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Editorial

Keeping human rights and justice on the agenda

It is easy for lawyers – including human rights lawyers – to focus upon 'eternal' truths and traditions in the face of political 'reform'. Our sources of law stress the importance of learned wisdom: the common law, with its presumptions of the inviolability of person and property, is said to reflect the sagacity of generations of judges. Parliament continues of course to pass new statutes and reform the old ones, but is bound more or less loosely by legislative conventions of drafting and interpretation, as well as by the more controversial 'superior' sources of law – that of the European Union; and the European Convention on Human Rights as incorporated in the Human Rights Act 1998. International law, customary and treaty-based, does not bind the legislature or government as a matter of domestic law, but as lawyers again we see that it can offer a superior collective wisdom, and we press for its incorporation where it does so.

Our focus – on the need to preserve standards of human rights, justice and fairness – often results in an inherent tension with governments, who are concerned with achieving results, often on a short timescale (as goes with the lifetime of our Parliaments), and who are strongly motivated by contexts – perceived public opinion; economic circumstances – which we say can never take precedence over justice and fundamental rights. Our expertise leads us to attach importance to what can be seen by politicians as small matters, bureaucracy, procedure, as obstacles to efficiency savings and to the results-focused reforms that they believe will be of real benefit to the country and its citizens. The universality of our principles – the fact that they attach to people by virtue of being human rather than any other particular virtue of theirs – means that, as has been said many times, they become associated with minorities who have little or no voting power; they, and the principles that protect them, become easy targets for a cynical media. Practising lawyers – who become professionally aware of the suffering of people hidden from public view in asylum detention centres, child prisons and the like and, unlike those people and their families, have the resources to make their voice heard – suffer from the further problem of a perceived 'vested interest' and the unpopularity of lawyers more generally.

The fact that, in the UK, injustice and human rights abuses are not frequent occurrences in the lives of the average person but are instead, suffered by minorities, the powerless (and voteless) and those living 'alternative' lifestyles, further creates a disconnection between the concerns of human rights lawyers and those featuring in the daily lives of many voters and the politicians that represent them. A culture of complacency has arisen, which at its worst sees

the voicing of our concerns as irrelevant moaning. The segregation of our society – socio-economic; racial, in some areas – has worsened this. It is notable that human rights abuses of minorities and the marginal often occur when the injustices in their lives threaten to intrude upon the rest of us: protestors whose activities might 'upset' ordinary passers-by or create disruption to business; mentally ill people who instead of quietly suffering at home have begun shouting in the street; homeless people who have taken to drinking in public places (not having any private place in which to do so) and/or, needing money, to begging; teenagers who congregate in town centres and whose presence frightens those who misunderstand their usually innocent intent. Segregation also means that many decent voters with values grounded in justice and fairness are simply unaware of the injustice that surrounds them: the destitution of failed asylum-seekers; deportations of foreign nationals to death or persecution; people with mental health problems given ASBOs and imprisoned for breaching them; other people's children locked up at 12 and 13 on the other side of the country from their families. Sadly, even the excellent work of (some) investigating media and of human rights organisations in publicising such abuses does not shake the complacency for many; like foreign famines, the problems are too distant from their lives to evoke more than passing pity and do not (unlike more common daily concerns such as health, education and taxation) feature at the forefront of our politics.

All this presents a fairly bleak picture – or a strong and ongoing challenge for the more optimistic – for lawyers seeking to protect justice, fairness and universal human rights. But there have been signs this year that national complacency stretches only so far. The events of the G20 demonstrations in London – including the tragic death of Ian Tomlinson – have resulted in an institutional, and importantly a public, wake-up call as to the state of freedom of expression and assembly in the UK. The 'kettling' of demonstrators in central London was witnessed by City bankers and other workers; the Bishopsgate Climate Camp, like the environmentalist movement more generally, attracted a constituency far beyond the traditional 'protest community'. New media facilitated the immediate and popular spread of images of the, at times, harsh reality of public order policing. Misconduct – such as the failure to display ID numbers – long known to the more marginal (because 'alternative') traditional protestors now became apparent to all. The reaction was one of genuine shock. A Parliamentary Committee called the Metropolitan Police and others to give evidence. Her Majesty's Inspectorate of Constabulary made a number of recommendations for improving the policing of protest and said that 'British police risk losing the battle for the public's consent if they win public order through tactics that appear to be unfair, aggressive or inconsistent.'[1]

Also this year, the Gurkha Justice Campaign showed that a campaign for the human rights of a minority can capture the public imagination and lead a government to abandon an unjust policy even in the area of immigration, where abuses usually go unnoticed by the wider population. This alone would have made them well-deserved winners of the 2009 Liberty/JUSTICE Human Rights Award. Two other organisations nominated for that award – The Aegis Trust and REDRESS – showed that a campaign largely fought out of the limelight can also lead to recognition of the need for justice and accountability for human rights abuses, as the government agreed to reform the law on jurisdiction for genocide, war crimes and crimes against humanity in the UK so that, for example, crimes against Rwandans in the 1994 genocide can now be tried here, and war criminals can no longer achieve impunity by settling in the United Kingdom.[2] Even the destruction of legal aid for the poor and marginalised, that bête noire of human rights lawyers, will only be accepted up to a certain point – as the comparative examples in Roger Smith's article below illustrate.

As the general election approaches, we must continue to encourage government, Parliament and the public to recognise the value of the 'eternal truths' of justice, fairness and fundamental rights, as represented in the European Convention of Human Rights, not merely by stressing their legal force and eminent origins but by explaining their vital contemporary importance for the achievement of a good society, the fairness and 'social justice' of which politicians frequently speak, and for the maintenance of the freedoms enjoyed by many of us which can otherwise be eroded gradually to destruction, and their achievement by others who will otherwise be lost to misery. Only by doing this can we surpass the stale 'liberty vs security' debate and the ignorance implicit in language of 'rebalancing' the criminal justice system, and become not a marginal, much-criticised lobby but the powerful voice of the conscience of UK society.

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Notes

1 'The British model of policing must be nurtured', HM Inspectorate of Constabulary press release, 25 November 2009.

2 Cf s70 Coroners and Justice Act 2009.

Human rights and the new British constitution[1]

Vernon Bogdanor, Professor of Government, Oxford University.

The 2009 JUSTICE/Tom Sargant memorial annual lecture was based on the text of this paper.

One of the dominant intellectual trends of our time is the transformation of political questions into legal questions: the transformation of questions in political thought, political philosophy and the historical questions of political philosophy into jurisprudential questions. A central role in that transformation was played by HLA Hart, the philosopher who refounded the study of jurisprudence in the 20th century. In 1955 he published a seminal article in *The Philosophical Review* entitled 'Are there any natural rights?', thereby starting what became a trend towards the transformation of questions of political philosophy into questions of jurisprudence. Hart's lead was followed by many leading contemporary political philosophers: John Rawls, Ronald Dworkin, and Robert Nozick to mention just three.

This trend corresponds, I believe, with an alteration in the character of liberalism in modern times. Traditional liberal philosophers, such as John Stuart Mill, were concerned primarily with the balancing of interests, a balancing to be secured through processes of parliamentary debate and discussion. Rights were seen by the utilitarians as devices to protect the powerful. In his Anarchical Fallacies, Jeremy Bentham famously called discussion of rights 'nonsense', and imprescriptible rights 'nonsense on stilts'. Mill, and his leading modern disciple, Isaiah Berlin, wrote of an irreducible pluralism of values, and claimed that for liberals there are no final answers. Rights, however, purport to provide final answers, and these answers are to be given not by elected leaders, following a process of democratic debate and discussion, but by judges. When someone says 'I have a right', that really ends the argument. It takes the argument out of politics so that no balancing of interests seems to be needed. It may be that liberals have become more accustomed to the agenda of rights because they feel that they have lost the public debate; they have been unable to persuade politicians or people, and therefore they have to rely on the judges.

Bentham used to argue that rights were the child of law. What he meant by this was that the only meaning one could attach to the notion of a right was of something embedded in a legal system. To speak of a moral right was to speak of

something that ought to be embedded in a legal system. In the modern world, however, rights are as much the *parent* of law as its child. The Human Rights Act, for example, translates into law a certain conception of human rights, a conception that is of course heavily influenced by the European Convention on Human Rights. The Human Rights Act is the cornerstone of what I regard as a new British constitution.[2] It is transforming our understanding of government and of the relationship between government and the judiciary.

AV Dicey – like Mill and Berlin, a great liberal thinker – was proud of the fact that Britain had no bill of rights. He would have been horrified, I think, by the Human Rights Act. Dicey said that there is in the 'English constitution' – by which I think he meant the British constitution – 'an absence of those declarations or definitions of rights so dear to foreign constitutionalists.' Instead, he argued, the principles defining our civil liberties are like 'all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges or from statutes.' With us, he says, 'the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts.' By contrast, 'most foreign constitution makers have begun with declarations of rights', and then he adds – not ironically I think – 'for this they have often been in no wise to blame'. But the consequence, Dicey argues, was that the relationship between the rights of individuals and the principles of the constitution is not quite the same in countries like Belgium, where the Constitution is the result of a legislative act, as it is in England, where the constitution is based on legal decisions. The difference in this matter between the Constitution of Belgium and the English constitution may be described by the statement that 'in Belgium individual rights are deductions drawn from the principles of the Constitution whilst in England the so called principles of the Constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals.'[3]

But following the Human Rights Act, our rights are no longer based on such inductions or generalisations. They are instead derived from certain principles contained within the European Convention on Human Rights. For judges are now charged with interpreting legislation in light of a higher law, the European Convention. Yet Dicey famously declared that there can be no such higher law in the British constitution; there is no law so fundamental that Parliament cannot change it, no fundamental or so-called 'constitutional law', and no political or judicial body which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution. Rights, however, have become something for judges rather than Parliament to evaluate.

Formally, it is true that the Human Rights Act preserves The sovereignty of Parliament, since judges are not empowered to strike down Acts of Parliament. All they can do if they believe that legislation contravenes the European Convention is to issue a statement, a declaration of incompatibility. But that statement has no legal effect. It is for Parliament to amend or repeal the offending statute (or part of a statute) if it so wishes, but it can do so by means of a special fast-track procedure.

The Human Rights Act, therefore, proposes a compromise between two doctrines: the sovereignty of Parliament and the rule of law. But the compromise, for its effectiveness, depends upon a sense of restraint on the part of both the judges and of Parliament. Were the judges to invade the political sphere and to make the judiciary supreme over Parliament, something which some critics allege is already happening, there would be some resentment on the part of ministers and MPs. Conversely, were Parliament to ignore a declaration of incompatibility, and refuse to repeal or amend an offending statute or part of a statute, the Human Rights Act would be of little value. So the Human Rights Act proposes a compromise between two conflicting principles. I once asked a very senior judge: what happens if these principles do in fact conflict, the sovereignty of Parliament and the rule of law? He smiled and said, 'that is a question that ought not to be asked.'

The Human Rights Act, then, as well as giving greater authority to the judges, seeks to secure a democratic engagement with rights on the part of the representatives of the people in Parliament, though the main burden of protecting human rights has been transferred to the judges, whose role is bound to become more influential.

II

Many human rights cases concern the rights of very small minorities, minorities too small to be able to use the democratic machinery of electoral politics effectively. Often, the minorities concerned are not only very small, but also very unpopular - suspected terrorists, prisoners, asylum seekers, and the like. Members of these minorities are not always particularly attractive characters: life would be rather simpler if the victims of injustice were always attractive characters or nice people like ourselves. Our legal system, however, is probably rather good at securing justice for nice people. It is perhaps less effective at securing justice for people who may not be quite so nice. But the Human Rights Act seeks to provide rights for all of us, whether we are nice or not: and perhaps there is no particular merit in being just only to the virtuous.

The Human Rights Act (HRA) is, therefore, based on a compromise, which could well prove shaky. I thought at the time the Act was passed that there was a very

real likelihood of conflict between the government and judges. But I thought the conflict would not arise for some time, and that the main effects would be long term. I was wrong. The conflict has occurred much sooner than I thought. In 2006, just 6 years after the HRA came into effect, Tony Blair suggested that there should be new legislation limiting the role of the courts in human rights cases, and that meant amending the Act. Blair's comments were supported by David Cameron, the Leader of the Opposition, who renewed Michael Howard's pledge in the Conservative Party's 2005 election manifesto to reform, or failing that, scrap the Human Rights Act.

The speed with which the HRA has led to a conflict between government and the judges is to my mind remarkable. In the US it took 16 years after the drawing up of the Constitution in 1787 for an Act of Congress to be struck down by the Supreme Court in the landmark case of *Marbury v Madison* of 1803. After that, no Act of Congress was struck down until the famous *Dred Scott v Sandford* case in 1857; a case which unleashed the American Civil War. It was not until after the Civil War, after 1865, that the Supreme Court really came into its own as a court that would review federal legislation. In France the Fifth Republic established a new body in 1958, the Conseil Constitutionnel, empowered to delimit the respective roles of Parliament and the government. But this body did not really assume an active role until the 1970s.

The impact of the Human Rights Act in Britain has been much more rapid and it has had radical implications. But the impact has not been noticed as much as it might have been, precisely because we do not have a codified constitution. It is because we do not have a constitution that radical constitutional change tends to pass unnoticed. In Bagehot's famous words, 'an ancient and ever-altering Constitution' such as the British 'is like an old man who still wears with attached fondness clothes in the fashion of his youth: what you see of him is the same; what you do not see is wholly altered.'[4] We have, therefore, not noticed that we have in effect made the European Convention on Human Rights, in practice if not in form, part of the fundamental law of the land. It is the nearest we have to a bill of rights.

The Human Rights Act, then, sought to muffle a conflict between two opposing principles: the sovereignty of Parliament and the rule of law. In doing so it presupposed a basic consensus on human rights between judges, on the one hand, and the government, Parliament, and people on the other. It assumes that breaches of human rights will be inadvertent and unintended, and therefore that there will not be significant disagreement between government and the judges. But there is clearly no such consensus when it comes to the rights of unpopular minorities. Two issues in particular – concerning the rights

of asylum seekers and suspected terrorists – have come to the fore since the Human Rights Act came into force and have led to conflict.

The problem of asylum long predates the Act, but it has grown in significance since the year 2000 and is now a highly emotive issue, capable, so politicians believe, of influencing voters in a general election and so determining the political character of the government. Terrorism has also taken on a different form since the horrific atrocity of September 11, 2001. The form of terrorism to which we were accustomed, that of the IRA, was in a sense an old-fashioned form of terrorism: it had a single, concrete and specific aim, namely the reunification of the island of Ireland. The terrorism of the kind championed by al-Qaeda is quite different; it is a new and more ruthless form of terrorism with wide if not unlimited aims, amongst which is the establishment of a new Islamic empire and the elimination of the state of Israel. Al-Qaeda apparently has terrorist cells in around 60 countries. To deal with this new form of terrorism, many governments, including that of the United Kingdom, believe, new methods are needed and these new methods may well infringe human rights. But the judges retort that we should not compromise our traditional principles of habeas corpus and the presumption of innocence: principles which, they say, have been tried and tested over many centuries and have served us well.

But some senior judges have gone much further than this. They have suggested that the conflict between the sovereignty of Parliament and the rule of law should be resolved by, in effect, abandoning the principle of the sovereignty of Parliament. Indeed, a natural consequence of the Human Rights Act, according to this view, should be a formal abnegation of the principle of the sovereignty of Parliament. The sovereignty of Parliament, they go on to argue, is but a judicial construct, a creature of the common law: if the judges could create it, they can now, if they so wish, supersede it.

