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Human Rights and the Criminal Justice System

Anthony Amatrudo and Leslie William Blake

ROUTLEDGE

Human Rights and the Criminal Justice System

We now live in a world which thinks through the legislative implications of criminal justice with one eye on human rights. *Human Rights and the Criminal Justice System* provides comprehensive coverage of human rights as it relates to the contemporary criminal justice system. As well as being a significant aspect of international governance and global justice, Amatrudo and Blake argue here that human rights have also eclipsed the rhetoric of religion in contemporary moral discussion. This book explores topics such as terrorism, race and the rights of prisoners, as well as existing legal structures, court practices and the developing literature in Criminology, Law and Political Science, in order to critically review the relationship between the developing body of human rights theory and practice, and the criminal justice system.

This book will be of considerable interest to those with academic concerns in this area, as well as providing an accessible, yet sophisticated, resource for upper level undergraduate and postgraduate human rights courses.

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ATA, March 2014

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Chapter 1

Human rights and contemporary Criminology

The public understanding of human rights has steadily increased its grip upon our social, legal, moral and political discourse and embedded itself in the routine ways in which we relate to each other, especially through our interactions with the public authorities, local government and the national state and to the Common Law itself. The existence of human rights has become a matter of common agreement. It is part of our everyday discourse. However, contemporary human rights language does throw up a plethora of definitions, rights and obligations hitherto not central to the everyday life of the citizen. This human rights language and its attendant discourse of competing definitions, rights and obligations is sometimes difficult to define and its extent is the matter of turbulent and on-going debate. Nonetheless, the notion that, at a basic level, human rights signify the core set of *rights* which relate to all persons, without exception, because they are all human beings and which underpin our social, legal, moral and political relationships is *fundamental* to modern political and social life. In terms of the criminal justice system, the human rights discourse has been focused upon such issues as noting the fairness, or otherwise, of laws, in terms of the way in which persons are treated in the criminal justice system (e.g. in the prison system and by the courts and the public authorities) and in terms of the law's overall function in limiting such things as the extent of police powers, notably in relation to the investigation process, and the expectations of fairness towards suspects. It also covers the role of the state and its capacity to act in accordance with internationally agreed norms of behaviour relating to human rights. Human rights are then a huge subject area which covers individuals, collections of individuals, state actors and international bodies. All human rights claims are universal, moral and non-negotiable. The subject of human rights is one that has most academic purchase in law and political science; but nonetheless it has gained ground in a number of other disciplines, not least Criminology, a discipline contingent upon the law. This chapter will set out three paradigm treatments of human rights within academic Criminology, those of Manuel Lopez-Ray, Stan Cohen and Lucia Zedner, and show how they can throw light on contemporary theory and practice. Manuel Lopez-Ray was concerned with practical issues of human

rights, public policy and the development of international standards of state behaviour. For Lopez-Ray, international law was vitally important because he saw it as best able to secure the universal demands of human rights in the criminal justice arena. Moreover, in terms of the development of the academic discipline of Criminology, he advocated that large-scale, international and state crime should be included as objects of study, not just those routine breaches of the criminal law which relate to delinquent behaviour. Stan Cohen's work focused upon a form of social theory which built upon earlier work by Foucault and Rothman. His work uses a form of historical explanation to show how the role of the state has altered in relation to its control function and how this, in turn, has affected contemporary thinking about how. Lucia Zedner is concerned with ethical matters relating to the operation of the criminal justice system in late modernity. Her work on risk is attuned to such issues as the rights of the individual to go about their business unhindered, and issues of personal privacy and civil liberties. It is fair to say that the work of these three thinkers is archetypal of three distinct traditions, or approaches, to human rights within the criminal justice system.

