

UCL HUMAN RIGHTS REVIEW

VOLUME 1 • OCTOBER 2008



UCL

Student Human Rights Programme

**UCL
HUMAN RIGHTS
REVIEW**

**FIRST
EDITION**

2008

ISBN: 978-0-9560806

Faculty of Laws
University College London
Bentham House
Endsleigh Gardens
LONDON WC1H 0EG

UCL Student Human Rights Programme

Published in the United Kingdom
By University College London, Faculty of Laws
Bentham House, Endsleigh Gardens, London WC1H 0EG
On Behalf of the UCL Student Human Rights Programme
<http://www.uclshrp.com/humanrightsreview>

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PREFACE

The UCL Human Rights Review is the result of a student effort by the UCL Student Human Rights Programme. This is the first edition of the Review which is the first of its kind at UCL Laws featuring both student and academic articles. In forthcoming editions we hope to expand the scope of the Review to encompass academic scholarship from staff and students of other universities as well as human rights practitioners.

This edition features some wonderful articles; a contentious debate about private care homes between Dawn Oliver and Rodney Austin; a thoughtful article on the mirror principle by Tom Rainsbury; a politically conscientious analysis by Theo Rycroft; four stylistically disparate but intellectually satisfying articles about the right to equality (O’Cinneide, Letsas) and freedom of expression (Norris, Guest); a well thought out analysis of socio-economic rights (Usher); a comprehensive discussion of the broader human rights issues related to human trafficking (Yusouff) and finally, an insightful book review by Jörg Fedtke.

Producing this journal has been a long journey and there are many people to thank. Firstly I thank my editorial team; Amal, Hejaaz, Siri, Jonny, Vishal and Alex whose dedication was paramount in producing the Review. I especially thank Amal who made sure the rest of the team stuck to deadlines and was generally on tap to answer any of my queries. My gratitude also goes to Tony for the wonderful graphic design and for always being available whenever Microsoft Word disagreed with me, even at 4.00 a.m.

The editorial team extends its gratitude to the UCL Future’s Grant for funding the printing of the Review as well as the launch. Special thanks also to our staff advisory board - Dr George Letsas for being so enthusiastic and supportive of the Programme and the Review over the past year, Professor Dawn Oliver for reviewing the student articles, for being on hand via email and for agreeing to speak at our launch, Professor Stephen Guest who advised and warned us greatly on typography, which true to his word, proved to be a daunting task and Colm O’Cinneide for helping us source student articles.

Our deep appreciation also goes to Baroness Hale of Richmond for agreeing to be our patron as well as for kindly attending and speaking at the launch of our first Review. We also thank Judge Spielmann for being so kind in accepting our invitation to speak at the launch and for having crossed borders to be with us.

Chris Campbell-Holt , thank-you for always being available with advice on typography, formatting and every other possible aspect of producing the Review. Your sound advice proved invaluable. We also thank Noreen, Richard and Sarah for the helpful pointers regarding layout, and for help with proof reading.

Needless to say, it is the brilliant papers which give substance to the Review; our heartfelt gratitude to the writers and particular thanks to Professor Jörg Fedtke for obliging on such short notice. Last but not least we wish to thank our families for their patience and support. We hope very much that you enjoy reading our Review and look forward to the next edition.

Sonalini de Zoysa Gunasekera
Editor-in-Chief, UCL Human Rights Review '08

PATRON'S FOREWORD

I was delighted, if rather surprised, to be asked to become the first Patron of the UCL Human Rights Review. The delight was to be involved in such a valuable enterprise. The contents of this review are truly outstanding. The idea of bringing together contributions from students and from staff under a student Editor-in-Chief works very well. It is common in the United States, where a student Barack Obama was President of the Harvard Law Review, but rare in the United Kingdom. UCL has been a leader in the UK field, first with the Jurisprudence Review and now with the Human Rights Review. That one student body can produce two such quality publications is a great achievement and testimony to the excellence of the UCL educational experience.

The surprise was to be chosen from the host of candidates much better qualified than I. I am not a UCL graduate or in any way associated with your Faculty (truth to tell, had I come to London instead of Cambridge, it would have been to King's . . . where I would also have gone on the staff had I not remained at the Law Commission and eventually become a Judge). I am one of those 'timorous souls' whose caution in the development of human rights is so critically but constructively discussed by Tom Rainsbury. I was clearly a deep disappointment to him in both the *Animal Defenders International* (political advertising ban) and *Countryside Alliance* (hunting ban) cases. I can only hope that the much less cautious approach we showed in the Northern Ireland case of *Re P* (adoption by unmarried couples), which was decided after he had written his paper, will be more to his liking. And I can take comfort that Rodney Austin approves of the minority opinions in *YL* (private care homes performing public functions) although Dawn Oliver does not.

There is much more food for thought (and not only for timorous Law Lords) in this compilation and I hope that it enjoys the wide readership that it deserves.

Brenda Hale of Richmond
September 2008

INSTRUCTIONS FOR CONTRIBUTORS

The UCL Human Rights Review welcomes contributions for consideration by the editors with a view to publication. Contributions should be sent to hrreview@uclshrp.com, as should all correspondence, books for review and other communications.

The Board of Editors will only consider material which complies with the following guidelines:

1. The submission should be an original, unpublished work not currently under consideration for publication elsewhere.
2. The UCL Human Rights Review publishes articles which deal with human rights issues which are jurisdiction specific and international. The Review encourages the submission of innovative articles which are relevant to the area of human rights. Articles which do no more than rehearse well known and familiar material should not be submitted.
3. Articles should be no longer than 7,500 words in length. Book Reviews and case notes should not exceed over 3,000 words.
4. Authors should state their present academic or professional affiliation and indicate any professional or personal involvement in the subject matter of the article.
5. It is preferred that submissions are sent as email attachments in recognised software to hrreview@uclshrp.com. The submissions must conform to the Oxford Standard for Citation of Legal Authorities.

Authors are asked to refer to previous editions for guidance. More detailed guidance will be sent on request.

Contributions to the UCL Human Rights Review express the views of their authors and not necessarily the views of the Board of Editors.

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Human Rights and the Private Sphere

DAWN OLIVER*

Section 6 of the Human Rights Act (HRA) does not provide for horizontal effect of convention rights. It provides instead that ‘public authorities’ are bound to act compatibly with those rights, and defines such authorities to include private bodies performing ‘functions of a public nature’ unless the nature of the act in question was private. In the case of *YL v Birmingham City Council* the House of Lords decided by a majority of three to two that a private care home was not performing a ‘function of a public nature’ in relation to a resident who was being paid for by her local authority; consequently a claim by the resident that the owners of the home were in breach of Article 8 of the European Convention of Human Rights (ECHR) when it sought to remove her from the home failed.¹

The *YL* decision was controversial. In government statements as the Human Rights Bill went through Parliament indications had been given that it was the government’s intention that privatised activities should give rise to HRA protection. The Joint Committee on Human Rights (JCHR) had published three reports before the hearing of *YL* that were critical of the approach that had been adopted by the courts in previous cases on the meaning of ‘functions of a public nature’ and urged the case for a different interpretation.² Indeed, the Secretary of State for Constitutional Affairs, unusually, intervened in *YL* to press for a broader interpretation of ‘function of a public nature.’ The House of Lords did not do so. After the decision, the JCHR pressed for steps to be taken to fill what is considered by some to be a ‘gap’ in human rights protection.³ Ultimately, in July 2008, a new provision, Section 145 of the Health and Social Care Act 2008 (HSCA) was passed, which provides - paraphrased - that care homes are to be taken to be exercising a function of a public nature for the purposes of Section 6 (3) (b) of the Human Rights Act 1998 when providing accommodation together with nursing or personal care to a person paid for out of public funds.

* Dawn Oliver is Professor of Constitutional Law; University College London.

¹ *YL v Birmingham City Council* [2007] UKHL 27.

² *The Meaning of Public Authority under the Human Rights Act* 7th Report, (2003-04) HL 39 HC 382; *The Meaning of Public Authority under the Human Rights Act* 9th Report, (2006-07) HL 77 HC 410; *The Human Rights of Older People in Healthcare* 18th Report, (2006-07) HL 156 HC 378. See also *Government Response* First Report, (2007-08) HL 5 HC 72.

³ *Legislative Scrutiny: Health and Social Care Bill* 8th Report, (2007-08) HL 46 HC 303.

Among the reasons advanced against treating private care homes as 'public authorities' within section 6 of the Human Rights Act 1998 was that this would involve superimposing statutory terms in the contracts between the home and the resident or local authority - i.e. interfering in contractual relations, without specific statutory authority and without dealing with the lacuna in the law and legal uncertainty that this would generate;⁴ and that it would create anomalies, since self-paying residents or residents paid for by their families would not be regarded as being subjects of 'functions of a public nature' and consequently, unlike residents in other rooms, would not have the protection for their homes that those paid for out of public funds would enjoy.⁵

Of course, the British government is under a positive obligation under the ECHR to secure that its legal system provides proper protection for convention rights. But it is not obvious that Article 8 ECHR itself requires that residents in care homes (or residents in other kinds of property, including privately rented premises) should have security of tenure in order to protect their 'right to respect for their home.'⁶ Whether or not the UK was in breach of the positive obligation, the new section 145 of the HSC Act now covers the case - in respect of care home residents only.

My focus in this short article is on the implications that would flow from giving 'horizontal effect' to convention rights, i.e. from requiring private bodies to respect the human rights, *qua* human rights, of those they deal with. We need to bear in mind that the starting point in most constitutional human rights provisions in the past has been that they have only vertical effect - effect as against *state institutions*. For instance, the Constitution of the USA, the first to include human rights protections, only does so in relation to 'state action.' The Canadian Constitution provides similarly, that human rights obligations only bind governments and legislatures. The applicability of explicit human rights protections has not depended on the nature of the function that was being performed, but on the identity of the respondent in a case.

It is only relatively recently that some countries have moved, often tentatively, towards requiring private bodies to respect human rights - i.e. towards giving horizontal effect, whether direct or indirect (the meaning of which is discussed below) to human rights provisions. Such extensions raise a number of practical and theoretical issues, which we shall outline below. It is concern on the part of the courts about these issues that has, in reality, produced the decisions in *YL* and other English cases.

Those who objected to the fact that private care homes were not regarded as exercising functions of a public nature were in reality saying that

⁴ *YL* (n 1) paras [27-31] (Lord Scott) and para [116] (Lord Mance).

⁵ *YL* (n 1) paras [115], [117], [119] (Lord Mance) and paras [135-137] (Lord Neuberger). See also Oliver, 'Functions of a public nature under the Human Rights Act' [2004] *PL* 329.

⁶ See the *Qazi* case (n 9) below on this.

such private bodies ought to respect the convention rights of those they deal with, especially where they are vulnerable, as those in care homes are. Of course most convention rights are in fact protected by the ordinary law of contract and tort and by property law. A reason why there has been a crop of cases about care homes and low cost housing, some before and some since the coming into effect of the HRA is that ordinary English law does not generally provide rights to respect for a person's private or family life, home and correspondence, and in particular none for respect for privacy or for the 'home' when it is not owned or rented by the claimant.⁷ Nor have our courts considered that a right to respect for one's home requires security of tenure. For instance, in *Qazi v Harrow LBC* the House of Lords held that it was not inconsistent with the essence of the right to respect for a home under Article 8 ECHR for a local authority to recover possession from an occupier after the termination of the tenancy by a valid notice to quit.⁸ However, some statutory exceptions to the general rule are provided for by the housing legislation. This protects residential tenants and their surviving partners or family members under 'assured' tenancies.⁹ But this legislation did not extend to residents of care homes.

So what are the arguments around extending horizontal effect to human rights generally? Professor Jörg Fedtke of the UCL Faculty of Laws and I have recently completed a comparative study¹⁰ of the extent, if any, to which fourteen countries (and the European Court of Human Rights) give effect to civil and political rights 'in the private sphere.'¹¹ These findings are very illuminating. While some countries do give such effect without specific legislation providing for it, generally giving direct horizontal effect (I prefer 'direct horizontal effect' to the German term '*unmittelbare Drittwirkung*') to human rights provision is considered inappropriate for various reasons, as the following discussion will show.

Practice in Other Jurisdictions

Human rights provisions may be included in the constitutions of states, or in constitutional or Basic Laws, or in international instruments. In none of the jurisdictions in our study did the constitution make specific provision for directly enforceable horizontal effect. The courts in some countries have nevertheless developed horizontal effect. Such effect may be direct or

⁷ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213; *Poplar Housing and Regeneration Community Association v. Donoghue* [2001] EWC Civ 595; *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; *R v Servite Houses and Wandsworth LBC, ex parte Goldsmith and Chatting* [2002] 2 LGLR 997; YL (n 1).

⁸ *Qazi v Harrow LBC* [2003] UKHL 43.

⁹ *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557.

¹⁰ D Oliver and J Fedtke (eds), *Human Rights and the Private Sphere* (Abingdon: Routledge-Cavendish 2007).

¹¹ The countries are Canada, Denmark, England and Wales, France, Germany, Greece, India, Ireland, Israel, Italy, New Zealand, South Africa, Spain, and the United States of America.

indirect. Indirect effect may require that laws be *interpreted* compatibly with human rights instruments, or that the courts should *develop the ordinary law* so as to give effect to such rights. Courts in most countries *interpret* their ordinary laws - statutes or civil codes, for instance - compatibly with human rights. But generally, especially in civil law countries, the courts do not *develop* the law (except by interpretation) since this would be contrary to the separation of powers as understood in those countries. There follows a brief summary of the position in some of the countries we included in our survey.¹²

Direct Horizontal Effect

Only India¹³ and Spain¹⁴ in our study give general direct horizontal effect to the rights set out in their constitutions. It is perhaps not surprising that India gives such direct horizontal effect, since it is a common law country and it is accustomed to courts exercising considerable inventiveness in developing the law. Spain is a rather more surprising example, since the tradition in civil law jurisdictions is against judges having a law-creative, in effect a legislative, function, for separation of powers reasons. But in Spain this is not regarded as a problem. Ireland¹⁵ treats the breach of the human rights in the constitution as a constitutional tort, thus giving them direct effect, but only if ordinary law gives plainly inadequate protection for the right or is manifestly deficient. Italian courts give direct horizontal effect to constitutional rights only - exceptionally - if there is a gap in legislation. The Greek¹⁶ constitution purports to give direct horizontal effect to rights, but the constitution is not self-executing and so these rights are only given effect if they are included in, for instance, the civil code. French¹⁷ courts give direct horizontal effect to the rights set out in the European Convention on Human Rights, but not to 'constitutional' rights; the French Constitution is not self-executing.

Indirect Horizontal Effect

Many countries' courts are expressly bound by their Constitutions to interpret their laws compatibly with the ECHR - Denmark,¹⁸ Ireland¹⁹ and Spain²⁰ are among these. In the UK,²¹ lacking a written Constitution, Section

¹² Footnote references in what follows are to the chapter in the book and the page in the summary chart giving the position in each jurisdiction at the end of the book *Oliver & Fedtke* (n 11).

¹³ *Oliver & Fedtke* (n 11) Chapter 6, chart 536.

¹⁴ *Ibid.* Chapter 12, chart 550.

¹⁵ *Ibid.* Chapter 7, chart 539.

¹⁶ *Ibid.* Chapter 5, chart 531.

¹⁷ *Ibid.* Chapter 3, chart 526.

¹⁸ *Ibid.* Chapter 1, chart 522.

¹⁹ *Ibid.* Chapter 7, chart 539.

²⁰ *Ibid.* Chapter 12, chart 550.

²¹ *Ibid.* Chapter 2, chart 524 (refers to England and Wales).

3 of the Human Rights Act 1998 provides that so far as possible statutory provisions are to be interpreted compatibly with convention rights. Even in the absence of constitutional or statutory provisions to that effect, a number of countries' courts give indirect horizontal effect to rights set out in constitutional instruments or in international instruments, either by adopting a principle of compatible *interpretation* or by the exercise by the courts of their powers, where they exist, to *develop* the law, for instance under their civil codes, so as to be compatible with constitutional values. In the UK, Section 6 HRA is taken to require the courts to develop the law so as to be compatible with the ECHR rights, a developmental duty. In Greece²² and Germany²³ the courts interpret the civil codes compatibly with constitutional rights; in Israel²⁴ the courts interpret legislative terms such as 'public policy,' 'unlawfulness' and 'good faith' consistently with the Basic Laws. In South Africa²⁵ the courts take constitutional values into account when interpreting and developing the law.

The Balancing of Rights and Interests and Public Interests

In the countries where human rights do have direct or indirect horizontal effect, the courts have to carry out a balancing exercise as between the rights of the claimant, the rights or interests of the respondent, and the public interest. This exercise is more complex than in vertical effect situations where the balance is between the claimant's right and the public interest. Courts have approached this balancing function in a range of ways.

In Denmark²⁶ private sphere claims are rejected where the balancing exercise would have negative effects on legal certainty. In the UK,²⁷ France,²⁸ Greece,²⁹ Germany³⁰ and South Africa,³¹ the balancing process is acknowledged to involve a proportionality analysis.³² If the clash is between rights to privacy - reputation - and the freedom of the press a public interest in the latter in the name of democracy is in play: in Israel the democratic consideration will trump the right to privacy. In Israel ordinary tort law is regarded as having established satisfactory balances between private rights and social interests, so that 'rights' have indirect horizontal effect in any event. The introduction of a 'right to dignity' in the Basic Law of 1992 has affected the development of tort law.

²² *Ibid.* Chapter 5, chart 531.

²³ *Ibid.* Chapter 4, chart 529.

²⁴ *Ibid.* Chapter 8, chart 541.

²⁵ *Ibid.* Chapter 11, chart 549.

²⁶ *Ibid.* Chapter 1, chart 522.

²⁷ *Ibid.* Chapter 2, chart 524.

²⁸ *Ibid.* Chapter 3, chart 526.

²⁹ *Ibid.* Chapter 5, chart 531.

³⁰ *Ibid.* Chapter 4, chart 529.

³¹ *Ibid.* Chapter 11, chart 549.

³² *Ibid.* at 507-511.

In New Zealand³³ the Bill of Rights Act (BORA) provides that rights are subject to ‘reasonable limits prescribed by law’ that are ‘demonstrably justified in a free and democratic society’ and this has been influential in the development of a new tort of invasion of privacy. It involves giving ‘appropriate weight’ to each conflicting right but the BORA does not give guidance as to what weight should be attached to each right. In South Africa³⁴ and Germany³⁵ similar proportionality tests are applied in both vertical and horizontal effect cases. This could be problematic, at least in theory, though in practice it does not seem to cause difficulties for the courts. Yet other jurisdictions, Greece³⁶ and India³⁷ among them, adopt a pragmatic approach and do not articulate tests as proportionality when balancing conflicting private rights.

Reflections

Turning to the UK, in the *YL* scenario, if the issue was conceptualised as one of horizontal effect, there would need to be a balancing of the ‘rights’ of the residents and the rights (e.g. property rights) and interests (e.g. in the proper management of their homes, the need to cover costs, profit margins) of the respondent owner of the home in question. Wider public interests may well be at stake in such cases. For instance, in the care home scenario, there might be a strong public interest in the owners of a home for severely disabled people being able to upgrade the home to provide proper facilities for the most severely disabled - this was the owners’ position in the *Leonard Cheshire* case.³⁸ This might mean that current residents have to be moved to another home. It would in my view be contrary to the public interest if privately owned and run, often charitable, care homes were prevented from modernising and upgrading their facilities because they could not move current residents.

Further, limiting the powers of managers of care homes to ask residents to vacate their rooms (perhaps because the resident has become so dependant that the care home does not have the qualified staff and equipment needed to provide for them) - as Section 145 HSCA 2008 does - will raise the costs of care home provision, and the legal uncertainty and consequent risk to which owners become subject, so that in time the supply of private care homes may be reduced. Many privately run care homes operate on narrow profit margins and the sums paid by local authorities for publicly funded residents often do not cover the actual costs. Private, self-paying residents may be cross-subsidising the publicly funded ones. A

³³ *Ibid.* Chapter 10, chart 547.

³⁴ *Ibid.* Chapter 11, chart 549.

³⁵ *Ibid.* Chapter 4, chart 529.

³⁶ *Ibid.* Chapter 5, chart 531.

³⁷ *Ibid.* Chapter 6, chart 536.

³⁸ *Leonard Cheshire* (n 8).

parallel may be drawn here with the effect of the security of tenure legislation for private residential tenants and rent control after the Second World War. This resulted in a severe shortage of good quality low cost private housing for rent. There could then be long-term negative consequences for the population of potential care home residents if managers were, because of inability to remove residents, unable to manage their homes and make accommodation available.

One could of course take the view that the needs of current care home residents are the most important consideration, and the longer-term negative implications for public policy and future care home residents of increasing security of tenure are not sufficiently strong to outweigh the interests of current residents. But the 'one' who takes that view should in my view be a politically accountable 'one.' Hence it is appropriate that the decision to extend security of tenure to care home residents paid for by the state has been taken by Parliament under the HSCA. That decision should be taken on the basis of evidence about the implications of extending security of tenure, and having weighed up the pros and cons and then persuaded Parliament to legislate on the matter. Some information was before Parliament about those matters when Section 145 was passed, though how much research had been done into the implications is not known. In any event it should not be a matter for a court operating on vague general statutory provisions about a 'function of a public nature' to decide such complex matters. I am not convinced that the courts are the right bodies to carry out the balancing exercise that decisions under section 145 will require - i.e. when a care home requires a resident to leave and the resident applies to a court under Section 145, claiming that the decision is in breach of Article 8 of the ECHR - given the absence of statutory criteria and guidance in the HSCA. Such criteria should require the courts to take into account matters such as the needs of the resident, the likely effect on the resident of being moved, the effect of non-removal of a disruptive or difficult resident on other residents, the ability of the home to provide the required level of care for the claimant, the needs of others seeking residential care, the financial implications of non-removal for the home, and public interests in, for instance, the availability of care home places or of provision for disabled people in the area. It is not at all clear from the wording of the ECHR that either such conflicting private interests or the conflicts between private and public interests are intended to be balanced in such cases, especially where what is at stake is the right to respect for one's home. As it is the courts will have to do their best in these cases without statutory guidance and there will be uncertainty until matters are clarified by case law. It may well be that a special tribunal rather like the former Rent Tribunals which dealt with security of tenure - and rent - disputes between private residential landlords and their tenants should have been established to deal with such cases, working within clear statutory criteria.

Returning to our comparative study, a number of jurisdictions have previously been keen to give direct horizontal effect to human rights provisions in their constitution or, in the case of Israel, a Basic Law. But they have rowed back from that position over the years, finding that such direct effect destabilises ordinary private law i.e. tort. Thus although the Supreme Court of Ireland initially decided that the human rights provisions in the constitution gave rise to a claim in a ‘constitutional tort’ since the 1950s that court has taken the view that claimants should normally plead their claims in ordinary tort law or whatever other part of the law might apply, and that constitutional tort claims for breach of human rights may only be brought exceptionally. In Israel too the concept of a constitutional law of torts has been rejected because of concerns about overlap and conflict with ordinary tort law and the need to develop a new set of general doctrines such as causation, vicarious liability, remedies etc. if a new constitutional law of torts were to be developed.

In conclusion, there are limits to how far the courts can go, in the absence of specific statutory provisions, in requiring private bodies to be bound to respect the convention rights or other human rights of individuals. The problems about horizontal effect are the same as those encountered in deciding whether something is a ‘function of a public nature’ under the Human Rights Act. My own view is that it is for Parliament to decide these matters. The courts will develop the law, including private law, towards creating indirect horizontal effect of convention rights, but they will be rightly concerned not to disturb the operation of ordinary law or to create over complex balancing exercises for themselves, with negative unintended consequences.

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Human Rights, the Private Sector and New Public Management

RODNEY AUSTIN*

The delivery of public services in Britain, whether by central or local government, has been transformed in the past quarter of a century by the phenomena collectively known as New Public Management.¹ Under this transformation, many hitherto governmental or publicly-owned bodies were privatised, many governmental functions have been contracted out, many discrete public services have been entrusted to semi-autonomous executive agencies or even to independent non-governmental bodies and even within government, independent financial centres such as foundation hospital trusts have been established. Many major public infrastructure projects have been implemented via Private Finance Initiatives (PFIs) or Public Private Partnerships (PPPs). The consequence of these developments has been that it is now very difficult to determine what is a public body and what is a private person, between what is a public function and what is a private act. This has enormous consequences for Section 6 (3) (b) of the Human Rights Act 1998 which defines a public authority as including any person, certain of whose functions are functions of a public nature, but excluding such persons from that definition when carrying out private acts. This definition was included in the Human Rights Act 1998 specifically to encompass within the application of the convention rights those bodies or persons to whom public functions have been transferred from government.²

The purpose of this article is to examine the application of this definition in the landmark *YL* decision, and to determine the consequences of that decision in the light of the ever-increasing trend in government to contract out its explicit statutory functions and duties. The combination of the House of Lords ruling in *YL* and the increasing transfer of government functions to private bodies may lead to the emasculation of the Human Rights Act 1998. It will be argued that the decision of the majority in *YL* was erroneous, and in particular was subject to faulty reasoning, based on considerations of the nature of the person carrying out the function and the medium through which the function was conferred on that person, rather

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¹ See Austin, 'Administrative Law's Reaction to the Changing Concepts of Public Service' in Leyland and Woods (eds), *Administrative Law Facing the Future* (Blackstone Press 1997) Chapter 1 for a detailed description of the phenomena collectively known as New Public Management.

² *Rights Brought Home: the Human Rights Bill* (1997) (Cm 3782) para [2.2]. See also Hansard (HC Debates) 16 Feb 1998 col 773 (Jack Straw MP Secretary of State for Home Affairs).

than the nature of the function itself, as required by Section 6 (3) (b). This article will also seek to rebut the argument that to include private contractors within the definition of a public authority under Section 6 (3) (b) necessarily requires the Courts to decide issues which are inappropriate for them to consider and determine.

The YL Decision

Mrs YL was a resident in a care home run by Southern Cross Healthcare Ltd, under a contract between Southern Cross and Birmingham City Council, in fulfilment of the Council's statutory duty, under Sections 21 and 26 of the National Assistance Act 1948, to arrange for the provision of residential care for the elderly who lack the means to provide for their own care.³ The Council paid Southern Cross Ltd out of public funds for the provision in one of Southern Cross' nursing homes, of residential care for Mrs YL, who suffered from Alzheimer's disease. Because of disputes between Southern Cross Ltd and Mrs YL's daughter, concerning visits by Mrs YL's husband and relations between Mrs YL's daughter and staff at the nursing home, Southern Cross gave notice to terminate Mrs YL's right to remain in the care home. Mrs YL argued, through the Official Solicitor as litigation friend, that Southern Cross Ltd was a public authority under Section 6 (3) (b), and thus under a duty to act compatibly with her convention rights, under Section 6 (1). She further argued that the notice of termination of her right to remain in the care home was incompatible with her Article 8 Convention right to respect for her home. By the time the case reached the House of Lords, the parties had reached a compromise settlement of the dispute, and Mrs YL was permitted to remain as a resident in the nursing home run by Southern Cross. But since the case raised an important question of principle, which had previously only been decided at Court of Appeal level,⁴ the House of Lords decided to hear the appeal. The Secretary of State for Constitutional Affairs intervened in the proceedings, supporting Mrs YL's case, as did a number of other organisations concerned with the care and protection of the vulnerable elderly.

The Majority Judgments

The majority of the House of Lords (Lords Mance, Scott and Neuberger) held that Southern Cross was not a public authority within the meaning of Section 6 (3) (b). Lord Scott characterised Southern Cross as:

‘...a company carrying on a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its homes and with the local

³ *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

⁴ *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; [2002] 2 All ER 936.

authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses...and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.⁵

Lord Scott also compared the provision by Southern Cross of residential care facilities with an outside company providing catering or cleaning services. With respect, this characterisation is wholly misleading. First, the vast majority (over 80%) of Southern Cross residents were paid for by local authorities, out of public funds, in fulfilment of the statutory duty placed on those authorities by the National Assistance Act 1948. The fees paid to Southern Cross will not have been commercially arrived at through negotiation but will have been determined by the local authorities' strict budgetary and taxing constraints imposed by legislation and central government controls. The fees paid will have been provided partly through central government grants, raised by national income taxes and national insurance charges, and partly by local council taxes. These are public monies and the contract between the two parties is not a purely private commercial transaction. It is noteworthy that the contract required Southern Cross to act compatibly with the residents' convention rights. This suggests that the local authority considered that the function it was transferring to Southern Cross by the contract was a function of a public nature, otherwise why would it require Southern Cross to act compatibly with convention rights, as required of public authorities under Section 6 (1)?

Secondly, the fulfilment of a statutory duty to provide residential care to the vulnerable elderly and infirm, who can no longer look after themselves and do not have the means to pay for care themselves, is clearly distinguishable from catering or cleaning services which are merely ancillary to the provision of public services. Clearly, there are some functions which fall obviously within the public sphere, and some within the private, but some will fall in the penumbra between. Running a prison is self-evidently a public function, but one which has been contracted out to private security companies. The supply, fitting and maintenance of the locks and other physical security measures necessary in the prison, under a contract with a commercial locksmith, is almost certainly not a function of a public nature. But the employment by the private contractor of the prison staff – governor and deputy governor, medical and psychiatric staff, and prison warders, is less clear, as this is a borderline or penumbral function. Although so central, indeed essential, to the performance of the clear public function of running the prison, these are nonetheless private contracts of employment. They are

⁵ YL (n 3) para [26].

not, however, merely ancillary to the public function, so they may nonetheless fall within the definition.

In addition, this characterisation argument is misplaced, since it concerns the nature of the body providing the service, a private commercial company, and the medium through which the service is provided, a private law commercial contract. The question which must be addressed under Section 6 (3) (b) is whether the function is of a public nature, not whether the provider of the function is private or public, nor whether the medium of provision is private law or public law. This is the whole point of Section 6 (3) (b), to include private persons who are carrying out functions of a public nature.

Lord Scott, having found that the provision of residential care was not a function of a public nature, also found that the act of giving notice of termination of the residents' right to remain in the care home, was an act the nature of which is private, thus excluding it from the application of Section 6. His reasoning for this finding is wholly dependent however on his finding that the relationship between Southern Cross and Mrs YL was private. But if the function of providing residential care is a function of a public nature, the termination of that function cannot be a private act. The private act exception is intended to cover those aspects of the provision of a public service which are wholly ancillary or incidental to the public service itself, e.g. cleaning and painting of the residential premises, or catering and cooking for the residents. The private act exception cannot involve the complete refusal to perform the public function.

While Lord Scott's judgment is severely flawed, that of Lord Mance is much more closely argued and persuasive, though not in the end convincing. Following an extensive analysis of European case law on the involvement of the state in the protection of convention rights, and of the British case law on amenability to judicial review, the core reasoning steps of Lord Mance's judgment are:

1. although every central and local government body is a mainstream public authority and therefore every function performed by such mainstream governmental body is covered by Section 6 (1) of the Human Rights Act 1998, not all functions of mainstream public authorities are necessarily functions of a public nature when performed by private persons, e.g. the supply of munitions to the military, which may be performed either by the military itself or by a private contractor under a commercial contract.
2. that there is a distinction between the local authority's duty under Section 21 of the National Assistance Act 1948 to arrange care and accommodation for the needy elderly, and the actual

provision of the accommodation, the former being a function of a public nature, the latter not.

3. where the actual accommodation is provided by a private contractor on commercial terms, for profit, that is not a function of a public nature, even though it may fulfil the statutory duty of the local authority to arrange care and accommodation.

With respect, this is an erroneous argument. The purpose of Section 21 of the National Assistance Act 1948 is the protection of the vulnerable and needy elderly, who are unable to look after themselves and lack the financial resources to provide such care for themselves. Since the advent of the welfare state in the post-WWII era, the relief of poverty, unemployment, sickness, disability and other similar social evils arising from market failure in capitalist economies has been seen as a core function of government. New public management has not denied that the provision of social welfare is a core role of the state; it has merely sought to provide it more efficiently, economically and effectively via the private mechanisms of the market. Changing the medium of delivery or the identity of the provider of a public service does not change the public character of the service. It is true that some contracted-out services, e.g. cleaning and catering, will be purely ancillary or incidental to the public function, but others will be the central core of that function. The provision of residential care homes is clearly the central core of the public function of arranging care and accommodation for the needy elderly.

Lord Neuberger recognised that the issue of whether the provision of residential care by a private contractor under a commercial contract for profit is a function of a public nature, is a borderline question, which he sought to resolve by resort to policy considerations; namely whether by contracting out the delivery of public services the government was seeking to free such contractors from the constraints to which public authorities are subject, in order to deliver those services more efficiently and economically. If so it is probable that Parliament did not intend for delivery of these services to be subject to the constraints of the convention rights, especially as there is an intensive regulatory regime governing the provision of residential care, which fulfils the state's obligations to ensure compliance with convention rights. It is for Parliament and such regulatory authorities to decide the policy issues surrounding the delivery and standards of care in residential homes which involve politically sensitive questions of economic resources, i.e. taxation and public expenditure. It was not appropriate therefore for the courts to become involved in such policy issues which they are not particularly well equipped to decide by including such private contractors in the definition of public authorities under Section 6 (3) (b).

With respect, when enacting the Human Rights Act 1998, Parliament and the government ministers responsible for the legislation were fully aware of the marketisation, contractualisation and privatisation of public services which had already taken place under the previous Conservative governments of 1979-1997. It is precisely because of this awareness that Section 6 (3) (b) was enacted, to ensure that new public management did not emasculate the Human Rights Act by excluding from the application of convention rights those substantial areas of public service delivery which had been removed from the direct control of the state. Regulation of such services, to ensure high quality of service delivery at reasonable cost, is separate and distinct from the observance of convention rights which are a safety net, the lowest common denominator of protection for the vulnerable. Furthermore, the courts are uniquely well-suited to decide whether convention rights have been violated and to provide appropriate remedies for such violation as required by Article 13 of the Convention and indeed as envisaged by the terms of the contract between the local authority and Southern Cross. That contractual obligation to respect the convention rights of the residents for whom the Council was paying would necessarily involve the courts in deciding whether the contractor had violated the residents' convention rights. So the policy argument adopted by Lord Neuberger is, with respect, unconvincing.

The Dissenting Minority Judgments

Lord Bingham and Baroness Hale strongly dissented from the majority, holding that the provision of residential care for the elderly, in fulfilment of the statutory duty of the local authority to make arrangements for the provision of such care, was a function of a public nature and that Southern Cross Ltd was accordingly a public authority within the meaning of Section 6 (3) (b). Lord Bingham considered that the provision of residential care for the needy elderly, beyond argument one of the most vulnerable groups within our society along with children, prisoners and mental patients, under a statutory duty, was clearly a function of a public nature:

‘...when the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6 (3) (b) of the 1998 Act was clearly drafted with this well-known fact in mind. The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would undoubtedly be a public function if carried out by B is, in my opinion, precisely the case which Section 6 (3) (b) was intended to embrace.’⁶

⁶ YL (n 3) para [20].

Lord Bingham regarded the means by which the statutory duty was discharged as irrelevant to the question of whether the function was of a public nature. Whether the local authority arranged for the accommodation in a home run by itself, another local authority, a charity or a private contractor, was simply a question of the alternative means by which the responsibility of the state may be discharged. Thus the distinction drawn by Lord Mance between the arrangements for the provision of residential care, and the actual provision thereof, was not significant:

‘...the intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant. By one means or another, the function of providing residential care is one which must be performed. For this reason also the detailed contractual arrangements between Birmingham, Southern Cross and Mrs YL and her daughter are a matter of little moment.’⁷

Lord Bingham rightly saw that the issue for determination was the nature of the function itself not how or by whom the function was performed. In his view:

‘...the nature of the function with which this case is concerned is not in doubt. It is not the mere provision of residential accommodation but the provision of residential accommodation plus care and attention for those who, by reason of age, illness, disability or other circumstances are in need of care and attention which is not otherwise available to them.’⁸

Lord Bingham noted that:

‘...for the past 60 years or so, it has been recognised as the ultimate responsibility of the state to ensure that those described in the last paragraph are accommodated and looked after through the agency of the state and at its expense if no other source of accommodation and care and no other source of funding is available. This is not a point which admits of much elaboration. That the British state has accepted a social welfare responsibility in this regard in the last resort can hardly be a matter of debate.’⁹

⁷ *Ibid.* para [16].

⁸ *Ibid.* para [14].

⁹ *Ibid.* para [15].

Lord Bingham stated that the provision of residential care was subject to detailed regulation but appeared to regard this as further evidence of the public nature of this function. He noted also that:

‘...despite the intensive regulation to which care homes are subject, it is not unknown that senile and helpless residents of such homes are subjected to treatment which may threaten their survival, may amount to inhumane treatment, may deprive them unjustifiably of their liberty and may seriously and unnecessarily infringe their personal autonomy and family relationships.’¹⁰

Lord Bingham considered that Parliament could not have intended the protection of those important values not to have applied to elderly residents merely because they were placed by the local authority in privately run care homes.

Baroness Hale’s judgment, with which Lord Bingham agreed, is the most detailed analysis of the facts of Mrs YL’s situation, of the statutory framework under the National Assistance Act 1948 and the National Health Service and Community Care Act 1990 and of the Human Rights Act 1998. Having established the obligations of the state under the European Convention on Human Rights for the acts of private persons and the willingness of the Strasbourg court to hold states responsible for violations caused by private bodies, Baroness Hale concluded that:

‘...the most effective way for the United Kingdom to fulfil its positive obligation to protect individuals against violations of their rights is to give them a remedy against the violator.’¹¹

This was in her view the purpose of Section 6 (3) (b) when establishing the concept of functions of a public nature being performed by private persons. It was the nature of the function being performed, not the nature of the body performing it, which matters under Section 6 (3) (b). Where the public, in the shape of the state, has assumed responsibility for a task at public expense and in the public interest that task is a function of a public nature. There was no doubt that the state had undertaken the responsibility of securing that the assessed community care needs of the vulnerable elderly were met, and in the modern ‘mixed economy of care,’ those needs could be met in a number of different ways.

‘But it is artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging

¹⁰ *Ibid.* para [19].

¹¹ *Ibid.* para [60].

them, when the state has assumed responsibility for seeing that both are done.’¹²

Another important factor for Baroness Hale was the public interest in having the task in question performed:

‘...in a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who are unable to look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly. They must be provided with the specialist care, including the health care that they need even if they are unable to pay for it themselves. No-one can doubt that providing health care can be a public function, even though it can also be provided purely privately.’¹³

Other factors which persuaded Baroness Hale that the provision of residential care under Section 21 of the National Assistance Act 1948 was a function of a public nature were that the function was performed at public expense and involved the use or potential use of statutory coercive powers.

The fact that people who pay privately for residential care may not be protected by Section 6 (3) (b) did not prevent its application to those who could not afford to pay since the former may have other remedies, as exemplified by the clause in the service provision contract, which required the provider to act compatibly with the convention rights of the residents in its care. It is precisely the ability of those who can afford to pay to protect themselves which distinguishes them from the more vulnerable elderly who cannot afford the cost of residential care and for whom the state has assumed responsibility. Equally, the human rights culture which applied to the overwhelming majority of residents in private care homes but paid for by local authorities would infuse the private contractual arrangements between the care provider and those residents who were self-payers.

Lastly, Baroness Hale noted that the court had not been concerned with whether Mrs YL’s rights had been or might have been violated but that the court in deciding whether that was the case would have to take into account the rights of others including possibly the rights of the company providing the accommodation.

This last point is important in rebutting the policy argument that the private sector should not be subjected to the constraints of the convention rights. Most, though not all, convention rights are qualified rights, subject to limitations based on, *inter alia*, the rights of others, the protection of public

¹² *Ibid.* para [66].

¹³ *Ibid.* para [67].

order and public morality, confidentiality, the prevention and detection of crime and so forth. The right to respect for the home guaranteed by Article 8 is not an absolute right and does not confer absolute security of tenure.¹⁴ It would be possible to defend the giving of notice terminating Mrs YL's residence in the home run by Southern Cross on a number of grounds if Mrs YL's behaviour or that of her husband or daughter detrimentally affected other residents or staff at the home. Equally, the company may have needed to decant residents in order to carry out repairs or improvements to the home. As a 'hybrid' public authority it would not lose its Convention or other legal rights,¹⁵ and would therefore have property rights in running the home which would have to be balanced against those of Mrs YL, using the test of proportionality. This would involve the courts asking the three questions set out in *Ex parte Daly*,¹⁶ namely whether there was a legitimate aim or objective of the measure being taken to restrict the convention right, whether there was a rational connection between the measure being taken and the legitimate aim or objective and whether the measure being taken was the least restrictive measure possible to achieve the aim or objective.

This would involve the courts to some extent in the substantive merits of the case but where there were important questions of policy, particularly questions concerning economic resources, the courts have demonstrated a marked reluctance to set aside the decisions of public authorities, conceding an area of discretionary judgment within which the authority's decisions are respected or deferred to by the courts on the basis of relative institutional competence. The Courts would also point to the existence of a detailed regulatory scheme in respect of privately run care homes as a further ground for deference or non-intervention.¹⁷ This indicates a judicial willingness to leave the substance of complex economic policy issues to be decided by those with greater expertise and possibly greater legitimacy,¹⁸ but the determination of the substantive merits of the violation of the claimant's convention rights is a different question from whether the residential care provider is or is not a public authority under Section 6 (3) (b).

Of course, in the case of absolute convention rights, such as the Article 3 right not to be subjected to inhuman or degrading treatment, no such balancing exercise is permitted, and the protection of that right would apply

¹⁴ *Qazi v Harrow LBC* [2003] UKHL 43; [2004] 1 AC 983.

¹⁵ YL (n 3) para [74] (Baroness Hale). See also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546 para [11] (Lord Nicholls).

¹⁶ *R v Home Secretary, ex parte Daly* [2001] UKHL 26; [2001] 2 AC 532.

¹⁷ *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] 2 AC 42.

¹⁸ On this issue, I am in principle in agreement with Professor Dawn Oliver, but not on the issue of whether private contractors should be included within the Section 6 (3) (b) Human Rights Act 1998 definition of public authorities. See Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] *PL* 476 and Oliver, 'Human Rights and the Private Sphere' in this volume.

to the vulnerable elderly residents irrespective of any question of economic resources. No policy considerations would be involved, only the issue of whether the treatment of the resident constituted inhuman or degrading treatment, in violation of Article 3. The violation of such fundamental rights protecting the dignity of vulnerable human beings should not be excluded from judicial determination. As was pointed out in *YL*, the literature is full of examples of inhuman and degrading treatment of the elderly in care homes.¹⁹

The Aftermath of YL

Both before and since the *YL* decision the Joint Select Committee on Human Rights has argued that the definition of public authorities under Section 6 (3) (b) should include private contractors carrying out statutory duties imposed upon core public authorities such as local authorities.²⁰ Initially the government's response was positive, consistent with the view it had taken as an intervener in *YL*:

‘...the question is how to enshrine in care home operations the Human Rights Act in an appropriate manner to make sure that people in care are treated with respect and dignity [...] it is possible that we can do it by amendments to regulations very speedily. I am looking both at a short-term solution, which this may well provide, and at a longer-term solution, for which I am sure I shall have the benefit of the expertise of noble Lords on human rights as well as that of people involved with care homes directly. This is about making sure that, where elderly people are cared for, they have the backdrop of the Human Rights Act to make sure that they are treated properly and certainly with respect.’²¹

The Joint Select Committee included in its report the following:

Recommendation 17

‘Because of the recent court decision that private care homes are not public authorities under the Human Rights Act, we recommend, as an interim measure before legislation is passed,

¹⁹ *YL* (n 3) paras [58]-[59] (Baroness Hale).

²⁰ Joint Select Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act* (2003-04) 7th Report, HL 39 HC 82; Joint Select Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act* (2006-07) 9th Report, HL 77 HC 410; Joint Select Committee on Human Rights *The Human Rights of Older People in Healthcare* (2006-07) 18th Report, HL 5 HC 72.

²¹ Hansard HL vol 693 cols WA598-599 (27 June 2007) Baroness Ashton, then Minister for Human Rights, in response to a parliamentary question answered on 27 June 2007.

that the care standards regulations be amended to require, as the health standards do, that care homes respect residents' human rights in accordance with the Human Rights Act.²²

But the government seems to have undergone a change of heart since its formal response to the Joint Committee's recommendation was as follows:

'Given that we will shortly be introducing a new regulatory framework, we do not propose to make amendments to the current care homes regulations. But we will legislate to ensure that that the new regulator can take into account any statute, including human rights legislation, in determining whether providers are able to retain registration.'²³

Therefore, it seems clear that the government does not intend to introduce legislation making private care homes directly subject to the Human Rights Act as public authorities under Section 6 (3) (b) but to include the observance of convention rights as part of the regulatory regime. This is not consistent with the position it took as intervener in *YL*.²⁴

In a surprising recent decision, the Queen's Bench Divisional Court held that the management and allocation of housing stock by a registered social landlord was a function of a public nature so that it was amenable to judicial review and regarded as a public authority for the purposes of the Human Rights Act 1998.²⁵ The court held that although the management and allocation of housing stock was not in itself an inherently governmental activity and although the trust was constituted and governed by its own rules, owned and managed housing stock and entered into private law contracts with tenants, the nature of its activities and the context within which it operated was a very different situation from an ordinary commercial business.

The court distinguished the housing trust from the private provider in *YL* on the grounds that the trust was a registered social landlord under statute and was heavily subsidised by public funds; that the trust's business was heavily subsidised by the state was attributable to the role it played in the implementation of Government policy. The social rented housing sector was permeated by state control and influence and was one in which registered social landlords could be said to take the place of local authorities.

²² Joint Select Committee on Human Rights *'The Human Rights of Older People in Healthcare'* (2006-07) 18th Report HL 5 HC 72 para [179].

²³ Joint Select Committee on Human Rights *'Government Response to the Committee's Eighteenth Report of Session 2006-07: the Human Rights of Older People in Healthcare'* (2007-08) 1st Report, HL 5 HC 72.

²⁴ But see now (n 30) below, for the government's subsequent legislative response.

²⁵ *Regina (Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377 (Admin); (2008) 158 NLJ.

Other relevant features were the voluntary transfer of housing stock to registered social landlords from the public sector and the statutory duty of co-operation with local authorities imposed upon the trust. This decision is of course consistent with the earlier decision on a social housing association, taking into account many of the same factors.²⁶ But by addressing the institutional arrangements for the performance of a function by a non-governmental body these decisions fail to address the crucial question namely whether the function is a function of a public nature, just as the majority judgments in *YL* fail to address that question.

Conclusion

Although the European Convention on Human Rights imposes obligations on states and not directly on private individuals, the Strasbourg jurisprudence does create state liability for the actions of private individuals and imposes positive obligations on states to protect the convention rights of individuals from violation by private, non-state actors.²⁷ This may involve the creation of rights and obligations as between private, non-state actors, known as horizontal effect, in contrast to vertical effect as between the individual and the state. Following the enactment of the Human Rights Act 1998, the Courts in the UK, which are bound under Section 6 of the Act to act compatibly with convention rights, have provided for horizontal effect in respect of the Article 8 right to respect for private life²⁸ and in respect of the Article 2 right to life and the Article 3 right not to be subjected to inhuman and degrading treatment.²⁹ There is therefore no objection in principle to the horizontal effect of convention rights and the inclusion of private persons in the Section 6 (3) (b) definition of public authorities was clearly intended to create a form of horizontal effect where public functions have been transferred from state bodies to non-state, private persons.

Given the transformation of the state and the delivery of public services under new public management in the past quarter century the decision of the House of Lords in *YL* removes much of the business of government from the application and protection of convention rights. This is the regrettable consequence of a decision in which the reasoning is erroneous and which is based on groundless policy considerations. It is to be hoped that the opportunity for overruling the *YL* decision in a differently constituted House of Lords (or Supreme Court) will arise in the not too distant future or that the Strasbourg court will have the opportunity to rule

²⁶ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] QB 48.

²⁷ *X & Y v The Netherlands* (1985) 8 EHRR 235; *Z v UK* (2001) 34 EHRR 97.

²⁸ *Douglas & Zeta-Jones v Hello!* [2001] QB 967; *Campbell v MGN* [2004] UKHL 22; [2004] 2 AC 457.

²⁹ *Venables & Thompson v News Group Newspapers Ltd, Associated Newspapers Ltd & MGM Ltd* [2001] 2 WLR 1038.

upon this question or that the government will introduce legislation to clarify the definition of a public authority under Section 6 (3) (b).³⁰ Given the admitted and frequent failures of the regulatory schemes to protect the vulnerable elderly in privately-run residential care homes, the application of convention rights is an important long-stop, last resort protection for the dignity of the many thousands of elderly people. The loss of this protection is a retrograde step in the development and furtherance of a human rights culture in the United Kingdom.

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³⁰ Shortly after completion of this article, the government introduced an amendment to the Health and Social Care Bill 2008, at the very final stages of the passage of the Bill, shortly before Royal Assent. This amendment is now Section 145 of the Health and Social Care Act 2008, which provides that a private care home, providing accommodation combined with nursing or personal care, for an individual, under arrangements made with a local authority under Sections 21 and 26 of the National Assistance Act 1948 is to be taken to be performing a function of a public nature, for the purpose of Section 6 (3) (b) of the Human Rights Act 1998, when doing so. This provision therefore overrides the majority judgments in *YL* and upholds the minority judgments. Note that this provision does not protect wholly self-paying residents of such a care home, only those paid for out of public funds.

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Rights Brought Home: the Human Rights Bill (1997) (Cm 3782).

Their Lordships' Timorous Souls

TOM RAINSBURY*

This paper evaluates the 'mirror principle' which has recently been embraced by the senior appellate court. According to the House of Lords, the domestic courts must not deviate from the case law of the European Court of Human Rights when interpreting the meaning and application of rights under the Human Rights Act 1998.