In a case in 2005, *Jackson and others v Attorney General*, which dealt with the legality of the Hunting Act 2004, Lord Steyn declared that the principle of the sovereignty of Parliament was a construct of the common law, a principle created by judges. 'If that is so,' he said, 'it is not unthinkable that circumstances could arise when the courts might have to qualify a principle established on a different hypothesis of constitutionalism.' Lady Hale of Richmond said that 'the courts will 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 powers'. She is saying, in effect, that courts might take upon themselves the power to strike down legislation. Reiterating this point, Lord Hope said that 'parliamentary sovereignty is no longer, if it ever was, absolute; it is not uncontrolled, it is no longer right to say that its freedom to legislate admits of no qualifications whatever.' He then added that the 'rule

of law enforced by the courts is the ultimate controlling factor on which our constitution is based.'[5]

Step by step, then, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament is being called in question. It can hardly, despite Lord Hope, be anything other than 'absolute'. For sovereignty is not a quality like baldness, a matter of degree, but more akin to virginity, a quality that is either present or absent.

The implication of the remarks by the three law lords, then, is that the sovereignty of Parliament is a doctrine created by the judges which can also be superseded by them. They would perhaps like to see this doctrine supplanted by an alternative doctrine: the rule of law. But is it for the judges to decide that for themselves? Or is it not rather the case that the doctrine of the sovereignty of the Parliament is part of our very constitutional history? Dicey, whom I quoted earlier, claimed that the roots of the idea of Parliamentary sovereignty 'lie deep in the history of the English people, and in the peculiar development of the English constitution.'[6] If Dicey is right, the judges alone cannot supersede the principle of Parliamentary sovereignty unless Parliament itself (and perhaps the people as well through referendum) agrees.

HLA Hart argued that the ultimate rule in any legal system was the rule of recognition.[7] This rule, Hart suggested, is not itself a norm, but a complex sociological and political fact, constituted by the practice of legal officials and judges. But legal officials and judges cannot alter a practice in a sociological or political vacuum. Surely Parliamentary and popular approval is also required for any alteration in the fundamental norm by which we are governed. At the present time, politicians clearly would not agree to give judges the power that it appears some seek, to supersede the sovereignty of Parliament.

Do the people themselves have a role in determining the rule of recognition? The Labour government's White Paper 'Bringing Rights Home', published at the same time as the Human Rights Bill was introduced into Parliament, found no evidence that the public wanted judges to have the power to invalidate legislation. It would be unwise to assume that anything has changed in the intervening period. But whatever the state of public opinion, it is clear that there is a conflict between two constitutional principles, a conflict which the Human Rights Act is designed to muffle. This conflict, if not resolved, could come to generate a constitutional crisis.

By a constitutional crisis, I mean not simply that there is a difference of view on constitutional matters. That is to be expected in any healthy democracy. What I mean by a constitutional crisis is that there is a profound difference of view as to

the method by which such disagreements should be settled. There is a profound difference of view as to what the rule of recognition is or ought to be.

In any society a balance has to be struck between the rights of the individual and the needs of that society for protection against terrorism, crime, and so on. But who should draw the balance, the judges or the government? Senior judges would say, I suspect, that they have a special role in protecting the rights of unpopular minorities, such as asylum seekers and suspected terrorists. They would say that in doing so they are doing no more than applying the Human Rights Act as Parliament has asked them to. The government, and one suspects most MPs, would disagree: they would say that it is for them as elected representatives to weigh the precise balance between the rights of individuals and the needs of society because they are elected and accountable to the people, while the judges are not. They would say that the Human Rights Act allows judges to review legislation, but this should not be made an excuse for the judges to seek judicial supremacy: they should not seek to expand their role by stealth, as the American Supreme Court did in the 19th century.

There is thus a profound difference of view as to how issues involving human rights should be resolved. The government believes they should be resolved by Parliament; the judges believe they should be settled by the courts. Because they disagree about this, each side is tempted to believe that the other has broken the constitution. Government and Parliament say that judges are usurping power and seeking to thwart the will of Parliament, whereas judges say that the government is infringing human rights and then attacking the judiciary for doing its job in reviewing legislation and assessing its compatibility with the Human Rights Act. The British constitution is coming to mean different things to different people. It is coming to mean something different to the judges from what it means to government and Parliament. The argument from Parliamentary sovereignty points in one direction; the argument from the rule of law in another.

There are two possible outcomes. The first is that Parliament succeeds in defeating the challenge from the judges in preserving Parliamentary sovereignty, which might mean that, on some future occasion, a declaration of incompatibility comes to be ignored. The second possible outcome is that the Human Rights Act trumps Parliament and that a declaration of incompatibility by a judge comes to be equivalent in practice to striking down legislation, since Parliament automatically gives effect to such a declaration by amending the law. It is too early to tell which outcome is more likely to prevail, but it seems unlikely that the compromise embodied in the Human Rights Act can survive over the long term. We are at present in a transitional period and eventually

some sort of constitutional settlement will be achieved. But it will be, I think, a painful process and there will be many squalls and storms on the way.

III

There is a paradox in current discussions of the Human Rights Act. The paradox is that those who appear most worried by it wish, nevertheless, to extend it. The Conservative Party, for example, proposes to repeal the Human Rights Act, but to enact in its place a home-grown measure giving the same protection as the European Convention, and also protecting additional rights. The Conservatives propose a British Bill of Rights. So also does the Labour government. So also do the Liberal Democrats. All three parties now favour a British Bill of Rights, though there may be disagreement on precisely what it should contain. There is agreement upon it, if not upon the provisions which such a bill of rights might contain.

In August 2008, the Parliamentary Joint Committee on Human Rights published a report, *A Bill of Rights for the UK?*[8] It recommended that Britain adopt a Bill of Rights and Freedoms since this would provide 'a moment when society can define itself.' Such a Bill should 'set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist'.[9] Such a Bill would, in the Joint Committee's view, have to build upon the Human Rights Act without weakening it in any way, and it would have to supplement the protections in the European Convention.

A British Bill of Rights, then, would increase the number of rights which the courts protect. Indeed, the European Convention on Human Rights was regarded by its signatories in 1950 not as a ceiling, the maximum protection which member states should grant, but as a floor, the very minimum which any state claiming to be governed by the rule of law should support.

In Northern Ireland, there is already broad agreement that greater protection of rights is needed than is offered by the Human Rights Act. The 1998 Belfast Agreement recognised that there ought to be:

> *rights supplementary to those in the European Convention on Human Rights to reflect the particular circumstances of Northern Ireland … These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.*

The Agreement provided for the establishment of a Northern Ireland Human Rights Commission, providing for the identity and ethos of both communities in the province to be respected, and also a general right to non-discrimination.

It also envisaged that the Human Rights Commission in the Republic of Ireland would join with that of Northern Ireland to produce a charter endorsing agreed measures to protect the fundamental rights of all those living in the island of Ireland. As yet, however, no Bill of Rights for Northern Ireland has been enacted.

It is not difficult to suggest rights additional to those in the ECHR which ought to be recognised in he United Kingdom as a whole – a general right to equality, for example, in addition to the right of non-discrimination guaranteed by the Convention; a right to privacy; a right to a healthy environment, something guaranteed in the 1996 post-apartheid South African constitution; a right to freedom of information; a specific right to non-discrimination on grounds of sexual orientation; recognition of the rights of children, as recognised in the United Nations Convention on the Rights of the Child – these are all examples of rights which, so it has been argued, ought to be protected in addition to those protected by the European Convention. There is also the large but contentious area of social and economic rights. The European Convention recognises a right to education but not a right to healthcare. Many of these rights are recognised in international treaties which the British government has signed. Nevertheless, additional rights would have to be formulated very carefully were they to be embodied in a British Bill of Rights. It would be difficult to make economic and social rights, for example, justiciable; and the law cannot become a mechanism for resolving complex social or economic problems. In a case in 1995, Lord Bingham commented that:[10]

> *It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like, they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment which the court can make.*

The courts must remain a last resort, not a path taken by those who cannot secure the reforms they wish to enact through the ballot box and Parliament.

In its report, *A Bill of Rights for the UK?*, however, the Joint Committee on Human Rights proposed five types of rights for inclusion:[11]

1. Civil and political rights and freedoms, such as the right to life, freedom from torture, the right to family life and freedom

of expression and association. It also proposed a new right to equality.

2. Fair process rights such as the right to a fair trial and the right of access to a court. The Committee also proposed a right to fair and just administrative action.

3. Economic and social rights, including the right to a healthy and sustainable environment. The Joint Committee accepted that such rights could not easily be made justiciable, and declared that they would impose a duty on the part of government and other public bodies, of 'progressive realisation', the principle adopted in the South African constitution. This principle would require the government to take reasonable measures within available resources to achieve these rights and report annually to Parliament on progress. But individuals would not be able to enforce them against the government or any other public body.

4. Democratic rights, such as the right to free and fair elections, the right to participate in public life and the right to citizenship.

5. The rights of particular groups such as children, minorities, people with disabilities and victims of crime.

One argument for adding such rights to those already recognised in the Convention is that it would make it easier for the British people to feel that they, as it were, 'owned' the bill of rights, that the bill of rights was indigenous. At present, many feel that the Human Rights Act is an elite project, designed only to protect highly unpopular minorities, such as suspected terrorists and asylum seekers. The Act, therefore, is not grounded in strong popular support. Rights that might be generally used by all would give human rights legislation greater popular salience, and might thus, paradoxically, make it easier to protect the rights of unpopular minorities.

But there is a fundamental difficulty with the idea of a British Bill of Rights which has not yet been faced. For some at least of the rights which might be embodied in a British Bill of Rights would seem to entrench upon the powers of the devolved bodies – the Scottish Parliament, the National Assembly of Wales and the Northern Ireland Assembly. Thus the extension of one aspect of the new British constitution – the protection of rights – might easily come into conflict with another – the devolution settlement. From a strictly legal point of view, of course, the protection of rights is a reserved matter, since Parliament, at least in theory, remains sovereign. Nevertheless, the devolved bodies have responsibility

for such matters as healthcare, and would undoubtedly see a British Bill of Rights providing for the right to health as a form of creeping centralisation, depriving them surreptitiously of powers which had been transferred to them by the devolution legislation. The devolved bodies might well wish to decide for themselves whether or not to provide for additional rights to those in the European Convention. There is some tension, then, between the principle of devolution and that of the entrenchment of rights UK-wide; and, insofar as a British Bill of Rights was based on the idea of rights that were fundamental to British citizenship, it could serve to unpick the delicate settlement reached in the Belfast Agreement which served to reconcile the unionists of Northern Ireland, who wished to remain British citizens, and the nationalists, who did not, and who do not see themselves as British at all. It would be necessary, then, to secure the consent of the devolved bodies, as well as MPs at Westminster, to a British Bill of Rights. That would not be easy since neither the SNP nor Sinn Fein would want to agree to something that they saw as 'British'. They would prefer rights for Scotland and Northern Ireland that were, as it were, self-generated. But if the devolved bodies were not involved in the negotiations, they might not accept a British Bill of Rights as legitimate. In 1980, when Pierre Trudeau sought to patriate the Canadian constitution, he did not consult the Canadian provinces until required to do so by the Supreme Court of Canada. Quebec, which already had its own provincial bill of rights, refused to accept the patriated constitution, since this would deprive it of autonomy in relation to French language and education rights.[12] The issue remained as a running sore, poisoning relations between Canada and Quebec for many years. A British Bill of Rights, therefore, could prove a highly divisive issue both in Scotland and in Northern Ireland.

If the British government preferred not to involve itself in difficult disputes with the devolved bodies, the alternative would be to propose a bill of rights applying only to England. There would then be an English rather than a British Bill of Rights, and the devolved bodies could be left to adopt whatever arrangements they wished if they sought to add to the rights already recognised in the Human Rights Act. An English bill of rights, however, could hardly be expected to strengthen the sense of Britishness. It could, on the contrary, weaken it.

Even apart from this problem, a British Bill of Rights might prove of very limited value in strengthening the sense of citizenship. It could delineate only the very minimum requirements of citizenship. Some ministers are currently sympathetic to the idea of a British Bill of Rights and Duties. The suggestion is that such a document could encourage good citizenship. Yet, many, if not most of the duties of good citizenship – eg the duty to be a good neighbour, the duty to contribute to one's community – are not such as can be ensured by law. They are problems for society, not for the legal system. It is a mistake to overburden

the legal system by giving judges the duty to resolve complex social problems, problems that they are ill-equipped by training to resolve. Nor could the rights of the citizen become dependent upon the extent to which she performed her social duties. The right to freedom of speech and to the other rights enshrined in the Human Rights Act are not dependent upon the satisfactory performance of social duties. They are granted to everyone living in Britain, regardless of whether or not they are good citizens. Some of the most contentious issues relating to rights concern the rights of prisoners, people who, by definition, have shown that they are not good citizens.

IV

In addition to adding to the rights listed in the Convention, the Human Rights Act could be strengthened in another way, by providing stronger protection for existing rights than is provided in the Act. There are two ways in which this can be done: by legislative entrenchment and by judicial entrenchment.

When calling for a home-grown British Bill of Rights in 2006, David Cameron suggested that it might be made exempt from the Parliament Act, which allows the Commons in the last resort to override the Lords. At present the only legislative provision that is exempt from the Parliament Act is that requiring a general election to be held at least once every five years. The reason for this, of course, is to ensure that an unscrupulous government with a majority in the Commons cannot postpone the date of a general election beyond five years to keep itself in power. Similarly, the effect of exempting a British Bill of Rights from the Parliament Act would be to ensure that a government could not alter its provisions without securing the agreement of the Lords.

An alternative might be to provide that the Act could be amended only by a special majority in the House of Commons, for example, two-thirds of those voting. Such provisions are common in relation to bills of rights. The American Bill of Rights can only be amended by a special majority of Congress and a special majority of the states; the same is true of the protection of rights in the South African constitution. The Canadian Charter of Rights and Freedoms can be amended only by two-thirds majorities in both houses. New Zealand and Israel, which like Britain lack a codified constitution, both give special legislative protection to certain rights. The 1993 Electoral Act in New Zealand contains an entrenched provision which can be amended only by 75% of the MPs in the single-chamber Parliament or by referendum. Israel has a set of Basic Laws protecting rights which can be amended only by an absolute majority in the single-chamber Parliament, the Knesset.

The second way of strengthening the protection offered by the Human Rights Act is by giving judges power to do more than simply issue a declaration of incompatibility when, in their view, legislation infringes the European Convention. In most countries with a bill of rights, such as the United States, South Africa and Germany, judges can invalidate legislation which conflicts with the bill of rights. In Canada, the government can over-ride the judges by introducing legislation, accepting explicitly that it is not accordance with the Charter of Fundamental Freedoms of 1982, but declaring that 'notwithstanding' this, it ought to be enacted. All legislation of this 'notwithstanding' type needs to be renewed every five years, but the political stigma attached to introducing legislation with such a clause is so great that the Federal government has never employed it – although it has been employed at provincial level by provincial governments. The Canadian government and Parliament can thus, like the British government and Parliament, decide to ignore the decision of a judge in a human rights case. It is, however, more difficult to take this course in Canada than it is in Britain, since if Parliament in Britain disagrees with a declaration of incompatibility, it merely does nothing but maintain the status quo, whereas the Canadian Parliament has to act positively to over-ride the Charter.