Manuel Lopez-Ray

Manuel Lopez-Ray was Chief of the Social Defense Section of the United Nations and, during a long and illustrious career of public service, he held several professorships, notably at the University of Madrid, and he was a distinguished Visiting Fellow at the Institute of Criminology at the University of Cambridge. Lopez-Ray was an important figure internationally and served as a delegate, or legal adviser, to numerous high-level international conferences and seminars, including the historic 1954 United Nations Seminar on the Institutional Treatment of Juvenile Offenders. Lopez-Ray's importance is in ensuring that criminological research was used to support the work of securing international and legally binding agreement on the treatment of persons who are the subject of criminal proceedings, especially in relation to prisoners and young offenders. He came to see that it was necessary that there was a rigorous evidence-base for work of governments and international bodies, such as the United Nations, and also that such work would necessitate international cooperation in order to arrive at sensible standards of treatment and human rights around the world. In 1953, he wrote *International Cooperation by the UN in the Prevention of Crime and the Treatment of Offenders*, in which he argued that standards of treatment, and human rights, for persons subject to the criminal justice system was not something that could be left solely to national governments. In 1945, the world had witnessed the dire results of allowing individual nations to set their own judicial standards without reference to international norms and conventions and it was Lopez-Ray's view that, since the enterprise of human rights is a universal one, the United Nations was best suited to the work of defending, and promoting, the human rights and proper

treatment of offenders, and others caught up in criminal proceedings, as its character is to be *universal*. Moreover, breaches of human rights should be dealt with under international law or by national laws that incorporate the principles of international law.[1] For Lopez-Ray, the most important thing was to gain agreement and then legally enforce those legally defined measures of treatment which equate to the basic human rights of persons; the more so in the wake of the excesses of the Nazi regime in Germany and those of the Japanese under its military regime during the 1930s and 1940s, which were detailed in a series of post-war trials and tribunals. Lopez-Ray is an important figure in the treatment of human rights by criminologists since he is the paradigm case of a scholar working in collaboration with others and utilising an empirical research-base in order to make a practical contribution to public policy. The importance of Lopez-Ray is in his legacy of linking the, often mundane, and local, aspects of the criminal justice system to much larger international and legally constituted justice frameworks; and in promoting a concern for the broadest possible canvas for criminological research and policy analysis.[2] He argued for a form of criminological explanation which also embraced state crime, war crime and genocide, as well as the common array of crimes which are usually taken to be the subject matter of Criminology. Lopez-Ray was, arguably, the most important criminologist of the modern era to focus upon state crime. A man of his times he saw war crimes and crimes of the powerful as within the purview of criminological analysis.[3]

Lopez-Ray thought it was essential that the *social policy* nature of human rights should be stressed and accordingly he made sure that not only lawyers but also criminologists, sociologists, medical professionals and those concerned with practical social policy should be the ones determining the practical matters of human rights and rightful treatment in relation to crime, delinquency and prisoners that the United Nations was to be focused upon. In his role of Chief of the Social Defense Section of the United Nations, Lopez-Ray saw his task as one of structuring United Nations policy in collaboration with non-governmental organisations and a broad spectrum of experts; rather than to maintain a narrowly legal treatment of *social defence*. Social defence being best understood here as the title given to the work of the United Nations on the prevention of crime and the treatment of offenders, including juveniles. Lopez-Ray was a very practical man and, in his role as Chief of the Social Defense

1 Lopez-Ray, M. (1957) 'The First UN Congress on the Prevention of Crime and Treatment of Offenders', *The Journal of Criminal Law, Criminology, and Police Science*, 47 (5). pp. 526–538.

2 Lopez-Ray, M. (1982) 'Crime, Criminal Justice and Criminology: an Inventory', *Federal Probation*, 46 (2). pp. 12–17.

3 Lopez-Ray, M. (1970) *Crime*. Routledge: London; Amatrudo, A. 'The Nazi Censure of Art; Aesthetics and the Process of Annihilation' in C. Sumner (1997) *Violence, Culture and Censure*. Taylor & Francis: London. p. 63.

Section of the United Nations, he aimed to provide leadership so as to ensure that those on the ground could get support from the United Nations as well as technical assistance, to maintain effective criminal policy at the national level. From the outset, Lopez-Ray saw these tasks as being supported by a rigorous research-base and the effective dissemination of both good and bad practices.[4]