Focusing solely on the 'scope' stage of rights interpretation,¹ it is first argued that there is no legal source which mandates such a principle. More importantly, there is no compelling reason why the national courts should be unable to extend the peripheries of these municipal rights beyond the scope of convention rights currently envisaged by the European Court (Part I). There are in fact a number of very good reasons why the courts should remain unrestrained in adopting a more generous interpretative role (Part II). Finally, in order to quell any concerns of judicial activism, several restraints are outlined which should colour this new dynamic approach (Part III).

One of the greatest triumphs of modern civilisation has been the prominence afforded to the protection of human rights. As every English law student will know, the spirit of liberty has existed in the United Kingdom for many centuries; the domestic courts have long acted as the guardians of our individual rights and freedoms by developing and upholding a number of 'Common Law rights.' The ratification of the European Convention on Human Rights 1950 (ECHR) and its incorporation under the Human Rights Act 1998 (HRA) represented two further bulwarks – one statutory and one under international law – to complement and add to these judicial constructs. Generally speaking, the national courts have employed these new instruments to great effect and decisions such as *A v Secretary of State for the Home Department (No 1)*² and *(No 2)*³ illustrate what some academics have labelled the 'new liberal voice' of the

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¹ This is the initial stage where the court must determine whether a right has been 'engaged' and is thus applicable.

² *A v Secretary of State for the Home Department* [2004] UKHL 56.

³ *A v Secretary of State for the Home Department* [2005] UKHL 71.

House of Lords.⁴ At the same time, the British judiciary have been rightly cautious in matters which have demanded a degree of sensitivity and restraint. It is contended, however, that there is presently one particular area in which the courts have been unduly deferential. In *R (Ullah) v Special Adjudicator*,⁵ the Law Lords emphasised that when interpreting the application of rights under the HRA, British courts should 'keep pace' with the jurisprudence of the European Court of Human Rights in Strasbourg (ECtHR). This paper argues that there is nothing prohibiting the courts from deviating from the case law of their European counterpart in order to provide a *more generous* interpretation of rights under the HRA. Moreover, in the context of interpreting the *scope* of these rights, there are a number of instances where it would be undesirable not to do so.

The 'Humpty Dumpty' Dictum

Lord Bingham, with the full endorsement of the House of Lords, outlined the following principle in *Ullah*:

'It is of course open to member states to provide for rights more generously than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. *The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*'⁶

In essence, this elevates the ECtHR's decisions to the level of *binding* - and not persuasive - precedent. When interpreting the new municipal rights under the HRA, the domestic courts must not outpace or fall behind any analogous interpretation which the European Court has given to the convention rights.⁷ Their Lordships, therefore, seem to see the ECtHR as being personified by a demanding Humpty Dumpty; that the meaning of rights and freedoms within member states must be 'just what I chose it to mean, *neither more nor less.*'⁸ Unfortunately, there has been no attempt by the courts to distinguish between clear, unclear and non-existent Strasbourg

⁴ Gearty, '11 September 2001, Counter-terrorism, and the HRA' (2005) *Journal of Law and Society* 18, 31.

⁵ *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

⁶ *Ullah* (n 5) (Lord Bingham) emphasis added.

⁷ Although the latter are alluded to in the HRA itself, it is important to appreciate that the two sets of rights are distinct.

⁸ Carroll, *Alice in Wonderland*. Note that Lord Bingham accepted that the European case law may be overlooked in 'special circumstances.' See Lewis, 'The European Ceiling on Human Rights' [2007] *PL* 720, 731. I agree with Lewis that these circumstances have been interpreted so narrowly that the exception's existence is extremely 'doubtful.'

precedents. As such, it must be presumed that the principle applies to all three; if there is a clear but negative European precedent, it should be followed but if not, the domestic court would presumably be outpacing Strasbourg if it were to provide a more generous interpretation. Some academics have hence identified the *Ullab* dictum as embodying a ‘mirror principle.’⁹ Although the reflective metaphor is very useful, this author proposes to use the term ‘comity’ to emphasise the friendly acquiescence that is presently being shown to the jurisdiction of a foreign court.¹⁰

Is There a Legal Source which Substantiates this Approach?

Section 6 HRA requires the courts to act ‘in a way which is compatible with a convention right.’ This ensures that the United Kingdom’s obligations under international law are observed and rightly precludes British judges from interpreting the scope of an incorporated right *less* generously than the ECtHR’s analysis of its respective convention counterpart. However, there is no such provision or decision which unequivocally prohibits a *more* generous interpretation.

First, and perhaps most importantly, the rights created by the HRA are *statutory rights* which are now ‘part of this country’s law.’¹¹ They are different creatures from the Articles protected under the European Convention and it should therefore be open for UK judges to interpret them accordingly. Furthermore, Section 2(1) HRA only requires domestic courts to ‘take into account’ European precedents. As Wicks explains, a “decision not to ‘stick like glue’ to the Strasbourg approach is perfectly legitimate.”¹² Turning to the ECHR, Lord Lester has indicated that the ‘only obligation under the Convention is in Article 46(1).’¹³ It therefore remains silent on the specific issue of domestic courts providing a more generous protection of convention rights which have been incorporated into the national law of member states. However, it is important to note that Article 53 ECHR expressly allows member states to recognise and protect rights *beyond* those listed in the ECHR.¹⁴ Finally, Strasbourg has been similarly reticent in declining to address the appropriate role for national courts. Given that the European Court ‘confines its reasoning strictly to the case before it,’¹⁵ this is not surprising. However, it should be noted that the existence of a ‘margin

⁹ *Lewis* (n 8).

¹⁰ The *Ullab* approach entails *double deference* to both Strasbourg and, indirectly, the domestic decision-maker.

¹¹ *Re McKerr* [2004] 1 WLR 807 para [25] (Lord Nicholls).

¹² Wicks, ‘Taking Account of Strasbourg?’ [2005] *European Public Law* 405, 422.

¹³ Hansard HL vol 583 col 512, the UK must abide by the ECtHR’s final judgment in cases to which it is party.

¹⁴ ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.’

¹⁵ Martens, ‘Incorporating the European Convention’ [1998] *EHRLR* 6, 13.

of appreciation' doctrine is difficult to reconcile with an argument that convention standards must be uniformly applied.¹⁶

Revealed in this light, one will appreciate that the comity principle has not been mandated by the ECHR, ECtHR or the HRA; Lady Justice Arden has thus labelled it the 'self-denying ordinance in *Ullah*.'¹⁷ However, to acknowledge this reality is not to say that the new interpretative method is *prima facie* wrong. The central question that must be addressed is not *can*, but *should* such a deferential stance be adopted?

Part I: Justifying Ullah

The *Ullah* approach prevents the courts from *outpacing* the ECtHR in its interpretation of the rights and freedoms under the Convention. This section identifies and evaluates the possible reasons for denying a more generous domestic interpretation when determining the *scope* of the new rights enshrined under the HRA.

Two 'Myths'

i) Strasbourg is 'better placed'

In *Anderson*, Lord Justice Buxton expressed that an international court interpreting an international instrument 'brings to that task a range of knowledge and principle that a national court cannot aspire to.'¹⁸ This adopts an essentially Platonic view that the European justices are a 'discerning minority' of individuals gifted with the 'blessed possession' of knowledge which is necessary to order society. It implies that a more generous interpretation should not be undertaken by the national judiciary since it does not possess sufficient expertise to come to the correct conclusion.

With the utmost respect, this assertion is unsound. The precise content of human rights has eluded the grasp of some of history's greatest minds and it is therefore misguided to bow down to the European Court's judgement on the ground that it is more likely to identify their 'correct' meaning. One could go further and argue that, in the words of Jeremy Bentham, this concession gives Strasbourg 'the satisfaction...of teaching grandmothers to suck eggs,'¹⁹ since the British judiciary has interpreted common law rights with great ingenuity for many centuries (and long before the fledgling European Court).

¹⁶ R (*Kebeline*) v DPP [2000] 2 AC 326, 380 (Lord Hope).

¹⁷ Arden, 'The Changing Judicial Role' (CALBRA Annual Lecture, 26 November 2007) para [49].

¹⁸ R (*Anderson*) v Home Secretary [2002] WLR 1143 para [91].

¹⁹ Bentham, *Works* (ed Bowring 1843) vol 2, 497 'while you poor simple souls know nothing about the matter.'

ii) *Democratic Qualms*

Amidst the euphoria surrounding the rise of human rights, a common concern has been the guardian role of the judiciary. It is frequently argued that it is *undemocratic* for these unelected and unrepresentative individuals to decide the meaning of such contestable values. I believe that this ever-present democratic concern is the underlying reason for the judicial restraint shown in *Ullab*. An initial response could be to look at the panoply of arguments which contend that the general judicial role under the HRA is *not incompatible with democracy*.²⁰ Many of these are very compelling but will not be pursued here since such ground is already well trodden. Alternatively, it is argued that, *even if these general arguments are not accepted*, this democratic anxiety should not arise when considering the adoption of a more generous interpretation, particularly at the *scope stage* of rights adjudication.

First, the official statements made at the time of the Human Rights Bill are ‘unusually explicit evidence of parliamentary intention’ that the courts should be free to outpace European jurisprudence.²¹ In this sense, *Ullab* is ironically undemocratic. Second, there is another reason why it might be seen as significantly undemocratic. The comity principle forthrightly defers to the opinion of the Strasbourg Court, *not the considered decisions of elected representatives*. It means that the rights of the domestic populace are determined by a democratically unaccountable panel of foreign judges, ‘some of them drawn from societies markedly unlike our own.’²² Finally, if a court claims that it is ‘deferring’ to the views of an elected representative when determining the *scope* of a right, it is deferring to what the decision-maker *believes the right should mean* and not whether he or she believes its violation is *necessary in a democratic society*. Although it is correct that deference on institutional and constitutional grounds should sometimes be applied in relation the latter,²³ it must not be applied to the former judgement; to do so would be to permit elected officials to set their own rules and break them, rendering our fundamental rights merely imaginary.

Why Uniformity?

The reason that Lord Bingham gave for the approach in *Ullab* was that ‘the meaning of the Convention should be uniform throughout the states party

²⁰ Perhaps the strongest is Lord Bingham’s recognition that the HRA ‘gives the courts a very specific, wholly democratic mandate’ see *Secretary of State for the Home Department* (n 2) para [42]. Others have stressed that the Act promotes a ‘democratic dialogue’ and embodies an acceptable compromise where judicial decisions are not binding *stricto sensu* on elected officials. Dworkin forcefully argues that an inherent feature of democracy itself is respect for fundamental values. See, Dworkin, ‘Does Britain Need a Bill of Rights?’ in *Human Rights in the UK* (OUP 1996). Sir John Laws makes a similarly compelling case in Laws, ‘Law and Democracy’ [1995] *PL* 72.

²¹ *Lewis* (n 8) 726. See Part II.

²² Bingham, ‘The ECHR: Time to Incorporate’ in *Human Rights in the UK* (OUP 1996) 8.

²³ See Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] *PL* 592.

to it.²⁴ An initial point to make is that his Lordship must be asserting that the Convention should be uniform at *both* the national and European level, rather than just the latter level. This is because a different national interpretation will not jeopardise the uniformity of Strasbourg jurisprudence since the ECtHR is not required to follow it.²⁵

In his Lordship's learned opinion, the Convention contains *autonomous* concepts which should not fluctuate and vary depending on which instrument or legal code they arise from. Without further explanation, however, this justification appears a little meaningless; having opted for an approach which promotes uniformity, it is justified by explaining that the Convention must be uniform. It is not explained *why* uniformity at both levels is necessary.²⁶ One possible argument could be to maintain that 'human' rights are objective values common to all men and women, and, if correctly interpreted, cannot therefore differ across member states. However, modern consensus seems to acknowledge that it is not as straightforward as this.²⁷ Instead, the author can identify three potential justifications for why uniformity might be desirable (although all are ultimately untenable).

No Governmental Right to Appeal

In *Al-Skeini*, Lord Brown explained that the 'danger' of a more generous interpretation is that 'the member state cannot itself go to Strasbourg to have it corrected.'²⁸ State parties have no right of petition under Article 34 ECHR. This rather technical argument initially appears to rest on the mistaken assumption that the ECtHR is more likely to make a 'correct' human rights interpretation (and its seal of approval is therefore required to cast legitimacy over a domestic court's decision). Such logic has already been argued to be untrue. However, proponents of uniformity might reply that the objection is not so much about which court will get the right answer but about a concern for *fairness*; it is *unfair* that the government cannot challenge an adverse domestic interpretation at Strasbourg yet the displeased individual can. Although this inequality already exists under the current structure, they would argue that it is fairer to proceed cautiously and require aggrieved individuals to pursue their cases at the ECtHR. This is unsustainable for a number of reasons.

First, it is not unfair that governments do not have a right of petition in order to challenge adverse rulings. This is because such a right would be meaningless in practice since it is difficult to imagine that the ECtHR would

²⁴ *Ullab* (n 5).

²⁵ Wintemute, 'The HRA's First Five Years' [2006] *KCLJ* 209, 211.

²⁶ *Lewis* (n 8) 732. Such judicial statements have often been made 'as assumptions or simply stated as self-evident truths.'

²⁷ This will be examined in further depth in Part II.

²⁸ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 para [106].

ever overturn a generous domestic interpretation. Indeed, it would almost certainly accord a ‘margin of appreciation’ in these instances and thereby serve a vestigial role. Second, it is unfair to require individuals to go to such additional length in order to protect their fundamental rights. This attitude effectively concedes that rights are, ultimately, only given to those who can afford them (an attitude that the HRA was specifically intended to counter). Finally, it is difficult to accept that *nominal* unfairness (if any) suffered by the government should stand in the way of a more effective protection of human rights. The unfairness caused will only ever be minimal since Article 26 ECHR stipulates that all domestic remedies must be exhausted before a case may be admissible before Strasbourg. Therefore, the government will still have equal and ample opportunity to challenge an adverse ruling at the domestic level.

Fairness to Foreign Citizens

In *Anderson*, Lord Justice Buxton stated that ‘fairness between the citizens of those different countries requires that [the ECHR’s] terms have a uniform and accessible meaning.’²⁹ This is a somewhat novel suggestion that interests of justice should transcend British borders into a European sphere; that like cases should be treated alike all over Europe. However, this argument is again flawed. Professor McCrudden has cogently argued that, for the principle of justice to operate, ‘the decision-maker has to have some duty to treat the similarly situated parties alike.’³⁰ For him, this duty derives from being *responsible* for the decision in both cases. Given that the UK courts are in no way responsible for decisions beyond British shores, the claim that a more generous domestic interpretation would be unfair is a *non sequitur*. In the alternative, one might question why a concern for being fair to foreign citizens in Andorra must *trump* a desired improvement in the protection of human rights in the United Kingdom. Lord Justice Buxton might point to the ancient maxim ‘let justice be done though the Heavens fall.’ However, it is debatable whether this must still hold true if the falling heavens are a sub-optimal protection of fundamental rights, and the injustice done is comparatively minute.

Legal Certainty

It might be argued that a less precedential approach will generate legal uncertainty. According to the late Professor Wade, this is undesirable because it becomes difficult to know which acts will attract legal implications.³¹ This may have adverse consequences such as discouraging beneficial activities and encouraging litigation. Although, it is conceded that

²⁹ *R (Anderson) v Secretary of State for the Home Department* [2001] EWCA Civ 1698 para [89].

³⁰ McCrudden, ‘Transnational Judicial Conversations on Constitutional Rights’ [2000] *OJLS* 499.

³¹ Wade, ‘The Concept of Legal Certainty’ [1940] *MLR* 183, 187.

a more generous approach may create a small degree of uncertainty, this is unobjectionable in the context under consideration.

First, the additional uncertainty generated by a more flexible interpretative approach will be very small. The law will still possess 'a solid core of certainty'³² where there are positive Strasbourg and domestic precedents. Second, a degree of uncertainty in the human rights context is in fact *beneficial*. The air of unpredictability will deter invasive official behaviour at the very fringes of human rights legitimacy; instead, it will encourage officials to make less interfering but equally effective decisions. There will be a 'double-check' ethos which goes hand-in-hand with the HRA's aim of facilitating a 'human rights culture.' Third, one must accept that uncertainty is an *inevitable part of any legal system* (this is particularly true for the common law which develops incrementally). Professor Wade therefore stressed that the law 'represents a kind of equilibrium between certainty and justice.'³³ More importantly, the Chief Justice of Canada has identified that uncertainty is particularly inevitable when dealing with the broad principles in human rights instruments.³⁴ Fourth, the ECtHR itself is not bound by its own precedents and it has explicitly acknowledged that the 'interests of legal certainty' may sometimes be ignored 'since the Convention is first and foremost a system for the protection of human rights.'³⁵ Finally, legal uncertainty could be mitigated through the adoption of prospective overrulings.³⁶

Part II: Justifying a More Generous Approach

The reason why the approach in *Ullah* is so objectionable is because it leads to a sub-optimal domestic protection of the rights conveyed under the HRA.³⁷ An effective protection of human rights demands a dynamic *principled approach* rather than a stultified precedential and legalistic one. As Sir Andrew Morritt V-C emphasised in *Aston Cantlow*, the judge's task is not to 'cast around in the European Human Rights Reports like black-letter lawyers seeking clues...it is to draw out the broad principles which animate the Convention.'³⁸ Indeed, the Privy Council has long upheld the view that constitutional instruments must be interpreted flexibly, avoiding the 'austerity of tabulated legalism.'³⁹ As Lord Wilberforce put it, a

³² McLachlin, 'Judging in a Democratic State' (Templeton Lecture 3 June 2004).

³³ Wade (n 31) 197.

³⁴ McLachlin (n 32).

³⁵ *Goodwin v UK* (2002) 35 EHRR 18 para [74].

³⁶ The House of Lords has recently indicated that it has the power to make such rulings in the interests of justice; *Re Spectrum Plus* [2005] 3 WLR 58.

³⁷ The third recital of the ECHR's Preamble requires state parties to ensure the 'maintenance and further realization of Human Rights and Fundamental Freedoms.'

³⁸ *Aston Cantlow* [2001] EWCA Civ 713 para [65].

³⁹ *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (Lord Wilberforce).

constitutional charter is '*sui generis*, calling for principles of interpretation of its own.'⁴⁰ In this light, David Pannick has argued that the HRA must be seen as a constitutional document which demands its own 'special principles of interpretation.'⁴¹ Outlined below are four interpretative principles which, it is argued, the UK courts should be free to apply at the 'scope' stage of adjudication in order to achieve a more effective protection of municipal rights.⁴²

The Dialogue Principle

In his Hamlyn Lecture, Professor Gearty identified that a major problem which plagues human rights scholarship is the 'crisis of authority,' the gargantuan task of providing an authoritative foundation for human rights.⁴³ Traditionally, natural law theorists argued that human rights were objective truths (defined by God or by Reason) and that their validity was 'as much a matter of definite knowledge...as the colour of a ripe apple.'⁴⁴ Jeremy Bentham famously replied that this was 'nonsense upon stilts.' Indeed, twentieth century scholarship has seen a move away from *meta*-ethics to *discourse* ethics where it is conceded that the precise meaning of human rights is not instantaneously identifiable and will invariably need to be made and remade.⁴⁵

If this is accepted, one must logically concede that, in order to render human rights *less* contestable, any interpretative process should invite debate and dialogue rather than nullify it.⁴⁶ It is therefore argued that the UK courts need to embrace and take part in a two-way 'creative dialogue'⁴⁷ with the Strasbourg court. If there is a good reason for departing from a European precedent, the courts must not feel restrained from interpreting the municipal right's scope more generously. This should ultimately provoke a response from the ECtHR which will be able to show its regard or disregard for the cogency of analysis in an analogous but subsequent case. Likewise,

⁴⁰ *Spectrum* (n 39) 329.

⁴¹ Pannick, 'Principles of Interpretation of convention rights under the HRA' (1998) *PL* 545, 545.

⁴² There is an inevitable overlap between the four principles.

⁴³ Gearty, *Can Human Rights Survive?* (CUP 2006) Chapter 2.

⁴⁴ Dahl, 'Decision Making in a Democracy' in *Toward Democracy* (IGSP 1997).

⁴⁵ *Lewis* (n 8) 744 -745. The author disagrees with Morgan who argues that this view makes human rights no better than subjective judgements with no moral force. As Lord Hoffmann explains, the assertion that human rights are universally true is still a 'half truth' since there remains an 'irreducible minimum' that we can all accept, see Hoffman, 'Human Rights and the House of Lords' [1999] *MLR* 159,165. It is only beyond this objective core, and within the ambit of certain 'grey areas' that it is vitally important for a contentious dialogue to take place see *Guzzardi v Italy* (1980) 3 EHRR 333 para [3] (Judge Matscher).

⁴⁶ 'The effective protection of human rights demands a 'process of arguing, urging, campaigning, denouncing, encouraging and asserting' (Sir Stephen Sedley's Holdsworth Lecture 2005).

⁴⁷ Steyn, '2000-2005: Laying the Foundations of Human Rights Law' [2006] *EHRLR* 349, 361.

the House of Lords will be then able to posit a riposte, and so on and so forth.

The Cultural Values Principle

This interpretative principle recognises the importance of cultural values when determining the meaning of the rights created by the HRA. It is premised on a view that it is wrong to perceive these statutory rights as essentially *European* constructs which must be moulded by a *European* Court, taking into account *European* values. This is particularly since the rights created by the HRA are not international rights created by treaty but liberties that have been born and bred in the United Kingdom. It demands that the courts should expand the purview of these rights in order to incorporate important 'constitutive values.'⁴⁸

What are these distinctive cultural values? Sir Alfred Denning opened the Hamlyn Lecture series with the impassioned eulogy that the United Kingdom has 'succeeded to the greatest heritage of all – the heritage of freedom.'⁴⁹ One can discern a number of rights which have been particularly pronounced and protected over time: freedom from unlawful detention,⁵⁰ access to justice,⁵¹ presumption of innocence⁵² and freedom of conscience,⁵³ are some of the many which spring to mind.

An adoption of this principle would enable these values to 'bolster' the model of convention rights, as seen through the eyes of the Strasbourg Court, in order to provide a 'particularly British view of fundamental rights.'⁵⁴ In particular, it should be noted that the European Court itself does not see the Convention as embodying a set of homogeneous European values which must be interpreted uniformly across the forty seven member states. As the Court's former President has stressed, the 'Convention is not intended to destroy the richness of the cultural and other variety found in

⁴⁸ Poole, 'Harnessing the Power of the Past?' [2005] *J Law & Soc* 534, 545-546. In a similar vein, Lord Hoffmann has argued that we have 'our own hierarchy of moral values... [and] it would be wrong to submerge this under a pan-European jurisprudence of human rights' at (n 45). See also *Pannick* (n 41) 165.

⁴⁹ Denning, 'Freedom under the Law' (Hamlyn Lecture 1949).

⁵⁰ *A* (n 2) para [87]. Lord Hoffmann has referred to this as 'a quintessentially British liberty.'

⁵¹ *Scott v Scott* (1913) AC 417 (Lord Hoffman).

⁵² *Woolmington v DPP* [1935] AC 462 (Viscount Sankey).

⁵³ *Entick v Carrington* (1765) 19 HST 1029.

⁵⁴ *Dworkin* (n 20) 64. See also *R (Marper) v Chief Constable of Yorkshire* [2002] EWCA Civ 1275 para [34] (Lord Woolf CJ): 'there can be situations where the standards of respect for the rights of the individual in this jurisdiction are higher than those required by the Convention [and there is] nothing in the Convention setting a ceiling on the level of respect which a jurisdiction is entitled to extend to personal rights.' However, this was rejected on appeal. Similarly, McLachlin CJ has argued that constitutional instruments should be seen as part of a 'hybrid system, incorporating aspects of the rights tradition into the common law and vice versa.' See also McLachlin, 'Bills of Rights in Common Law Countries' (2002) *ICLQ* 197, 197.

Europe by imposing rigid, uniform solutions.⁵⁵ In particular, the ‘margin of appreciation’ doctrine acknowledges that countries may hold different cultural values and ensures that these differences are respected; Strasbourg remains ‘subsidiary to the national systems safeguarding human rights.’⁵⁶

The Evolutive Principle

‘Like the eagle in the sky that maintains its stability only when it is moving, so too is the law stable only when it is moving.’⁵⁷ The beliefs and philosophies of societies are always in constant flux. The furore surrounding the publication of D.H. Lawrence’s *Lady Chatterley’s Lover* is a good example of how the moral attitudes of society may change over time. Another example is the decriminalisation of homosexuality under the Sexual Offences Act 1967 and its subsequent protection under the Equality Act 2006. Not bound by its earlier decisions,⁵⁸ the European Court itself is free to adopt a flexible interpretative approach in order to reflect the shifting sands of moral opinion within the meaning of the Convention. It emphasises that the ECHR should be seen as a ‘living instrument which...must be interpreted in the light of present-day conditions.’⁵⁹

It is argued that this interpretative principle should be adopted in the *domestic* as well as the *European* sphere. Again, the rights that the HRA establishes are part of the domestic law and are distinct entities from the Articles protected under the ECHR. The courts should therefore be free to keep them abreast with modern domestic attitudes, rather than waiting much longer for cases to reach the European Court and for a general consensus to crystallise everywhere else in Europe. Interestingly, Roger Masterman has highlighted that a refusal by a national court to interpret rights ‘evolutively’ will mean that the ECtHR is ‘starved of one of the sources of information regarding prevailing present-day conditions,’ thus rendering it more difficult to determine if there has been a change in the pan-European consensus.⁶⁰

It should be noted that Justice Scalia, a proponent of the ‘strict constructionist’ judicial philosophy, has been critical of the ‘evolutionist’ approach.⁶¹ He argues that it promotes the imposition of value-laden judgments by judges and that it must remain for the legislature and ballot-

⁵⁵ Ryssdall, ‘The Coming Age of the ECHR’ [1996] *EHRLR* 18, 25-26.

⁵⁶ *Handyside v UK* (1976) 1 EHRR 737 para [48].

⁵⁷ Barak, ‘A Judge on Judging’ [2002] *Harv L Rev* 16, 29 (Lord Steyn has commented that this is ‘pre-eminently true of human rights law’ in Steyn, ‘Laying the Foundations of Human Rights Law’ [2006] *EHRLR* 349).

⁵⁸ *Cossey v UK* (1991) 13 EHRR 622 para [35].

⁵⁹ *Tyrer v UK* (1978) 2 EHRR 1 para [31].

⁶⁰ Masterman, ‘Section 2(1) of the HRA 1998’ [2004] *PL* 725, 732.

⁶¹ Scalia, ‘*Ayatollahs of the West*’ (The Tercentenary Lecture in Public Law, Edinburgh University, 11 December 2007).

box to recognise and protect these emerging social values.⁶² The immediate response to this is to deny the assertion that a dynamic judicial role in the UK is undemocratic (see above). In particular, the HRA is a very different instrument from the American Constitution since judges are unable to invalidate legislation under its provisions. Unlike in the United States, the HRA promotes a democratic dialogue between all three branches of government *where Parliament - not the courts - has the ultimate say*. In addition, the adoption of the strict constructionist view will hinder the effective protection of fundamental rights; as the ECtHR has already recognised, a failure to keep the meaning of the Convention in line with modern attitudes risks 'rendering it a bar to reform or improvement.'⁶³

The Comparative Principle

If it is accepted that the precise peripheries of human rights are contestable to some degree, it must surely be desirable that the broadest possible panoply of rights jurisprudence is at the disposal of a discerning judge. In determining the appropriate scope of human rights under the HRA, foreign rights analysis - and not *exclusively* Strasbourg's analysis - should be embraced.⁶⁴ Justice La Forest has convincingly argued that the 'greater use of foreign material affords another source, another tool for construction of better judgments' and will 'enhance their effectiveness and sophistication.'⁶⁵ In the struggle to identify the limits of these often amorphous entities, judges around the world should promote a 'brisk international traffic in ideas about rights.'⁶⁶ It seems nonsensical to view supposedly *human* rights through such a restrictive European lens.

Synopsis: A New Approach

It is clear that the recent comity principle has suppressed the adoption of these important interpretative principles. For example, Lord Bingham declined to review Commonwealth jurisprudence in *Sheldrake* (the *comparative* principle), explaining that the courts 'must take their lead from Strasbourg.'⁶⁷ Similarly, Lord Hope in *N v Home Secretary* expressed that '[i]t is for the Strasbourg court, not for us, to decide whether its case law is out of touch

⁶² Judges must give constitutional texts the original meaning that they bore when they were first democratically approved.

⁶³ *Stafford v UK* (2002) 35 EHRR 32 para [68].

⁶⁴ *Arden* (n 17) para [49]. One must acknowledge Lady Justice Arden's concern that it may not *always* be appropriate to 'transplant' foreign interpretations into our own jurisdiction.

⁶⁵ La Forest, 'The Use of American Precedents in Canadian Courts' [1994] *Maine Law Review* 211, 216.

⁶⁶ Glendon, *Rights Talk* (Free Press 1991) 158. For example, the Constitutional Court of India has interpreted the right to life as including the right to enjoy pollution-free water and air (a more expansive interpretation than Strasbourg's).

⁶⁷ *Sheldrake v DPP* [2004] UKHL 43 para [33].

with modern conditions (the *evolutive* principle).⁶⁸ Again, Lord Steyn in *Marper* stated that the Convention Articles ‘should receive a uniform interpretation throughout member states, unaffected by different cultural traditions (the *cultural values* principle).’⁶⁹

It is proposed that these essential adjudicative tools should be adopted by the UK courts. It is time to move forward from the current myopia which reduces the domestic judiciary to little more than a ‘sullen defendant’ of our individual freedom.⁷⁰ It is only through a dynamic and creative ‘symbiosis’ of ideas that these fundamental rights will become less contestable, more acceptable and more effective.⁷¹

However, a call for generosity is not a call for unfettered judicial freedom; the courts must steer clear from the ‘Scylla of excessive activism.’⁷² The proposed approach does not advocate a re-conceptualisation of the HRA as a domestic bill of rights. It still acknowledges Lord Kingsland’s concerns that such a reading might cast judges ‘adrift from their international moorings...with no accurate charts by which to sail... [and going] in whatever direction they wish.’⁷³ Rather than advocating the absolute *independence* of the UK courts from Strasbourg, it is merely asserted that they should not be absolutely *dependent*; the adjudicative process must be seen as a *two-way* relationship where Strasbourg precedents, although remaining extremely persuasive, should be seen as ‘stepping stones’ rather than ‘halting-places.’⁷⁴

Alternative Submission: Parliamentary Intention

Even if one does not accept that the above principles have freestanding veracity and value, it is now argued that a dynamic interpretative approach has been mandated by Parliament itself. *Prima facie*, the HRA does not explicitly stipulate its objectives or intentions. However, if one turns to the Parliamentary materials and White Papers which were released during the passage of the Human Rights Bill (HRB),⁷⁵ it can be seen that there are several aims which underlie the 1998 Act. For the purposes of the present discussion, there is one which is of particular importance: the intention that the HRA would enable the national courts to make a direct ‘contribution to

⁶⁸ *N v Home Secretary* [2005] UKHL 31 para [36].

⁶⁹ *R(Marper) v Chief Constable of Yorkshire* [2004] UKHL 39 para [27].

⁷⁰ *Dworkin* (n 20) 65.

⁷¹ Sir Stephen Sedley has argued that ‘the vigour of a constitution has far less to do with its formal provisions than with the energy and imagination deployed by the courts in interpreting and applying them.’ See Sedley, ‘The Sound of Silence’ [1994] *LQR* 270, 275.

⁷² Laws, ‘The Limitations of Human Rights’ [1998] *PL* 256, 261.

⁷³ Hansard HL vol 583 col 514 (18 November 1997).

⁷⁴ *Birch v Brown* [1931] AC 605, 631 (Lord Macmillan). See also Part III.

⁷⁵ See *Pepper v Hart* [1993] AC 593, 634 (Lord Brown-Wilkinson) on the admissibility of parliamentary material as evidence.

the development of the jurisprudence of human rights in Europe.⁷⁶ Thus, the Lord Chancellor promoting the Bill emphasised that:

‘The Bill would *of course* permit UK courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might make a *successful lead to Strasbourg*.⁷⁷

One merely needs to remember Lord Bingham’s remark in *Sheldrake* to perceive the evident disparity between judicial and parliamentary will; ‘the United Kingdom courts *must take their lead from Strasbourg*.⁷⁸

Moreover, it is possible to go *even* further and identify Parliamentary endorsement for the specific interpretative principles which have been proposed. For example, the White Paper expressed that ‘our courts’ decisions will provide the European Court with a useful source of information and reasoning⁷⁹ (the *dialogic* principle).’ Lord Irvine expressed that the UK courts might depart from a Strasbourg decision ‘given decades ago’ in light of ‘the circumstances of today⁸⁰ (the *evolutive* principle).’ The White Paper referred to the desirability of the domestic courts influencing the European court ‘on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the UK⁸¹ (the *cultural values* principle).’ Considering this remarkably clear evidence, it is unfortunate that the comity principle has sometimes been justified on the purported basis that it is in accordance with parliamentary will.⁸²

Part III: Potential Limitations to a More Generous Approach

‘Beware the slippery slope’ is a familiar, yet very potent, caveat. An immediate riposte to a more generous interpretative role is that it has the potential to be abused. One must appreciate that the slippery slope concern is not a justification against a generous interpretative approach (as in Part I). Instead, the argument ‘contains the implicit concession that the proposed resolution is not itself troublesome... [and] perhaps even desirable.’⁸³ It focuses our fears on the possibility that the acceptable role might be misused in the future.

⁷⁶ White Paper – *Bringing Rights Home*’ see para [1.14].

⁷⁷ *Marper* (n 69); *Hansard* (n 73) (Lord Irvine).

⁷⁸ *Sheldrake* (n 67).

⁷⁹ *White Paper* (n 76) Para [1.18].

⁸⁰ *Hansard* HL vol 583 col 1271 (19 January 1998). See also *Marper* (n 69).

⁸¹ *White Paper* (n 76) Paragraph 1.18.

⁸² *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 para [53] (Baroness Hale).

⁸³ Schauer, ‘Slippery Slopes’ [1985] *Harv L Rev* 361, 368.

The primary aim of this paper has been to challenge the validity of the comity principle. As such, the question of how far the House of Lords should go, *if the alternative approach is accepted*, is not immediately relevant to this initial objective. It might be considered *obiter dicta*. However, for the purpose of completeness, it is important to address the question of where to draw the line between an acceptable and unacceptable creative interpretation. Six *restraints* can be briefly sketched out which, it is contended, should be borne in mind if theory is to be applied to practice.

1) Continued use of ‘distancing devices’⁸⁴ - The new approach does not mandate the desertion of clear and principled argument. Judges must still take heed of Judge Cardozo’s guidance:

‘The judge, even when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own idea of beauty or goodness. He is to draw inspiration from consecrated principles.’⁸⁵

The courts must continue to use objectively convincing analysis in order to convince others (not only other courts but also the populace) that it is an acceptable interpretation.

2) Where the Strasbourg precedent is clear but *negative* and not *unclear* or *non-existent*, the court should proceed with more caution in adopting a generous interpretation. A clear Strasbourg decision will still carry much weight and strong reasons must be given if it is to be overruled. *The European jurisprudence must still be taken into account.*⁸⁶ However, where there is no precedent, or where the case law ‘lacks its customary clarity,’⁸⁷ the UK courts should be particularly willing to engage in a dialogue with the ECtHR. As Judge Martens has noted, such situations demand that domestic courts use ‘daring and creativity.’⁸⁸

3) Where an interpretation would lead to a *conflict with another right under the HRA*, the court must be particularly circumspect in

⁸⁴ These are principles which can be used to come to a decision ‘in a way that is independent of the personal tastes of the judges.’ See Raz, ‘On the Authority and Interpretation of Constitutions’ in *Constitutionalism* (CUP 1998) 190.

⁸⁵ Cardozo, *The Nature of the Judicial Process* (Dover 2005) 141.

⁸⁶ *Wicks* (n 12) 147. Wicks explains that a failure to do so would be outside the realms of legality; taking into account requires a ‘thorough analysis at the very least.’

⁸⁷ *Lord Nicholls* (n 67) para [14].

⁸⁸ *Martens* (n 15) 14.

broadening the meaning of that right. However, if it would merely lead to a mutual and complimentary 'overlap' with another right, there is no obvious reason why a generous interpretation should not be adopted. In *JJ and Others*, Lord Hoffmann argued against employing an 'over-expansive interpretation' where it would preserve the 'key distinction' with other rights.⁸⁹ It is submitted, however, that there is no immediately obvious reason which mandates this perspective. The only exception is where the peripheries of a ratified right could be interpreted so as to 'bleed' into the content of an unratified right (as this would subject the government to obligations which it had expressly not agreed to).⁹⁰

4) Where the proposed interpretation entails the imposition of a *positive duty* on the State, judges should again be more guarded in embracing a creative role. As the ECtHR recognised in *Chapman v UK*, such decisions are often a 'matter for political not judicial decision.'⁹¹ However, it should still be open to courts to recognise new duties if there are strong reasons for doing so.⁹²

5) Where the right under scrutiny is an *absolute right*, courts should show a degree of restraint since, unlike qualified rights, there is no opportunity for the State to justify its actions (all utilitarian considerations are *trumped*). If one is engaged, it is violated; the ramifications of a generous interpretation are therefore more accentuated.

6) Courts must not design *new rights* - Courts may only build on *existing* rights. To borrow Viscount Sankey's metaphor, the HRA should be seen as 'a living tree, capable of growth and expansion'⁹³ but the courts must refrain from seeding new trees which have not been consented to.⁹⁴

To conclude, it is helpful to summarise the above with the words of Sir John Laws: 'Judges will, if I may say so, need to be imaginative and conservative at the same time.'⁹⁵

⁸⁹ *Home Secretary v JJ and Others* [2007] UKHL 45 para [44].

⁹⁰ *Guzzardi v Italy* (1980) 3 EHRR 333 para [6].

⁹¹ *Chapman v UK* (2001) 33 EHRR 18 para [99]. See also Fredman, 'Positive Duties and Positive Rights' [2006] *PL* 498.

⁹² Indeed, their Lordships arguably did so in *R (Limbuella) v Home Secretary* [2005] UKHL 66.

⁹³ *Edwards v Attorney-General for Canada* [1930] AC 124, 136.

⁹⁴ *Brown v Stott* [2003] AC 681, 703 (Lord Bingham).

⁹⁵ *Laws* (n 72) 257.

Conclusion

Lord Denning once drew a distinction between two judicial extremes:

‘On the one side there were the *timorous souls* who were fearful of allowing a new cause of action, on the other side there were the *bold spirits* who were ready to allow it if justice so required.’⁹⁶

When the Human Rights Act came into force on 2 October 2000, the national courts were presented with the exciting challenge of ‘bringing rights home.’ In the absence of any legal mandate, the House of Lords in *Ullah* has indicated that it has no desire to embrace fully such a role.⁹⁷ The timorous souls have, thus far at least, prevailed over the bold spirits.

This said, it is encouraging to finish by highlighting that there may still be bold spirits which lie within. Recently, the House of Lords has not been entirely consistent in applying the comity principle; there has been an occasional divergence between the judicial approaches *de jure* and *de facto*.⁹⁸ Their Lordships’ inconsistency is particularly evident in the two recent cases of *R (Countryside Alliance) v Attorney General*⁹⁹ and *Home Secretary v JJ and Others*.¹⁰⁰ The former case remained loyal to the *Ullah* dictum. The House of Lords had to address the question of whether the scope of Article 8 could extend to cover a right to hunt foxes. Despite acknowledging that hunting is ‘integral to their identity,’¹⁰¹ the House was unanimous in rejecting the plaintiffs’ claim that Article 8 was engaged by the hunting ban. Baroness Hale, citing *Ullah*, explained that ‘the Strasbourg jurisprudence has not gone so far in its interpretation’ of Article 8.¹⁰² This should be contrasted with the case of *JJ and Others* which was handed down only one month before. It is contended that the *Ullah* dictum was disregarded by the majority in this case. The House of Lords, by a majority of 3–2, held that various ‘control orders’ which imposed a curfew on the complainants between 4 p.m. and 10 a.m. (and a myriad of other requirements) amounted to a deprivation of liberty

⁹⁶ *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178.

⁹⁷ Instead, it is merely seen as an incorporated treaty which allows domestic remedies for the violation of international rights.

⁹⁸ For example, in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 where it was acknowledged that modern attitudes had changed ahead of Strasbourg (the *evolutive* principle); in *Limbuella* (n 92) where the scope of Article 3 was extended beyond previous Strasbourg interpretations (the *dialogic* principle) and in *R (Begum) v Denbigh High School* [2006] UKHL 15 where foreign rights jurisprudence was used (the *comparative* principle).

⁹⁹ *R (Countryside Alliance) v Attorney General* [2007] UKHL 52.

¹⁰⁰ *JJ and Others* (n 89).

¹⁰¹ *R (Countryside Alliance)* (n 99) para [55] (Lord Rodger).

¹⁰² *Ibid.* para [115] (Baroness Hale).

under Article 5. Such an interpretation was made despite acknowledging that Strasbourg had not yet ruled on 'any case at all closely comparable with the present.'¹⁰³ In fact, Lord Brown explicitly applied the *evolutive* principle when he expressed that 'nowadays a longer curfew regime than 16 hours a day...would surely be classified in Strasbourg as a deprivation of liberty.'¹⁰⁴

One of the few positives about the presently negative *Ullab* approach is that it can 'be reversed quite easily by the courts should they choose to do so.'¹⁰⁵ This paper has contended that it is time to do so. In its place, the domestic courts must embrace a more principled and dynamic interpretative role in demarcating the scope of the new municipal rights that the Human Rights Act has created. It is only through doing so that the Act will achieve its full and intended potential.¹⁰⁶

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¹⁰³ *JJ and Others* (n 89) para [19] (Lord Bingham). Only Lord Carswell, dissenting and citing *Ullab*, recognised that the absence of a comparable Strasbourg precedent meant that the House should 'exercise some caution' see para [83].

¹⁰⁴ *JJ and Others* (n 89) para [106] (Lord Brown).

¹⁰⁵ Professor Klug before the JCHR: HC 150-I (3 December 2007)

¹⁰⁶ It is also encouraging to see that, since completing this paper, there has been a dissent in the House of Lords about the validity of *Ullab* in the *Animal Defenders case* (n 82). Lord Bingham, Baroness Hale, Lord Carswell and Lord Neuberger continued to cling onto a 'cautious approach to interpretation' see para [53]. However, Lord Scott forthrightly stressed that 'domestic courts are nonetheless not bound by the European Court's interpretation' see para [44].

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The Rationality of the Conservative Party's Proposal for a British Bill of Rights

THEO RYCROFT*

‘The Conservative Party, under my leadership, is determined to provide a hard-nosed defence of security and freedom. And I believe that the right way to do that is through a modern British Bill of Rights that also balances rights with responsibilities.’¹

The Labour Party’s manifesto commitment to give further effect [in the words of the preamble to the Human Rights Act 1998 (HRA)] to the European Convention on Human Rights (ECHR) was meant merely to pave the ground for a constitutional Bill of Rights. This proposal continued, albeit in watered down form, in the document with which the Labour Government introduced its proposed Human Rights Bill in 1998, which contained a brief reference to an autochthonous Bill of Rights.² The Department of Constitutional Affairs’ review of the HRA³ (the DCA Review) appeared until 2007 to represent the Government’s corporate position⁴ that enthusiasm for a second stage Bill of Rights within government had waned considerably. However, in 2007 Jack Straw⁵ announced he will consider plans for a Bill of Rights and Responsibilities, providing a clear set of values, including a provision for greater equality, ‘which will help forge a sense of what it means to be British.’⁶

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¹ Cameron, D ‘*Balancing freedom and security – A modern British Bill of Rights*’ Speech to Centre for Policy Studies, 26 June 2006.

² Jack Straw and Paul Boateng, ‘*Bringing Rights Home: Labour's Plan to Incorporate the ECHR into UK Law*’ (Labour Party 1996).

³ ‘*Review of the Implementation of the Human Rights Act*’ (Department for Constitutional Affairs now the Ministry of Justice June 2006).

⁴ ‘The views expressed in the [DCA Review] are not the views of one Government Department; they express the views of the Government.’ Lord Chancellor, evidence to Joint Committee on Human Rights, 30 October 2006, Q17; but the position appears to have changed with the appointment of Gordon Brown as Prime Minister.

⁵ Secretary of State for Justice and Lord Chancellor.

⁶ Interview on the Today programme, 29 June 2007. This policy was expanded upon in the Green Paper entitled ‘*The Governance of Britain*’ launched jointly by Gordon Brown and Jack Straw days after Brown became Prime Minister in July 2007, and by Jack Straw in his evidence to the Joint Committee on Human Rights (JCHR) on a British Bill of Rights on 21 May 2008.

However, the UK human rights framework and the HRA itself have been on the end of some attacks (both direct and implicit) by senior members of the Government, including the former Prime Minister⁷ and the Home Secretary⁸. This no doubts reflects (and probably informs) the fact that public have, on balance, a negative view of the HRA.

It was in a sometimes remarkably similar tone to both parts of the DCA review, and also the attacks on the HRA by individual ministers, that David Cameron launched his proposal to set up a policy commission in the Conservative Party to consider repealing the HRA and replace it with a 'British Bill of Rights,' whilst remaining a signatory to the ECHR. The HRA had failed, in Cameron's view, adequately to protect liberty, and it had undermined the state's ability to provide its citizens with security. What was needed was a document which defined 'the core values which give us our identity as a free nation' and spelt out 'the fundamental duties and responsibilities of people living in this country both as citizens and foreign nationals.'⁹

The Bill of Rights debate has gained airtime in other quarters too; the Liberal Democrats have reaffirmed their commitment to introducing a Bill of Rights, as part of a Written Constitution,¹⁰ JUSTICE have published a comprehensive report into the issue¹¹ following a discussion paper¹² and the Parliamentary Joint Committee on Human Rights (JCHR) has heard evidence in the course of an inquiry into a British Bill of Rights.¹³

The political climate is now quite different from that in which the Labour party set out its proposals in 1993. Then, their motivation in *Bringing Rights Home* was to stem the tide of British cases going to the European Court of Human Rights at Strasbourg (ECtHR) and to allow the decisions of British courts to contribute to ECHR jurisprudence. Robin Cook's much

⁷ 'Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights' Tony Blair, Press Conference announcing anti-terror measures in wake of 7 July London bombings, 5 August 2005.

⁸ 'And let's be clear. It cannot be right that the rights of an individual suspected terrorist be placed above the rights, life and limb of the British people. It's wrong. Full stop. No ifs. No buts. It's just plain wrong' Dr John Reid, Speech to Labour Party Conference, 28 September 2006. See also John Reid's speech to the 'G6' Conference of interior and home affairs ministers in Venice on 12 May 2007, in which he referred to gaps and inadequacies in the international human rights framework which make it difficult to counter the terrorist threat.

⁹ Cameron (n 1).

¹⁰ Simon Hughes, 'Liberal Democrats Shadow Attorney General and Secretary of State for Justice' Hansard HC col 117 (19 Feb 2007).

¹¹ 'A British Bill of Rights: Informing the debate.' The final report of the JUSTICE constitution committee, 19 November 2007.

¹² JUSTICE Consultation Project, 'A Bill of Rights for Britain' (February 2007). Lord Kingsland, Shadow Lord Chancellor and a Vice-Chairman of JUSTICE commented, 'when JUSTICE and the Conservative Party simultaneously think there is a problem, it must be a problem worth looking at' see Hansard HL col 1405 (22 March 2007).

¹³ 3 December 2007, 14 January 2008, 28 January 2008, 3 March 2008, 10 March 2008 and 21 May 2008 (Report yet to be published as at July 2008).

heralded ‘ethical foreign policy’ seemed to encapsulate the priority given to Human Rights by the new Labour government. The situation is radically different now. The terminology of human rights, at least when employed by Labour and Conservative politicians, now focuses not on the rights of individuals, but on the proposition that those rights must be balanced against the rights of the community as a whole.¹⁴

In this essay, I shall examine the each of the reasons, both explicit and implicit, behind the Conservatives’ proposals¹⁵ in order to ascertain whether those proposals are rationally connected to the reasons I identify.

History of the Conservative Party’s Attitude to Bills of Rights

In order to examine the reasons behind the Conservative Party’s recent proposals for a Bill of Rights, it is useful to consider the history of the Party’s attitude to Bills of Rights and to incorporation of the ECHR into British law.

The modern history of the Bill of Rights debate¹⁶ can be said to have begun in the late 1960s with Anthony Lester’s pamphlet entitled *Democracy and Individual Rights*,¹⁷ in which he argued that the solution to the increasing examples of the denial of individual freedom by Parliament¹⁸ was to enact a Bill of Rights (which would not, at first, be enforceable by the Courts). The first heavyweight Conservative contribution to the debate was, in the same year, in the form of a pamphlet¹⁹ by the Conservative Opposition Front Bench Spokesman on Home Affairs, Quintin Hogg. Hogg famously characterised parliamentary democracy having become no more than an *elective dictatorship*. He argued, amongst other things, that there was now a requirement for some form of Bill of Rights, which should set out a general declaration of individual rights in order to safeguard against the *arbitrary rule of the modern Parliament*. His proposal was to incorporate the ECHR into English law so as to make it justiciable by British Courts.

¹⁴ It is interesting to note the government’s attitude to whether the EU Charter of Fundamental Rights becomes legally binding: it was one of Blair’s ‘red lines’ which the UK would not accepted be crossed at the EU summit in Brussels June 2007.

¹⁵ I am not concerned herein with the Labour Party’s proposals, which seem unlikely to be the subject of a Bill before the next General Election, given the Government’s commitment to a long period of consultation. See *The Governance of Britain* (n 6) para [213].

¹⁶ Michael Zander, *A Bill of Rights for Britain* (4th edn 1997) 1-39.

¹⁷ 1968.

¹⁸ Such as the succession of Commonwealth Immigrant Acts in the 1960s, the last of which (1968) deprived British citizens from the Commonwealth of their prior right to enter the United Kingdom; the delegation to the executive of sweeping powers such as allocation of Council housing (decided on the basis of unpublished criteria); and the system of security vetting decisions for a Government employee in which he could not be represented.