Judicial entrenchment in Britain would entail explicit recognition that the Human Rights Act was fundamental constitutional legislation. It already has a certain status as fundamental law precisely because it is not subject to the doctrine of implied repeal. But to allow judges to invalidate legislation would be formally to undermine the doctrine of Parliamentary sovereignty. It might be argued, however, that if we can modify this doctrine by subscribing to a superior legal order, the European Union, and providing for judges to 'disapply' legislation which is contrary to European legislation, then we can also modify it by giving judges the power to 'disapply' human rights legislation. In gradually coming to distinguish between 'fundamental' and 'non-fundamental' statutes, we are moving in a tortuous and crab-like way towards establishing real constitutional principles, towards becoming a constitutional state.

V

The Human Rights Act, it has been argued, is of greatest value in cases concerning small and unpopular minorities: minorities that are unable to use electoral and political processes effectively. Larger minorities are generally able to use these processes, and perhaps for them the Act may be less helpful. Nor can the Human Rights Act be expected to resolve wider social issues. It cannot be expected to deal with the wider problems that face us in a multicultural society. It cannot resolve our culture wars.

Trevor Phillips, the Chair of the Equality and Human Rights Commission, has drawn attention to the range and nature of these conflicts in such areas as the implementation of affirmative action policies, and the recognition and use in the British legal system of Sharia law and Sharia courts. To what extent, if at all, should the civil courts recognise: the jurisdiction of sharia courts; the legitimacy of arranged marriages and concerns over their potential for coercion; or the role of faith schools in our society? Where, for example, parents wish to send their child to a Jewish school, but the mother is a convert, should the school be able to decide whether to admit the child or should it be a matter for the courts? What should be the balance between the freedom of choice of parents in choosing schools and the goal of securing racial and social integration? This last issue is perhaps of particular importance in building a stable multicultural society. With free choice of schools, many schools remain 100% white, while others remain 50-60% peopled by members of ethnic minorities. There is, some would suggest, insufficient of a cultural mix. Survey evidence has shown that very few English people have close friends from other cultures. The question originally asked was to ask people to list their 20 closest friends, but this question was abandoned since most English people do not have 20 close friends! Is it consistent with public policy that ethnic groups remain so separate?

None of these issues can be settled simply by invoking rights. All of them involve a clash of rights and a clash of interests. For this reason, they are not questions which judges can easily resolve or finally settle. The great danger, particularly with the idea of extending rights into the social and economic sphere, which the Parliamentary Joint Committee on Human Rights recently proposed, is of bringing judges into areas that lie beyond their competence. There is a danger, in addition, that we seek to enlist the support of judges to transform our current liberal prejudices into unshakable verities and eternal truths. For these reasons, I believe that the legal paradigm, inaugurated by the work of HLA Hart, may have gone too far. It is worth remembering what American Supreme Court Justice Robert Jackson said of judges in the 1930s when the United States Supreme Court was using its power of judicial review to cripple President Roosevelt's economic and social programmes. 'We are not final', he said, 'because we are infallible, but we are infallible only because we are final'.[13] Justice Stone reminded his colleagues that '[w]hile an unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint'.[14] It was a salutary reminder.

It is dangerous for a society to believe that it can leave its liberties in the hands of judges. The Human Rights Act, like the Bill of Rights in the United States, shows what is in the shop window; the question of whether one can actually buy the goods is quite separate. It must be remembered that the American

Bill of Rights, which is today so greatly lauded, did not prevent segregation or 'lynch law' existing in many states in the South for very many years. The equal protection clause of the Fourteenth Amendment was a mockery in practice for anyone belonging to the African American minority until the Voting Rights Act was passed in 1965.

I conclude, therefore, that the philosophy of rights, while it may be necessary, is not sufficient to meet the challenges of the 21st century. We need to return to an older form of liberalism, that championed by Mill, a liberalism which seeks to balance interests and competing claims. The philosophy of rights is most needed in cases dealing with vulnerable and unpopular minorities whose interests will not be recognised by the ballot box. But even in this very limited area, we must be aware of over-estimating what can be achieved by judges. Judges, constitutions and political institutions are necessary to protect human rights, but they can never be sufficient. The condition of society matters also. Mill famously criticised Bentham for believing that a constitution is a mere set of rules or laws, rather than a living organism representative of an evolving political morality. Dicey also believed that the quality of a legal system depended on the quality of the society which it served. He once said that 'the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions.'[15] That may seem, at first sight, an arrogant statement. But what he meant was that our laws rest essentially on a public opinion that supports the protection of human rights; that the protection of human rights depended not only on laws and institutions, but on a spirit favourable to human rights.

Edmund Burke is supposed to have said that 'all that is necessary for evil to triumph is for good men to do nothing.' No one has been able to find the source for this quotation, but whether he said it or not, there are many eloquent testimonies to its truth. We are mistaken if we believe that human rights legislation is sufficient to preserve our freedom.

In a book published long ago, in 1925, called The Usages of the American Constitution, the author tells the story of a church in Guildford, the Holy Trinity Church. On the site of this church was an earlier building which was destroyed in 1740 when the steeple fell and carried the roof with it. One of the first to be informed of the disaster was the verger. 'It is impossible', he said, 'for I have the key in my pocket'.[16] The Human Rights Act is the key, but it will not of itself prevent the fall of the steeple. Only a vigilant public opinion can do that.

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Notes

1 Some of the arguments in this lecture are based on themes in my book, The New British Constitution, Hart, 2009.
2 Ibid.
3 AV Dicey, Introduction to the Study of the Law of the Constitution (10th ed), Macmillan. 1959, p144.
4 W Bagehot, 'The English Constitution', in Collected Works, *The Economist*, 1974, vol V, pp203-4.
5 [2005] UKHL 56, para 102.
6 Law of the Constitution, p69 fn.
7 The Concept of Law, Clarendon Press, 1961.
8 HL165, HC 150, 2007-8.
9 *A Bill of Rights for the UK?*, p5.
10 *R v Cambridgeshire Health Authority, ex parte B* [1995] 1 WLR 898.
11 HL165, HC 150, 2007-8.
12 See G Marshall, 'Canada's New Constitution (1982): Some Lessons in Constitutional Engineering', in V Bogdanor (ed), Constitutions in Democratic Politics, Gower, 1988.
13 *Brown v Allen* 344 U.S.(1953) 540.
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15 Law of the Constitution, p195.
16 HW Horwill, The Usages of the American Constitution, Oxford University Press, 1925, p243.

The decline of legal aid: we are not alone

Roger Smith

This article looks at global developments on legal aid and compares them to domestic experience. The information is taken from a joint JUSTICE and International Legal Aid Group electronic newsletter.

The 1970s provide the golden age of publicly funded legal services – at least in countries like Canada, the United Kingdom, Australia, New Zealand and the United States. There was an increasing interest in, and commitment to, meeting the legal needs of the poor, even if funding was at levels considerably less than at present. Alas, however, times are now very different and legal aid is in relative decline in all these countries. Only in countries which have come later to the realisation of the need for such legal assistance is there growth in legal aid – in the case of Eastern Europe, often under pressure from the demands of the European Convention on Human Rights (ECHR).[1]

The Canadian province of Ontario is currently suffering a dispute strikingly similar to the Bar's recent boycott of very high cost criminal cases in England and Wales. Senior Toronto lawyers have been refusing to take serious 'guns and gangs' cases because they derided their remuneration as too low. The protest has spread to Ottawa and to other towns in Ontario, such as Thunder Bay. Typical of the anger of practitioners was that expressed by Mark Ertel, president of the Defence Counsel Association of Ottawa:[2]

> *I'm personally boycotting, and I think most experienced lawyers are not taking these [legal aid] certificates … [Taking these cases] is like charity work. Running your office, you're losing money. Ninety-eight dollars an hour isn't enough to turn on the lights.*

Fees range between $77 (£44) and $98 (£56) an hour up to a cap for each case. As a result, Mr Ertel told the Ottawa Citizen: 'You actually end up working for $30 or $40 an hour. It happens all the time.'[3] The boycott got influential support from judges and prosecutors, at least one of the latter expressing embarrassment that resources were so unbalanced that the prosecution could afford to pay expert witnesses at double the rate available to the defence. The action had some effect and the government was shamed into some degree of action. It announced an increase in funding of $150m (around £86m) over four years.[4] It remains to be seen whether this will be enough to dampen opposition. The

government promised better 'big case management', a shift to block fees, 'more rigorous quality management' and more funding for legal clinics in the same package. The money was thus spread around and linked to initiatives that will further reduce costs.

Canadian unrest followed a similar dispute among lawyers in Australia, particularly in the Victorian capital, Melbourne. Around 200 attended a rally outside Melbourne's county court in November 2008 to demonstrate against the failure of the Commonwealth government to provide sufficient cash to meet the costs of those areas of law for which it is responsible. The commonwealth/state split in federal Australia provides fertile ground for disputes on burden-sharing but opens up the possibility of obtaining support of one against the other. In this case, state officials and politicians were happy to join the protest against federal parsimony. The Victorian Premier, John Brumby, supported the protest, saying that:[5]

> *You've only got to look at the figures. What used to be a 60/40 arrangement is now a 40/60 arrangement … We're now doing the lion's share of the funding, and what the Federal Government needs to do is to increase their funding to at least come up to match the funding that is being provided by our Government.*

As in Ontario, there has been an attempt to buy off the dispute. The federal government stumped up an additional one-off $20m (£11m) funding and Mr Brumby's government added another $25m (£13m). Lawyers were not impressed, however, and Victorian Bar chairman John Digby QC proclaimed the addition funds 'very disappointing … As a one-off band aid measure, it does nothing to stabilise the long-term operation of the legal aid system.'[6] Clearly, the struggle continues in Victoria – as elsewhere.

An irony of the current situation is that - just at the moment when legal aid spending is being capped, cut or, in the weasel words of our government, 'refocused' - research is burgeoning into the need for access to justice. Professor Hazel Genn started a global movement with her seminal Paths to Justice survey in 1999.[7] She followed this study of England and Wales with one of Scotland which she undertook jointly with Professor Alan Paterson. Her methodology – of identifying 'justiciable problems' and surveying for their incidence – has since been followed by researchers in a number of other countries, including the Netherlands and Canada. Her approach has been developed by the Legal Services Research Centre of our own Legal Services Commission. It has undertaken a number of longitudinal studies which have proved the intuitive observation that problems come in 'clusters', around an event such as divorce or disability.

There has been, perhaps for obvious political reasons, no comparable research effort into the implications of the cuts and restrictions to criminal legal aid.

One of the reasons why legal aid in Victoria is currently hit so badly is that a disproportionately large percentage of the funding comes from neither Commonwealth nor State government but from what we would call interest on solicitors' client accounts or, in the American formulation, interest on lawyers' trust accounts (IOLTA). Nationally, IOLTA funds amount to 18 per cent of overall spending. In Victoria, the percentage is 30.[8] IOLTA funds around the world have taken a 'double whammy' in the recession: fewer transactions are drastically reducing funds and interest rates on those funds have declined sharply.

The country whose legal aid has been hit most by plummeting IOLTA income is the United States. In 2008, IOLTA generated $370m (£229m). Some estimates made at the beginning of 2009 halved that figure for this year.[9] The importance of a loss of the magnitude projected can be seen by comparison with the size of the total federal budget for civil legal services. For the financial year 2009, the federal Legal Services Corporation received $390m or £241m. Thus, government expenditure on legal aid in the US, for all its greater population, is less than a quarter of that in England and Wales. Other funds are, therefore, extremely important to sustain US provision.

The relative poverty of civil legal services in the US reflects the hostility of presidents from Reagan to the two Bushes. Oddly enough, the Legal Services Corporation (LSC) was actually established by the Republican President Nixon who was extremely supportive: 'For many of our citizens … legal services have reaffirmed faith in our government of laws … we must make [the programme] immune to political pressures and a permanent part of our justice system'. Ronald Reagan was, however, hostile. He had tangled with LSC legal programmes when he was Governor of California and he continued bear a grudge when he got to the White House. He began cutting the budget and hedging LSC funding with mandatory restrictions in relation to the cases that could be handled by agencies receiving federal funds. For example, they were restricted in acting for illegal immigrants. The Bushes continued this approach and the LSC was only kept alive by vigorous support in Congress in years when the President recommended a zero budget.

President Obama has been kind to the LSC, getting an increase in funds through Congress and beginning the process of cutting back the funding restrictions. These have been so severe that in many of the better funded states, like Massachusetts, services were split between those funded by the LSC and very limited in the cases that they could take, and those funded by IOLTA and other unrestricted funds which had a much wider brief. President Obama has also

been much better at celebrating legal aid birthdays. He issued a press release praising the 'great work' of the LSC on its 35th birthday. Alas, both Gordon Brown and David Cameron remained silent on the 60th birthday of legal aid in England and Wales. Celebration was delegated to Lord Bach, Jack Straw's junior minister. Praise got no higher.

Civil legal aid in the US is being cut back, with Massachusetts typical, if not rather better off, than other states. The *Boston Globe* reported:[10]

> *Greater Boston Legal Services, the region's largest legal assistance agency for the poor, reduced its staff from 135 to 124 employees this year and is preparing to lay off at least 10 more in the fall. South Coastal Counties Legal Services Inc. is planning to lay off five lawyers. And the Legal Assistance Corporation of Central Massachusetts has reduced its staff from 42 to 31, cut benefits, and closed its offices on alternating Fridays.*

Criminal legal services, which are separately funded, are scarcely less better off. In New York, funding for public defenders comes through the judiciary. As a result, campaigners were able to get legislation to limit the number of cases being undertaken by publicly funded lawyers. *The New York Times* reported:[11]

> *Under the law, New York State's chief administrative judge would be required to establish new caseload standards for public defenders by April 1, 2010. The judiciary would then have four years to phase in the limits and ensure proper funding. Despite the state's grim economic condition, the judiciary's budget for the current fiscal year remained stable at $2.57 billion.*

Both the American Bar Association and the National Legal Aid and Defenders Association have traditionally used recommendations as to maximum caseloads in order to prevent the underfunding of defence provision. Traditionally, this is not something that has appealed to legal aid practitioners in the UK because they have been paid per case, but as funding shifts to a block basis, this may be something which will have more appeal – particularly for junior staff who will argue that they are being overburdened and underpaid. New York's Legal Aid Society expects a shortfall of $11m for the year from July 2009-10 although its 435 salaried lawyers handled a caseload of 227,000 in 2008-9, an increase of around 10 per cent over the previous three years. The Society has sought to mobilise the traditional commitment of private law firms in the US to pro bono services and has established nine 'externships', private practice lawyers who will work for the society from their own offices.[12]

The US does, however, provide occasional glimpses of light. There is still room for innovation. California in particular is home to a number of lawyers exploring the extent to which cases can be 'unbundled' – that is, broken into their constituent parts – for some, but not all, of which a lawyer can provide assistance. The *Los Angeles Times* reported on the delightfully named 'LegalGrind', a café with something extra:[13]

> *Fortunately for the newly downgraded, the access-to-justice movement has advanced in recent years from Skid Row to Main Street. At storefront law offices like Santa Monica's LegalGrind, a cafe-legal clearinghouse, those facing court dates to deal with divorce, custody matters, driving offenses and debt can find out for $45 how best to tackle their problems without plunking down a $5,000 retainer and $400 an hour for a lawyer. Bar associations in California and a dozen other states, meanwhile, have whittled away at the ethics rules and industry mind-set that used to discourage attorneys from taking clients on a "limited scope" basis. This involves representing them on specific aspects without taking responsibility - and charging fees - for the client's full range of legal problems.*

And there continue to be experiments with the provision of legal advice through the internet and with court-based 'self help' centres. These are popular in California, where the Los Angeles Superior Court opened its twelfth centre in Pasadena in March 2009. The centre is located in the former court library; is open five days a week; and provides a range of resources including workshops and clinics on a variety of civil matters, including family law:[14]

> *The Pasadena facility was funded by the Superior Court, the Judicial Council of California, the Administrative Office of the Courts and through grants from the State Bar, to Neighborhood Legal Services and Bet Tzedek Legal Services. It will be staffed by court employees, legal aid partners and Justice Corps student interns, court officials said. Services will also be available in Spanish, Mandarin, and Cantonese.*

Otherwise, innovation and development is to be found much more in jurisdictions which historically have had little legal aid provision. South Africa is expanding its provision of salaried justice centres. Jamaica has set up an education drive to explain to police officers why they should welcome legal representation of suspects during interviews and not seek to evade it:[15]

> *'We are seeking to sensitise the Jamaica Constabulary Force that every citizen is entitled to the service of an attorney at the point of questioning and if that person is arrested and charged,' the [Legal Aid Council] executive director, attorney Hugh Faulkner, said. Faulkner reminded the*

> *handful of sub-officers from the various stations within the St Andrew North Police Division, who gathered at the Grant's Pen Police post for the meeting, that the rights of citizens must be respected and that there is always the presumption of innocence in relation to detained persons.*

Rwanda has hosted a mid-African conference to encourage legal aid. Ghana has recently opened a legal services programme for remand prisoners. And, in the Philippines, the Supreme Court has stepped in to increase legal aid provision by requiring all practising lawyers to undertake 60 mandatory pro bono hours. This has understandably been somewhat controversial among the legal profession but the court has battled on with its plan, albeit that the start date has been put back to January 2010. China has a characteristically chequered position. On the one hand, the authorities have closed down the offices of the Open Constitution Initiative which provided representation in a number of high profile cases, including the tainted milk scandal, and have arrested, though now released, its director. On the other hand, 100 lawyers, many of them party members, have been dispatched to rural areas in order to provide much-needed services. The head of the programme was quoted as saying, somewhat improbably: 'Lawyers are a group with a strong sense of social responsibility. Besides, they have earned enough money, and don't have to worry about giving up one or two year's income'. Clearly, a cultural difference from the rest of the world there.

