The Law Society

Graham Turnbull Human Rights essay competition

20th Anniversary

In association with

FJG FISHER JONES GREENWOOD SOLICITORS

I am delighted to introduce this publication of winning entries in the Graham Turnbull Essay Competition over the last ten years.

Graham Turnbull was a solicitor qualified in England and Wales who was killed whilst serving as a UN Monitor in Rwanda during the genocide which took place in 1997. After his death, and in consultation with his family, Mel James the human rights policy adviser at the Law Society at the time was instrumental in establishing the Graham Turnbull Memorial Trust, a charity to commemorate Graham's work and his ultimate sacrifice. Every year since then the Human Rights Committee of the Law Society of England and Wales has run an essay competition on a topical human rights theme for students and newly qualified lawyers and the trust has provided the prizemoney for the winning entry.

This year is the 20th anniversary of Graham's death and we thought that it would be fitting to re-publish some of the winning entries as a tribute to Graham and others like him who quietly put themselves at risk to protect the rights of others. We hope you will enjoy re-visiting some of these themes which remain resonant with the current human rights landscape and join us in paying tribute to Graham's work.

Tony Fisher
chairperson
Human Rights Committee
The Law Society of England and Wales

Contents

2008: Is human rights law relevant in combating poverty and social injustice?

Winner: Ian Clarke

The fight against poverty and social injustice must invariably be fought on many fronts and attention must be paid to questions of debt, bad governance and internal armed conflict. However, it is submitted that human rights law can, and indeed is being used as a means of combating poverty and social injustice. Human rights can encompass a range of different notions from the traditional conception of negative liberty, requiring governments to do little more than leave the individual alone, to a more positive conception of social, economic and cultural rights and entitlements. It is this latter conception which concerns this paper.

Social rights place burdens on governments to provide certain necessities for their citizens. The South African Constitution for example states that everyone has the right to housing, health care services, sufficient food and water and medical security. However these rights are qualified by ss. 26(2) and 27(2) which provide that: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." One question that such rights raise is how they are to be enforced. The United Nations Committee on Economic, Social and Cultural rights has recommended a "minimum core" approach, suggesting states concentrate on those in most need before moving to other less pressing needs.

This approach is seen in the South African case of Government of the Republic of South Africa v Grootboom (2001 (1) SA 46). The claim was brought on behalf of a group of destitute people with absolutely no shelter. They alleged that this fact violated s26 of their constitution which guaranteed their right to housing, and imposed upon the state the obligation of taking reasonable legislative measures, within its resourses to realise this right. The courts approach to the case was to adopt the test of reasonableness. The government's housing programme at the time was to build permanent housing for as many as possible, instead of providing shelter for the desperate in the interim. The court held that this programme must be modified, even if that meant decreasing the rate at which permanent housing could be constructed, noting that a:

> *"programme that excludes a significant sector of society cannot be said to be reasonable ... those whose needs are most urgent and whose ability to enjoy all rights are therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right ... If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test".*

The South African Constitutional court has in fact gone further in its analysis in cases such as Minister of Health v Treatment Action Campaign (No.2) (2002 (5) SA 721). This matter concerned the constitutionality of the government's programme of access to the anti-retroviral drug nevirapine, which helps prevent mother-to-child transmission of HIV/AIDS. This drug, instead of being widely available through the public health system, was restricted to two test sites in each province where

further research was being conducted about the viability of making the drug more widely available. The court evaluated each of the governments reasons for restricting the drug against the standard of reasonableness, in rejecting each it highlighted the different strands contained within the test of reasonableness, from noting a simple lack of evidence to a lack of proportionality between means and ends.

In neither Grootboom nor the Treatment Action Campaign cases did the court set out what the state's minimum obligations to social rights were. The court was clearly concerned about the capacity and the appropriateness of the judiciary to making such decisions. However, despite this, the court in Grootboom did in effect set out a minimum core obligation when it held that the state's policy was defective in that it did not provide temporary shelter to the most desperately in need. There are also references to "the basic necessities of life" and the fact that the term "progressive realisation", which as noted above limits ss 26 and 27, should not be taken as a licence to ignore those whose needs are most pressing. Such references therefore do indicate that the court does keep alive the concept of minimum core obligations, but sees them as relevant in the consideration of what amounts to reasonableness.

As important as the analysis of reasonableness is the question of dignity. In Grootboom the court found that the policy of building as many permanent dwellings as possible could not outweigh the needs of the destitute, their needs had to be safeguarded and their dignity protected. In effect this analysis is founded on the principles of discrimination. Those who were destitute were being discriminated against, their needs were not being addressed and the state was not treating them as equal to those with housing, no matter how inadequate. Clearly a cost was imposed on those with such housing, but ignoring the destitute was arguably disproportionate, and certain categories of people would have to be disadvantaged so as to advance the cause of the destitute. Seen like this, the courts approach accords with principles of substantive equality, as opposed to formal Aristotelian equality. The latter approach would have entrenched pre-existing inequality, whereas the former provides an objective the state should work towards.

Social rights therefore not only help to entrench notions of equality into the arena of poverty and welfare policy, they also legitimise judicial intervention and require the state to take positive steps towards achieving certain social ends. Human rights law does therefore have a part to play in combating social injustice, and the manifestations of poverty. However, questions remain over whether such judicial responses are legitimate. In any state resources are limited, and especially so in the developing world where governments do not necessarily have the resources to guarantee all socio-economic rights across the board. It is important at this point to differentiate between political and civil rights (which often require the state to refrain from acting) which require little in the way of financial output, with social and economic rights which place positive burdens upon the state, to provide such things as housing, health care and education. The former are important in the fight against poverty, not least by guaranteeing functioning modern states, but it submitted that social and economic rights, are in the short term the drivers that end poverty and social injustice.

However, such rights are costly – the right to housing is invariably more expensive that the right to vote. That said, the scarcity of resources should not be a bar to the enforcement of such rights, and as noted above the South African constitution expressly recognises budgetary constraints. The courts can therefore decide between competing demands for resources. Whether they should or not is a different matter, as such decisions encroach upon the territory of the executive and legislative branches of the state. Moreover, the judiciary are often unelected and it can be questioned whether they should have the power to over-rule the policies of the elected government. However, such policies

must be capable of scrutiny, and it is the scrutiny of executive decisions which helps to nurture a viable human rights culture within government. The very fact that government policy may be held to account should encourage governments to work towards policies that are human rights compliant. Further, the judiciary do not seek to decide how budgets are allocated, but as evidenced above simply adjudicate on whether spending is reasonable. Indeed, the court in Grootboom stated that it was for the executive to work out the details of their housing programme and that:

> *"A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent ... It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do, the requirement is met."*

To address the question posed at the top of this paper then, human rights law has an important role to play in combating poverty and social injustice. The South African experience, informed by the principles of reasonableness, dignity and equality, attempts to reduce through the medium of rights law social injustice. However, it is perhaps too much to stay that this approach combats poverty. It certainly combats the manifestations of poverty, ie lack of shelter, health care etc, but it cannot of itself increase wealth. Judicial intervention does not increase gross domestic product, nor does it work upon trade deficits and spiralling debt. However, what it may do is create the conditions where this can be achieved. A citizen can not add to the wealth of the nation, cannot be truly economically active, if he or she has no shelter or education, or has no access to basic health care. It is only when such things are provided that poverty can truly be fought.

Whilst this paper has concerned itself with social rights, it remains important to keep an eye on political and civic rights. Such rights too have a part to play in creating the conditions for economic growth. States which respect such rights are largely stable and open to outward investment. They are also less likely to suffer from internal armed conflict and corrupt government. When populations are denied these rights, or they are thought to be violated, the social contract between the citizen and the state is in jeopardy (as seen in the depressing situation current in Kenya) and growth falters and can cause increased poverty.

Finally, as important as human rights law is, it is not enough of itself to eradicate poverty and social injustice. As noted at the beginning of this piece, the problems of debt, bad governance, conflict and trade must also be addressed. The decisions of courts cannot by themselves bring peace or prosperity to a county, but they can guide governments and do nurture a sense of justice which is important in creating viable and successful states.

2009: Can international human rights law provide meaningful obligations for business?

Winner: Laura White

International human rights law is traditionally made by states, for states. The state is the basic unit of international law and most international law places obligations on nations rather than private actors. However, in recent years, the privatisation and deregulation of economies and the liberalisation of trade has conspired to achieve a shift in the balance of economic and political power in the international arena away from governments to Multinational Corporations (MNCs). This change in power relations has exposed what John Ruggie, the special representative of the UN Secretary-General describes as "governance gaps" in the regulation and enforcement of international human rights.[1] MNCs have outgrown national regulation (especially in respect of poorly equipped and under-resourced developing countries) challenging the state's monopoly on international governance. In this situation, logic dictates that governments must either persuade or compel corporations to shoulder greater responsibility for human rights. This essay will explore this "business and human rights predicament"[2] and the extent to which the existing legal framework is capable of creating meaningful obligations for business.

International human rights law can create both direct and indirect obligations for business. All UN member states have a legally binding commitment to ensure that national legislation effectively enforces international standards for human rights; not only in respect of the state and its emanations, but also in relation to non-state actors. This duty is stipulated explicitly in the Convention on the Elimination of All Forms of Discrimination against Women,[3] the Convention on the Rights of the Child,[4] and the Convention on the Elimination of All Forms of Racial Discrimination.[5] Significantly, the International Criminal Court (ICC): the Rome Statute recognises the human rights responsibility of private actors for grave human rights violations: including slavery, human trafficking and forced labour.

A state also has international obligations to ensure that where human rights are violated, the victim has access to adequate forms of redress. Signatories to the international treaties on human rights can face penalties for failure to provide victims with access to effective remedies for violations committed by private actors.[6] In practice weak-governance, conflict and corruption can pose practical barriers to the implementation of effective national law, especially in developing countries. However, even where

1 J Ruggie (2008), Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, p3.

2 ibid.

3 Article 2(e) requires states "to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise".

4 Article 32 obliges states to protect children from economic exploitation and hazardous work.

5 Article 2(1)(d) obliges states to "prohibit and bring to an end...racial discrimination by any persons, group or organisation".

