
17 At para 67.
18 At para 69.
19 At paras 8-9.
20 Laws LJ had characterised the legal reality as a 'spectrum'. At one end there lay violence 'authorised by the state but unauthorised by law'. At the other, there lay 'a decision made in the exercise of lawful policy, which however may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision'. In that case the decision would be lawful unless the degree of (indirect) suffering it inflicted reached such a degree of severity that the court would be bound to limit the state's rights to implement the policy on Art 3 grounds. Lord Brown dismissed the notion of directness or indirectness, or positive or negative obligations. He stated that in Art 3 cases real issue to be 'whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim'.
21 The judgment appears to leave s55 defunct, despite Lords Bingham and Hope leaving to determination on a case by case basis whether an individual's Art 3 rights would be breached. Baroness Hale appeared to adopt an approach by which 'cashlessness + rooflessness = inhuman and degrading treatment' (Alasdair Mackenzie, 'Case analysis', EHRLR (2006) (1), p71).
22 At para 101.
23 Alastair Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, Hart Publishing, 2004, quoting from *Gul v Switzerland* (dissenting opinion of Judge Martens) 1996-I 165.
24 Eg *Kelly v UK* (2001) EHRR.
25 Eg *Z v UK* (1997) 24 EHRR 143.
26 Keir Starmer, European Human Rights Law, Legal Action Group, 1999, chapter 5.
27 Henry Shue, Basic rights: subsistence, affluence, and U.S. foreign policy, 2nd edn, Princeton University Press, 1996.
28 Jeremy Waldron, Liberal Rights: Collected Papers 1981-1991, Cambridge University Press, 1993.
29 At paras 66-67.
30 Thus, the 'spectrum' analysis developed by Laws LJ in the Court of Appeal, though it helpfully underlines the relevant factors in determining the scope of a positive obligation, is inappropriate. It also goes against Strasbourg jurisprudence on Art 3, which rejects any notion of proportionality assessment. While the rationale for the state's impugned action may be understandable, 'it is of the essence of the state's obligation not to subject any person to suffering which contravenes Art 3 that the ends cannot justify the means'. *Limbuela* at para 77 per Baroness Hale.
31 Stephanie Palmer, 'A wrong turning: Article 3 ECHR and proportionality', (2006) CLJ 65 (2) p448.
32 *Chahal v UK* (1997) 23 EHRR 413; *Aksoy v Turkey* (1996) 23 EHRR 553.
33 *Ireland v UK* (1978) 2 EHRR 25, at 162.
34 See, in particular, Sandra Fredman, 'Human rights transformed: positive duties and positive rights', PL 2006 AUT, 498-520.
35 Sandra Fredman, 'Social, Economic and Cultural Rights', in David Feldman (ed), English Public Law, Oxford University Press, 2004.
36 See Amartya Sen, 'Freedoms and Needs', *The New Republic*, 1994, pp31,32, cited in Henry Steiner and Phillip Alston, International Human Rights in Context, 2nd edn, Oxford University Press, 2000, p269. See also *Annual Human Rights Report 2003*, Foreign and Commonwealth Office, p366.
37 One commonly cited example is the right to a fair trial (Art 6 ECHR), which has been

recognised as encompassing the duty to provide civil legal aid in complex cases. The ECtHR stated in *Airey v UK* [1979-80] 2 EHRR 305, at 26: 'While the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court considers ... that the mere fact that an interpretation of the Convention may extend in the sphere of social economic rights should not be a decisive factor against such an interpretation: there is no water-tight division separating out that sphere from the field covered by the Convention'.

38 (2001) 33 EHRR 18, at 99.

39 Art 2(1) ICESCR.

40 India's Supreme Court has received criticism for its over-ambitious approach which can leave huge disparity between judicial rulings and governmental response, but it has cultivated practices such as its own remedial orders to ensure ongoing supervision. In *Peoples' Union of Civil Liberties v Union of India*, SCI (Civil) No 196 (2001) it issued a continuing mandamus to oblige states fully to implement schemes including mid-day meals at school.

41 'A society must seek to ensure that the basic necessities of life a accessible to all if it is to be a society in which human dignity, freedom and equality are foundational'. *Khosa and Mahlaule v Minister for Social Development* (2004) (6) BCLR 569, at [52]; see also Sachs J in Port Elizabeth Municipality v Various Occupiers (2005) (1) SA 217 at [15] CC.

42 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] I KB 223 CA.

43 Sandra Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights', Center for Human Rights and Global Justice Working Paper, Economic and Social Rights Series, No 8, 2005.

44 As evidenced by the accompanying political narrative. Then Home Secretary David Blunkett expressed his wish to 'signal to people through the world that the United Kingdom is not a soft touch'. HC Debates col 627, 29 October 2001.

45 Ronald Dworkin, Taking Rights Seriously, Duckworth, 1978, p182.

46 As described by John Stewart Mill in On Liberty, Penguin, 1859, p74.

47 See n45 above.

48 Jeffrey Jowell, 'Judicial deference: servility, civility or institutional capacity?', PL 2003 p597.

49 Ibid.

50 Colin Harvey, Seeking Asylum in the UK: Problems and Prospects, Butterworths, 2000.

51 *Somersett's case* (1772) 20 State Tr 1 at 20.

52 JCHR, 2006-2007, HL 81-I.

53 *Belgian Linguistics Case* (1968) 1 EHRR 252.

54 At para 2.

55 At para 7.

56 [2004] UKHL 56.

57 At para 136.

58 At para 237.

59 *East African Asians v UK* (1973) 3 EHRR 76; *Navhova v Bulgaria* App. Nos 43577/98, 6 Jul 2005 – as cited in JCHR HL 81-I.

60 See n34 above, at 510.

61 Alasdair Mackenzie, 'Case analysis', EHRLR (2006) (1), pp67-73.

62 Baroness Hale explained in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at 135, that 'Everyone has the right to respect for their home. This does not mean that the state or anyone else has to supply everyone with a home. Nor does it mean that the state has to grant everyone a secure right to live in their home. But if it does grant that right to some, it must not withhold it from others in the same or an analogous situation. It must grant that rights equally, unless the difference in treatment can be objectively justified'.

63 Ibid.

64 Comparative case law reveals analogous approaches. In *Khosa* (see n41 above), the South African Court struck down a scheme which excluded permanent residents from access to child support grants and old age pensions which were available to South African citizens. The Canadian case of *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 focused on the exclusion of claimants under 30 years of age from the minimum benefits provided for those over 30.