However, the area of the world with the most coherent expansion of legal services is central and Eastern Europe. In countries like Moldova, Ukraine, Georgia and Bulgaria, legal aid laws are being drafted and money obtained for legal aid. The immediate stimulus is the need to comply with the obligations of the European Convention on Human Rights (ECHR) – in this case, Article 6 ECHR. The long-term reason is the positioning of these states in relation to membership of the European Union which effectively requires compliance with the ECHR. Georgia provides a good example. Although ravaged by the unsatisfactory legacy of its war with Russia, Georgia has established what looks like rather a good criminal legal aid system. Its former head reports:[16]

> *In July this year, the Legal Aid Service (LAS) celebrates its second anniversary. The Service coordinates the legal aid system of the country as an autonomous agency under the Ministry of Corrections and Legal Assistance. It was established in July 2007 upon adoption of the new law on legal aid. According to the law, legal advice on any legal matters is accessible for everyone despite of the social status of the person, while legal representation is provided for indigent persons on criminal cases only. In Georgia, with its population of 4 million, legal aid is provided through a mixed scheme of Legal Aid Delivery – full time, salaried lawyers in 12 Legal Aid Offices throughout the country and about 120 contracted private*

> *lawyers who are paid per case according to complexity of the case. In 2008, legal aid lawyers defended interests of clients on up to 11,000 criminal cases and more then 4,000 legal consultations were rendered. The Service operates through 12 regional offices with up to 120 contracted lawyers and covers almost the whole country.*

In addition, Bulgaria has just increased its legal aid budget by a third and Moldova has also recently passed a new legal aid law.

An issue which lies just under the surface in almost all countries where lawyers act for those accused of heinous crimes is an identification of the lawyer with the client. This tends to be less prevalent in countries where there is a divided legal profession, which operates institutionally to insulate counsel from the client, and those where there is a long tradition of legal aid. However, both India and Germany provide examples of the problem. After the Mumbai terrorist outrage, the photo that went around the world showed Mohammed Ajmal Amir, also known as Kasab, holding a gun. His right to representation caused a storm because the local lawyers in Mumbai refused to act for him. The chief justice and other legal luminaries weighed in to emphasise his constitutional right to representation. He inflamed the situation further by requesting assistance with legal aid from Pakistan. This was particularly embarrassing for Pakistan because, at the time, it was denying that he was its national. A number of Indian lawyers appointed to act for him refused. One, who accepted, was removed by the court after it transpired that she was also acting for one of the victims of the attack and had a conflict of interest. A similar issue arose over the case of Josef Fritzl, the Austrian father who imprisoned and raped his daughter. Fritzl's lawyer, Rudoph Mayer, received death threats. The *Austrian Times* reported Mr Mayer's commendable cool:[17]

> *Lawyers who refuse to defend certain acts contradict my view of professional ethics'. One caller said I should be hung from a lamp post next to Fritzl. Another letter suggested locking me in a cell next to him. But I don't need personal security. If someone wants to kill me, they'll manage anyway. And I can look after myself. I have been a member of a boxing club in Vienna for 30 years.*

It is perhaps worth remembering that, for lawyers, legal aid is not just a source of income: it pitches them at the centre of the criminal justice system, playing an important role for clients, sometimes in difficult circumstances. It is not always clear that politicians in countries that have developed relatively good legal aid schemes over the past decades quite appreciate the importance of their role.

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Notes

1 See further: Roger Smith, 'Old Wine in New Bottles: human rights, legal aid and the new Europe' *JUSTICE Journal*, vol 2, no 2 (2005), pp 57–72.
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3 Ibid.
4 8 September 2009.
5 'Lawyers protest against legal aid crisis', *ABC Melbourne* website, 27 November 2008.
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7 Paths to Justice – What People Do and Think About Going to Law, Hart, 1999.
8 N Berkovic, 'Legal aid funds plummet as demand soars', *The Australian*, 8 May 2009.
9 'Legal-Aid Groups Suffer Due to the Economy', *Philanthropy Today*, December 2008, available on the website of *The Chronicle of Philanthropy.*
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14 SM Okamoto, 'Superior Court opens Self-Help Legal Center in Pasadena Courthouse', *Metropolitan News-Enterprise* website, 12 March 2009.
15 *Jamaica Observer*.
16 Rusudan Tabatadze, *JUSTICE-ILAG Legal Aid Newsletter*, May-June 2009. More info about developments within the Georgian legal aid system can be obtained at www.legalaid.ge
17 'Incest family – Lawyer of Josef Fritzl had death threats – PICTURE', *Austrian Times* website, 3 May 2008.

The media and human rights

Heather Rogers QC

This paper was delivered to the 11th annual JUSTICE/Sweet and Maxwell Human Rights Law Conference on 22 October 2009, and was intended to form the basis for discussion.

The media serve an important function in a democratic society, whether they are acting as 'bloodhound or 'watchdog'. They are the 'eyes and ears' of the public. But freedom of expression is a qualified, not an absolute, right under Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Does domestic law impose too many restrictions upon the media and impede reporting on matters of public interest? Or does it impose too few restrictions upon unwarranted and intrusive reporting? This paper gives some illustrations of how domestic law reconciles the rights to reputation and to respect for privacy on the one hand and the right to freedom of expression on the other. In our discussion, we will consider where the balance should be struck and what reforms might be needed.

Expression and reputation: defamation

An action for defamation is an important restriction upon media freedom. There are three main substantive defences for a media defendant faced with such a claim: justification; *Reynolds* privilege; and fair comment.

Justification – 'substantial truth'

To show that what has been published is substantially true is a complete defence to a defamation claim. There is no requirement that publication be in the public interest or for the public benefit. The fact that the defendant has the burden of proof has been held not to constitute an infringement of Article 10(1) ECHR.

This defence is subject to a number of technicalities. The defendant has to identify the defamatory meanings which are said to be true – there are often arguments as to what the ordinary person would have understood the publication to mean – and about shades of meaning. The defendant must set out the facts on which the defence is based. The court can exercise its powers of 'case management' to keep the issues within reasonable and proportionate bounds. It is all a question of balance: a libel action is not a public inquiry, but a claimant should not obtain vindication on a false basis. See, for example,

McPhilemy v Times Newspapers Ltd[2] and *Carlton Communications plc v News Group Newspapers Ltd*.[3]

The burden on a defendant can be onerous. The technicalities may result in interim appeals to the Court of Appeal. But defendants can – and do – succeed.[4]

Reynolds *privilege – the protection of 'responsible reporting'*

The most significant new defence – devised ten years ago by the House of Lords – is the '*Reynolds* defence'.[5] The courts have differed as to whether this defence is an aspect of conventional common law 'duty/interest' privilege – or whether it is an entirely new jurisprudential creature. What matters is that it provides protection for responsible reporting on matters of public interest. The defence has been reinvigorated by the House of Lords decision in *Jameel v Wall Street Journal Europe Sprl*.[6] The essential elements of the defence can be summarised as follows:

(1) the publication must concern a matter of public interest; and

(2) the steps taken to gather, verify and publish the information must be responsible and fair.

In considering whether the subject-matter of the article is a matter of public interest – that is, a matter of public concern or something of 'real' (legitimate) public interest – the court will look at the publication as a whole. It will also consider whether the defamatory statement(s) included in it contributed to the public interest being served. A media defendant cannot 'drag in damaging allegations which serve no public purpose'; but the court should allow for 'editorial judgement' about which details it is appropriate to include.[7]

As to what steps the journalist is required to take, this will depend all the circumstances of the case. In *Reynolds*, Lord Nicholls listed, by way of illustration, ten factors which the court might take into account:

(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(2) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(4) The steps taken to verify the information.

(5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.

(6) The urgency of the matter. News is often a perishable commodity.

(7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(10) The circumstances of the publication, including the timing.

The House of Lords emphasised in *Jameel* that this useful checklist should not be treated as a series of 'hurdles', at any of which the defendant might fail.

This defence is intended to provide proper protection for responsible journalism. The courts have emphasised that it should be applied in a practical and workable manner.[8] Does this provide sufficient protection to the media? Strasbourg jurisprudence emphasises that the exercise of the right to freedom of expression carries with it 'duties and responsibilities', and the safeguard offered by Article 10(1) ECHR is subject to the proviso that journalists act in good faith, in order to provide accurate and reliable information in accordance with the ethics of journalism.[9]

Ordinarily, journalists are under an obligation to take reasonable steps to verify factual statements before publication. But there may be cases – sometimes referred to as 'neutral reportage' – where this duty is modified. There may, for example, be a public interest in reporting the fact that an allegation has been made (such as allegations and counter-allegations in a political dispute). The media may not know or be able to prove which side is right.[10] To constitute 'reportage', the report must be a fair and disinterested one. If the allegation is

'adopted' by the journalist, the defence is likely to fail.[11] A similar approach can be seen in Strasbourg cases.[12]

The *Reynolds* defence adjusted the balance between the protection of reputation and freedom of expression. It may deprive a claimant of a remedy, even where a false and defamatory allegation has been widely published. The court will look carefully at all the facts and circumstances, while recognising that it – unlike the editor – has the benefit of hindsight. The decision of Tugendhat J after trial of *Flood v Times Newspapers Limited* has now given an indication of how this defence is working in practice.[13]

Fair – or honest - comment

The importance of the right to comment has been emphasised in many cases. However, this defence is hedged about with technicalities. To qualify for the defence, what is published must be recognisable as comment – but the borderline between 'fact' and 'comment' is difficult to draw. The comment must be based upon facts. Where there is no sufficient factual basis for the comment (or value judgment), the defence will fail.[14]

Striking the balance: is the right to reputation a Convention right?

Article 10(2) ECHR recognises that the protection of reputation is one of the legitimate aims which may justify a restriction upon freedom of expression. While reputation is not expressly protected as a Convention right,[15] it has been treated as being an essential aspect of Article 8 ECHR in some Strasbourg decisions.[16] However, in April 2009, the European Court of Human Rights (ECtHR) took a different approach in its decision in *Karako v Hungary*.[17] Developments – both in Strasbourg and domestic cases – are awaited with interest.

Some practical issues

One big question about defamation proceedings remains their costs, particularly with the additional costs where cases are brought under conditional fee agreement, where an unsuccessful defendant may end up having to pay a 'success fee' and the costs of after-the-event insurance. In December 2008, an Oxford University study compared costs in defamation actions across Europe. Costs in England and Wales were 140 times the average of costs in the other jurisdictions surveyed.[18] Earlier this year, the Ministry of Justice consulted on 'controlling costs in defamation proceedings'.[19] Following that consultation, a trial scheme has been introduced with a view to reducing costs, which will run for a year from October 2009.

The 'offer to make amends' procedure, introduced by sections 2-4 of the Defamation Act 1996, was intended to offer a quicker and cheaper way to resolve defamation claims where the defendant was willing to offer an apology.

While this has not turned out to be a 'cheap and cheerful' route – the costs can be considerable – the courts have shown a determination to make it work.[20]

Of course, there remains a right to jury trial in defamation cases (subject to the limitations in section 69 of the Supreme Court Act 1981). There has been an increasing trend towards trial by judge alone, which facilitates case management and makes the court process quicker and cheaper. But would the removal of the right to jury trial be too high a price to pay?

Defamation and the internet

The domestic law of libel has had to take into account modern means of communication, dealing with (amongst other challenges) the liability of internet service providers and internet search engines.[21] The Ministry of Justice has recently announced a new consultation on what it calls the 'multiple publication rule' – that there is a separate cause of action for each 'publication' (including each time material is downloaded from the internet).[22] This consultation closes in mid-December 2009. This rule undoubtedly creates problems for those who publish on the internet, including newspapers whose archive is accessible online.

The American approach

Domestic defamation law in England and Wales departs from the relevant principles in the USA in significant ways, not least, the absence of a 'public figure' doctrine. There have been complaints of 'libel tourism' and certain US states have now adopted legislation that provides that English libel judgments will not be enforced. Does this mean that our law fails to provide sufficient protection for freedom of expression? Or might it be that there is insufficient protection of the right to reputation in the USA?

Expression and privacy: misuse of private information

English law has developed significantly, particularly since the Human Rights Act 1998 (HRA) came into force on 2 October 2000, so as to provide greater protection for privacy. The ongoing developments are in accordance with the principle of, and approach under, Article 8 ECHR. The principal decisions of interest in this jurisdiction are: *Naomi Campbell v MGN Limited;*[23] *Douglas v Hello! Ltd (No 3);*[24] *McKennitt v Ash;*[25] *HRH Prince of Wales v Associated Newspapers;*[25A] *Browne v Associated Newspapers;*[26] and *Murray v Express Newspapers*.[27]

The *Naomi Campbell* case acknowledged a new cause of action for 'misuse of private information'. This developed the established cause of action for breach of confidence. The essential elements of the claim are, as described by the Court of Appeal in *McKennitt*:[28]

> *First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10? The latter inquiry is commonly referred to as the balancing exercise.*

The first question depends upon whether there is a 'reasonable expectation of privacy' in respect of the information in question. In *Murray*, the Court of Appeal said that this was a 'broad' question:[29]

> *… which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.*

The *Murray* decision took into account the Strasbourg decision in *Von Hannover v Germany*[30] (the *Naomi Campbell* case was decided before *Von Hannover*). That decision emphasised that there could be a reasonable expectation of privacy in a public place; that even 'public figures' had a right to privacy; and referred to the right to 'control the use of one's image'. *Von Hannover* envisages greater protection for private rights than had previously been recognised in this jurisdiction, in particular in relation to photographs taken in the street.