¹⁹ ‘*New Charter*’ (Conservative Political Centre No 430 1969). The document was expressed to be the views of the author, and not those of the Conservative Party.

The next major Conservative figure to advocate a Bill of Rights was Sir Keith Joseph.²⁰ He argued that a Bill of Rights was needed to protect the rule of law from parliament.²¹ By this he meant that the courts should be able to protect individual freedoms as against the executive, for example by protecting property from planning law, and by limiting taxation. He proposed a Constitutional Court with the power to vet legislation for compatibility with such individual freedoms.

Lord Hailsham re-entered the debate in the same year with a series of articles²², and then, in 1976, a lecture in which he argued for a written constitution and, as part of it, an entrenched Bill of Rights ‘containing as a minimum the rights defined by the European Convention to which we are already parties.’²³ At around the same time, the Society of Conservative Lawyers published a report²⁴ which, whilst neutral on a Bill of Rights, endorsed the incorporation of the ECHR in a manner in which it would have precedence over domestic law.²⁵ Then, it appeared that incorporation of the ECHR seemed to have been taken up more formally by the Conservative front bench when Leon Brittan²⁶ (unsuccessfully) moved amendments to the Scotland Bill on its second reading in 1978 designed to provide Scotland with a Bill of Rights based on the ECHR.²⁷

This apparent direction of the Conservative leadership found what was to prove (until now) its highest point in Margaret Thatcher’s election manifesto of 1979.²⁸ In the context of claims that the Labour Government had allowed outside groups, such as strike committees and pickets to usurp some of its democratic functions, and the traditional role of the legislature having suffered from the growth of government, stated that if elected, they would wish to discuss a possible Bill of Rights with all parties.

However, by 1985, the Conservative Government was stating that ‘the time was not yet ripe’ for any all party talks,²⁹ and in 1986, the Conservative

²⁰ Member of Edward Heath’s shadow cabinet at the time, and later to become Secretary of State for Education and Science under the Thatcher government and chief architect of the application of monetarist economics to British political economics, and in developing Thatcherism.

²¹ *Freedom Under Law* (Conservative Political Centre 1975).

²² *The Times* 2nd, 16th, 19th and 20th May 1975.

²³ ‘*Elective Dictatorship*’ (The Richard Dimbleby Lecture 1976) reproduced in Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (1999).

²⁴ ‘Another Bill of Rights’ in *Society of Conservative Lawyers* (Conservative Political Centre 1976) 18 reproduced in Blackburn (n 23). He also supported incorporation in evidence to the House of Lords Select Committee on a Bill of Rights 1977 referred to in *Zander* (n 16).

²⁵ This reveals the writers’ assumption that such incorporation would not amount to enacting a Bill of Rights.

²⁶ Shadow Spokesman for Devolution.

²⁷ Hansard HC (1 Feb 1978) quoted in *Zander* (n 16).

²⁸ ‘*Election Manifesto*’ Conservative Manifesto (1979) 21 reproduced in Blackburn (n 23).

²⁹ Lord Elton, Minister of State for Home Office, response to Parliamentary Question (PQ) from Lord Hylton as to whether they will initiate constitutional discussions between all parties concerning a Bill of Rights, Hansard HC col 159 (12 Mar 1985) col 159 reproduced in Blackburn (n 23).

Government opposed a Bill introduced by a Conservative peer, Lord Broxbourne,³⁰ on the basis that it would destroy the political impartiality of judges.³¹ In 1989, Thatcher stated that

‘[The Government] is committed to...the principles of Human Rights in the [ECHR] but we believe it is for Parliament rather than the judiciary to determine how these principles are best secured.’³²

John Major confirmed this as the Government’s position in similar terms in 1993.³³

Following Labour’s election in 1997, and the passing of the HRA, the Conservative’s position seemed to harden even further. Prior to the 2005 election, Michael Howard promised to *reform or repeal* the HRA.³⁴

There is little of genuine principle governing the Conservatives’ record on a Bill of Rights and incorporation of the ECHR (two issues which must be kept distinct). The closest person to come to setting out a principled ideological position was Keith Joseph. This is no surprise. On at least one view, Thatcherism should favour the rule of law to the extent that it can impose restrictions on the power of the state over individual freedom. Hailsham, on the other hand, appears to have been motivated by his liberal sensibilities as a lawyer, rather than party ideology, in his moments of pro-incorporation advocacy.³⁵ A further muddying factor is the effect of the state of opposition on how a party views measures which limit the power of the executive. Governments are unwilling to limit their own power. It is salient to note that it was during periods of opposition in the 1970s, and now under Cameron, that the Conservatives have pushed human rights protection onto the agenda. However there is perhaps an underlying instinct in Conservative politicians (notwithstanding public perception of the nature of human rights as being from the left of the political spectrum) which should support, as Joseph did, legislation which protects individual freedom against the power of the state. Even if it contributes little to the reasons why the Conservative Party is now advocating a British Bill of Rights (which I

³⁰ The Human Rights and Fundamental Freedoms Bill (1986).

³¹ Sir Patrick Mayhew, Solicitor-General, Hansard HC col 1272 (6 Feb 1986) quoted in *Zander* (n 16).

³² Response to PQ from Graham Allen asking whether the PM would support incorporation of the ECHR, Hansard HC cols WA251-2 (6 July 1989) reproduced in *Blackburn* (n 23).

³³ Response to similar PQ from Clive Soley, Hansard HC col WA822 (15 Jan 1993) reproduced in *Blackburn* (n 23).

³⁴ ‘MPs angry at ‘Bill to end all Bills’ *Daily Express* 18 March 2005.

³⁵ Dominic Grieve, the then Shadow Attorney General, appears to have similar motivations. Grieve appears to have primary responsibility for the Conservative Bill of Rights project (a responsibility which appears to have survived his promotion to shadow Home Secretary).

shall argue are primarily based on current political pressures), that instinct is evident in Cameron's speech in June 2006.³⁶

Cameron's commitment to producing a draft 'British Bill of Rights' is therefore, on the face of it, a radical departure from the Conservatives' position since the early 1980s. It is also self-evidently a heavyweight new policy. What, then, are the factors which lead to the new Conservative leader taking this position, and will their substantive proposals achieve their aims?

Cameron's Speech

Cameron's speech in June 2006 made a dramatic impact.³⁷ There was extensive press coverage. Critics claimed that scrapping the HRA would be pointless if the UK remained a signatory to the ECHR.³⁸ The Director of Liberty said the plans lacked clarity.³⁹ Michael Mansfield QC labelled the plans a 'complete nonsense.'⁴⁰ Kenneth Clarke described the proposal as 'xenophobic and legal nonsense.'⁴¹ Lord Lester agreed.⁴² Cameron's old tutor at Oxford, Professor Vernon Bogdanor⁴³ was critical of the coherence of Cameron's proposals.⁴⁴ In his speech, Cameron begins by setting out what he sees as the fundamental challenge to 21st century governments; striking the right balance between security and liberty.

[We] are fiercely determined to protect Britain's security with tough and intelligent action to fight crime and fight terrorism. But in doing so we will never be casual about our freedoms.'

He characterises Labour's security legislation since 1997 as '[failing] to protect our security but which in the process undermines our civil liberties.' Cameron set out three possible solutions to the problems he identified:

- 1) Pulling out of the ECHR and abolishing the HRA.
- 2) Remaining bound by the ECHR but abolishing the HRA.

³⁶ For example he objects to the government's 'ill-judged attempt to criminalise religious hatred, which would have unacceptably restrained free speech,' and states, '[w]e understand that freedom is central to the British way of life. It is a vital part of our history and our heritage. We feel it in our bones.'

³⁷ No doubt partly because it was one of the first substantive policy announcements he had made since becoming leader of the Conservative Party on 6 December 2005.

³⁸ David Pannick QC, quoted in *The Times* (26 June 2006).

³⁹ Liberty Press Release in response to Conservative Party proposal to scrap the Human Rights Act, 26 June 2006.

⁴⁰ Quoted in *The Independent* (27 June 2007).

⁴¹ Quoted in *The Daily Telegraph*, 28 June 2007.

⁴² Hansard HL col 1376 (22 Mar 2007).

⁴³ Professor of Government at Brasenose College, Oxford.

⁴⁴ Interview with Professor Bogdanor, *The Guardian*, 1 July 2006.

- 3) Remaining bound by the ECHR, but abolishing the HRA and enacting a 'British Bill of Rights' to replace it.

It was the last of these which he put forward as the right answer. He went on to announce a Policy Commission

‘of jurists and legal experts...to determine how the nature of our participation in the ECHR can be aligned with the principles and legal effect of our modern British Bill of Rights.’⁴⁵

The right balance between individual liberties and collective security is, as Cameron recognises, an issue which lies at the heart of the modern political discourse. That they are both prayed in aid of Cameron’s project is, on the face of it, surprising, since they each normally represent the primary concerns of those from different sides of the human rights debate. I shall begin by examining whether Cameron’s aims in respect of both of those ideas are achievable in the way he has proposed.

Liberty

Cameron argues that the HRA has not been effective in protecting fundamental rights in Britain.⁴⁶ This argument is repeated in a policy document on crime.⁴⁷ Further detail is provided by the content of a speech in October 2006⁴⁸ by Dominic Grieve⁴⁹ in which he repeated the call for a British Bill of Rights. He characterised it as a response to illiberal policies of

⁴⁵ Consisting of Lord Lyall (former Conservative Attorney General), Martin Howe QC, Jonathan Fisher QC, David Anderson QC, and Austin Morgan. Lord Lester has criticised the fact that the membership of the commission since it contains only male barristers, see Hansard HL col 1379 (22 Mar 2007).

⁴⁶ In particular, he identifies the attempt to criminalise religious hatred (in what became the Racial and Religious Hatred Act 2006 following a Government defeat in the Commons which forced the Act to contain free speech protections); new powers contained in the Regulation of Investigatory Powers Act 2000; the Civil Contingencies Act 2004; and the Government’s proposals for Identity Cards.

⁴⁷ It’s Time to Fight Back: how a Conservative Government will tackle Britain’s crime crisis (28 August 2007). ‘[E]ven on its own terms the Human Rights Act has not proved to be effective in protecting fundamental rights in Britain. It has not protected the right to trial by jury and it did not prevent the right to free speech from being undermined in the Government’s legislation on religious hatred.’

⁴⁸ Dominic Grieve, *Liberty and Community in Britain*’ Speech to Conservative Liberty Forum, 2 October 2006.

⁴⁹ *Grieve* (n 35).

the Blair government;⁵⁰ ‘a pragmatic legislative response to the dangers of excessive executive power and action in a period of discord.’⁵¹

The speech reads in parts like a classic liberal critique of an executive which, as Professor Ronald Dworkin wrote about the Thatcher Government, ‘makes freedom just another commodity’⁵² and mirrors JUSTICE’s call for vigilance against the executive’s increasing power.⁵³ Cameron and Grieve are both, it seems, from the liberal wing on the Conservative Party. They are joined by Lord Kingsland⁵⁴ who described the HRA as

‘useful camouflage for promoting legislation which undermines [Human Rights]...before the HRA was on the statute book no-one would have dreamt of questioning these very hard earned, long established, common law rules. Yet we are now told that these changes are human rights convention compatible.’⁵⁵

Repealing the HRA and doing nothing else would be portrayed as a deeply illiberal step. Cameron agrees; it would be ‘taking a backwards step on rights and liberties.’ It is inconceivable that the Conservatives, seeking to appeal to the centre ground of British politics, could repeal the HRA without replacing it with a new Bill of Rights. It is a necessary consequence of the political ground that they seek to occupy that they are proposing to enact a new Bill of Rights.

Grieve gives the clearest Conservative statement of intent as to what the rights in the new Bill of Rights will seek to achieve. He states,

‘while remaining compliant with the European Convention on Human Rights there will be an opportunity to define the rights under the European Convention in clearer and more precise terms.’⁵⁶

⁵⁰ He gives as examples the Government’s criminal justice and anti-terror legislation; pre charge detention; Proceeds of Crime Act; the attack on jury trials; ASBOS and dispersal orders; ID cards/information rights/DNA database; the Civil Contingency Act; and the Legal and Regulatory Reform Act.

⁵¹ He gives as examples Walter Wolfgang who was arrested for heckling under the Terrorism Act at the Labour Party conference; protestors at the Cenotaph who were arrested for reading out the names of the British soldiers who had died in Iraq; Brian Haw, the protestor whom the government sought to have removed from Parliament Square; the banned ‘Bollocks to Blair’ T Shirts.

⁵² Ronald Dworkin, *A Bill of Rights for Britain* (1990) 12.

⁵³ Discussion Paper [para 4].

⁵⁴ Shadow Lord Chancellor.

⁵⁵ Hansard HL col 1404 (22 Mar 2007).

⁵⁶ *Liberty and Community in Britain* (n 7).

He goes on to list certain rights as ‘core values in the area of civil liberties that should be identified and protected’ in a new Bill of Rights:

- 1) the right to trial by jury in indictable cases.⁵⁷
- 2) recognition of a new category of ‘constitutional’ statutes⁵⁸ for example that of limiting parliaments to five years.⁵⁹
- 3) the prohibition of the imposition of fines and penalties without prior conviction.
- 4) safeguards in relation to extradition, the interception of communications and the use of information held about citizens by public authorities.
- 5) additions to the right to freedom of expression so as to spell out that equality under the law prevents different groups having different laws applying to them.

Jonathan Fisher QC adds to that list the following:⁶⁰

- 1) the right of a person to be tried in Britain.
- 2) the right to be tried by a British court before being extradited.
- 3) the need to restrain the powers of Police to submit people to compulsory interrogation.
- 4) the protection of privilege against self-incrimination, and of legal privilege.
- 5) the need to make it harder to derogate from the right to freedom of assembly and from the right to freedom of speech.

⁵⁷ Lord Kingsland has agreed, ‘jury trial and evidential protections are unfamiliar on continent; the [ECtHR] has been reluctant to grapple with issues when they have been taken to Strasbourg. That is one of the reasons why talk of a home grown Bill of Rights is in the air,’ Hansard HL cols 1404-1405 (22 Mar 2007).

⁵⁸ A category recognised by Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195. Laws LJ suggests that ‘constitutional statutes’ possess a superior status, and ought not to be repealed absent express statutory wording.

⁵⁹ Grieve is referring to the five year maximum term a parliament may sit by virtue of the Septennial Act 1715 as amended by the Parliament Act 1911.

⁶⁰ Chairman of Research, Society of Conservative Lawyers and member of Cameron’s Policy Commission. Evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q21.

6) the need to strike a balance between the right to a private life and the right to freedom of expression. This, Fisher says, is for Parliament, not the courts.

7) the right to self defence, and to defence of the home and property.

Adding to the rights contained in the ECHR better to protect liberties in a new Bill of Rights is sometimes referred to as ‘ECHR plus.’⁶¹ Is a Bill of Rights containing ‘ECHR plus’ rights capable of meeting the challenges to liberty identified by the Conservatives?⁶² Where the courts’ interpretation of ECHR rights are not providing protections against infringements of civil liberties, then in theory new or more precise rights should be capable of doing so. The best example is a free-standing equality provision, lacking in the ECHR, which would allow individuals to claim redress merely on the basis that they had not been treated equally in any area of life, without having to rely on the fact that the unequal treatment is in relation another right guaranteed under the ECHR (for example, religion).

Further, the desire to protect liberty is at least partly causative of the Conservatives’ policy that the UK should remain bound by the ECHR. Cameron points to the fact that abolishing the HRA and pulling out of the ECHR without replacing it with a new Bill of Rights would leave only common law protection against abuse of executive power. Grieve agrees that the idea that the common law and ancient statutes such as Magna Carta and the Bill of Rights 1688 can protect collective and individual liberties is ‘a romantic fancy in today’s world.’⁶³

It seems therefore that the Conservatives’ proposals are consistent with a desire to protect liberty from recent attacks by the government. However, there is another call to arms in Cameron’s speech; security.

⁶¹ JUSTICE Discussion Document [para] 18. Some of the proponents of the HRA might have hoped that the HRA would allow judges to develop an ‘ECHR plus’ jurisprudence under the HRA. This has not happened. See *R (Ullah) v SSHD* [2004] 2 AC 323 para [20] (Lord Bingham) emphasising that the duty of the national courts is to keep pace with the ECtHR jurisprudence as it evolves: no more, but certainly no less. See also *Kay v Lambeth London Borough Council* [2006] 2 AC 465 para [88] (Lord Hope) emphasising the importance of the principle that the national courts should not ‘outpace the ECtHR.’

⁶² Until the new rights are set out in full, it is not useful to consider whether the new rights are *in fact* likely to increase liberty. Further, whether other rights such as social and economic rights, children’s rights, carers’ rights, a free standing equality provision or disability rights should be included in a new Bill of Rights is outside the scope of this essay.

⁶³ *Liberty and Community in Britain* (n 48).

Security

i) Crime

Cameron claims that the HRA has tilted the criminal justice system in favour of the criminal. His views were repeated in a policy document on crime.⁶⁴ Cameron gives the following examples:

- 1) A backlog of 146 cases in which individuals who have had their assets seized by the Assets Recovery Agency have brought HRA challenges to those seizures;
- 2) The claim by Andrew Bridges⁶⁵ in his report into the case of Anthony Rice⁶⁶ that those managing his case had been overly concerned with Human Rights considerations. This Cameron says is a wide trend whereby ‘officials are now so frightened of being sued under the [HRA] that they try to protect themselves by making decisions which are often absurd and occasionally dangerous;’
- 3) The fact that police forces have refused to issue ‘wanted’ posters in relation to escaped prisoners.

The Anthony Rice case makes a useful case study. Although the DCA Review stated categorically, ‘[d]ecisions of the UK courts under the [HRA] have had no significant impact on criminal law, or on the Government’s ability to fight crime,’⁶⁷ the Review makes a causal link between human rights considerations and the death of Naomi Bryant.⁶⁸ The JCHR Report is highly critical of this finding of a causal link.⁶⁹ Douglas Carswell⁷⁰ found the

⁶⁴ *It’s Time to Fight Back* (n 47) ‘In Britain today, people rightly sense that the criminal justice system is too often tilted in favour of the criminal and away from the victim.’

⁶⁵ Chief Inspector of Probation.

⁶⁶ A life sentence prisoner who was released on licence and subsequently murdered Naomi Bryant.

⁶⁷ DCA Review 1.

⁶⁸ DCA Review (2006) 27, referring to a finding of the Bridges Report as follows, ‘Central to the Chief Inspector’s findings is that the operation of the [HRA]...has sometimes caused staff to focus excessively on the rights of the individual at the expense of the protection of the public.’

⁶⁹ JCHR Report (2006) 14-15, ‘We were unable to find any concrete evidence in the [Bridges] Report itself that any decision concerning the release or management of Anthony Rice was affected in any way by human rights considerations being given precedence over public protection...It therefore appeared to us that the concern repeated throughout the Report...is more in the nature of a general concern rather than one based on clear findings.’ The JCHR wrote to Mr Bridges for clarification. He stated that it was a distortion of his findings to say that Rice was released in order to meet his human rights, and that he did not think that decision-makers are interpreting the HRA wrongly. The Lord Chancellor (in his evidence to the JCHR of 30 October 2006, Q8) found Bridges’ letter ‘difficult to align with his report.’ The JCHR accepted it as confirmation of their view.

arguments of the JCHR ‘deeply offensive.’ Whether or not Anthony Rice was released because of his human rights, the fact that Bridges found, at the very least, evidence of the effect of human rights concerns generally on the normal operation of the parole process supports Cameron’s concern about the negative impact of the HRA on officials. It would only be if the Conservatives’ new Bill of Rights was properly applied in areas such as this that their proposals would be successful in allaying such concerns. How the Conservatives will achieve this is not clear.

ii) Terror

Cameron goes on to argue that the HRA has undermined the powers of the state to deal with terrorism, and in particular contributed to the difficulties in deporting individuals considered to be risks to national security to countries in which they may be at risk of torture or ill-treatment on return.

It is clearly wrong to argue that the HRA is even partly the reason why the British Government cannot deport suspected terrorists who face a real risk of ill-treatment or torture contrary to Article 3 ECHR in their home countries. That prohibition is entirely due to the UK’s international obligations as a signatory to the ECHR,⁷¹ which would apply even if the HRA were repealed. If the HRA were repealed, and the UK were still subject to the ECHR, the UK would be left in the extremely unsatisfactory position that human right claimants could still petition the ECtHR, whatever the statutory position of English law. As a result, some, perhaps best described as being on the other wing of the Conservative Party to Cameron, are sceptical of the coherence of his proposals as a result.⁷²

However, Cameron does in fact come close to acknowledging this problem. He fairly (albeit broadly) characterises the ECHR and its relationship with the HRA⁷³ and correctly refers to the fact that it is a

⁷⁰ Conservative member of the JCHR who produced a draft JCHR report (reproduced at pages 46-56 of the JCHR Report) calling for the repeal of the HRA and withdrawal from the HRA, which was not accepted by the JCHR.

⁷¹ Article 1 (Obligation to respect human rights) states: ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ The Convention Rights include Article 3 as interpreted by *Chahal* (n 74).

⁷² Douglas Carswell stated, ‘I do not believe it is enough simply to repeal the [HRA]. The UK must curtail courts’ ability to adjudicate on the basis of the ECHR, which necessarily involves withdrawing from the convention, and not merely unincorporating it from UK law,’ Hansard HC 19 col 110 (Feb 2007) a position repeated in his draft JCHR paper.

⁷³ ‘Britain played a leading role in drawing up the Convention, which provides for the collective enforcement of the liberties set out in the United Nations Universal Declaration of Human Rights...It is important today for us to understand not just the fact of Britain’s participation in the ECHR, but the nature of that participation...Until the Human Rights Act was implemented in 2000, any British citizen who felt that their rights had been infringed had to take their case to the European court of Human Rights in Strasbourg - a complex and time-consuming process... The Act was intended, in effect, to bring the ECHR home to enable our citizens to seek protection in our courts of their civil liberties under the European Convention...The idea was to

judgment of the ECtHR⁷⁴ that means that the Secretary of State cannot deport someone whose presence is ‘not conducive to the public good.’⁷⁵ Cameron states:

‘this difficulty is not caused by the [HRA]. But the [HRA] has made the problem worse...Because of the interaction of the [HRA] and the nature of our participation in the ECHR, [deportation] is not possible.’⁷⁶

These arguments were repeated by Henry Bellingham.⁷⁷ In fact he used the same phraseology as Cameron.⁷⁸ It is not clear what is meant by the HRA ‘making the problem worse,’ but I assume they are concerned with the fact that the British courts are applying ECHR jurisprudence directly. It is interesting in this regard to note the Government’s position as set out in the DCA review:

{[t]he HRA has had an impact on counter terror legislation. The main difficulties in this area arise not from the [HRA], but from decisions of the ECHR.’⁷⁹

Again, it is not entirely clear from the DCA review precisely how the HRA has effected counter-terror legislation. (Although they do agree that the HRA has not created any additional barriers to a deportation in the context

give people a clear sense of their rights in an increasingly complicated world...On the face of it, this seemed a logical step.’

⁷⁴ *Chahal v UK* (1997) 23 EHRR 413. On the face of the ECHR it does not apply to the dangers which someone removed from the UK might face in the country to which he is removed. Article 1 requires the state parties to secure the rights of those ‘within their jurisdiction.’ However, the ECtHR held in *Chahal* that what would be the equivalent of persecutory ill-treatment under Article 3 ECHR in the country to which an individual would be returned would make return a breach of the ECHR by the state returning the individual in all circumstances, including where that person presents a risk to national security. *Chahal* represents now a consistent jurisprudence which UK Courts should apply and not merely have regard to: *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

⁷⁵ The wording of Section 3(5) of the Immigration Act 1971 under which the Secretary of State exercises his power to deport an individual on non-conducive grounds.

⁷⁶ Cameron (n 1).

⁷⁷ Shadow Minister for the Department of Justice, in a House of Commons debate on Human Rights following the publication of the DCA Review, the JCHR report on the DCA Review Joint Committee on Human Rights (The Human Rights Act: the DCA and Home Office Reviews Thirty-second Report of Session 2005-05 HL Paper 278 HC 1716 alternatively ‘*the JCHR Report*’) and the Government’s response (Cm 7011) Hansard HC col 74 (19 Feb 2007).

⁷⁸ ‘[B]ecause of the Human Rights Act, and the nature of our participation of the ECHR, that was not possible.’ Hansard HC col 79 (19 Feb 2007).

⁷⁹ DCA Review (2006) 10.

of a real risk under Article 3 than those already provided by the ECHR⁸⁰). In reference to the *Belmarsh case*⁸¹ the DCA Review states

‘whilst the HRA may have brought forward the moment of decision, ultimately the compatibility of the 2001 Act with the [ECHR] could in any event have been tested before the [ECtHR] ... [t]he combined view of the security agencies is that, although there are significant resource implications in servicing the structures set up to deal with dangerous terrorist suspects, these result not from the [HRA], but from decisions of the [ECtHR].’⁸²

It may be that both the government and Conservatives, therefore, are not concerned with any legal problem with the HRA in itself; rather they are concerned with the direct enforcement of ECHR jurisprudence by the courts.

Why then would the Conservatives not want to withdraw from the ECHR? There are very good reasons. International law does not recognise the right of a signatory to a treaty unilaterally to withdraw from the obligations it has assumed under that treaty, unless there is such a provision in the treaty itself. There is such a ‘denunciation’ provision in the ECHR.⁸³ However Dworkin, rightly considers that the UK is subject to the ECHR as a matter of moral obligation as well as (absent any denunciation) international law.⁸⁴ Most commentators consider that it would be political suicide to withdraw from the ECHR.⁸⁵ Cameron seems to agree. He says,

‘the act of leaving the ECHR would send a message to all those countries that we encouraged to sign up to it that you cannot have rights and security at the same time.’⁸⁶

⁸⁰ *Cm 7011* (n 4).

⁸¹ *A & Others v SSHD* [2005] 2 AC 68, in which the House of Lords found that Part 4 of the Anti-terrorism, Crime and Security Act 2001 (under which the Secretary of State had the power to detain without trial suspected foreign terrorists) was incompatible with Article 14 ECHR because it discriminated on the ground of nationality or immigration status.

⁸² The same might be said of the challenges under Articles 5 and 6 ECHR to the Control Order regime set up by the Prevention of Terrorism Act 2005 (due to be heard by the House of Lords on 5 July 2007).

⁸³ Article 58, which merely requires 6 months’ notice to be given (although withdrawal would not have any retrospective effect).

⁸⁴ *A Bill of Rights for Britain* (n 52) 24.

⁸⁵ Professor Francesca Klug who describes denunciation as ‘an extraordinary thing to...it would be inconceivable to the rest of the world, because we fight wars in the name of democracy and human rights, to disown the most successful human rights treaty in the world’ (evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q13).

⁸⁶ There are other issues surrounding denunciation of the ECHR which, because it does not appear to be what the Conservatives are proposing, are outwith the scope of this essay: namely whether it would be possible to end the right of individual petition to the ECtHR without

Cameron is also there hinting at another reason why leaving the ECHR is inconceivable. Whilst membership of the Council of Europe is not a formal condition of the UK's membership of the European Union, the fact that the EU now requires new potential entrants to the EU to ratify the ECHR means that it would at the very least make its continued membership of the EU extremely difficult if the UK denounced the ECHR.⁸⁷

The DCA Review,⁸⁸ unsurprisingly, agrees with those positions, as do JUSTICE.⁸⁹ So if the Conservatives do not propose leaving the ECHR, they are left with the following problem. Given that the main issue raised by the Conservatives in relation to security concerns the problems caused by the interpretation of *Chahal* by the ECtHR,⁹⁰ any such more precise definitions are likely to be inconsistent with settled interpretation of the ECHR.⁹¹ In those circumstances, is the proposal to remain bound by the ECHR workable? The answer to that question depends on whether, if there is a conflict with the interpretation of ECtHR rights and the necessary interpretation of a new right, the ECtHR would inevitably find against the UK Government when a case raising the question reaches the ECtHR. Taking Cameron's principal security example, would the ECtHR do anything other than follow *Chahal* if a new Bill of Rights contained a provision permitting the Home Secretary to balance the likelihood of an individual being tortured on return to a foreign country with the risk he poses to national security?

To answer this, Cameron puts forward an argument based on the ECHR doctrine of the 'margin of appreciation' whereby, to the extent that there are

denouncing the treaty; whether it would be possible make any new reservations from the ECHR; and the consequent issues of denunciation for the devolutionary settlements (the ECHR is entrenched in respect of the three devolved assemblies).

⁸⁷ See Professor Klug 'you do have to ratify the [ECHR] to be a member of the EU' (evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q19); Rabinder Singh goes further, 'membership of the European Union today requires adherence to the [ECHR]. That is certainly, as I understand it, what we expect of potential new entrants, so I think it is a matter of legal obligation' [my emphasis] (*Ibid.* Q63); Jonathan Fisher disagrees: his view is that if the UK enacted its own 'Bill of Rights and Obligations' then the UK's duty under Article 6 of the EU Treaty to respect fundamental rights would be satisfied (*Ibid.* Q41); the Lord Chancellor has the best view, 'the way the relevant treaties are drafted does not express it as a condition, but to all intents and purposes, I believe it is not possible to be a member of the [EU] and to have...denounced the [ECHR]' (*Ibid.* Q96).

⁸⁸ 37-38.

⁸⁹ JUSTICE views the UK's relationship with the Council of Europe and its ECHR [membership] as a political reality and as non-negotiable. Moreover, our continuing membership of the European Union is effectively conditional on compliance with the ECHR' (Discussion Paper para [17]).

⁹⁰ See discussion of *Chahal and Article 3* (n 74). In order to allow the Secretary of State to take into account an individual's risk to national security when assessing whether he should be deported notwithstanding a risk of treatment contrary to Article 3, a Bill of Rights would have to give an expressly different interpretation to the Article 3 right from that currently given by the ECtHR.

⁹¹ It will not be possible to consider the extent to which the new rights are in fact consistent with ECHR rights until a draft of the new Bill of Rights can be examined.

rights in the new Bill of Rights which are inconsistent with the ECHR, the ECtHR would allow the UK to rely on the balance it had struck, by means of a Bill of Rights, between the rights of individuals and the community as a whole. Cameron cites the example of Germany where, he claims, the ECHR defers to German 'Basic Law'⁹² in conflicting situations. Grieve and Fisher make similar claims.⁹³ Professor Klug argues that this claim is false because (1) Germany does not receive any greater width from the ECtHR than other countries; and (2) margin of appreciation is a concept which only applies where there is no consensus between signatories.⁹⁴ JUSTICE states that they are unaware of any argument to support Cameron's claim.⁹⁵ There is however at least some case law in which German Basic Law does not appear to have been given any specific weight so as to increase the normal margin of appreciation allowed by the ECtHR to states: the case of *Von Hannover*.⁹⁶ In that case, the ECtHR set out the principle that the German state has a margin of appreciation to strike the balance between the competing interests of the individual and of the community as a whole in the context of the right to privacy and freedom of the press.⁹⁷ The ECtHR went on to find that the state was not acting within its margin of appreciation. They appear to give no weight in applying the margin of appreciation principle to the fact that the German Constitutional Court had interpreted its Basic Law to dismiss the appeal to it by the applicant. This clearly does not mean that the ECtHR would never allow a state a margin of appreciation on the basis that it had applied its own Bill of Rights. However, in *Von Hannover* no such principle is articulated in relation to German Basic Law.

A further problem is that, prior to the HRA, the courts had shown definite signs that they were prepared to begin the process of judicial incorporation of the ECHR. The government might find that they are called to account on ECHR principles in UK courts even having repealed the HRA.⁹⁸ The Conservatives would have to argue that English courts would

⁹² The Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) is the constitution of Germany.

⁹³ *Liberty and Community in Britain* (n 48); evidence to Constitutional Affairs and Home Affairs Select Committees, 31 October 2006, Q21.

⁹⁴ Klug's second reason does not appear to be correct. The ECtHR does not limit its application of the concept to situations where there is no consensus; rather it is applied in certain specific decision-making areas, e.g. social and economic policy. For example see *Burden & Burden v UK* (2007) 44 EHRR 51 in relation to inheritance tax policy).

⁹⁵ JUSTICE Discussion Paper [para 18].

⁹⁶ *Von Hannover* (2005) 40 EHRR 1. The case concerned photographs of Princess Caroline of Monaco. The claim was against the state for failing in its positive obligation to protect the Princess's right to privacy after she had failed in a series of applications in the German courts to prevent publication of the photographs.

⁹⁷ *Ibid.* para [57].

⁹⁸ *R v SSHD ex parte Brind* [1994] 1 AC 696 in which the House of Lords held that, absent any contrary indication, parliament would be assumed to have been legislating in accordance with the ECHR.

take the same view of margin of appreciation for the proposal to be fully viable.

Since there seems to be no settled view, the Conservatives cannot be certain that their argument based on the margin of appreciation will provide them with the magic pill to cure the difficulties that their insistence on maintaining ECHR membership causes. The theory will certainly require litigation before the ECtHR to establish it.⁹⁹ Consistent defeat at the ECtHR, even on a relatively small number of issues, in a situation where a Conservative government had passed constitutional legislation in order to secure a certain result, would leave that government in a very difficult position indeed.

Cameron also touches on a further role his Bill of Rights would play in protecting security. He states, it could ‘help us promote active citizenship and forge a renewed sense of national cohesion making a lasting contribution to the general wellbeing of our country.’ This argument, however, receives far more emphasis in Grieve’s speech.¹⁰⁰ He argues that success in tackling deep problems with community cohesion in Britain,¹⁰¹ and the threat of home-grown terrorism,¹⁰² is dependent on

‘winning the struggle for hearts and minds and in identifying those shared values which unify us...[A new Bill of Rights] has the potential to play a beneficial role in promoting a common identity.’

This ambitious aim is mirrored by the recent statements of the Gordon Brown’s administration.¹⁰³ It is certainly rational but whether it is achievable is another question.

⁹⁹ However the Government’s strategy is already to litigate in order to secure the interpretations it considers appropriate. For example, the UK has been permitted to make observations jointly with Lithuania, Portugal and Slovakia in two national security/Article 3 deportation cases currently before the ECtHR (App No 37201/06 *Saadi v Italy* and App No 25424/05 *Ramzy v The Netherlands*) in order to argue that *Chahal* was wrongly decided and that states should not have to dismiss national security concerns as irrelevant once a real risk of Article 3 treatment on return is found. Cameron is seeking to do something very similar, but by different means: ‘But a British Home Secretary must have more flexibility in making judgement in the public interest, balancing the rights of terror suspects against the rights of British citizens. I believe it is wrong to undermine public safety – and indeed public confidence in the concept of human rights – by allowing highly dangerous criminals and terrorists to trump the rights of the people of Britain to live in security and peace.’

¹⁰⁰ 2 October 2006 (n 48).

¹⁰¹ Caused, Grieve claims, by mass migration and a failed policy of multiculturalism.

¹⁰² Such as the 7 July London bombings.

¹⁰³ *The Governance of Britain* (n 6).

The Unloved HRA

Cameron acknowledges that some of the impact of the HRA has been positive.¹⁰⁴ However, Grieve has said that the ‘disenchantment [with the HRA] which I pick up from my postbag is the single most important political phenomenon of the last few years’ mentioning, in particular, the amount of correspondence he receives on the subject of the perceived assistance Article 8 ECHR gives to gypsies resisting eviction.¹⁰⁵ The perception seems to be that the HRA, incorporating the ECHR which is enforced ultimately in a foreign court, increases the rights of the undeserving. The campaign against the HRA has at times been vicious, but it has also sometimes been based on inaccurate understandings of court decisions.¹⁰⁶ This has had a corrosive effect on the popular acceptance by the HRA.¹⁰⁷ Due to this perceived unpopularity of the HRA, the Conservatives principally see the HRA as presenting a *political* rather than a legal problem. Grieve has made explicit reference to this.¹⁰⁸ This lends support to an analysis of Cameron’s speech on political rather than legal terms. If the HRA is perceived as damaging security *notwithstanding its terms* then the critique that the Conservatives wrongly blame the HRA on its terms as damaging security, loses much of its force.

Recognition of this political problem appears across the political spectrum, including by the former Prime Minister.¹⁰⁹ The DCA Review, in more considered terms, states that the HRA has been

‘widely misunderstood by the public, and has sometimes been misapplied in a number of settings. Deficiencies in training and guidance have led to an imbalance where too much attention is paid to individual rights at the expense of the wider

¹⁰⁴ He cites as example the right of elderly married couples not to be separated in different care homes, and the right of families of the deceased to be represented at coroners’ inquests. See also the comments of Lord Kingsland, ‘Many things of real constitutional value have flowed from the arrival of the HRA on our statute book’ Hansard HL 22 Mar 2007 col 1404.

¹⁰⁵ Debate with Shami Chakrabarti, ‘*A British Bill of Rights*’ (Gray’s Inn, 13 March 2007).

¹⁰⁶ For example, *The Sun*’s campaign started on 12 May 2006 to ‘*rip up the [HRA]*.’ This followed the judgment of Sullivan J in the Afghan hijackers’ case (*S v SSHD* [2006] EWHC 1111). The Afghans had hijacked a plane and landed at Stansted, They had successfully appealed to an immigration Adjudicator against removal on Article 3 ECHR. The Government had accepted that finding. The Secretary of State changed his policy on discretionary leave and granted them temporary admission. The Afghans applied for judicial review. The judge (whose decision was upheld on appeal) found the new policy unlawful. *The Sun*’s campaign therefore appeared to be based on a misunderstanding of the nature of the proceedings before Sullivan J.

¹⁰⁷ Lord Lester complains that the legitimacy of the HRA is under sustained and unfair attack by the tabloid press (Hansard HL 22 Mar 2007 col 1375). Liberty agrees (letter to JUSTICE in response to their Discussion Paper, 7 May 2007). Lord Falconer also agrees: ‘I think they are doing significant damage to the way the Act is perceived in the Country’ (evidence to JCHR 21 May 2007, Q69).

¹⁰⁸ *Debate with Shami Chakrabarti* (n 105).

¹⁰⁹ *Blair Press Conference* (n 7).

community. This process has been fuelled by a number of damaging myths about human rights which have taken route in the popular imagination.¹¹⁰

The JCHR Report broadly agrees with this assessment; however it lays great emphasis on the adverse effect of unfounded assertions by very senior ministers who use it as a scapegoat for administrative failings in their own departments. In particular, it draws attention to the comments of the former Prime Minister¹¹¹ and the former Home Secretary¹¹² concerning HRA decisions, which, in the JCHR's view 'only serves to fuel public misperceptions of the [HRA] and of human rights law generally.'¹¹³

Others have made similar points. Lord Kingsland¹¹⁴ said,

'the HRA has not commanded the public respect that it ought to have done and that it deserves... [due to] foolish or misplaced decisions...by public servants...[and] lukewarm endorsement from ministers.'¹¹⁵

Baroness Whitaker stated, 'the Act has not become part of the national culture fully enough yet.'¹¹⁶ JUSTICE agrees that 'political and cultural entrenchment have become mixed.'¹¹⁷ Liberty go further, and state that calls for a new Bill of Rights stem from the fact that the HRA:

¹¹⁰ DCA Review p.29 and ff. where the Review sets out why myths about the HRA have been a driver for attacks on the HRA using it as a proxy for other issues. The Review considers that there are three different types of myth in play: cases never brought (e.g. Dennis Nilsen's judicial review against the decision to refuse him access to pornography whilst in prison, which failed at the permission stage. It is interesting that the Review describes this as a 'case never brought' – it clearly was a case brought, albeit unsuccessfully!); urban myths (such as the supposed provision of Kentucky Fried Chicken to Barry Chambers whilst he was avoiding arrest); and misrepresentations of the HRA (e.g. the Afghan hijackers case (n 71) and Article 8 ECHR decisions involving Gypsies and Travellers).

¹¹¹ 'We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this' (Tony Blair, Press Conference, 10 May 2006). As set out in footnote 71, this appears to be a misunderstanding of the decision of Sullivan J.

¹¹² 'When decisions which appear inexplicable or bizarre to the general public, it only reinforces the perception that the system is not working to protect or in favour of the vast majority of ordinary decent hard-working citizens in this country.' (John Reid, quoted by BBC, 11 May 2006). This statement appears to be less inaccurate in relation to the decision of Sullivan J, to the extent that it is a comment on the perceptive effect of the decision.

¹¹³ The Lord Chancellor, in evidence to the JCHR (30 October 2006, Q1 and Q2), confirmed that the official position of the Government was that the hijackers should not be returned, given that the Immigration Adjudicator had found on the facts that there was a real risk of treatment contrary to Article 3 ECHR on return, for as long as that risk subsisted.

¹¹⁴ Shadow Lord Chancellor and a Vice-Chairman of JUSTICE.

¹¹⁵ Hansard HL 22 Mar 2007 col 1404.

¹¹⁶ Hansard HL 22 Mar 2007 col 1377.

¹¹⁷ *JUSTICE discussion paper* (n 95) 3.

‘has been the target of a concerted media campaign which has unfairly portrayed the [HRA] and the rights it contains as a charter for criminals and terrorists and a threat to public safety. Prominent politicians have attacked, as an abuse of common sense, judicial decisions to protect even the most fundamental human right, the absolute prohibition against torture.’¹¹⁸

A further reason for the problem of perception has been identified as the lack of consultation in the initial stages of the HRA, which has led to a lack of ‘ownership’ by the people.¹¹⁹

A significant theme in adverse press coverage of the HRA is a perception that the HRA is somehow a ‘European’ measure. Herein lies the motivation for the emphasis in Cameron’s speech on a *British* Bill of Rights, presumably in contradistinction to the *European* Convention on Human Rights. The Government have acknowledged this as an aspect of the public perception of the HRA.¹²⁰ Much of the response to that emphasis has focussed on the fact that British government lawyers were heavily involved in the drafting of the ECHR.¹²¹ However, this point is not always validly prayed in aid by defenders of the Britishness of the ECHR. Richard Shepherd¹²² quotes the Labour Lord Chancellor¹²³ at ratification of the ECHR in March 1951 as

¹¹⁸ Liberty’s response to JUSTICE’s discussion paper, letter dated 7 May 2007.

¹¹⁹ *Grieve* (n 34) and *Shami Chakrabarti* (n 105).

¹²⁰ ‘It is an irony that bringing our rights home, in the sense of making them enforceable here rather than in Strasbourg, somehow conspired to make rights to which we are all accustomed seem more alien and foreign.’ Vera Baird, Under-Secretary of State for Constitutional Affairs, Hansard HC 19 Feb 2007 col 69. Contrast with Lord Irvine’s (Labour Lord Chancellor who introduced the Human Rights Bill into Parliament) comment that the task was to ‘find a distinctively British approach for our British Parliament and British Courts’ (Keynote address to the Conference on a Bill of Rights for the United Kingdom, University College London, 4 July 1997, quoted in K.D Ewing, ‘The Human Rights Act and Parliamentary Democracy’ [1999] 62 *MLR* 79)

¹²¹ ‘Why do we have the campaign against the [HRA]? One reason is the allergy to the word ‘European.’ The fact that the name of the convention is the European convention on human rights leads some who are ill informed to assume that it is the spawn of the European devil: the European Union. It is not of course...If anything it was the creation of the British Government and the British judiciary after the war, very much supported by Sir Winston Churchill at the time, although not perhaps by Atlee.’ David Heath, Liberal Democrat MP, Hansard HC 19 Feb 2007 col 88: ‘It is the modern Magna Carta. Why are we not as proud of the [HRA] as the Americans are proud of their Bill of Rights?...partly because of its novelty...[and] partly because [the ECHR] contains the dreadful word ‘European’...even though it was largely drafted by British lawyers lead by David Maxwell-Fyfe [Conservative Attorney General in 1945, and subsequently Lord Chancellor as Viscount Kilmuir]’ Lord Goodhart, Liberal Democrat Lord Chancellor and Chairman of JUSTICE, Hansard HL 22 Mar 2007 col 1388.

¹²² Conservative member of the JCHR.

¹²³ William Jowitt, the First Earl Jowitt.

writing in a memorandum to the Cabinet Committee that acceptance of the ECHR, although a political necessity was ‘an unqualified misfortune.’¹²⁴ A less partisan analysis by Dr. Elizabeth Wicks concludes that the Government of the time saw it as an instrument of limited application.¹²⁵ Professor Danny Nicol¹²⁶ suggests that the British negotiators saw the draft as a means to ensuring that Europe should never again be menaced by totalitarian regimes. Since all the prospective signatories were democracies, the aim was therefore to preserve the status quo. This led to a ‘minimalist’ approach, requiring a short list of political rights, rather than (as others wanted) a dynamic, living instrument which was capable of reflecting new, as yet unascertained, rights as time went on. The ‘minimalists’ were successful in negotiations, and the majority of the Articles of the ECHR were drafted to contain detailed provisions. The result is, of course, a very different instrument, expressly interpreted by the ECtHR as a ‘living instrument.’¹²⁷ Appeals to the *Britishness* of the ECHR as currently interpreted on the basis that it reflects the intentions of its British drafters are therefore misplaced.

But could a new Bill of Rights solve the Conservatives’ political problem concerning public perception of the HRA? In order to do so, their Bill of Rights would not only have to allow British liberty and security to be better protected, but also to achieve cultural entrenchment by means of a universally accepted set of norms which define the relationship between the individual and the state.

The Government, recognising the same perceptive problem with the HRA have taken a policy decision to remain fully committed to the HRA (and ECHR).¹²⁸ Instead of repealing the HRA, they proposed:¹²⁹

- 1) to conduct a review of how the police, probation, parole and prison services balance public protection and individual rights (and if necessary legislating to prioritise public protection).

¹²⁴ Quoted in Hansard, HC 19 Feb 2007 col 96.

¹²⁵ Wicks, ‘The UK Government’s Perceptions of the ECHR at the Time of Entry’ [2000] *PL* 438.

¹²⁶ Nicol ‘Original Intent and the European Convention on Human Rights’ [2005] *PL* 152.

¹²⁷ This norm of treaty construction is made possible by the fact that the ECtHR is not bound by its previous decisions.

¹²⁸ However, the DCA Review does consider amendment of the HRA as a possible solution to situations where public officials get the balance wrong in applying the HRA. The JCHR was unimpressed by this proposal: ‘None of the three cases which sparked controversy [Afghan hijackers, Rice, deportation of foreign prisoners]...demonstrates a clear need to consider amending the [HRA]’ (JCHR Report, 16). Lord Falconer was forced to row back from any commitment to amend (evidence to JCHR, 3 October 2006, Q10, Q57 and Q58).

¹²⁹ DCA Review, 1-2. The lead was to be taken by the DCA.

- 2) to provide better and more consistent advice and training on human rights within departments and for public sector managers, with emphasis on safety arguments.¹³⁰
- 3) to take a pro-active and coordinated approach to human rights litigation.
- 4) to better inform the public about human rights.¹³¹

It has taken the courts (on both sides of the bench) some time to reach a stage where the HRA is being routinely, accurately and efficiently argued and applied as a matter of course (for the most part). The last 7 years have seen extensive development of human rights law based on the direct application of the ECHR in English law.¹³² As evidenced by the DCA review, people's understanding of their human rights is already limited, without the confusion which would flow from repealing the HRA. For these, practical but extremely important reasons, repealing the HRA without replacing it with an instrument which incorporated (but then built on) ECHR rights could have a chaotic and damaging effect on the administration of justice. It would also therefore further damage people's confidence in and understanding of a legal culture of human rights. It is obvious for this reason why the government have launched a robust defence of the HRA. For the Conservative project to be workable, it must therefore be cast as building on the HRA, not as an alternative to it.

There are two further aspects of popular acceptance of a new Bill of Rights which the Conservatives point to. In his speech Cameron states that his British Bill of Rights would define our core values, setting out our fundamental duties and responsibilities, and balancing them with each other. Grieve considers that a statement of the obligations of individuals to the wider community

‘could provide a benchmark in the balancing exercise that the judiciary must carry out in reconciling the rights of the individuals to the rights of the wider community.’¹³³

¹³⁰ *Making sense of human rights: A short introduction* (DCA, 30 October 2006) ‘is designed for officials in public authorities to assist them in working with the Human Rights Act 1998 and to raise their awareness of human rights; *Human Rights: Human Lives A Handbook for public authorities*’ (DCA, 30 October 2006) ‘has been designed to raise staff awareness of the different rights and freedoms protected by the Human Rights Act’ (DCA website).

¹³¹ Lord Falconer launched the Ministry of Justice's human rights campaign *Human Rights: Common Values, Common Sense* at the Harry Street lecture at Manchester University on 9 February 2007.

¹³² To take as only one example the application of the ECHR principle of ‘proportionality,’ in addition to common law principles, to the standard of review to be carried out by the Courts in judicial review by the House of Lords (*R (Daly) v SSHD* [2001] 2 A.C. 532).

¹³³ *Liberty and Community in Britain* (n 48).

Aside from the jurisprudential question of whether duties are *capable* of being balanced against rights by a court adjudicating on entitlement to those rights,¹³⁴ if the Conservatives are successful in their drive to secure public ownership of a new Bill of Rights through consultation¹³⁵ then a statement of responsibilities tied to rights might go some way to removing the stigma attached to human rights instruments as charters for the undeserving, and allow acceptance of a new Bill of Rights. Labour agrees, as Jack Straw has now made clear.¹³⁶

A second aspect of popular acceptance of any new Bill of Rights concerns its status in law. If an instrument is to be appealed to as a document which defines the citizens of a country, it must be seen to be above party politics. This matters in the manner of its enactment, and also the extent to which it can be amended to suit the short term political aims of a party which happens to be in power. Bills of Rights are both political and legal documents; to treat them in the same category as the Dangerous Dogs Act, for example, would be to lessen their capacity for cultural entrenchment. For this reason, some form of parliamentary entrenchment which places the instrument above the easy reach of the executive should be considered. Grieve, Fisher and Cameron have suggested 'soft entrenchment' whereby the operation of parliament acts is excluded in relation to the new Bill.¹³⁷ They appear not to advocate fully entrenching a new Bill of Rights so that it cannot be amended by parliament.¹³⁸ They cite the doctrine of parliamentary supremacy. However, Dworkin disagrees that a parliament cannot limit the power of a future parliament.¹³⁹ He asks what the authority for that proposition is, and suggests that for parliament not to be able to limit its own power in the future would itself be a limitation of the power of parliament. This argument has some force. If a parliament made a simple declaration against future amendment,¹⁴⁰ then a future parliament would

¹³⁴ Although there has been some comment by Conservative lawyers, in particular by Jonathan Fisher QC in his paper '*A British Bill of Rights and Obligations*' (Conservative Liberty Forum, 31 October 2006), on the nature and justiciability of such obligations, discussion in depth of those proposals is outside the scope of this essay.