65 Thus, Lord Scott elaborated: 'If individuals find themselves destitute to a degree apt to

be described as degrading, the state's failure to give them the minimum support necessary to avoid that degradation may well be a shameful reproach to the humanity of the state and its institutions but in my opinion does not without more engage Article 3'. At para 66.
66 [2002] 4 SCR 429.
67 At para 99.
68 See *Khosa*, n41 above, at 66.
69 For example, the treatment found to be inhuman and degrading in *Ireland v UK* (1978) 2 EHRR 25 would, on a reading of *Selmouni v France* (1999) 29 EHRR 403, now be deemed torture.
70 Racist treatment may be deemed degrading treatment if it is institutionalised. In the *East African Asians cases* (1981) 3 EHRR 76, the European Commission on Human Rights found that the refusal of entry into the UK to the British passport holders resident in Uganda, Tanzania and Kenya amounted to institutionalised racism. Consistent adverse treatment of people because of their race was degrading and passed the threshold of severity to breach Art 3.
71 [2004] QB 36, 69, at para 57.
72 *R (S, D, T) v SSHD* [2003] EWHC 1951 (Admin).
73 At para 60.
74 [2003] UKIAT 00065.
75 *Cyprus v Turkey* [2002] 35 EHRR 30, at 219.
76 *LCB v UK* [1999] 27 EHRR 212, at 36.
77 (1997) 24 EHRR 24.
78 (2001) 33 EHRR 205.
79 [2005] UKHL 31.
80 At para 99.
81 At para 8.
82 At para 53.
83 Conor Gearty, Principles of Human Rights Adjudication, Oxford University Press, 2006, chapter 6.
84 Eg Iain Byrne, *'Making the Right to Health a Reality: Legal Strategies for Effective Implementation'*, Commonwealth Law Conference, London, September 2005.
85 IPPR's 2005 poll found that a UK majority favours a 'pathway into citizenship' for illegal immigrants - 66 per cent believe undocumented migrants who have been in the UK for more than four years and who work and pay taxes should be allowed to stay and not be called illegal. 67 per cent also believe asylum seekers should be allowed to work. http://www.iasuk.org/C2B/PressOffice/display.asp?ID=363&Type=2, This relative tolerance gives reason for optimism as well as concern over public attitudes (IPPR 2005)
86 Maeve Sherlock, *'Closing the door: the UK's erosion of the right to* asylum', British Institute of Human Rights Lunchtime Lecture, 8 December 2005.

Human rights protection in Australia: momentary glimmers of hope in Victoria and the Australian Capital Territory, in the context of the retreat from human rights by the federal government

Liz Curran

Victoria and the Australian Capital Territory, within an Australian federal system of government, have recently passed legislation to improve human rights protection. Both enactments are partly based on the United Kingdom's human rights legislation. This article looks at the processes that led to the introduction of legislation in both of these jurisdictions. It will also examine some key differences from the United Kingdom Human Rights Act 1998 especially around the extent to which 'public function' has been defined in Victoria. The article will also discuss the reticence of a Conservative federal government to protect human rights in Australia and some of its retrograde steps in this regard, and the challenges and conflicts that these present for a state-based human rights system.

Introduction and background

There is minimal human rights protection for the citizens and non-citizens who are on Australian shores. It is one of the last countries in the western world to have little constitutional or legislative human rights protection on a national level. Although there is an Australian Constitution, this document largely governs the separation of powers between the state, the federal government and the judiciary; there is very little in the document that pertains to the relationship between the citizen and the state.

In Australia, United Nations human rights instruments do not become law until incorporated into the statutory system within Australia by an Act of Parliament. Where however there is some ambiguity in the manner in which legislation can be interpreted, there is High Court authority which states that international human rights law can be used as a tool of interpretation, on the basis that the legislature would not intend to act inconsistently with fundamental human rights.[1] Some United Nations human rights conventions

and covenants have been either fully or partly incorporated into Australian laws: these include equal opportunity legislation,[2] provisions in the Family Law Act 1975 (Commonwealth) pertaining to the need to act in 'the best interests of the child',[3] and the Racial Discrimination Act 1975.[4]

It is in this context that in recent years two jurisdictions in Australia have decided to improve the protection of human rights. Both the Australian Capital Territory in 2004 and Victoria in 2006 have passed human rights legislation: much of this legislation is modelled on the United Kingdom's Human Rights Act 1998 (HRA UK), with some key differences around implementation and the availability of individual remedies and compensation for a litigant. One limitation on this state based human rights based protection is that it can only apply to areas within state law. This includes areas such as criminal law, prisons, freedom of speech, discrimination and some parts of the civil law, but not areas such as immigration or social security.

Like the HRA UK, the legislation in these two jurisdictions covers civil and political rights only and does not extend to economic and social rights. This is the subject of some controversy[5] and in Victoria, as a result, a legislative review is to occur four years after the legislation comes into force to consider whether economic and social rights should be included.[6] As in the United Kingdom, this absence of economic and social rights does not preclude arguments that pertain to such rights being made when they are intrinsically linked to civil and political rights being litigated.

What makes the situation in Australia difficult is that it is a federation: there is a federal centralised government in Canberra and six states and two territories, each of which have power to control policy and legislation in certain areas of policy. As the main recipient of taxation revenue, the federal government has been able to maintain control over state spheres of influence by tying the receipt of funding to conditions: these are commonly referred to as 'tied grants' or 'special purpose grants'. The states' areas of influence can overlap with those of the Commonwealth government, for example, in health, education and housing. In addition, various interpretations of the Constitution by the High Court in recent years have vested greater powers in the Commonwealth government, as it has taken a more centralised view.[7] For example, recently the High Court awarded the Commonwealth government power over industrial issues, stating that the Commonwealth could rely on its 'corporations power' under the Constitution to make laws in respect of industrial relations.[8] Industrial relations was traditionally an area in which state governments had retained their sphere of influence.

Further difficulty arises from a provision contained within the Constitution which states that if a state law comes into conflict with the Commonwealth law, then the Commonwealth law will prevail.[9] This may have problematic implications for Victorian and Australian Capital Territory human rights instruments. Some of the difficulties of the federal system for human rights will be discussed later in this article.

The process which led to human rights protection in the Australian Capital Territory

In discussions between the author and the new Attorney General of Victoria, Rob Hulls, in November 1999, Mr Hulls indicated that he was not averse to a formal recognition of indigenous Australians in a Victorian constitutional document, nor was he dismissive of the idea of Victoria becoming the template for other states to introduce human rights protection along the lines of that in Canada or the United Kingdom.[10] He remarked upon the inertia on human rights protection at federal level and said perhaps it was for the states, led by Victoria, to take the initiative. In 2000, Mr Hulls commenced a process for the development of the justice statement for the state of Victoria, with the idea of having a strategic plan and direction for the next ten years of government.[11] In this document he wanted to include ideas for the development of the human rights framework.

In the end, it was the Australian Capital Territory (ACT) which was the first jurisdiction in Australia to introduce human rights legislation. Although Victoria followed the 2004 ACT legislation with its own Act in 2006, there are marked differences between the two Acts which were adopted, even though they are both based on the HRA UK.

The Labor party in the ACT in 2001 had indicated that it intended to establish some form of consultative process to discuss whether or not a bill of rights should be developed for the territory. The Attorney General of the ACT, John Stanhope, had been an acknowledged supporter of human rights for many years. An ACT Bill of Rights Consultative Committee was convened by the newly elected Labor party with a respected law academic from the Australian National University, Professor Hilary Charlesworth, being appointed as its chair. Other members of the committee were Professor Larissa Behrendt, with expertise in law and indigenous studies, Penelope Layland, a journalist and poet, and Elizabeth Kelly of the ACT Department of Justice.

The terms of reference for the committee reflected the political sensitivity of the government in the ACT, which feared an electoral backlash that could be created by conservative talkback radio hosts and newspaper columnists, who were traditionally averse to any discussion of greater human rights protection

and argued that any human rights document would detract from the role of the Parliament and the elected people's representative. The consultative committee was to examine whether it was 'appropriate and desirable' to have legislative human rights protection. Further, if such a bill of rights was considered to be appropriate then, what form should it take, what would be the effect of such a bill on the 'exercise of executive and judicial powers', should there be a legislative override and what rights and responsibilities should be included in such a bill were it enacted.[12] A website was established for the committee with items such as 'What are the issues?', 'Reports', and links to other websites with information on human rights and other models.[13]

The consultative committee produced an issues paper. In this paper, information about what human rights are and the various models of protection that have been adopted around the world were discussed and questions were asked as to what models might be appropriate. There was a call for both written and oral submissions in response to the paper and the committee also held town meetings. In a different route to that taken in Victoria it also held a 'deliberative poll'.[14] As a result of the consultations, it was found that a majority of the territory's residents were in favour of a bill of rights. There was however a minority who were opposed to any form of a bill of rights.