The second question – the balancing test – applies where both Articles 8 and 10 are at stake. Lord Steyn emphasised in *Re S (A Child)* that:[31]

> *First, neither article has **as such** precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*

The court's 'intense focus' will consider all the facts of the case, looking at each item of information (including photographs) separately and also by reference to the overall context. How this works in practice is demonstrated by *McKennitt* (book about a Canadian folk singer by a former associate and friend) and *Browne* (information provided to a national newspaper by a former sexual partner). The

court found it easy to dismiss the claimed public interest in *HRH Prince of Wales* (newspaper publication of his private travel journals).[32]

The balance is being worked out. But there are concerns:

- Does the law protect trivial private information? Should it do so?

- How far will protection of privacy rights impede reporting of matters of 'public interest'? For example, would the exemption from disclosure of personal data, under section 40 of the Freedom of Information Act 2000, have resulted in the concealment of matters of public interest in connection with MPs' expenses?[33]

The court determines what disclosure is – and is not – in the public interest. The belief of the journalist (even if reasonable) does not decide the matter.[34] In *Mosley v News Group Newspapers*,[35] the judge thought that there might have been a public interest, had there been a 'Nazi theme' to the sexual activity or if it had included mocking of Holocaust victims. Did he draw the line in the right place? What if Mr Mosley had been a candidate for election? Would the public – potential voters – be entitled to know about his 'unconventional' sexual activity? When does the personal become political?

Prior restraint

One major concern about increasing privacy rights is whether, as a result, there will be more interim injunctions to prevent publication and an unwarranted 'chill' upon freedom of expression. 12 HRA provides that an injunction should be granted only if the applicant establishes that it would be 'likely' to win at trial. The court will take into account the importance of the Convention right to freedom of expression.[36] The public interest may be difficult to assess at the interim stage. The uncertainty of success – and the costs of failure – may inhibit publishers from challenging an attempt to restrain publication. Even if successful, a media defendant may be subject to restriction for a considerable period of time.[37]

There is also a real uncertainty about when information will be considered to be in the 'public domain', at least to a sufficient extent to defeat an application for an injunction. 'Private' information – in particular, photographs – may be protected by the courts even after publication in the national (or international) media or on the internet.[38] Mr Mosley is applying to Strasbourg, to establish a requirement that the media give notice before publication of private information. An award of damages after publication is, it is claimed, too little and too late. But would this go too far to protect privacy?

Reporting the courts

It is important that the media should be able to report court proceedings. New guidelines have recently been issued for the family courts (both in terms of allowing access to family proceedings and in what may be reported) and for the criminal courts (as to when reporting restrictions may be imposed).[39] There is growing concern about reporting of civil proceedings, with the use of the court's power to sit in private under rule 39.2 of the Civil Procedure Rules and to make reporting restrictions orders. The Court of Appeal acknowledged in *Browne*[40] that anonymity was a course to be avoided, unless required by justice. Media organisations challenged the decision to grant anonymity to the applicants in the first case to be heard in the Supreme Court, with the result that one applicant has been named, with a ruling reserved on the rest. It is to be hoped that the new court will soundly endorse the principles of open justice.[40A] The question of 'superinjunctions' – orders which prevent the reporting of all information relating to the proceedings, including even the fact that an injunction has been granted – has recently attracted a good deal of attention in the media and in Parliament.

Parliamentary interest: the DCMS Select Committee inquiry

This year, the Parliamentary Select Committee on Culture, Media and Sport has been inquiring into 'Press Standards, Privacy and Libel'. The evidence submitted to the committee illustrates some of the issues of current concern.[41] Its report is awaited with interest.

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Notes

1 *McVicar v United Kingdom* (2002) 35 EHRR 22; *Steel v United Kingdom* [2005] EMLR 314.
2 [1999] 3 All ER 775 (CA).
3 [2002] EMLR 16 (CA).
4 For recent examples, see *Desmond v Bower* [2009] EWCA Civ 667 and [2009] EWCA Civ 857; *Henry v BBC* [2006] EWHC 386 (QB).
5 *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 (HL).
6 [2007] 1 AC 359 (HL).
7 *Jameel*, n5 above, Lord Hoffmann at paras 51, 61 and 77; and see Lord Hope at paras 112–113.
8 Cf *Bonnick v Morris* [2003] 1 AC 300 PC; *Harper v Seaga* [2009] 1 AC 1 (PC).
9 See, for example, *Cumpana v Romania* (App No 33348/96, judgment of Grand Chamber of 17 Dec 2004) at para 102, and *Lindon v France* (2008) 46 EHRR 35 at para 67.
10 Eg *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 215 (CA); *Roberts v Gable* [2008] QB 502 (CA).
11 Eg *Charman v Orion* [2008] 1 All ER 750 (CA); *Galloway v Telegraph* [2006] EMLR 11 (CA).
12 Eg *Jersild v Denmark* (1994) 19 EHRR 1; *Thoma v Luxembourg* (2003) EHRR 21.
13 [2009] EWHC 2375 (QB).

14 Cf *Nilsen & Johnsen v Norway* (2000) 30 EHRR 878; *Lowe v Associated Newspapers* [2007] QB 580; *Cheng v Paul* [2001] EMLR 1.
15 In the ECHR. But compare the Universal Declaration of Human Rights, which expressly protects reputation (Article 12).
16 Cf *Cumpana v Romania* (2004) 41 EHRR 200; *Lindon v France* (2008) 46 EHRR 35; *Pfeifer v Austria* (2009) 48 EHRR 8.
17 ECtHR, 28 April 2009.
18 Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, University of Oxford, *A Comparative Study of Defamation Proceedings Across Europe,* University of Oxford, Dec 2008, available from the Programme in Comparative Media Law and Policy (PCMLP) website.
19 Ministry of Justice, *Controlling Costs in Defamation Proceedings*, CP4/09, 24 Feb 2009. The response to consultation has now also been published: Ministry of Justice, *Controlling Costs in Defamation Proceedings – response to consultation*, CP4/09, 24 September 2009. Costs are also being considered by Lord Justice Jackson, as part of his Review of Civil Litigation Costs.
20 *Tesco Stores v Guardian Newspapers Ltd* [2009] EMLR 90 (Eady J); *Warren v The Random House Group* [2009] 2 WLR 314 (CA).
21 See s1 Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013). For how the courts have dealt with these challenges so far, see *Bunt v Tilley* [2007] 1 WLR 1243 (Eady J); *Metropolitan International Schools Ltd v Designtechnica* [2009] EWHC 1765 (Eady J).
22 Ministry of Justice, *Defamation and the internet: the multiple publication rule*, CP20/09, 16 September 2009.
23 [2004] 2 AC 457 (HL).
24 [2006] QB 125 (CA). The appeal in the House of Lords, reported at [2008] 1 AC 1, concerned the commercial litigation between rival magazines and the elements of the tort of interference with contractual relations; there was no appeal in relation to the claim by Michael Douglas/Catherine Zeta Jones (the case concerned publication of unauthorised photographs of their wedding).
25 [2008] QB 73 (CA).
25A [2008] Ch 57 (CA).
26 [2008] QB 103 (CA).
27 [2008] 3 WLR 1360 (CA).
28 At para 11.
29 At para 36.
30 (2005) 40 EHRR 1.
31 [2005] 1 AC 593 (HL), at para 17.
32 [2008] Ch 57 (CA).
33 See, for example, the website of the Campaign for Freedom of Information (www.cfoi.org.uk).
34 *Mosley v News Group Newspapers Ltd* [2008] EMLR 679. Compare the test for the journalism exemption under the Data Protection Act 1988, section 32; and see the new defence to the criminal offence under section 55 of that Act (both depend on the 'reasonable belief' of the journalist.
35 *Mosley*, n34 above.
36 But that right can be qualified, where necessary and proportionate, for the protection of the rights of others. So, it has been said, the court will also have particular regard to Art 8 privacy rights.
37 See eg *Cream Holdings v Bannerjee* [2005] 1 AC 253 (HL); *Napier & Irwin Mitchell v Pressdram Limited* [2009] EWCA Civ 443, [2009] EMLR 21.
38 See eg *Mosley v News Group Newspapers* [2008] EWHC 687 (QB); *Barclays Bank v Guardian News & Media* [2009] EWHC 591 (QB).
39 Note that, in Strasbourg, publication of a photograph of a convicted defendant leaving court was an infringement of Article 8: *Egeland v Norway* [2009] ECHR 622 (16 April 2009). Should this lead to changes in media practice in England and Wales?
40 At para 3.
40A *A (and others) v HM Treasury* (judgment pending).
41 Available from the Committee's pages on the Houses of Parliament website.

Mutual legal assistance vs mutual recognition?

Jodie Blackstock

The Tampere European Council meeting in 1999 set down the cornerstone of future development in the European Union (EU) as mutual recognition. This stemmed largely from the fact that the UK did not want to see laws in the area of police and judicial co-operation harmonised. The government was not comfortable, given the Eurosceptic disposition of the British, with engaging in EU-wide legislative provision for the investigation and prosecution of offences. The compromise was mutual recognition of the process carried out in other EU countries, based on the premise that the Union had a close and trusting relationship. Scrutiny of applications for assistance in cases was therefore no longer required to the same degree. Traditional barriers to applications were to be removed and judicial authorities were to co-operate as much as possible in the investigation and prosecution of cross-border crime. This article poses the following questions: where does this leave the Council of Europe treaties in this area? Why is a further legislative system necessary between the EU member states?

Introduction

In the last 50 years, international travel and global trade has increased exponentially. Prior to that global movement, there was little need for co-operation between countries in the prosecution of crime. It is now commonplace for British people to holiday in another EU member state, where there is no visa requirement, just a simple display of a passport on entry. Indeed, for the 13 contracting parties to the Convention Implementing the Schengen Agreement 1990 (the Schengen Convention), no border checks take place at all. Transactions increasingly take place instantaneously through the medium of the internet. It is possible to seek out any item anywhere in the world, purchase and expect delivery within a week. With the freer movement of people and goods, however, came an increase in cross-border crime and easy escape for perpetrators of crime.

It remains far easier for the perpetrators of crime to take advantage of the ease in global travel than investigators. Whilst informal arrangements between police authorities have always been commonplace, the admission of evidence obtained during an investigation in court is more complex, as is the detention of the suspect. Article 41 of the Schengen Convention affords a limited power of hot pursuit to officers across a border. But there are numerous difficulties where evidence and witnesses are in one member state and the prosecution is in another.

International instruments have attempted to grapple with international criminal enterprise for many years. As long ago as 1856, the Foreign Tribunals Evidence Act provided for the taking of evidence in England to assist foreign tribunals. 1870 saw the Extradition Act, which laid down a framework in which agreement to the surrender of a national for both civil and criminal proceedings could be considered. Radical overhaul of extradition proceedings was seen with the Extradition Act 2003, which in large part provided for the use of the European Arrest Warrant.

The development of procedural criminal law in the EU owes much to the extensive effort of the Council of Europe (CoE) in this area. After all, the 27 member states of the EU comprise half of the CoE. The conclusions of the EU Justice and Home Affairs (JHA) Council meeting in February 2009 indeed made this observation:

> *ACKNOWLEDGING that in some cases it may be necessary to provide for more specific and detailed rules between the Member States of the European Union. Such deeper integration does not detract from the important nature of the Conventions of the Council of Europe;*
>
> *STRESSING that the Council of Europe Conventions play an essential role in the co-operation between EU Member States and third states;*
>
> 1. *Reiterates its respect for the legislative activities of the Council of Europe in the area of criminal justice;*
>
> 2. *Reaffirms its intention to continue the close co-operation between the European Union and the Council of Europe in this area;*
>
> 3. *Calls upon Member States to sign, ratify and implement the Conventions of the Council of Europe in the area of international co-operation in criminal matters and on approximation of criminal legislation when appropriate, in particular when the provisions of these conventions are integrated in the acquis of the EU.*

Developments at the European level

In 1953, the Council of Ministers of the CoE convened a committee of governmental experts to consider the need for a convention on extradition. The committee reported that there was further need for a convention on mutual assistance in criminal proceedings. To this end, in 1957 the European Convention on Extradition was finalised and in 1959 the European Convention on Mutual Assistance in Criminal Matters followed with eight initial signatories.

Since then, a number of CoE conventions have been agreed to enable closer co-operation to take place, for example:

- European Convention on Extradition, Paris, 13 December 1957;
- European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, European Treaty Series No. 30;
- European Convention on the International Validity of Criminal Judgments, The Hague, 28 May 1970;
- European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972;
- Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983.

Of these, the extradition, mutual assistance and transfer of sentenced persons conventions have been ratified by all CoE member states, though the actual entry into force across the member states spanned decades. The international validity and transfer of proceedings instruments have only been ratified by approximately half of the CoE member states.

The UK did not ratify the mutual assistance instrument until the enactment of the Criminal Justice (International Co-operation) Act 1990. When introducing the Bill before Parliament, the Minister of State at the Home Office addressed the need to enhance international co-operation, which until then had been possible only to a limited extent under the Evidence (Proceedings in Other Jurisdictions) Act 1975, the successor to the Foreign Tribunals Evidence Act:[2]

> *Our ability to give assistance to other countries has … meant that our prosecuting authorities have encountered serious difficulties in obtaining from overseas evidence which was crucial to cases which were being investigated in this country. Part 1 of the Bill will put this right. It fills the gaps which at present exist in our legislation and it will enable us to seek – and to provide – the full range of assistance which is often needed.*

By the 1990s the EU, which comprises 27 of the 47 CoE member states, identified the need for closer co-operation in the field of police and judicial co-operation. An exceptional meeting of the heads of state comprising the European Council of the EU met in Tampere in 1999 under the Finnish presidency of the EU, in order to consider the issue of justice and home affairs. Prior to this meeting, Jack Straw, the then Home Secretary, spoke at a conference in Avignon on judicial

co-operation,[3] at which he identified four obstacles to progress in this area: the use by law enforcement agencies of nineteenth-century mechanisms to fight 21st-century crime; the administrative burden of making these mechanisms work; the disparity in criminal law between countries; and jurisdiction. He observed that the European Conventions on Money Laundering and Asset Confiscation, Transfer of Prisoners and Driving Disqualification were examples of how mutual recognition worked as a mechanism to enhance co-operation:

> *What we now need to consider, I suggest, is the possibility of applying this same principle of mutual recognition to the earlier stages in criminal procedure … mutual recognition of all court decisions is unlikely to be achievable straight away, but we should aim to develop a new work programme heading in that direction.*
>
> *… There will certainly be difficulties along the way. Issues of sovereignty and constitutional principles, reflecting long traditions in each of our countries, are at stake and I suspect that, in each of our countries, the public may not yet be ready to accept the direct application of decisions by courts in other Member States, particularly where the decision affects our own nationals. There is undoubtedly a need for much greater public understanding than exists at present of the judicial procedures in other EU countries. There would need to be confidence about such matters as how police treat suspects, different sentencing patterns and adequate standards of interpretation for foreign defendants.*
>
> *There is also the fact that controls and criteria for the exercise of coercive powers differ. Some approximation of minimum standards may be needed before we could seek public acceptance of the direct enforcement of such powers.*
>
> *In short, mutual recognition is by no means an easy option; but it is one which I believe deserves very serious consideration as being a method of proceeding incrementally rather than trying to force major changes in all our countries at one time. I would see this being taken forward under a long term coherent programme which would be designed to achieve full mutual recognition for judicial cooperation over a period of years – and I will not attempt at this stage to specify how many. I would hope, however, that agreement might be reached soon on a timetable of priorities.*

Following the Tampere meeting, the Council Act of 29 May 2000 (2000/C 197/01) establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union[4] (the EU Convention) was presented

for signature. The aim was cemented in the Hague Programme for 2004-2009, which was fleshed out in an Action Plan.[5]

Council of Europe Convention on Mutual Assistance in Criminal Matters

At the time when the CoE Convention on Mutual Assistance in Criminal Matters (the Convention) was agreed, no multilateral convention on this subject had previously been drawn up. It followed the CoE Convention on Extradition, and aimed to cover aspects of cases even where extradition was refused. In particular, it would cover minor offences without the need for dual criminality in both countries.[6] The Convention is in force in all CoE member states.