6 For examples the European Court of Human Rights judgments against states in relation to human rights violations committed by private non-state actors see: Z and Others v UK 34 Eur. H.R. Rep. 3 (2001); Osman v UK (1998) 29 EHRR 245.

states have failed to legislate to give effect under national law to international human rights treaties, companies may still be vulnerable to legal challenge if claimants seek to litigate in other jurisdictions, for example, the jurisdiction of the parent company in respect of the activities of its global subsidiaries. Furthermore many jurisdictions also allow for the prosecution of "international crimes" including slavery, human trafficking and forced labour against both those directly responsible and those who are complicit in aiding and abetting such crimes.

A new strand of transnational jurisprudence is emerging in the UK,[7] Canada,[8] Australia[9] and most significantly in the United States which seeks to confer corporate liability upon businesses incorporated within these jurisdictions for human rights violations committed abroad. In the past two decades, over 40 cases have been brought under the 200-year old Alien Tort Claims Act (ATCA) on the basis that corporations have violated international law outside the US.[10] However, even in these relatively sophisticated legal systems, effective remedies are in practice difficult to obtain. Litigation is inevitably convoluted, complex and extremely costly. In addition, the tendency towards judicial deference for executive privileges on matters relating to national security or foreign relations may mean no judgment is ever reached.[11] Nevertheless, these cases extend access to an independent and well functioning judicial system to victims of human rights violations living in countries with no rights to redress under their own national law. These cases ensure that the yardstick for MNCs remains the international human rights obligations of the host state.

Businesses are also directly accountable in international law for human rights violations, although currently their responsibility exists solely in "soft law," which is not legally binding. The most significant example of this soft law is the Organisation for Economic Cooperation and Development (OECD)'s Guidelines for Multinational Enterprises (the Guidelines). Adopted in 1976 and last revised in 2000, the Guidelines consist of voluntary principles and standards for responsible business conduct. In many ways they constitute the first international legal document on corporate social responsibility (CSR) and remain the most prominent instrument for transnational CSR and responsible investment. Countries that adhere to the Guidelines include the 30 members of the OECD, (who collectively produce more than two-thirds of the world's goods and services) plus 10 others such as Argentina and Brazil.

Although the OECD expressly describe the Guidelines as non-legal recommendations that companies are invited to follow voluntarily, the Guidelines are accompanied by detailed implementation procedures that are binding on OECD member states. Each adhering country agrees to set up a National Contact Point (NCP) to promote the Guidelines at the national level, and handle all enquiries and complaints regarding implementation. Access to the NCP is inclusive allowing any individual or "interested party" (including NGOs) to lodge complaints, relating to the activity of a company anywhere in the world. The NCP makes an initial assessment of whether the issues raised merit further examination and then, if the complaint proceeds, will act as a mediator between the parties. Where the mediation fails, the NCP has the discretion to issue its own statement and recommendations and may also make a referral to the OECD's Committee on International Investment and Multinational

7 Connelly v RTZ Corporation (1997) 3 W.L.R 373 and Shalk Willem Burger Lubbe et al v Cape plc (2000) 2 Lloyds Reports 383 in respect of industrial injuries.

8 RIQ v Cambior COU-143670.

9 For example, Gagarimabu v Broken Hill Proprietary Co Ltd [2001] VSC 517 an action against BHP mining company in respect of their actions in Papua New Guinea that led to an out of court settlement.

10 See the Business and Human Rights Resource Centre (BHRRC)'s Jurisprudence Database; examples include Wiwa versus Royal Dutch Petroleum Company in relation to alleged corporate complicity in the torture and assassination of human rights activists in Nigeria.

11 For example Corie et al v Caterpillar Inc Case: 05-36210 and Mohamed and Others v Jeppesen Dataplan Inc. C07-02798.

Enterprises (CIIME), which has ultimate responsibility for the guidelines.

The Guidelines and monitoring procedure are the only international mechanism that looks directly and exclusively at the conduct of multinational companies. However, despite their potential, the impact of the Guidelines, to date has been disappointing. There is considerable disparity between the commitment of endorsing governments to implementation and the powers of the NCPs and CIIME are limited. Their decisions are not binding on the parties and they cannot impose sanctions on a MNC which is found to be in violation of the Guidelines. Some corporations have been willing to enter into voluntary arrangements to monitor their compliance with NCP decisions[12] but, there are no obligations for corporations to do so. The OECD's practice of protecting the identities of the companies means that it is difficult to rouse public pressure to reinforce changes in corporate behaviour. Furthermore, OECD member states do not promote the Guidelines by stipulating that compliance is a precondition for activities, such as procurement or credit acquisition. The procedure has little immediate impact on the behaviour of MNCs and for many the lack of sanctions renders proceedings under the Guidelines "a hollow exercise."[13]

Although soft law, by definition, cannot impose binding legal obligations upon companies, the reality is more complex. The OECD Guidelines are an up-to-date consensus of developed nations about general principles of international regulation and public policy and therefore inevitably carry weight as an authoritative international declaration. Evidence of the persuasive effect of the discourse of corporate responsibilities for human rights can be seen in the increasing number of companies that have adopted a formal policy statement which makes explicit reference to human rights.[14] There is also evidence within some jurisdictions of the impact of human rights upon the national legislation that regulates business behaviour. For example the UK Government's has enshrined the "enlightened shareholder value approach" within the Companies Act 2006, requiring directors to consider the impact of their company's operations upon the community, the environment and their employees, when deciding what is in their members' interests.[15]

However, in the absence of transparent and universal standards obliging corporations to address human rights issues, it is up to MNCs to regulate themselves, with disparate results. An OECD survey of 246 voluntary corporate codes found that the only issue that all included was prohibition of child labour, while less than half recognised the right to freedom of association.[16] Where commitments are voluntary, there is no level playing field and more enlightened companies can lose out to their less ethical competitors (the so called "free rider" phenomenon).[17] Furthermore, a voluntary code relies on the goodwill of the company concerned. In an economic downturn, it is easy for a company to "downsize" voluntary human rights obligations, which are not considered integral to business performance or may even be viewed as a barrier to profit.

12 For example Adidas, who agreed to monitoring by the Fair Labor Association following intervention by the Dutch NCP into their production practices in India; see Dutch NCP, A joint statement by the NCP, Adidas and ICN (2003).

13 RAID (2008) Fit for Purpose? a Review of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises 2008 p21.

14 According to a recent survey by the BHRRC, 167 companies have a formal policy statement on human rights representing over half of the UK's FTSE 100 CSRWire, Weekly News Alert 26.08.08.

15 Section 172, Companies Act 2006 see also Section 417 on reporting requirements for listed companies.

16 OECD, Codes of Corporate Conduct (2001/6).

17 Peter Muchlinski (2001), Human rights and multinationals: is there a problem?, p35.

Conclusion

The legal landscape for business and human rights is changing from a language of duty to a language of legal obligation. There is a growing conviction among states, legal commentators and business leaders themselves that human rights must be a core component of socially responsible corporate behaviour. However, despite this consensus, the regulatory framework to hold business accountable for human rights remains a "mixed economy" of disparate national law, non-binding international standards and self-regulation. In the absence of a transparent and predictable regulatory regime the most powerful drivers for greater human rights obligations for business are perhaps public opinion and market forces. Corporations ignore human rights at their peril. Businesses associated with human rights violations can suffer losses in relation to external investment, brand value, share price, employee morale, productivity and recruitment. As international law slowly develops its armory of binding standards for corporate conduct, NGOs and regulators would be well advised to continue to seek to engage the hearts and minds of business leaders, positioning human rights as an imperative that companies cannot afford to neglect. It was perhaps this logic which led the ICJ to substitute "business-speak" for legal terminology in a recent report which defined corporate complicity with reference to "zones of legal risk."[18] As Ruggie states, there is "no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – states, businesses and civil society – must learn to do many things differently."[19]

18 International Commission of Jurists, Corporate Complicity in International Crimes (2008).

19 Ruggie (2008): 4.

2010: Can human rights be universal and have respect for cultural relativism?

Winner: Sanjivi Krishnan

"A claim about what is right is a claim about what is right for anyone."[1]. Human rights set moral claims, or norms, intended to apply to all humans. Cultural relativism, which holds that moral norms can only be valid in relation to a particular culture, would deny universal validity to human rights. In reality, however, human rights laws, the products of political compromise, are sufficiently malleable to allow for some cultural variation. This fact points to a more fundamental tension – human rights cannot become universally obeyed norms without having some respect for cultural relativism and seeking local legitimacy.

Normative claims purport to tell us a truth about what is "right," - morally, legally or pragmatically. Such claims may assert validity over a limited scope, while others set out general truths not limited to one context. The Universal Declaration of Human Rights proclaimed in 1948 that "universal and effective recognition and observance" of the rights therein would be the "common standard of achievement for all peoples and all nations." Human rights set standards for the treatment of individuals by the state, extending to "all human beings." In doing so, they aspire to universality. Moral values are the product of experience, whether social, religious or economic, roughly constituting "culture". The diversity of societies' experience, and thus values, can be described as "cultural relativity."[2] Cultural relativism is a philosophical viewpoint that says a society cannot be judged by external moral standards but only by its own.[3] This viewpoint precludes the very possibility of a universally applicable moral standard. If human rights norms yield to the conflicting internal norms or practices of a particular society, then as a theoretical matter, human rights do not apply to the human beings in that society, and are not universally valid.