The consultative committee recommended a draft bill which was largely modelled on the HRA UK. Because of existing resistance to any form of entrenched constitutional human rights protection in political circles in the ACT, on the grounds that this compromised the sovereignty of Parliament, the committee opted for an ordinary piece of legislation rather than a constitutional bill of rights. As in the United Kingdom, the committee suggested that judges should be able to interpret statutes and the common law in a human rights context. The committee also recommended that the judges be empowered to issue declarations of incompatibility. It was also proposed that judges be given the power to invalidate subordinate legislation that did not comply with human rights standards contained in the bill, but not to invalidate legislation. The committee suggested that any person be able to bring an action for a declaration of incompatibility. It also suggested that a person aggrieved could bring a case for a remedy including compensation against the executive if their rights were breached. The committee recommended that the new legislation would include economic, cultural and social rights within the definition of human rights for the new Act. This last measure reflects a growing view in Australia about the interconnectedness of economic social and cultural rights and civil and political rights.[15]

As is often the case, the brave and innovative proposals for the form that the new bill would take were not all accepted or adopted. Most notably, economic

and social rights were not included in the definition of human rights. Remedies and actions for compensation by litigants in their own right were also omitted. The power to invalidate subordinate legislation was also excluded from the final Act.

The provisions of the ACT Human Rights Act and its operation

The Human Rights Act 2004 (ACT) (HRA ACT) came into force on 1 July 2004 and defines human rights in essence as the rights contained within the International Covenant on Civil and Political Rights. Evans has observed that in the final Act most references to the executive have been removed, leaving a level of uncertainty as to the effect the Act will have on administrative action.[16] In the Australian Capital Territory, in contrast to the UK and Victoria, there is a unicameral system of Parliament, namely the Legislative Assembly. Clearly, this makes the legislative process much quicker and easier. In the United Kingdom and Victoria, however, proposed laws are arguably subject to greater scrutiny – for instance because of the presence of minor political parties, which can dominate the upper house in Victoria.

In the ACT, under s38 HRA ACT the Standing Committee on Legal Affairs (SCLA) is required to report to the Legislative Assembly on human rights issues raised by proposed bills. Unfortunately, no additional resources were allocated for the SCLA to undertake this task.[17] Evans questions whether the committee will be able to carry out its obligations effectively. She observes however that in the past the SCLA did have an obligation to report on where bills 'unduly trespass on personal rights and liberties…'. These provisions, she observes, are still narrower than those required under the Act and so the resource issue remains pertinent.

Like the situation in the United Kingdom, s31 HRA ACT requires the courts, when interpreting human rights, to make reference to international law and the judgments of foreign and international courts and tribunals where appropriate. If lawyers are appropriately trained and start to include human rights in their repertoire of legal arguments, then this provision may extend the common law precedents to include human rights concerns which have not been routinely presented in the Australian courts. Time will tell whether the 'run of the mill' Australian lawyer will be prepared to rise to this occasion.[18] The Act however does not require the SCLA to consider delegated legislation.

S33 HRA ACT requires the Attorney General to issue a compatibility statement on whether 'in the Attorney General's opinion, the bill is consistent with human rights'; if it is not consistent with human rights then they must state how it is inconsistent. Also, under s33 if the court makes a declaration of incompatibility, the Attorney General is required to present copy of that declaration to the

Legislative Assembly within six sitting days and to provide a written response to the declaration within six months. Evans has raised a concern that in a unicameral parliament such as this there is a risk that reports to the Legislative Assembly may become a matter of form rather than substance.[19]

She also states that the Act does not require the Attorney General to give written reasons for his or her view as to the inconsistency or consistency with human rights. This situation is different to the legislative regime in Victoria where detailed reasons are required to be given by the Attorney General. Evans does note, however, that when the Legislative Committee has made an indication that a bill is not consistent with human rights, and the Supreme Court later affirms their view, then this would be very embarrassing and is an incentive for government to avoid introducing bills that are inconsistent with human rights. She goes on to argue that this has been the case in other jurisdictions such as in New Zealand where the new and formal system of declarations introduced by the Human Rights Amendment Act 2001[20] (NZ) in respect of discrimination cases provides evidence that the declarations can have a real influence on government policy. Evans observes that although declarations have not been all that frequent in the United Kingdom, in a number of cases it has led to legislative change that has enhanced rights.[21]

The more challenging area in all jurisdictions is how the human rights frameworks will apply to the actions of the executive and its delegates. This author has a particular interest in how human rights frameworks can be used by people who are vulnerable, disempowered and marginalised so as to improve their treatment and the respect and dignity that is accorded to them. One of the difficulties for people who are in this position is that the government and its departments often play a significant part in their lives. Poor and disadvantaged people rely on government services to a greater degree than the rest of society. They rely on governments for income support, public housing, health care, and, given the services that are provided to them, are often accordingly subject to significant government scrutiny over how they lead their lives and how accountable they are. Such a scenario sets up a situation of dependency whereby these people are so frightened of challenging their treatment by government agencies and so unaware of their rights[22] that they tolerate inappropriate intrusion and treatment. Often those most likely to litigate using human rights are those who are already involved in the legal system and so disposed to using it, for example defendants, prisoners and asylum seekers. Whilst they are entitled to do so, for many of vulnerable, disempowered and marginalised people even the notion of going to a lawyer for help is alien and so effort is needed to include such groups in the benefits of human rights protection.[23]

In the ACT, as in the United Kingdom, there is a limitation on the scope of scrutiny of action by delegates of the executive. In view of the above, this is a matter for concern. The Victorian legislation goes further in providing a broader definition of 'public authority' than exists in the United Kingdom or the ACT. This will be discussed later. Clearly, the requirement that the Attorney General has to turn his or her mind to whether or not a bill is consistent with human rights means that more thought about human rights will be given in the preparation of a bill than was previously the case. The ACT government is preparing a pre-enactment scrutiny policy and procedures to apply across government. Under the legislation a Human Rights Commission was established but without a complaints handling mechanism. The legislation underwent a twelve-month review recently and this review took submissions. In the final report[24] various recommendations were made. Recommendation one states that 'it is clear that the HRA is achieving results within the Executive and Legislature and that it should continue to operate as a dialogue model'. In recommendation two it states that 'while there is a case for improving community engagement, the focus at the moment should remain on the dialogue with the Assembly'. Recommendation three states that the executive should encourage agencies to make greater use of explanatory statements in relation to compatibility and give a summary of reasons (recommendation four).

There was significant discussion on the benefits of the inclusion of economic and social rights as well as environmental rights but in the end the committee recommended government should explore only direct enforceability in specific areas of health, education and housing and not include other economic, social or cultural rights (recommendation ten).

Exactly how the scrutiny of policies and procedures will be evaluated and measured is an interesting question. A significant cultural change within the public service which considers the impact on people's human rights of their actions on the ground is needed if the human rights legislation is to truly have an impact. Recently in the Victorian context, the author was informed by a very senior public servant that they had little to worry about as their policies and procedures were consistent with human rights. This comment revealed a uniformed and cursory response to human rights compliance as there are policies and procedures which are inconsistent with the civil and political rights contained within the new Victorian Charter.[25] The comment perhaps highlights the immense role of education and training that needs to be undertaken on human rights within the civil service, but also reflects a lack of understanding of how the policies and procedures operate on the ground and the potential scope for challenge that exists. If the government and public servants only take a formulaic approach in checking that its policies and procedures are consistent with human rights, and if these approaches are not properly scrutinised and

assessed for accuracy, then little will change on the ground for citizens.[26] The difficulty here is that full and proper audits require independent scrutiny, proper and appropriate complaints mechanisms and reporting of statistics and an empowered citizenry to inform on the impact of policies. Such audits are expensive, resource intensive, time consuming and potentially embarrassing to the government and the public servants. To have any real effective on the human rights framework a detailed examination of human rights compliance as experienced by the people on the ground would be needed.