Article 1 provides that the contracting parties shall afford the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting party, though assistance can be refused where the requested party considers the matter to be a political or fiscal offence or execution of the request to be likely to prejudice the 'sovereignty, security, ordre public or other essential interests of its country.'[7]

Chapter II deals with letters rogatory. Article 3 requires the execution of letters rogatory from the judicial authority of the requesting party, in the manner provided for by national law, for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents. If evidence is required on oath, the requested party is to comply so far as national law does not prohibit it. Where assistance requires the search or seizure of property, Article 5 allows contracting parties upon ratification to subject the offence to a dual criminality check, and to require the offence to be extraditable in the requested country under national law and that the letters rogatory be consistent with the law of the requested party. Conditions for the use of the material in the requested country and for its return are provided for in Article 6.

Chapter III provides for service of writs and judicial verdicts for the appearance of witnesses, experts and prosecuted persons. Article 7 requires service of such documents. Article 8 confirms that a witness or expert duly served who fails to appear shall not be subject to punishment or restraint, unless they subsequently enter the requesting territory and are again summonsed to appear. Article 9 confirms that the costs of attendance shall be borne by the requesting state.

Article 11 provides for the transfer of a person in custody, to be returned within the period stipulated by the requested party. They may refuse if the person does not consent, if his presence is necessary for the purpose of criminal proceedings

in the requested country, if such transfer would prolong his detention, or if there are other over-riding grounds. Article 12 ensures speciality: the person is not to be detained or prosecuted for acts anterior to their departure from the requested country. This immunity ceases if the person has not left the requesting country fifteen days subsequent to their appearance, or having left, then returns.

In Chapter IV, Article 13 requires parties to communicate judicial records requested by a judicial authority in the requesting country to the same extent as they would be communicated in the requested country. Chapter V provides for procedure. Article 14 confirms that a request should state:

a) the authority making the request,

b) the object of and the reason for the request,

c) where possible, the identity and the nationality of the person concerned, and

d) where necessary, the name and address of the person to be served.

Letters rogatory should also state the offence and a summary of the facts and shall be communicated between the ministries of justice, unless cases of urgency require them to be forwarded by judicial authority to judicial authority. Direct transmission is possible where investigation prior to prosecution is taking place, and Interpol may be utilised for this purpose. The Convention is without prejudice to bilateral agreements. Article 16 confirms that translation is not required, though parties could stipulate this upon ratification. Article 17 confirms that authentification of documents is not required. Article 19 requires that reasons be given for any refusal.

An information laid in one country for proceedings in another shall be transmitted through the ministries of justice (article 21). Article 22 requires each contracting party to inform each of the other contracting parties of criminal convictions and subsequent measures imposed upon the latter's nationals at least once a year.

In Chapter VIII (final provisions), Article 23 allows a contracting party to make a reservation to any provision. However, it also specifies that the party cannot benefit from assistance in relation to that provision from another party unless it lifts that reservation. Article 24 allows the parties to declare what each considers to be a judicial authority. Article 29 allows any party to denounce the Convention, taking effect six months after notification to the Secretary General of the CoE.

The instrument was therefore wide ranging and ambitious. As indicated above, however, its use was not immediately taken up by the contracting parties. For the UK, it was not until the Second Protocol to the Convention came into force, which as will be seen below by and large adopts the EU Convention on Mutual Assistance in Criminal Matters, that the Convention also came into force.

The CoE organised a meeting in June 1970 for the persons responsible at national level for the implementation of the Convention. The participants in this meeting examined the problems arising in connection with the implementation of the Convention and adopted a number of conclusions including, inter alia, certain proposals aimed at facilitating the application of the Convention in the future. A sub-committee to the European Committee on Crime Problems was convened, and experts from all the contracting parties met over the next few years, culminating in an Additional Protocol to the Convention.[8] The Additional Protocol removed the option to refuse assistance in relation to fiscal offences. It also extended the application of the Convention to the enforcement of penalties, by requiring service of documents concerning the enforcement of sentences, recovery of fines, or payment of costs of proceedings and 'certain measures' relating to the enforcement of sentences. The third area it expanded upon was notification of criminal convictions. Where information has been communicated, upon request the convicting country is to communicate a copy of the conviction and subsequent measure with any other relevant information, for the purposes of ascertaining whether the country of nationality need take any action (ie revocation of a driving license).

A further committee of experts[9] drew up a Second Additional Protocol[10] (the Protocol) which was opened for signature on 8 November 2001. This made extensive changes to the Convention, the explanation for which is set out in the Explanatory Report:[11]

> 7. *That purpose is achieved by way of modernising the existing provisions governing mutual assistance, extending the range of circumstances in which mutual assistance may be requested, facilitating assistance and making it quicker and more flexible.*
>
> 8. *It takes due account of political and social developments in Europe and technological changes worldwide.*
>
> 9. *Thus, in many provisions it follows very closely, often literally, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the member States of the European Union (henceforth EU), while in other provisions it follows the Convention of 14 June 1990 (henceforth Schengen) implementing the Schengen*

> *Agreement of 14 June 1985. It also follows, as indicated, the draft European Comprehensive Convention on International Co-operation in Criminal Matters (henceforth Comprehensive).*

Article 1 of the Convention was amended to include the adverb 'promptly', introducing a requirement of 'swiftness'. Its remit was extended to administrative criminal law and to legal persons. Article 11 was amended to require the attendance of a person in custody for 'evidentiary' purposes to avoid what had been perceived to be conflicting and confusing uses of the term 'witness'. Article 15 of the Protocol established that requests shall, as a general rule, be in writing, but can be transmitted electronically and through telecommunications; that they shall in general be channelled via the ministries of justice, but may be forwarded from judicial or administrative authority as required; and that Interpol is to be used only in urgent cases. Costs under Article 20 are no longer to be sought, underlining 'the importance of keeping mutual assistance disconnected from costs, the general rule being that of gratuity'[12] unless they are substantial or extraordinary. The costs of video link or telephone link and witness expenses may be sought unless there is an agreement otherwise. Article 24 now obligates, rather than as previously suggesting, declarations of each party's definition of judicial authority, and allows for amendment.

Chapter II of the Protocol introduces new obligations. Article 7 allows for refusal or postponement where action would prejudice domestic proceedings. The party must consider whether partial action can be taken, with a requirement to give reasons for any decision. Article 8 requires the requested party to follow the procedure stated by the requesting party as necessary, even where this does not accord with national law:[13]

> *Presently, the need is recognised by all to open new frontiers to judicial co-operation. The first such new frontier consists in coming back to basics and executing what is requested, as opposed to executing equivalent actions. What is requested is often no more than what is legally required in the requesting Party for evidentiary purposes. Equivalent action executed instead of what is requested often is not admissible in the requesting Party for evidentiary purposes.*

This article is qualified by requiring compliance to the extent that the action sought is not contrary to fundamental principles of the requested party's legal system.

Article 9 of the Protocol almost entirely reproduces Article 10 of the EU Convention, in relation to video conferences. It affords for evidence to be given by video link where it is not desirable or possible for the witness to attend the

hearing, so far as this is not contrary to fundamental principles of law and there exists the technical means to do so. It also allows parties to extend the facility to the appearance of the accused/suspect. Article 10 then reproduces the EU Convention in relation to telephone conferences, where the witness agrees and the procedure is not contrary to fundamental principles of the requested country's law.

Article 11 affords the option of spontaneous communication of information where the sending party thinks the receiving party may benefit from that information in an investigation they know that party to be conducting. Article 12 affords a request to receive articles obtained through criminal means to be returned to their rightful owners through the assistance of the requested party. Article 13 affords temporary transfer of a person who is already in custody for the purposes of investigation, with provision for their consent where this is required. Article 14 allows for personal appearance when a person has been transferred to serve their sentence in another member state, in circumstances where review of the judgment is required in the other member state.

Article 15 confirms that procedural documents and judicial decisions should still be issued in the language of the issuing state, but shall now be accompanied by a short summary translated into the language of the requested party. Article 16 extends service by post of any procedural documents and judicial decisions to any person in the territory of another party (Article 15 applying with respect to translation). Article 17 extends the existing right to cross-border hot pursuit, to cross-border observations, and where agreement has been reached with the other party, with agreed conditions, and where urgency requires, pursuit without permission. This may only be for the types of offences specified.

Whilst the Convention is now in force across all CoE member states, the Second Additional Protocol has been ratified by only 18 contracting parties.[14] Only a few EU member states have ratified the Protocol. The most logical explanation for this is that the extensive obligations under the EU Convention negate this requirement, since the obligations would then be duplicated. In relation to the UK, which is one such non-ratifying party, the Crime (International Co-operation) Act 2003[15] incorporates the requirements of both instruments into domestic law through the adoption of the EU Convention.

European Union Convention on Mutual Assistance

On 29 May 2000 the EU Convention was established by the Council of the European Union and signed by all member states.[16] Norway and Iceland informed the Council on the same day that they were in agreement with the content of the provisions of the EU Convention applicable to them, and in due time would take the necessary measures to implement those provisions (as a

result of their accession to the Schengen aquis). This was the first instrument attempting to assist with judicial co-operation following the Treaty on European Union[17] (TEU) and the Tampere Presidency Conclusions.

The Explanatory Memorandum to the EU Convention[18] explains that the EU Convention was intended to improve judicial co-operation by developing and modernising existing provision in this area:

> *In fact, the Council felt that mutual assistance between the Member States already lay on solid foundations, which had largely demonstrated their effectiveness, i.e. the European Convention on Mutual Assistance in Criminal Matters and its 1978 Protocol, on the one hand, and the Convention of 14 June 1990 implementing the Schengen Agreement of 14 June 1985, on the other hand, without overlooking the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, which contains certain precedents in the field of mutual assistance, as well as some provisions and special arrangements between certain Member States.*

Article 1 of the EU Convention states that its primary aim is to supplement and facilitate the application of the international agreements and lists those instruments. Importantly, the EU Convention cannot be used alone, but rather links into the other instruments identified, thereby preserving rather than replacing them. However, where provisions conflict, it is the EU Convention that prevails (though it shall not affect more favourable agreements and instruments). Its intention is to extend the range of circumstances in which assistance can be requested and improve techniques to enhance efficiency. It identifies new areas for action as a result of the developments in technology and the political and social environment (as already set out in the Second Additional Protocol to the Convention, above).

As the Explanatory Memorandum to the EU Convention points out, these changes to and identified inadequacies in the current framework for assistance were largely due to the development of the Schengen area with the removal of barriers between the contracting states, and the development of the internal market. Police and judicial authorities needed suitable rules to combat international crime, which was fully exploiting the potential of this new freedom of movement, and the characteristics of which had changed significantly as a result. Of critical distinction between the Council of Europe instruments and EU activity is Article 35 TEU which confers upon the European Court of Justice the jurisdiction to interpret the EU Convention.

Article 3 of the EU Convention extends requests for assistance to administrative proceedings which relate to offences punishable under the national law of the requesting or the requested EU member state, or both, as infringements of legal rules where the decision may result in proceedings before a court having jurisdiction in criminal matters. The provision includes legal as well as individual persons. Article 4 requires assistance to be afforded in accordance with the formalities and procedures of the requesting member state so far as possible. This contrasts with the position under the Convention, where the procedures of the requested member state apply. The purpose of the EU Convention position is to ensure that the information received can be relied upon as evidence in the proceedings before the requesting state. A refusal can only be given where the process indicated would be contrary to fundamental principles of law.

Article 5 amends the rules concerning sending and service of procedural documents. These are now to be sent by post in the first instance. The exceptions are where this is not possible or appropriate; however, any request for assistance from the competent authority is to be accompanied by as much information as possible to assist in locating the person concerned. Where there is reason to suspect that the person may not understand the language of the requesting state, Article 5 obliges the most important parts to be translated, not only for the benefit of the addressee, but also to promote the effectiveness of the service. The document is to be accompanied by a 'report' explaining how the person affected can obtain information about their rights and obligations, translated where necessary.

Article 6 amends the general rule for requests for assistance to that of communication between judicial authorities directly, whereas previously, under the Convention, it was through ministries of justice. These requests can be made through electronic means, speeding up the process of the request. Equally, the Explanatory Memorandum suggests that the Article allows for oral requests where there is an urgent need for assistance, which can then be followed up later in writing. Article 7 provides for the exchange of information relating to criminal offences where one member state considers that this may be of use to an investigation in another member state, rather than a request for assistance. This must be carried out in accordance with the national law of the providing state and places mandatory obligations upon how the information is used in the other state.

Article 8 provides for articles obtained by criminal means to be returned to their rightful owners, subject to the bona fide rights of third parties. It does not intend to effect change to national laws relating to confiscation.[19] Article 9 allows member states who have a person in their custody but require his or her transfer to another member state for the purposes of investigation, to request a

temporary transfer to that other member state and for the person to be held in custody there for a specified period prior to return. Article 10 states that where it is not desirable or possible for a witness or expert to be heard in person, a video link can be used, so long as this does not interfere with a fundamental principle of law in the requested state. It sets down the rules by which this process may take place. Article 11 provides a similar arrangement for telephone conferences.

Article 12 provides that each member state is obliged to adopt means to ensure that, where it is requested to do so by another member state, it can permit a controlled delivery of illicit items (such as recreational drugs) to take place on its territory in the framework of a criminal investigation into an extraditable offence. The responsibility for such operation lies with the requested member state. Article 13 lays down the framework within which joint investigation teams can take place, in accordance with Article 30 TEU. Article 14 deals with covert operations and requesting permission for an undercover agent to operate in another member state. Articles 15 and 16 ensure that the officials who are involved in the cross-border operations in Articles 12 and 13 hold criminal and civil liability as if they were domestic officials.

Title III of the EU Convention deals with interception of telecommunications. As the Explanatory Memorandum explains, this is the first instrument which attempts to lay down specific rules on co-operation in this area:

> *In the last decade telecommunications technology has undergone considerable development, particularly in the field of mobile telecommunications. These are very widely used by offenders in the context of their criminal activities. The absence of specific international agreements has made cooperation contingent on the goodwill of the individual Member States, whose practices are scarcely homogenous, which makes the work of practitioners more difficult.*

The section is not technically mutual assistance in the traditional sense, since it is more 'permission' than 'assistance' that is required. Once permission to intercept is received, remote access can be obtained by the requesting member state without any effort on the part of the member state where the information is being intercepted.

Article 23, for the first time in a convention on mutual assistance in criminal matters, considers data protection and provides that data exchanged in accordance with the Convention can be used only for:

a) the purpose of proceedings to which the EU Convention applies;

b) other judicial and administrative proceedings directly related to proceedings referred to under point (a);

c) preventing an immediate and serious threat to public security;

d) any other purpose, only with the prior consent of the communicating member state, unless the member state concerned has obtained the consent of the data subject.

Article 24 requires the member states upon signature to state which authorities are competent for the extended reach of the EU Convention.

The similarities between the Second Additional Protocol to the Convention and the EU Convention can therefore be seen. In large part, the instruments now replicate each other.