¹³⁵ Grieve says we should: 'engage in a national debate as to what aspects of our legal and constitutional framework constitutes core values in the area of civil liberties that should be identified and protected...if the document we draft is well-worded and is perceived to provide protection to our rights and freedoms, then it will become effective in defining common values so that all British citizens of different backgrounds feel common ownership of it;' see *Liberty and Community in Britain* (n 48). This is remarkably similar to the government's current proposals.

¹³⁶ *The Governance of Britain* (n 6).

¹³⁷ This would mean that the House of Lords would have full veto powers over any proposed amendments.

¹³⁸ Grieve says, '[I]t will therefore be possible to repeal or override part or all of a Bill of Rights in exactly the same way as the Government has routinely done to Habeas Corpus and Magna Carta.' See *Liberty and Community in Britain* (n 48).

¹³⁹ *A Bill of Rights for Britain* (n 52) 26.

¹⁴⁰ As they did, for example, in the Acts of Union 1707 and 1800 (example used by JUSTICE in their Discussion Paper).

have to face up squarely to what it was doing, which would at least in theory mean that there would have to be clear popular support for amendment or repeal. For the time being, however, the Conservatives at least recognised that some form of entrenchment is required for their conception of the role a new Bill of Rights would play to work.

The Role of the Judiciary

Some Conservatives have expressed deep dissatisfaction with what they see to be the shift in the constitutional balance¹⁴¹ that the HRA has caused as between the judiciary on one hand, and parliament and the executive on the other.¹⁴² It is not clear where the leadership stand, but often criticism by politicians of decisions under the HRA has implied that judges are straying on the territory of parliament and, worse, the executive. This argument is misconceived. The courts are merely carrying out the function assigned to them by an Act of Parliament passed by elected representatives of the people. Further, the assertion of rights by citizens against the state in court is itself a fundamentally democratic right in itself: it amounts to direct participation in the outcome of decisions which affect those citizens. Dworkin quotes the French historian François Furet as saying that the single triumph of our time is the growing acceptance of a crucial idea; that democracy is not the same thing as majority rule.¹⁴³ In a similar vein, Laws LJ in a famous article wrote that those who govern must have limits set to what they can do; it is a function of democratic power that it is not absolute.¹⁴⁴

The Conservatives propose to retain the ingenious architecture of the HRA which, broadly, allows the courts to adjudicate on rights asserted by individuals, but allows parliament the final say on whether to amend ECHR incompatible legislation.¹⁴⁵ So the constitutional balance which has developed under the HRA would be likely to persist. Certainly some members of the Conservative Party see this shift in balance as part of the political problem with the HRA. If the Conservatives, similarly to members

¹⁴¹ Professor K.D. Ewing comments that the HRA represents ‘an unprecedented transfer of political power from the executive and legislature to the judiciary’ [1999] 62 *MLR* 79; but c.f. the DCA Review which states ‘has not significantly altered the constitutional balance;’ the view of a senior judge (Maurice Kay LJ – evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q67) is that at the very least the HRA has drawn judges into new territory as shown by the question at issue in *A & Others* (the lawfulness of the UK’s derogation from an international obligation), although in the event great deference was shown by majority in that case.

¹⁴² e.g. (amongst many examples of Conservative criticism of judicial activism) Martin Howe QC has written that the HRA has allowed the Courts to decide questions which are essentially political and that if this is to continue we should recognise that political factors should play a part in the appointment of judges (*‘A British Bill of Rights’* Conservative Liberty Forum 9 July 2006).

¹⁴³ *A Bill of Rights for Britain* (n 12) 13.

¹⁴⁴ Laws J, ‘Law and Democracy’ [1995] *PL* 72, 81.

¹⁴⁵ Grieve has stated that the new Bill of Rights would retain ss. 2, 3, 4 and 6 of the HRA.

of the government, are not content with where the balance now lies, their Bill of Rights will have to shift that balance once again. For the time being, however, it seems the leadership agrees with Lord Lester when he says,

‘[t]here is no risk in this country of a government of unelected judges. They have approached the Strasbourg jurisprudence through rather than round British law, weaving the Convention rights into the fabric of the British system. That is vital if we are to command public confidence.’¹⁴⁶

Conclusions

The coherence of the Conservative project, in terms of the relationship between the reasons for it and the measures it advocates, is at present mixed.

It wrongly appeals to the *Britishness* of the ECHR. It does not make clear how deficiencies in the application of the HRA by public officials will not be repeated in a new Bill of Rights. The argument, on which much rests, in relation to the margin of appreciation to be applied by the ECtHR is apparently unsubstantiated. Most crucially, their decision to attack the HRA rather than seeking to build on its successes (even if by repealing it), risks further failure to entrench a culture of human rights; as the Director of Liberty has said ‘beware of permanent revolution.’¹⁴⁷

However, Bills of Rights are both political and legal documents. The Conservatives have recognised (as others have) the political problem which currently exists in relation to human rights. They have proposed a measure to solve that problem which seeks to further the protection of civil liberties. Their proposals are consistent with their ideology. They are committed to remaining bound by the ECHR. Perhaps most importantly, they aim to seek wide consultation and ownership of their new Bill of Rights, and see in it (as others do) a means to foster a greater understanding of the relationship between the individual and the state in order to increase national cohesion. Their proposals, for these reasons, are at least capable, once fully developed, of solving the problems they have identified.

¹⁴⁶ Hansard HL 22 Mar 2007 vol 609 col 1375.

¹⁴⁷ Debate with Dominic Grieve (*supra*) amongst other places.

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The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?

COLM O'CONNOR*

Many written constitutions contain express statements guaranteeing the right to equality in some form or other. Examples include the Equal Protection Clause contained in the 14th Amendment of the US Constitution, Article 40.1 of the Irish Constitution and Section 15 of the Canadian Charter of Rights and Freedoms. International human rights treaties contain similar provisions, such as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR) which is best described as a truncated equality right. The existence of a general principle of equal treatment is recognised even in legal systems such as the UK and the EU which do not have a formal written constitution; the English courts in applying the Common Law have taken the view that unequal treatment that cannot be justified may constitute an irrational act by a public authority,¹ while the European Court of Justice has recognised equality as a general principle of EU law and therefore as a norm to which the actions of the EU institutions and member states applying EU law must conform.²

The existence of a 'right to equality' however defined, is now therefore often regarded as an essential feature of both national law and international human rights instruments. Such equality guarantees have often been applied by courts to protect individuals and groups against discrimination. However, the overall impact of these various legal expressions of the principle of human equality has been mixed. The 'right to equality' has often been interpreted by national and international courts in a narrow and restrained manner. Substantial uncertainty has also tended to surround how such a right should be interpreted and applied by courts and other bodies; 'equality' appears to be an open-ended and indeterminate concept, capable of giving rise to multiple and often conflicting accounts of its 'proper' meaning.

Various attempts have been made using concepts such as 'dignity' and 'substantive equality' to give more bite and tangible content to the otherwise normatively underdeveloped principle of equality. These attempts have had

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¹ Jeffrey Jowell, 'Is Equality a Constitutional Principle' (1994) 47 *Current Legal Problems* 1.

² Case 144/04 *Mangold v Helm* [2005] ECR I-9981.

some success, but remain problematic in many ways, often because they often fail to add much to the inherent fuzziness of the idea of equality. It may be better for lawyers, judges and other constitutional actors to refrain from wasting excessive energy on attempts to define in positive terms what 'equality' means. Instead, it may be more productive to develop a rigorous analysis of what types of behaviour or social outcomes are incompatible with the principle of equality. In other words, it may be a more fruitful enterprise to define the equality principle in negative terms as requiring legal intervention to prevent the occurrence of certain forms of discrimination and demeaning treatment, rather than trying to establish what exactly equality is through abstract moral reasoning.

The Equality Principle in Constitutional and International Human Rights Law

It is commonplace for written constitutions to contain resonant and sweeping statements guaranteeing the right to equal treatment. The oldest and perhaps best known example is the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, enacted in 1868 following the US Civil War and the abolition of slavery; it simply provides that '[No] state shall...deny to any person within its jurisdiction the equal protection of the laws.' Similar guarantees of the right to equal treatment are embedded in every major international human rights instrument, such as Article 26 of the ICCPR and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ Article 14 of the ECHR contains a truncated equality right that is confined to guaranteeing non-discrimination in the enjoyment of convention rights.⁴ However, Protocol 12 ECHR makes provision for a 'free-standing' equality right even if most European states have been very slow to ratify this new provision.

Even constitutional systems with no written constitutional text, such as that of the UK, tend to recognise the existence of some form of residual entitlement to equal treatment as part of the system's underlying general principles of law. Thus, for example, the Privy Council in *Matadeen v Pointu* recognised that a general principle of equality was, in Lord Hoffmann's words, 'one of the building blocks of democracy and necessarily permeates any democratic constitution... treating like cases alike and unlike cases differently is

³ The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and the new UN Convention on the Rights of Persons With Disabilities (CRPD) recognise in their texts the existence of a general right to equality, to which their more specific and precise provisions are designed to give substantive content in particular contexts.

⁴ *Belgian Linguistics Case* (1979-80) 1 EHRR 252.

a general axiom of rational behaviour.⁵ A similar development can be recognised within EU law.⁶

It is therefore now commonplace for national constitutions and international human rights instruments to recognise the importance of equality as a fundamental right. By embedding this right in legal texts, these instruments give concrete legal shape to the philosophical belief, now deeply rooted in political rhetoric and popular feeling, that all humans are entitled to a degree of equality of respect in how they are treated by the state. This serves an important symbolic and rhetorical purpose; by the inclusion of equality as a fundamental right within their frameworks, national legal systems and international human rights law reflect the significance that equality has acquired as a social concept since the French Revolution. In addition, a legal right to equality is a useful and progressive tool, as it enables disadvantaged individuals and groups to challenge discriminatory policies and practices. The existence of a guaranteed fundamental right to equality gives victims of discrimination both a legal and political platform from which to push for change. Campaigning lawyers can use this right to challenge discrimination through the legal process, while political campaigners can use the constitutionally approved language of equality to highlight injustice and call for reform.

For example, the Equal Protection Clause of the US Constitution was used to considerable effect by civil rights campaigners from the late 1940s onwards to attack segregation in the southern US states. Similarly, Section 9 of the South African Constitution of 1996 has been used to challenge an array of different discriminatory practices,⁷ and both this equality clause and Section 15 of the Canadian Charter of Fundamental Rights and Freedoms have paved the way for the legal recognition of equal rights for same-sex partners in both jurisdictions.⁸ Article 14 ECHR is now being put to use as a mechanism for

⁵ *Matadeen v Pointu* [1999] 1 AC 98, 109. See also the analysis adopted by McCombe J in *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin). For academic support for the existence of this general principle of equality in UK public law see Jowell, 'Is Equality a Constitutional Principle?' (1994) 47 *Current Legal Problems* 1; Allen, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *LQR* 221, 244. See however the more sceptical view of the existence of this general principle of equality taken by Stanton-Ife, 'Should Equality Be a Constitutional Principle?' (2000) 11 (2) *King's College LJ* 133, and McColgan, 'Discrimination Law and the Human Rights Act 1998' in Campbell, Ewing and Tomkins (eds), *Sceptical Approaches to Human Rights* (OUP 2001) 215-241, 218-224. See also the doubts expressed by Dyson LJ in *Association of British Civilian Internees (Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473 paras [85]-[86].

⁶ Case 144/04 *Mangold v Helm* [2005] ECR I-9981. See also Articles 20, 21 and 23 of the EU Charter of Fundamental Rights, even if it is not a legally binding instrument as yet, and may never be.

⁷ *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1999] (1) SA 6.

⁸ *Minister of Home Affairs v Fourie* (2006) (1) SA 524 (CC); *Halpern v AG Canada* (2003) 225 DLR (4th) 529.

securing greater equality for the severely disadvantaged Roma communities of Central and Eastern Europe (see below).

The Often-Disappointing Results of Equality Jurisprudence

However, equality rights can also be interpreted and applied in a manner that can render them empty vessels, lacking any significant legal impact or substance.⁹ At times, equality guarantees can actually have counter-productive results; grand constitutional statements about the importance of equal treatment can give the impression that all is well with a constitutional system and encourage complacency, even in circumstances where serious inequalities persist in a society.

This ‘hollowing-out’ of the principle of equality is not an uncommon feature within comparative constitutional jurisprudence.¹⁰ For many years the US Equal Protection Clause lay largely dormant, with its interpretation by the US Supreme Court depriving it of real substantive content. For example, segregation in the southern US states obtained the constitutional stamp of approval in *Plessy v Ferguson* in 1896.¹¹ The narrow and formalistic interpretation given by the Canadian judiciary to the equality clause contained in Section 1 (b) of the Canadian Bill of Rights 1960 was one of the reasons why this Bill of Rights was subsequently supplemented and effectively replaced by the Canadian Charter of Fundamental Rights and Freedoms in 1982.¹² The Common Law principle of equality is often talked about, but has rarely been given substantive effect in English law.¹³

The Limits of Article 14 ECHR

The same, until recently, could also be said for the right to equal treatment established by Article 14 ECHR. The text of the Convention confines the scope of Article 14 to guaranteeing equal treatment in the enjoyment of Convention rights. However, even allowing for this modest scope of application, Article 14 is a highly underdeveloped provision of the ECHR. Until recently the European Court of Human Rights has tended to shy away from the complexities of Article 14 preferring instead to base its decisions on

⁹ Aileen McColgan, *Women Under The Law: The False Promise of Human Rights* (London: Longman, 1999).

¹⁰ Aileen McColgan, ‘Women and the Human Rights Act’ (2000) 51(3) *Northern Ireland Law Quarterly* 417.

¹¹ *Plessy v Ferguson* 163 US 537 (1896).

¹² The limits of this approach can be seen in the contrasting Canadian cases of *R v Drybones* [1970] SCR 282 and *Canada (Attorney General) v Lavell* [1974] SCR 1349.

¹³ See Rabinder Singh, ‘Equality: the Neglected Virtue’ [2004] *EHRLR* 141. See also *Nagle v Feilden* [1966] 2 QB 633; *Weinberger v Inglis (No 2)* [1919] AC 606; *Sweeney v Coote* [1907] AC 221; Bob Hepple, *Race, Jobs and the Law in Britain* (2 edn Harmondsworth 1970) 246.

other articles of the Convention.¹⁴ Over the last four decades, the Court has often been to the forefront in protecting the rights of unpopular minorities, in particular homosexuals and religious minorities; however, it has usually relied upon the Article 8 right to privacy, the Article 9 right to freedom of religion and other Convention provisions to achieve this.¹⁵

Where it has been necessary for the Court to apply Article 14 it has applied a test based around a series of questions; a) whether the claim in question relates to an issue that comes within the ambit of one of the other Convention rights; b) whether there has been a difference in treatment of persons in similar situations; c) whether this difference in treatment is on one of the ‘suspect’ grounds outlined in Article 14¹⁶ and d) whether this difference of treatment was objectively justified, in the sense of satisfying the well-established ECHR proportionality analysis. However, the lack of case law on Article 14 has meant that this approach has remained underdeveloped. Judge Bonello in 2000 commented:

‘[that he found it] particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim.’¹⁷

The same remark could have been made with even greater force about Article 14. In particular, what constitutes the ‘ambit’ of another Convention right is notoriously unclear, and what remains hard to define; the Court’s pronouncements on the point have often lacked precision.¹⁸ Which individuals or groups will be deemed to be in a similar situation is also often uncertain, as is the extent to which indirect discrimination is covered.¹⁹ The grounds of discrimination that can trigger Article 14 are also unclear, in particular what constitutes ‘other status;’ the Strasbourg court has stated that Article 14 is a

¹⁴ *Dudgeon v UK* (1982) 4 EHRR 149.

¹⁵ For example, the bulk of the Court’s key decisions on sexual orientation have been decided mainly on the basis of the privacy right in Article 8 ECHR.

¹⁶ Sex, race, colour, language, religion, political or other opinion, national or social origin, minority status, property, or birth, on the grounds of ‘other status.’

¹⁷ *Angelova v Bulgaria*, App No 38361/97, Judgment of 13 June 2002, dissenting opinion.

¹⁸ For example, see the vague attempt to define the ambit of a right in *Petrovic v Austria* (1998) 4 BHRC 232 para [28] ‘the subject matter of the disadvantage...constitutes one of the modalities of the exercise of a right guaranteed,’ or in the alternative, the measures complained of are ‘linked to the exercise of a right guaranteed.’

¹⁹ But see now *Thlimmenos v Greece* (2000) 29 EHRR 162, discussed further below.

‘non-exhaustive’ guarantee, in that it is not confined in scope to a set amount of equality grounds, but has at times spoken of discrimination on the basis of a ‘personal characteristic.’²⁰ This has periodically been interpreted by national courts as substantially restricting the scope of the guarantee.²¹

Textual Constraints and the Lingering Influence of ‘Formal Equality’

Why in general have constitutional equality clauses been so underdeveloped? A number of reasons can be put forward. Firstly, equality clauses are often limited by having too narrow a scope of application, often due to the express wording of their text. The equality right in Article 14 ECHR remains inescapably circumscribed by its restrictions on its scope clearly established in its text.²² The European Court of Human Rights has been relatively generous in its interpretation of what is deemed to come within the ‘ambit’ of the other Convention rights in cases such as *Sidabras and Dziantas v Lithuania* (see below).²³ However, the ultimate limits of Article 14 are well illustrated by a case such as *Botta v Italy*,²⁴ where the inability of a disabled person to access beaches and other public facilities was deemed not to come within the ambit of a Convention right, and therefore Article 14 was not engaged.

A second reason for the underdeveloped nature of equality jurisprudence is that constitutional equality clauses have in particular been interpreted as providing for ‘formal equality,’ for example, in line with Aristotle’s description of the equality principle as involving the treatment of like cases in an alike manner, while unlike cases should be treated in an unlike manner.²⁵ This concept of equality requires that individuals who are classified by law or policy as being in a similar situation should be treated alike by the state.

This type of ‘formal equality’ analysis is often casually dismissed in academic literature as an outmoded understanding of equality. However, it is intimately interlinked to the core elements of the concept of the rule of law. The concern of formal equality is to prevent the formation of different categories of citizens with differing rights and status, and to guarantee the equality of all before the law. This is an important aspect of equality, which encapsulates the rejection of formal hierarchies and unequal classes of citizenship that inspired the French

²⁰ *Magee v. UK* [2000] ECHR 216 para [50].

²¹ *R (S) v Chief Constable of South Yorkshire* and *R (Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39.

²² L. Wildhaber, ‘Protection Against Discrimination under the European Convention on Human Rights: A Second-class Guarantee?’ (2002) 2 *Baltic Yearbook of International Law* 71.

²³ *Sidabras and Dziantas v Lithuania* (2004) 42 EHRR 104.

²⁴ *Botta v Italy* (1998) 26 EHRR 241.

²⁵ Aristotle, *The Politics* III.IX (London: Penguin 1962) 195-196.

revolutions of the 18th and 19th century and has since continued to shape western liberal democracies.

However, the usefulness of adopting a formal equality perspective in areas of legal dispute is inevitably limited, at least in contemporary western societies, where rule of law concepts are more or less established and understood. Constitutional equality clauses and the equality guarantees contained in international human rights treaties perform a useful symbolic role in giving expression to the idea of the equality of law before the law. However, in tangible legal terms, if courts adopt a formal equality analysis, this will usually only involve the application of some form of more or less intense ‘rationality’ review, whereby courts assess whether distinctions made in law and state action are rational, fair and justifiable on their face.

This type of rationality review may be capable of addressing obvious forms of unfairness, such as the example given by Lord Greene MR in the English case of *Associated Provincial Picture Houses v Wednesbury Corporation*²⁶ of irrational discrimination based on the colour of a person’s hair. It also may go further than this very improbable and restrictive example may indicate; rational review adopting a formal equality perspective may ensure that distinctions made in law between individuals and groups which are arbitrary, or not reasonably capable of being justified by reference to a difference of capacity or status, or which is unrelated to the purpose of the legislation in question, may be opened up to challenge.²⁷

However, formal equality analysis lacks any substantive account of what is required to ensure concrete equality of status for all citizens; the emphasis is on securing equality and sameness of treatment in how law is made and applied, not in securing ‘substantive equality’ or ‘equality of respect’ as an ultimate good. The capacity of formal equality to address more complex issues of substantial equality, group disadvantage and redistribution is therefore limited. In addition, as formal equality is concerned with ensuring equal treatment and observance of rational principles *on the face* of enacted law, it lacks any real conceptual framework to cope with the discriminatory *impact* of apparently neutral and inoffensive state action. This means that formal equality analysis can approve a government measure as fully in accord with the right to equality, when it nevertheless is deeply discriminatory in its effects. The classic example of this is the US Supreme Court’s refusal to find that segregation violated the Equal Protection Clause in *Plessy v Ferguson*;²⁸ the Court took the view that as long as

²⁶ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

²⁷ *Brennan v Attorney General* [1983] ILRM 449, 480 (HC) (Barrington J): ‘the classification must be a legitimate legislative purpose...it must be relevant to that purpose, and that each class must be treated fairly.’

²⁸ *Plessy v. Ferguson* 163 US 537 (1896)

segregating states applied their 'separate but equal' policies in a non-arbitrary fashion, the equality principle was not violated, even through the actual impact of segregation was to condemn Afro-Americans to a degrading form of third-class citizenship.

Across Europe, there is considerable attachment to the formal conception of the equality principle.²⁹ In civil law systems, the post-Napoleonic attachment to the uniform and rational application of law to all individuals equally remains strong. In the Common Law world, formal equality chimes with the historically dominant English concept of the judiciary acting as 'lions under the throne,' applying the law neutrally and rationally as servants of the democratically elected and sovereign Parliament. Also, if one adopts a legal realist perspective, it is apparent that adherence to a formal equality approach may have considerable attractions for judges; it permits them to sidestep political controversies by confining their intervention in complex political and social debates about equality to the narrow question of whether the state action in question has complied with the requirements of formal equality.

The Anti-Discrimination Approach

However, formal equality analysis is now being challenged by the emerging tendency of courts to adopt wider and more 'substantive' interpretations of the right to equality. An 'anti-discrimination' analysis is increasingly adopted by national or international courts. Anti-discrimination analysis treats certain forms of distinction as inherently more 'suspect' than others; the use of a person's race, ethnicity or gender in employment decisions and other forms of 'suspect classification' are often seen as *prima facie* irrational and subject to strict and intensive forms of judicial scrutiny. In addition, anti-discrimination analysis tends to be more concerned with the impact of state policy and practices upon disadvantaged groups than is formal equality; it therefore opens the door to a concern with disparate impact and indirect discrimination, where the use of apparently neutral criteria to differentiate between different groups results in particular groups being subject to disproportionate and unfair disadvantage.

To a large extent, this shift from a formal equality approach to the use of anti-discrimination analysis has its origins in US constitutional law; indeed, as we will see below, there exists a strong perception in certain quarters that anti-discrimination analysis is the product of a distinctive 'Anglo-American' form of political liberalism. As previously noted, the Equal Protection Clause of the US Constitution had been originally interpreted by the US Supreme Court as

²⁹ See the discussion in Dagmar Schiek, 'Torn Between Arithmetic And Substantive Equality? Perspectives On Equality In German Labour Law' (2002) 18(2) *International Journal of Comparative Labour Law and Industrial Relations* 149. See also Olivier De Schutter and Julie Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law' (2008) 71(3) *MLR* 358.

restricted to ensuring formal equality of status, civil rights and citizenship.³⁰ However, in the seminal case of *Brown v Board of Education of Topeka*³¹ in 1954, the US Supreme Court re-interpreted the Equal Protection Clause as prohibiting racial segregation in education, thereby considerably expanding its reach and impact. The true significance of *Brown* lay not in the practical impact of the decision, which remains a source of debate and controversy today.³² Instead, the importance of *Brown* lies in how the Supreme Court in that case focussed on the impact of segregation and repudiated the use of classifications based upon race; this involved a dramatic departure from its previous approach of attempting to ensure that the formal requirements of the ‘separate but equal’ doctrine were observed.

The decision in *Brown* was taken up by the civil rights movement and used as a tool to press for change, to considerable effect. The scope of the Equal Protection Clause and associated articles of the US Bill of Rights was extended to cover family law, housing, education, and the myriad range of activities of federal and state government.³³ This opened the path for the introduction of federal anti-discrimination legislation covering these areas of activity.³⁴ ‘Disparate impact’ analysis was developed in *Griggs v Duke Power*³⁵ and subsequent constitutional case-law.³⁶ Racial distinctions were subject to strict scrutiny analysis, with distinctions based on gender increasingly subject to a relatively less exacting but still demanding standard of review.³⁷ In starts and fits, the Supreme Court has gradually recognised that certain forms of classification which are linked to patterns of abuse and denial of equal citizenship in US society should be treated as ‘suspect’ forms of differentiation, which opens the way to intensive judicial scrutiny of the use of such forms of classification that goes well beyond the limits of rationality review.

Brown and the subsequent development of the equal protection jurisprudence of the US Supreme Court had a massive impact, at least in the English-speaking legal world. It provided the template for what was in the late 1950s and early 1960s a radical new vision of the role of courts in protecting constitutional rights; in the wake of *Brown*, protecting disadvantaged groups

³⁰ *Stauder v. West Virginia* (1879) 100 US 303; *The Civil Rights Cases* (1883) 109 US 3.

³¹ *Brown v Board of Education of Topeka* (1954) 347 US 483.

³² James T. Patterson, *Brown v Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York and Oxford: OUP 2001); Jack M. Balkin (ed), *What Brown v Board of Education Should Have Said* (New York: NYU Press 2001).

³³ *Loving v Virginia* (1967) 388 US 1; *Heart of Atlanta Motel Inc. v. United States* (1964) 379 US 241; *Jones v Mayer* (1968) 392 US 409.

³⁴ Civil Rights Act 1964 (Pub. L. 88-352, 78 Stat. 241, July 2 1964).

³⁵ *Griggs v Duke Power* (1971) 401 US 424.

³⁶ *Washington v Davis* (1976) 426 US 229.

³⁷ *Craig v Boren* (1976) 429 US 190.

against discrimination became a task that courts applying constitutional equality principles were now expected to perform. Strategic litigation initiated by activist lawyers and non-governmental associations in the US, Canada and elsewhere began to push the boundaries of existing formal equality approaches, and courts have responded, reflecting the changed assumptions about their appropriate role.

Substantive Equality

In some cases, such as South Africa and Canada, constitutional courts have gone further than the US and developed what was become known as a 'substantive equality' analysis, where the right to equality is interpreted as requiring the elimination of historically-rooted patterns of prejudice, discrimination and disadvantage that contribute to the subordination of particular groups. Subsection 15 (1) of the Canadian Charter, in effect since April 1985, provides that:

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

This clause was drafted with the specific intention of encouraging the Canadian courts to depart from their highly-criticised formal equality analysis which had been adopted in interpreting the equality clause contained in the original 1960 Bill of Rights (discussed above). Subsection 15 (2) of the Charter proceeds to specify that this 'does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or group.' Section 9 of the South African Constitution is framed in similar terms.

Both the Canadian Supreme Court and the South African Constitutional Court have interpreted these equality clauses as prohibiting forms of disadvantage, stereotyping or prejudicial treatment which deny the human dignity of individuals and groups. In concrete doctrinal terms, this means that state action which has an adverse impact upon disadvantaged groups, such as women, persons with disabilities or homosexuals, is subject to close scrutiny and must be shown to be clearly necessary and justified. In contrast, differences in treatment which are not linked to historic and persistent patterns of disadvantage or which are not seen as involving a denial of human dignity, will usually be subject to a much weaker standard of review. Positive action designed to combat disadvantage will also not be subject to intensive review,

and will be presumed in general to be constitutional. (In contrast, positive action can be considered to be problematic under formal equality and anti-discrimination approaches, as it can involve favouring particular groups on the basis of their possession of a characteristic such as race, gender or ethnicity, and therefore can feature differential treatment on the basis of a ‘suspect characteristic’).³⁸

The South African and Canadian courts have therefore developed an innovative and rigorous and innovative ‘substantive equality’ jurisprudence, so-called because it focuses upon the substantive impact of state action upon disadvantaged groups, rather than on the formal classification of groups. For example, in decisions such as *M v H*³⁹ and *Halpern v Canada (A.G.)*,⁴⁰ the Canadian courts have interpreted Section 15 of the Charter as requiring the state to recognise same-sex partnerships as equal to traditional heterosexual marriages.⁴¹ The South African Constitution Court has taken a similar stance, and was instrumental in compelling the abolition of discriminatory anti-gay legislation.⁴² In *Hoffmann v South African Airways*,⁴³ unjustified discrimination on the grounds of HIV status was prohibited. In *Eldridge v British Columbia (Attorney General)*,⁴⁴ the Canadian Supreme Court held that deaf persons were entitled to publicly-funded sign language interpretation to access medical services under Section 15, as the failure to provide access would otherwise deny deaf persons the equal benefit of the law.

This approach to equality leaves formal equality behind in its wake; the focus shifts away from an emphasis on rational review and equal treatment before the law towards subjecting measures that contribute to or perpetuate group disadvantage to rigorous review. Support for the substantive equality approach within legal scholarship stems from the influential work of Owen Fiss, who argued in the 1970s for the US Supreme Court to adopt a ‘group subordination’ approach to interpreting the Equal Protection Clause.⁴⁵ Contemporary proponents of substantive equality include Sandra Fredman,⁴⁶

³⁸ See the discussion in N. Bamforth, M. Malik and C. O’Cinneide, *Discrimination law: Theory and Context* (London: Sweet & Maxwell 2008) Chapters 6 and 7.

³⁹ *M v H* (1999) 171 DLR (4th) 577.

⁴⁰ *Halpern v Canada (A.G.)* (2003) 225 DLR (4th) 529.

⁴¹ Emily Grabham, ‘Law v Canada: New Directions for Equality under the Canadian Charter?’ (2002) 22 (4) *Oxford Journal of Legal Studies* 641-66.

⁴² *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1999] (1) SA 6.

⁴³ *Hoffmann v South African Airways* (2001) 1 SA 1 (CC).

⁴⁴ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR. 624.

⁴⁵ Owen Fiss, ‘Groups and the Equal Protection Clause’ (1975) 5 *Philosophy and Public Affairs* 107.

⁴⁶ Sandra Fredman, *Discrimination Law* (OUP 2001).

while ‘identity’ theorists such as Iris Marion Young have argued along similar lines.⁴⁷

However, it is too early to hail the substantive equality approach as the ‘correct’ or ‘most suitable’ interpretation of all equality clauses in national constitutions or international human rights treaties. In both Canada and South Africa, there has been a pattern of broad political support, or at least a lack of strong political opposition, to the substantive equality jurisprudence of the courts. Notably, where political support has been less forthcoming, the Canadian courts at least have been more cautious,⁴⁸ demonstrating some reluctance to apply the substantive equality approach in its full rigour when it comes to terrain where courts have historically tread cautiously, such as welfare systems⁴⁹ and special needs educational policy.⁵⁰ Also, the substantive equality approach rests on the assumption that it is possible to identify groups which have been subject to clear and distinct patterns of discrimination. In other social contexts, there may be less consensus on this matter.⁵¹ In addition, given the range of measures that might have a disparate impact on disadvantaged groups, the scope of the substantive equality principle may appear to some to be potentially too wide.

Article 14 ECHR – New Life and Old Uncertainties

The problem of how to reconcile very different views as to the best approach to interpreting the right to equality is demonstrated by recent decisions of the European Court of Human Rights. The Court has recently begun to expand and develop its Article 14 jurisprudence. This has occurred partially in response to prodding by non-governmental organisations using test case strategies to highlight pressing equality issues, and partially in response to academic and judicial concerns about the inadequacy of the Court’s equality jurisprudence. To begin with, the Court as already mentioned has begun to adopt an increasingly wide interpretation of what issues will fall within the ‘ambit’ of the other

⁴⁷ Iris M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press 1990).

⁴⁸ Judy Fudge, ‘The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts’ in Tom Campbell, Keith D. Ewing and Adam Tomkins (eds), *Sceptical Approaches to Human Rights* (OUP 2001) 336.

⁴⁹ *Gosselin v. Quebec (Attorney General)* [2002] 4 SCR. 429.

⁵⁰ *Eaton v. Brant (County) Board of Education* [1997] 1 SCR. 241.

⁵¹ For example, in the UK, it might appear apparent that minority ethnic groups should benefit from positive action to redress the severe past disadvantage that many of these groups suffered. However, if a white, working class group were also to claim historical disadvantage, should protection under the substantive equality principle also be extended to them, given the UK’s class traditions and the exclusion of working-class families from access to social goods such as good quality education for so long? If so, what implications might this have for positive action programmes?

convention rights and thereby trigger the potential application of Article 14.⁵² The Strasbourg Court in its case law has also shown an increasing readiness to recognise indirect forms of discrimination as covered by Article 14, and to examine the effect and impact of state law and policy, rather than just the formal classifications used.⁵³ It also has established that the use of certain grounds of differentiation to distinguish between individuals and groups, such as race and gender would have to satisfy a very high threshold of justification; sexual orientation is one such ‘suspect’ ground.⁵⁴ The Court is therefore developing a reasonably strong ‘anti-discrimination’ approach in its jurisprudence. In *Connors v UK*,⁵⁵ it even recognised that certain groups may require special treatment to reflect their special needs, which can be seen as representing the first glimmerings of a ‘substantive equality’ approach.

This shift in approach has been confirmed by the very significant recent decision of *D.H. v Czech Republic*, where the Grand Chamber of the Court held that Czech educational policies which resulted in *de facto* segregation of Roma children in special schools violated Article 14, potentially opening up the scope of the Convention in new and dynamic ways.⁵⁶ *D.H.* is particularly striking for how the Grand Chamber of the Court reversed the earlier decision of the first instance Chamber of the Court, which had considered that there was no evidence that Roma children had been actively discriminated against or singled out for special treatment in the allocation of school places in the Czech system. On appeal, the Grand Chamber took the view that the statistical evidence presented by the applicants as to the extent of Roma segregation in the special schooling system placed the onus on the Czech government to justify the educational policies which had produced this outcome, which it failed to discharge. The Grand Chamber was thus willing to accept that statistical evidence of disparate impact could place a member state under an obligation to justify the practices in question.

The *D.H.* decision therefore marks a distinct shift away from the relatively tame and formalistic nature of the Court’s previous Article 14 jurisprudence. The Court’s willingness to consider the impact of the Czech educational policies in question, its recognition of the historically disadvantaged status of Roma, and its readiness to infer the existence of discrimination from a distinct

⁵² In *Sidabras and Dzijauntas v Lithuania* (2004) 42 EHRR, the ECHR considered that the imposition of severe and wide-ranging restrictions upon individuals taking up employment in the private sector could come within the ambit of Article 8, and therefore Article 14 could be triggered. See Virginia Mantouvalou, ‘Work and Private Life: *Sidabras and Dzijauntas v Lithuania*’ (2005) 30(4) *ELR* 573, 581-82.

⁵³ *Thlimmenos v Greece* (2000) 29 EHRR 162.

⁵⁴ *R v Secretary of State for the Home Department, ex p. Carson* [2005] UKHL 37.

⁵⁵ *Connors v UK* [2004] 40 EHRR 189.

⁵⁶ *D.H. v Czech Republic* (App No 57325/00) Judgment of 13th November 2007 ECtHR..

statistical pattern of disadvantage all bear the hallmarks of a willingness to engage in a substantive equality analysis.⁵⁷ It is also notable that the Grand Chamber cited *Brown* in their judgment, thereby explicitly linking their decision in *D.H.* with the seminal impact of *Brown*.

The Strasbourg Court appears therefore in *D.H.* to have nailed its colours in a conscious and deliberate manner to the mast of the post-*Brown* Anglo-American equality jurisprudence. However, this decision also generated several fierce dissenting opinions. Judge Borrego Borrego in his dissent objected in particular to the Court placing especial emphasis on the ‘overall social context’ of the position of Roma in Czech society, which he suggested was not an ‘appropriate’ approach to the question of whether individual rights had been violated.⁵⁸ His strong criticisms of the majority’s decision therefore focused upon the group-centred focus of the Court’s reasoning, which he regarded as negating the individuality of the members of the Roma community. He also accused the majority of adopting arguments from the Anglo-American jurisprudence fed to it by ‘British and American’ lawyers which were alien to the formal and individualistic understanding of equality adopted within much of continental European jurisprudence. Judge Jungwiert also attacked the majority’s decision for its adoption of what he regarded as an ‘abstract’ criticism of an entire education system.

Fundamental to these criticisms is a discomfort with the adoption of the group disadvantage approach that lies at the heart of the substantive equality model, and which represents a considerable deviation from the formal equality model embedded still in many European constitutional systems. In *D.H.*, therefore, we see the tension between the substantive equality approach and the classical formal equality analysis clearly demonstrated in the sharp disagreement between the majority and minority. It remains to be seen how this conflict will play out in subsequent cases. In particular, it will be interesting to see if the ECHR jurisprudence goes further down the substantive equality route. Given the comparative novelty of substantive equality jurisprudence in the European context, can the ECHR move much further beyond an anti-discrimination approach? Should it try to do so, given its transnational status?

The trajectory of the Strasbourg Court’s jurisprudence remains as yet uncertain which obviously generates uncertainty when UK courts, as well as other European courts, attempt to apply Article 14 in their domestic legal systems. A similar uncertainty can be found in the jurisprudence of the European Court of Justice when it applies EU anti-discrimination legislation.

⁵⁷ See now also the decision in *Stoica v. Romania* (App No 42722/02) Judgment of 4 March 2008, ECtHR.

⁵⁸ *Ibid.* paras [5]-[6] of Judge Borrego Borrego’s dissenting opinion.

As McCrudden has argued, trace elements of the ‘anti-discrimination’ and ‘substantive equality’ approaches identified above can be detected in the case-law of the ECJ, along with a strong residue of affection for formal equality.⁵⁹ The ECJ appears to oscillate between these different approaches.⁶⁰ The scope of the underlying general equality principle of EU law therefore remains unclear and undeveloped. In the absence of widespread political agreement as to what a right to equality involves, courts often tread cautiously.

Why a Lack of Clarity about the Meaning of ‘Equality’ Muddies the Judicial Interpretation of Equality Rights

None of the different approaches to interpreting the equality principle outlined above can be sharply differentiated. Formal equality can combine with the anti-discrimination approach, which can in turn merge with substantive equality analysis. Often, the differences between these different approaches involve questions of emphasis. Formal equality prioritises rationality and individual fairness; its principal concern is to prevent the singling-out without good cause of individuals and groups for special treatment. Anti-discrimination analysis is more concerned with the impact of law and policy upon disadvantaged groups and is particularly concerned with specific types of prejudice and discrimination. Substantive equality approaches are primarily concerned with preventing disadvantage. Often, these approaches will overlap. At times, however, they will diverge, generating the tensions and uncertainties that reflect profound uncertainty about the proper scope and content of the equality principle.

These problems all derive from a basic underlying issue; it remains unclear as to what ‘treating persons equally’ actually involves. Equality and the linked concept of non-discrimination are regularly cited by politicians, activists, academics and the media as a basic social good. Equality is now almost universally accepted as a good thing, at least in the abstract. However, the very ubiquity of the idea of ‘equality’ has served to conceal an absence of clarity about what it actually involves. There are multiple accounts in political philosophy of what normative meaning or meanings should be attached to the term ‘equality.’ In legal literature, there is a similar extensive debate about the meaning and ultimate usefulness of equality as a legal concept.⁶¹ Nor is this

⁵⁹ Christopher McCrudden, ‘Theorising European Law’ in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity: The New Equality Directives* (ICEL/Equality Authority: 2003) 1.

⁶⁰ Mark Bell, ‘The Right to Equality and Non-Discrimination’ in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EC Charter of Fundamental Rights: A Legal Perspective* (Oxford: Hart Publishing 2003) 91.

⁶¹ Nick Bamforth, ‘Conceptions of Anti-Discrimination Law’ (2004) 24(4) *Oxford Journal of Legal Studies* 713-715.

debate confined to the realm of academic speculation. At the political level, arguments about the definition and importance of equality as a principle continue to generate considerable heat and light. Equality can mean wildly different and often conflicting things to different people, who might sharply disagree on a particular issue while asserting passionately their commitment to 'true' equality.

As Weston and others have argued, equality is an 'empty idea' if there is no normative framework that can determine when cases are alike and when they are different, which forms of distinctions between individuals and groups are legitimate and which are not.⁶² Formal equality, anti-discrimination analysis and substantive equality are all normative frameworks that can give some substance to the idea of equality. Each can give definite content to the right to equal treatment contained in constitutional texts and international treaty instruments, which would otherwise be an empty formula. The question then becomes which if any of these frameworks is a 'best fit' (to use Ronald Dworkin's phraseology) with our current understanding of how our constitutional systems should work? Which of these normative frameworks should a court adopt when it comes to the concrete task of deciding when the right to equal treatment has been breached?

Philosophical Analysis of Equality

This question links directly to the philosophical and jurisprudential debate about the normative value of the concept of 'equality.' 'Libertarian' schools of thought, perhaps best exemplified by the work of Robert Nozick, tend to regard the equality principle as lacking sufficient normative substance to justify any substantial governmental interference with individual autonomy.⁶³ Those of a libertarian bent tend therefore to gravitate towards support for formal equality approaches to interpreting constitutional equality principles. This school of thought is also heavily influenced by Hayek's famous argument in favour of formal equality and against substantive concepts of equality, based on his contention that 'any policy aiming at a substantive ideal of distributive justice must lead to the destruction of the rule of law.'⁶⁴

In contrast, 'equality of opportunity' theorists build on the work of John Rawls, Ronald Dworkin and others and argue for individuals to be given a level playing field upon which fair social competition and individual lifestyle choices can be enacted.⁶⁵ 'Capabilities' or 'basic functioning' theorists, drawing on the

⁶² Peter Westen, 'The Empty Idea of Equality' (1985) 95 *Harv L Rev* 537.

⁶³ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books 1974) Chapter 8.

⁶⁴ Friedrich Hayek, *The Road to Serfdom* (Routledge and Kegan Paul 1944) 79.

⁶⁵ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press 2000) especially Chapters 2 and 4; Gerry A. Cohen, 'On the Currency of Egalitarian

highly influential work of Amartya Sen, suggest that societies should ensure that individuals have the basic capacities necessary to flourish or to exercise agency in their lives. Other theorists argue for various versions of ‘strong egalitarianism’ or ‘welfare’ or ‘equality of outcome’ whereby all individuals must benefit from a certain equal amount of ‘human good’ irrespective of their luck or their life choices.⁶⁶ Proponents of these interpretations of equality tend to be and large to gravitate towards anti-discrimination or substantive equality approaches.

These philosophical and jurisprudential debates shape the discussion as to which approach courts should adopt in interpreting the equality principle.⁶⁷ However, there is a danger of the abstract nature of this debate, couched as it is in the Kantian language of contemporary political philosophy, glossing over other considerations that will inevitably come into play. Considerable political disagreement exists in contemporary societies as to what extent should group differences be institutionalised within law and policy. In addition, stark and often passionate disagreement can exist as to how much ‘social engineering’ should be conducted via equality and anti-discrimination law.⁶⁸ These areas of disagreement are ultimately rooted in wider conceptual disputes as to the relationship between equality, liberty, autonomy and other values, as well as to the appropriate role of the state *vis-à-vis* different forms of group identity, discrimination and disadvantage. Such arguments will inevitably have a considerable influence upon which approaches are adopted by courts to interpreting the equality principle. So too will arguments about the proper institutional role of unelected courts in a democracy.

The Genealogy of Judicial Interpretations of the Right to Equality

However, the crucial influence on the debate in different jurisdictions as to how to interpret the equality principle may perhaps be the relevant historical context, and in particular the manner in which equality has been given legal and constitutional shape within a national legal system over time. Particular ways of

Justice’ (1989) *Ethics* 906-944; Richard Arneson, ‘Equality and Equal Opportunity for Welfare’ (1989) *Philosophical Studies* 77-93; Carl Knight, ‘In Defence of Luck Egalitarianism’ (2005) 11 *Res Publica* 55-73; Elizabeth S. Anderson, ‘What is the Point of Equality?’ (1999) *Ethics* 287-337.

⁶⁶ Derek Parfit, *Reasons and Persons* (OUP 1984) 493-502.

⁶⁷ Some commentators have questioned whether equality claims can ever serve as an adequate conceptual foundation for anti-discrimination law. See Eliza Holmes, ‘Anti-Discrimination Rights Without Equality’ (2005) 68(2) *MLR* 175. For criticism of this argument, see Colm O’Cinneide, ‘Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain’ (2006) 57(1) *Northern Ireland Legal Quarterly* 57-101.

⁶⁸ For a critique of ‘social engineering,’ see Morris B. Abram, ‘Affirmative Action: Fair Shakers and Social Engineers’ (1986) 99(6) *Harv L Rev* 1312-26. However, every form of state regulation constitutes a form of social engineering, including all law.

understanding equality will often become embedded in national constitutional systems, just as they may become deeply engrained in national political debates, or lodged in popular consciousness. The case-law of courts on questions of equality and discrimination reflects how equality is understood within society when key decisions are made.

Therefore, it is important to understand the historical development or the 'genealogy' of the principle of equality within national legal systems. As already discussed, in most societies across the globe, equality is now understood as an important social value, even if popular understandings of what equality actually means in practice are often fuzzy and vague. However, most societies over time have been founded on inequality. Indeed, human societies throughout history could be said to have actively embraced inequality, treating it as natural and God-given. Greek city-states were heavily reliant upon slave labour, as was the Roman Empire. Slavery appears to have also been relatively common in the Islamic Caliphate,⁶⁹ while toiling underclasses of peasants supported the civilisations of China, medieval Europe and Africa. The Indian caste system is perhaps the planet's longest-lived social structure.

All this has changed, at least in theory. (Contemporary forms of exploitation continue to exist in practice.) For the most part, both intellectual opinion and popular opinion now assumes the basic legitimacy of equality as a fundamentally good thing. A number of factors explain this profound transformation, which has come about via a series of waves of social transformation. Religious ideas about the equality of humans before the Divine, the Reformation and the emergence of modern capitalism, the influence of the Enlightenment philosophers, and ultimately the social movements of the 1960s (in particular feminism, the civil rights movement, and the gay and disability rights movements) have all contributed.⁷⁰

However, it would be a mistake to conceptualise the triumph of equality as a matter of intellectual and popular opinion positively opting for a distinct concept of equality. The modern embrace of equality is largely the product of the gradual rejection of various specific forms of inequality. Political struggles have resulted over time in the recognition in most societies that certain forms of inequality such as racism, patriarchal oppression, the 'natural right to rule' of the aristocracy, segregation and anti-Semitism, are illegitimate and should be rejected. Through this slow process, various forms of inequality have become thought of as 'beyond the Pale' of acceptability (at present, this process is

⁶⁹ Shaun Marmon, *Slavery in the Islamic Middle East* (Princeton, NJ: Marcus Wiener 1999).

⁷⁰ Jeremy Waldron, *God, Locke and Equality Christian Foundations in Locke's Political Thought* (Cambridge: CUP 2002); Sanford A. Lakoff, *Equality in Political Philosophy* (Cambridge, Mass: 1964).

happening with regard to distinctions based on sexual orientation, whose acceptability is gradually been eroded in a slow but systematic manner).

This rejection of specific forms of inequality has been central in establishing respect for equality as a core value for most contemporary human societies. It has also shaped how the very abstract concept of the right to equality has been understood. The long march of equality has involved a slow historical process of learning; as different forms of inequality become rejected as no longer acceptable, social norms have gradually been altered to reflect the new understanding. This means that respect for equality and non-discrimination principles are often defined negatively, both in the popular consciousness and in law, as involving the absence of these rejected forms of discrimination. Thus, acting 'equally' tends to be interpreted as not being racist, not being sexist, and so on.

This is reflected in the judicial interpretation of the equality principle. National courts and international human rights institutions have gradually interpreted the equality principle so as to prohibit the state from recognising or giving effect to condemned forms of inequality. In other words, the equality principle has tended to be fleshed out by a gradual process of shaping constitutional and human rights principles so as to permit courts to exercise review over what came to be accepted as 'suspect' or 'undesirable' forms of inequality. Layers of protection have been gradually laid down in constitutional or human rights law in response to the learned experience of societies as to what forms of inequality are unacceptable.

This has certain consequences. The American and French Revolutions established the central importance of the idea of formal equality to any constitutional system. Equal access to what McCrudden has described as essential 'political goods,' such as the enjoyment of core civil and political rights or democratic rights such as the right to vote, were gradually protected by judicial recognition of the formal equality principle.⁷¹ Then, the political activism of the 1960s established the claims of women, ethnic minorities, persons with disabilities and others to access not just 'political goods' but also to access employment, services, education and other 'social goods.' This in turn led to the expectation that functioning systems of rights protection should protect the right of these groups to access these social goods without discrimination. In the wake of *Brown v Board of Education*, this has gradually resulted in the development of the anti-discrimination approach to interpreting the equality principle. Now, the argument is made that the 'anti-discrimination' approach that has developed in the US, UK and elsewhere does not go far

⁷¹ Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (OUP 2004) Chapter 11.

enough. Supporters of substantive equality argue that this approach does not provide adequate enough protection against the subordination of particular social groups, which our contemporary understanding of the nature of inequality now increasingly sees as the key equality issue.