In reality, the common cultural relativist tendency of states is to accept the applicability of human rights but use culture to redefine their content. This is reflected, for example, in Iran's defence of punitive amputations,[4] and the divisive "Traditional Values" resolution passed recently by members of the UN Human Rights Council.[5] Furthermore, while many such claims are not accepted by other states, there does otherwise exist significant room for cultural variation in the established human rights regimes. Notably, the most effective international human rights regimes are not the UN treaty bodies but rather regional ones founded by states with shared experience and cultural traditions. The respective treaties demonstrate particularised human rights provisions. For instance, the right to life

1 XIAORONG LI, ETHICS, HUMAN RIGHTS AND CULTURE 63 (2006) (emphasis supplied).
2 JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 89 (2003).
3 John J. Tilley, Cultural Relativism, 22 HUM. RTS. Q. 501, 505 (2002).
4 Iran envoy defends amputation, THE TELEGRAPH (Feb 9, 2008).
5 Human Rights Watch (HRW), UN Human Rights Council: "Traditional Values" Vote and Gaza Overshadow Progress (Oct 2, 2009), available at: http://www.hrw.org/en/news/2009/10/05/un-human-rights-council-traditional-values-vote-and-gaza-overshadow-progress.

begins at conception in the American Convention on Human Rights,[6] in recognition of Latin American Catholic beliefs. The African Charter on Human and People's Rights specifies duties to the community in conjunction with rights.[7]

Under human rights treaties, such as the European Convention, the precise content of rights such as the freedoms of expression and religious manifestation is sometimes explicitly left for definition using states' local standards, under the "margin of appreciation" doctrine.[8] Concession to this level of cultural relativism does not compromise them—it makes them more likely to be universal by enabling greater consensus. This is why Donnelly argues "only for universality at the level of the concept."[9]

Having said this, the elasticity of human rights provisions has limits. For instance, it is impossible to square Iran's legally mandated punishments of amputation of limbs, flogging and execution by stoning with the prohibition on cruel, inhuman and degrading punishment.[10] They exist because, in the revolutionary government's view, they are mandated by the Qur'an,[11] and are motivated by the belief that severe punishment in this life will prevent a harsher punishment in a person's next, external life.[12] Further, Islamic cultural relativists justify the state coercively enforcing religious beliefs by appealing to a conception of freedom, based on self-perfection and discovering God rather than western laissez-faire.[13] These conceptions of cruelty and freedom, respectively, are entirely at odds with dominant ideas of human rights, meaning that conceding to cultural relativism here would completely nullify the latter.

What is the appropriate reaction to these cultural objections? Some scholars would argue that religious objections are "self-serving" efforts to sustain authority[14] and legitimise brutality or severe gender inequality,[15] and thus should be ignored. Judge Higgins suggests that cultural relativism is "advanced mostly by states, and by liberal scholars anxious not to impose the Western way of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards."[16] This statement is revealing in two ways - first, it concedes that human rights are western cultural products, and second, it shows hints of the same attitude that has historically accompanied the condescending, if well-meaning, efforts of colonial missionaries.

The modern prevailing concept of human rights is undeniably a product of western experience. It was born in Enlightenment-era notions of human dignity, finding expression in 18th century revolutionary Bills of Rights, and gaining their modern international status in the aftermath of atrocities committed during World War II.[17] More fundamentally, the idea of universal values per se is a western one - a product of Protestantism - and is not shared by Eastern civilisations.[18] While it is certainly true that the UDHR and Covenants were assented to by the very countries now pleading cultural difference,

6 Article 4.
7 Article 29.
8 Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct. H.R. 48 (1976); and Şahin v. Turkey, 44 Eur. H.R. Rep 5 (2007).
9 Donnelly at 97.
10 The General Assembly has condemned these as torture: G.A.Res. 63/191 U.N. Doc. A/RES/63/191 (Feb. 24 2009).
11 SHIRIN EBADI, IRAN AWAKENING 51 (2006).
12 Abdulahi An-Na'im, Cultural Legitimation in HUMAN RIGHTS, SOUTHERN VOICES 88 (Twining ed. 2009).
13 REZA AFSHARI, HUMAN RIGHTS IN IRAN: THE ABUSE OF CULTURAL RELATIVISM 5 (2001).
14 Afshari at 4; Donnelly at 118.
15 HUMAN RIGHTS WATCH, PERPETUAL MINORS 7-9 (2008).
16 ROSALYN HIGGINS, PROBLEMS AND PROCESS 96 (1994).
17 See generally RHONA K SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS (2 ed, 2002).
18 FAREED ZAKARIA, THE POST-AMERICAN WORLD 84 (2009).

Third World countries arguably signed up because paying lip service to them was precondition to acceptance into the world community.[19] As moral claims impressed by some cultures upon others, it is meaningless to talk about human rights being universal in any sense other than their ultimately being adopted and effectively respected by all. In this regard, the legwork to foster actual respect for the rights still has to be done - and not only in relation to "pariah" nations, but also even western democracies. However, human rights advocates have tended to presuppose the universality of human rights, and to define in opposition to it a select few backward "others" whose parochial ignorance must be supplanted with the global truth.[20]

Regarding Higgins' second assertion, it is not clear, empirically speaking, whether all "oppressed" people would be "anxious" for human rights. In the case of corporal punishment in Iran, it is impossible to know, as citizens may not speak out for fear of the consequences of challenging religious authority.[21] On the other hand, when asked about gender inequality, one response Saudi women have given is that they do not want or need western help or sympathy.[22] Viewing human rights problems through a dynamic of tyrannical cultures oppressing helpless victims begging to be saved is counterproductive. Mutua argues that a "savages-victims-saviour" metaphor underpins human rights discourse, echoing the historical arrogance of colonial proselytising and cultural imperialism.[23] It is tempting to dismiss this as political correctness, but it matters for two reasons.

First, people resent condescending outsiders coming to "save" them. We need look no further than at the hostility shown by so-called "Sun readers"[24] towards the "foreign" Human Rights Act 1998 and ECHR. The response of human rights advocates has been to respect their views and engage with them in a respectful way.[25] The same respect given to the British people is owed to people anywhere else in the world.

Second, characterising the "oppressed" as victims denies their own agency and mischaracterises the situation in which human rights abuses take place. To explain this, I refer to one of the most maligned examples of cultural practices, namely, female genital mutilation (FGM). This means "partial or total removal of the external female genitalia or injury to the female genital organs for non-medical reasons."[26] It has been held to constitute inhuman and degrading treatment, and accordingly states are obligated to criminalise it and punish offenders.[27] Practised by some Christians and Muslims mainly in Africa in order to discourage premarital sex by diminishing a girl's stimulation,[28] it understandably provokes revulsion as the gruesome embodiment of outmoded patriarchy. However, the reality is more complex. Kristof and WuDunn talked to a midwife in Sudan, where FGM is illegal but never prosecuted, and she remarked: "This is our culture! [...] We all want it. Why is it America's business?"[29] When women want their daughters to be "cut", it is no wonder that legal bans are not enforced. Confronted with the

19 Makau Mutua, Savages, Victims, and Saviors: the Metaphor of Human Rights, 42 HARV. INT'L. L. J. 236 (2001)
20 Mutua at 225.
21 An-Na'im at 88.
22 NICHOLAS D. KRISTOF & SHERYL WUDUNN, HALF THE SKY 154 (2009).
23 Mutua, and see NIALL FERGUSON, EMPIRE (2001) on the "civilizing mission".
24 Proceedings of the Convention on Modern Liberty (Mar. 1, 2009): http://www.modernliberty.net/read/transcripts/citizens-and-the-state-the-crisis-of-liberty.
25 See Liberty's "Common Values" campaign: http://www.liberty-human-rights.org.uk/issues/human-rights-act/index.shtml.
26 WHO, Factsheet on FGM: http://www.who.int/mediacentre/factsheets/fs241/en/index.html.
27 http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.82.En?Opendocument.
28 Kristof & WuDunn at 221.
29 Id, at 223.

fact that laws alone do not discourage the practice of FGM, Senegal-based NGO Tostan[30] has sought to educate women about health risks and human rights concerns but leave them to make their own informed decisions. Its ability to navigate local cultural conditions such as the effect of decisions by one village on their relations with others, as Kristof and WuDunn detail, led to many mothers opting against the procedure for their daughters.[31]

Tostan's method heeds Mutua's call for a "culturally pluralistic" approach to tackling FGM, which means empowering adherents to arrive at locally legitimate solutions rather than "demonizing and finger-pointing" and ultimately being "insensitive to the dignity of the very women they want to save."[32] Both this example and that of Britain show that people will rarely be inclined to adopt apparently alien norms unless they are shown to be legitimate in the context of those people's local conditions. The approach is not without flaws—it may not stop all "cuttings", meaning it tolerates some persistence of a practice we regard as torture—but it appears more effective than absolutist grandstanding. Culturally pluralistic human rights advocacy supported by INGOs becomes harder in relation to abuses actively perpetrated de jure by the state, such as brutal punishments. But even then, the principle remains that change must be locally instigated in order to successfully navigate entrenched cultural power dynamics.

Universal norms are possible only if we reject the proposition that moral judgments are valid only relative to their sponsor cultures. But human rights are not universal purely because they claim to be. Rather, their universality ultimately depends on actual enjoyment by all human beings. Achieving universal coverage necessitates allowing societies to incorporate their own cultural judgments into human rights laws where possible, and also engaging directly with opposing cultural practices to arrive at locally legitimate solutions that foster greater compliance with human rights.

30 Id, at 224.
31 Id at 229.
32 Mutua at 245.

2011: Does everyone in the UK have access to adequate housing, health care, social security and employment? If not, would a bill of rights help?

Winner: James Potts

The first question can be answered shortly with a 'no'. 8.1 million houses in the UK do not meet the Government's Decent Homes standard,[1] and 2.3% of households live in overcrowded accommodation.[2] Health outcomes vary widely across the UK.[3] State pension and social security rates remain low: £65.45 for standard Jobseeker's Allowance is just 10% of average UK earnings. In February 2011 there are 2.49 million people unemployed,[4] a problem not confined to the current recession, and 5.3 million people fall below the low pay threshold of £6.75 per hour.[5] These problems disproportionately affect women, ethnic minorities and disabled people, and vulnerable groups such as Traveller and Gypsy communities and asylum seekers can find it extremely difficult to access necessary services.[6]

The second question is more difficult. The UK, still a wealthy but increasingly an unequal society, surely has the economic resources to tackle these issues. As Kofi Annan said, 'we have the means and the capacity to deal with our problems, if only we can find the political will'. The question is whether a Bill of Rights which incorporates economic, social and cultural rights (ESCRs) could be worded so that it both has a real impact in helping to address these problems and carries sufficient political support to become enacted. The latter requires such a Bill to address concerns that it will take resource allocation decisions away from democratically accountable politicians and place them in the hands of (unrepresentative, if independent) judges.

This essay argues that it can be done. It looks at the current status of ESCRs ('second-generation' rights, as Karel Vasek called them), and explores the form that a Bill of Rights might take, with reference to the Constitutions of India, Canada and South Africa. Unlike in those countries, the principle of Parliamentary sovereignty in the UK means that a Bill of Rights will probably only ever be an ordinary Act of Parliament (even if becomes particularly well-embedded), not an 'entrenched' constitutional statute. This essay argues that the Human Rights Act 1998 (HRA) provides a model for

1 Department for Communities and Local Government: http://www.communities.gov.uk/documents/housing/pdf/920785.pdf

2 Equality and Human Rights Commission, How Fair is Britain? (2010): http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_ch12.pdf

3 Department of Health, NHS Atlas of Variation in Healthcare: http://www.rightcare.nhs.uk/atlas/index.html

4 ONS: http://www.statistics.gov.uk/pdfdir/lmsuk0211.pdf

5 TUC report: http://www.tuc.org.uk/extras/living-wage-rep-sep-2010.pdf

6 How Fair is Britain?, ibid.

the better protection of ESCRs by such a statute.