Legislative activity in the EU

Despite the extensive requirements under the EU Convention, activity has progressed in the area of justice and home affairs in the European Union at a remarkable rate. Council framework decisions, which pursuant to Article 34(2)(b) TEU are binding as to the result to be achieved and must be transposed into domestic law, have increasingly been adopted to provide more structured development to the practicalities of mutual assistance. There are now 10 instruments in force grappling with the idea of mutual recognition:

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[20] – implemented;

2. Council Framework Decision (2001/C 75/02) on the execution in the European Union of orders freezing assets or evidence[21] - implemented;

3. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties[22] - implemented;

4. Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record[23] - implemented;

5. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[24] - implemented;

6. Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings[25] – transposition into domestic law by 2010;

7. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union[26] – transposition by 2010;

8. Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[27] – transposition by 2010;

9. Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[28] – transposition by 2011;

10. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[29] – transposition by 2011.

However of all these instruments, it is, in reality, only the European Arrest Warrant that has been a success. Of the other instruments, the majority are not in force at all, or only partially in most member states.[30] Proposals for framework decisions on conflicts of jurisdiction, transfer of proceedings, a European supervision order and procedural safeguards are currently under consideration in the JHA Council, despite the limited effect of the previous instruments.

The current draft of the Stockholm Programme (the programme which will shape activity in the area of justice and home affairs) is extensive and ambitious in terms of the means suggested for greater co-operation.[31] With all

this legislative activity, it is reasonable to suggest that there is duplication and confusion between the instruments adopted in the EU and the CoE.

Roadmap on procedural safeguards

Perhaps the most effective way of illustrating the relationship between these two European organisations is the Swedish EU presidency's initiative to reintroduce the issue of procedural safeguards for defendants in criminal proceedings. The previous proposal for a framework decision[32] was unsuccessful because it was overambitious. It attempted to legislate for a number of important procedural safeguards, but by doing so the detail of each right was bargained away until it was effectively of little practical benefit.[33] Therefore, the Swedish presidency has presented a 'roadmap' in which consensus as to the need for an instrument in this area is set out, with a list of measures for which it has been agreed that examination of the proposals for legislative acts presented by the Commission will be given priority status. As the Council resolution on the 'roadmap' observes:[34]

> *(10) Discussions on procedural rights within the context of the European Union over the last few years have not led to any concrete results. However, a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual. Efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union.*
>
> *(11) Bearing in mind the importance and complexity of these issues, it seems appropriate to address them in a step-by-step-approach, whilst ensuring overall consistency. By addressing future actions one area at a time, focused attention can be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure.*

When the previous instrument was considered, member states raised concerns about conflicts with the European Convention on Human Rights (ECHR). This same issue had the potential to prevent the agreement of a general approach to this area on the 23 October 2009 in the JHA Council meeting.[35] The House of Commons European Scrutiny Committee (the Committee) had been holding the instrument for scrutiny for the reasons set out in its report[36] on its deliberations surrounding the proposal for a framework decision on interpretation and translation,[37] although it fortunately lifted this in readiness for the JHA Council

meeting. The Committee noted the problematic relationship between the EU and the CoE:[38]

> *The view of the Council of Europe on this proposal is important. The EU should be vigilant not to create an alternative hierarchy of human rights standards which are lower than, or conflict in other ways with, those developed under the ECHR as interpreted by the ECtHR. This would negate the good intentions of this Framework Decision and lead to considerable legal uncertainty. The rights established under this proposal must, therefore, be consistent with the ECHR.*

Exceeding the ECHR standard

In surrendering 516 people to other countries across the EU this year, the UK should have been safe in the knowledge that the trial they received for their alleged crime would be equivalent to that which they would receive at home. These individuals were surrendered because the Extradition Act 2003 no longer allows scrutiny, unless a legal bar is identified or an infringement of the ECHR can be made out. The presumption is that because each EU member state is a party to the ECHR, standards are equivalent. Numerous studies have shown this not to be the case.[39]

Whilst the minimum starting point for defence safeguards should be that of the ECHR, there is no necessity for standards to remain as low as the common denominator for the CoE, an international body constituted differently to the EU. Nor does it have to follow that the achievements of the ECHR will be undermined by action at the EU level. This latter action intends to build upon the ECHR with practical standards that will make an effective impact in practice upon suspects faced with prosecution. It can be argued that the CoE is ill-equipped to perform this role because it does not have the mandate, infrastructure, democratic legislative set-up or enforcement capabilities of the EU.

The House of Lords EU Select Committee considered the relationship between the two organisations when reporting upon the previous framework decision, and perhaps aptly, answered the current concerns in this way:[40]

> ***While we commend the excellent work of the Council of Europe, and in particular of the European Court of Human Rights, in ensuring human rights protection in Europe, the shortcomings of this system should not be ignored.*** *In an organisation which covers countries as diverse as the United Kingdom, Turkey and Russia, the standards set are inevitably aimed at securing minimum safeguards at a level acceptable to all its members; there is a significant backlog of cases pending before the*

> *Strasbourg Court, which is only expected to increase; and there is no means of enforcing a judgment of the Court of Human Rights. EU cooperation is at a far more advanced stage. The agreement of a number of measures in the criminal justice sphere on surrender proceedings, organised crime and terrorism provides an example of how action can be coordinated across the EU at a level which could not currently be achieved in the Council of Europe and puts the EU in a position to set higher standards. While Third Pillar measures do not benefit from the same stringent enforcement measures available under the First Pillar, there is nonetheless greater scope for securing enforcement in the EU than in the Council of Europe, and future constitutional developments may bring further improvements here.*

Conclusion

In explaining why it is necessary to extend beyond the ECHR in the protection of the Article 6 ECHR rights of suspects and accused persons in criminal proceedings, the reason for additional legislative activity at EU level is perhaps also identified. The mutual assistance and mutual recognition instruments are all similar, but the European Union instruments have the opportunity to result in more practical and effective steps than those of the Council of Europe, due to the size and political set-up of the EU institutions. Whilst mutual assistance remains an important goal for the 47 member states of the CoE, the increasing integration of the EU has shown that there is a need not only for more advanced legislative proposals, with enforcement obligations, but also for the political will to develop this legislative infrastructure. The EU member states are now actively and regularly engaged in the prevention and prosecution of cross-border crime. The CoE is no longer able to provide a satisfactory framework for those operations through its treaty development mechanism.

However, the action of advancement in the EU has provided the impetus for improvement at the level of the CoE, as can be seen in the amendments to the Convention. These developments may reach into the other instruments where EU activity appears to replicate that of the CoE. Rather than presume the two organisations' powers and treaties to be in conflict, developments in this area have shown that there is in fact a mutual benefit to this process. The CoE has indeed recognised such a benefit, so long as certain provisos are adhered to:[41]

> *In line with the comments made with respect to the Stockholm Programme, the Council of Europe considers that the consolidation and the possible enhancement at the EU level – through the adoption new [sic] EU instruments – of the standards of the ECHR and its protocols, as interpreted by the European Court of Human Rights, would contribute to the further development of a common European legal area, in which co-operation*

> *with the relevant Council of Europe bodies and mechanisms could play an important role.*

The future of mutual recognition has recently been set out in the draft Stockholm Programme.[42] The programme identifies a need for evaluation of current instruments to ensure not only effective implementation of the adopted framework decisions, but also the development of appropriate mechanisms through which to ensure that the instruments actually achieve their goals. The programme recognises the importance of the CoE treatises and the disadvantages of the legislative approach thus far, not only within the area of justice and home affairs in the EU, but in parallel law making by the EU and the Council of Europe:

> *The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime which lacks efficiency and flexibility. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model should have a broad scope and should cover all types of evidence, taking account of the measures concerned. The European Council invites the Commission to propose … a comprehensive legal instrument to replace all the existing instruments in this area, including the Framework Decision on the European Evidence Warrant, covering all types of evidence, including orders to hear persons by means of videoconferencing, and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.*

This approach should be welcomed and pursued by the member states. Conventions have their place in the Council of Europe. In the EU, however, greater co-operation between EU member states has necessitated clear legislative endeavours at EU level, through the repeal of fragmentary and amending legislative instruments. It is time for the repeal of the EU Mutual Assistance Convention, and each of the individual framework decisions extending activity in this area, in favour of a comprehensive EU legislative act on mutual co-operation in criminal matters.[43]

Notes

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7 Article 2.
8 ETS No 99.
9 Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) operating under the authority of the European Committee on Crime Problems.
10 ETS No 182.
11 Council of Europe, *Explanatory Report on the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*.
12 Ibid, para 48.
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14 As at 2 November 2009, see Council of Europe website.
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16 Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union , OJ C 197, 12 July 2000, p1..
17 OJ C 191, 29 July 1992.
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19 See Explanatory Report.
20 OJ L 190, 18 July 2002, p1.
21 OJ L 196, 02 August 2003, p45.
22 OJ L 076, 22 March 2005, p16.
23 OJ L 322, 9 December 2005, p33.
24 OJ L 328, 24 November 2006, p59.
25 OJ L 220, 15 August 2008, p32.
26 OJ L 327, 5 December 2008, p27.
27 OJ L 337, 16 December 2008, p102.
28 OJ L 350, 30 December 2008, p72.
29 OJ L 81, 27 March 2009, p24.
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33 House of Lords European Union Committee, *Breaking the deadlock: what future for EU procedural rights?*, 2nd Report Session 2006–07, 16 January 2007.
34 Council of the European Union, Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings - General approach, Brussels, 23 October 2009, 14791/09.
35 Ibid.
36 House of Commons European Scrutiny Committee, 29th Report Session 2008–09, para 75.
37 Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, COM(2009) 338 final, Brussels, 8 July 2009.

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39 See (1) T Spronken and M Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, University of Maastrict, EC, DG JLS, 12 December 2005, 2008 update ongoing;

(2) Working Group for Cooperation in Criminal Matters, *Fourth round of Mutual Evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" - Report on the first seven evaluation visits (Ireland, Denmark, Belgium, Estonia, Spain, Portugal and the United Kingdom)*, Council of the European Union, 8409/08, Brussels, 15 April 2008;

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(5) JUSTICE, OSJI, University of the West of England and the University of Maastricht, Effective Criminal Defence Rights, ongoing (see University of Maastricht website for more details).

40 See n33 above, para 51.

41 Observations by the Council of Europe Secretariat on a Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings and on a Draft Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings, Council of the European Union, 12926/09, Brussels, 7 September 2009, p4.

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Book reviews

The New British Constitution

Vernon Bogdanor
Hart Publishing, 2009
334pp £17.95

In his latest book Bogdanor looks through the eyes of a political historian, a constitutional lawyer and a political scientist to chart the recent changes to the British constitution. Bogdanor notes at the outset that we are in the midst of a new constitution being born which is, as yet, incomplete. It is this incompleteness that Bogdanor faults. He argues that the new constitution was introduced in a 'piecemeal', unplanned manner such that the British people did not notice or appreciate the change. It is hard to deny that a new constitution is being born. Early on in the book the reader is met with a list spanning two pages of the 15 main constitutional changes since 1997. However, unlike other countries, our 'new' constitution is an incomplete process rather than an event marked by a momentous historical change such as the end of a war, the gaining of independence or a change of political regime. The new British constitution has been gradually initiated by the government in an attempt to correct the loss of national self-confidence.

In his introduction the author notes that where Bagehot and Dicey analysed the old constitution, this book explores the underappreciated new constitution. This book clearly describes what the new constitution is, how it came about, how it works and why it matters. Bogdanor argues that what we are now moving towards is a 'quasi-federal constitution' that emphasises the separation of powers rather than Parliamentary sovereignty. We are moving towards a constitutional state, but not a popular constitutional state. Constitutional reform has so far failed to redistribute power downwards, to the people. What we have in Britain is an un-codified constitution that is indeterminate. This model cannot limit or regulate government power; instead it legitimises the 'omnicompetence of government'.

The book takes a sequential approach, beginning by questioning why the old system was challenged and replaced. Bogdanor then points specifically to the Human Rights Act and the devolution legislation as catalysing the current constitutional change, before expounding, in practical terms and by analogy, what constitutional effect these two pieces of legislation have had. Ultimately, these two laws limit the rights of Westminster as a sovereign Parliament. The final chapters give suggestions of what the next stage in the constitutional change could and should be to secure more popular involvement in politics.

Interestingly, Bogdanor dedicates an entire chapter of the book to referendums. He argues strongly for the referendums as a powerful 'conservative weapon' in creating a popular constitutional state. The referendum need not replace the machinery of representative government, but merely supplement it. He calls for an ideological change. We need to consider the people, acting through the referendum, as assuming the function of a third chamber of the

legislature in addition to the lower and upper houses. Referendums redefine sovereign legislature. If used correctly, the referendum could entrench constitutional provisions by providing a special mechanism including the consent of the people.

However, our incomplete new constitution raises a paradox: elastic constitutions imply an elastic use of the referendum. Use of the referendum currently lies in the hands of the political class. So if the referendum lies at the discretion of government, then how can it also constitutionally control the government? Bogdanor alludes to de Gaulle's Fifth Republic and admonishes that rather than limiting the power of government, the referendum could augment it, as it did in France.

Bogdanor then considers whether a referendum result could be mandatory rather than advisory. However, the same problem remains. If the referendum can only be used at government discretion, then it is unlikely to be used frequently. Indeed it is likely to be used as a tactical weapon. Bogdanor ends the chapter by leaving the reader with the question of whether the referendum can be taken out of the control of the political class and made a genuinely popular weapon. In the following chapters the author considers an answer: including referendums and the rules regulating them in a written constitution. The author does not entertain this solution for long and his penultimate chapter is dedicated to the problems involved with a potential written British constitution. The author considers the problem of scope – what ought to be included – and the logistical problem of who is to have the authority to draw up, ratify and amend the constitution.

Bogdanor's book is a practical analysis of the British constitution. Its appeal is certainly not limited to lawyers or political historians. This is an engaging, clear and timely read for all. The book comes at a time when both the government and the opposition are talking widely about a bill of rights, and this is a must-read for anyone interested in the startling constitutional changes proposed by the parties.

Sangeetha Iengar, human rights intern with JUSTICE, summer 2009.

Human Trafficking – Human Rights: law and practice

Sandhya Drew
Legal Action Group, 2009
368pp £30.00

Human Trafficking - Human Rights: law and practice is a concise and thorough run-down of the law and practical guidelines surrounding the concept of human trafficking, an area where 'interest ... outstrips information as to its scale'.[1] Sandhya Drew manages to bring together elements of criminal, employment, immigration, contract and public law to paint a clear picture of a practice which is estimated by the International Labour Organisation to affect over 12.3 million people currently. However, it is made clear from the outset that this is not simply a legal practitioner's guide. For meaningful resolution, Drew advocates 'not just a multi-agency approach, but also engagement with trade unions, employers, NGOs and civil society'.[2] This advice seems to have been heeded in the UK, where the Human Trafficking Centre, set up in 2006, has since moved from a sole focus on policing

to co-ordinating several state agencies – including the police, prosecution, health and the judiciary – and regularly consulting the above-named groups.

To view human trafficking in any narrow context is to have very limited success. The approach prior to the current multi-agency human rights-based model was based solely on immigration control, which failed on two accounts: it failed to distinguish between trafficker and trafficked; and it conversely added fuel to the trafficking fire, as victims are often initially enticed by the offer of a way round restrictive immigration controls.