Thus, unfolding social debate about inequality in our modern societies is reflected in judicial interpretations of the equality principle; as existing interpretations come to be seen as outmoded or inadequate, then pressure within legal systems builds up for new approaches to be developed. New or ground-breaking arguments about how equality should be understood may also come in conflict with embedded ways of understanding equality. Also, new approaches to conceptualising equality will often come into tension with how equality is understood in the popular consciousness. As a result, re-conceptualisations of the equality principle are often seen as unwelcome and alien intruders into an established status quo. The dissenting judgments in *D.H.* exemplify this problem.

This partially explains the way in which judicial interpretation of the equality principle has tended to lag behind legislative innovation and social developments. However, it is also apparent that if embedded approaches to interpreting the equality principle become patently outmoded, then the pressure for change may eventually generate shifts in the case law. Philosophical debates about the meaning of equality may illuminate discussion but it is ultimately the interplay of legal, social and political factors against the historical background context that will drive forward change in how equality rights are interpreted and understood. That is why judges, lawyers and activists would perhaps do better to engage less in abstract philosophical debates and focus more on identifying what now constitute unacceptable forms of inequality in today's society, what causes these forms of inequality, and what justification can exist for state action which generates particular aspects of this inequality. In other words, the legal understanding of the right to equality should be built around our developing understanding of disadvantage, discrimination and inequality, rather than abstract concepts of equal treatment.

Conclusion

Interpreting and applying equality clauses tends to be an uncertain and complex process, which often has yielded little tangible protection for aggrieved individuals and groups. Nevertheless, a shift can be detected from formal equality to anti-discrimination and substantive equality approaches in the contemporary case-law of national and international courts, illustrated by the recent *D.H.* decision of the European Court of Human Rights and the evolving Canadian and South African substantive equality jurisprudence. This may open up more space for the equality principle to come into play as a source of

protection for disadvantaged groups against unequal treatment. However, equality jurisprudence is haunted by the uncertain and contested concept of 'equality.' It may be better for judges and lawyers to concentrate less on abstract debates about what equality means and focus more on building a clear idea of what constitutes unacceptable forms of disadvantage, discrimination and inequality.

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Are Laws Proscribing Incitement to Religious Hatred Compatible with Freedom of Speech?

DAVID NORRIS *

Freedom of expression and religion are rightly viewed as two fundamental cornerstones of any modern liberal democracy. Both represent vital components in the realisation of personal autonomy, provide an important basis for the determination of political structures and may ultimately advance the Millian truth principle. Yet despite these shared utilities an undoubted tension exists between the individual's expressive capacity to disparage and denigrate the views of others and the right of religious communities to manifest their beliefs. In an era where societies attempt to embrace multiculturalism the conflict between these two values is of particular resonance. It is with this tension in mind that this essay will seek to analyse whether an incitement to religious hatred law can ever be reconciled with the effective protection of free expression. In answering this question, an examination of the guiding rationale justifying the need for an incitement to religious hatred law will first be examined. Focus will then turn to whether such laws can in theory be specifically tailored to ensure that free speech values are not unduly sacrificed. Finally attention will centre on the practical safeguards required to ensure an incitement law strikes the appropriate balance between religious and expressive freedoms.

The Justification for Religious Hate Speech Restrictions

At its extremes, hate speech represents a particularly malicious form of expression that causes direct psychological harm to its victims and incites others to commit acts of violence against the targeted group.¹ The free dissemination of ideas representing certain communities as inferior creates a social climate that is conducive to the spread of xenophobia and racism.² This can strip marginalised individuals of a sense of self-esteem and undermine their ability to fully participate in a society where progress is impeded by derogatory stereotypes and discrimination.³ An entrenchment

* David Patrick Norris wrote this article whilst reading for a Masters in Public Law and Human Rights at UCL.

¹ T M. Massaro, 'Equality and Freedom of Expression: the Hate Speech Dilemma' (1991) 32 *W & Mary L Rev* 211, 221.

² A Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 *Santa Clara L Rev* 729, 740.

³ L Sumner, Hate Propaganda and Charter Rights in WJ Waluchow (ed), *Free Expression: Essays in Philosophy and Law* (Clarendon Press Oxford 1994) 153-154.

of a lower social and economic status of some may also result from prolonged exposure to an idea that those targeted are not of equal value to other members of society.⁴ This is especially problematic where vulnerable individuals accept prevailing discriminatory attitudes as representative of an unalterable state of affairs. In this regard, it is the children of marginalised communities who are most at risk of being disadvantaged from the intemperate propagation of hate speech:

‘...they may lack a healthy sense of self-worth, have low estimates of their prospects for a decent and contented life and may tend to remove themselves from competitive situations and thus from attaining vocational and educational success.’⁵

It is with these concerns in mind that a number of jurisdictions have long recognised that it is a legitimate curtailment of free expression to proscribe hate speech targeted at racial distinctions.⁶ A coherent justification for this protection is often advanced on the basis that race is an immutable characteristic which underpins the core of an individual’s identity.⁷ Therefore an assault on an individual’s race targets the very foundations upon which that individual’s self-esteem is built and arguably amounts to a ‘complete affront to personal dignity.’⁸

An argument for a similar prohibition of religious hate speech is generally dismissed on the grounds that, unlike race, a belief structure does not constitute an unalterable aspect of an individual’s identity.⁹ This contention asserts that a religion can be freely changed and represents an essentially externalised life choice for an adherent.¹⁰ This however, is a questionable assumption given that to many believers religion is intrinsically linked to both their individual and communal identities.¹¹ A reality which has been acknowledged in the United Kingdom by the Select Committee on Religious Offences in England and Wales:

⁴ K Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70(1) *MLR* 89, 96.

⁵ M Idriss, ‘Religion and the Anti-Terrorism, Crime and Security Act 2001’ [2002] *Crim LR* 890, 892.

⁶ European States have largely embraced race hate legislation. See E Barendt, Free Speech and Religion: Secular and Religious Perspectives on Truth in A Sajo (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 36.

⁷ Goodall (n 4) 97.

⁸ S Vance, ‘The Permissibility of Incitement to Religious Hatred Offences under European Convention Principles’ [2004] *Transnat’l L & Contemp Probs* 201, 244.

⁹ A Myers, ‘A Crime to Tell the Truth’ (2005) 155 *NLJ* 957.

¹⁰ I Hare, ‘Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred’ [2006] *PL* 521, 534.

¹¹ See the Commission for Racial Equalities comments in the House of Lords ‘*Select Committee report on Religious Offences in England and Wales*’ (2003) Chapter 2 para [9].

‘It is not true that a distinction between race and religion will depend on characteristics which cannot be changed as a matter of choice: it is of course true that people cannot alter their racial origin, but there are communities in the UK where it is inconceivable that anyone could change their professed religion and continue to live within the community concerned.’¹²

If it is therefore accepted that religion may constitute a ‘defining’¹³ characteristic of a person’s identity then attacks based on religious distinctions necessarily raise similar dignity concerns as to those which justify the proscription of race hate speech.

It may also be argued that to make distinctions based solely on whether hate speech is religiously or racially motivated is liable to create arbitrary results. Where race is inextricably linked to a particular religious community, abusers may view either aspect of a group’s identity as directly interchangeable.¹⁴ A dangerous situation arises when, despite the targeted group and harm remaining the same, the law offers no protection because of semantic phrasing on the part of the abuser. Indeed, prior to the enactment of the Race and Religious Hatred Act 2006, this artificial distinction was successfully exploited by far right groups in the United Kingdom who simply used religious terminology as a ‘surrogate’ for race.¹⁵ When faced with such abuse the UK courts attempted on occasion to extend existing race provisions to cover specific religious groups.¹⁶ This was, however, limited by legislation to religions whose adherents could show a common ethnic background and thus excluded the larger faiths with more diverse memberships.¹⁷ Such a gap in protection must be viewed as deeply unsatisfactory when it is considered that despite a diversity of ethnic origin many adherents of the major religions are markedly identifiable within society.¹⁸ In contrast, an approach including religious followers as part of an ‘identifiable group’ who are protected from hate speech is far more inclusive of the likely targets of racist and xenophobic expression. This has been the path adopted in Canada¹⁹ and emphasises a societal desire to place a high degree of value on multiculturalism.²⁰

¹² *Ibid.* Chapter 8 para [100].

¹³ J Garland, B Spalek and N Chakraborti et al, ‘Hearing Lost Voices - Issues in Researching ‘Hidden’ Minority Ethnic Communities’ (2006) 46(3) *Br J Crim* 423, 428.

¹⁴ *Goodall* (n 4) 98.

¹⁵ *Select Committee Report* (n 11) Chapter 2 para [16].

¹⁶ *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) (Lord Fraser) and *Seide v Gillette Industries Ltd* [1980] IRLR 427 (EAT) (Lord Slynn).

¹⁷ *Hare* (n 10) 525.

¹⁸ *Goodall* (n 4) 97-98.

¹⁹ Section 319 of the Criminal Code of Canada 1985.

²⁰ Section 27 of the Canadian Charter of Rights and Freedoms.

The need for a broader approach to hate speech regulation is reflected in a modern reality which increasingly finds States faced with ever more culturally diverse populaces.²¹ The harmonious inter play between different religious groups, as with racial tensions, is often directly hindered by the free propagation of hate filled invectives.²² A societal cost is not only paid by violent confrontation but is also evidenced in the long term damage to community relations:

‘Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted.’²³

As recognised by the Canadian Supreme Court, the net effect of such conceptions potentially leads to discrimination,²⁴ ‘serious discord between various cultural groups’²⁵ and ultimately violence against minorities.²⁶ These issues have particular resonance for the United States and a number of European countries which have witnessed an alarming growth in abuse of religious communities since the World Trade Centre attacks in 2001.²⁷ Indeed such concerns have informed recent legislative change in the UK, mirroring the type of justification relied upon to introduce similar racial hatred restrictions in the mid 1960s and 1970s.²⁸ The adoption of laws proscribing the use of religiously motivated hate speech may therefore be viewed as a legitimate curtailment of reactionary expression threatening the pluralistic interests of society.

The Appropriate Theoretical Limitations of a Religious Hate Speech Law

The harm caused by religious hatred may legitimately be viewed as directly comparable to those concerns which ensure that race hate restrictions often enjoy a special exception from free speech principles. However, a more cogent criticism of religious hatred legislation is to be found in the very nature of the concepts which the law potentially shields from abuse. Whilst rhetoric targeted at racial distinctions may frequently be described as

²¹ See the comments of B Jenkins in M Gerrard, ‘Faith in the Law’ [2002] *LS Gaz*, 27 Jun, 22.

²² *Sumner* (n 3) 153.

²³ *R v Keegstra* (1990) 3 SCR 697 para [66].

²⁴ *Ibid.* para [67].

²⁵ *Ibid.* para [66].

²⁶ *Ibid.* para [67].

²⁷ E MacAskill, ‘US Group Claims Hate Crime Rising in Europe’ *The Guardian* (June 5 2007) World News and ‘Concern Over Revenge Attacks on Western Asians’ *The Guardian* (September 18 2001) UK News.

²⁸ D Nash and C Bakalis, ‘Incitement to Religious Hatred and the *Symbolic*:’ How Will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28 *Liverpool LR* 349, 368.

‘thinking without content,’²⁹ anti-religious speech is often laden with attacks on an abstract set of beliefs rather than purely seeking to vilify a group of adherents.³⁰ This is perhaps understandably at issue when two religious sects clash via the espousal of mutually conflicting views as to the very nature of existence and salvation. Not only may a desire to convert new followers create a competitive climate between religions, but the mere espousal of counter claims as to divine truths may also be highly insulting to the beliefs of others.³¹ A tension therefore exists between the desire of religious adherents to enjoy their beliefs free from insult and the legitimate proselytising activities of other faiths.

The introduction of religious hatred legislation into this competitive climate thus potentially favours the status quo by limiting the strength of religious counter claims that may deeply offend the existing views of believers. Certainly from the perspective of the Millian truth principle this is a serious infringement on an individual’s ability to discover and challenge theories which are represented as unalterable truths.³² Whilst scientific and empirical reasoning may be of little assistance in the determination of philosophical truths,³³ open discourse offers perhaps the only rational tool available to humanity which can challenge misguided and poorly informed perspectives. Aside from certain core tenants, religions are rarely set in stone and have tended to evolve according to the tides of human history.³⁴ Views which were once perceived as heretical can, with time, become accepted as legitimate interpretations of religious texts.³⁵ To therefore draw a line preventing the espousal of alternative doctrines, even when these are highly blasphemous to the views of others, undermines one of the great utilities of free expression.

Coupled with this perspective is an acknowledgement that religious ideas can overlap with political discourse to a greater degree than speech focused on racial hatred.³⁶ Profound questions are often asked, particularly in non-secular States, as to what extent legal and social structures should correspond to religious doctrines:

²⁹ *Vance* (n 8) 244.

³⁰ See the views of Richard Dworkin and Galileo Galilei discussed in B Block, ‘Beware the Whirligig of Time’ (2007) 171 (51/52) *JP* 902.

³¹ *Hare* (n 10) 534.

³² The Millian truth principle is explained in E Barendt, *Freedom of Speech* (2nd edn OUP 2005) 7-13.

³³ *Barendt* (n 6) 32.

³⁴ M Mahlmann, Free Speech and the Rights of Religion in A Sajo (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 43.

³⁵ For example, even Jesus Christ according to the Gospel of St John was accused of blasphemy. See J Oliva, ‘The Legal Protection of Believers and Beliefs in the United Kingdom’ (2007) 40 *Ecc LJ* 66, 68.

³⁶ *Vance* (n 8) 205.

‘...religious groups make influential, voluntary contributions to debate on matters of profound public controversy, including abortion, homosexuality and the place of women in society.’³⁷

It would certainly be excessive for the law to allow religious groups the freedom to advocate contentious viewpoints whilst at the same time preventing the dissemination of counter arguments that are deemed offensive to these perspectives.³⁸ To do so runs a substantial risk of stifling those important debates which guide and shape the contours of a fully functioning democracy.

A more difficult issue to resolve is when speech directly intended to incite hate against the followers of a religion, rather than its beliefs, is heavily laced with political comment. This is a growing concern in an era which has witnessed frequent acts of terrorism in the name of religion.³⁹ Reaction to such highly emotive events has often ‘melded religious doctrine and political threat in the minds of many commentators’⁴⁰ leading to rhetoric which is extremely inflammatory. The Italian prosecution of Orianna Fallaci,⁴¹ not long after the World Trade Centre attacks, typifies the difficulties faced in this area. Here the author’s book despite a predominantly political focus makes an accusation that Muslims ‘multiply like rats.’⁴² To leave such commentary unchecked certainly represents a dangerous mix for societies faced with the dual concerns of multicultural tolerance and religious extremism.⁴³ A legitimate question is therefore asked as to whether a balance can be struck between free speech principles and the protection of religious hate speech victims in a global climate of rising tensions.

In response, a suitable compromise may be reached by ensuring that a regulatory system prevents the espousal of hatred against adherents of a faith whilst not proscribing insulting speech focused merely on the tenets of a religion. In this manner, the utility of free speech is largely preserved and those seeking to manifest their beliefs are protected against scurrilous attacks. The difficulty this presents, however, is that it asks courts to make

³⁷ *Hare* (n 10) 535.

³⁸ *Ibid.* at 534.

³⁹ E MacAskill, ‘Russia and China Lead the Way as Coalition Against Islamic Extremism Takes Shape’ *The Guardian* (14 September 2001) World News. See also U. Khan, ‘Young British and Muslim: One Woman’s Journey to the Home of the 7/7 Bombers’ *The Guardian* (18 June 2006) Politics.

⁴⁰ *Vance* (n 8) 246.

⁴¹ ‘French Court Hears Call for Ban on *Anti-Muslim* Book’ *Agence France-Presse* (Oct. 9 2002) available at 2002 WL 23620832 as cited in *Vance* (n 8) 245.

⁴² *Vance* (n 8) 245.

⁴³ An issue particularly relevant in the United Kingdom. See M Riddell, ‘Integrate? Tell that to the Christian Church, Mr Blair’ *The Guardian* (10 December 2006) Comment is Free and N Klein, ‘Racism is the Terrorists’ Greatest Recruitment Tool’ *The Guardian* (13 August 2005) World News, Religion.

distinctions which are not always apparent on the facts of a case.⁴⁴ Attacks against individuals are frequently enmeshed with legitimate criticisms of dogma;⁴⁵ whilst rhetoric condemning particular tenets of a religion may be so closely linked to the practices of adherents that such comments are perceived as incitement of hatred against the faithful.⁴⁶ The interpretive task left for the courts is consequently not an easy one, but if free speech principles are to truly retain their value belief structures must be exposed to open discourse that potentially insults the existing views of believers.

Where a system is protective of the believer rather than the faith an additional question arises as to how far conceptions of tolerance can be advanced to ensure the civility of discourse within society.⁴⁷ Although a natural interpretation of ‘hatred’ suggests only a serious form of vilification,⁴⁸ a broader definition might be welcomed as a useful filter against insensitive and offensive language:

‘...no one defending freedom of expression can be happy defending a cultural climate in which freedom exposes religious minorities to a daily drizzle of cheap jokes on television, ignorant remarks in the supermarket and the public house, and the occasional taunt or epithet on the way to the mosque or temple...’⁴⁹

Yet to extend hate speech prohibitions in this manner runs the danger of overly censoring public debate. Personal autonomy is unduly restricted when the nuances of insulting terminology are sacrificed for more temperate language.⁵⁰ Basing hate speech regulation on a desire to simply avoid offending others ensures that contentious views can only safely be espoused by the most erudite within society capable of fully asserting their position in moderate language.⁵¹ This potentially restricts contributions to the marketplace of ideas to the intellectual elite.⁵² Moreover, attempts to sanitise public discourse may also re-enforce an air of political correctness in which

⁴⁴ A Jeremy, ‘Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006’ (2007) 9 *Ecc LJ* 187, 190, 196-197.

⁴⁵ See Polly Toynbee’s comments cited in F Bennion, ‘Religious Hate Bill’ (Goggins A Gogo) (2006) 170 *JPN* 87, 90.

⁴⁶ See Rowan Atkinson’s comments cited in Bennion *ibid.* at 90.

⁴⁷ *Vance* (n 8) 248.

⁴⁸ A Samuels, ‘Stirring up Religious Hatred – Racial and Religious Hatred Act 2005’ (2006) 170(36) *JP* 695, 695.

⁴⁹ As per Michael Ignatieff referenced in H Fenwick & G Phillipson, ‘Publication Review: Media Freedom under the Human Rights Act’ [2007] *PL Win* 852.

⁵⁰ *Hare* (n 10) 527.

⁵¹ Although no doubt far right groups would continue to provide guidance as to how to circumvent legal restrictions. See *Goodall* (n 4) 93.

⁵² See James Fitz-James Stephens comments cited in A Jeremy, ‘Religious Offences’ (2003) 7(33) *Ecc LJ* 127, 137.

valuable contributions to debate are withdrawn for fear of offending others.⁵³ The open ended nature of an ‘offence’ based law, especially in the context specific realm of religious sensibilities,⁵⁴ would thus create a far too proscriptive environment for the effective expression of individual views.

Yet if value is placed on autonomy and a fully contested marketplace of ideas then it may be viewed as a double standard to welcome offensive rhetoric whilst simultaneously proscribing the extremes of hate speech. An argument adopted in the United States is that truth is best tested by the rigours of public debate free from government intervention.⁵⁵ It follows from this that the espousal of hate speech is most effectively combated by the counter speech of ridicule and scorn rather than by regulation.⁵⁶ Unlike speech which is merely offensive the expression of hatred could be seen as directly prohibitive to the realisation of the autonomy interests of others and the effective operation of the marketplace doctrine:

‘...it is very difficult to encourage open and free dialogue, involving people of faith communities who may feel insecure and may actually have a sense of fear in relation to their own religious identity.’⁵⁷

Extreme forms of marginalisation may thus strip hate speech victims of any meaningful conception of free expression.⁵⁸ As a consequence, the dissenting views of vilified communities may be silenced and hatred spread without the full contestation of alternative perspectives.

With this in mind the utility of the market is more successfully preserved by the establishment of boundaries which accord to a social contract theory of governance. Under this approach, governments are tasked with ensuring an equality of respect for the fundamental rights of each citizen. It is therefore legitimate to proscribe hate speech when it abrogates the free expression rights of others. This is broadly consonant with the Article 17 jurisprudence of the European Court of Human Rights, which allows for hate speech restrictions when the underlying principles of the Convention are jeopardised.⁵⁹ Not only does this approach promote equal access to the marketplace of ideas but it also safeguards the ability of vulnerable religious groups to voice political concerns at times of heightened tension. Moreover if it is accepted that democracy is the ‘procedural expression of the strict

⁵³ *Barendt* (n 6) 40.

⁵⁴ *Block* (n 30).

⁵⁵ See the dissent of Holmes J in *Abrams v United States* [1919] 250 US 616 (US Supreme Court) 630. See also *RAV v St Paul* [1992] 505 US 377 (US Supreme Court) 387.

⁵⁶ B Block, ‘Freedom to Offend?’ (2006) 170(11) *JP* 193, 194.

⁵⁷ Inter Faith Network cited in the *Select Committee Report* (n 15) para [9].

⁵⁸ *Goodall* (n 4) 113.

⁵⁹ *Norwood v United Kingdom* (2004) 40 EHRR SE 111 (App No 23131/03) 113.

equality of human worth⁶⁰ then it is counterintuitive for democratic free speech rationales to allow expression which promotes hatred of others. The predominant utilities of free speech are therefore best served by legal regimes with well tailored hate speech provisions that ensure the tolerant acceptance of alternative cultures.

Practical Safeguards for a Religious Hate Speech Regulation

From the preceding analysis it is apparent that a well tailored prohibition on religious hate speech is compatible with and even helps to promote free expression in a multicultural society. However a balance must be struck so that such provisions are not open to misuse in practice. If the vitality of free speech is to be preserved it is essential that legislation does not become a tool of reactionary religious bias or stifle expression because it is impermissibly vague. The following section will therefore consider the practical limitations and safeguards required to establish an acceptable legal framework.

An area of notable difficulty is the definition to be attributed to the term 'religion' under an incitement statute. The vast array of beliefs present in modern society ensures that almost any group may band together to form a 'religion.'⁶¹ Consequently where legislation adopts a subjective definition allowing an individual to simply assert that their particular belief structure constitutes a religion, the ability to adequately foresee which philosophical perspectives will be protected is severely restricted. Whilst hate speech in general is to be abhorred there are some instances when it would be illegitimate to place restraints on the 'trenchant and hostile criticism'⁶² of such an array of belief structures. This is particularly the case where quasi-religious organisations, more readily described as 'cults,' harm and exploit individuals within society.⁶³ Although incitement provisions should protect the believer rather than the faith, the often contentious practices of some groups may blur the line between the two: Critics of Scientology speak of its *victims*, rather than *catechumens* and of young people being *brainwashed*.⁶⁴

Even if rhetoric of this nature is deemed permissible by the courts, the ability of such organisations to pressure for the criminal prosecution of their detractors may in itself chill free expression.⁶⁵ When it is considered that some 'cults' exploit vulnerable individuals by isolating them from their family and extracting their possessions,⁶⁶ it becomes all the more unpalatable to allow the criminal law to be used as a shield to silence criticism of these

⁶⁰ *Mahlmann* (n 34) 60.

⁶¹ B Block, 'A Hard Act to Follow' (2007) 171(18) *JPN* 321, 322.

⁶² *Select Committee Report* (n 11) on the acceptability of such comments under Article 10(1) of the ECHR, Chapter 8 para [111].

⁶³ See criticism of Scientology in *Re B and G (Minors) (Custody)* (1985) Fam Law 127 (CA).

⁶⁴ *Jeremy* (n 44) 199.

⁶⁵ *Myers* (n 9).

⁶⁶ *Select Committee Report* (n 11) Chapter 8 para [111].

adherents.⁶⁷ Yet such difficulties are not necessarily resolved with the formulation of an objective definition of religion. The varying belief structures of the major faiths indicate that even a simple definition may not be workable in this context. Whilst an emphasis may be placed on monotheism, the existence of religious creeds such as Buddhism suggests that a more expansive approach should be taken.⁶⁸ However, a broader definition is likely to include the very organisations that make a subjective approach undesirable.⁶⁹

In response to these difficulties the United Kingdom's religious hatred legislation has notably left religion as a question of fact for the courts to develop.⁷⁰ This potentially creates a more flexible approach that allows the courts to determine whether socially harmful groups fall within the statute's ambit.⁷¹ Yet it does not provide a suitable basis upon which an individual may regulate his conduct with sufficient clarity. Although guidance may be found in the determinations of charitable tax law cases, the objects of an incitement statute are sufficiently different to require an independent approach from this jurisprudence.⁷² Nor may an individual gain much assistance from an analysis of comparative jurisdictions because of a wide divergence in the range of determinations in this area. Germany for example considers Scientology to be a cult,⁷³ whilst the ECHR and Australia have both accepted that it is a legitimate religion.⁷⁴ As prosecutions are likely to be infrequent, higher courts will be given little opportunity in the short term to determine the full scope of the regulations.⁷⁵ Therefore it would be preferable for an exhaustive list of religions to be contained within the provisions of religious hate speech statutes.⁷⁶ This would help establish the scope of restricted expression without the need for expensive or prolonged court action and ensures that criminal convictions are only given to those who could reasonably have ascertained that their conduct would be illegal.

In line with this ethos it would similarly be unjust to curtail speech where the speaker is unaware that his comments are likely to incite hatred. The very notion of 'hate' is subjective to the individual and the natural consequence of expressing a particular view, especially in the realm of religious sensitivities, is often difficult to predict.⁷⁷ To ensure that expression

⁶⁷ *Myers* (n 9).

⁶⁸ *Jeremy* (n 44) 198.

⁶⁹ D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn OUP 2002) 921.

⁷⁰ Section 1(29A) of the Racial and Religious Hatred Act 2006

⁷¹ *Feldman* (n 69) 921.

⁷² P Edge, 'Extending Hate Crime to Religion' (2003) 8 *J Civ Lib* 5, 19.

⁷³ M Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 290.

⁷⁴ *Church of Scientology and 128 of its members v Sweden* No 8282/78 21 DR 109 (1980). See also *Church of the New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120.

⁷⁵ *Select Committee Report* (n 15) Chapter 4 para [50].

⁷⁶ Suggested in 'Offences against Religion and Public Worship' Law Commission No 145, 1985, para [44].

⁷⁷ J Scriven, 'Comment: Hate Law Crosses the Fine Line' [2004] *LS Gaz*, 17 Dec, 6 (2).

is not dampened by the uncertain effect of religious commentary it is essential that an incitement statute include an intention element.⁷⁸ In this regard, French penal provisions⁷⁹ which define incitement only according to its effect on others has been strongly criticised as effectively operating *ex post facto*.⁸⁰ In jurisdictions bound by the European Convention on Human Rights this is particularly problematic as legal restrictions must not be unduly vague or operate retrospectively.⁸¹

The disadvantage of an intention element is that it may result in few convictions because of evidentiary difficulties. Where a jurisdiction requires a high degree of proof to establish the offence, the ability of prosecutors to adduce sufficient evidence for a conviction will be significantly hampered.⁸² This has been a notable difficulty under the United Kingdom's race hate laws whereby careful phrasing has enabled racist organisations to circumvent the legislation.⁸³ Similar problems may well be experienced under the 2006 provisions⁸⁴ which require that an individual must intend to stir up religious hatred:

[Juries are expected to require proof beyond reasonable doubt that this intention existed and it would be easy for any defendants to hide this intention behind temperate and reasonable criticism of someone's religion...]⁸⁵

Yet even if successful prosecutions are limited legislation may be deemed effective where it forces intolerant groups to replace invectives that incite hatred against adherents with more viable criticism of religious tenants.⁸⁶ The value of an intention element is also enhanced in the context of groups who seek to organise excessive reactions to religious insensitivities.⁸⁷ In such situations there is a danger that a contrived furore may be used to demonstrate that otherwise unknowing comments are of sufficient gravity to amount to hate speech.⁸⁸ Therefore an intention element safeguards innocent expression by focusing on the mental state of the defendant rather than the unpredictable actions of third parties.

Religious hatred legislation also becomes problematic when religious groups are able to utilise these provisions to silence the proselytising of rival

⁷⁸ *Vance* (n 8) 248.

⁷⁹ Pleven Law 1972.

⁸⁰ *Vance* (n 8) 227.

⁸¹ *Ibid.* at 227.

⁸² *Nash and Bakalis* (n 28) 357.

⁸³ *Religious Offences* (n 52) 134-135.

⁸⁴ Race and Religious Hatred Act 2006.

⁸⁵ *Nash and Bakalis* (n 28) 357.

⁸⁶ *Select Committee Report* (n 11) Chapter 8 para [101].

⁸⁷ See the Danish cartoon incident discussed in *Block* (n 30).

⁸⁸ *Hare* (n 10) 528.

faiths. Attempts to convert new adherents often result in the espousal of views which are highly controversial to the existing beliefs of others.⁸⁹ In such situations hate speech legislation may be used as a ‘weapon’⁹⁰ by rival groups seeking to argue that the manifestation of belief in this manner should be prohibited. Problems of this nature have notably been experienced within India where the effect of incitement laws has been to encourage ‘intolerance, divisiveness and unreasonable interference with freedom of expression.’⁹¹ This is largely due to an excess of vexatious litigation based on social quarrels rather than the propagation of genuine religious hate rhetoric.⁹² To prevent the abuse of the legal system in this manner, incitement laws should contain a procedural filter to avert ill-founded private prosecutions. In the United Kingdom this has been achieved via the Attorney General’s fiat which determines whether an action may proceed in any particular case.⁹³ Although this prevents frivolous litigation it should be noted that to vest such power in a member of the executive potentially raises accusations of political bias,⁹⁴ especially when decisions are not reviewable by the courts.⁹⁵ A more satisfactory approach is to place a consent requirement with a wholly independent body to maintain an appearance of neutrality in such decisions.⁹⁶

With the above safeguards and limitations in place it is suggested that an incitement statute would adequately preserve the vitality of free speech within society. Where jurisdictions seek to go further by deeply entrenching the protection of freedom of expression there is a danger that the utility of hate speech regulations may be undermined. Indicative of this is the United States’ approach of restricting speech only when there is an imminent danger of violence.⁹⁷ Although exceptionally protective of expression, the stringent requirements in place do little to dissuade the growth of extreme intolerance:

‘Because of American exceptionalism in regard to hate speech, the United States has become the centre for production of some particularly ugly propaganda. For example, Nebraska became a

⁸⁹ *Myers* (n 9).

⁹⁰ *Scriven* (n77).

⁹¹ See the comments of the Indian Attorney General in the *Select Committee Report* (n 15) Chapter 4 para [52].

⁹² RJ Dhavan, ‘Religious Freedom in India’ (1987) 35(1) *AJCL* 209, 221.

⁹³ Section 1 (29L) of the Racial and Religious Hatred Act 2006.

⁹⁴ *Select Committee Report* (n 11) Chapter 7 para [86] see the comments of the Muslim Council of Britain stating that the Attorney General should publish his criteria for decisions if his independence is to be preserved.

⁹⁵ *Jeremy* (n 44) 200.

⁹⁶ *Select Committee Report on Religious Offences* (n 11) Chapter 7 para [92].

⁹⁷ *Brandenburg v. Ohio* [1969] 395 US 444, 447.

world-wide centre for the production and distribution of neo-Nazi propaganda.⁹⁸

To reduce a religious hate speech law to the status of a public order regulation effectively ignores expression that leads to the long term marginalisation of vulnerable groups. Whilst the tangible harms of hate speech are sometimes difficult to establish the spread of hostility towards religious adherents can with time lead to violent outbursts.⁹⁹ It would certainly be remiss of governments to wait for this eventual manifestation of hate when preventative legislation may be available. As a consequence hate laws must strike a delicate balance that maximises free expression whilst not allowing for the creation of a climate in which the voices of minorities are lost.

Conclusion

It is a reality of any multicultural society that religion plays a pivotal role in the development of social and political interactions. If the values of tolerance and democratic freedom are to retain meaning the boundaries of acceptable conduct must exclude expression which promotes religious hatred. Although legislation may not result in a large number of convictions, the symbolic condemnation of extreme intolerance serves to formally enshrine the importance of pluralism to society. This is particularly important when opinions are polarised by acts of terrorism perpetrated by religious extremists. To allow xenophobic and racist groups to capitalise on heightened sensitivities at such times jeopardises the continuing maintenance of non violent and cohesive relations. Religious hate speech laws thus prevent a situation in which the most forceful and bigoted voices in society suppress a true diversity of opinion. Well tailored restrictions of speech consequently do not overstep the mark when they ensure that expressive contributions are equally valued throughout society.

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⁹⁸ D Smolin, 'Exporting the First Amendment? Evangelism, Proselytism, and the International Religious Freedom Act' (2001) 31 *Cumb L Rev* 685, 695.

⁹⁹ *Tsesis* (n 2) 763.

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Respect for Bad Thoughts

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Let us say you are sexually aroused by the thought of a man raping a baby and so you create a computer-generated image on your laptop, adding some red pixels to give the illusion of blood. You are now liable to three years' imprisonment. There is no need for proof of the risk of harm to anyone, for merely to possess this 'extreme pornographic image' constitutes the offence.¹ Furthermore, it is difficult to see a significant difference between having this thought and computer-generating it, for only pedants would argue that the offence lies *only* in the fact of possession (and in any case somewhere along the line the person who produces the image must do it with the thought, principally, of sexual arousal). Of course, the purpose of the offence is to enable the conviction of paedophiles who do a lot of this sort of thing and do a lot of harm. But the reality is that this offence creates a right in the state to *punish* people for merely having a thought, bad though that thought is.

There is an additional point. If it were really 'wrong in itself' to possess extreme pornography and this wrong really were independent of harm to others there would, in principle, be no justification for *anyone* possessing such material. True, the lack of justification would stymie the function of the courts and prosecutors since possession in their hands would mostly be necessary for a successful prosecution. But why should those involved in your prosecution be allowed to possess what you are not? It would be unfair: they are allowed to commit the offence but you are not. That Parliament allows it is insufficient because that is self-justifying and doesn't address the moral problem. If it is wrong *in itself* to possess extreme pornography that is a wrong for everyone, in the same way it is wrong for anyone to murder. Few people would suggest that if the occasional murder would help the prosecution of an offence then that could be permitted by Parliament. The point applies equally to possession of drugs, at least in those cases where someone has produced a drug (e.g. growing cannabis) for their own use. We should therefore view the argument - that prosecution of

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¹ S.63 of the Criminal Justice and Immigration Act 2008.

the offence couldn't be justified when possession of extreme pornography was required for it to be successful - as a *reductio ad absurdum*. Because prosecution is required, it must follow that it is the possession of extreme pornography *by the defendant* as opposed to the state that is especially disturbing and that suggests that the rationale for the offence is harm to others. The problem, however, remains. The possession of this image, like the possession of home-grown cannabis, harms no one. The ancestor of this offence is still in force – possessing pornographic photographs of children – but requires evidence of an intention to distribute, thereby including the harm element.² It is now possible to manipulate images without downloading, and people will be able to create ghastly images of whatever they think and as sadistic and as sexual as they like. Should these people really be subject to criminal liability merely because they have, for themselves, produced images on their computer screen, or printed these images onto paper?

The issue of thought crimes is intimately related to whether hate speech should be made criminal. There is a philosophical tradition of drawing a sharp line between 'the mind' and 'the body' (perhaps Descartes started it) which on examination doesn't amount to much. We can see a person's thoughts 'on their face' or in the awkward or relaxed way they go about a task. Stillness and silence, and the presence of hidden thought, can be just as chilling as violent action (think of the use of silence in a Pinter play or the ominous background bureaucracy in Kafka novels) or as comforting as the quiet of home. Human relationships, particularly intimate ones, flow in a seamless medium between thought and action. Nevertheless expressing hate is insulting, hurtful and potentially cruel, and one can see how it could, especially if it contributes to a persistent pattern of behaviour from others, cause harm, that is, amount to an unjustifiable interference with personal freedom.³ But hate speech is not necessarily harmful and it must be true to say, generally, that the expression of hateful thoughts and feelings is well within the normal range of situations that human beings expect to face. For no one, surely, would advocate the outlawing of hate speech between man and wife in the throes of divorce or the expression of hate from a couple

². S.1(c) of the Protection of Children Act 1978 of which makes it an offence to possess indecent photos with a view to their being distributed, etc.

³. In this context, I use 'harm' to mean an 'unjustifiable interference with liberty' following the most consistent interpretation of Mill in his famous essay on liberty. See also Raz, *The Morality of Freedom* (OUP, 1986) Chapter 15. As Raz says, 'harm' in every day use would include some violation of our physical integrity and such violation does not necessarily restrict our liberty (a pin-prick, say); it reveals a different dimension of moral wrong. The arguments concern the question of what is unjustifiable, of course.

whose children have just been badly maimed by a drunken driver. Where then is the room for the outlawing of hate speech itself as a category of act that is separate from the clearly harmful cases of intimidation, bullying, and harassment? Those cases that fall short are not so different from the computer-generated images you have produced. I suggest the real aim of the legislation is to get at hateful and horrible thoughts and the unpleasant people who have them rather than to prevent anti-social conduct.

One of the practical problems is that where isolated expressions of hate are harmless, in conjunction with the expression of similar expressions they can become harmful. However such situations may be defined so as to include concert with others, thus preserving the harm principle. Hate speech developed this way becomes just another dimension of the offence of harassment. Someone who stares at you once or follows you home once, displaying an inchoate thought, might not quite pass a margin suitable for criminal liability but once this becomes a pattern or course of conduct (which might in some circumstances amount only to a repeat act) it can become harmful.⁴ It does not follow, of course, that isolated non-harmful hate speech becomes harmful merely by its being promulgated in concert with others. One of the popular problems concerning hate speech is whether individuals in football crowds shouting racist slogans along with others should be subject to criminal sanction, and there is a tendency to assume that merely because a crowd is involved the action is harmful. The more interesting problem here concerns the link between speech and thought. Crowd chanting of racist slogans is pretty clearly often completely mindless, the chanters neither believing nor disbelieving what it is they are saying.

How much does any of this matter? Waldron has recently claimed that the issue of hate speech is not that of the thought itself and that people who advocate the criminalisation of hate speech do not want to 'get inside people's minds.' Rather, hate speech is harmful to some ethnic and other groups because it creates a 'polluted social environment' for them.⁵ His invocation of 'pollution' is troublesome. 'Pollution' suggests that hate speech somehow gets into the air we breathe, and the analogy with speech and action perhaps suggests more than it should. Is there really more to an expression of hateful thoughts than what generally constitutes communication? Take swearing which is, in general, unpleasant although it

4. See s.2 of the Protection from Harassment Act 1997. See also s.7 where 'course of conduct is defined' and, particularly, s.7 (4) which states that speech can amount to harassment.

5. Waldron, Review of Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* May 29th 2008 *New York Review of Books* Vol.55 No.9

is often the aggression with which it is uttered that is more so. But swearing can also be an effective form of speech – and funny let's not forget. Is it 'polluting'? There are many unpleasant things on our streets, true. But what constitutes 'pollution' short of actual interference with any person is difficult to say and veers into the realm of taste. Part of the difficulty is that the debate concerns the creation of criminal offences and these import stigma, punishment, publicity, delay and worry.⁶

Is the hateful thought really irrelevant to 'social pollution?' If through technological development it became possible to read people's thoughts would those thoughts be subject to Waldron's suggested test of social pollution? Maybe the answer lies in the question of control. If we can't control certain of our thoughts (we clearly can some, and this is part of the problem of self-discipline) it could be unfair to impose criminal liability, in the same way as it would seem to be unfair to hold a Tourette's sufferer to account when uncontrollably using obscene language.⁷ Would we, however, adjust to the idea of making people liable for their controlled thoughts so that the whole business of hate speech would just step back a bit into what was only formerly the public realm?

It is at least odd to suppose we could lock someone up because their perhaps unintentionally made public thoughts were polluting.⁸ If there were a predominance of sullen looking people at the theatre spoiling my enjoyment of *The Sound of Music* would that be anywhere on the road to being 'socially polluting' to those whose evening would be enhanced by a more appreciative audience? Or the sight of drunk tramps in cardboard boxes and the very idea of their thoughts as we step our way from the Thames to the opera at Covent Garden? It is easy to be seduced into thinking that 'pollution' is the defining issue. Take possessing extreme pornography. Probably people who are sexually aroused by the thought of violent sexual acts on children are a serious cause for concern. Look at it from the point of view of the police who daily see the connection between paedophiles who are convicted of offences and the horrible pornographic material they have back at their flats. The concern here is, of course, the dispositions such people might have. There is also a degree of prurience:

⁶. See Hart, *Punishment and Responsibility* (2nd rev. ed. OUP 2008) ch.1.

⁷. For example, the British Institute for Brain Injured Children (BIBIC) is concerned at the seemingly disproportionate number of ASBOs given to children suffering from autism, Asperger's disease and Tourette's syndrome.

⁸. Incidentally, a crowd chanting racist slogans at a football match might be less polluting if their thoughts were on view, since crowd behaviour can be mindless - what two thousand joined voices of hate produce may be accompanied by relatively few actually joined thoughts of such hate.

people don't want people to arouse themselves sexually with such thoughts. And there is the danger that disgust will overcome rational assessment of evidence. The possession offence tends to suggest that popular belief in untested empirical assumptions about the relationship between bad thoughts and anti-social behaviour has held favour with politicians. We could argue that where children are involved *and* the harm possible to them is high the criminal law may justifiably lean heavily in their favour so that only weak empirical assumptions of a connection are sufficient. And perhaps this weighting in favour of the protection of children – a bending over backwards - against the private possession of these materials comes closest to a decent justification. But in general to criminalise within the realm of what people think would be to demolish the last bastion of privacy any of us has.⁹

The political background to the legislative proposal to create the offence of 'possession of extreme pornography' was populist and perhaps cynical. It required some courage to be a critic of the proposal in public because of the danger of being singled out as someone who 'condones' violent sexual thought. But that charge would be wrong for it does not follow that because a person supports a right to bad thoughts that they must therefore approve the content of those thoughts. Playing on widespread lack of appreciation of this relatively difficult idea is the major reason Parliament gets away with it (another is moral panic but I shall not discuss that here); the thoughts envisaged by the statute can be genuinely horrible.¹⁰ The government was also able to call on the increasingly popular view that moral judgements are merely matters of taste and so unsupportable by reasons - just facts to be reported about 'how we *feel* about things.' This is often called the 'yuk' factor,' meaning the view that 'feeling disgusted' substitutes for proper moral assessment and judgement. In that potent and dangerous idea it is easy to lose sense of the once more popular idea that 'people's thoughts are their own,' which is a much stronger version of (because it underpins) the idea that we have a 'right to do wrong' which entails a right to *express* wrong or deeply hurtful thoughts. Criminalising our thoughts would mark a serious step backwards in our legal system and the

⁹. Dominic Lawson, 'We All Want to Protect Children from Sexual Abuse – But This Is An Intrusion Too Far' *The Independent* 30 May 2008.

¹⁰. Obviously, thinking this way is not *always* horrible. I might be a detective, trying to work out where blood would fall in such a scenario, the better to detect the crime (but perhaps knowing I'll be sexually aroused by it). Or I might be an artist developing a Leda and the Swan theme but also motivated by sexual interest. Less obvious is where I have produced the image in order to be aroused, to see how horrible it would be, as a well-meant attempt at empathising with a paedophile's motivation.

progression to speech is no greater than on a gentle slope. Is a sullen face, the incline of a head, a sudden look of anger, an expression of disgust, pursed lips or rapid blinking in response to what someone thinks, so different from the having of a thought? I suggest that respect for people requires respect for *expression* of their thoughts, too, and that no valuable freedom is possible if that freedom is curtailed where no harm is threatened to others. The crux is that there is a crucial sense in which we respect another person yet rightly have absolutely no respect for that other's thoughts and dispositions.

It helps in examining this idea to isolate cases where thoughts have no consequence for others but are uncontroversially bad thoughts. If we think that there is merit in thinking that such thoughts should not be criminalised, that should give us some clue as to the extent to which those bad thoughts may without fear of criminalisation be thrust into public space. Some will naturally think that a thought is bad *only* because it has the potential for bad consequences and so I am navigating non-existent questions. But this position seems to me untenable because there is sufficiently clear evidence that perfectly harmless people harbour thoughts that are unpleasant, nasty, lazy, dishonest, violent and the rest. So I shall disregard the following sorts of reasons for justifying freedom of thought:

- a. because we might not be right about whether they really are bad (and so we might accidentally prevent a D.H. Lawrence, or James Joyce, or a Shakespeare from engaging in a beneficial imaginative project);
- b. because preventing people from having bad thoughts is either downright impossible, or too inefficient to be justified; or
- c. because there is insufficient empirical evidence that such thoughts might lead (perhaps in conjunction with a significant number of other similar thoughts) to:
 - *harmful* acts (unjustifiable interference with the freedom of others), or to the
 - *insulting* acts, short of harming others, or to
 - a '*polluted*' social environment in which life is less pleasant and less hopeful either for some particular group, e.g. women, or just generally.

Do we really have a right to 'do wrong'? That idea is a relatively late product of the Western Enlightenment and was not always with us; indeed the idea of our having rights 'against' anyone or of individuals 'possessing

rights' was not according to some studies part of the discourse of political philosophising until Grotius's time.¹¹ And so very likely the case for the importance of a 'right to do wrong' must be put again. But I don't have to go *that* far in order to establish, with less difficulty I believe, that we have a right to whatever thoughts we like. And like those who argue for a right to act wrongly, I'll claim that it is a requirement of respect for people that we respect their ability to be self-initiators, to have and direct their own thoughts and desires, in short, that we respect them as free people however much we lack respect for what it is in the end they decide to do.

It follows there are two levels at which we can show disrespect for another person only one of which makes meaningful a right according to which another can justifiably claim that their dignity has been significantly attacked. To be highly insulting shows disrespect but does not give rise to a right 'not to be insulted.' To prevent another from expressing a thought shows disrespect at a deeper level, one that *does* give rise to a right not to be so treated. The argument for respect at two levels is important because it attacks the idea that the showing of disrespect by someone leads to the withdrawal of their right to express their thoughts, while allowing that withdrawal when the disrespect attacks the very expression of thought itself. To be rude and hurtful, in short, is allowed where it does not amount to harming others but attempting to prevent a person from forming his thoughts is not allowed. The former does not strike at respect where it matters.

The ground for a right to freedom of expression – my suggestion is protection of mental activity – lies firmly in the idea of respect for others, but only at the deeper level. This means that the expression of disrespectful thoughts – displaying pictures of the recent dead, or acts of bestiality – has no bearing at all on the question whether rights to expression of those thoughts should be denied.¹² Many place the thoughts and acts of denying certain propositions – for example, that God exists or that the Chinese government is repressive, or denying the Holocaust – into the same category. But these are human beings who say these things and as vile although these thoughts may be the respect for the humanity of those human beings must remain.

There is an array of mental activity we can subsume under the idea of 'bad thoughts.' Decisions and intentions are clearly bad if bad consequences are contemplated. Awareness of a risk of bad consequences – recklessness,

¹¹. Tuck, *Natural Rights Theories*, (CUP 1981).

¹². These two examples are Barendt's; see his *Freedom of Speech* (2nd ed. OUP 2005) 33.

intentional inadvertence, not caring, 'turning a blind eye,' or shirking responsibility - are likewise bad and exist within the shade of intention. There are less clearly consequential bad thoughts, however, such as controlled fantasies that a person will intentionally produce involving creativity, imagination, sexual arousal, greed and much besides. Uncontrolled fantasies are those we have in dreams. The full gamut of our mental states is the stuff of psychologists and novelists, as well as exists in our daily life. There are thoughts that offend the dignity of the person who has them - they 'lower' him - or they encourage or manifest a disposition in that person to act wrongly towards others. We know the person who consistently prefers certain sorts of mental activity of say an undisciplined and self-indulgent or other sort.

The important sense of respect relies in our understanding of what we ourselves are alike and that others are like us. Our innate capacity to see others 'as us' is governed by a rational mechanism that both constrains our understanding of our self and constrains our contact with others. We draw from our internal knowledge of ourselves and use that knowledge to understand others; we innately recognise others to be human 'like us.' Because the transmission of what we understand as significant in ourselves is projected onto others our judgements about ourselves should rationally match up with those transmitted judgements. It would be inconsistent, for example, to say of another that they are 'human' and then deny they suffer pain (without, at any rate, some further explanation, say, about anaesthesia). This inter-personal understanding seems to me to be at the core of moral judgement. It expresses, for example, the so-called 'principle of reciprocity' at the heart of many religions that you should not act towards another in a way that you would not want them to act towards you.

This account of moral judgement is not intended to be a straightforward derivation from empirical judgements about ourselves (that we wish to avoid pain, for example). Rather our self-judgements depend not on what we only think to be desirable or not but what is *objectively* so. These judgements are not generalisations because they are not detachable from judgements about what it is to be 'human.' It is through self-knowledge *and* knowledge of others that we make judgements of a universal kind about human nature. Kant took this rather straightforward view much further in claiming that our motives for acting morally could lie in reason alone (and the ability to formulate universal rules). But he thought that awareness of our own capacity for free choice meant that in the knowledge that others are 'like us' we were bound to conform in our exercise of our freedom to rules that applied in exactly the same way for everyone. But common to both my

view and Kant's is that appreciation of others as equally human to ourselves as the basis for moral rules means that 'the human being' (or the 'human' or the 'person') becomes the centre or 'end' of moral deliberation (in Kant, the 'rational being' is central).¹³ Therefore fundamental weight and not just 'a consideration to be taken into account' - as some lawyers like to say - has to be given to the 'person behind' the thoughts and actions.