S34 and Schedule 2 HRA ACT include a requirement that all government departments and units must include, in their annual reports, statements of the 'measures taken by the administrative unit during that period, to respect, protect and promote human rights.' This is a good provision but again, as Evans points out, could also run the risk of being a merely formulaic response rather than one which has involved self reflection and consideration.[27]

The ACT legislation fails to explain in any provision what the human rights implications will be where a body is carrying out a public function. This is similar to the questions that have been asked in the United Kingdom regarding the definition of a 'public authority'. For example: does it apply to private bodies exercising public powers? Will it cover the statutory exercise of a private role? These matters will have to be clarified by the courts.

McKinnon,[28] in a paper examining the HRA ACT in its second year of operation, stated that 18 cases[29] had been considered since 1 July 2005, compared to 14 in the first year of the Act. She notes that the majority of these cases, 13 out of 18 were in the Supreme Court. Two were in the Administrative Appeals Tribunal and two were in the Residential Tenancies Tribunal. She indicates that it was hard to gauge how many cases have been heard in the magistrate's courts as these decisions were not often recorded. She expresses the view that in the first year there was only a superficial deference to the Act and it was not necessarily decisive in any of the cases. She notes however that this appears to be changing as cases have increasingly included references to comparative and international human rights case law.

In the criminal jurisdiction the only reported decision involving the HRA ACT concerned the criminal prosecution of a young person for a sexual offence. The case was abandoned for want of prosecution.[30] The child's representative argued the proceedings should be stayed as there has been an inadequate investigation that had prejudiced the child's ability to defend the charges which was a breach of s20(3) HRA ACT. *Eckle v Germany*[31] from the European Court of Human Rights was cited. McKinnon observes that this case illustrates that the courts may now be prepared to use the inherent powers of the HRA ACT to enforce human

rights. There have been several other cases which demonstrate this development of the court's role.[32] McKinnon states that 'while there have been more cases under the Human Rights Act in its second year there is still some reticence in the legal profession in the ACT to actively apply the Act.'[33]

In terms of the impact on the legislature, McKinnon argues there are significant challenges.[34] These include the new counter terrorism regime where the Attorney General promisingly sought advice on its compatibility with the HRA. However, there have been problems emerging, as discussed above, from the nature of state based human rights protection with, for example, the federal government overriding ACT laws recognising civil unions between gay and lesbian couples.

McKinnon notes that other Parliamentary committees have also started to use the new human rights regime regarding environmental planning and its impact on residential areas and rights to privacy and the protection of family. In their deliberations these committees have also used analysis of judgments from the United Kingdom courts and the European Court of Human Rights.[35] She raises the concern that the policy of the government has been to require that human rights issues are addressed in explanatory statements prepared by the department responsible for the legislation. She notes this reflects limited resources but states that the current sharing of responsibility for human rights across departments does not involve challenging the preconceptions that civil servants may have. She laments that the Attorney General's statements have not always given reasons for incompatibility.[36]

The process which led to human rights protection in Victoria

As stated above, the process towards a Charter of Human Rights and Responsibilities in Victoria commenced in the late 1990s. Discussions commenced when the current Labor government was still in opposition.

Articles appeared in Victorian newspapers[37] arguing for human rights protection at a state level because it was unlikely, in the political climate, that a federal government would initiate such protection. When the government decided to launch a justice plan considerable effort was made by non-government organisations, individuals and academics to shift the justice statement from being a functionary document to one that actually reflected a vision incorporating human rights and access to justice. The justice statement in its draft form was a document where the main focus appeared to be on the mechanisms of the legal system, rather than on the effect of the legal system on the people.

In the early days of the preparation of the justice statement in 2002-2003, the Equal Opportunity Commission was called on for its expertise to provide input

into its formulation. Once it was accepted by the civil servants that human rights protection should be a pivotal element of any justice statement progress was significant. In the author's view the support of some senior civil servants augers well for the future of the human rights frameworks as their involvement in the process gave them a sense of ownership and understanding of human rights.[38] The then director of the Equal Opportunity Commission, Dr Di Sisely, and her staff organised round table meetings with a number of individuals and members of the Department of Justice who were charged with the preparation of the justice statement. These meetings involved providing the civil servants with information on why human rights protection was important, how it could be implemented and details of other models of human rights protection around the world. There was some reticence about the loss of control that departments would have if the members of the public were able to challenge them. Initially it was suggested that the human rights protections would only be applied to the Department of Justice and would not apply across all government departments. Forceful arguments were presented to the contrary that the government could not pick and choose in this way. It was strongly argued at these meetings that human rights protection in the context of a dialogue between the legislature, the courts and the executive would lead to improved decision-making, greater accountability and could actually be of benefit to civil servants. Once they were trained in human rights issues civil servants could prevent potential negative impacts of policies on the ground and also avoid critical public scrutiny. The argument was that through proper consideration of human rights prior to legislation and the introduction of administration policies and processes, there would be an advancement of good public sector management.

The difficulty in these early days of discussions was that for many civil servants the only exposure that they had to human rights was the United States Bill of Rights, which quite justifiably had many critics. Models from elsewhere were discussed at these meetings including the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights and the South African constitutional protection of human rights under the bill of rights in chapter two of the Constitution. The United Kingdom's legislation was also raised but was still in its infancy at the time.

One major concern of both the politicians and the civil servants was the fear that the unelected courts could be viewed as telling the government what to do. This reservation was a major obstacle in the discussion of human rights and remains an issue mainly in the tabloid press and with conservative commentators,[39] even though the actual legislation makes government more accountable to the people but still retains the ultimate sovereignty in legislation and policy. An increasing awareness of the possibilities for human rights protection in Victoria emerged after discussions about the dialogue model that operates in Canada and

the United Kingdom, along with a variety of academic articles and evaluations of other models in force which were provided to those in charge of drafting the justice statement. Many of the key civil servants shifted their position on human rights protection from the extremes of cynicism, hesitancy and fear to a sense of optimism and preparedness to explore other models. This proved to be a time of great opportunity and these key civil servants rose to the occasion.

During 2003, the non-civil servant participants at these meetings started to have early morning meetings. It became known as the 'Breakfast Club'. This group eventually expanded to include members of the legal profession, charities and churches working with the underprivileged, social service agencies, academics and other non-government organisations and statutory bodies. The membership at times varied and, as the efforts to improve human rights protection in Victoria gained momentum and more meetings and documents needed to be drafted, much of the work was done by email. All of the participants volunteered their time and their expertise. The expanded group became known as the 'Charter Group' in 2004. The group's strategies included conducting meetings with other human rights organisations; holding workshops on how to write submissions; and hosting a website with an online petition.[40] Professor Zifcak, the chair of the Charter Group stated 'One of the flaws in prior inquiries was that there was never enough community interest,' 'We set out to change that.'[41] A pivotal development was the state government's commitment in the justice statement 2004-2014 to discuss and consult with the Victorian community about a charter.

With the Attorney General, Rob Hulls, very keen on the idea of human rights protection, the challenge was to convince the rest of his Cabinet, many of whom were initially quite conservative and sceptical. In such a political climate it was a prudent move by the Attorney General to establish a Human Rights Consultative Committee in April 2005 to consult with the community and report on how human rights and responsibilities could best be protected and promoted in Victoria. Also strategic was the makeup of this committee. It was chaired by Professor George Williams, a constitutional law expert from the University of New South Wales. The other members of the committee were chosen to reflect what the general community might find appealing. They included Andrew Gase, an Olympic sportsman, Rhonda Galbally, an admired community philanthropist and former founder of the Australian Health Institute, and Haddon Storey, a former liberal party member of the Legislative Council from 1971-1996. The Solicitor General, Pamela Tate SC, was appointed Special Council to the Human Rights Community Consultative Committee.