Victims of trafficking rarely recognise themselves as such, as traffickers range in practice from large and efficient criminal organisations to a few loosely connected individuals, perhaps relatives of the victim or trusted family friends. Taking into account additional cultural and communication barriers, even the first step of victim identification requires 'significant proactive outreach skills'.[3] There is an obvious need for specific social welfare training and general public information campaigns, which states parties to the UN Convention Against Transnational Organised Crime are required to at least consider.[4] Helpfully, Drew has included lists of common signs which allow the reader to engage more precisely in such a process of identification in multiple situations, including the care, construction, hospitality and sex work sectors where demand for cheap, flexible labour is high.

As Mrs Justice Cox summarises in her foreword, most of the legal framework surrounding human trafficking is to be found in international instruments. The primary guarantee against trafficking in humans is contained in Article 4 of the European Convention on Human Rights, initially aimed at preventing labour exacted by force by the state but since broadened to cover breaches by non-state actors.[5] As a corollary, Drew argues that the non-derogable character of the jus cogens rule against slavery applies to human trafficking also, the latter being a modern form of slavery. Unsurprisingly for a transnational phenomenon, the very definition of human trafficking derives from international law[6] and contains three elements: transfer; force or fraud or some act negating consent; and intended exploitation. Drew systematically examines relevant multilateral treaties, International Labour Organisation conventions and UN conventions and notes the significance of each, making this book a useful guide to locating specific provisions in disparate sources.

Alongside the usual legislation and case studies, Drew includes many other interesting materials, ranging from reproductions of hard-hitting Home Office awareness-raising campaigns ('Walk in a punter. Walk out a rapist'), to judgments from primordial historical cases that formed the origins of the right to freedom from slavery,[7] via practical advice on where to turn for support, both for victims themselves and for those who engage with them. As a book designed to educate and inform about an as yet small but burgeoning area of the law, contained mostly in international instruments, the focus is understandably on clarity rather than deep theoretical analysis. 'Key Points' boxes at the beginning of each chapter, the periodic use of diagrams and flow-charts and consistently simple language and structure make this book as useful for the student or the layperson as it is for practitioners - and,

according to Mrs Justice Cox, judges too.[8]

Structurally easy to follow, the first three chapters deal with existing relevant international, European and national law respectively. The following chapters explore in greater depth the specific offences of trafficking for sexual exploitation and trafficking for the purpose of exploitation. The next set of chapters concentrates on social welfare measures available for victims and short-term assistance and support, as well as how to obtain compensation, and further, longer-term solutions for trafficked individuals, including the circumstances in which a rehabilitated victim may be returned to his or her country of origin. The final part of the book looks at preventative measures, with a special focus on eliminating the profit from trafficking in humans – an important final point as Drew reminds us of the driving commercial nature of the activity, with global annual profits of USD $31.7 million. Detailed reference is made to 'lifestyle offences' within the Sexual Offences Act 2003, the Asylum and Immigration (Treatment of Claimants etc) Act 2004 and the Gangmasters (Licensing) Act 2004, under which the criminal conviction of a trafficker can trigger assumptions that property acquired by him or her in the previous six years was done so as a result of criminal conduct, and may be confiscated. Drew also outlines the ways in which victims may seek compensation from their trafficker, and the potential for the use of forfeiture orders.

Thorough, comprehensive and concise, Human Trafficking - Human Rights: law and practice is useful for a broad spectrum of readers. Its greatest strength is in the way that it brings together disparate disciplines, sources and frameworks to create a guide that deserves to be the first port of call for all those called upon to aid a victim of trafficking.

Shereen Akhtar, criminal justice intern with JUSTICE, summer 2009.

Notes

1 S Drew, Human Trafficking – Human Rights: law and practice, LAG, 2009, para 1.3.
2 Ibid, para 1.12.
3 Ibid, para 1.15.
4 See UN Convention Against Transnational Organised Crime, arts 6, 9-15.
5 *Siliadin v France* (App 73316/01, judgment of 26 July 2005, Second Section, European Court of Human Rights).
6 UN Convention Against Transnational Organised Crime, art 3.
7 *Somerset v Stewart*, 12 Geo 3 (1772) KB.
8 See Foreword at ix.

The Law of Human Rights (2nd ed)

Richard Clayton QC and Hugh Tomlinson QC
OUP, 2009
2,768pp £295.00

The first edition of Clayton and Tomlinson's The Law of Human Rights arrived in 2000 at the dawn of a new legal landscape. It provided timely and necessary guidance and direction to judges and practitioners in applying the principles and rights of the European Convention on Human Rights (ECHR) in the domestic jurisdiction. Without a doubt, the text played a vital part in shaping the 'torrent' of jurisprudence under the Human Rights Act 1998 (HRA). Since then, the last ten years have seen the HRA embedded and entrenched deep into the constitutional framework of the UK, having far-reaching impact across broad areas of the law – some foreseen, whilst others perhaps less so. This new, second edition of The Law of Human Rights deals comprehensively with the impact of the HRA, providing detailed description and analysis of the case-law and its practical implications. Considerable research combined with the expert knowledge of the authors has contributed to this widespread and detailed study of human rights in the UK.

Whether expected or even welcomed, it is impossible to dispute the influence of the jurisprudence of the Strasbourg court on the courts and tribunals of the UK, which has been plainly evident. The text proficiently and appropriately weaves together the two sets of jurisprudence, describing, explaining, and sometimes criticising the nature and substance of this relationship.

The text begins by dealing with certain key issues, themes and principles in the field of human rights. Chapter 1 considers the constitutional protection of human rights and Chapter 2 deals with the effect of unincorporated human rights treaties in domestic law. After dealing with the background to the HRA, the focus is shifted onto the principles underlying the substantive provisions of the Act itself and their application. Chapter 3: Interpretation and Synopsis covers the key provisions of the HRA in turn. Chapters 4 and 5 address the relationship between the HRA and statute law, and the effect of human rights on public bodies. The key principles under the ECHR are then assessed, including the doctrines of margin of appreciation and proportionality as well as restrictions and limitations of rights. The text concludes by addressing the fundamental practical aspects of remedies and procedure – both under the HRA and the ECHR. Chapters 21 and 22 focus on remedies and procedure under the HRA, with Chapter 23 explaining the procedure of the European Court of Human Rights.

However, the indubitable strength of The Law of Human Rights lies in its detailed and structured treatment of the substantive ECHR rights. In this regard, the authors' description and normative analysis is second to none. Chapters 7-20 systematically and logically deal with the key Convention rights in turn, looking at the nature of the right in question, and addressing how it has been applied domestically and under the ECHR. The icing on the cake is the text's masterful use of comparative and international material, which is interwoven with the substantive analysis of the Convention rights. Although this is not comprehensive, as the authors themselves state, the text draws on

useful global examples which it is hoped will contribute positively to the development of the law of human rights in the UK. The international and comparative material that is referred to is usefully found in a handy second volume. Regular paperback supplements also provide full updates of relevant case-law and legislation.

The Law of Human Rights is well-structured and easy to use for students and practitioners alike. Its logical structure in complimented by a comprehensive index. Although the text is considerable in length (being over 2000 pages), it is necessarily so. With the recent establishment of the Supreme Court, and with human rights continuing to be firmly fixed in legal discourse, and rightly so, this well-timed second edition of The Law of Human Rights is an essential companion for all human rights practitioners.

Qudsi Rasheed, Legal Officer (Human Rights), JUSTICE.

Human Rights: Judicial Protection in the United Kingdom

J Beatson, S Grosz, T Hickman and R Singh with S Palmer
Sweet & Maxwell, 2008
912pp £124

This book provides an in-depth and penetrating examination of the various forms of judicial protection for human rights in the United Kingdom. Whilst the Human Rights Act (HRA) and the European Convention on Human Rights (ECHR) receive the attention they deserve, this book does not provide an article-by-article analysis of Convention rights. There are other books for that job. Rather, this book examines the overarching principles behind the separate articles and places them within the landscape of human rights protection in the United Kingdom.

There are many benefits of the cross-article approach adopted. One is that there is no temptation to equate human rights exclusively with those rights enshrined in the ECHR and the authors are acutely aware of the important protection for fundamental rights found both in the common law and in EU legislation. Another benefit of the approach adopted is that, when looking at Convention rights, it elevates the place of general principles that lie behind the different articles. It is when examining those features of the HRA and the ECHR which apply across articles that this book really comes into its own.

The first three chapters deal with the landscape of legal protection of human rights in the UK, the Strasbourg jurisprudence and general principles of domestic law. Despite the inevitable focus on the HRA, the authors are careful not to overlook the common law, the devolution statutes of Scotland and Northern Ireland and the indirect incorporation of Convention rights via EU law. The Strasbourg jurisprudence is analysed at several levels, from the political values underpinning the Convention to a detailed unpicking of the method used by the Strasbourg court to analyse justification of interference with a Convention right.

Indeed, a feature of this book is the ability of the authors to move at an abstract level between different principles and regions of case-law combined with the capacity to zoom in on the details in areas worthy of particular attention. An illustration of this is the first-rate discussion of proportionality in the chapter concerning the general principles that domestic courts apply in human rights cases. A presupposition of the chapter is, as the authors note, that such general principles do in fact exist with more structure than a series of meta-principles, or slogans, such as 'deference' and 'proportionality'. The examination of proportionality begins with a historical introduction to the de Freitas criteria, and then moves through a careful demonstration that the case-law is not easily reconcilable with established principles. In response to this tension, the authors suggest that greater use should be made of a distinction between relative-proportionality and overall-proportionality, which they submit is implicit in the reasoning of the English courts and has often been overlooked. The precision which the authors bring to this topic is commendable; moreover, it exemplifies the approach adopted throughout the book. The authors are able to scratch the surface of apparently

settled issues in order to draw out largely unacknowledged tensions which they then go on to treat with incisive analysis. If the authors are to be faulted at all, it is that occasionally they are a little quick to dismiss arguments that the case-law does not stand up to such principled examination.

The middle section of the book is focussed squarely on the Human Rights Act. The scope of protection under the HRA is covered with an in-depth examination of the developing case-law culminating in a typically penetrating analysis of the decision in *YL v Birmingham City Council*. This is followed by a discussion of the ways in which the HRA imparts a horizontal effect. The impact of the HRA on legislation, via the duty of interpretation and declarations of incompatibility, is scrutinised in a discussion underpinned by an awareness of potential ramifications for the sovereignty of Parliament. The effect of the HRA on decision-making by public authorities is examined with particular focus on the impact of Article 6 ECHR on the availability and nature of judicial review proceedings.

The final chapters cover remedies and devolution. The legislative bases of, and principles behind, remedies under the ECHR and the HRA are set out, with damages under the latter usefully contrasted with those under other causes of action and ombudsman awards. The specific protections for human rights built into the devolution statutes of Scotland, Northern Ireland and Wales are placed in their constitutional surroundings.

Throughout the book, the main text covers issues in substantial depth, but remains accessible and clear. The text is written in largely self-contained sections and is supplemented by an appendix containing relevant legislation, whilst Chapter Five also contains a useful table of declarations of incompatibility. The comprehensive footnotes and case references reflect the mass of experience which the authors bring from academia, the judiciary and both sides of the legal profession. Practitioners will therefore find this book an invaluable reference tool.

Owen Greenhall, criminal justice intern with JUSTICE, summer 2009.

JUSTICE briefings and submissions

1 April 2009 – 31 October 2009

Available at www.justice.org.uk

1. Briefing and suggested amendments to the EU Proposal for a *Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings*, April 2009;
2. JUSTICE Student Human Rights Network electronic bulletin, Spring 2009;
3. Briefing and suggested amendments to the Policing and Crime Bill for report stage in the House of Commons, May 2009;
4. Briefing on the Coroners and Justice Bill for second reading in the House of Lords, May 2009;
5. Candidate briefing for the European Parliamentary elections regarding procedural safeguards, May 2009;
6. Standing Committee for Youth Justice, of which JUSTICE is a member, letter to Ministers to express concerns about court ordered remands of children and young people, May 2009;
7. Briefing on the Policing and Crime Bill for second reading in the House of Lords, May 2009;
8. *Secret Evidence*, published as hard copy and online, June 2009;
9. Briefing on the Borders, Citizenship and Immigration Bill for second reading in the House of Commons, June 2009;
10. Briefing and suggested amendments to the Coroners and Justice Bill for committee stage in the House of Lords, June 2009;
11. Letter to Peers in support of amendments to the Coroners and Justice Bill that would prevent people suspected of genocide, war crimes and crimes against humanity from escaping justice in the UK, June 2009;
12. Criminal Justice Alliance, of which JUSTICE is a member, open letter to the Secretary of State for Justice on funding for legal representation for families at inquests, June 2009;
13. Briefing and suggested amendments to the Policing and Crime Bill for committee stage in the House of Lords, June 2009;
14. Joint JUSTICE, Aegis Trust and REDRESS statement welcoming the government's announcement on the law of war crimes, crimes against humanity and genocide, July 2009;

15. Joint position statement on the development of procedural safeguards in the EU ahead of the Council Working Group meeting on 9 July 2009, July 2009;
16. Response to the Home Office consultation, *Regulation of Investigatory Powers Act 2000: Consolidating Orders and Codes of Practice*, July 2009;
17. Joint JUSTICE, ILPA, JCWI, Liberty and the Migrants Rights Network letter to the Home Secretary concerning the citizenship proposals in Part 2 of the Borders, Citizenship and Immigration Bill, July 2009;
18. Response to the Home Office consultation, *Protecting the Public in a Changing Communications Environment*, on its communications data proposals, July 2009;
19. Response to the European Commission Communication on *An area of freedom, security and justice serving the citizen*, July 2009;
20. Standing Committee for Youth Justice, of which JUSTICE is a member, report, *The Funding of Custody for Children: Devolving the Budget*, July 2009;
21. Response to the Home Office consultation on the police retention of DNA, July 2009;
22. International Commission of Jurists, in conjunction with the Swedish and British sections, statement supporting the adoption of common minimum safeguards for defendants in the EU area of freedom, security and justice, July 2009;
23. Briefing on the European Commission proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, July 2009;
24. Briefing on the Draft Council Framework Decision on the transfer of proceedings in criminal matters, July 2009;
25. Briefing and suggested amendments to the European Arrest Warrant scheme, September 2009;
26. Response to the second Ministry of Justice consultation, *Voting Rights of Convicted Prisoners Detained within the UK*, September 2009;
27. Response to the Home Office consultation on *Amendment to Section 5 of the Public Order Act 1986*, September 2009;
28. JUSTICE Student Human Rights Network electronic bulletin, Autumn 2009;
29. Response to the Ministry of Justice consultation, *Crown Court Means Testing: Draft Regulations*, October 2009;
30. Response to the Ministry of Justice consultation, *Legal Aid: Refocusing on Priority Cases*, October 2009;

31. Joint JUSTICE, REDRESS and the Aegis Trust briefing on the Coroners and Justice Bill for report stage in the House of Lords concerning amendments seeking to strengthen the law on genocide, war crimes and crimes against humanity, October 2009;
32. Joint JUSTICE, Liberty and Inquest briefing on the Coroners and Justice Bill for report stage in the House of Lords concerning amendments to allow the use of intercept material in inquests and resisting the government's proposed use of the Inquiries Act, October 2009;
33. Briefing and suggested amendments to the Coroners and Justice Bill for report stage in the House of Lords, October 2009;
34. Briefing and suggested amendments to the Policing and Crime Bill for report stage in the House of Lords, October 2009;
35. *To Assist the Court; Third Party Interventions in the UK*, published in hard copy and online, October 2009;
36. *A New Parole System for England and Wales*, published in hard copy and online, October 2009.[1]

Notes

1 Research project and report funded by The Nuffield Foundation.

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