ESCRs in the UK

The major current source for ESCRs in the UK is international treaties. The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for minimum standards and progressive realisation of social security, healthcare and employment rights, building on Articles 22-27 of the Universal Declaration of Human Rights, as do further UN treaties and ILO Conventions. The First Protocol to the European Convention on Human Rights contains rights to property and education, though subject to express reservation and treated in UK law as 'weak' rights, in divergence from Strasbourg jurisprudence.[7] The European Social Charter provides for rights to housing, employment, social security and health, supervised by the European Committee on Social Rights through a process of review and recommendation. Meanwhile the Social Chapter of the EU Treaty has set out many employment and non-discrimination rights. The Limburg Principles 1987 and Maastricht Guidelines 1997 have been important interpretative sources for translating these into domestic law.

Yet unlike many other Commonwealth and European countries the UK has not incorporated ESCRs from international treaties into a domestic Bill of Rights. The Government has traditionally opposed this, for example in its Green Paper of July 2007, The Governance of Britain. In a second Green Paper, Rights and Responsibilities (2009), it was more positive about ESCRs, but this was based on existing entitlements to services not incorporation of international conventions. The Joint Committee on Human Rights (JCHR) in its Twenty-Ninth Report (2008) advocated the introduction of a Bill of Rights including ESCRs. The Coalition Government's proposal for a British Bill of Rights is widely expected to include only civil and political rights, not ESCRs.

The position under the HRA

The HRA is an important exception to Parliament's general approach of piecemeal legislation in areas affecting citizens' rights rather than guaranteeing fundamental rights. It has also become an indirect means for individuals to enforce ESCRs in the UK. For example Art.8 ECHR has been used to challenge eviction and housing decisions in the recent cases of Manchester CC v Pinnock [2010] UKSC 4 and Hounslow LBC v Powell [2011] UKSC 8. In Limbuela v SSHD [2005] UKHL 66 it was held that withdrawing social support from destitute asylum seekers can constitute a breach of Art.3, and in Bernard v Enfield LBC [2002] EWHC 2282 Art.8 was used to challenge inadequate provision of healthcare. Of course public authorities are also bound by general public law duties: for example, closure of a healthcare service can be challenged for lacking an equalities impact assessment, or a housing decision on the basis that it is irrational.

However these powers under the HRA (an indirect route to protecting some ESCRs) and general public law (which imposes high thresholds such as unreasonableness) are necessarily limited. A Bill of Rights including ESCRs has potential to be much more effective.

ESCRs in a Bill of Rights? – objections

The principle objection to the incorporation of ESCRs in a Bill of Rights is that it would give unelected judges power over resource allocation decisions which are essentially political and require democratic accountability. As the Green Paper on Rights and Responsibilities (3.52) states:

7 See A v Essex CC [2008] EWCA Civ 36.

Decision-making in economic, social and cultural matters usually involves politically sensitive resource allocation and if the courts were to make these decisions, this would be likely to impinge on the principles of democratic accountability as well as the separation of powers between the judiciary, the legislature and the executive which underpins our constitutional arrangements.

Further, the standards of healthcare, poverty, etc. considered acceptable change over time, unlike rights such as liberty and freedom of speech which are unchanging. Therefore the objection is made that levels of provision for second-generation rights should change over time, in accordance with the electorate's demands, rather than being set down in a Bill of Rights, which would in any case need to be so loosely phrased that it would be declaratory rather than practically useful.

However these objections can be countered. Firstly, individuals have always demanded at least minimum standards of ESCRs (and, indeed, there is public support for them to be enshrined in national law[8]). A Bill of Rights which made ESCRs justiciable could and should contain a provision that the courts must have regard to executive legislative discretion on resource allocation. Secondly, the courts currently make decisions under the HRA which affect resource allocation, and are able to perform that balancing exercise capably. In any case the role of the courts has not been to remake decisions but to review their proportionality (HRA) or legality (under general public law). Thirdly, a Bill of Rights can provide for flexible 'progressive realisation' of ESCRs. Finally, many HRA rights are loosely phrased but have proved justiciable (Art.8), while some ESCRs are relatively concrete (right to education).

ESCRs in a Bill of Rights? – international perspectives

Other countries take a variety of approaches to how ESCRs are domestically incorporated, whether or not they are justiciable, and the level of judicial scrutiny. In the Indian Constitution ESCRs are non-justiciable 'Directive Principles of State Policy'; however the Supreme Court frequently has regard to them in developing the definitions of justiciable civil and political rights.[9] Ireland takes a similar approach. At the other extreme, Finland, Latvia, Estonia, Poland and Romania provide for fully justiciable and legally enforceable ESCRs for health and social security, and courts have struck down laws unduly restricting them.[10] A number of African and American states have also incorporated wide-ranging ESCRs from international conventions such as the American Declaration of the Rights and Duties of Man and the African Charter on Human and People's Rights. The Canadian Charter provides only for civil and political rights, while the Quebec Charter of Human Rights and Freedoms provides for considerable ESCRs. The approach of the Canadian courts, however, focuses on a negative obligation not to make inequality worse under the principle of equality in Article 15 of the Charter.

South Africa's Constitution, as highlighted by the JCHR,[11] is a hybrid model. The Government is required to take reasonable legislative and other methods to achieve progressive realisation of ESCRs, for which it is accountable to Parliament. ESCRs are justiciable in the courts, applying the test of reasonableness, but only within carefully circumscribed limits and in relation to extreme cases, with deference given to the fact that the Government must act within its resources. For example, in Grootboom v Republic of South Africa (2000) the Constitutional Court held that the State's failure to provide emergency housing for applicants evicted from a squatters' camp breached their rights to

8 Polly Vizard (LSE), Case Report 61 (2010): http://sticerd.lse.ac.uk/dps/case/cr/CASEreport61.pdf

9 Kothari, 'Social Rights and the Indian Constitution', LGD 2004 (2): http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/kothari/#a21

10 JCHR, Twenty-Ninth Report, para.166-8: http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16508.htm

11 ibid.

adequate housing. However the Court is also wary of inferring with decisions on resource allocation: in Soobramoney v Minister of Health (1997) it rejected the applicant's challenge to a decision to deny him kidney dialysis, upholding the decision as a rational choice given limited resources. As the JCHR suggests, this model avoids on the one hand 'subversion' of the constitutional relationship by making ESCRs fully legally enforceable, and on the other the risk under the declaratory model of 'the constitutional commitments being meaningless in practice' (para.169).

Conclusions

The South African model therefore represents the best for a Bill of Rights in the UK incorporating ESCRs. Indeed it is arguable that the South African model does not go far enough. For example, a UK Bill of Rights could set a test of proportionality for judicial review of ESCRs, as the HRA does for civil and political rights. This would be in line with their nature as fundamental human rights rather than the entitlements and expectations affected by administrative decisions which are reviewed only on the more stringent public law bases of irrationality, illegality or procedural unfairness.

In any case, the South African model would have to be adapted to the UK. Parliamentary sovereignty requires, as under the HRA, that it is made clear that the courts can challenge administrative decisions and secondary legislation but not Acts of Parliament. In respect of primary legislation the courts would have only interpretative powers (as far as possible giving effect to other legislation in a way compatible with ESCRs) and possibly the power to make a declaration of incompatibility. A Bill of Rights would also require amendment to key statutes of the devolved administrations, and therefore requires political will across the UK.

However, if this can be done, it has the potential to help greatly in creating equal standards in key areas such as housing, health care, social security and employment. During his presidency Franklin D. Roosevelt proposed a Second Bill of Rights for the USA which would incorporate ESCRs so that no citizen would go 'ill-fed, ill-clothed, ill-housed and insecure'. This is yet to be realised. But, in the UK, a Bill of Rights incorporating ESCRs would be a step towards this, building on the successes of the HRA. The positive effects of the HRA have been felt in the way it has been relied on for civil and political rights and has encouraged a culture of rights in public authorities and beyond. It has also had to stretch, to an extent, to cover the void left by the lack of ESCRs in domestic law: for example a case like Grootboom, in South Africa, could probably be won in the UK under Article 8 HRA. However a less extreme case might fall by the wayside, causing serious injustice. A Bill of Rights incorporating ESCRs has a good chance of helping to keep those who suffer from inadequate housing, health care, social security and employment from falling by the wayside.

2012: In the light of the growing prison population should we look for alternatives to imprisonment?

Winner: Stephen Gummer

The Facts
Setting: A fictional Cabinet Room in the present day

Prime Minister (PM): I want to reduce the number of people in prison.
(Audible discontent)

On Friday 3 February 2012 the prison population was 87,668.[1] This is an increase of over 3,000 people in three years and an increase of 43,040 since 1993.[2] Surely this must be leading to overcrowding?

Justice Secretary (JS): Prison is overcrowded. In 2008, the prison population overtook the Prison Service's own target for 'safe overcrowding'.[3] In November 2011, Shrewsbury Prison was 196 per cent overcrowded.[4] The number of people sharing a one person cell is 19,268.[5] We've been keeping prisoners who have been going to and from court in police cells overnight to ease the pressure. A recent case showed the risks; a prisoner was moved from prison to a police cell and then to another local prison due to overcrowding. The prisoner suffered from mental health problems and due to the multiple transfers his symptoms were overlooked. He committed suicide.[6]

PM: So you're in favour?

JS: No, sir.

PM: What? Surely that constitutes inhuman and degrading treatment? Where's the Lord Chancellor?

JS: He's been abolished sir, that's still me. There are human rights abuses linked to the overcrowding of prisons. 58 men and women killed themselves while in custody in 2010.[7] In the same year there were 11,252 prisoner-on-prisoner assaults.[8] Over 2,000 children are now in prison, some aged 12, and this brings new risks. Gareth Myatt, a 15 year-old, died while being physically restrained at Rainsbrook Secure Training Centre. This was an undoubted violation of the UN Convention on the Rights of the Child.