The government however provided a 'Statement of Intent' to guide the committee. This sadly was more circumscribed than the model the Attorney

General had foreshadowed and indicated the cabinet would not favour extension to economic and social rights but rather just civil and political rights. In June 2005 the committee released a community discussion paper and called for submissions. Booklets and pamphlets were produced to inform people of the process and how to engage in it. There were also advertisements placed in the daily newspapers. The committee took submissions via the internet, letter and postcard and in the end the number of submissions totalled 2,524.[42] This was the largest number of submissions ever received in Australia canvassing human rights issues[43] and one of the highest numbers of submissions on any issue in Victoria for an independent inquiry. More than 84 per cent of the people who made submissions wanted the law changed to better protect their human rights. All submissions to the committee were published.

Despite all of this, the main opponents of the human rights movement continued to claim that the process was undemocratic and that it would mean the loss of Parliamentary sovereignty.[44] However, the preferred model in the final recommendations of the committee was a non-entrenched legislative model where the court, as in the United Kingdom, could only issue a declaration of 'inconsistent interpretation' rather than strike legislation down.[45] It created the dialogue model, as exists in Canada and the United Kingdom, between the executive, Parliament and the judiciary. Some Parliamentarians claimed that the human rights legislation was 'contrary to the bible' and would prevent debate on human rights, encourage costly litigation and undermine the separation of powers.[46] In an odd twist the Leader of the Opposition, in the Parliamentary debates, argued that he was in favour of improved human rights protection but then voted against the bill[47] stating it did not go far enough.

The Attorney General was very aware that human rights protection had traditionally been resisted by conservative parties and by talk back radio hosts and the tabloid press. He wanted to ensure that the committee consulted widely with the public, not just in metropolitan Melbourne but also in the rural community.[48] He wanted to send the message that human rights belong to all people, not just some, and that he wanted their input first into whether human rights protection should occur, if so in what form, and what sorts of models might be considered if the community wanted further human rights protection.

In May 2006 the Attorney General introduced the Charter of Human Rights and Responsibilities Bill 2006 into State Parliament. In July 2006 the Charter was enacted and came into effect as law. From 1 January 2007 all new Victorian legislation had to be certified as complying with the Charter. On 1 January 2008 the Charter will take effect across all state government activities. The staggered time delay was necessary to enable time for training and processes to be put in

place before the legislation comes into full force. This is similar to time delays in the UK to ready its instrumentalities for the new Act in 1998.

The provisions of the Victorian Charter of Human Rights and Responsibilities Act 2006 and its operation

The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) defines human rights as the civil and political rights set out in Part II of the Act. These are close to the rights contained in the International Covenant on Civil and Political Rights but do not include all of the rights. They include equality before the law (s8), the right to life (s9), protection from torture, cruel and inhumane punishment (s10), freedom of thought, conscience, religion and belief (s14), protection of families and children (s17), cultural rights with explicit recognitions of indigenous rights to identity and culture (s19), the rights to liberty and security of person (s21), the right to humane treatment when deprived of liberty (s22), the rights of children in the criminal process (s23), the right to a fair hearing (s24) and rights in criminal proceedings (s25). The Preamble sets the tone for the legislations stating:

> *On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.*

It also outlines key foundational principles such as the rule of law, human dignity, equality and freedom.

S1(2) states the main purpose of the Charter is to protect and promote human rights by:

> *(a) setting out the human rights that Parliament specifically seeks to protect and promote; and*
> *(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and*
> *(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and*
> *(d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.*

S2(3)(a) states that the Charter enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision.

Unlike the situation in the United Kingdom, the initiating legislation gives further power to an existing Equal Opportunity Commission, which is renamed the Equal Opportunity and Human Rights Commission (the Commission), to monitor and promote the human rights culture and its implementation. The Charter gives the Commission the power to intervene in proceedings before a court or tribunal which relate to the application of the Charter (s40), to report annually on the Charter to the Attorney General, to review programmes at the request of public authorities and to assist the Attorney General in any review of the Charter (s41). This should avoid some of the gaps that have developed under the English model due to the absence of a human rights commission and will hopefully hold agencies to account and improve practice. The normal opportunities exist for other interveners under the Court's rules.

Again, unlike the situations in the United Kingdom, with the constrained definition of 'public authority' used by the legislature and limited by the House of Lords,[49] the Victorian legislature has gone further to extend its definition of public authority in Division IV of the Charter. S4 not only defines what a 'public authority is but also gives examples to guide the courts. it states:

> *(2) In determining if a function is of a public nature the factors that may be taken into account include …*
>
> *(a) that the function is conferred on the entity by or under a statutory provision;*
>
> *Example*
> *The Transport Act 1983 confers powers of arrest on an authorised officer under that Act.*
>
> *(b) that the function is connected to or generally identified with functions of government;*
>
> *Example*
> *Under the Corrections Act 1986 a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government.*
>
> *(c) that the function is of a regulatory nature;*
> *(d) that the entity is publicly funded to perform the function;*
> *(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.*

Example
All the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State.

(3) To avoid doubt:
(a) the factors listed in sub-section (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and
(b) the fact that one or more of the factors set out in sub-section (2) are present in relation to a function does not necessarily result in the function being of a public nature.
(4) For the purposes of sub-section (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.
(5) For the purposes of sub-section (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.

S5 notes that the human rights in the Charter are in addition to other rights and freedoms and do not derogate from other rights. Most importantly s7 requires that limitations on human rights must be demonstrably justifiable, having regard to factors such as the nature, extent and purpose of the limitation. This was reinforced in one of the few decisions thus far under the Charter.[50]

S32 of the Charter states that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights and that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. The section does not however affect the validity of an Act or provision of an Act that is incompatible with a human right; or a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Finally, another similarity with the HRA ACT is that a complainant cannot bring an action in its own rights on the grounds that an act is unlawful under the Charter: it can only arise where other relief or another remedy are being sought (s39). Similarly, a person is 'not entitled to be awarded any damages' (s39(3)). Time will tell how the Charter will impact upon human rights[51] but already in Victoria an education and training campaign of civil servants, Parliamentarians, the judiciary and non-government agencies is under way.[52] Such training must be ongoing especially in view of the high turnover of staff in some of these authorities.

There were encouraging signs in Victoria even before the introduction of the Charter. The President of the Court of Appeal, in a case requiring the balancing of human rights, called on the lawyers making submissions to refer to and expound upon international human rights jurisprudence to assist the court in the exercise of its discretion.[53] The Charter presents a legislative imperative for the judiciary to consider human rights beyond ambiguity.

Problems of a federal government that is resistant to human rights protection for state and territory based human rights frameworks

There have been a number of failed attempts to attain human rights protection in Australia. At best, there is national human rights legislation establishing a Human Rights and Equal Opportunity Commission (HREOC).[54] However, since 1996 HREOC has lost much of its funding, been strongly criticised by the federal government and has been the victim of many failed attempts in the Senate to water down its powers.[55] In addition, the HREOC has experienced significant budget cuts in 1996 and in 2003.[56] Fortunately, most of these attempts have been blocked in the Senate by the Opposition and some of the minor of parties or by the proroguing of Parliament.

The Conservative Liberal government currently holds the majority of seats in the Senate and the House of Representatives, thus making it very difficult since 2004 to block government legislative reform. A federal election is due on 24 November 2007.