In 1955 Manuel Lopez-Ray convened a United Nations Congress at the *Palais des Nations* in Geneva, Switzerland. It was practical in focus and the main items on the agenda were the standard minimum rules for the treatment of prisoners, the question of prison labour and measures to prevent juvenile delinquency. The Geneva Congress was also keen to stress the social nature of the rehabilitative process. It was the largest Congress of its type and sixty-one countries were represented and 521 persons participated, including delegates from the Council of Europe, International Labour Organisation (ILO) and the World Health Organisation (WHO). The ILO was concerned about the issue of prison labour in terms of its use effect on the wages of law-abiding workers, as well as the conditions and remuneration levels for prisoners themselves. The ILO was also concerned to ensure that prison labour was not exploited, especially for public works. This was set out in a research submission to the Congress undertaken by the distinguished American sociologist from the University of Chicago, Prof. Ralph England.[5] The 1955 Congress was ahead of its time in making a policy of non-discrimination explicit in the governance of prisons, and the proceedings noted: 'and there shall be no discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status'.[6] The Congress adopted a very humanitarian approach to institutional prison life and argued that prisons should try to: 'minimize the differences between prison life and life at liberty which tend to lessen the responsibility of prisoners or the respect due to their dignity as human beings'.[7] The Congress advocated an approach to incarceration which stressed the prisoner's continuing relationship with their community rather than their separation from it. This essentially communitarian view was way ahead of its time in the 1950s. It is to the credit of Lopez-Ray that this position was enshrined in the 1955 Congress Report and later United Nations policy on the rights of prisoners which is strongly

4 Lopez-Ray, M. (1957) 'The First UN Congress on the Prevention of Crime and Treatment of Offenders', *The Journal of Criminal Law, Criminology, and Police Science*, 47 (5). p. 528 (pp. 526–538); Lopez-Ray, M. (1982) 'Crime, Criminal Justice and Criminology: an Inventory', *Federal Probation*, 46 (2). pp. 14–17.

5 England, R.W. (1993) 'Who Wrote John Howard's Text? The State of the Prisons as a Dissenting Enterprise', *British Journal of Criminology*, 33 (2). pp. 203–215.

6 Lopez-Ray, M. (1957) 'The First UN Congress on the Prevention of Crime and Treatment of Offenders', *The Journal of Criminal Law, Criminology, and Police Science*, 47 (5). p. 530.

7 Lopez-Ray, M. (1957) 'The First UN Congress on the Prevention of Crime and Treatment of Offenders', *The Journal of Criminal Law, Criminology, and Police Science*, 47 (5). p. 530; Lopez-Ray, M. (1955) 'L'Ensemble des regles pour le traitement des detenus', *Revue International de Criminologie et de Police Technique*, 9 (3).

oriented towards the practice of individualised treatment of inmates. The Congress conceived of prisons as a social service and as places for rehabilitation. Accordingly it argued for small prisons of no more than 500 inmates in order to achieve rehabilitative success; this is set out in Rule 63 of the Congress proceedings. The number 500 was arrived at by conceiving that this was, typically, the maximum number of prisoners that a governor might recall and that personal knowledge of prisoners was an important element in determining their treatment. Again we detect Lopez-Ray set this essentially practical criminological concern, namely prison welfare, to a tangible social policy outcome set out in an international report. Reverberations of Lopez-Ray's (and the Geneva Congress's) progressive views can also be seen in the decision of the European Court of Human Rights on the voting rights of prisoners, presently so controversial in the UK.

Lopez-Ray was always alive to the necessity of ensuring that practical matters relating to criminal justice were dealt with fairly and with legal backing so as to ensure fair and humane treatment. He was also concerned to ensure international minimal standards of treatment, as, for example, in the case of prison overcrowding. He saw Criminology as contributing to the knowledge base needed to enact legislation around standards of acceptable provision, at the international level. He also understood that criminal justice policy required a range of expert knowledge to draw upon. He wrote:

> Provided first that crime is considered as a sociopolitical phenomenon and subordinately as a behavioural problem, and secondly that whatever are the equations and theorems used and models formulated, all of them have an instrumental character and as such are subservient to the protection of human rights individually and collectively understood. The fact that Criminology cannot avoid its composite nature does not prevent it from becoming a real discipline.... The criminological curriculum should be completed by adding political science, sociology of law and of international relations, political sociology, history, economy, development and planning problems, human rights theory and practice, logic and methodology. Not every criminologist is expected to be fully acquainted with each of these disciplines but at least should know something about them. The ensemble would mean a more complete and coordinated interdisciplinary approach and that manuals should undergo substantial change.... Criminology as well as criminal policy should keep in mind that national, international and transnational crime are becoming more interdependent than ever.[8]

What criminological understanding gained through the work of Lopez-Ray was nothing less than the linkage of criminal justice policy to a broad understanding

8 Lopez-Ray, M. (1982) 'Crime, Criminal Justice and Criminology: an Inventory', *Federal Probation*, 46 (2). p. 17.

of the world, and how it works, in order to advance the cause of justice and human rights at a practical and political level. Manuel Lopez-Ray began a tradition of criminologists working both at the nation state level and at the international level to advance the cause of justice and to ensure that all criminal justice systems, wherever they are, focus upon higher ideals of justice, fair treatment and human rights and not just on matters of law enforcement.