People are, however, disposed to make judgements that conflate a person's humanity and our due respect for that (which I emphasise must flow from our respect for ourselves) with how that person thinks and acts, in some sense *how* they exercise their humanity. They will conclude that because a person has failed in some way that the necessity for respect that person is due as a human being has vanished. The view that respect does not depend on how the freedom is exercised runs counter to the idea that we respect free thought so long as it is exercised in a way that contributes to maintaining and enhancing a decent society - a democratic one - or it enables people by endorsing moral independence to develop morally.¹⁴ I believe these restrictions are unnecessary. Much better are some theories such as Scanlon's¹⁵ which maintain that thought and speech should be protected (i.e. not criminalised) because the human 'capacity to be rational' should be protected. These theories are better because the proposed justification is less instrumental to a person's good. The thought lingers, however, as to whether we may intervene to protect someone from having irrational thoughts and expressing them; the celebration of rationality seems to require too much. Should we really restrict the thoughts and speech of someone to protect their rationality? It is *human* to respect people who are pretty well incapable of rational thought. We might also think how we should conceive of rational thought. People are nasty, stupid, brilliant, self-deceiving, imaginative, dull, creative and mad; this array probably defies categorisation into the rational and irrational. I would rather suggest it is respect for the extraordinary range of 'things that go on in people's minds' that gets at it better, although the connection with freedom as Kant discerned is there: we cannot quite understand the *production* of thoughts and thoughts-and-actions without some conception of there being some

¹³ I give the alternatives to remove any suggestion that I intend no special meanings for these terms other than that I'm not concerned with a biological classification.

¹⁴ The origins of the 'rational approach' are in Milton, *Areopagitica* (1644). See also Mill, *On Liberty* (1851) ch.2 'Of the Liberty of Thought and Discussion'. See for contemporary developments Bollinger, *The Tolerant Society* (OUP 1986); Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982); Raz, 'Free Expression and Personal Identification' (1991) 11 *OJLS* 3.

¹⁵ See Scanlon, 'A Theory of Freedom of Expression' 1972 *Phil. & Pub. Affairs* 204. Also see Fried, *Saying What the Law Is: the Constitution in the Supreme Court* (Harvard UP 2004).

initiation on our own part. We respect this aspect of the human condition just because it is *human*. People are still to be valued and respected as human even when they think and say and do things that strike at the very roots of rationality, even the roots of understanding of what it is to be human. The medical procedure of frontal lobotomy brings this out well. This intervention penetrates the centre of human personality; it can be meant well as it prevents a person from doing themselves harm irrationally, and from the post-operative docility after the irrational storm it may seem a sensible and kind solution. But it eliminates a vital spark.

Indeed it is the failure to grasp the distinction between ‘the person’ and ‘his or her acts’ that lies behind serious misunderstandings about what it is to be moral. We must be able to conclude that a person is a human being yet recognise their faults. The question then becomes one of what it is appropriate to do about those faults and we should ask and answer that question on the assumption that the person is a human being. That we should make such judgements seems not just natural – we are like other human beings – but desirable and necessary. Transmitting *our* judgements into others *we* would want to be corrected, encouraged, led and educated by others into improving and honing our own judgements. And so to use the idea of ‘bad thoughts’ it cannot be just morally permissible for human beings to disapprove of ‘what goes on in the mind’ of other people but at least in the case of less mature members of the community, children being the obvious example, it is our moral duty to encourage people to avoid bad thoughts.

If you accept that it is permissible to make these sorts of judgements, and that at times it might even be permissible to encourage others to think differently, then it seems reasonable to suppose that the ground for correcting others lies in some sort of respect for their ability to change themselves. Here we have a clue as to the sorts of consideration relevant to determining respect for another person’s *being a human being*. What in another person we regard as an absolutely necessary condition for our being critical of them is that they are human beings with the capacity to choose to think to act and to be otherwise. I therefore conclude that each human being has a *right* to have ‘bad thoughts.’

Let us take the distinction between respecting human beings and respecting their thoughts and actions to its extreme by considering a human being whose actions we despise as far as we can almost possibly imagine, namely, Adolf Hitler. He was an evil person in the truest sense of the term. He was not insane, although he was clearly unhinged. His life on Earth had

the most ‘murderous impact’.¹⁶ He was responsible for human suffering on a gigantic scale; some fifty million dead and many more maimed, psychologically destroyed and so on. It was intentional. Yet our respect for Hitler’s status as a human being does not alter and should not alter from that of any other human being. We cannot detach ourselves from his condition because we recognise him as a human being and *therefore* we recognise elements of him in ourselves. In full knowledge of what he had done we would nonetheless suppose it a failing of our community if we did not accord to him the same respect in the court system, say, as any other person. If he fell ill while awaiting trial we would not think that because he had lost all respect as a human being, which is in one sense but only one, obviously true, there was no need to provide medical treatment. Our ‘common humanity’ denies us that possibility. Thus, in the less extreme case, we must respect the human being ‘in whose person’ resides those thoughts that are behind the obscene and violent computer-generated image, assuming that those thoughts are not high-minded¹⁷ and are *bad*.

Equality is fundamental to understanding respect for others. This is a crucial idea in bringing out the connection that we have with others that is implicit in judging others to be like us as human beings. The argument that we ‘are equal’ to others because we are able to recognise that they, like us, have their own thoughts and a ‘point of view’ is only a start to a more nuanced moral principle of equality. While it is more helpful to develop that idea from the idea of a ‘point of view’, we can get into the idea of equality even through thinking that because another entity has two legs, like us, then that other entity is ‘equal’ to us; at least we appreciate, for example, that the other will have, like us, difficulties in water, and difficulties like us, in familiar situations with balance. But the idea of an individual with a relatively conscious view of its own capacities and most important a sense of its own ‘self’ combines the different elements of our being. The judgement constituting our ‘point of view’ focuses on why it is that we do not want to drown or lose our balance and recognises the power that we have to alter events both for ourselves and in the environment. Equality means here ‘seeing the other person as in relevant respects like yourself.’ Much lies in the idea of ‘relevant’ because it brings out the non-empirical judgements we make in determining what it is to be human. So we don’t think that we are unequal merely because we are not exactly alike physically; rather we are equal in ‘being human.’

¹⁶. Shirer, *The Rise and Fall of the Third Reich*, (Arrow Books 1991) last page.

¹⁷. See comment above, n.10.

Claims of a deficit of equality are claims that draw upon the human condition – our understanding of what it is to be human taken primarily from those thoughts lying behind our own point of view. As I have argued, they are not empirical claims. If equality is primarily conceived in that way, as a kind of metric of comparison, there is a temptation to think that equality is only about comparison and not about what constitutes the value of the entities being compared. But equality is not empty because it is necessary to specify a point of view. In appreciating and coming to understand our own point of view we must introspect; what else can we do? We must consider what we think is important and relevant for ourselves. One thing we find is that we don't have a proper sense of ourselves unless we are free to think about the different possibilities in determining the best way to live. So understanding freedom arises from introspection; we see that 'point of view' is an idea to be developed. Indeed, our 'life's story' can and should be viewed as a developing set of points of view, each changed according to events that occur as a result of things we have done and as a result of conscious decisions to change our point of view. We should not be driven by any idea that the metaphor of a point of view requires it to be fixed at some time and in one place but by the idea that our ways of seeing things can change. All this is possible while maintaining a point of view that is our own.

And our thoughts are in some sense not private. For as we have seen we can appreciate the point of view of others as a result of our transmission of our point of view onto *them*. This naturally creates a dialogue between them and us in which it would be natural to absorb how it is that others would see us from their projecting their point of view onto us. This only sounds cryptic if you believe that we really cannot understand what it would be like to be another person; that cannot be true because part of our judgment about the points of view of others presupposes that the other is a human being. Although there is a kind of circularity in this idea it is not the sort of circularity that matters. It is rather a matter of reciprocal appreciation. Dialogue of one sort or another is very important although it could take many forms such as a social connection even without formal linguistic communication. We can make judgements about some animals showing our recognition of humanity in them. That must mean that there is a workable sense in which we can appreciate their point of view; it is one that can certainly be reciprocal at a level of inarticulable feeling and it is a perfectly feasible and plausible way of understanding some animals as equals.¹⁸ We

¹⁸. Singer, 'All Animals are Equal' in *Applied Ethics* (ed. Singer OUP, 1986).

can learn from animals although not to the same degree or with such variety as we can from other human beings much more like us. It is not surprising that animal rights activists, some of whom promote equality for animals, rely on ideas such as sentience of which the capacity to feel pain and frustration (which presupposes freedom) and some limited sense of self figure very highly. The invocation of sentience promotes very much the idea I advocate here, that it is by introspection into ourselves and our projection onto others that we may make rational claims about how we ought to treat others. It is not an absurd idea that we might feel drawn to reproach animals for their violent behaviour as, too, we feel drawn to reproach human beings for their expression of violent thoughts.

Dialogue requires a two-way transmission of ideas. So by an enrichment of our understanding of others we come to enrich our understanding of ourselves. Understanding ourselves shows that we are free to make decisions that change the way we are and we acknowledge that freedom in others. Introspection allows us to see that we can make no sense of ourselves unless we are free - even if only in a limited way. We are not inactive, passive consciousnesses. We are self-initiators whose identity depends on our ability to make alterations to our environment in the widest sense. At the very basis of that idea of freedom is our freedom to think. Although we can envisage odd neurological states where we can't move a limb, it is still possible to understand that in such states we are free in having free thoughts. It is very difficult, though, to see what it would be like to have just one thought, perhaps a view of a non-moving flat perspective through an only eye that can see, or even just one, like Yossarian's in *Catch-22* 'Where are the Snowdens of yesteryear?' or a tune that goes on endlessly. On the other hand, we think of these thoughts as obsessive or maniacal, meaning that we have no control over them and so the very antithesis of freedom (one can be 'trapped by one's thoughts'). Having uncontrolled thoughts is actually a horrific idea. But it has reality for many of us. At the basis of our being, I suggest, is our understanding that we may change our thoughts, to adjust and monitor how we really are. The freedom to think and modify or constrain our actions in relation both to others and ourselves is an absolutely necessary condition of our being able to have any kind of human life and therefore moral life at all. Think of the ways reflection on our own lives modifies the way we treat others. Think how recognition of the mistakes we make encourages us to be more tolerant of the mistakes of others, or how appreciation of 'how that would feel to us' slows the speed or level of condemnation or kind of approach to improving or the degree of punishment that we would be prepared to support for curtailing anti-social

activity. This seeing of others as ourselves is a powerful antidote to cruelty and the principle follows naturally from rational dialogue about the human condition. I believe that it is along such lines that we can demonstrate a rational connection through the idea of what is distinctively human to recognising others as equal to ourselves.

So far I have discussed the interplay between our sense of others and ourselves in the context of purely moral assessment. When our dialogue and thus our connections with others manifest themselves in sustained ways as they inevitably do through the existence of families and wider (and different) social units, we begin to understand *community* in a significantly moral way. I suggest that way ought to include our understanding that because others are human beings, they too have ways of being that they themselves can initiate. Our recognition both that others are free *and* that they are like us requires that our relationship be detached as well as cordial and civil. This relationship is not one of the sort of special relationship between two lovers since there is kind of attraction there that is excluding, although that detached and cordial relationship is what should be left once the pain of separation has gone, if it does. But the relationship should not be regarded either as one of mutual distrust of the sort that might obtain between two competing corporations and which may only be governed by laws of contract rigidly interpreted to exclude refinements of fairness and decency. Corporations are probably the extreme case; while corporations are composed of human beings having 'legal' personality, they lack sentience and exist for very specific purposes. Nevertheless, their free will is the free will of its members and associates such as shareholders and to suppose that rigidity of contract is applicable in such cases may concede too much.

What is the conclusion to be drawn? If you agree that respect is due to all human beings and that the respect is a form of transmitted self-respect, I suggest you will be moved to the idea that the self-initiating freedom of thought marks out a fundamental identifying criterion of what it is to be human. And we must respect freedom of thought for that reason alone, independent of what unpleasant and bad thoughts ensue. Respect for humanity requires that I must be free to have whatever thoughts I please to have and where those thoughts manifest themselves in actions that do not unjustifiably interfere with the freedom of others we must respect the right to these actions as well. We should not, however, lose sight of the fact that my freedom is perfectly compatible with your freedom to explain, persuade, correct and educate me from those thoughts. This follows from straightforward reciprocity and the nature of the community to which non-contractual reciprocity gives rise. We all recognise our ability to be mistaken

in our beliefs and so other people can and may correct our beliefs. Therefore it must at least not come as a surprise to us that others might guide and lead us and that our right to exercise our deep freedom must be exercised, where control is possible, with proper restraint.¹⁹

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¹⁹. Nor should it be lost that explaining, persuading, correcting and educating are not the same as conditioning, coercing, punishing, and so on. To correct a mistaken thought requires understanding *from within* how the process has gone wrong. I cannot endorse my new way of thinking if I have been forced into it; my identity is forcefully changed in the process. It is aversion therapy of the sort that Alex underwent in *A Clockwork Orange*, and Winston underwent in Orwell's *1984*. And one has to be careful not to suppose that conditioning takes place only in these extreme cases of torture. To a considerable extent our thoughts are shaped and conditioned to make it easier for us to think in bland ways, about the capitalist society, the third world, and violent solutions to problems.

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No Human Right to Adopt?

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Where does European human rights law stand on adoption? The European Court's approach has for a long time been that the European Convention of Human Rights (ECHR) does not guarantee the right to adopt. This position sounds clear enough until we ask ourselves what is meant by a right to adopt. Is it a right that the state provides interested parties with an adoptive child? A right that one be authorised to adopt, should an adoptive child become available? A right to adopt a child with whom one already has *de facto* parent-child bonds? Are we moreover referring to a putative right held by couples or single persons? And does it matter if the putative right-holder is married, co-habiting or heterosexual? Before we make sense of the claim that the ECHR does not guarantee the right to adopt, we must clarify the sense, out of the many possible ways in which such a right is understood. We must be able to distinguish between all these alleged rights on a principled basis, explaining why some, but not others, are human rights. Our account must be more fine-grained than the general statement that there is no right to adopt.

In two early cases, the first decided in the mid-seventies and the second in the late-nineties, the former European Commission on Human Rights declared inadmissible applications which complained that national adoption laws violate the ECHR, without examining the merits of the complaint. In the first case, *X. v. Belgium and the Netherlands*¹ the applicant - an unmarried man - complained that Dutch law did not allow him to adopt an abandoned child whom he had looked after for several years. In the second case, *Di Lazarro v Italy*² the applicant - also unmarried - complained that Italian adoption law at the time did not permit unmarried persons to adopt save in limited circumstances;³ unlike Mr X, Ms Di Lazarro had no established

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¹ *X v Belgium and the Netherlands* No 6482/74, Commission decision of 10 July 1975, DR 7, 75.

² *Di Lazarro v Italy* No 31924/96, Commission decision of 10 July 1997, Decisions and Reports (DR) 90-B, 134.

³ Such as when an unmarried person wishes to adopt an orphan child to whom he or she is related or with whom he or she has a stable relationship which began before the parents' death.

relationship or bonds with a particular child, and was simply fighting for recognition of her eligibility, as a single person, to apply for adoption.

In both cases, the Commission held that the application was incompatible *ratione materiae* with the provisions of the ECHR on the ground that the right to adopt is not included among the rights guaranteed by the ECHR and cannot be ‘read into’ either the right to respect for private and family life (Article 8 ECHR) or the right to marry and found a family (Article 12 ECHR). The Commission reached this conclusion on the basis of two arguments; first, a textualist argument that the right to adopt is not enumerated in the Convention and second, an intentionalist argument that the provisions of the Convention cannot be given a scope which the contracting parties expressly intended to exclude. It noted, in passing, that the Convention ‘does not oblige states to grant a person the status of adoptive parent or adopted child’⁴ but that interfering with an existing relationship between an adoptive parent and an adoptive child might engage the responsibility of a state under Article 8 ECHR.⁵

One might interpret *Di Lazaro* and *X v Belgium* as lending precedential⁶ support to the proposition that applications which challenge the compatibility of national adoption laws, are always inadmissible ‘*ratione materiae*’ under the ECHR. This would amount to the view that the ECHR gives no protection to the right to adopt, *no matter how that right is understood*, and that complaints about adoption-related laws and practices are inadmissible because they fall outside the ambit of Article 8 ECHR. Yet in recent years, the Court has shown great willingness to examine a number of adoption-related cases, which it has found admissible. These cases are divided into two categories; first, cases where an existing adoption, lawful under domestic law, has interfered with, or is part of, a person’s private or family life under Article 8 ECHR, and second, cases in which no adoptive status has yet been granted and the applicant alleges discrimination on the basis of sexual orientation, in relation to her application for authorization to adopt.

In the cases of the second category the Court has directly confronted the question of whether the practice of applying for authorisation to adopt falls within the ambit of a convention right, which is a condition for the

⁴ *Di Lazaro v. Italy* (n 2) 139.

⁵ *X v Belgium and Netherlands* (n 1) 77.

⁶ The European Court is not formally bound to follow its previous judgments but it has remarked that ‘in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents’ (see *Mamatkulov v Turkey* [2005] 41 EHRR 25 [para] 121). Indeed, the Court routinely justifies its judgments by reference to settled precedent. For an insightful analysis of the moral foundations of the doctrine of precedent, which shows why – contrary to Strasbourg’s dictum – certainty is not the value underlying it, see Scott Hershovitz, ‘Integrity and Stare Decisis’ in S. Hershovitz, *Exploring Law’s Empire* (2006) Chapter 5. Note that decisions reached by the former European Commission may carry less precedential weight, due to the very different institutional setting under which it operated.

applicability of Article 14 ECHR (non-discrimination clause). In *Fretté v France* (2002),⁷ the Court answered the question in the affirmative, holding that the practice of applying for authorisation to adopt falls within the ambit of article 8 ECHR; it found however no violation of the non-discrimination clause. In *E.B. v France*⁸ – a judgment which some European Court judges described in their separate opinions as overturning *Fretté* – the Court held that the applicant had been discriminated against on the basis of her sexual orientation and in relation to her application for authorization to adopt.

In both *Fretté* and *E.B.* some judges expressed concerns about the applicability of the Convention in cases of alleged discrimination in relation to applications for authorization to adopt, given that the Convention does not guarantee the right to adopt.⁹ Another judge argued that the Court's current doctrine has a discriminatory effect in that a homosexual's application alleging discrimination in relation to his or her application to be authorised to adopt has been found admissible by the Court, whereas a heterosexual's application alleging violation of her private or family life in relation to his or her application to be authorised to adopt would be inadmissible.¹⁰

This article aims to shed light on the Court's somewhat muddled approach to issues of adoption, both in relation to admissibility and to merits. The article is divided into three parts. In the next section I shall argue that there should be no strict rule against the admissibility of applications that challenge the compatibility of adoption laws and practices with the ECHR.¹¹ Potentially, any adoption-related issue might give rise to an ECHR violation and hence all adoption-related applications may have to be examined at the merits stage, whether or not they allege discrimination (unless of course they are manifestly ill-founded or are inadmissible for some other reason). As I shall argue, there can be circumstances under which the state's failure (or refusal) to grant someone adoptive status may amount to a violation of the ECHR, in virtue of principles the Court has already given effect to. My argument turns on a broader claim that questions about the ambit of convention rights, usually examined at the admissibility stage, are in fact disguised and elliptical propositions about the substantive rights of the ECHR, which are normally examined at the merits stage.

⁷ *Frette v France* (2002) 38 EHRR 438.

⁸ *E.B. v France*, Grand Chamber judgment of 22 January 2008 App no 43546/02.

⁹ See the dissenting opinion of Judge Costa in *Fretté*.

¹⁰ See dissenting opinion of Judge Mularoni in *E.B v France*.

¹¹ I shall speak of adoption 'laws and practices' to account for the fact that the European Court refrains from ruling *in abstracto* on the compatibility of domestic legislation with the ECHR. I do believe however that all ECtHR judgments, properly understood, have general normative consequences on whether relevant domestic enactments (constitutions, legislation, decrees) should be formally repealed or disapplied and on how (in monist countries) these enactments should be interpreted and applied by the judiciary. In that sense, the European court *is* indirectly -and inevitably- judging the compatibility of domestic legislation with the ECHR.

I will then turn to an analysis of the two judgments on discrimination and adoption, *Fretté* and *E.B.* I shall argue that the way in which the Court collected judges' votes in *Fretté* constitutes a case of judicial paradox and that a different decision-making process would have resulted in a ruling of a violation. The paradox consists, in short, in the fact that only one judge (out of seven) endorsed the majority reasoning in its entirety, which most importantly contained the finding that rejecting an application for authorization to adopt on the grounds that the applicant is homosexual does not constitute discrimination. In my view, the paradox explains why the Court was so anxious in *E.B.* to overturn the reasoning in *Fretté* as it did not reflect the beliefs of the majority of judges.

Thirdly, I shall turn to the Court's substantive reasoning in *E.B.* which held that a rejection of an application for an authorisation to adopt, on the implicit ground of the applicant's sexual orientation, constitutes discrimination. I shall argue that the Court rightly reached this conclusion by employing a standard of review that correctly captures the moral principles underlying the test of proportionality.

The Ambit of the Convention

In a number of cases the European Court has indirectly reviewed the compatibility of adoption laws and practices with the ECHR, after finding the applications admissible. It cannot therefore be said, with any qualifications, that adoption issues are incompatible *ratione materiae* with the Convention. Consider the following three cases.

In *Keegan v Ireland*, the European Court held that a lawful order to place a child born out of wedlock for adoption (under Irish law), without the knowledge or consent of the natural father, amounted to a violation of the ECHR. Having established that the relationship between the applicant and his child constituted 'family life' for the purposes of Article 8 ECHR, the Court held:

'[that the] fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life.'¹²

The Court's, rather formal, approach was to construe the case as one about family life, not about adoption. But in effect what the Court did was to review Irish adoption law (or the way it was applied by Irish authorities in the applicant's case) in light of the human rights principles that underlie

¹² *Keegan v Ireland* (1994) 18 EHRR 342.

Article 8 ECHR. The Court's ruling was as much about adoption as it was about the family life. To see this consider the following point; the proposition that Irish adoption law had violated Mr Keegan's right to family life under the ECHR entailed the proposition that the ECHR rights of the adoptive parents of Mr Keegan's child would *not* have been violated if they had been denied custody upon the natural father's objection.¹³ For it could not have been the case that in order to respect Mr Keegan's human right to family life, Ireland would have to violate the human rights of the adoptive parents. In fact the ruling entails a more general proposition about adoption, namely that ECHR law requires contracting states to give due regard to the interests of the adoptive child's natural parents; that, other things being equal,¹⁴ the natural parents' consent is required in all cases of adoption.

In *Pini and others v Romania*, a case of inter-country adoption, two Italian couples had each lawfully concluded adoption proceedings and acquired parental rights according to the provisions of Romanian law. The couples had been sent photographs of the adoptive children who lived at a private educational centre in Romania, in the care of which they had been placed when they were abandoned at the age of three. The educational centre however refused to give custody of the children to the adoptive parents and to obey court orders to that effect, initiating a series of legal challenges against the enforcement of the orders which lasted for more than three years, eventually succeeding in blocking the transfer of custody. The applicants complained that the failure of the Romanian authorities to execute the domestic courts' final decision to give effect to the lawful adoption order amounted to an infringement of their right to family life under Article 8 ECHR. The European Court held, by five votes to two, that the Convention was in the present case applicable because there was a legal bond between the applicants and their adopted children which amounted to family life within the meaning of Article 8 ECHR.

The majority in *Pini* reached this conclusion on the ground that the relations between an adoptive parent and an adopted child are of the same nature as family relations. Under settled case-law of the Court, Article 8 ECHR may apply to relationships between a child born out of wedlock and its natural parents,¹⁵ relationships between persons who have *de facto* family bonds,¹⁶ as well as to relationships that arise from a lawful and genuine

¹³ Assuming this happened before they developed emotional bonds with the adoptive child.

¹⁴ We must add this qualification to account for cases where some other principle, of a greater weight, justifies conferring parental rights over a child whose biological father/mother has not consented. This might be true for example in the case of a child raised by someone other than its biological parent whom it came to regard as its only parent. Our culture is of course full of stories about the tragedy, for all the people involved, of disputes over custody between a biological mother and an adoptive mother. Consider Bertolt Brecht's classic play *The Caucasian Chalk Circle* and Stephen Gyllenhaal's film *Losing Isaiah*, to name just a few.

¹⁵ *Keegan v Ireland*; *Odievre v France*, judgment of 13 February 2003 App No 42326/98.

¹⁶ *Johnston and others v Ireland* (1986) 9 EHRR 203; *Berrehab v Netherlands*, A 138 (1988).

marriage, *even if no family bonds have yet been fully established*,¹⁷ in other words, according to the Court's case law *de facto* family ties are a sufficient but not a necessary condition for the applicability of the right to family life. *De jure* family bonds resulting from a lawful marriage may also fall within the ambit of Article 8 ECHR irrespective of *de facto* emotional ties. The Court concluded that by analogy, *de jure* family bonds resulting from a lawful adoption also fall within the ambit of Article 8 ECHR, irrespective of *de facto* emotional ties.

Just like *Keegan*, *Pini* was as much about adoption as it was about family law. The Court's ruling entailed the proposition that ECHR law imposes constraints on how states treat lawful adoptive parents; other things being equal, states are not allowed to withdraw, or to adversely affect the exercise of the right of an adoptive parent once they have lawfully conferred it.

Finally, in a more recent case, *Emonet and others v Switzerland*¹⁸ the applicants maintained that the legal effects of adoption under Swiss law violated the right to respect for family life. Mrs Mariannick Faucherre and Mr Roland Emonet, a non-married couple living together, wished to have the biological child of the first adopted by the second. When the adoption process was completed, they realized that under Swiss law the mother-daughter relationship between Mrs Faucherre and her adult daughter, Mrs Isabelle Chantal Emonet (the third applicant) had been severed. Their request to have the relationship restored was subsequently rejected by the Swiss authorities. The European Court found the application admissible, holding that the relationship between the three applicants amounted to a *de facto* family life, which had been interfered with by Swiss law. It went on to find that, unlike adoption of minors, in the case of co-habiting couples who adopt adult children it is not necessary for the state to sever parent-child relationships in order to promote the best interests of the adoptive child. Although the couple could have achieved the desired legal consequences under Swiss law by getting married, the Court held that co-habiting couples should have the choice of achieving the same result without getting married, through adoption.

Again, the Court's ruling in *Emonet* entails general constraints regarding the adoption laws (and practices) of contracting states. Assuming that *Emonet* was correctly decided, the ECHR now requires - other things being

¹⁷ The leading authority here is the case of *Abdulaziz, Cabales and Balkandali* (1985) 7 EHRR 471, in which the United Kingdom refused permission to three non-nationals, who had no rights of permanent residence, to join their lawful spouses who had the right to remain indefinitely in the United Kingdom. The Court held that "by guaranteeing the right to respect for family life, Article 8 (art. 8) 'presupposes' the existence of a family ... However, this does not mean that all intended family life falls entirely outside its ambit. Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage" [para 62].

¹⁸ *Emonet and others v Switzerland*, Judgment of 13 December 2007, App No 39051/03.

equal - that a person, whose biological adult child is adopted by his cohabiting partner, maintain their legal rights of parenthood.

In sum, while not about the right to adopt per se, all three of the above judgments (*Keegan*, *Pini* and *Emonet*)¹⁹ entailed legal constraints, under the ECHR, on the way in which the adoption law of contracting states affects individual rights and duties. In that sense, all three judgments entail principles that govern what rights individuals have in relation to adoption; principles which the Court must normally apply in future cases (unless there is a strong reason to overturn precedent) and which bind all contracting states in their law-making and law-applying practices, irrespective of whether there has been a legal challenge before the European Court.

It is therefore somewhat misleading to claim that adoption issues are incompatible with the ECHR. For as we saw, the principles underlying the Court's case law certainly condition the way in which contracting states confer adoptive rights and duties under law. The principles tell us which aspects of adoption law and practice must conform to ECHR rights and how. These principles justify for instance why the Court found that the rights of the adoptive parents in *Pini* had been violated; the principles *protected* Ms Pini's adoptive family as much as they would have her biological family.

Now it might be argued, as the Commission observed in *Di Lazzaro*, that the ECHR 'does not oblige states to grant a person the status of adoptive parent or adopted child' and that that is the sense in which adoption issues are incompatible, *ratione materiae* with the ECHR. In other words, it might be said that it is only if contracting states choose to allow adoption, that the ECHR imposes some conditions on adoption law, conditions that stem from other individual interests that the Convention protects (like family life); and that it is only if someone *already* has the status of an adoptive parent or child that his or her application is admissible (i.e. compatible *ratione materiae* with the provisions of the ECHR).

To the extent that this argument is meant to justify a strict rule against the admissibility of applications that request the granting of adoptive status, it fails. Once we accept that adoption issues are justiciable under ECHR principle, we can imagine the Court hearing cases in which the applicant asks to be granted the status of adoptive parent. Take the case of Mr X as an example. Recall the principle found in the Court's case law, that the Convention protects not only *de jure* family relationships but also *de facto* family bonds. In the Court's own words, 'the question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the existence of close personal ties.'²⁰ This principle would apply in the case

¹⁹ There are other adoption-related cases which could have been used to make the same point, like *Odievre v France*, Judgment of 13 February 2003 App No 42326/98, but I have chosen to concentrate on the three mentioned above.

²⁰ *Emonet* (n 18) [para] 33.

of Mr X, who had looked after a child for a long time and had established a parent-child relationship albeit in the absence of a biological connection. His complaint that he was not allowed to adopt that child should have been found admissible, just like other cases where there were *de facto* family bonds. In fact it seems to me that Mr X would have a pretty strong case that he and his child both had rights to have their relationship made legal, if the following principle is true; once one develops strong and long-standing parental bonds with a non-biological child, then their relationship should be vested with all the sub-rights and duties that married couples and/or natural parents have in relation to their children; these would include for instance the legal duty of Mr X not to abandon the child and the legal right of the child to inherit Mr X.²¹

But even if we set aside the merits of Mr X's case, it is clear that if *de facto* family bonds fall within the ambit of Article 8 ECHR, then his application (and any other application which is similar in a morally relevant sense) ought to be ruled admissible, *in spite of the fact that Mr X asked to be granted the status of an adoptive father*. The example of an adult and his non-biological child who have a *de facto* family bond and seek adoption status is meant to support the following more general thesis about the applicability of the Convention to adoption issues: we cannot always know *in advance of examining the merits* of a case that challenges adoption legislation (or the lack thereof) whether some human rights principle requires contracting states to grant, withhold or respect adoptive rights. The question of whether the application 'falls within the ambit' of the Convention, cannot always be divorced from the substantive question of whether the applicant's ECHR rights have been violated. For whether or not some facts or issues fall within the ambit of a convention article (usually examined at the stage of admissibility) is in fact *shorthand* for the statement that the applicant's ECHR rights have not been violated (i.e. a merits judgment). It is an elliptical proposition about some substantive right of the ECHR.

Take for example the case of Ms *Di Lazzaro* whose application was declared incompatible *ratione materiae* with the Convention. She was a single, unmarried person, who had no established bonds with a particular child, claiming that she had the right to be eligible to adopt. The rejection of her application entails the position that contracting states may, subject to conditions,²² grant authorisation to adopt only to married or co-habiting

²¹ I will not discuss here the issue of whether the recognition of these rights and duties must be phrased in law using the vocabulary of 'adoption,' 'adoptive father/mother,' 'adoptive child' etc. The issue is the same as the debate over whether same-sex unions recognized by law must not only have the same rights and responsibilities as marriages, but also be called 'marriages.' On this see the discussion by Ronald Dworkin in his, *Is Democracy Possible Here?* (2006) Chapter 3.

²² I cannot fully state all the conditions here but they would include things like: the existence of scientific evidence that it is in the best interests of the child to be raised by two parents rather than one; that there are enough couples willing to adopt orphans or abandoned children; that no other single person, similarly situated, has been granted adoptive status, and so on and so forth.

couples and that, other things being equal, single persons have no right to be eligible to adopt under the ECHR; that in other words, whether to allow single persons to be eligible to adopt is a matter of state *policy*. But this conclusion is warranted only if no other human rights principle is applicable to the applicant's case and we can only know that if (a) we know all the pertinent facts about the case and (b) we have established that these facts do not call for the application of a human rights principle. Both these conditions raise substantive issues of ECHR rights, usually examined at the merits stage. When the Court takes the subject matter of the applicant's request (for example, to be granted – or to be eligible to be granted – adoptive status) as determinative of admissibility, it bypasses the examination of substantive issues of principle, using the nature of the applicant's request as a *proxy* for the existence of a human rights violation. Doing so saves the Court time and other resources as it may well be the case that, more often than not, using the object of the applicant's request as a proxy gets the substantive question of a human rights violation *right*. But since this may not always be the case,²³ it is wrong to think of the ambit of the ECHR rights in terms of an all-or-nothing rule because there is a risk that some cases in which there has been a human rights violation, are arbitrarily excluded from substantive examination.

The Court therefore need not - indeed should not - decide, either that all adoption-related cases fall within the ambit of Article 8 ECHR, or that they are all inadmissible. In cases, like *Di Lazzaro v Italy*, where nothing indicates the applicability of a human rights principle (and hence the possibility of a human rights violation) the Court may dismiss the application at the admissibility stage by making a (covert and speedy) judgment about the merits. But in cases like *X v Belgium* (or, as we shall see, in *Fretté*) the Court should declare the case admissible and proceed to the merits given its distinguishing features. There would be no inconsistency in doing so, whereas there might be an inconsistency in declaring a case inadmissible without examining the merits, even though it shares the same properties with cases in which there has been a human rights violation.

Fretté v France: A Judicial Paradox

French law (Articles 343-1 of the Civil Code) permits any single person over the age of twenty-three to apply for authorisation to adopt. In its 2002 Chamber judgment in *Fretté* the European Court of Human Rights held, by

²³ Imagine for example someone who complains that her right to liberty under the ECHR is violated because her state refuses to allow her to participate in spaceship missions to the moon. The Convention does not guarantee the right to fly to the moon, the Court might say, in declaring the case inadmissible. But that conclusion would be wrong if the following facts obtain: there are regular flights to the moon open by law to all, at a reasonable price, except to those who have in the past been charged with a transport-related criminal offence even if, like the imagined applicant, they have been acquitted. In that scenario, the application should, I would think, be admissible.

the narrowest of margins (four votes to three), that the decision of the French authorities to deny a single person the authorisation to adopt a child, based primarily on his sexual orientation (homosexuality), did not violate the right not to be discriminated against under Article 14 ECHR, taken in conjunction with the right to private life under Article 8 ECHR. But the four judges in the majority reached this conclusion by different routes.

Three judges concurred that there was no breach of the ECHR but on different grounds than the majority; Judge Costa (joined by judges Jungwiert and Traja) argued that Article 14 ECHR was inapplicable in this case because the facts in question (refusal of an application for authorisation to adopt) do not fall within the ambit of Article 8 ECHR (right to family and private life). On Judge Costa's view, the decision of the French authorities did not interfere with applicant's family and private life under Article 8 ECHR, because that right encompasses neither a right to adopt²⁴ nor a general right that no state decision be based on one's sexual orientation, assuming the decision is well balanced and not hostile. Judge Costa concluded that Article 14 ECHR was inapplicable and that therefore there had been no violation of the Convention, while being hesitant to decide whether refusing homosexuals the authorisation to adopt, as single parents, is discriminatory. He found it difficult to examine whether the decision of the French authorities was discriminatory *in abstracto*, i.e. without reference to a particular right in the Convention as to the enjoyment of which there has been differential treatment. Such, he noted, would be the issue facing the court under the autonomous non-discrimination clause of the new Protocol 12 ECHR, which however was not in force.

The fourth judge, P Kuris, in the majority opinion found that Article 14 was engaged because the facts did fall within the ambit of Article 8 but that the difference in treatment between homosexual and other applicants for single parent adoption was in pursuit of a legitimate aim; that of the best interests of the perspective adopted child. In deciding whether there was an objective and reasonable justification to treat homosexuals differently on the issue of single-parent adoption, and in the result, writing as the majority, he relied heavily on the fact that there is no consensus among contracting states on homosexual adoption and no consensus within the scientific community about the possible negative effects on children adopted by homosexuals. Drawing on the settled doctrine of the margin of appreciation, the majority noted that the absence of common ground between the laws of the contracting states, entails a wide margin of appreciation in assessing whether differential treatment is justified. *Fretté* was a controversial judgment for many reasons. First, the majority allowed a wide margin of appreciation on

²⁴ Costa distinguished *Fretté* from cases like *Dudgeon v United Kingdom* 4 EHRR 149 (1981) (criminalisation of homosexuality) and *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 (dismissal of homosexuals from the army) in which, on his view, there had been a direct interference with the applicants' private life.

an issue involving differential treatment on grounds that belong to ‘suspect categories,’ i.e. grounds - such as race, gender and sexual orientation - that have widely and openly been used in the not-so-distant past for institutionalised discrimination. Such deferential stance goes against the widely shared intuition that differential treatment on the basis of grounds belonging to suspect categories should normally call for *more*, rather than less, judicial scrutiny.

Second, the case raised a difficult question about the applicability of Article 14 ECHR (non-discrimination), which is a non-autonomous right of the Convention that applies only when the facts at issue constitute interference with another right of the Convention. Thirdly, the case raises questions about judicial decision-making more generally.

The Court’s decision in *Fretté* constitutes a case of a judicial paradox in that only *one* out of the seven judges endorsed the reasoning which figures in - what was handed down as - the majority judgment, namely that the differential treatment in question was not discriminatory. Only judge P. Kuris opined that Article 14 ECHR was applicable in this case *and* that the differential treatment in question was not discriminatory. As mentioned above, three judges found that there was no violation on the sole grounds that Article 14 ECHR was inapplicable. Hence they joined judge Kuris in ruling, albeit on separate grounds, that there had been no violation of the Convention; but they did not decide whether, assuming Article 14 was applicable, the right not to be discriminated against had in the present case been violated. The remaining three judges, Sir Nicolas Bratza, Fuhrmann and Tulkens, dissented on the grounds that Article 14 ECHR was applicable *and* that the difference in treatment in question amounted to discrimination.

Here is the paradox: for the Court to rule a violation of Article 14 ECHR it must satisfy itself both that Article 14 ECHR is applicable and that the differential treatment in question was discriminatory. In *Fretté*, the majority of judges (4 out of 7) thought that the right not to be discriminated against under Article 14 ECHR was applicable and the majority of those (3 out of 4) thought that the way the applicant was treated was discriminatory. Yet since there was a vote only on whether article 14 was violated, the majority of judges (4 out of 7) voted against the finding of a violation. The following table illustrates the paradox:

Table: *Fretté v France*

| Judge | Applicability of article 14 ECHR | Discrimination? | Violation of art. 14 ECHR |
|-----------|----------------------------------|-----------------|---------------------------|
| KURIS | yes | no | no |
| COSTA | no | did not decide | no |
| JUNGWIERT | no | did not decide | no |

| | | | |
|-----------------|------------|----------------|-----------|
| TRAJA | no | did not decide | no |
| BRATZA | yes | yes | yes |
| FUHRMANN | yes | yes | yes |
| TULKENS | yes | yes | yes |
| MAJORITY | YES | YES | NO |

This is an instance of a general paradox in collective decision-making which results from the fact that for any multi-judge court, there are two ways of collecting votes and reaching results. Following Sager and Kornhauser²⁵ we can call the first one the *case-by-case* (or outcome-based) protocol and the second one the *issue-by-issue* (or reason-based) protocol. Under the case-by-case protocol, first each judge reaches a decision as to whether the applicant should prevail in this case, having decided individually on the legal issues raised, and then the Court renders judgment by aggregating these decisions. By contrast, under the issue-by-issue protocol, the Court aggregates what judges decide *on each issue* first, and then renders judgment as to whether the applicant should prevail in this case by taking into account the aggregated outcomes on each issue.²⁶ Which of the two protocols is used makes a material difference when the outcome of the case turns on more than one doctrinal issue and the judges are split on how they decide on each one. When the split is marginal, different outcomes as to whether the plaintiff prevails will be reached, depending on whether votes are collected on an issue-by-issue basis or on a case-by-case basis. In these cases, the choice of protocol - other things being equal - determines whether the applicant prevails or not.

Fretté was one such case. The Court followed a case-by-case (or outcome-based) protocol which resulted in the finding of no violation of Article 14 ECHR. Had the Court used the issue-by-issue (or reason-based) protocol, taking two separate votes (one on the applicability of Article 14 ECHR and

²⁵ Lewis Kornhauser and Lawrence Sager, 'The Many as One: Integrity and Group Choice in Paradoxical Cases' 32 *Philosophy and Public Affairs* (2004) 249–276; Lewis A. Kornhauser and Lawrence G. Sager, 'The One and the Many: Adjudication in Collegial Courts' *California Law Review* (1993) 1-59; Lewis Kornhauser and Lawrence Sager, 'The Many as One: Integrity and Group Choice in Paradoxical Cases' *U of Texas Public Law & Legal Theory, Research Paper No 55* (August 15, 2003), available at SSRN: <http://ssrn.com/abstract=441466>. For a critical response see Christian List and Philip Pettit, 'On the Many as One: A Reply to Kornhauser and Sager' 33 *Philosophy and Public Affairs* (2005) 377-390. One of the examples Kornhauser and Sager use is the case of *Palsgraf v Long Island Railroad Co* 162 NE 99 (NY 1928) which raised the following two issues: first whether the defendant's negligence caused the plaintiff's injury and second whether the defendant had a duty to take care.

²⁶ Looking at the table above, the difference between the two protocols can also be described as follows: under the case-by-case protocol, the final aggregation is vertical (bottom row) whereas under the issue-by-issue protocol, the final aggregation is horizontal (third column). The vertical aggregation results in the applicant losing because the majority of outcome decisions was negative whereas the horizontal aggregation results in the applicant prevailing because the majority decisions on the two issues were both affirmative.

one on whether differential treatment was discriminatory)²⁷ then a different outcome would have been possible. Assuming the concurring judges (Costa, Jungwiert and Traja) would still refuse - as they actually did - to vote on whether the differential treatment was discriminatory, then the issue-by-issue aggregate outcomes would both come out affirmative, resulting in the finding of a violation. If, on the other hand, the concurring judges decided to vote on the second issue (as we may well assume that they would, knowing that their vote could make a difference),²⁸ then it would simply take one vote to tip the balance in favour of the finding of discrimination (and hence of a violation of Article 14 ECHR). Since the three concurring judges suspended judgment on the issue of discrimination then this second possibility should remain open.

This is not the place to discuss which protocol provides the best solution to the paradoxes of multi-judge court decision-making process. Suffices to say that, assuming everything else about the facts of the case and the mental states of the judges remained the same, a violation of Article 14 ECHR could have been found in *Fretté*, if simply a different protocol had been used to collect votes. It is moreover puzzling that the majority judgment incorporated the reasoning of the minority (P Kuris) as opposed to the majority (Costa, Jungwiert and Traja) of those who voted against the ruling of a violation of Article 14 ECHR. If the Court had taken the case-by-case (outcome based) protocol to its logical end, it should have presented Costa's (joined by Jungwiert and Traja) concurring opinion as the majority judgment. The justification for not doing so cannot lie in the fact that these three judges were outvoted on the issue of the applicability of Article 14 ECHR, for this would only have been relevant under the issue-by-issue protocol which was not the one that the Court followed.

In sum, we might want to resist the claim that *Fretté* stood as a precedent that the refusal to grant the applicant an authorisation for adoption, on the basis of his sexual orientation, is non-discriminatory under the ECHR. First, the result could have been different had the Court followed an issue-by-issue protocol, taking two separate votes, one on the applicability of Article 14 and one on whether the differential treatment was discriminatory. Second, even if we grant that the Court rightly followed an outcome-based proposal, it is plausible to argue that the majority judgment was grounded on the finding that Article 14 was inapplicable (which is what the majority of

²⁷ Given what was said in the previous section about the nature of questions about the 'applicability' of convention rights (namely that they are cannot be divorced from the substantive question of whether there has been a violation), I am inclined to think that the first issue could not have been the mere 'applicability' of Article 14 ECHR but a more substantive one, to do with the normative conditions for the violation of the right not to be discriminated against.

²⁸ We may assume that one of the reasons why Costa, Jungwiert and Traja did not wish to decide, in their dissenting opinion, whether refusal of an authorisation to adopt was discriminatory, was that they knew that their decision would not affect the outcome given that there was no separate vote on the question of discrimination.

those who voted against the finding of a violation held) rather than on the finding that the differential treatment in question was not discriminatory. Finally, it is worth highlighting that the three judges who voted that there was no violation of Article 14 ECHR did so on the basis that the right to apply for authorisation to adopt does not fall within the ambit of Article 8 ECHR, refusing to examine the issue of discrimination. As we saw in the previous section, treating the question of ambit as precluding the examination of whether some human rights principle has been violated is a formal approach, given that the question of applicability of a convention article cannot always be divorced from the issue of whether a substantive ECHR right has been violated. Judges Costa, Jungwiert and Traja could have moved on to decide whether there had been a breach of the non-discrimination clause even though they thought that applications for authorization to adopt do not fall within the ambit of Article 8 ECHR.²⁹

E.B. v France: Over-inclusion and Suspect Grounds

In the case of *E.B. v France*, which was decided by the Grand Chamber in January 2008, the applicant, Ms E.B., a lesbian, was refused authorization to adopt by the French authorities. Unlike *Frette*, the Court took a separate vote on whether the case falls within the ambit of Article 8 ECHR and held unanimously that the application was admissible. When it turned to the merits, the Court found that the applicant had been refused authorization to adopt on two grounds. First, because of the lack of a paternal referent in the household of the applicant and second, because of the attitude of the applicant's homosexual partner who expressed no commitment to the adoption plans. Although the European Court held that these two grounds are legitimate in principle, it found that the first ground was used, in the circumstances of the case, as a pretext and that it was the applicant's homosexuality that served, implicitly, as a decisive factor leading to the decision of the French authorities to refuse her authorization to adopt.³⁰ The Court concluded that the applicant suffered a difference in treatment on the basis of her sexual orientation and went on to examine whether the difference in treatment had an objective and reasonable justification.

²⁹ It may be suggested that, contrary to the actual beliefs of Judges Costa, Jungwiert and Traja, their vote against the ruling of the violation must be interpreted as a vote that excluding homosexuals from authorization to adopt does not constitute discrimination. This is because the *ratio decidendi* of any judgment consists in the principle that *in fact* justifies the judicial outcome, as opposed to the one that judges thought justifies the outcome (I am indebted to discussions with Nicos Stavropoulos on this point). In *Frette* however, it appears that the outcome is over-determined, if we assume that two different principles can equally justify it (one about whether adoption falls within the ambit of Article 8 ECHR and one about whether denying homosexuals authorization to adopt amounts to discrimination).

³⁰ The Court argued that it 'contaminated' the decision to reject the applicant, a decision which was otherwise based on reasonable and objective grounds. Some judges found the contamination theory objectionable. See the dissenting opinions of judge Zupancic and Loucaides.

Contrary to the majority's reasoning in *Fretté* which recognised a wide margin of appreciation, the Court noted that 'where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8.'³¹ Given that no such reasons were put forward by the French government and that the denial of the applicant's authorization to adopt was based on considerations regarding the applicant's sexual orientation, the Court held, by ten votes to seven, that there was a violation of Article 14 ECHR (non-discrimination) in conjunction with Article 8 ECHR.

E.B. v France is a landmark judgment for a variety of reasons; not least because the Court overturned (though not explicitly so) the much-criticized judgment of *Fretté*. First, it reaffirms a fundamental liberal-egalitarian principle that should govern human rights adjudication, namely that no one should suffer a disadvantage or be deprived of a liberty or opportunity because of one's choice of lifestyle, or because others think of him or her as less than an equal.³²

Moreover, the judgment indicates that the European Court may be retreating from its arguably over-heavy reliance on the use of the margin of appreciation and the idea of *consensus*. I have elsewhere criticised the margin of appreciation on the grounds that it is incompatible with liberal principles underlying the Convention.³³ Whether or not there is consensus among contracting states is an irrelevant consideration that, when taken into account, might well give effect to biased and prejudiced considerations for restricting liberty. Indeed, in a number of cases in the past the European Court has upheld moralistic measures that restrict liberty in order to promote public morals, on the grounds that there is no uniform conception of public morals in Europe. But in *E.B.* the European Court made no reference to the margin of appreciation and to the lack of consensus among contracting states on whether homosexuals should be given authorization to adopt, as it had done in *Fretté*.³⁴ The lack of reference to the margin of appreciation in *E.B.* is therefore a positive development that should be welcomed and that will hopefully be applied by the Court across the board in the future.

Second, it shows how the egalitarian principles underlying the Convention are to be given effect in differences of treatment based on 'suspect grounds' where the likelihood of discrimination is high, given long-standing societal prejudice; according to the Court's reasoning the burden should be on the state to provide particularly *weighty* reasons that call for differential treatment. The Court's position is wholly justified for it captures

³¹ *E.B v France* (n 8) [para] 91.

³² I have argued at length in favor of this principle in George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007) Chapters 5 and 6.

³³ *Ibid.* at 110-9.

³⁴ Or at least as the judge who wrote the majority judgment in *Frette* did.

a fundamental egalitarian principle that should govern the test of proportionality in human rights review; measures that secure *marginal* or *speculative* gains to the interests (well-being) of others cannot justify difference in treatment based on 'suspect' grounds (sex, sexual orientation, race, religion etc) in the allocation of fundamental liberties and opportunities. Such measures are disproportionate and we have a right against the government not to be subjected to them. For example, contrary to the Court's reasoning in *Fretté*, the lack of consensus among the scientific community about the possible negative effects on adopted children, means that the benefits to the well-being of children are speculative and that lack of evidence should therefore count in favor of, rather than against, allowing homosexuals to adopt.

What if, however, there was scientific evidence to the effect that children raised by homosexuals are more likely to suffer harm in their fundamental interests than children raised by heterosexuals?