The Racial Discrimination Act 1975 was recently disregarded with the passage of legislation in the Australian Parliament with the support of the federal Opposition Labor Party. The new provisions remove the right of indigenous peoples to social security benefits in certain circumstances in the Northern Territory.[57] The legislation purported to take action on the lamentable situation of child abuse in Aboriginal children. As part of a series of bills passed by Parliament indigenous people will now face restrictions on finances (despite the fact that many are already destitute), removal of rights of appeal and changes to land entitlements, all in the guise of preventing child abuse. For over the last decade, the government has tried to remove land rights and minimise the control of indigenous communities over their daily lives. This last example highlights the precariousness of human rights in Australia – especially for its most indigenous people who are vulnerable and marginalised and who have been subjected to a long history of infringement of their human rights, significantly sub-standard living conditions and lower health and well-being indicators (compared to the rest of the population) and paternalistic control by governments.

Conclusion

Poor and disadvantaged people rely on government services to a greater degree than the rest of society. They rely on governments for income support, public housing, health care, and often are, accordingly, subject to significant government scrutiny over how they lead their lives. Such a scenario sets up a situation of dependency whereby these people, frightened of challenging their treatment by government agencies, in fear of losing their benefits,[58] and also often unaware of their rights,[59] tolerate inappropriate intrusion and sometimes poor treatment. For this reason, the extent to which the actions of civil servants and their agents are required to conform to human rights standards is a critical element if human rights are to be enforced for all. This may be where there is most potential for vulnerable and marginalised people to improve their human rights given the cost and other barriers which exist in their being able to litigate. If departmental agencies in their day to day dealings with people improve their policies, processes and decision-making to ensure they are human rights compliant, then although largely invisible this may mean a real difference. Perhaps policy improvements will needed to be celebrated when they occur. What must be bought home to the Australian public, to avoid some of the negative reaction there has been to human rights by some in the United Kingdom, is the message that human rights belong to all of us and not just selected groups who tend to be already before the courts. They should remember what history reveals: once human rights are derogated from we are all diminished and it can be a slippery slide downwards if we are all placed at risk.

Liz Curran is a law lecturer at La Trobe University, Australia who was based at JUSTICE and the Legal Services Research Centre from July to September 2007 to undertake research on human rights and legal aid services to the vulnerable and marginalised. This research has been supported by a grant from the Victoria Law Foundation. Liz (as part of her role as lecturer) is a clinical supervising solicitor in a law clinic at the West Heidelberg Community Legal Centre in a disadvantaged postcode in Melbourne. She is also a member of the Committee of Liberty Victoria.

Notes

1 *Chu Kheng Lim v Minister for Education, LG and Ethnic Affairs* (1992) 67 ALJR, 125, 143; *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69 and *Dietrich v The Queen* (1993) 67 ALJR 1, 6-7, 15, 31, 37 and 44.

2 As part of the implementation of the Convention on the Elimination of all Forms of Discrimination Against Women.

3 As part of the implementation of the need to act in the 'paramount interests of the child' in the Convention on the Rights of the Child.

4 As implementation of the Convention on the Elimination of all Forms of Racial Discrimination.

5 M Salvaris, 'Economic and Social Rights: The Charter's Unfinished Business', forthcoming, *Just Policy*, 2007.

6 G Williams, 'The Victorian Charter of Rights and Responsibilities: Exegesis and Criticisms', [2006] 30 (3) *Melbourne University Law Review*, 28.
7 A Lynch, 'The High Court – Legitimacy and Change Review Essay', Haig Patapan, 'Judging Democracy – The New Politics of the High Court of Australia', [2001] *Federal Law Review*, 12; Dr M Leet, 'The Centralising Ambitions of the High Court', 7 December 2007, The Brisbane Institute, http://www.brisinst.org.au/resources.
8 *New South Wales v The Commonwealth* [2006] HCA 52.
9 S109 The Commonwealth of Australia Constitution Act 1900 (Commonwealth).
10 A Labor government was elected in Victoria in September 1999. A meeting between the author and the new Attorney General Mr Hulls took place in late November 1999 when these matters were raised.
11 See http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Vision/JUSTICE+-+Justice+Statement+and+PDF.
12 *Towards an ACT Act: Report of the ACT Bill of Rights Consultative Committee*, ACT Bill of Rights Consultative Committee, May 2003.
13 See http://jcs.act.gov.au/prd/rights/index.html.
14 Such a poll was mooted for Victoria but there were questions around the funding. Some academics indebted to conduct a survey but this did eventuate for similar reasons around funding availability.
15 Chapter two of the South African constitution recognises in its human rights framework not just civil and political rights but also economic, social, cultural and environmental rights. See also M Salvaris, 'Economic and Social Rights: The Charter's Unfinished Business', forthcoming, *Just Policy*, 2007.
16 C Evans, Comment, 'Responsibility for Rights: the ACT Human Rights Act', Volume 13 (2004) *Federal Law Review,* p1.
17 Ibid, p4.
18 In the United Kingdom there is some concern that in deprived communities the legal profession respond to the Human Rights Act (HRA UK) in a rigid and uninformed way. In an article outlining a survey which was conducted in the Cynon Valley with local solicitors it was revealed that many, although aware of the Human Rights Act, did not really considered it as a necessary tool in their work and lost many opportunities to present arguments in their client's cases. The conclusion was that this attitude involved a lack of practical application training, and the distance and cost of training events for these lawyers. There was also uncertainty about how to access rights and misinformation about how the HRA UK was to be used: for example, many believed that they had to go to the European Court of Human Rights. There was also a perception amongst local lawyers that human rights arguments would be problematic due to pressures of time and that the lower courts would be not be receptive to human rights arguments. and a fear that using human rights arguments would give the impression they only had a weak case. This meant that the local lawyers were reticent to use the legislation. Despite this, 79 per cent of lawyers surveyed indicated that they would welcome training on the Act. See R Costigan, P A Thomas, 'The Human Rights Act: A View from Below', *Journal of Law and Society*, Vol 32 No 1, March 2005, p51.
19 See n16 above, p6.
20 The Bill of Rights in New Zealand has no statutory basis for declarations to be made that they have developed through judicial rulings. This is a different situation to that in the United Kingdom and Victoria.
21 C Evans, Comment, 'Responsibility for Rights: the ACT Human Rights Act', Volume 13 (2004) *Federal Law Review,* p1, at p6. See also Lord Steyn, *Ghaidon v Godin Mendoza* [2004] UKHL 30 in the appendix to the judgment.
22 A Buck, N Balmer and P Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups', Volume 39 No 3 (June 2005) *Journal of Social Policy and Administration*, p302, pp318-320.
23 P Pleasence, A Buck, N J Balmer, R O'Grady, H Genn and M Smith, 'An integrated approach to social justice', *Causes of Action: Civil Law and Social Justice*, Legal Services Commission, 2004, ch 5, p105 and M Noone and L Curran, 'Access to Justice and Human Rights: an exploration of the experiences of social security recipients in postcode 3081', conference paper, W G Hart Legal Workshop, Access to Justice, London, June 2007.