Stan Cohen

David Nelken has argued that:

> (Stan) Cohen was not interested in criminal justice as such, except as an illustration of wider changes in 'social control'. His task … was to locate courts, prisons and police in an overall social space … of social control … and broader trends in welfare and social services. But this means that developments which are marginal to criminal justice may well be central to wider changes in social control. And it is questionable how far it is possible to rely on 'penal statistics' in an argument concerning 'changing ideologies of social control'.[9]

Cohen's work was never taken by statistical data, black letter law or policy analysis so much as with broader political themes relating to social (and political) structures and their role in controlling persons; especially in relation to the state and the role of ideology in the process of social control. Although he wrote explicitly on human rights, notably in relation to Israel and South Africa, it is his 1985 book *Visions of Social Control: Crime, Punishment and Classification* that has had the biggest impact within academic Criminology in terms of its contribution to the on-going literature on the development of social control systems in western societies and the ways in which political and cultural change can usher in inclusionary and exclusionary strategies. *Visions of Social Control: Crime, Punishment and Classification* also foresaw the ways in which the populations of western countries would welcome social control; and, far from it needing to be imposed as in the past, that it would be wholeheartedly embraced.

Cohen begins *Visions of Social Control: Crime, Punishment and Classification* with a chapter on master patterns which set out four transformations which occurred between the nineteenth century and latter half of the twentieth century. First, Cohen sets out how the state became more and more involved in the process of social control whereby older forms of social control, which tended to be less formal and outside of the state, became surmounted by:

9 Nelken, D. (1985) 'Community Involvement in Crime Control', *Current Legal Problems*, 38 (1). p. 247.

> The increasing involvement of the state in the business of deviancy control – the eventual development of a centralized, rationalized and bureaucratic apparatus for the control and punishment of crime and delinquency and the care or cure of other types of deviants.

Second, there grew up an: 'increasing differentiation and classification of deviant and dependent groups into separate types and categories, each with its own body of "scientific" knowledge and its own recognized and accredited experts'. Third, Cohen notes: 'increased segregation of deviants into "asylums" – penitentiaries, prisons, mental hospitals, reformatories and other closed, purpose-built institutions'.[10] At this stage imprisonment becomes the favoured form of dealing with 'undesirable behaviour' and the predominant form of punishment generally. The prison becomes seen as the mainstay of both the punishment and the reformation of offenders from the nineteenth century onwards. Lastly, he notes a shift away from public forms of punishment, which emphasise the body, towards forms of punishment which are aimed at the offender's mental state. 'The mind replaces the body as the object of penal repression and positivist theories emerge to justify concentrating on the individual offender and not the general offence.'[11] However, it has to be noted here that Cohen's four transformations are indebted to earlier accounts, notably to Rothman's *The Discovery of the Asylum*, as well as Foucault's *Discipline and Punish: The Birth of the Prison* and Rusche and Kircheimer's *Punishment of Social Structure*. Moreover, unlike Foucault, Cohen's work discusses several accounts of these transformations and advances numerous reasons why they came about in the first place and whether they were desirable, or not. He postulates that it can be argued that these reforms were motivated by the positive and altruistic intentions of a more humane post-Enlightenment world and that the transformation was to a better form of social control; and on the other hand his account follows Rothman's *The Discovery of the Asylum*, which maintained that, even if reformers were humane, nonetheless their lack of expertise, skill and overall understanding led to dire outcomes. For example, the exclusionary institutions, though said to be an improvement, were not up to the task of rehabilitation, the more so because they soon became overcrowded. Cohen also offers up a more political answer as to why the transformations came about and here he follows Foucault and Rusche and Kircheimer, simply by arguing that the capitalist system demanded a newer, harsher and more consistent form of social control. Moreover, the task of social control was aimed at creating a compliant working class. Cohen argues: 'It renders docile the recalcitrant members of the working class. It deters others,

10 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 12.