It is first worth noting that the burden of responsibility the state carries when it positively assumes the role of providing a home and a family to a parentless child might be higher than when it monitors the well-being of a child who is being raised by his biological parents. In the former case, the state assumes the positive role of making a fundamental decision about the welfare of a child and his long-term interests; it is, we might say, the sole acting agent. In the latter case however, the state is monitoring the performance of other agents (the parents) who have the primary responsibility for the welfare of a child and (we may safely assume) have proper motivation to do so, and who have already established emotional bonds with the child that are worthy of respect.³⁵ This explains why there are many people, of the kind we are all familiar with, who would be ineligible as adoptive parents for lack of appropriate parental skills or commitment, yet who nonetheless are perfectly entitled to have children and retain legal responsibility of them. In other words, there is nothing inconsistent in the requirement that adoptive parents be better than the average biological parent and in recognizing that biological parents have a right not to be deprived of their parental responsibility save in order to prevent significant harm to children.³⁶

It may therefore be suggested that this point should weigh in favor of not taking any chances in authorizing adoptions with groups that, on average, will provide a poor home for adoptive children. But the suggestion

³⁵ I shall not discuss here the suggestion that the state could or should assume exclusively the responsibility for the welfare of all children upon birth, but it seems to me that it ignores various morally relevant biological facts about human psychology, as well as issues of distributive justice in the allocation of the cost of state child-raising. See the very interesting discussion by Veronique Munoz-Dardé, in 'John Rawls, Justice in and Justice of the Family' *The Philosophical Quarterly* Vol 48 No 192 (1998) 335-352; 'Is the family to be abolished then?' *Proceedings of the Aristotelian Society* Vol XCIX part 1 (1999).

³⁶ Section 31 (2) of the UK Children Act 1989.

must fail. We must be very careful when we construct a hypothetical in which there is scientific evidence to the effect that children raised by homosexuals are more likely to suffer harm in their fundamental interests than children raised by heterosexuals. For it matters crucially *why* there is a statistical correlation between the child-raiser's sexual orientation on one hand and harm to the fundamental interests of the child on the other. Consider three possible explanations of such a (hypothetical) correlation; first, that it is because the adoptive child suffers psychologically from societal bias and prejudice, being stigmatized; second that it is because homosexual relationships are more likely to be unstable (which in turn affects children), not by nature, but due to social prejudice and institutional inequalities and third (what seems to me the most unlikely of all) that due to biological factors, homosexuals are by nature less likely to feel motivated to show proper care and attention to their children.

Though we may assume that the first two 'scientific' explanations are plausible on the hypothetical under consideration (i.e. an alleged statistical correlation between sexual orientation and below-average protection of the child's well-being), they would fail to justify the practice of a blanket ban on all homosexuals from authorization to adopt (as in *Frette*). This would be so for two reasons. First, because such a ban would be *over-inclusive*; it would cover homosexuals who are very good parent material, whose adoptive children need suffer no stigma or prejudice (say because they live in a very liberal societal environment) and whose condition need not be subject to the institutional and social injustices that might adversely affect couple stability (say because the couple is particularly well-off and well-educated). The over-inclusiveness obtains as a result of the fact that sexual orientation is not the *cause* of possible harm to children but simply an epistemic tool for predicting such harm.³⁷

But over-inclusiveness, by itself, would not be a sufficient condition for a measure to be deemed discriminatory as we do not object to it in other contexts. We do not, for example, complain that the speed limit is over-inclusive because it prohibits very skilled drivers, like Lewis Hamilton, from driving at a speed at which they risk causing no harm to others. Nor would we find it objectionable if the state imposed a blanket ban on everyone over the age of eighty to adopt young children. The difference in gay and lesbian adoption, the reason why over-inclusiveness is an issue, lies in the knowledge of the fact that sexual orientation is very likely to be - and has

³⁷ One might think that this is not the case in the third possible explanation of the hypothetical above, namely that homosexuals might genetically lack the motivation and commitment to raise and care for children. If such a highly implausible explanation of the hypothetical correlation were true it would still fail to justify a blanket ban on homosexual adoption because we would also have to establish a further premise, namely that the social environment can have no positive effect on the alleged genetic trait. Given what we know about genes and the way they interact with the environment, such a premise would be extremely difficult to establish.

historically been - used, either directly or indirectly, as a basis for discrimination (*a suspect ground*).³⁸

In sum, when measures are over-inclusive on the basis of suspect grounds, States must find alternative means of ensuring that suitable applicants are not penalised for the mere existence of a statistical correlation between allowing people with a particular property (e.g. sex, sexual orientation, race, religion) to enjoy a liberty (e.g. authorised to adopt) on one hand and damage to the pursuit of a legitimate aim (security, welfare of children, economic stability etc) on the other. The Court did well to apply a kind of strict scrutiny test, placing the burden on the state to show why differential treatment on the basis of suspect grounds is necessary. This test should remain strict even when the state supplies, in good faith, weighty reasons in favor of differential treatment in the allocation of a benefit, which however has an over-inclusive effect. In the case of a state, like France, which has chosen³⁹ to confer upon single persons the benefit of being eligible to adopt, adoption authorities must be required to look at each individual application separately rather than use sexual orientation as a *proxy* for suitability which will inevitably result in the exclusion of suitable applicants. Other things being equal, homosexuals who have all the qualities that are necessary for single persons to become adoptive parents have a *right* under the ECHR to be authorised to adopt.

Conclusion

In this article, I presented a survey of the legal issues that adoption-related cases have raised in the case law of the ECHR. The position of the European Court has shifted gradually from a strict rule against the admissibility of adoption-related cases to a great willingness to scrutinise adoption laws and practice, particularly in relation to discrimination. It has been argued that this shift is justified on the basis of a general argument about the ambit of the ECHR rights. Propositions about the ambit of convention rights are elliptical statements about the merits of each

³⁸ Over-inclusiveness and suspect grounds of differential treatment are necessary but may not be sufficient to establish that the differential treatment was discriminatory. One suggestion might be to add a further condition, namely that the treatment in question affects a fundamental human interest. Consider the following example (put to me by Stuart Lakin): suppose the state refuses to accept blood donations from homosexuals because they are twice more likely to be HIV positive or have other blood transmitted diseases. We might think differently of this case because unlike creating a family, giving blood is not a fundamental interest. I am not convinced however that this suggestion is correct even though it seems to be in the right neighbourhood. A related issue, which I think does condition whether the difference is discriminatory, is whether the (financial) cost of avoiding over-inclusion is too high compared to the importance of the interest involved. It would not for example be discriminatory to refuse blood donations from homosexuals if the process of ensuring that their blood is not contaminated (or the process of decontaminating it) cost the NHS thousands of pounds more than if it only accepted donations from heterosexuals.

³⁹ I shall not discuss in this paper whether the refusal to allow single persons to adopt might be deemed to be a case of indirect discrimination against homosexuals.

application which the Court must not make too quickly as they may well raise substantive issues of human rights principles that have already been recognised by the Court. There are aspects of the adoption laws and practices of contracting states that raise important issues of principle regarding family life, which the Court has already decided in its case law. Principled consistency with established case law requires the Court to extend the application of those principles to adoption cases. One such principle is the requirement to give legal recognition to *de facto* family bonds, including bonds developed between non-biological parents and their children.

In relation to discrimination and adoption, the European Court's controversial judgment in *Fretté* in 2002, stood as authority for the claim that refusing a single person the authorisation to adopt a child, based primarily on his sexual orientation (homosexuality), does not violate the right not to be discriminated against under Article 14 ECHR. I have challenged whether this is in fact what the European Court decided in *Fretté*. The case constitutes an example of a judicial paradox, in that only one judge endorsed the majority reasoning in its entirety and that had the Court followed a different way of voting, it could have reached a different outcome. In my view, *Fretté* should be interpreted to have decided against the applicant on the ground that adoption issues fall outside the ambit of Article 8 ECHR, and not the ground that the treatment in question was not discriminatory. What was presented as the majority judgment in *Fretté*, not only failed to attract the support of the majority of the European Court judges, it also violated fundamental egalitarian principles of human rights. When the Court re-examined the issue six years later, in the recent *E.B.* it was anxious to assert the view that differential treatment of single-person applications for authorisation to adopt, on the basis of the applicant's sexual orientation, is discriminatory. But what it in fact affirmed, reversing *Fretté*, was that adoption issues fall within the ambit of Article 8 ECHR, for the purposes of examining whether there has been discrimination under Article 14 ECHR. This finding is particularly welcomed and the Court should extend this principle to other cases under Article 8 ECHR, not necessarily alleging discrimination.

Still, the ruling of a violation in *E.B.* is an important point of principle which the Court did very well to emphasise and which is defended admirably in the judgment, without any reference to states' moral consensus on the issue or to speculations about scientific data. The Court correctly placed the burden on the state to provide particularly *weighty* reasons that call for differential treatment and did not allow any margin of appreciation in the absence of concrete evidence. This approach is fully justified by the moral values of human rights which prohibit differential treatment based on suspect grounds (such as race, religion, gender, sexual orientation), for the sake of speculative or marginal gains to the interests of others. Unless states

show exactly how differential treatment leads to the protection of fundamental and weightier interests that cannot otherwise be served, then the applicant alleging discrimination should prevail.

Taking a step further, this paper discussed what kind of evidence *could* be produced to justify a *blanket* exclusion of homosexual and lesbian applicants from authorisation to adopt. I argued that the kind of evidence that could be produced would still fail to justify a blanket ban, because the ban would be *over-inclusive*; it would exclude applicants that are perfectly suitable to adopt, using their sexual orientation as an arbitrary criterion. The over-inclusion would offend the egalitarian principles that underpin the ECHR. The rationale of *E.B.* therefore supports the conclusion that contracting states which allow single persons to adopt and which practice a blanket exclusion of homosexual and lesbian applicants, are in breach of the ECHR, *no matter what evidence they can produce in defense of such practice.*

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Adjudication of Socio-Economic Rights: One Size Does Not Fit All

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Any discussion of judicial adjudication of socio-economic rights must address three broad questions; (1) on what basis can judges pronounce on socio-economic rights (legitimacy), (2) how such adjudication should take place (workability) and most important in the real world, (3) how well do comparative adjudicative models secure such rights (efficacy). This essay will look first, in Part I, at arguments from legitimacy relating to socio-economic rights and the justiciability of such rights (question 1). Part II will then explore the practical viability of socio-economic rights adjudication - encompassing questions 2 and 3 - by surveying the real-life experience of a number of developed economies (Britain, Ireland and the United States) and of two developing economies, India and South Africa.

It will be argued that whilst in every case a satisfactory answer has to be given to all three of these fundamental questions, the treatment of socio-economic claims in a democratic society is not a case of one size fits all. The most appropriate model in any constitution is driven by contextual factors, of which three would seem particularly important; (i) the level of resources available for welfare provision relative to the needs of the population, (ii) the political consensus on wealth redistribution and (iii) the degree of legitimacy popularly accorded to judicial rights adjudication as opposed to legislative and executive action.

Although the South African and Indian populations suffer from some of the same problems with regard to poverty and are likely to display strong popular support for welfare transfers, in the case of India, the legitimacy of the legislature and executive has been tarnished by corruption and bureaucratic inefficiency¹ and this is likely to have helped shift the normative separation of powers 'line'² away from deference to the administration in favour of judicial activism.³ It is contended that, in the absence of a formal

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¹ See V. Sripathi, 'Towards Fifty Years of Constitutional and Fundamental Rights in India: Looking Back to See Ahead 1950-2000' [1998] 14 *Am Univ Int'l L Rev* 413, 450. See also J. Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *Am J Comp L* 495, 515.

² See Cassels (n 1) 506-13 (India) and *Minister of Health v Treatment Action Campaign* (2002) (5) SA 721 para [98] (South Africa).

³ In South Africa, on the other hand, Kate O'Regan (a judge of the Constitutional Court) has pointed out that the new democratic settlement 'renders a quality of fundamental legitimacy to

democratic mandate for welfare entitlement, judicial intervention to sustain welfare rights will only be seen as legitimate where it reflects shared popular values which have been disappointed by the formal democratic process (for example, through corruption or extreme inefficiency).⁴

In practical terms it will be concluded that 'rich' western states, with well established welfare systems and popular confidence in majoritarian democracy, should combine a minimum core approach with a reasonableness approach to welfare entitlements, even if they do not expressly subscribe to enforceable enumerated socio-economic rights.⁵ In contrast, where there is large-scale poverty, it is argued that the pure reasonableness approach taken by the South African constitutional court is more likely to satisfy questions (2) and (3) than the minimum core advocated by the UN Committee on Social, Economic and Cultural Rights⁶ and as attempted by the Indian courts.

Part I: Legitimacy and Justiciability - Theoretical Background

Legitimacy: Rights as Consensus Values

Rights theory postulates that there are certain foundational values which must apply to all democracies; Dworkin justifies the entrenchment of civil and political rights against possible encroachment by a majoritarian government as a priori necessary for the very existence of a democracy (which he defines as government chosen through a process where each citizen has an equal ability to participate in the choice).⁷ However, as Schneider points out⁸ further justification is required before a welfare system can be axiomatically included in the canon of fundamental human rights norms. Dworkin argues that basic standards of subsistence are as essential to people's ability to participate in democracy on an equal basis as first tier rights.⁹ On the other hand others have argued that relying on Social

legislative and executive action which was absent in the past;' K. O'Regan, 'Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law' cited in C. Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights' (2006) 22 *SALJ* 264, 270.

⁴ See, for example, *The Economist* (February 24, 2007) 84 suggesting that South Africa's local governments are failing to deploy resources to improve welfare as efficiently as might be hoped.

⁵ None of the four Western countries studied in this essay do so (save for Ireland's right to primary education, in the Irish Constitution 1937 Article 42.4. The latter does, however, specify statutory entitlements to welfare provision in detailed legislation and may also, as discussed below, in practice derive certain unenumerated welfare rights from common law or civil and political rights.

⁶ See Committee on Economic Social and Cultural Rights (CESCR) 'General Comment 13 - The Right to Education' (1999) UN Doc EC. 12/1999/10.

⁷ See C Schneider, 'The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy' (2000) *UCL Jurisprudence Review* 101 for a lucid summary.

⁸ *Schneider* (n 7) 110.

⁹ See the discussion of Rawls' Reich's and Michelman's theories of welfare rights, and the history of US welfare adjudication in W. Forbath, *Social Rights, Courts and Constitutional Democracy - Poverty*

Contract theory to provide legitimacy for law and rights inevitably makes inclusion of socio-economic rights more problematic.¹⁰ There is, it is said, no incentive to extend social protection to those, such as the elderly or severely disabled, who cannot contribute to the general well-being of society. A counter-argument is that the social contract can be regarded as a form of social insurance, whereby participants can rationally insure themselves - and their dependents, born and unborn - as much against old age and disability as against the threats of external violence or internal lawlessness which concerned Rousseau. However, in contemporary academic and judicial writing¹¹ it appears that the dominant thread of justification for basic welfare entitlements is the normative premise that a just society should respect and sustain human dignity of every member. Albie Sachs encapsulates this position:

‘...The very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being. It is not the duty of courts to side with one section of society against another...But there is every reason why it should be incumbent on the courts to see to it that basic respect for the dignity of every person is maintained at all times. That is why we have fundamental rights.’¹²

Whichever political or moral theory is advanced to justify rights, it remains essential in a practical sense (to avoid popular insurrection or non-enforcement by the executive)¹³ that the governed should view any proposed rights as a matter of *consensus*. Fundamental (and tautologous) to

and *Welfare Rights in the United States* [2006].

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=845924> especially 20-40. See also G. Van Beuren, ‘Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act’ (2002) *PL* 464.

¹⁰ See the entries on Contractarianism and Contemporary Approaches to the Social Contract in the Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries> 2, 4-5.

¹¹ See C. O’Cinneide, ‘Socio-Economic Entitlements and the UK Rights Framework’ 18-19 Irish Human Rights Commission Conference (10 December 2005); *Van Beuren* (n 9) 1; *Forbath* (n 9) 32; *R (Limbuella) v Home Secretary* (2005) UKHL 56; [2006] 1 AC 396 (HL) para [54] (Lord Hope), para [76] (Baroness Hale: commenting that Articles 2 and 3 are the most important of the ECHR rights, reflecting ‘the fundamental values of a decent society, which respects the dignity of each individual human being’); numerous cases where the Indian Supreme Court based its extensive intervention to enforce human rights standards on citizens rights to a dignified life, summarised in H. Suresh, ‘Socio-Economic Rights and the Supreme Court’ <<http://www.ambedkar.net>, 7; *Khosa v Minister for Social Development* (2004) (6) SA 505 (CC) para [40], [80], [82].

¹² A Sachs ‘The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case’ 140 in Jones, Peris and Kristian Stokke (eds), *Democratising Development: The politics of socio-economic rights in South Africa* (Martinus Nijhoff Leiden 2005).

¹³ As happened following the imposition by the US Supreme Court of desegregation on schools in the southern states in *Brown v Board of Education of Topeka* (1954) 347 US 483. See comment in F. Cross, ‘The Error of Positive Rights’ (2001) 48 *UCLA L Rev* 857, 892.

the concept of democracy is that the legitimate authority of laws (including rights) derive from the consent of the governed.¹⁴ As Habermas argues, ‘democracy will only work if the addressees of laws feel like the authors of those laws.’¹⁵ This sense of popular allegiance to rights may be achieved in a number of ways, clearly including the adoption by a legitimate government or legislature with a democratic mandate (as for example the UK’s incorporation of the ECHR by the Human Rights Act 1998, or in ordinary statutory rights). Alternatively, a bill of constitutional rights may be derived through a Habermas-style process of public debate,¹⁶ in which all citizens feel they have been able to participate, or as the embodiment of a mass movement to a new, transformative constitutional settlement.¹⁷ Thus Pieterse concludes:

‘...It is often argued that judges should stray onto ‘political’ terrain only if they proceed on a moral premise shared by society...The clearer such a shared articulation of justice and the ‘common good,’ the less problematic becomes judicial review in the social terrain...In South Africa today, such a shared moral/political premise is embodied by the 1996 Constitution.’¹⁸

Justiciability of Socio-Economic Rights

It is however, equally important to remember that the opposite is also true. Consensus, and hence legitimacy, will not be achieved if the postulated rights are seen as created by judicial fiat, or as going substantially beyond the shared values of the community. Unelected judges may then be accused of imposing their own, un-mandated, political views¹⁹ and usurping the role of the elected branches of government, a classic breach of the separation of powers. The US Supreme Court’s striking down of employment protection regulations enacted by a democratic state legislature as an unconstitutional breach of freedom of contract, in *Lochner v New York*,²⁰ serves as a reminder of the dangers of assertive review by judges who may pursue their own counter-democratic political agenda.

¹⁴ *Stanford Encyclopedia* (n 10).

¹⁵ *Schneider* (n 7) 109.

¹⁶ C. O’Cinneide, ‘What a Bill of Rights Can and Cannot Achieve’ Northern Ireland Human Rights Commission Review (2006) Issue 2, 5 regarding a proposed Bill of Rights for Northern Ireland.

¹⁷ In Ackerman, ‘The Rise of World Constitutionalism’ (1997) *Virginia Law Review*. B. Ackerman gives examples of post-Independence India, post-apartheid South Africa, post-communist Eastern Europe and post-Nazi Germany. See also *Sripati* (n 1) 471-72.

¹⁸ M. Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *SAJHR* 383, 411-12.

¹⁹ *Sripati* (n 1) 451 states that the Court in India now plays a political role with unclear legislative and adjudicative functions. *Cassels* (n 1) 497-98. The public interest litigation jurisprudence of the Indian Supreme Court has been ‘informed by strong socio-political views and commitments.’

²⁰ *Lochner v New York* 198 (1905) US 45.

Thus, even if certain socio-economic rights are identified, it is necessary to look at how judges can legitimately decide on the *content* of the right; to whom welfare provisions extend and at what levels. This is the point at which many opponents of socio-economic rights argue that they are non-justiciable; unlike most fundamental civil and political norms, in the realm of socio-economic rights there is no firm popular consensus on welfare transfers. Thus there is no objective way for a judge to decide on the level of an individual's welfare entitlement, or the size or allocation of the public purse. These are inherently *political* decisions²¹ and must therefore be determined by the elected branches of government who are accountable to the electorate for the decisions they reach. This is the separation of powers approach which will be considered fully below in relation to the UK pre-ECHR. It is further pointed out that broad socio-economic rights (primarily referring to housing and subsistence, healthcare, education and environment) have the potential to impose *heavy financial costs* on society, involving enforced sharing of resources to a degree that civil and political rights do not.²² Many socio-economic problems, particularly those involving resource rationing²³ and environmental standards,²⁴ may in addition be described as *polycentric* in that they involve situations with complex and often unforeseeable repercussions on numerous parties. It has been powerfully argued²⁵ that traditional adversarial *court proceedings are practically unsuited* to determining such disputes and that administrative forums, such as public enquires and ombudsmen, or the parliamentary process, represent a better way to obtain the evidence needed and the representation of a wide number of interests. This argument may be rebutted by those who say that the processes of the court itself should be adapted to this form of litigation; through adopting a more inquisitorial judicial approach, as for example in the administrative law systems of France and Germany, and relaxing locus standi rules for public interest litigation. These adaptations find their supreme example in the public interest litigation (PIL) practices of the Indian Supreme Court, discussed below.

In most Western democracies²⁶ - with a high perceived legitimacy for the democratic electoral process and mature welfare states - socio-economic

²¹ *R. v Environment Secretary, Ex p. Hammersmith and Fulham LBC* [1991] AC 521 (HL) (Lord Nicholls) 593.

²² See A. Sachs, 'The Judicial Enforcement of Socio-Economic Rights' (2003) *Current Legal Problems* 579.

²³ *R v Cambridge Health Authority ex p B* [1995] 2 All ER 129, 137 discussed in Section 2 below.

²⁴ *Hatton v UK* App No 36022/97 (2001) the ECtHR gave a wide margin of appreciation to the British government to determine its own policy on aircraft noise.

²⁵ Originally by Lon Fuller: discussed in J. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *CLJ* 367.

²⁶ Including the UK, Canada, Ireland and the US, but not, however, Finland, which has followed the minimum core approach of the UN Committee on Economic, Social and Cultural Rights in including a minimum entitlement to care and subsistence in its Constitution: see Section 15 A of the Constitution Act of Finland 1995.

entitlements have been largely kept within the ambit of statutory regulation, as opposed to being enshrined as broadly enforceable rights in entrenched constitutions. This has the advantages of flexibility in response to changing circumstances and public values,²⁷ electoral accountability for measures taken, and allowing a high degree of specificity as to the scope of rights rather than leaving the content of rights to be determined by judges on a case by case basis. The arguments for this position were extensively canvassed prior to the drafting of the Irish Constitution²⁸ and led to socio-economic interests (generally)²⁹ being classed as non-justiciable Directive Principles of Social Policy.³⁰ The stated objections to broadly enforceable socio-economic rights as opposed to enforceable positive rights - which remain powerful ones today - included uncertainty, the problem of unanticipated consequences (the rights might 'recoil like a boomerang on the Government of some future day in circumstances not anticipated by the originators') and the serious danger of disaffection amongst the community if the state's implementation of socio-economic rights were subsequently to fall short of the promise held up by the Constitution.

Part II: Workability and Efficacy - Comparative Systems of Socio-Economic Rights Adjudication

This section will look at four variants of socio-economic rights protection in developed and developing economies; (i) the purist position in a number of western democratic welfare states with non-entrenched, non-statutory socio-economic rights including Ireland and the UK prior to the ECHR where the separation of powers doctrine is strongly invoked to confine determination of welfare entitlements to the executive branches of government; (ii) the moderating influence of the ECHR and increased judicial recognition of common law rights with regard to socio-economic rights in the UK (along with a comparison of Canadian court practice); (iii) the approach taken in India, where theoretically non-justiciable socio-economic rights in the form of Directive Principles have been judicially transformed into actionable rights and (iv) the South African Constitution - an instructive modern example of entrenched socio-economic rights.

²⁷ In King, 'Constitutional Rights and Social Welfare: A Comment on the Canadian Chaoulli Health Care Decision' (2006) 69 *MLR* 631, 641-43 J. King emphasises the need for courts to take the need for administrative flexibility seriously in framing remedies for breaches of welfare rights.

²⁸ See Memorandum by J. McElligott (Secretary of the Department of Finance March 23 1937) summarised in G Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 *Irish Jurist* 174, 176-9. The Irish approach was followed in the Indian Constitution 1950 (Part IV Directive Principles of State Policy) drafted just over a decade later see *Ibid.* at 179.

²⁹ *Sripati and Cassels* (n 1).

³⁰ Article 45 of the Irish Constitution 1937.

Western Welfare States without a Charter of Socio-Economic Rights

i) United Kingdom (pre ECHR)

The view that socio-economic rights involve ‘difficult and agonising judgments’ on the allocation of a limited budget between competing priorities thereby being purely a matter for the administrative authority to determine and are inherently non justiciable was exemplified in *R v Cambridge Health Authority ex parte B*³¹ (concerning whether a health authority should be ordered to fund expensive and unproven cancer treatment). In a classic application of the separation of powers, Sir Thomas Bingham MR was clear that the court’s role was not to be ‘arbiters as to the merits of cases of this kind’ (i.e. polycentric cases involving public spending priorities). This would involve straying too far from the court’s proper constitutional sphere which was to confine themselves to the lawfulness of decisions (applying the highly deferential standard of *Wednesbury* unreasonableness to the exercise of executive discretion). Bingham MR consequently did not expect the health authority to produce evidence justifying its spending priorities. This purist position has, however, arguably been moderated to some extent by the incorporation of the ECHR into UK law, and an increased judicial willingness to identify certain common law rights (as discussed below).

Ireland

The separation of powers theory was endorsed even more explicitly by Costello J in the Irish case of *O’Reilly v Limerick*³² (approved by the Irish Supreme Court in *Sinnott v Minister for Education*).³³ Travelling groups had argued that the state’s failure to provide them with sites with basic sanitary and water services amounted to a breach of an unenumerated constitutional right to ‘a certain minimum standard of basic material conditions to foster and protect his or her dignity and freedom as a human being.’³⁴ In declining to adjudicate on the alleged constitutional right to serviced sites, Costello J invoked both of the classic reasons for deferring³⁵ to the local authority’s housing policy; (i) the constitutional principle that only the elected branches of government could legitimately decide on the allocation of public funds, and (ii) the fact that the courts did not have the institutional capacity to assess the competing claims on resources and their wider implications. Costello J’s reasoning was subsequently reflected in the views of the Constitution Review Group³⁶ set up in 1996 to consider afresh whether

³¹ *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898. This case, and other UK cases relating to rationing of welfare resources, are helpfully reviewed by E. Palmer, ‘Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law’ (2000) *OJLS* 63.

³² *O’Reilly v Limerick Corporation* [1989] ILRM 81.

³³ *Sinnott v Minister for Education* SC [2001] 2 IR 545 (Hardiman J).

³⁴ *O’Reilly* (n 32) 192.

³⁵ See J. Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ (2003) *PL* 592.

³⁶ Report of the Constitution Review Group (Dublin 1996).

enforceable socio-economic rights should be entrenched in the Irish Constitution. The Group concluded that:

‘...The main reason ...why the Constitution should not confer personal rights to freedom from poverty, or to other specific economic or social entitlements, is that these are essentially political which, in a democracy, it should be [for] the representatives of the elected representatives of the people to address and determine.’³⁷

In this context, Hogan³⁸ finds that the Directive Principles of Social Policy of the Irish Constitution have thus been largely worthless in terms of delivering social progress.

The United States

The historical trajectory of welfare rights adjudication in the US clearly illustrates the close tie between prevailing political values and the fate of claims to welfare entitlement. Summarising his article on this theme, Forbath observes that:

‘...The rise and fall of constitutional welfare rights in the US Supreme Court seems to confirm the old American adage that the Court *follows the election returns*. As the national polity shifted rightward, so did the constitutional outlook of newly appointed justices [nominated by the President and confirmed by Congress], and so did the court’s welfare jurisprudence.’³⁹

Thus Supreme Court decisions ‘historically, have seldom strayed far from what was politically acceptable.’⁴⁰ Certainly during the Democratic presidencies of the 1960s, the Warren Court came close to recognising a welfare right of the poor, as advocated by Professor Charles Reich.⁴¹ This stance duly changed after the newly elected Republican President Nixon appointed Warren Burger as the new Chief Justice, and after him three more conservative judges. In *Dandridge v Williams*⁴² the court gave the Maryland legislature a wide margin of discretion to impose a ceiling on child benefit for large families,⁴³ stating that ‘the intractable economic, social and even

³⁷ *Constitutional Review Group Report* (n 36) 235.

³⁸ Hogan (n 28).

³⁹ Forbath (n 9) .

⁴⁰ G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 340 (2nd edn American Politics and Political Economy Series 2003) also cited in *Cross* (n 13) 888.

⁴¹ *King v Smith* 392 US 309 (1968) striking down an Alabama ‘man-in-the-house’ welfare eligibility rule, and commentary in Forbath (n 9) 9-20.

⁴² *Dandridge v Williams* 397 US 471 (1970).

⁴³ M. Tushnet, ‘Social Welfare and the Forms of Judicial Review’ 82 *Texas L Rev* 1895, 1902.

philosophical problems presented by public welfare assistance programmes are not the business of this Court.⁴⁴ The Court was not prepared to intervene to overturn the legislature's political decisions on the limits and level of welfare entitlements,⁴⁵ even to the extent of requiring the legislature to provide minimum levels of basic subsistence for all Americans, as this would involve encroaching upon 'the jealously guarded power of the purse' (a critical part of American political culture which was, after all, embodied in the famous rallying cry of the struggle for American Independence).⁴⁶

In short, American courts are unlikely to assert expensive welfare rights unless they would command broad political support, especially in view of the fact that they depend on the co-operation of the executive branch in order to implement any mandatory orders.⁴⁷ The validity of this concern was clearly demonstrated in the *Brown v Board of Education*⁴⁸ debacle, where school desegregation was only actually implemented when the President and Congress took action a decade later. A failure of implementation could in turn jeopardize the standing of the Court and lead to public disillusionment in the Constitution itself.⁴⁹

ii) The Impact of the ECHR and Common Law Rights on English Welfare Provision

The *ex parte B* Case discussed above was decided before the Human Rights Act 1998 incorporated the ECHR into English law. Building on a prevailing judicial and academic momentum towards the incorporation of common law constitutional rights,⁵⁰ Laws J in *ex parte B* had at first instance sought to invoke the importance of preserving life, in that case, by reversing the burden of proof and placing the onus on the health authority to justify alternative spending priorities (an approach rejected by the Court of Appeal as noted above). This begs the question as to how the courts would deal with such a problem if faced with it now that ECHR Article 2 (right to life) is part of English law, placing the burden of justification squarely on any

⁴⁴ *Dandridge* (n 42) 487.

⁴⁵ S. Holmes and C. Sunstein, 'The Cost of Rights; why Liberty depends of Taxes' (2003) 114 *Public Choice* 121: 'The level of protection welfare rights receive is determined politically, not judicially.'

⁴⁶ 'Taxation without representation is tyranny' (quotation by James Otis 1725-1783); See also D Beatty 'The Last Generation: When Rights Lose their Meaning' in Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Nijhoff 1994) 352: 'The courts have never challenged the sovereignty of the people to maintain control of the purse... They have never disputed the levels at which any government programme of social welfare has been set.'

⁴⁷ *Cross* (n 13) 887-93.

⁴⁸ *Brown* (n 13).

⁴⁹ *Beatty* (n 46) 355.

⁵⁰ *R v Home Secretary ex parte Leech* (No. 2) [1994] QB 198. See also J. Laws, 'Law and Democracy' [1995] *PL* 72; S Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 *LQR* 270.

public authority interfering with the right to life and requiring a high level of judicial scrutiny as regards the proportionality of such interference.⁵¹ Interestingly, obiter comments of the Court of Appeal in the *Herceptin Case*,⁵² seem to suggest that, even with Article 2 in place, and applying a rigorous proportionality test which balances the patient's need for potentially life-saving treatment and other calls on health authority funds, the court would find it 'difficult, if not impossible, to say that such a policy was arbitrary or irrational.'

The Court of Appeal did, however, recognise a common law constitutional right in *Joint Council for the Welfare of Immigrants*,⁵³ holding that the withdrawal of income support to asylum seekers who failed to claim asylum immediately on entry to the UK was ultra vires due to a common law constitutional right not to be made destitute. This was a bold decision (which was subsequently reversed in Section 11 of the Asylum and Immigration Act 1996) whereby the Court effectively identified its own minimum core standard of welfare,⁵⁴ in a manner unlike the post Warren US Supreme Court.

ECHR incorporation in 2000 provided the firmer ground of enumerated rights, which although viewed primarily as civil and political rights, provided judicial recognition of welfare deprivation⁵⁵ in extreme cases. Thus in *Bernard*,⁵⁶ Sullivan J held that the extremely unsuitable accommodation provided for a family where the mother was severely disabled meant that she was unable to play any part in family life and thus violated Article 8 (right to home and family life). In *D v UK*⁵⁷ the ECtHR found that a decision to deport an AIDS sufferer back to St Kitts, where he had no family and would not receive adequate medical treatment, would amount to inhuman and degrading treatment under Article 3.

It is clear from both domestic and Strasbourg jurisprudence that, outside these extreme cases, the scope of ECHR rights to found socio-economic claims is extremely limited. In *Chapman v UK*⁵⁸ the ECtHR held that Article 8's guarantee of home life did not impose on states a positive obligation to provide a home for every citizen; and in *Connors v UK* the Court stated that 'in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide.'⁵⁹ As O'Conneide argues,

⁵¹ Compare *R v Ministry of Defence ex parte Smith* [1996] QB 517 (reasonableness review) to *Smith and Grady v UK* (2000) 29 EHRR 493 (proportionality).

⁵² *R (Rodgers) v Swindon NHS Trust* [2006] EWCA Civ 392; (2006) 1 WLR 2649 (Sir Anthony Clarke MR).

⁵³ *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

⁵⁴ *O'Conneide* (n 16) 5.

⁵⁵ *O'Conneide* (n 16) for a full review of social deprivation cases.

⁵⁶ *R (Bernard) v London Borough of Enfield* (2002) EWHC 2282 (Admin); (2003) HRLR 4.

⁵⁷ *D v UK* (1997) 24 EHRR 423.

⁵⁸ *Chapman v UK* [1997] (App no 27238/95) ECHR para [99].

⁵⁹ *Connors v UK* [2004] (App no 66746/01) ECHR.

the minimalist level of the welfare protection afforded by Articles 2, 3 and 8 of the ECHR is consistent with the minimum core approach advocated by the UN Committee on Economic Social and Cultural Rights, and with notions of basic human dignity, which have become today's central rationale for human rights (see Section 1). At this level they are both affordable for developed western democracies and likely to command the popular consensus necessary to achieve democratic legitimacy. Although there will always be some measure of subjectivity in deciding precisely what level of provision (of housing, education or healthcare etc) constitutes a minimum core necessary for human dignity, both the ECtHR and the UK courts have demonstrated a high degree of caution so as not to risk accusations of judicial over-reach; thereby giving credibility to Dworkinian claims that this dignity-based minimum can be adjudicated as a matter of principle rather than policy.

As has been pointed out by Jowell,⁶⁰ and expressly approved by the House of Lords in *A v Home Secretary*,⁶¹ the Human Rights Act 1998 imposes a *duty* on the court and not just a mandate to protect the rights in the ECHR, and to avoid undue deference. Similar statements have been made in relation to the obligations placed on the Canadian courts to uphold express constitutional rights. In *Chaoulli v Quebec*⁶² the Canadian Supreme Court struck down Quebec legislation prohibiting private medical insurance as violating constitutional rights to life, liberty and personal security. Deschamps J stressed that courts 'should not hesitate to assume their [rights review] responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.'⁶³ Notwithstanding the fact that it had in fact been persuasively argued that the Canadian Supreme Court did in fact trespass too far into the realm of healthcare policy in that case.⁶⁴

iii) India: Directive Principles Treated as Enforceable Rights

The Indian Supreme Court's creative transformation of India's non-justiciable Directive Principles of Social Policy (DPSP) into actionable rights - through reading these Directive Principles with the enforceable right to life in Article 21⁶⁵ is well documented.⁶⁶ In doing so the Court did not shy from elaborating ambitiously on the content of such actionable rights. For example, in *Francis Coralie*, Bagwati J held that the right to life is not limited

⁶⁰ Jowell (n 35).

⁶¹ *A v Secretary of State for the Home Department* [2004] UKHL 56; (2005) 2 AC 68 (HL) (Lord Bingham) para [42].

⁶² *Chaoulli v Quebec* [2005] 1 SCR 791.

⁶³ *Ibid.* at 837.

⁶⁴ *King* (n 27) 619-43.

⁶⁵ Article 21 of the Constitution of India 1950.

⁶⁶ *Suresh* (n 11) 7; *Cassels* (n 1) 501-05; S. Dam, 'Vineet Narain v Union of India: A Court of Law And Not Justice - Is the Indian Supreme Court Beyond the Indian Constitution' (2005) *PL* 239.

to protecting life and limb but imports a comprehensive ‘right to live with human dignity and all that goes along with it;’ this included not only the bare necessities of life (food, clothing and shelter) but also facilities for expressing oneself and mixing with others.⁶⁷ In *Shantistar Builders*,⁶⁸ the right to shelter was held to require a ‘decent environment’ and ‘suitable accommodation which would allow [a human being] to grow in every aspect - physical, mental and intellectual.’ In *Olga Tellis*,⁶⁹ it was held that the right to life included a right to livelihood, so that squatters could not be evicted from the city of Mumbai, where they had come to find work, without alternative sites being found for them. In order to enforce the rights of the poor, the Court developed a liberalised procedure for public interest litigation (PIL)⁷⁰ including relaxed standing rules, a more inquisitorial judicial approach often involving fact-gathering commissions, mandatory remedies and detailed supervision of enforcement.

The Supreme Court’s activist stance can be criticised on two fronts. Firstly it may be said that the Court is pursuing its own political agenda, in breach of the separation of powers and of the express intention of the Constitution.⁷¹ Thus critics have observed that the courts are usurping the function of the executive and entering into the fields of policy and resource allocation. This has at times led the Court to make orders which represent micro-management of state agencies⁷² such as the closure of polluting factories⁷³ and the management of the Agra Women’s Refuge and Bihar prisons. The Court’s supporters have justified this activity as being necessary in order to compensate for the state’s own disregard for the law and the Constitution⁷⁴ and have pointed to the ‘popular moral support’ which the Court enjoys at a time when ‘other social and political institutions are facing a legitimisation crisis.’ As Cassels points out, the principle of the separation of powers ‘presupposes that the executive and the legislature are themselves vested with legitimacy and popular support.’⁷⁵

Of greater practical concern, however, is the allegation that in ordaining the implementation of welfare rights the Court is, as Cassels queries, attempting the impossible. Abstract orders without the will or ability on the part of the administration to enforce such orders risk an erosion of the Court’s authority. The Court may be successful in cutting through

⁶⁷ *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746.

⁶⁸ *Shantistar Builders v Narayan Khimalal Tatome* AIR 1990 1 SCC 520.

⁶⁹ *Olga Tellis* AIR 1986 SC 18.

⁷⁰ *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 especially paras [10]-[14] and *Cassels* (n 1) 497-507.

⁷¹ This is the point made by *Dam* (n 66).

⁷² U. Baxi, ‘Judicial Discourse: The Dialectics of the Face and the Mask’ 35 *Journal of the Indian Law Institute* 1 (1993) 7.

⁷³ *MC Mehta v Union of India* AIR 1987 1086.

⁷⁴ *Baxi* (n 72) and *Sripati* (n 1) 449-50.

⁷⁵ *Cassels* (n 1) 515.

bureaucratic obstacles or malfeasance to achieve satisfactory outcomes in some individual cases. For example, the judgment in *Samity*,⁷⁶ suggests that while the claimant was denied emergency medical treatment by hospital officials because he was unable to make payment, the court may have successfully sanctioned this unlawful behaviour. However, in the majority of PIL cases where solutions require additional resources on a vast scale, or radical social or economic change, the practical impact of judicial pronouncements has been minimal; slums have not disappeared, bonded and child labour⁷⁷ persists and pollution continues. Thus Cassels rightly points out that, on the Indian model of review (which purports to give content to welfare rights and effectively holds up such rights as justiciable), the value of socio-economic rights adjudication must primarily be assessed in terms of its use in drawing attention to unacceptable welfare standards and creating public pressure on the authorities to act. On this measure, the effort and resources involved in PIL may not be well spent. It is accordingly suggested that the South African approach to socio-economic rights represents a more realistic and probably more constructive model of review in a country where resources are inadequate to meet the basic needs of all citizens.

iv) South Africa

In *Treatment Action Campaign v Minister for Health (TAC)*⁷⁸ (requesting orders to enforce a constitutional government obligation to make the anti-HIV drug Nevirapine available and to roll out a national programme to prevent mother-to-child transmission of HIV), the South African Supreme Court⁷⁹ reiterated the justiciability of socio-economic rights⁸⁰ and emphasised that the primary duty of courts is to the Constitution and the law. If state policy is inconsistent with the Constitution the courts are obliged to say so, and 'In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion that is mandated by the Constitution itself.'

However, the Court in *TAC* realistically went on to confirm that the 'the socio-economic rights of the Constitution [referring in particular to the Article 26 right to adequate housing and the Article 27 rights to healthcare, nutrition and social security] should not be construed as entitling everyone to demand that the minimum core be provided to them it is impossible

⁷⁶ *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) SCJ 25.

⁷⁷ *MC Mehta v State of Tamil Nadu* [1996] 6 SCC 756 where the Court made a detailed structural order concerning child labour but see R Ramesh 'Between a Rock and a Hard Place – How UK Patios Rely on Child Labour' *The Guardian* (February 13, 2007) which reports that, a decade later, laws prohibiting child labour are still not being enforced. See also *Cassels* (n 1) 515-17 and *Suresh* (n 11) 16, 18.

⁷⁸ *Treatment Action Campaign v Minister for Health (TAC)* (2002) (5) SA 721 (CC).

⁷⁹ *Ibid.* paras [25], [99].

⁸⁰ Established originally in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

to give everyone access even to a ‘core service’ immediately. All that is possible, and all that can be expected of the state, is that it act *reasonably to provide access* to the socio-economic rights identified in Sections 26 and 27 in a progressive basis.⁸¹ As had been similarly reasoned in the previous cases of *Soobramoney*⁸² (relating to a claim for kidney dialysis) and *Grootboom*⁸³ (relating to housing provision), the rights stated in Articles 26 (1) and 27(1) had to be read in conjunction with the qualifying provisions in Article 26 (2) and Article 27 (2) which provide that ‘the state must take reasonable legislative and other measures, within all available resources, to achieve the progressive realisation of each of these rights.’ This is similar to the progressive realisation doctrine of the UN Committee on Economic, Social and Cultural Rights, and also recognises, (unlike the Indian Supreme Court jurisprudence) that the level of available resources is a factor that can legitimately be weighed in assessing the reasonableness of state policy.

This approach has led to varying outcomes in the socio-economic case law of the Constitutional Court. In *Soobramoney* the Court held that a policy rationing the use of short supply dialysis machines which prioritised patients whose renal failure was reversible, unlike that of the claimant’s, was rational in adopting a ‘holistic approach to the larger needs of society;’ thus the claimant’s own right would not in this case act as a trump card.⁸⁴ In *Grootboom* the state’s policy regarding access to the housing stock was held to fall short of the progressive aspirations of the Constitution in failing to give sufficient priority to the poor and vulnerable, although the Court may have shown a naive degree of deference in restricting itself to a merely declaratory order.⁸⁵ In *TAC* itself the Court emphasised its duty ‘to give effective relief’ and proceeded to make a mandatory rather than a merely declaratory order, reflecting perhaps the gross unreasonableness of government policy in failing to dispense medicine when it was actually free. However, this order too has been criticised⁸⁶ for failing to include a supervisory element, especially in view of the urgency of the situation, with the result that implementation was seriously delayed. It is submitted that, in this aspect the South African Courts can learn from the heavily supervisory approach of the Indian courts.⁸⁷ Unlike the Indian courts, the South African reasonableness approach gives an appropriate degree of deference to the

⁸¹ *TAC* (n 78) paras [26]-[39].

⁸² *Soobramoney v Minister for Health, Kwa Zulu Natal* [1997] 12 BCLR 1696 (CC).

⁸³ *Government of South Africa v Grootboom and Others* [2000] 11 BCLR 1169 (CC).

⁸⁴ *Soobramoney v Minister for Health, Kwa Zulu Natal* [1997] 12 BCLR 1696 (CC) para [31].

⁸⁵ This has been criticised in e.g. Swart, ‘Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor’ (2005) 21 *SAJHR* 215, 219-22, likening the subsequent failure of the claimants to obtain any tangible relief to the disappointment suffered by the claimants in *Brown* (n 14).

⁸⁶ *Swart* (n 85) and *Pieterse* (n 18).

⁸⁷ *MC Mehta v Union of India* (1996) 4 SCC 750 (orders relating to the relocation or closure of polluting industries).

administration in delimiting the right. However, Swart⁸⁸ and Davis⁸⁹ are persuasive in their arguments that the courts should consider carefully the full range of remedies at their disposal (including damages, structural interdicts and contempt proceedings against recalcitrant officials), so as to avoid the empty promise of actions such as occurred in *Grootboom*.

The progressive realisation/reasonableness approach, whilst allowing a degree of flexibility to government policy, does not equate to letting the government off the hook. Firstly as described in relation to ECHR law, the existence of the constitutional right places the burden of justification on the public authority. Then, as Steinberg describes, the standard of scrutiny is an intense one, involving a proportionality exercise (as opposed to the deferential *Wednesbury* style test in traditional administrative law, exemplified by the Court of Appeal in *ex parte B*), where fundamental values such as dignity and equality may be heavily suitably weighted against one another.⁹⁰ Refuting the institutional competence argument, Steinberg points out that ‘scrutiny is not the same as engaging in policy-making or budgeting. Courts are ill-equipped in engaging in respect of the latter, not the former.’ This echoes a similar statement made by G Davidov, quoted by Deschamps J in *Chaoulli*:

‘Courts do not have to ...create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding.’⁹¹

Conclusion

This review has revealed a number of differing approaches taken to the judicial determination of non-statutory socio-economic rights. As postulated at the outset the appropriate solution for a state - which is legitimate, workable and efficacious - will vary according to the prevailing political and economic conditions. I agree, however, with Forbath’s view that ‘a liberal society that prizes the dignity of the individual, if it is an affluent one that can afford a guaranteed income that protects all against desperate want, must do so.’⁹² This reflects both a normative protection of basic human dignity and a general consensus in wealthy societies that people should not be left to starve on the streets. Nonetheless, to preserve consensus approval, and hence, legitimacy - as well as important economic incentives for able-bodied people to aspire to more than the guaranteed income - any non-

⁸⁸ Swart (n 85).

⁸⁹ D. Davis, “Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite?’” (2006) 22(2) *SAJHR* 301.

⁹⁰ Steinberg (n 3) 276-83.

⁹¹ *Chaoulli* (n 62) 837; G Davidov in “The Paradox of Judicial Deference” (2001) 12 *NJCL* 133, 143.

⁹² Forbath (n 9) 32

legislated safety net provision must be kept to the minimum necessary to preserve human dignity (as exemplified by the ECHR jurisprudence). The impact of entrenched rights is to place a heavy burden on authorities to justify any denial of such rights - to be assessed, taking into account available resources, on the ECHR or South African models of proportionality.

Moreover, it must regrettably be accepted, as South Africa does (see *TAC*), that in many countries even the minimum core is not immediately practicable; and in such cases the approach should be confined to the South African proportionality/reasonableness model. If this flexible approach is taken to the *scope* of the rights entitlement, courts should then consider it their duty to ensure that their orders are carried through using all appropriate remedies at their disposal.

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Global Human Trafficking and the UN Convention against Transnational Organised Crime

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Trafficking in human beings is one of the fastest growing criminal businesses in the world. The US State Department's Office of Trafficking in Persons estimates that over one million women and children are trafficked around the world each year, generally for the purposes of domestic servitude or sexual exploitation.¹ The International Labour Organization's (ILO) Global Report 2005² posts similar figures, estimating that 600,000 to 800,000 people, of whom 50% are children and 80% female, are trafficked internationally every year generating an estimated profit of US\$31,654 million for criminal organisations worldwide. Despite the practice having reached a level comparable to the illicit arms and drugs trades, public awareness remains remarkably low. First, this paper first provides a definition of human trafficking and separates it from other similar but distinct concepts. Second, this paper assesses the responses in international law. Third, the paper discusses the make-up of criminal organisations and the broader socio-economic problems behind trafficking. Finally, the paper concludes by analysing the national trafficking laws of the United States to provide a contrast to international approaches, and discusses whether the international framework is effective for combating Trafficking across states.

Definition

What is Trafficking?

Harold Hongju Koh, former US Assistant Secretary of State for Democracy, Human Rights and Labour, in testimony before the US Committee on International Relations, described trafficking as 'the very antithesis of the Universal Declaration of Human Rights.'³ Though trafficking is universally condemned, a clear understanding of what it means may be lacking and various definitions have been offered. The

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¹ US Department of State, *Pressing Forward to stop Trafficking in Women and Children* 2 [2000].

² *A Global Alliance against Forced Labour* International Labour Conference 93rd Session 2005.

³ *The Global Problem of Trafficking in Persons: Breaking the Vicious Cycle on Trafficking of Women and Children in the International Sex Trade* Before the House of Commons on International Relations, 106th Cong. 2 (1999). See also L Potts, 'Global Trafficking in Human Beings: Assessing the success of the United Nations Protocol to Prevent Trafficking in Persons' 35 *Geo Wash Int L Rev* 227 (2003).