24 *Human Rights Act 2004, 12 Month Review Report*, Department of Justice and Community Safety, June 2006.
25 For an illustration of non-compliance, Victoria has a good system called a 'dual track' system for youth offenders that enables a judge to place a 'vulnerable' young offender between the age of 18 and 21 in a youth justice facility rather than an adult prison. This is not available to people of the same age who are on remand.
26 Evans highlights that the New Zealand attempts to audit government compliance with human rights proved time consuming, controversial and expensive. See C Evans, n16 above, p7.
27 See n16 above, p8.
28 G McKinnon, 'The ACT Human Rights Act – The Second Year', paper presented at the Australian Bill of Rights Conference, 21 June 2006, ANU.
29 See http://acthra.anu.edu.au
30 *Perovic v CW* No CH 05/1046 (1 June 2006) unreported.
31 5 EHRR 1.
32 Criminal - *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (5 December 2005); *Pappas v Noble* [2006) ACTSC (27 April 2006); *R V Khajehnoori* [2005] ACTSC (9 August 2005); *Skaramuca v Craft* [2005] ACTSC 61 (22 July 2005); *Taysaving v Mazlin* [006] ACTSC 41 (24 April 2006); Civil - *IF v ACT Commissioner for Housing* [2005] ACTSC 80 (26 July 2005); *Vosame Pty Lmtd and ACT Planning and Local Authority* [2006] ACT AAT 12 (2 May 2006); *Bragon v Traders Pty Ltd and ACT Gambling and Racing Commission* [2006] ACTAAT (7 February 2006); *Peters v ACT Housing* [2006] ACTRTT 6 (18 January 2006).
33 See n28 above.
34 Ibid.
35 Ibid.
36 Ibid.
37 'Reform for the Peoples Sake', The *Age*, December 2002 see www.theage.com/articles/2002/12/27/1040511174470html and 'Enshrine the Right,' The *Age*, 23 December 2004.
38 Williams also notes this involvement of the civil service early in the process gave ownership. See G Williams, 'The Victorian Charter of Rights and Responsibilities: Exegesis and Criticisms', [2006] 30 (3) *Melbourne University Law Review*, 28.
39 J Izzard, 'Human Rights or Rites', (2006) L(5) *Quadrant Magazine*.
40 'Charting the Rights Course', Vol 80 No 11 *Law Institute Journal* (November 2006), 25.
41 Ibid.
42 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Human+Rights+Charter/JUSTICE+-+Human+Rights+Charter+-+Home.
43 Ibid and see G Williams, 'The Victorian Charter of Rights and Responsibilities: Exegesis and Criticisms', [2006] 30 (3) *Melbourne University Law Review*, 28.
44 See The *Herald Sun*, 21 February 2006 where Peter Farris QC claimed that the rights of Australians were fully protected by law. He has since used the Charter in a client case. Piers Ackerman claimed that almost every dictatorial and authoritarian nation could boast of a Bill of Rights, *Daily Telegraph*, 28 March 2006. These claims ignored the 84 per cent of Victorian submissions, many with detailed comment stating the contrary, and yet still argued the process was undemocratic.
45 Note that the Victorian term is 'inconsistent' interpretation rather than 'incompatible' as is the case in the ACT and UK. The significance of this difference in wording is not yet known.
46 See Victorian Parliamentary Hansard, House of Assembly, members Sykes, Stensholt and Hardman, 18 July 2006, 2244.
47 Andrew Macintosh MP, Parliamentary Debates Hansard, 2 March 2006-June 2006 Legislative Council.
48 For details as to how the community members were consulted and galvanized see G Williams, 'The Victorian Charter of Rights and Responsibilities: Exegesis and Criticisms', [2006] 30 (3) *Melbourne University Law Review*, 28.

49 The House of Lords has considered the term 'functions of a public nature' contained in s6(3)(b) HRA UK in *Aston Cantlow Parish Church Council v Wallbank* [2003] UKHL 37, per Lord Nicholls at 912 and Lord Hope at 63, *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 and *YL v Birmingham City Council* [2007] UKHL 27.
50 *TSL v Secretary to the Department of Justice* [2006] VSCA (26 September 2006).
51 Two other cases have raised issues pertinent to the Charter since its enactment. They are *R V Williams* [2007] VSC 2 (15 January 2007) which raised the issue of a right to legal counsel. It was the first case where substantive attention was given to the Charter. It involved a prominent convicted murderer and his choice of lawyer. The Crown submitted that as the Charter was still transitional it ought not be considered. The court however did consider issues raised by the Charter including whether the judge in his administrative capacity was a public authority within the meaning of the Act, whether there were limits on the rights to counsel and at what date did Parliament intend the courts to be actively involved in interpreting human rights. The court decided that the judge was acting in a judicial capacity. The court found Parliament did not intend the legislation to come into force until 1 January 2008 in this regard but noted that the court might be bound to consider human rights as the provisions around a fair trial and criminal process came into force on 1 January 2007. The issue however was not determined. King J discussed at length the concepts of human rights being absolute and provisions of the new charter in the case. King J ruled that even with or without the Charter in force the right of an accused to choose counsel at public expense was not a rights but the right to a fair trial was a human right. She referred to Canadian jurisprudence and indicated that Williams would be given time to secure other legal aid counsel. In the case of *R v White* [2007] Bongiorno J stated that the incarceration of a person with a severe psychiatric illness in a prison may amount to an infringement of the Charter. The plaintiff was remanded in custody in a remand prison due to a shortage of beds in a psychiatric hospital. In a strong judicial statement Bongiorno J stated it was not appropriate that persons found not guilty on the grounds of a mental impairment be imprisoned. He said it appeared to not only be contrary to the spirit but the letter of the Charter. As there were no beds the judge said he would remain on remand but that the situation was unsatisfactory.
52 See Victorian Equal Opportunity and Human Rights Commission, http://www.humanrightscommission.vic.gov.au/Home.asp.
53 *Royal Women's Hospital v Medical Practitioner's Board of Victoria* [2006] VSCA 85.
54 Established by the Human Rights and Equal Opportunity Act 1986 (Commonwealth).
55 Human Rights Bills which downgraded the Commission were placed before the Senate three times in 1996, 1998 and 2003 but has never become legislation. The bills sought to restrict commissioner powers and the rights of the HREOC to intervene in cases involving human rights issues. It was not supported in any of these attempts by the HREOC which stated that it 'threatens human rights commission independence.' See, *'Human Rights Bills Threatens Human Rights Commission Independence'*, Human Rights and Equal Opportunity Commission press release, 27 March 2003.
56 See 'Questions on Notice from Evidence Given to the Senate, Legal and Constitutional Legislation Committee Reference on the Australian Human Rights Commission Legislation Bill 2003' at www.hreoc.gov.au/legal/submissions/qon/8may.html.
57 Legislation on indigenous issues before Parliament as at 16 August 2007 include the *Northern Territory National Response Act 2007*; *Social Security and other Legislation Amendment Act* 2007 and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment Act* 2007.
58 M Noone and L Curran, 'Access to Justice and Human Rights: an exploration of the experiences of social security recipients in postcode 3081', conference paper, W G Hart Legal Workshop, Access to Justice, London, June 2007.
59 A Buck, N Balmer and P Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups', Volume 39 No 3 (June 2005) *Journal of Social Policy and Administration*, p302, pp318-320.

Book reviews

Lawyers in Conflict: Australian lawyers and legal aid

Mary Anne Noone and Stephen A Tomsen
Federation Press, 2006
pp246 $35.00

The history of the development of legal aid should be written. This book is a helpful contribution from Australia. Many countries, particularly those with common law legal systems, expanded their publicly funded legal services in the 1970s; held the expansion into the late 1980s and early 1990s; and then at various dates depending on local circumstances saw a decline in resources, provision and morale. This is certainly true in this country. This book indicates that Australia is much the same.

One of the authors, Mary Ann Noone, has played a major role in the Australian legal centre movement, being associated with West Heidelberg Legal Centre (which is linked to her Melbourne university, La Trobe) for many years. This gives the book an edge. It is not quite the authorised history of legal aid which would be commissioned by the Law Society, either of England and Wales or the Australian State of Victoria where West Heidelberg is situated. The analysis is firmly based on the understanding that 'legal aid lawyers and activists challenged the position of elites, generally represented by the law societies within the profession'.