11 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 13.

it teaches habits of discipline and order, and it reproduces the lost hierarchy. It repairs defective humans to compete in the market place.'[12] Interestingly, this is a mirror-image of the Geneva Congress aim of the minimalisation of the differences between prison life and liberty.

Cohen was alive to the fact that the transformations in social control which he set out met with considerable opposition and it led him to write of the 'destructuring impulse'.[13] His four-stage history of transformations is compelling. First, 'away from the state' in a move to decentralise and a withdrawal of state activity in favour of 'community based, less bureaucratic' agencies. Second, a move 'away from the expert'; and the 'monopolistic claims of competence in classifying and treating various forms of deviance'. Third, 'away from the institution' and a movement towards decarceration, and to more inclusive community treatments, care and correction that focus on reintegration.[14] Lastly, 'away from the mind' and 'back to justice'. He advocates a movement towards an approach which should 'focus instead on body rather than mind, on act, rather than actor'. He argues that, during the 1960s and 1970s, calls to destructure grew louder and louder and that many imagined that the system of social control which had grown up would lessen its grip upon humanity. However, the 1970s did not usher in a more humane treatment and rather than lessen their grip, 'the original structures have become stronger; far from any decrease, the reach and intensity of state control have been increased'.[15] Indeed, this was the moment when 'the system enlarges itself and becomes more intrusive, subjecting more and newer groups of deviants to the power of the state and increasing the intensity of control directed at former deviants'.[16] It is this historically derived narrative which leads Cohen to his meta-narrative of social control. For him the 'likeliest future of social control … is a future of decisive and deepening bifurcation; on the soft side there is definite inclusion, on the hard side, rigid exclusion'.[17]

By *soft* he had in mind a range of things from 'mental health' issues to 'minor delinquent infractions'. What Cohen clearly understood was that inclusionary practices would develop alongside exclusionary ones but that these would be extended to non-deviant persons and those deemed to be those *at risk* as the

12 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 23.
13 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 31.
14 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 31.
15 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 37.
16 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 38.
17 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 232.

inclusionary mechanism utilises 'diagnostic, predictive and preventive' measures and that, amongst other things, 'leisure, family, child rearing, sexuality' would all become part of a system of social control. Moreover, that surveillance would come to pervade our social spaces and that our urban environments 'will become sites for behavioural control'.[18] Observation is the key to this process and Cohen terms the model of preventive control a 'panopticon vision'.[19] By *hard* he had in mind the normal gamut of offences we commonly term criminal and for these the system of exclusionary control would be continued with its incarceration and segregation of deviants. Interestingly, he cites Durkheim as key in this process in terms of 'boundary maintenance, rule classification, social solidarity'.[20]

This dualistic approach of inclusionary and exclusionary mechanisms characterised late modernity for Cohen. The older form of exclusionary social control would go on unabated and the newer forms of inclusionary control would develop with greater surveillance and thought control becoming acceptable to the masses; which increasingly would come to see the world as a threatening place from which they need protection. It is not surprising that he cites Orwell in his analysis: an analysis which is totalising in seeing inclusionary control mechanisms as increasingly part of our daily lives and in which not only social space, but also the very workings of the mind, become subject to control.[21] In the period since the publication of *Visions of Social Control: Crime, Punishment and Classification*, it appears that social control has proceeded along the line that Cohen set out and indeed, in the phrase that will forever be associated with him, there has indeed been *net widening and mesh thinning*. The prison system has expanded and more and more of the inclusionary structures and systems, which he detailed, seem to have been built in to our existences and the routines of our lives. The growth of technology has aided the growth in inclusionary controls and far from demanding that this growth be reversed, or even slowed down, events such as the destruction of the twin towers in New York and 7/7 bombings in London have actually led to public calls for greater social control: to say nothing of the routine surveillance and recorded filming of our actions in public spaces and on-line, which hardly raise an eyebrow. Indeed, as time moves on, our culture now accepts routine surveillance, monitoring and recording: such activity is now understood as normal. What Cohen once flagged up as something to be concerned about by way of a ghastly prophetic *vision* is now an accepted part of the routine pattern of modern life and considered a necessary

18 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 232.
19 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 221.
20 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 233.
21 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. pp. 197–235.