1 HM Prison Service (2012), 'Population and Capacity Briefing for Friday 03/02/2012'.
2 HM Prison Service (1993), 'Prison Service Annual Report April 1992-1993'.
3 NOMS (2008), 'Prison Population and Accommodation Briefing for 22 February 2008'.
4 Hansard (2010) HC, 7 December 2010, column 202W.
5 Hansard (2011) HL, 3 October 2011, column WA135.
6 Prisons and Probation Ombudsman for England and Wales (2009), 'Annual Report 2008-2009'.
7 Ministry of Justice (2011), Press Release – 'Deaths in prison custody 2010'.
8 Ministry of Justice (2011) 'Safety in Custody Statistics 2010'.

Prison infrastructure is also failing to cope with overcrowding and this has led to prisoners suffering inhuman conditions. A 2007 Report at Portland Prison found:[9]

> *"Young prisoners were not always able to get out of their cells to use the toilet recesses. As a consequence, some used buckets and some threw excrement and urine out of the window… with waste leaking into staff offices and other accommodation below."*

PM: And with all that you're still not in favour. Why not?

JS: It's unthinkable.

PM: What about the Chancellor? Last year we exceeded 88,000 people in prison, surely we can't afford this?

Chancellor: Prison costs are high. The average cost per prisoner, per year is £45,000[10] and every new prison place costs £170,000.[11]

And that's just the costs we know about. In truth we don't know how much prison costs. In 2011, the Public Accounts Committee reported on the massive cost of the National Offender Management Service (NOMS). They noted that the Ministry of Justice (MOJ) did not actually have a detailed understanding of the costs of NOMS.[12]

PM: So given all of that you must be on my side, we need to reduce the prison population.

Chancellor: No Prime Minister.

PM: Why?

Chancellor: It's just unthinkable.

PM: Home Secretary, if we are paying more to keep more people in inhuman and overcrowded conditions at least tell me it's working?

Home Secretary (HS): Err, actually PM, prison is not effective as a method of reducing crime. 57 per cent of people sentenced to under a year in prison commit an offence within one year of release.[13] That number is 71 per cent for children.[14] Those statistics are actually a lot higher, the numbers I gave you only reflect the amount of people who get caught reoffending, not the amount that actually do.

PM: But isn't crime going down?

HS: Oh yes but there's no evidence that it's linked to the increase in the prison population. Crime

9 HMIP (2007), 'Report on an unannouced full follow-up inspection of HMYOI Portland (3-12 January 2007) by HM Chief Inspector of Prisons'.
10 Hansard (2010) HC, 3 March, column 1251W.
11 Hansard (2010), HC Deb, 13 September, column 847W.
12 House of Commons (2011), 'Public Accounts Committee, sixteenth report, Ministry of Justice Financial Management'.
13 Ministry of Justice (2011), 'Proven Re-offending Statistics Quarterly Bulletin January to December 2009'.
14 Ministry of Justice (2011), 'Proven Re-offending Statistics Quarterly Bulletin January to December 2009'.

fell across the western world throughout the 90s; the reduction was probably caused by economic growth.[15]

PM: So you must want to use prison less frequently?

HS: No sir.

PM: Let me guess, it's just unthinkable?

HS: Err… yes Prime Minister.

The Equation

The realities of the penal system of England and Wales all point in one direction - we have to reduce the prison population. The past 20 years has seen the prison population rise, the cost of the prison system rise and the human rights abuses increase, all in exchange for little impact upon crime rates.

This point becomes all the more apparent when one considers some of the alternatives available to custody. The two-year reoffending rate for community orders was 36.8 per cent in 2008[16], in contrast to the current 57 per cent of people sentenced to less than 12 months in prison who commit an offence within a year of release. Further, statistics suggest that community orders such as unpaid work or drug treatment only cost the taxpayer £2-3,000 a year.[17]

The APPG for Women in the Penal System has reported on the success of the Together Women Programme, a charitably-run project that aims, not to punish, but to work with women to divert them from crime:[18]

> *"The re-offending rate of women using Together Women support is just 7 per cent compared to a national average of 36 per cent."*

The question supposes that the growth of the prison population and all that this entails is a critical factor necessitating reform.

Figure.1

Prison Population ↑ = Human rights abuses ↑ + Costs ↑ + Reoffending ↑

The prison population must be reduced

It seems self-evident that if large-scale use of prison does not work then we must stop large-scale use of custody. Yet even with alternatives that are more effective and more humane, overuse of custody continues.

15 BBC News (2011), 'Ken Clarke says imprisonment not linked to crime fall'.
16 Ministry of Justice (2010), 'Reoffending of adults: results from the 2008 cohort, England and Wales'.
17 Left Foot Forward (2011), 'Ministry of Justice policy must be effective - not just tough'.
18 All Party Parliamentary Group for Women in the Penal System (2011), 'Women in the Penal System'.

The fictional Cabinet knew the facts but refused to reduce the prison population. One is left with the conclusion that our society's over-use of imprisonment cannot be based solely on the facts.

A 2011 poll showed that 58 per cent of the public thought prison did not work but that over 80 per cent thought prison sentences were too often too lenient.[19] In other words, at least 38 per cent, of those polled felt that prison did not work but that time in custody should be increased. The consensus is that the prison system is broken but we shouldn't fix it.

"It's just unthinkable"

Punishment via imprisonment is ingrained in our social consciousness. In the poll mentioned above 67 per cent of the public stated that the focus of justice should be on 'deterrence' of the individual not rehabilitation.[20] What is apparent is that our society focuses on punishing the individual more than healing the social environment in which crime is created; even though the latter is more likely to prevent reoffending.

A 2006 study researched 12 countries' use of custody.[21] The study found that neo-liberal countries such as the UK and the USA have high rates of imprisonment when compared with social democracies, like Sweden and Finland.

Cavadino and Dignan suggest that this is no coincidence and that a country's political and economic philosophy impacts upon its' use of imprisonment. In particular, they submit that the neo-liberal individualism that underpins our free markets and our social comprehension fosters a heightened belief among our society that:[22]

> ***"Individuals are solely responsible for looking after themselves."***

In our society's view, criminal actions are caused and determined by the individual alone and so are the consequences.

We apply this theory to breaking point. Our politicians are certainly guilty of this. The age of criminal responsibility in England and Wales is 10 years old. Experts question whether a 10 year-old can truly be held to be a culpable agent in the eyes of the law but we impose the fiction nonetheless.[23] In contrast, social democracies tend to pursue a welfare-based approach:[24]

> *"…the offender… is regarded not as an isolated culpable individual who must be rejected and excluded from law-abiding society, but as a social being who should still be included in society…"*

Our judiciary too, despite being independent, are affected by the philosophical undercurrent that flows throughout our neo-liberal social fabric. The judge in the trial of Thompson and Venables described the Defendants as "wicked". The acts of the two 11 year-olds were awful. However the language used by the judge goes to the nature of the individual. In such a case social democracies look not just at individual blame but also social failure. Our approach to penal policy applies absolute individualism to

19 Ashcroft (2011), 'Crime, Punishment and the People'.
20 Ibid.
21 Michael Cavadino and James Dignan (2006), 'Penal policy and political economy'.
22 Ibid.
23 BBC (2010), 'Calls to raise age of criminal responsibility rejected'.
24 See note 21.

the Defendant and therefore absolute culpability. If the individual is always absolutely to blame then use of prison instead of community alternatives becomes the only acceptable solution.

The recent debate on prison voting is a good example of how this individualistic mind-set affects treatment of prisoners. Many of Europe's social democracies allowed prisoners the right to vote without being compelled to do so. However the resistance to the policy in the House of Commons was overwhelming:[25]

> *"When someone commits a crime that is sufficiently serious to put them in prison, they sacrifice many important rights: not only their liberty, of course, but their freedom of association, which is also guaranteed under the UN charter of human rights and the European convention on human rights, and their right to vote." (David Davis MP)*

If the individual alone is culpable then it is unproblematic to remove them from society. Punishing the individual is so heavily ingrained in the neo-liberal mindset that prisoners have been denied not just their liberty but the most fundamental of rights in a neo-liberal society; the right to vote.

Jurisprudence scholars state that the rationale for imprisonment emanates from a mixture of theories comprising deterrence, punishment, incapacitation and rehabilitation. However the British neo-liberal philosophy doesn't allow us to socially contextualise a crime and the result is that our sentencing policy focuses on individualised punitivism via imprisonment.

Conclusions

Should the growing prison population cause us, as a society, to look at alternatives to custody? Yes, prison often fails and more effective and humane alternatives exist.

However will the growing prison population cause British society to reassess their overuse of custody? Sadly, not. When one looks at prison it appears to be failing by every measurable standard. The prison population is soaring, costs are rocketing, incidents of human rights failures are widely reported and we are not tackling reoffending. However none of these failures are relevant if society's core policy objective is skewed towards punishment. Reforming the penal system requires one not just to confront the facts of our penal system but to overthrow the very political philosophy that shapes British society. It will take more than a rising prison population to achieve that.

25 Hansard (2011) HC, 10 February, column 493.

2013: In view of the scope and extent of the civil legal aid cuts, is the UK in breach of its obligations under the European Conventions on Human Rights?

Winner: Niall Coghlan

Socrates: Apollo almighty, my head - what did we discuss last night?

Lawyer: The cuts to legal aid, old friend, and their compatibility with ECHR Art. 6

S: Ah yes, I'd been meaning to ask you about that. Well? Did you manage to persuade me they were not merely immoral, but in fact unlawful? Talk me through it.

L: We first agreed that ECHR 6, the right to a fair trial, might be breached by these cuts, because in Airey and Steel the Court held that the lack of legal aid for a decree of nullity and a defamation case respectively was a breach.

S: Yes, yes we did – but this only applied when 'civil rights' were involved, which was true of family, employment and negligence cases, but not immigration and most housing cases, no?

L: Quite. The second limitation was that the Court, understanding the limited funding of many legal aid systems, was reluctant to unilaterally require funding in swathes of cases. Only in the most complicated and grave ones would ECHR 6 be breached.

S: Like Steel itself – a year-long trial with 130 live witnesses where McDonald's spent £10m on lawyers whilst the defendants were penniless.

L: Precisely. And even in these cases, exceptional funding could be provided under s10 of LASPO: in theory, the Act is entirely compatible with ECHR.