A distinguishing characteristic of Australian provision has been, since the 1970s, a much greater willingness to use salaried lawyers rather than private practitioners. Thus, though the Law Society of England and Wales soon came around from an early period of hostility to law centres when it realised that a private practice advice scheme was going to see them off as any form of threat, the position was rather different in Australia. Early expansion came through salaried lawyers in the Australian Legal Aid Office (ALAO). Law Society opposition was virulent and, in the words of the then Attorney General, 'Neanderthal'.

This first wave of expansion fell foul of larger political currents. The radical Whitlam government fell as the result of constitutional manipulation and the ALAO dismantled. State commissions then took the lead. These were still powerful, independent and exciting when I first visited in 1991 and wrote them up as models for England and Wales for the Legal Action Group. However, in truth, their golden days were already over. Bruising clashes over funding followed. Federal money was withdrawn. Brutal changes of leadership were imposed and independence crushed. The commissions were renamed, re-oriented and became much more like the Legal Services Commission in this country – handmaidens to do the bidding of the executive.

The book tells this sad story – though there are successes to be recounted. Some of Australia's legal centres have been among the best in the world. Certainly, at least through the 1980s and into the 1990s, Redfern Legal Centre in Sydney and Fitzroy Legal Service in Victoria were wonderful examples of creativity. In

small jurisdictions unable to support a national organisation of the kind represented by the Legal Action Group, Fitzroy began an impressive publication programme centred around its *Legal Resources Handbook*. This began in 1977. This year, 30 years later, it has just gone on line.

This book is not perfect. Close reading suggests that the interviews which underlie it were conducted sometime ago. However, it is a good account of developments in a jurisdiction sufficiently similar to our own to give food for thought. For those concerned with the fate of legal aid here, it illustrates how widespread the falling away of political support for the idea of access to justice is. This is interesting, and not a little confusing and counter-intuitive, in two jurisdictions which have both introduced human rights legislation and profess themselves convinced of the value of a rights culture. Still, that is another story. If you are interested in legal aid, read this book. There is, as yet, no domestic equivalent and there should be.

Roger Smith, Director, JUSTICE

Equality Law

Karon Monaghan
Oxford University Publishing, 2007
768pp £88.95

Freedom of Religion, Minorities and the Law,

Samantha Knights
Oxford University Publishing, 2007
256pp £46.95

These two books, which both seek to address the current equality and human rights norms, emanate from members of Matrix Chambers.

Equality Law aims to consider the full scope of protection against discrimination in UK and European law and provide an analytical critique of the current legal framework, its underlying concepts and the history of protection against discrimination. It reflects the author's 18 years in practice at the forefront of UK discrimination law.

It is an ambitious book aiming to provide a learned overview of current equality law. It has chapters covering the history and context of protection against discrimination in UK law, interpreting anti-discrimination law, EU law and fundamental rights, the protected classes for discrimination, the key discrimination concepts, the areas covered by discrimination laws from employment to goods, facilities, services and public authorities and it concludes with a section on strategic action, statutory duties and Commissions.

Karon Monaghan admits that the production of this book was harder than she thought and took a year longer to prepare than had been planned, with the inevitable result that the law changed in the meantime, a perennial problem that many lawyers will recognise. However, this extra time has facilitated the consideration of the historical and political roots of the relevant legislation, both domestic and European, which explain many of the anomalies and inconsistencies of our current legal provisions. As she puts it:

> *Each of the main anti-discrimination enactments has very different and idiosyncratic histories. Understanding the history of the enactments is important in making sense of their contents.*

Karon Monaghan is rightly critical of the current symmetrical approach to discrimination law in relation to gender, race, religion or belief, sexual orientation and age and the difficulties to which this gives rise when it comes to considering any form of positive action to alleviate years of deeply embedded structural disadvantage experienced by many minority groups. Consequently the structural causes of discrimination need to be acknowledged and measures put in place to counter these. In grasping this criticism she considers the alternative models developed in a number of other jurisdictions including Canada and South Africa and the importance of a constitutional equality guarantee. The importance given to positive action in the Equalities Review, or as it is termed in the Review 'balancing measures', may lead to further examination of ways to achieve real social change for minority people. However, she suggests that it is not only the law that needs to be adapted; the application of the law also needs to reflect an awareness of the nature of the inequalities in our society:

> *… hope for a radicalisation of equality law depends in large part on a commitment to fundamentally changing the constitution of the judiciary.*

This book is a thorough and detailed exposition of the subject that will repay many return visits. The fluid nature of equality law means that it is always hard to pin down and difficult to know when to stop. It is up to date to September 2006. For equality law practitioners and academics alike it will provide a significant source of information and ideas that will be a welcome addition to any equality library.

Freedom of Religion, Minorities and the Law is a much smaller book that is the 'culmination of a project that began in 2002 at the School of African and Oriental Studies, London, shifted to the Law Faculty at Harvard University, Massachusetts, and back to Matrix Chambers, London'. It sets out to put the law in relation to religion and religious minorities into its wider historical and political context. Samantha Knights starts by questioning the myth of British 'toleration' and shows the links between the development of immigration laws and the changing need for labour that in turn affected the religious diversity of the population. Alongside this she highlights the development of human rights and traces the increasing recognition of the rights of minorities precipitated after each World War. Within this context she then examines the overarching legal framework on freedom of thought, conscience and religion in England followed by a chapter on the difficult question of how to balance competing interests; clearly this is a sensitive area where a difficult balance has to be reached. She examines the potential conflicts between individual and group rights, between parental and child rights and minority and majority rights in turn; exposing the difficulties but offering few solutions. This is an area in which we can expect to see more developments in the future. The next chapters cover the specific areas of education, employment, immigration and asylum, and planning, prisons and health and safety. This book provides a useful summary of the law for those wishing to consider role of freedom of religion in the UK today.

Gay Moon, Head of the Equality Project, JUSTICE

JUSTICE briefings and submissions

1 March 2007 – 31 October 2007

1. Response to House of Commons Home Affairs Committee inquiry *Towards Effective Sentencing*, March 2007;
2. Briefing on the Fraud (Trials without a Jury) Bill for second reading in the House of Lords, March 2007;
3. Response to Department for Constitutional Affairs consultation *Voting Rights of Convicted Prisoners Detained within the United Kingdom*, March 2007;
4. Briefing on the renewal of control order legislation for the House of Lords debate, March 2007;
5. JUSTICE Student Human Rights Network Spring electronic bulletin, April 2007;
6. Response to consultation on Draft Supreme Court Rules, April 2007;
7. Submission to the House of Common Home Affairs Committee on a surveillance society, April 2007;
8. Evidence to EU Sub-Committee E on European Supervision Order, April 2007;
9. Joint briefing with Liberty, INQUEST and Prison Reform Trust on the Corporate Manslaughter and Corporate Homicide Bill for House of Commons consideration of Lords Amendments, May 2007.
10. Submission to House of Lords Constitution Committee inquiry on the impact of surveillance and data collection, June 2007;
11. Briefing on the Serious Crime Bill for second reading in the House of Commons, June 2007;
12. Briefing on the Serious Crime Bill for House of Commons Committee stage, June 2007;
13. *The Governance of Britain*: JUSTICE preliminary paper, July 2007;
14. Submission to the House of Common Home Affairs Committee on counter terrorism proposals, July 2007;
15. Submission to the Joint Committee on Human Rights inquiry into a British bill of rights, August 2007;
16. JUSTICE *Futures* paper, *The Future of Counter-Terrorism and Human Rights*, September 2007;
17. Further evidence to the House of Common Home Affairs Committee on counter terrorism proposals, September 2007;
18. JUSTICE Student Human Rights Network Autumn electronic bulletin, October 2007;
19. Briefing on the Criminal Justice and Immigration Bill for second reading in the House of Commons, October 2007;
20. JUSTICE *Futures* paper, *The Future of the Rule of Law*, October 2007;
21. Control orders appeals briefing paper, October 2007.

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