United Nations Economic and Social Council (ECOSOC) had used the following definition:

‘...Trafficking in Persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons:

(i) by threat or use of violence, abduction, force, fraud, deception, or coercion (including the abuse of authority), or debt bondage for the purpose of:

(ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).⁴

Other definitions however seem to align themselves to different criteria. According to the International Organization for Migration (IOM), trafficking in migrants can be said to exist if the following conditions are met:

‘...an international border is crossed; departure, transit, entry and/or stay of a migrant is illegal; an intermediary - the trafficker - is involved in the movement of the migrant providing services such as supplying counterfeit identity documents, official or unofficial transportation and introduction into the illegal labour market in the destination country; the trafficker profits from such activities and that the transaction is voluntary, other than in cases of trafficking women for the purposes of sexual exploitation, on the basis that the migrant may be willing to be trafficked to secure their long term well being.’⁵

Clearly, even within the UN system, definitions can vary radically. The IOM makes little reference to the idea that a trafficked migrant is held *in forced labour in slavery-like conditions* after transportation. It also removes *coercion* as a necessary ingredient in trafficking and asserts that trafficking can be voluntary when the migrant is willing to be transported. This line of reasoning leads to an argument which holds that, instead of being classified as ‘victims’ those being trafficked should be regarded as ‘customers’ who consent to their illegal movement across borders and, much in the same way

⁴ *Integration of the Human Rights of Women and the Gender Perspective* Report of the Special Rapporteur on violence against Women UNESCOR Comm. on Hum. Rts, 56th Sess, Agenda Item 8, 12 E/CN.4/2000/68 (2000).

⁵ A Schloenhardt, ‘The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia-Pacific Region’ 21 *Adel L Rev* 82 (1999) 82.

as a contract is created, offer consideration in the form of payment. For the people involved, there is by definition, no element of coercion when first contact with recruiters is established. Nevertheless, it is also widely agreed that migrants generally seek the services of traffickers because that is their only available avenue out of intolerable conditions in their home countries.

Trafficking is usually associated with contravention of an individual's will; for example, by deception or forceful abduction. This can sometimes be contrasted with migrant smuggling, where people are assumed to want illegal transportation across one or more state borders. Some go as far as to say that, in having effectively entered into business transactions with traffickers, the migrants become accomplices to the crime. While theoretically logical, this sort of categorisation seems to contradict human experience and begs the question whether any law based on these definitions would be fit for purpose. Migrants often consent to one set of promises but find that, in practice, their circumstances develop unexpectedly. The term 'migrant smuggling' is frequently, but incorrectly, used interchangeably with 'human trafficking.' It is only by separating these distinct concepts that we can accurately attempt to identify 'victims' and 'criminals,' and how any legal response should be fashioned. Following the introduction of the United Nations Convention against Transnational Organised Crime (UNTOC) together with its ancillary Protocols against trafficking in persons, and against migrant smuggling by land, sea and air, people smuggling and trafficking in human beings are now recognized as separate, internationally agreed, criminal offences and as such has been defined by the UN.⁶ Trafficking in human beings is defined as:

‘...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat, or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’⁷

The smuggling of people is defined as:

⁶ B Iselin and M Adams, *Distinguishing between Human Trafficking and People Smuggling* UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, Bangkok (2003).

⁷ A 3 (a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) (entered into force on 25 December 2003).

‘...the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident...’⁸

The question of consent was one of the most widely debated, when attempting to provide a definition for trafficking in the UN Protocol. The general conclusion was that a trafficked person can, and indeed often does, consent to their illegal movement. However, if that consent was procured by one of the ‘improper means’ listed above, it is nullified. For example, if persons consent to their illegal movement and then find themselves in an exploitative or coercive situation, their original consent is nullified by the deception. No person can consent to being enslaved or exploited in slave-like conditions and no migrant working in such conditions can therefore be said to be aiding and abetting this crime. This has now become clearly entrenched in Article 3 (b) of the UN Trafficking Protocol:

‘...the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.’

Commonly, smuggled migrants are seen as complicit in the crime because they give their consent to being smuggled across the border. However smugglers often fail to deliver what is promised as transportation routes are repeatedly modified in appalling conditions. An important issue overlooked by many is that consent in this context can be of two types. A migrant can consent to being moved across a border by any means necessary (often the only choice for those fleeing persecution) *or* through safe and clearly defined routes and the transportation promised at the outset. In the case of the latter, migrants do not consent to being kept in squalid conditions for unreasonable periods of time but often find that that is exactly what happens.

The perception that migrant smuggling is a victimless crime, although immigration laws have been broken, seems weak. Smuggled migrants can be subject to inhuman and degrading treatment and despite being left to their own devices at arrival can often be held in debt bondage. Smugglers have been known to take advantage of those being moved by extorting more money from them or failing to deliver the service in a safe manner. While the question of consent runs between the two, the concepts of migrant

⁸ Article 3 of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (2000) (entered into force on 28 January 2004).

smuggling and trafficking in persons differ in other ways. The key differences are detailed as follows:

The Intention of Traffickers

The intent behind any movement is an important element in distinguishing between human trafficking and migrant smuggling. For human traffickers the purpose of moving people is to exploit them once they have arrived at their destination. The intent *ab initio* of the trafficker is to make profit from delivering their victims into exploitation.⁹ For migrant smugglers the purpose of movement is to take people across a national border. While extortion and exploitation can take place en route, the key intent is to move the person in continuance of a mutual agreement.

Recruitment

Human traffickers usually approach their victims after finding people who fit a certain profile. Traffickers often initiate contact with these people in order to mislead or coerce them into moving with false promises of lucrative job opportunities. For example, in 2004 traffickers from Cyprus were able to recruit trafficked Belarusian women as prostitutes after offering them jobs as waitresses through local employment agencies.¹⁰ People smugglers, rather than luring their victims themselves, are often approached by people who are willing to pay to be taken out of the country. The Snakeheads of China are a good example of migrant smugglers who build up a good business reputation on successful movements of migrants.

International and Domestic Destinations

Human trafficking can take place internationally or domestically within the victim's country of residence. The destination is usually to the precise location of exploitation, for example a factory or brothel. Migrant smuggling can only take place internationally as its entire purpose is to transfer people from their country to another, where they have no lawful right of residence. Many feel that the exclusion of domestic trafficking from the international definition makes it incomplete. However, this is done in accordance with a founding principle of the UN Charter that 'nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...'¹¹

Profit

When we consider human trafficking, it is critical to consider that most profit is generated from the ongoing exploitation of the person being

⁹ *Iselin and Adams* (n 6) 4.

¹⁰ Chapter 4 of the US Department of State, *Trafficking in Persons Report* (2004) 1.

¹¹ Article 2 para [7] of the UN Charter (1945).

trafficked. It is the *raison d'être* for the trafficking.¹² Profits accrued are kept by employers whereas costs such as those for food, accommodation or even abortions, are borne by the victims in the form of increased debt. Migrant smugglers make their profit from payments made to them by 'customers' wanting transportation across a border. Prices are negotiated by taking into account transportation, forgery and bribery costs, though these are often changed during the journey.

The Use of Violence

Human trafficking is classified as a violent crime, as victims typically need to be restrained and forced into compliance, at least from their arrival onwards, if not from the outset. The level and types of violence used render trafficking one of the world's most serious crimes. People smuggling is classified as a migration offence as it is not usually involved with violence. However, violence has been used when victims default on payments, or simply to make an example of any that compromise the cross border movement.

The Role of the Victim Post Arrival

Upon arrival, a trafficked person will be put to work and they will remain indefinitely. Trafficked victims will be deprived of their liberty and effectively incarcerated at the site of exploitation. In contrast, an illegal migrant, once smuggled, is largely left alone to disappear into the new population or make an appeal for asylum. The smuggler may offer additional provisions, such as safe houses but these are not necessarily expected. Only victims of trafficking are awarded victim status under international law. However, because of a lack of understanding on the differences between the two, most trafficked victims will at the point of detection be labelled illegal migrants, to be detained and eventually deported. UNTOC and its supplementary Protocols have outlined criminal justice responses to the problem of detection and treatment of trafficked and smuggled migrants. These recommendations have, as yet, only been implemented in a handful of national legal systems but, in the face of growing public awareness, it is hoped more will follow in the near future. The Convention has introduced several requirements regarding many aspects of transnational crime. The following section analyses this legislation and assesses its potential to tackle trafficking effectively across the globe.

¹² *Iselin and Adams* (n 6) 7.

International Law Responses

The UN Convention against Transnational Organised Crime

The call for an international convention against transnational organised crime arose out of the 1994 United Nations World Ministerial Conference on Organised Crime held in Naples, Italy. It expressed the ‘urgent need for more effective international mechanisms to assist states and to facilitate the implementation of joint strategies for the prevention of and to combat organised transnational crime, and the further need to strengthen the role of the UN as a focal point in that field.’¹³ In 1998 the UN General Assembly, in Resolution 53/111 created an intergovernmental *ad hoc* committee consisting of non-UN and UN member states as well as non-governmental organisations to address the matter.¹⁴ UNTOC and its supplementary Protocols were approved by the General Assembly in Palermo, Italy in 2000 with 124 Member States signing the Treaty.¹⁵ Eighty signed the related Protocol on trafficking and 70 signed the Protocol on the smuggling of migrants.¹⁶ The aims of the Convention are two-fold; first, to eliminate differences between national state laws and, second, to set standards for municipal systems at the levels necessary to combat trafficking. This is outlined in Article 1 of the Convention which states:

‘...the purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively.’

The Protocols

The attached Protocols also have their own aims. Article 3 of the Smuggling Protocol seeks to ‘criminalise migrant smuggling and promote cooperation among states in actions against people smuggling.’ Article 1 of the Trafficking Protocol similarly seeks ‘to prevent and combat trafficking in persons, paying particular attention to the protection of women and children and to promote and facilitate cooperation among state parties in order to achieve this.’ The drafters clearly recognised that state cooperation was vital and that all states would have to enact anti-trafficking laws in order to prevent the creation of safe havens for traffickers. However, cooperation alone would be insufficient and the Convention outlined a number of corresponding strategies. The Protocol against trafficking advocated *the three P approach*. This contains provisions requiring states 1) to prosecute offenders through the criminalisation of trafficking conduct, 2) to protect

¹³ ‘The World Ministerial Conference on Organised Transnational Crime, Italy, 21-23 Nov 1994’ 24/25 *UN Crime Prevention and Criminal Justice Newsletter* 18.

¹⁴ UN General Assembly, A/Res/53/111 (1999) para [10].

¹⁵ ‘More than 120 Sign New UN Convention on Transnational Organised Crime as High Level meeting concludes in Palermo’ *UN Press Release* Dec 15 2000 as quoted in *Potts* (n 3) 236.

¹⁶ *Ibid.* at 236.

adequately the victims of such offences and 3) to prevent further actions through information sharing and cooperation.

Article 5 (1) of the Trafficking Protocol aims to use legislation as a tool to create new laws expressly criminalising trafficking in persons, especially women and children, to ensure that offenders are prosecuted. Article 11 also requires states to aim to adopt measures such as stricter border controls and identity checks. To implement a more coherent transnational enforcement system in nations of trafficking origin, transit and arrival, states agree to exchange information they have acquired about potential offenders. These are listed in Article 10 of the Trafficking and include:

- a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;
- b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and
- c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.¹⁷

In addition to the efforts against perpetrators, there are also provisions calling for the protection of victims. Through Articles 6 (1) and (2) the Trafficking Protocol obliges states to inform victims about potential court proceedings against offenders and to ensure victims' privacy. Article 6 (3) provides for the physical, psychological and social recovery of victims, through appropriate housing, counselling, medical and educational opportunities. Article 6 (6) enables victims to seek compensation for damages, including fines or forfeited proceeds as well as restitution from perpetrators. Article 7 allows states in appropriate cases to consider adopting immigration laws permitting victims to remain on their territory, permanently or temporarily. Article 8 requires nations to accept and assist, without undue delay, the repatriation of trafficking victims who are nationals or at least residents of that state. Some of the more long sighted provisions of the Protocol are those designed to combat trafficking through preventative measures. Article 9 of the Protocol recommends that states adopt anti-trafficking social policies which include information campaigns,

¹⁷ Article 10 (1) of the *UN Trafficking Protocol* (n 7).

educational programmes for schools and social and economic initiatives to collectively combat trafficking in persons.

The Smuggling Protocol takes up a similar approach aiming to criminalise people smuggling and share state information, as well as to allow specific measures to stop the smuggling of migrants by sea. To eliminate safe havens for migrant smugglers Article 6 of the Protocol obliges nations to legislate to criminalise such behaviour. Actions which may potentially amount to this are listed in Article 6 (1) as:

- a) The smuggling of migrants;
- b) When committed for the purpose of enabling the smuggling of migrants:
 - (i) producing a fraudulent travel or identity document;
 - (ii) procuring, providing or possessing such a document.¹⁸

Through Article 6 (2) each state is also required to adopt measures to establish as criminal offences; acting as an accomplice to an offence established above, or organising or directing others to commit such offences. It is important to point out that illegal migrants who have been smuggled are not liable to criminal prosecution 'for the fact of having been the object of conduct set forth in Article 6.'¹⁹ Thus the illegal migrants may not be regarded as accomplices to the crime, despite often having provided direct financing for their movement across borders. This is done on the basis that no moral blame should be attributed to victims of such crime since their original agreement is often vitiated.

Smuggling by sea is a common but highly dangerous method of migrant smuggling and is therefore awarded specific attention by the Protocol, in accordance with the International Law of the Sea. Article 8 (1) obliges states, when requested, to help bring to a halt any vessel from the requesting state which is suspected of being used for the smuggling of migrants. Similarly Article 8 (2) requires states to confirm registry of a vessel as that of the flag state. In such circumstances the flag state may authorise the requesting state, *inter alia*:

- a) To board the vessel;
- b) To search the vessel; and

¹⁸ Article 6 of the *Smuggling Protocol* (2000) (n 8).

¹⁹ *Ibid.* Article 5.

- c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorised by the flag State.²⁰

We can begin to appreciate the value of these common standards, if we examine how easily national statutes have been able to vary between one another. A good example is provided by states in the Asia-Pacific region, through which approximately 200,000-225,000 women and children - almost one third of the global trafficking trade - are trafficked annually.²¹ The immigration laws of Thailand, Malaysia, China and the Philippines criminalise the bringing in of people not lawfully authorised to enter the country,²² while Singaporean, Taiwanese and Cambodian provisions focus on the 'aiding and abetting' of a non-citizen's illegal immigration.²³ Similarly the immigration laws of Malaysia, Cambodia and Thailand concerning the harbouring of illegal migrants make it an offence to harbour any person not lawfully entitled to reside in the country, while the offence in Hong Kong criminalises 'any person who *assists* an unauthorised entrant to remain in Hong Kong unlawfully.'²⁴ Additionally, there are few regional agreements attempting to limit these differences through the sharing of information.

The Smuggling Protocol assists States in facilitating these processes with Article 10 (1) which holds:

'...state parties, in particular those with common borders or located on routes along which migrants are smuggled, shall... exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information...'²⁵

Matters to be shared can include typical routes and means of transportation, the identity and methods of known criminal groups and the altering, reproducing, acquiring or otherwise misusing travel and identity documents. In light of stricter measures to combat fraudulent documentation, border controls have also been tightened by Article 11 of the Smuggling Protocol. The emphasis on document fraud is evident in most states, showing an understanding of how trafficking is linked to wider international crime. If we look once again to our Asia-Pacific example, only Thailand, the

²⁰ *Ibid.* Article 8.

²¹ A Derks, 'Combating Trafficking in South East Asia' *IOM Research Series* (2000) 5.

²² A Schloenhardt, 'Trafficking in Migrants in the Asia-Pacific: National, Regional and International Responses' *Singapore J Int'l and Comp L* 696 (2001) 714.

²³ *Ibid.* at 715.

²⁴ Section 37 DA of the Immigration Ordinance 1972 (Hong Kong) quoted in *Schloenhardt* (n 22).

²⁵ Article 10 of the *Smuggling Protocol* (n 8).

Philippines, and Papua New Guinea have failed to implement laws to combat document fraud in the context of immigration. Other States have assembled their fraudulent document laws to take into account the activities of organised criminal groups, with whom they are often associated. For example, Vietnam imposes greater penalties if forgery 'is committed in an organised manner.'²⁶

The laws regarding document fraud are necessarily technical and it is important for law enforcement to be able to keep pace with developments. The Smuggling Protocol, in Article 14, addresses the training that should be given to relevant officials on how to deal with illegal migration. This includes training on how to detect fraudulent documents and gathering intelligence, as well as treating migrants with respect for their human rights. Article 14 (3) building on nascent global cooperation asks that:

'...states...with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6...'²⁷

The Smuggling Protocol does not however, include measures for the protection of victims and there are no provisions to ensure that such persons have the opportunity to appeal for asylum, without being penalised for entering states illegally.²⁸ Both Protocols contain savings clauses stating the obligations of states under international law such as the principle of *non-refoulement* introduced in the 1951 Convention Relating to the Status of Refugees.²⁹

We can see in light of this that classification as a victim of trafficking or as a smuggled migrant, has significant impact on treatment under international law. Smuggled migrants are afforded basic protections, particularly the right to life and the right not to be subjected to inhuman or degrading treatment under Article 16 of the Smuggling Protocol but not the relatively broader range of protections given to trafficking victims in Articles 6 and 7 of the Trafficking Protocol. It is questionable that such a substantial difference in the social and legal rights awarded to victims should be based on a very blurry *de facto* distinction.

The lack of protection awarded to victims is apparent when victims are used to assist in criminal investigations against offenders. Often when

²⁶ Art 266 (2) of the Penal Code 2000 (Vietnam) quoted in *Schloenhardt* (n 22).

²⁷ Article 14 of the *Smuggling Protocol* (n 8).

²⁸ European Council on Refugees and Exiles background paper, '*An overview of proposals addressing migrant smuggling and trafficking in persons*' (2001) 3.

²⁹ This principle, prohibiting the repatriation of refugees to countries where their freedom is threatened on grounds of race, religion, nationality, social group or political partisanship is now considered by the office of the UN High Commissioner for Refugees as one of customary international law. See Conclusion No. 25, Executive Committee, UNHCR (1982).

traffickers are caught and prosecuted, their cases fall apart because of poor witness protection, or victims' fears of deportation.³⁰ Smuggled migrants are afraid of retaliation by offenders, recrimination within their families or villages or the stigma of being labelled a prostitute.³¹ It is not clear why victims are not afforded the necessary protection to enable them to provide information against the offender. An exploited victim of trafficking may conceivably have consented to their illegal movement across borders until it was vitiated by being subjected to some form of exploitation. However, exploitation does not apply to all migrants who are smuggled which leads to separate categories of trafficked victim and smuggled migrant. We can therefore see quite clearly that the distinction based on consent is a specious one.

Worryingly, several of the new measures aiming to tighten border controls may have the adverse effect of limiting the right to free movement especially for those who find themselves undocumented in war-torn or other unstable environments, leaving illegal methods of transnational movement as their only recourse. It is well known that persons in need of protection will often take great risks to cross a border. It is for these reasons that NGOs are urging a greater focus on the socio-political root causes of trafficking.³²

There is general consensus that greater bilateral and multilateral cooperation is needed to tackle the global character of trafficking. But according to many state officials including many of those present at the Convention signing ceremony, this strategy must address the great economic divide between developed and underdeveloped states that makes so many vulnerable to trafficking and transnational crime.³³ President Chissano of Mozambique remarked that:

‘...combating transnational crime can only be successful and effective if we bring together our efforts and resources. The richest nations must support unconditionally the most disadvantaged nations by providing them access to financial and material means, to modern technologies and know-how.’³⁴

Some western states have supported this plea. The Secretary of State of Norway commented on the wider interests of all nations to ensure that developing states were more able to protect their territories from organised

³⁰ U.S Dept of State, *Trafficking in Persons Report* (2003) 9 quoted in S Nel, ‘Victims of Human Trafficking: Are they adequately protected in the United States?’ *Chi.-Kent J. International & Comparative Law* 3 (2005) 10.

³¹ *Ibid.* at 10.

³² *European Council on Refugees and Exiles* (n 28) 2.

³³ UN Press Release, ‘*Aspects of UN Convention against Transnational Organised Crime*’ UN Doc. L/T/4356 (2000).

³⁴ *UN Press Release Dec 15 2000* (n 15) 247.

crime.³⁵ The Protocol on smuggling supports this but, as we have seen, obliges states only to *consider* providing technical assistance. Alternatively it may have been prudent to make funds available to non-state parties such as UNICRI, the United Nations Interregional Crime and Justice Research Institute, who undertake specific projects in this area.

As the Trafficking Protocol recognises that women and children are predominantly more vulnerable to being trafficked than men, Mary Robinson, UN High Commissioner for Human Rights, has suggested the Protocol should contain an individual section for children to address their specific needs. These were highlighted by cases such as that in Maryland in the US, where four residents of Montgomery county were arrested for bringing two teenage girls from Cameroon to the US and forcing them to work as domestic servants without pay. Their young age, lack of local knowledge and fear of repercussions against their families caused the girls to conclude that escape was impossible.³⁶ Most States however have dismissed this as they are already obliged 'to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form' under the Convention on the Rights of the Child.³⁷ There may be concern that such amendments will create unnecessary legal duplication of the existing legal framework.

The Role of Destination State Demand and Organised Crime The Role of Organised Criminal Groups

Illegal migration today has to be seen in the light of changing conditions and structures in the global economic arena. A general increase in the population has led to a concomitant increase in unemployment in developing states while economic disparities between nations have widened. This has galvanised people to move abroad in search of a better standard of living or to escape war or persecution.³⁸ In response to this increasing movement, states began to restrict access to their immigration and asylum systems. This led migrants to look for other means of entry into destination states, usually through professional smugglers, working as part of organised criminal groups. The restrictive immigration policies, coupled with the increase in migration globally and the relatively small risks of detection, create an illegal market, and an opportunity for criminal organisations to provide services illegally.

While there are a number of academic definitions of organised crime, we may find useful the broadly recognised definition provided by US criminologist, Howard Abadinsky:

³⁵ UN Press Release Dec 15 2000 (n 15) 33.

³⁶ Phuong Ly, 'Couples Allegedly Held Two In Servitude' *Washington Post* (2000) B1.

³⁷ Article 35 of the UN Convention on the Rights of the Child (1989).

³⁸ *Schloenhardt* (n 5) 84.

‘organised crime is a non-ideological enterprise involving a number of persons in close social interaction, organised on a [structured] basis with [different] levels/ranks for the purpose of securing profit and power by engaging in illegal and legal activities.’

There is some doubt as to whether migrant smuggling, at least, is quite so hierarchically organised. For example Zhang and Chin argue that ‘most alien smugglers are otherwise ordinary citizens whose familial networks and fortuitous social contacts enable them to pool resources to transport humans.’³⁹ In reality, international criminal organisations are arranged in a number of different ways. Small flexibly organised groups can exist, usually comprising amateurs who do not operate internationally, unless it is within a specific region. There are also highly professionalised networks with defined hierarchical structures. These groups typically include an ‘arranger’ responsible for overseeing entire operations, a ‘recruiter’ with responsibility for finding and gathering potential migrants who can often double up as a ‘debt collector’ responsible for collecting money from migrants once they arrive at their destination. A ‘transporter’ responsible for moving migrants across borders, corrupt public officials who allow themselves to be bribed to provide fraudulent travel documents or enforcement authorities who turn a blind eye. For example, Indian brothel landlords attempting to traffic Nepalese women into India, reportedly pay local law enforcement officials to remain silent.⁴⁰ An ‘informer’ who gathers intelligence about borders and transit procedures of states en route to the destination, and a group of enforcers responsible for maintaining order among migrants and employees alike. Finally, money launderers who try to give a legitimate appearance to the proceeds of their illegal activity, for example, by reinvesting the money in legitimate enterprises.⁴¹ With this structure in place, organisations can ‘systematically exploit the discrepancies between different jurisdictions and legal systems and quickly find loopholes in law enforcement, border control and legislation in different countries.’⁴² Organised criminal groups are defined in Article 2 (a) of the Convention as:

‘...a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in

³⁹ Zhang and Chin, ‘Enter the Dragon: Inside Chinese Human Smuggling Organisations’ 40 *Criminology* 737 (2002) 1.

⁴⁰ J Chuang, ‘Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts’ 11 *Harvard Human Rights Journal* 65 (1998).

⁴¹ For a more detailed version of this list consult *Schloenhardt* (n 5) 93.

⁴² A Schloenhardt, ‘Trafficking in Migrants in the Asia-Pacific: National, Regional and International Responses’ *Singapore Journal Int’l and Comp L* 696 (2001) 700.

accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.’

The Convention itself introduces a variety of measures to tackle the problem of crime at this organisational level. Article 5 (1) (i), reflecting the varied concepts of organised crime, discusses the offence of ‘conspiracy’ for the purpose of financial or other benefit while paragraph (ii) discusses liability for participation in a criminal group. The Convention leaves the approach to this to individual states but in doing so fails to perform one of its most fundamental tasks; it cannot bridge the gap between national discrepancies in this definition. Because there is no international ‘organised crime’ offence, traffickers may still be free to exploit loopholes.

The problem is further exacerbated by the fact that individual nations can have not only separate laws, but entirely separate concepts of organised crime. For example, out of the jurisdictions previously examined, only Taiwan, Hong Kong, Macau and the Philippines have legislated directly against criminal organisations. Of these, Hong Kong and the Philippines employ largely procedural provisions to facilitate seizures and court prosecutions while Taiwan and Macau focus on the offence of membership in a criminal organisation. However the Convention’s leavening influence is perhaps better illustrated by remembering that, prior to this, many affected states in South East Asia had no legal concepts of conspiracy, or participation in organised criminal activity at all. This meant that some of those involved could never be prosecuted and possibly not even extradited.

Article 31 aims to prevent organised crime by limiting the corruption of businesses and public officials by, for example, requiring states to monitor the expenditure of public authorities and disqualifying business directors, who have been convicted of offences involving organised crime. In addition, it advocates the implementation of public awareness campaigns similar to the Torture and Smuggling Protocols.

Article 16 tackles the loopholes that exist between legal systems, by attempting to provide for extradition to the greatest possible extent, even in the absence of more specific bilateral and multilateral agreements. It is subject to the following exceptions:

- i) states may refuse to extradite if there is no official extradition Treaty between them and the requesting country.
- ii) states may refuse to extradite if they have reason to believe those extradited will be persecuted on grounds of religion, race, sex or political affiliations.

- iii) states may refuse to extradite their own nationals but in such cases must bring proceedings in municipal courts. Essentially they are obligated to ‘extradite or prosecute (*aut dedere aut judicare*).’⁴³

Article 21 allows states to ‘consider the possibility of’ transferring criminal proceedings to one another when parties from numerous jurisdictions become involved.⁴⁴ Article 18 is arguably one of the Convention’s most welcome provisions, as it facilitates pragmatic mechanisms by which signatories may offer each other mutual assistance in investigations, prosecutions and judicial proceedings in relation to organised crime. Article 30 also allows states to provide financial and material assistance by offering voluntary altruistic donations or by offering a portion of the confiscated proceeds to less developed states. Article 19 focuses on technical features by promoting cooperation in law enforcement and information sharing.

In the pursuance of implementation, it was originally envisaged that states would provide biannual reports showing their progress. However, in view of fierce resistance a lower requirement of having conferences to review implementation was adopted. This could mean that, despite the principled intentions of the Convention, the suggestion that it can be so loosely implemented may overshadow its promise. Critics have argued that:

‘...state parties have too great a freedom to modify the requirements of the convention and not implement unwanted provisions into domestic law. Too few mechanisms exist at the international level to ensure cooperation and compliance by States, thus creating safe havens for criminal organisations.’⁴⁵

The significance of this depends on exactly what type of role we expect the Convention to play. Is the aim to provide a universal body of law, a model law of sorts, with sufficiently precise standards to allow all states to have the same law, or to provide a framework of minimum standards and default cooperation procedures, in order to more closely harmonise different national systems and make cooperation easier? The Trafficking Protocol’s preamble admits the need for a comprehensive approach but claims that, in the absence of a universal instrument which addresses all aspects of trafficking in persons, an instrument addressing trafficking ‘[would] be *useful*

⁴³ Article 16 (14) of the UN Convention against Transnational Organised Crime (UNTOC) (2000).

⁴⁴ The language used in this article seems especially weak when contrasted with other international instruments such as the European Convention on the Transfer of Proceedings in Criminal Matters, under which States may not refuse the acceptance of transfer of proceedings requests except in specific cases.

⁴⁵ *Schloenhardt* (n 42) 742.

in preventing and combating that crime.⁴⁶ This suggests that such an outlook may also be true of the Convention as a whole. On this reading it would be difficult to criticise the Convention for lack of precision in aligning state laws, as it does not admit to having that function. Commentators point out that the Convention is the result, not of contemporary and detailed knowledge of organised universal crime but a compromise between various conflicting political influences, that may have overrepresented the more powerful nations. Provisions also require a substantial amount of financial resources which smaller states may struggle to acquire.

The Convention paves the way for effective measures to stop international trafficking and smuggling of persons based on international cooperation. By applying greater controls on international criminal organisations, they may be stopped, not for trafficking offences directly but for lack of transparency in business undertakings or illegal financing for example. By suppressing the organisation itself, automatically the illegal activities, in which it is involved, are also suppressed. Nevertheless, significant challenges remain.

The Question of Migrant Demand

We know that there are both emigration ‘push’ and immigration ‘pull’ factors behind human trafficking and smuggling. However, it is worth considering whether high demand from host states, for certain types of work, plays an indirect role in luring migrants, especially when demand is aimed specifically at migrant workers. This possibility will be considered in the context of the sex industry and domestic work – two common destinations for trafficked persons. In these lines of work customers tend to place a great deal of emphasis, not just on the quality of work but also their appearance, age, race and gender. It is therefore conceivable that in certain industries consumer demand may be closely linked to the phenomenon of human trafficking.⁴⁷

An international survey identified that customers in various countries feel there is a link between a client’s social status and the ethnic identity of the sex worker whose services they purchase. This is made clear by one interviewee who claimed ‘poorer men have to go to migrant workers because they are cheaper.’⁴⁸ This does not however, mean that prostitutes who are nationals of a country are always preferred to migrants. Most

⁴⁶ M Iñiguez de Heredia, ‘People Trafficking: Conceptual issues with the United Nations Trafficking Protocol’ *Human Rights Review* (2006) 6.

⁴⁷ B Anderson and J O’Connell Davidson, ‘Is Trafficking in Human Beings Demand Driven?’ *IOM Migration Research Series* (2003) 12. See also D Hughes, ‘The ‘Natasha’ Trade – The Transnational Shadow Market of Trafficking in Women’ *Journal of International Affairs* (2000).

⁴⁸ *Ibid.* quote of Thai Government Official at 21.

interviewees in Asian states placed white European migrant workers at the top of their hierarchy.

Private employment in households for domestic work is often dependant on the race of the worker. This is mainly due to stereotypes that migrant workers are more disciplined and professional as well as ‘cheap and obedient.’ As domestic work falls into the private sector, employers are not bound by long term contractual obligations and can act as they wish. Migrant workers are seen as valued because employers believe they are less likely to quit without notice, either because of immigration status or because they have nowhere else to go.⁴⁹

Employers also favoured the separateness of migrant workers as they made any social gaps between employers and employees ‘unbridgeable,’ so that there was no need for employers to feel guilty about issues like class distinction. The evidence therefore suggests that in this area at least, demand for migrant workers specifically is high. Migrants are exploited because they have no alternative options to exercise, low economic status and a lack of support networks. Consumption patterns seem to establish themselves at young ages and be based on social considerations, for example to keep up one’s status as a ‘busy professional’ or ‘good mother and wife.’⁵⁰

It is difficult to see exactly how international law against trafficking, exploitation and criminal organisations deals with these types of social considerations at the root of the matter. Besides better regulating these markets we must, more pressingly, address issues of migrants vulnerability through social measures involving education and enforcement.

Developed State Responses: A US Case Study

We have seen how the different laws of South East Asia have led to irregular anti-trafficking frameworks. However, many of the countries examined often have limited financial capabilities or other competing political agendas, while the concept of organised crime linked to trafficking is relatively new. South East Asian countries also have the notable problem of existing in a region densely populated with states of differing legal and political persuasions. In order for anti-trafficking mechanisms to work they have to be similar or identical across territories. The Convention may be helpful in facilitating this process. States in more developed regions tend to suffer less from such problems. The United States, for example, is encroached only by borders on two sides and has far greater financial capacity to adopt effective anti-trafficking provisions. Nevertheless, it can be seen from the figures above that the United States experiences almost as much trafficking activity as a State of destination, as some parts of the Asia-

⁴⁹ *Ibid.* at 30.

⁵⁰ *Ibid.* at 41.

Pacific do as states of origin and transit. Does the US therefore have as much to gain from the UNTOC?

The US Interpretation

Modern US anti-trafficking law is drawn from the Trafficking Victims Protection Act (TVPA) 2000, a division of the Victims of Trafficking and Violence Protection Act, reauthorized most recently in 2005. This contains provisions with regard to prosecution of offenders, protection of victims and prevention of trafficking. Under the first branch, sentencing has been increased, and new forced labour, sex trafficking and document withholding offences have been created. Under the second branch an innovative ‘T-Visa’ is now available; a non-immigrant visa category providing three years’ temporary residence and employment authorisation. After three years a recipient may apply for permanent residence. The US is currently the only country which allows the possibility of permanent residence to trafficking victims. The eligibility requirements for a T-Visa would be met providing the applicant is:

- i) a victim of a severe form of trafficking;
- ii) has complied with any reasonable request for assistance from local, state or federal law enforcement in the investigation of the offence;
- iii) is physically present in the US, the Mariana Islands or Samoa; and
- iv) would suffer extreme hardship involving unusual or severe harm if removed.⁵¹

During any investigation, undocumented trafficking victims may live and work lawfully under the policy of ‘continued presence.’⁵² Additionally, a U-Visa is available to entrants for those who are either victims of trafficking themselves or possess information necessary for an investigation or prosecution.

The prevention branch aims to fund public awareness efforts as well as social programmes internally and overseas. For example in 2004, the Department of Health and Human Services (HHS) launched the ‘Rescue and Restore Victims of Human Trafficking’ awareness campaign. The campaign has functioned primarily as an education and media tool but critics are sceptical as to whether it is reaching victims directly, arguing that

⁵¹ Section 101 (a) (15) of the Trafficking Victims Protection Act (2000).

⁵² *Ibid.* Section 107 (c) (3).

specific grassroots campaigns should replace more general efforts. Only local initiatives are likely to penetrate through to trafficked persons 'such as non-English newspapers and radio and distributing inconspicuous items containing a hotline number, such as brocade lipstick cases and matchbooks distributed in New York Chinatowns and prayer cards distributed among Hispanic populations.'⁵³ According to the HHS hotline, the number of calls currently received each month from actual trafficked persons is 'very, very small.'⁵⁴

The main concern however, is that the approach taken by the legislation has conceptualised trafficking as a law enforcement problem and fails to adequately implement a human rights element into its model. Under the TVPA, assistance is only afforded to those trafficked persons willing to assist law enforcement and the stringent application requirements mean that a large number of victims become ineligible for support. For example in an El Paso case one out of seventy-five persons revealed the details of her trafficking; all those who remained silent were deported.⁵⁵

In 1999, the US estimated that approximately 45,000 to 50,000 women and children were trafficked annually into the country.⁵⁶ The study further revealed that there were several purposes behind it including prostitution, domestic servitude, construction, manufacturing and agriculture.⁵⁷ Six years later following implementation of the TVPA, the estimate was revised to between 14,500 and 17,500 people.⁵⁸ Officially, the US has identified and awarded T-Visas to only 675 people since 2000, despite 5000 being available annually. The significant difference in numbers can be explained by the narrowly defined group in which victims now find themselves. 'They are people who have received a T-Visa, a form of immigration relief conditioned upon assistance to law enforcement, who have been deemed to meet the TVPA definition of victim trafficking.'⁵⁹ The following persons therefore will not be included; those who are US citizens, those who require no immigration relief or who apply for and receive a different form of assistance, those who fail to come forward to report to or assist law enforcement, those who on the basis of their interviews with law enforcement officials are deemed inappropriate witnesses, those who are released by law enforcement because they are not the best witnesses in a group coming forward collectively and those who fail to meet the evidentiary requirements of the T-Visa.

⁵³ Women's Commission for Refugee Women and Children, *The U.S. Response to Human Trafficking: An Unbalanced Approach* (2007) 17.

⁵⁴ Interview with Gil Ortiz, Covenant House Nyneline and Human Trafficking Hotline quoted in *The U.S. Response to Human Trafficking* (2007) 18.

⁵⁵ *U.S. Response to Human Trafficking* (n 53) 23.

⁵⁶ *Ibid.* at 10.

⁵⁷ *Ibid.* at 10.

⁵⁸ US Department of State, *Trafficking in Persons Report 6* (2006).

⁵⁹ *US Response to Human Trafficking* (n 53) 12.

This reflects the broader debate about the widely varying global estimates on numbers of trafficking victims, which is the consequence of differing interpretations of what it means to be trafficked. For example, groups such as the Human Rights Caucus, who consider sex work as legitimate labour, generate smaller numbers than those such as the Coalition Against Trafficking in Women, who consider prostitution as an abuse of women's rights regardless of consent and therefore regard all women brought to another country as prostitutes to have been trafficked. Indeed Outshoorn notes that 'the way in which prostitution is defined, for example as a criminal problem, a human rights problem, an economic problem, or a public health problem determines how it will be controlled.'⁶⁰ The same can be said for trafficking.

The Office of Refugee Resettlement has confirmed 'a small fraction, 3.9% of victims found will yield individuals who receive a visa.'⁶¹ One theory to explain this is that the nature of law enforcement requires the provision of detailed accounts of trafficking, which are simply unattainable when victims have not been allowed counselling and basic services. Early interviews 'result in the exacerbation of trauma symptoms such as anxiety and the sense of danger, memory problems and disjointed accounts that create credibility concerns.'⁶² As a result law enforcement is unable to determine if a victim is trafficked and the individual is deported. A victim is more likely to be responsive if they do not feel coerced.

Additionally, the Department of Justice (DOJ) reports show that over the past five years 75% of trafficking prosecutions have only been related to sex trafficking.⁶³ This is because providers of services and benefits are cautious about advising victims to report their experiences if they were trafficked for other purposes such as labour. Should their case be turned away, no benefits would be awarded and they could face deportation proceedings. Thus the risks of reporting may, in some instances, outweigh the potential benefits. Some go as far as to remark:

'...just as a trafficker believes a person is only valued for her labour, the law enforcement approach treats a trafficked person

⁶⁰ Outshoorn, 'Introduction: Prostitution' in P Coontz and C Griebel, 'International Approaches to Human Trafficking: the Call for a Gender-Sensitive Perspective in International Law' *Women's Health Journal* 4/2004, 50.

⁶¹ Presentation by A Darrell & Company, at the US Department of Health and Human Services Conference of Survivors of Sex Trafficking, Washington D.C., 'Trafficking Victim Outreach Grant: the Results (2006).

⁶² Interview with Judy Okawa, The Center for Traumatic Stress Studies, quoted in 'The US approach to Human Trafficking' 23.

⁶³ U.S Department of Justice, Attorney General's Annual Report to Congress on US Government Activities to Combat Trafficking in Persons (2006) quoted in *US Response to Human Trafficking* (n 53) 15.

as only valued for her information. Without the information, there is no reason to help.⁶⁴

The US presents its legislation as an example to the rest of the world and has laid out plans to assist other states in building their anti-trafficking policies. The Department of Justice annual report sets minimum standards for foreign governments who wish to receive US assistance. These are:

- a) To prohibit trafficking and punish acts of trafficking;
- b) To prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault, for the knowing commission of trafficking in some of its most reprehensible forms;
- c) To prescribe punishment that is sufficiently stringent to deter and that adequately reflects the offence's heinous nature for the knowing commission of any act of trafficking; and
- d) To make serious and sustained efforts to eliminate trafficking.⁶⁵

The DOJ Report categorises countries into three tiers according to their compliance with these standards. Those ranked lowest face the possibility of being sanctioned. By doing this the US is perpetuating a flawed approach largely centred around criminalisation at the expense of human rights protections.

Shortcomings of the Law Enforcement Model

Far from benefiting from the International Convention, the US model helps us identify its main weaknesses. The UN Convention and its Protocols, while ostensibly an extensive attempt to alleviate trafficking, still encounter significant difficulties because of their understanding of the problem as one of law enforcement. This is true regardless of whether the Convention's true function is to act as a model law or to create procedural harmonisation between states. The Articles in the Trafficking Protocol focusing on criminalisation have been structured with the strongest use of language, for example, 'all states shall adopt' suggesting that it imposes obligations on states rather than mere encouragement. The Articles dealing with protection use relatively weaker language. They require states to protect victim confidentiality *in appropriate cases* and *to the extent possible* under its domestic laws. It encourages state Parties to *consider* implementing a range of victim

⁶⁴ *Ibid.* at 22.

⁶⁵ S Nel, 'Victims of Human Trafficking: Are they adequately protected in the United States?' *Chi.-Kent J. International & Comparative Law* 3 (2005) 22.

recovery programs. It urges states *to endeavour* to address the physical safety of victims and *to consider* adopting measures to allow victims to reside in their territories temporarily or permanently.

The weakness of the language is partly attributable to the fact that the Trafficking Protocol was negotiated under the auspices of the UN Crime Commission, a body authorised to deal with law enforcement rather than human rights.⁶⁶ A human rights approach is favourable because of its capacity, among other things, to provide durable and lasting solutions that go beyond the ‘myopic prevention techniques’ of law enforcement.⁶⁷ The focus of the Protocol results in a supply side approach that places primary responsibility on law enforcement and border control. It disregards the demand side of the problem or the factors of economic and social inequality between developing and developed nations, which create the endless supply of people into the trafficking market. It is a criticism that has been noticed by Coontz and Griebel, who remarks:

‘...the Protocol’s failure to give even minimal attention to the... demand aspects of trafficking is troubling. For example, the idea of sanctioning the clients of prostitution and thus taking a stab at demand is a difficult legal area to address internationally when the criminal target varies...in different national prostitution laws. Nonetheless, wholesale pardoning of the clientele is untenable for achieving the Protocol’s long-term goal of eradicating trafficking. ...The total neglect of the issue of demand in the Protocol suggests that the UN instrument lacks a viable remedy for the deep-rooted causes of trafficking.’⁶⁸

The Protocol’s substantive make-up goes some way in displaying whose interests it is geared towards protecting. The structure of the legislation suggests it is balancing the interests of individual victims, with the collective interest in suppressing organised crime, and the interests of destination states to control their borders.

However, it is difficult to determine whether this balancing act can be effectively achieved especially given its current emphasis on criminalisation. Neo-realist political theory may in this case be correct in observing that, first and foremost, states act to ensure their own survival. The success of the Trafficking Protocol has so far been due to the fact that trafficking has

⁶⁶ A Jordan, ‘International Human Rights Law Group’ in *The Annotated Guide to the Complete UN Trafficking Protocol* (2002).

⁶⁷ J Chuang, ‘The Role of International Law in Countering Human Trafficking’ *American Society of International Law Webinar* (2006) 28.

⁶⁸ P Coontz and C Griebel, ‘International Approaches to Human Trafficking: the Call for a Gender-Sensitive Perspective in International Law’ *Women’s Health Journal* 4/2004, 56.

‘been addressed as an activity that threatens state authority and its borders rather than as a human rights concern.’⁶⁹

There is further evidence that the Convention may not be quite as forthright in practice as it is in theory. In November 2000, UN police in Bosnia raided and closed three brothels suspected of housing trafficked prostitutes. Surprisingly, six of the officers were later forced to resign for their failure to include local police in the operation and threatening the stability of UN diplomatic efforts in Bosnia, despite indications from a UN report that there was ‘compelling evidence of complicity by the local police’ in the sex trade.⁷⁰

People trafficking is the result of deep-rooted global inequality, the effects of which have reached into society, politics and even values and cultures. It is within this broader context that trafficking should be understood. Globalisation has, to some extent, facilitated the movement of persons through improvements in transportation and communication, the development of international tourism allowing the distribution of information about life abroad and even the spread of transnational crime. Poverty, war and a chronic lack of opportunities lead vulnerable people to consider the possibility of emigrating and ‘trying their luck’ elsewhere, either themselves or through their children. Recruiters become difficult to identify because of corrupt officials and because, in most cases, contrary to commonly held belief, they are acquaintances or ‘friends’ of victims.⁷¹ Stories of success circulate around local districts inspiring others to take up similar action.⁷² In response stringent migration controls are enforced, while there is significant demand for exploitable labour from destination states. These multifaceted root causes are subtle and require equally complex, diligent and gradual remedies to be tackled effectively.

To its credit, the Trafficking Protocol has attempted to deal with trafficking holistically, referring to the causes, such as poverty and inequality, which are at the source of the problem and incorporating measures to deal with prevention and post-trafficking protection. It has also provided a universal and up-to-date definition of trafficking which should in time allow states to produce anti-trafficking instruments on the basis of similar premises. But, crucially, all of these measures have been taken without effectively binding states’ responsibilities meaning that ultimately its promise has been compromised. The Protocols in the framework of the Convention have at the very least provided an important step forward, but it

⁶⁹ *M Iníñiguez de Heredia* (n 46) 10.

⁷⁰ C Lynch, ‘Six UN Officers in Bosnia Resign After Unauthorised Raid’ *Washington Post* (2000) A20.

⁷¹ *Coontz* (n 68) 52 (noting typical examples such as ‘a friends uncle’).

⁷² F Laczko and M Gramegna, ‘Developing Better indicators of Human Trafficking’ *Brown Journal of World Affairs* (2003) 189.

is regrettably difficult to imagine them as the comprehensive and indispensable instruments they may once have promised to be.

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***Christian Tomuschat –
Human Rights: Between
Realism and Idealism***

JÖRG FEDTKE*

Human Rights: Between Idealism and Realism by Christian Tomuschat¹ ‘attempts to combine principled legal reasoning with a sharp assessment of the relevant practice’ in the area of human rights protection. This aim, set out in the Preface to the second edition of the book, is a tall order; it promises to provide not only a jurisprudential approach to the topic but also empirical evidence concerning the respect that human rights currently receive beyond the safety of a purely intellectual discourse. And that is not all. The tension between realism and idealism, highlighted by the title and quite possibly an important incentive for many readers to pluck this volume from the crowded shelves of legal bookstores or university libraries, is accompanied by a second, equally challenging dimension. Human rights are today increasingly a joint venture as well as a source of conflict between domestic legal systems and the international legal order. Tomuschat promises to separate fact from fiction both within

legally organised societies and on the international level.

The result of this ambitious exercise receives a mixed response. Tomuschat’s scholarly potential and extensive international experience – he was, inter alia, a member of the International Commission of Jurists and has for many years served both on the Human Rights Committee and the International Law Commission of the United Nations – is reflected in the ease with which he presents the jurisprudential and international components of his narrative. The history of human rights, the development of different generations of protection (including related aspects such as democracy, good governance, human security, and globalisation), the role of NGOs, the status of humanitarian law, and both the criminal prosecution of human rights violators and the financial indemnification of their victims, are treated with admirable linguistic precision and a considerable degree of detail despite the limited size of the volume. The chapters on the current system of international human rights protection are particularly impressive, and should provide a valuable resource for both practitioners and academics with an interest in the field. This includes the sections about the work of political bodies within organisations such as the United Nations or the European Union, the contribution of expert bodies

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¹ 2nd Edn. Oxford Univ. Press 2008.

to the development of an international human rights culture, and the role of tribunals such as the International Criminal Court of the International Court of Justice, all of which receive extensive coverage.

The downside of this strong emphasis on the international dimension of human rights protection is a rather limited treatment of their implementation on the national level. The amount of domestic material, both in terms of references to 'black letter' law and empirical evidence, is hardly sufficient to meet Tomuschat's self-imposed standard of a 'sharp assessment' of the relevant legal and social practice of human rights protection on the ground.

A second – related – limitation of the book becomes apparent in Tomuschat's approach to the universality of human rights. Following an analysis of the legal framework as currently found in international agreements and domestic law, a discussion of the values underlying human rights in different societies, and an (admittedly generalised) assessment of empirical practice, the reader is directed to a statement by Michael Walzer, an American political scientist and social philosopher, who believes that human rights are today universally accepted as a 'minimal (...) moral code' which at least includes the prohibition of

murder, slavery, torture, and genocide (p. 95). Tomuschat expands this catalogue by adding that 'in no country of the world do public authorities claim to be allowed to deal with the life, the freedom, and the physical integrity of citizens according to their arbitrary pleasure' and identifies the International Covenant on Civil and Political Rights as fairly undisputed common ground between the main religious and political systems examined in the book – with exception of the fact that 'they are formulated as individual rights.' This may strike some readers as a rather optimistic assessment of our post-9/11 world, in which even countries belonging to so-called 'Western civilization' have developed very different approaches to the core rights of terror suspects and – if on a somewhat different level – ordinary citizens. Once put to the test in a set of very specific circumstances, most rights (including data protection, personality rights, free speech, the right to engage in political activity, human dignity, and even the concept of democracy) are interpreted very differently in countries as closely related – politically, culturally, and economically – as the United States, the United Kingdom, France, or Germany. Some of the more obvious differences, for example the approach to the death penalty, abortion, and the targeted killings of suspect individuals by security forces, are briefly touched

upon in the text, but a more profound analysis by a human rights expert of Tomuschat's calibre would have been desirable.

An overall assessment of *Human Rights* is thus difficult. The book would have immediately scored top marks had the author openly limited his efforts to covering international systems of human rights protection. The alternative – to expand quite considerably the scope of the exercise and to enter into a more detailed comparative analysis of both domestic law and

international instruments – was neither intended nor feasible. Tomuschat was careful to exclude this option in the preface by rightly emphasising that, 'given the vast dimensions of the area covered, it was not possible to devote monographic attention to each on of the issues discussed.' Despite this caveat, the book still seems a little lopsided. Perhaps he should consider changing the title to *International Human Rights* once a third edition of the book is contemplated – which will hopefully be the case.

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