S: I cannot have won that easily. You then had two ways in which a breach might be found anyway, by the practical functioning of the system, didn't you?

L: Three, I'll have you know. The lack of an independent review of any decision for exceptional funding; the possibility of the Court widening Airey/Steel liability; or national courts finding a breach, following the Perotti criteria, in a case where they 'really cannot do justice' because of the complexity of the case.

S: Three, yes, but three weak ones. The first could be remedied by setting up an independent review, as LASPO provides for; the second, we said, was unlikely given the Court's current desire to appease the UK and given the fact the ECHR explicitly requires legal aid only for criminal cases; and the third gives no lower a bar than Airey/Steel, as well as being more likely solved by a request for exceptional funding.

L: Your memory returns - conveniently missing the author. Those were my points!

S: Yes, old friend, they were. But the concluding point was mine: law has done what it can to limit the cuts. We must now make the moral case against them.

2014: Applying human rights and humanitarian law, in what circumstances should forcible measures be permitted against a state that is subjecting its people to human rights abuses?

Winner: Rebecca Hadgett

At present, forcible measures on the basis of grave human rights abuses are legally permissible with United Nations (UN) Security Council authorization under Chapter VII of the UN Charter.[1] The natural understanding of the Charter is that recourse to forcible measures outside the Chapter VII scheme is a violation of the blanket prohibition on use of force contained in Article 2(4)[2] and the commitment to respect sovereignty in Article 2(7).[3] However, there are arguably sound moral grounds for intervention in crises absent such authority, causing some states to both conduct unauthorized forcible measures on humanitarian grounds[4] and continually made statements as to their belief that some sort of exception sanctioning such action subsists in international law,[5] raising the question of an evolving opinio juris.

Whilst a question mark continues to hang over the legality of any such intervention, the recourse to forcible measures may occur in unsuitable circumstances, namely those motivated by foreign policy decisions unconcerned with abuses of human rights. Clarification is necessary.

In this essay, I elucidate the factors that should be contained within a definition of appropriate international humanitarian intervention. I propose that consideration of the 'intention' of the forcible measures is not to be incorporated as a condition of action but, instead, is suitable as a guiding principle. The 'intention to halt or alleviate human suffering caused by grave human rights abuses' becomes a framing principle of the entire discussion, ensuring that the factors included in a definition of forcible measures in this context respond to the risk of unjustified unilateral action.

The Importance of Intention

Drawing upon the 'just cause' principle in jus ad bellum, previous attempts to delineate acceptable

1 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter) ch 7.
2 Ibid, art 2(4).
3 Ibid, art 2(7).
4 See eg, North Atlantic Treaty Organization (NATO) campaign in Kosovo in 1999.
5 Eg, Belgium relied on a doctrine of humanitarian intervention in Legality of Use of Force Case (Provisional Measures) [1999] ICJ Rep, pleadings of Belgium, 10 May 1999, CR99/15 in Simon Chesterman, Just War or Just Peace? (OUP 2001) 213.

circumstances for humanitarian action have included a condition pertaining to the intention behind forcible measures. When academics outlined their proposal for the Responsibility to Protect (R2P), one key condition was that the action was conducted with the "Right Intention", which meant that the "primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering".[6] Similarly, Human Rights Watch stated that the "dominant reason" for action should always be "humanitarian purpose".[7]

Though reassurance may be gained by including such a condition, in this form it is likely to raise more questions than it answers. It is an imprecise notion, with little indication of how it could be evidenced in practice. Further, as Human Rights Watch highlights, "purity of motive" can hardly be expected,[8] given that any resort to forcible measures will inevitably incorporate consideration of many varying tactical factors. Simply citing humanitarian motive or proper intention as a condition for action fails to achieve clarity. Further, to list intention of one of several requirements underplays the fact that identifying illegitimate action is a central concern and, ultimately, the raison d'être of any attempt to define the principle of forcible measures on humanitarian grounds.

Instead, acknowledging that action should only be permitted for the purposes of preventing further abuse of human rights should inform decisions about other criteria. The 'intention to halt or alleviate human suffering caused by grave human rights abuses' would serve as the guiding principle, promoting positive action aimed at preventing abuse of human rights whilst restricting any permissible action to the furtherance of this cause.

I. A Threshold Criterion

The most obvious method of securing proper intention is to prescribe the situations in which forcible measures may be appropriate. By raising a threshold requirement, the pool of situations requiring potential action is narrowed considerably, ensuring states only intervene when there are grave breaches of human rights.

In this regard, during a speech given to the House of Commons, Leader of the Opposition Ed Miliband spoke of two elements to a threshold requirement: the need for clear, condemnatory evidence and the requirement that the crimes perpetrated are of an extreme nature.[9] Citing the Attorney General's advice on the legality of intervention in Syria, he spoke of the need for "convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress".[10]

On the need for evidence, Miliband discussed the importance of thorough research to ensure that there is "compelling" evidence of state responsibility before action is considered.[11] It seems appropriate that detailed fact-finding should be a part of this process and is a necessary precursor to any action, forcible or otherwise. To prevent manipulation of the evidence by interested parties, it is also important that the gathering of evidence and the determination of whether the threshold requirement is surpassed are conducted by an impartial multinational body.

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6 International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect (International Development Research Centre, 2001) xii, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

7 Human Rights Watch (HRW), 'War in Iraq: Not a Humanitarian Intervention' (Human Rights Watch, 26 January 2004) <http://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention>.

8 Ibid.

9 HC Deb 29 August 2013, vol 566, cols 1440–1448.

10 Ibid, col 1443.

11 Ibid.

On the substantive requirement of the nature of the crisis, a threshold requirement was considered in the formulation of R2P, where intervention would require "a large scale loss of life" at the responsibility of the state or "large scale 'ethnic cleansing'".[12] A focus on severe international crimes, as defined in customary international law, the Geneva Conventions[13] or statutes of international tribunals,[14] would provide both consistency with the post-conflict regime of accountability through international criminal charges and would provide a focus on alleged abuses that comprise relatively well defined and widely condemned criminal actions.

Both the "compelling" evidence requirement and the narrowing of the remit to particular international crimes provide tests amenable to adjudication by a court or independent tribunal, a role potentially appropriate for the ICJ, ICC or a relevant UN organ. This would ensure the decision is a step removed from key political players who may have vested interests in pursuing, or prohibiting, action.

II. A Necessity Requirement

Given that the appropriate motivation for action is solely to limit grave human rights breaches, it is apt that the response should be tailored to focus solely upon the humanitarian crisis and the abuses giving rise to it. Such an obligation would have three elements.

First, all other non-forcible routes should have been exhausted. The doctrine of R2P espouses a rule that "every non-military option for the prevention or peaceful resolution of the crisis has been explored", ensuring that diplomatic alternatives are pursued vigorously.[15] If the aim of humanitarian protection can be achieved in a less invasive way, then the non-forcible alternative should be pursued.

Secondly, forcible methods should only be considered where they are significantly likely to have an impact.[16] If forcible measures are unable to address the humanitarian crisis, they should not be pursued, even if the circumstances giving rise to the need are dire and there are no viable non-forcible measures. In practice, the threshold condition requiring "compelling" evidence of state responsibility will involve an impartial and timely investigation into events, usually conducted by a UN body, as with Syria,[17] but potentially also as an outcome of preliminary ICC investigations, perhaps in circumstances similar to the prompt examination into recent events in the Central African Republic.[18] Either those conducting the investigation, or a UN body assessing the evidence, should form a series of assessments as to the viability and potential impact of both non-forcible and forcible measures.

Finally, any forcible measures taken should be proportionate, which would include, at the least, a geographic and time limitation.[19] In order to ensure such measures do not become a method of circumscribing international law and are instead pursued as part of the wider international legal

12 ICISS (n 6).

13 Eg, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 147, creating penal sanctions for particular 'grave breaches'.

14 Eg, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 arts 2–5.

15 ICISS (n 6).

16 A provision of "reasonable prospects" is included in R2P, ibid.

17 United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, 'Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013' (2013) <http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf>.

18 'ICC to Open War Crimes Probe in CAR' (Al Jazeera, 8 February 2014) <http://www.aljazeera.com/news/africa/2014/02/icc-open-war-crimes-probe-car-2014285164926916.html>.

19 HC Deb (n 9) col 1440.

system, there should be a duty to uphold other international objectives, including maintaining state sovereignty, to the greatest extent possible. A disproportionate use of force would both betray a non-humanitarian purpose and constitute an unjustified use of force contrary to the UN Charter.[20]

III. A Need for Proper Authorisation and Procedural Safeguards

One of the most controversial aspects that must be addressed is the procedure required to gain authorisation to conduct forcible measures. Requiring unanimous Security Council agreement before action would ensure there is little distinction between a doctrine of humanitarian intervention and current practice under Chapter VII. Though the Security Council have been willing to see humanitarian crises as threats to peace and security in the past,[21] and elucidating a doctrine of intervention may reinforce the obligations of the international community to support such action, the Security Council has largely been unwilling to commit to forcible measures that may be legitimate on the grounds outlined above.[22] It is for this very reason that states have contemplated unilateral forcible measures to date. The continued failure to provide an alternative to Security Council sanctioned action has resulted in frustration, inadequate response to crises and an increased risk of unilateral action.

A definition for forcible measures taken in pursuance of human rights objectives should recognise that legitimacy and authorisation could come from a range of sources. A thorough proposal was drafted as part of the R2P doctrine, where three authorising bodies were suggested: the Security Council, the General Assembly and Regional Organisations, with the Security Council having the first opportunity to respond.[23] Other organisations have emphasised the importance of approval from a number of states.[24] Ensuring action was authorised by a widely-supported multinational body would adequately facilitate action, in a greater range of scenarios than is currently viable, whilst ensuring unilateral action is not feasible.

IV. Respect for International Human Rights Law

For the same reason that Chapter VII confers broad powers on the UN to respond in whatever way is required, it is important that impact of intervention is not unduly inhibited. Despite this, given any measures are to be pursued with the aim of securing human rights protection, it seems important to articulate that the military forces conducting any intervention must themselves respect international human rights law.[25]

Conclusion

In light of fears that a principle of forcible measures could be used for illegitimate political means, I suggested that consideration of the 'intention to halt or alleviate human suffering caused by grave human rights abuses' should be at the forefront of any definition and must frame substantive requirements. The test itself could then incorporate safeguards through a threshold requirement, a necessity requirement, proper procedure for authorisation and a requirement that military forces act in line with international human rights law.

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20 UN Charter (n 1) art 2(4).

21 Eg, UNSC Res 955 (8 November 1994) UN Doc S/RES/955 established ICTR in response to threat to peace arising from Rwandan conflict.

22 Both Russia and China vetoed a draft Resolution threatening UN action against Syria under Chapter VII; see Adam Gabbat, 'Russia and China Veto of Syria Sanctions Condemned as 'Indefensible'', The Guardian (New York, 19 July 2012) <http://www.theguardian.com/world/2012/jul/19/russia-china-syria-sanction-veto>.
A copy of the draft resolution is available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/538>.

23 ICISS (n 6) xii, 53–54.

24 HRW (n 7).

25 Ibid.

2015: The roots of many of our basic rights go back to the Magna Carta whose 800th Anniversary is being celebrated in 2015.

Given this important legacy, to what extent would proposals to repeal the Human Rights Act 1998 and pull out of the European Convention on Human Rights impact on the protection of human rights in the UK and around the world?

Winner: Ian Robert Mcdonald

On 1 April 1998, Christopher Alder - a former British Army paratrooper, decorated for his service - was assaulted, and taken to hospital with a head injury. He was visited by police as a victim, but arrested when his behaviour became 'troublesome'. After just five minutes in a police vehicle Christopher emerged unconscious, with his trousers at his knees. He was dragged into the station and left, for 11 minutes, gasping for life. As nearby police watched and joked, reportedly making monkey noises, Christopher choked to death in his own blood, urine and excrement.[1]

An inquest held that his life was unlawfully taken, but no officer was ever convicted or even disciplined. His sister, Janet, had one hope: our human rights framework. However, as Christopher died before the Human Rights Act was introduced, she had to take her case to the European Court of Human Rights

1 'Government issues landmark apology over Christopher Alder's death in custody' (Liberty, 22 November 2011) <https://www.liberty-human-rights.org.uk/news/press-releases/government-issues-landmark-apology-over-christopher-alder%E2%80%99s-death-custody> accessed 24 January 2015.

in Strasbourg. Consequently, Janet's ordeal lasted 13 years. The Government fought her at every stage, before eventually admitting violations of Articles 2 (right to life); 3 (no inhuman or degrading treatment); and 14 (no discrimination) of the European Convention on Human Rights.[2]

Janet's story is tragic, but sadly not unique. I open with it not for hyperbole but because it illustrates, I think, the true importance of human rights, and the significance of the European Convention's long-overdue incorporation into British law via the Human Rights Act. Clearly, had the Act been in force when Christopher died, the Government would have struggled to deny Janet the justice she deserved for so long.

The Convention is regularly derided as some foreign concoction, foisted upon us by Europe. Nothing could be further from the truth. After the horrors of the Holocaust, it was Winston Churchill who called for 'a Charter of Human Rights'; and largely British lawyers who drafted the Convention itself. In so doing they drew inspiration from the Common Law, and entirely British principles of due process and equal treatment dating back to Magna Carta. The United Kingdom was the first State to ratify the Convention, in 1951; however, without its incorporation, instances of British law failing to provide sufficient protection were not uncommon, and this country's record in Strasbourg was not overly favourable.[3]

Thankfully, on 2 October 2000, the Human Rights Act was passed, 'bringing rights home' by making Convention freedoms directly enforceable in British courts. It has achieved so much in its short tenure, from safeguarding service personnel[4] to providing redress for rape victims.[5]The legislation has also, I would suggest, made a less obvious, but no less meaningful, contribution outside the courtroom, shaping attitudes and raising standards. It can be no coincidence that this country's performance in Strasbourg has improved accordingly; in 2014, the United Kingdom lost just four of 1,997 cases lodged against it.[6]

Like the Convention, the Act too has been plagued by mistruths. But its protections are truly the most basic; those that every human being should enjoy. As Lord Bingham put it, they are not trivial, unnecessary or 'un-British'.[7] He rightly asked which of the Act's small selection of rights its critics would relinquish. The right to life? The right to a fair trial? The right not to be tortured? It is doubtful many would wish to live in a country where these most fundamental freedoms were not properly protected.

Yet that is the reality we now face. The Conservatives have vowed to repeal the Act, and replace it with a 'British Bill of Rights and Responsibilities'.[8] The Bill would, we are told, limit human rights law only to those cases the Government deems 'most serious'. Elsewhere, with CIA torture in the spotlight and the United Kingdom's own role in that practice wholly unclear, the absolute protection against inhuman treatment would be diluted in certain cases. And the right to a private and family life would

2 Ibid.

3 See, for example, Malone v UK (1983) 5 EHRR 385; or Smith and Grady v UK (1999) 29 EHRR 493.

4 See, for example, Smith & Ors v Ministry of Defence [2013] UKSC 41.

5 See, for example, DSD & NBV v Commissioner of Police of the Metropolis [2014] EWHC 2493 (QB).

6 Owen Bowcott, 'UK broke law in fewer than 1% of European human rights cases in 2014' The Guardian (London, 29 January 2015) <http://www.theguardian.com/law/2015/jan/29/uk-broke-law-european-human-rights-cases-2014> accessed 30 January 2015.

7 Lord Bingham, 'Keynote Address' (Liberty's Anniversary Conference, London, 6 June 2009) <https://www.liberty-human-rights.org.uk/sites/default/files/lord-bingham-speech-final.pdf> accessed 24 January 2015

8 The Conservatives, 'Protecting Human Rights in the UK' (2014) <https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf> accessed 24 January 2015.

be 'radically' restricted in deportation appeals, for both criminals and mere 'suspects'.[9]

In current form, then, the Bill would weaken the rights of everyone in this country - vulnerable minorities and innocent children in particular. And it would transform previously inalienable freedoms into fragile privileges, conditional on citizenship and conduct. Such linking of rights with 'responsibilities' is not desperately novel, and may sound tempting. But our criminal and civil law is already full of duties and obligations, owed by 'the people' to the State. The Human Rights Act, conversely, is one of the few tools allowing ordinary citizens to hold the powerful to account for abuse and neglect.

The potential impact of the proposals extends beyond the individual, though. Repeal of the Act, which underpins the United Kingdom's devolution agreements, would also threaten our wobbling Union, and the still-fragile peace settlement in Northern Ireland. Indeed, the Scottish Government has recently pledged its support for the Act.[10] Meanwhile, diminishing Convention protections at home would surely increase the prospect of the European Court ruling against this country - feeding a retreat to the nocuous pre-incorporation position that one must travel overseas for justice.

Astonishingly, however, the Bill would go further still, by treating Strasbourg judgments as merely 'advisory' until approved by Parliament. This is undoubtedly driven by a perception that the European Court is somehow 'changing British laws'. Much has been made, for instance, of the Strasbourg ruling on prisoner voting.[11] But the United Kingdom is yet to implement that decision; there has been no change in British law. The Human Rights Act, after all, is careful to preserve Parliamentary Sovereignty.

In ratifying the Convention, though, this country has agreed to comply with its obligations under international law—including respecting the European Court. It is inconceivable that Strasbourg judgments could be downgraded in the United Kingdom, but remain binding upon other signatories; it would destroy the Convention. The Bill's stance, therefore, would lead not only to this country's departure from the Convention but possibly the Council of Europe itself, which has rejected the proposals.[12] Such a withdrawal would align the United Kingdom alongside only Belarus and Kazakhstan, and cast doubt over its future within a European Union insistent on Member States belonging to the Council of Europe also.

As well as damaging its global reputation and influence, this country's exit would undermine the cause of those in younger democracies still striving for the freedoms the Bill seeks to discard. The message to nations with far worse human rights records would be simple: the European Court is worthless. It is difficult to imagine the result being anything other than the corrosion of international human rights. Predictably, British talk of deserting the Convention has caused alarm—including amongst bereaved families of the 2004 Beslan school massacre, who have brought a case in Strasbourg. Two of the relatives, Ella Kasayeva and Emma Tagayeva, have warned that the United Kingdom's departure would be a 'catastrophe':

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9 Frances Gibb, 'Dangerous inmates to be stripped of human rights' The Times (London, 20 January 2015) <http://www.thetimes.co.uk/tto/law/article4328312.ece> accessed 24 January 2015.

10 'Shared commitment to Human Rights Act' (The Scottish Government, 29 January 2015) <http://news.scotland.gov.uk/News/Shared-commitment-to-Human-Rights-Act-1562.aspx> accessed 30 January 2015.

11 Hirst v the United Kingdom (No. 2) [2005] ECHR 681.

12 Peter Dominiczak and Bruno Waterfield, 'Tory plans to 'ignore' European human rights rulings rejected by Strasbourg' The Daily Telegraph (London, 3 October 2014) <http://www.telegraph.co.uk/news/politics/conservative/11139924/Tory-plans-to-ignore-European-human-rights-rulings-rejected-by-Strasbourg.html> accessed 30 January 2015.

> *The UK must not think only of itself, because this will lead to other countries completely disregarding the rule of law…It is hard to overestimate the significance of the European Court of Human Rights for the Russian people. It is the only deterrence from this lawlessness. It is our only hope.*[13]

That all of this comes as the United Kingdom prepares to celebrate Magna Carta's 800th anniversary—eight centuries at the forefront of the fight for rights and freedoms—makes the betrayal all the greater. If that famous document's ultimate lesson was that no power is absolute, the Human Rights Act keeps that flame alive today by exercising constraint over an ever-larger Executive. So the Act should be regarded, as Magna Carta still is, as a statement of basic principles and law—not some temporary dalliance, ripe for tinkering with by passing administrations.

Regrettably, though, many Conservatives clearly consider their promise to scrap the Act a potential vote-winner. This is a sad status quo, borne chiefly out of a lack of public education. Incorporation of the Convention was arguably one of Labour's finest achievements but, amidst the so-called 'War on Terror', Ministers swiftly disregarded the Act in favour of authoritarianism—leaving it to be warped and discredited. A new securitised discourse instead emerged, fuelling dichotomies of 'us and them' and depicting fundamental freedoms as enemies of sense and safety.

The British Bill of Rights and Responsibilities fits neatly into this new epoch. Its title alone is illustrative: people are no longer judged purely by the fact they are human; but by where they are from, or what they have done. 'Rights' become the sole preserve of the law-abiding, British-born majority, at whom the Bill is targeted—those who believe, often misguidedly, that their liberty is threatened by alleged 'outsiders'. In an increasingly uncertain world, such an approach may hold some appeal. But modern life's inevitable challenges cannot excuse the abandoning of values for which our predecessors fought and died. Values which are universal; not dependent on nationality, behaviour or status. Values which will be forever lost in an era of 'British' Bills for British people.

Were the proposals enacted tomorrow, most of us would likely not face being returned to places of torture, or separated from our families. Admittedly, it is often the vulnerable and undesirable—immigrants, asylum-seekers, prisoners, criminals—to whom human rights matter most. But history reminds us that we can all become society's outcast. Just ask Jenny Paton, a mother-of-three spied upon because her local Council wrongly thought she was lying about living in a certain catchment area; or Gary McKinnon, who faced decades in a United States 'supermax' jail for looking for 'little green men' on the Internet—despite never leaving his London bedroom.

Thus we must all retain some imagination, because it can, and does, happen to anyone. If we simply nod along as politicians exploit fear and prejudice to dismantle basic freedoms—allowing ourselves to be persuaded that the handful of rights we enjoy is apparently a bad thing—how can we expect any proper protection when it is us, or our loved ones, bearing the brunt of the State's excesses?

Janet, of course, need not imagine. Her brother Christopher served this country with distinction, and yet his life was treated with complete contempt because of the colour of his skin. I began this essay with Janet's experience; I leave its final word to her also. For she offers, I think, a more compelling

13 Dr Alice Donald, 'UK must not think only of itself' (UK Human Rights Blog, 24 October 2014) <http://ukhumanrightsblog.com/2014/10/24/uk-must-not-think-only-of-itself-massacre-families-urge-uk-not-to-leave-echr-alice-donald/> accessed 29 January 2015.

argument for human rights than I ever could:

> *The whole experience has emphasised to me that everybody's got human rights; everybody's entitled to justice…I don't think people understand the Human Rights Act - it affects every single one of us. To scrap it would be dangerous - there wouldn't be justice in this country for a lot of people.*[14]

14 Corinna Ferguson, 'My HRA: Janet Alder' (Liberty, 15 February 2013) <https://www.liberty-human-rights.org.uk/news/latest-news/my-hra-janet-alder> accessed 3 February 2015.

2016: A most radical recommendation? Should interception warrants be judicially authorised or does there need to be democratic accountability?

Winner: Kerry Nicholson

The development of technology has increased the ability of the police and intelligence agencies to delve into people's private lives. Following Snowden's revelations on the extent to which private communications are used by these institutions, there has been widespread demand that the law be updated and the protections strengthened. One particular recommendation is that the judiciary should authorise warrants.[1] While this seems radical, in the light of international approaches, constitutional considerations, and practical realities, it becomes clear it is not in fact radical, but overdue. Arguments that use democratic accountability against judicial authorisation do not fully understand the requirements of democracy.

Radical in the Narrowest Sense

Recommending judicial authorisation of interception warrants is only radical in the sense that it is contrary to the current established practice in the United Kingdom;[2] it is not novel, extreme or cutting edge. Many other jurisdictions require judicial authorisation in some form, including the United States, Canada, and New Zealand. The European Court of Human Rights recently confirmed the legitimacy of judicial authorisation in Zakharov v Russia, stating that it was an important, though not obligatory, safeguard.[3] The Court's attitude is well established: in 1980, it held that "in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge".[4] A procedure that has long been approved by the European Court of Human Rights and which is used across the world cannot be regarded as radical.

Is Judicial Authorisation Democratic?

While judicial authorisation may not be radical, any change to the law should be justifiable. Communications are increasingly important in fighting crime and terrorism, which in turn creates a greater threat to privacy rights, and so the regime governing interception should be robust enough to withstand strong scrutiny based on constitutional principles.

1 E.g. Anderson, "A Question of Trust".
2 Ibid, para 14.48.
3 [2015] ECHR 1065, para 249.
4 Klass v Germany (1980) 2 EHRR 124, para 167.

One argument put forward against judicial authorisation is that there needs to be democratic accountability. However, this is misleading. The judiciary is not elected, but a lack of democratic accountability should not be confused with a lack of democratic legitimacy.[5] At the heart of democracy is the prevention of the exercise of arbitrary power,[6] which is prevented through the accountability of decision makers. The government is accountable in the ballots, and the judiciary is accountable through publicly justifying its decisions based on the law. However, neither of these protections applies conventionally in the case of the authorisation of warrants as they are inherently secret: there is a tension between transparency, and therefore accountability, and effectiveness in surveillance.[7] The focus therefore shifts to who is democratically legitimate – who is the more likely to prevent the exercise of arbitrary power - as opposed to who is directly democratically accountable.

The judicial authorisation of warrants is democratic because judges have no vested interest in either granting or rejecting warrants, and can therefore approach the matter objectively. In contrast, the executive is incentivised to grant warrants by the inherent secrecy of the decision. The government gets no positive publicity for refusing a warrant, but risks criticism in the event of a terror attack or serious crime, especially if it comes to light that it may have been prevented if a rejected warrant had been granted. While the judiciary has nothing skewing its objectivity in the authorisation process, the same cannot be said of the executive, who is motivated not to give due consideration to privacy rights. Therefore, while neither institution is publicly accountable in the usual way, the executive is not impartial, making the judiciary the democratic option.

Furthermore, judicial authorisation of warrants is also desirable as it would bring consistency to domestic law. As pointed out by Akdeniz while he argued for judicial authorisation in 2001, judges have been issuing such warrants to the police for years under the Official Secrets Act 1911 and the Official Secrets Act 1989.[8] Not only does this highlight that judges are capable of authorising warrants, but to differentiate between different types of warrants without a clear reason is unconstitutional, reiterating the need for a reform in the law.

Is Judicial Authorisation Pragmatic?

A change to law should not only be constitutionally sound, it should also be pragmatic: can a judge make a decision that is as informed as a decision made by the Home Secretary? Will a warrant be given international recognition if authorised by a judge? Those responsible for authorising warrants need to have the expertise, the time and the credibility to do so effectively, and the judiciary trumps the executive on each of these criteria.

Starting with expertise, it might be argued that judges do not have the wider knowledge essential for making a just decision. However, as highlighted by Feldman, this reasoning is flawed. He points out that "[t]he government only has that information which is given to it by the police and the security service, and may not be keen or able to evaluate critically the assessment made of it by

5 As Lord Bingham put it in A v Secretary of State for the Home Department "I do not in particular accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected... But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is… wrong to stigmatise judicial decision-making as in some way undemocratic. [2007] UKHL 56; [2005] 2 AC 68, para 42.

6 Barendt, "Separation of powers and constitutional government", P.L. 1995, Win, 599-619, page 606.

7 See Murphy, "Transparency and surveillance: assessing the approach of the Investigatory Powers Tribunal in Liberty", P.L. 2016, Jan, 9-18.

8 Akdeniz, "Regulation of Investigatory Powers Act 2000: Part 1: BigBrother.gov.uk: state surveillance in the age of information rights", Crim. L.R. 2001, Feb, 73-90, null, page 78.

those institutions… the government depends for its information on bodies with an interest in playing up the degree of risk".[9] As discussed above, the government has the same interest in accepting an exaggerated degree of risk. In contrast, a judge can be supplied with the same information and make an objective assessment of it. Further, judges appointed to grant interception warrants would build up broad expertise over time in the same way that the Home Secretary does by working on the issues on a daily basis.

Moving on to capacity, does the Home Secretary have the time to assess each warrant application she receives? As noted by Anderson: "the Home Secretary routinely signs thousands of warrants per year".[10] No matter how diligent she is, it would be impossible to give every application the proper and thorough assessment required. However, if the duty were entrusted to designated judges, each application could be given the serious contemplation that the determination of such important rights deserves.

Finally, given the nature of communications, interception warrants need to have international credibility, and so the authorisation process must appear legitimate to foreign jurisdictions. The Intelligence and Security Committee confirmed the difficulties in enforcing warrants in the United States: "The considerable difficulty that the Agencies face in accessing the content of online communications, both in the UK and overseas, from providers which are based in the US – such as Apple, Facebook, Google, Microsoft, Twitter and Yahoo – is therefore of great concern."[11] Judicial authorisation, as required in the United States, would bolster the legitimacy of warrants issued to American companies by the United Kingdom, helping the agencies to function productively. Anderson, who recognised the need for international respect of warrants, supported this point.[12]

The Current Proposals

The Draft Investigatory Powers Bill provides for a degree of judicial authorisation in the form of a "double-lock".[13] The Home Secretary would approve a warrant, which would then be passed to a Judicial Commissioner to assess the decision based on the principles of judicial review. This involvement of the courts is a welcome step, but it is not enough: the priority of decision makers is in reverse. Judicial Commissioners should make the first assessment and, if a warrant engages matters relating to national security, the Home Secretary should then have the opportunity to veto based on issues that could not have been considered by the Commissioner, such as diplomatic relations. This is pragmatic, and a true reflection of the constitutional issues at play.

Conclusion

Interception warrants, while an important tool in protecting the public, also provide the opportunity for the gross abuse of power. That it why the responsibility for deciding whether they should be authorised should lie with the judiciary, and not the Home Secretary, who is neither objective nor accountable in the circumstances. Respecting the right to privacy throughout the warrant application process is a crucial part of defending democracy itself. President Aharon Barak of the Supreme Court of Israel realised the value in protecting civil liberties in the face of more sustained and more serious terror threats than most countries will ever experience: "A democracy must sometimes fight with one

9 Feldman, "Human rights, terrorism and risk: the roles of politicians and judges", P.L. 2006 Sum, 364-384, page 380.
10 A Question of Trust, para 14.49.
11 ISC Rigby Report, November 2014, para 457.
12 A Question of Trust, para 14.51.
13 Draft Investigatory Powers Bill, sections 14-19.

hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."[14] It is vital that individual liberties are properly protected in the current political climate which seeks to wage a war on terror, and the judicial authorisation of interception warrants is a key factor in doing so.

14 Case HCJ 5100/94, Public Committee Against Torture v The State of Israel and the General Security Service (1999) 7 B.H.R.C., para 39.

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