aspect of crime control or crime prevention; or any number of other variables which might stand in lieu of crime, such as terrorism, extreme religion, or immigration. In many ways, this concern for the increased use of inclusionary mechanisms is underpinned by an earlier concern of Cohen's, namely that of the moral panic.[22]

What Cohen's work does do very effectively is to point us towards deeper moral arguments about how we should live, to arguments about civil liberties and human rights, to social justice as a goal of human polity and to the possibility of a private life in an interconnected world. Cohen wants us to stop and think through the implications of a system of social control which grows exponentially, little by little, and every time makes a bit wider the net and a bit narrower the mesh. As he wrote:

> The choice between exclusion and inclusion is, above all else, a political decision determined by the nature of the state. Nevertheless, different as the actual governing criterion is, the dimensions of choice at each stage of the system are the same. At the macro-level, do we construct exclusive or inclusive systems? At the micro-level, do we exclude or include this particular individual?[23]

Lucia Zedner

Lucia Zedner is one of Europe's leading criminal justice experts. She has, arguably, better than anybody else been alive to the way in which the language of *risk* has been used to undermine the (typically more liberal) language of *human rights*. However, her work is very much located in a body of scholarship which, following Stan Cohen, asks profound political and moral questions of her readers, that bear upon human rights and civil liberties issues. Her work flows from the same well-spring as Cohen's and, although more forensic, and less theoretical, she shares a common subject matter. In the modern world, 'rights-based' discourse has been increasingly challenged by a growing acceptance that risk permeates our daily lives and that in the sphere of criminal justice the management of risk can, and in many cases should, trump concerns about the sovereignty of the individual and his or her rights. In recent times issues such as terrorism, sexual crime and anti-social behaviour have all triggered a call to play down the rights of individuals in the utilitarian management of risk for the safety of the greater number of citizens' safety. Risk has been used to champion the safety and well-being of the wider society over, and against, any rights that individuals might typically expect to possess and we have seen this most clearly in

22 Cohen, S. (1972) *Folk Devils and Moral Panics*. Routledge: London.
23 Cohen, S. (1985) *Visions of Social Control: Crime, Punishment and Classification*. Polity Press: Cambridge. p. 271.

terrorist cases in the post-9/11 period. The news media, and our elected representatives, have all used highly censorious language in advocating policies which prioritise the public safety and security of the many over the rights of individuals. Politicians have consistently sought to marginalise arguments concerning civil liberties in favour of those risk-based arguments that limit the innate anti-majoritarianism of human rights discourse, and its attendant concern for both civil liberties and calls for the protection of the individual against the power of the state and power of public authorities. Much the same might be said of those prosecuting authorities who wish to treat *serious* crime differently to *ordinary* crime.[24] Be it risk, or seriousness, there are those who would like to undermine the finely honed protections that are afforded to suspects under the Common Law. Lucia Zedner has cogently set out the threat posed by an overemphasis upon risk-based analysis over and against a rationale which affords a priority to human rights considerations and civil liberties arguments. Zedner's work has huge implications for the future direction of academic Criminology. Rather than attempt a general survey of Zedner's work, we shall concentrate upon two seminal articles that encapsulate her view and which, taken together, form a profound reflection upon the issues thrown up in the contemporary world by human rights in the context of the risk society.

Neither Safe nor Sound? The Perils and Possibilities of Risk

In this 2006 article in *The Canadian Journal of Criminology and Criminal Justice*, Zedner focused upon the impact that a public policy based upon risk has for civil liberties. She detailed how risk-analysis, unless kept in check, will undermine both human rights and even basic legal values. The logic for this is compelling because all aspects of human life afford some level of risk, the more so in the field of criminal justice. Therefore unless from the outset the public authorities utilise sound moral judgement and ethical principle against calls for greater and greater assessments of risk then their attendant intrusions upon the lives of individuals are liable to go unchecked. Moreover, Zedner shows how *risk* is both a vague and all-encompassing term and one which originated in the realms of engineering and the natural sciences. The conception of risk, and probability, as typically invoked relate back to a mathematical treatment of such variables in relation to tightly defined parameters provided by a natural science methodology. Zedner argues that the *facts* relating to crime and the response to terrorism are altogether different in that they relate to less easily contained situations and their causality can never be so easily understood. She argues that 'human risks are necessarily reactive and call for reflexive strategies'.[25] Zedner details how risk-based approaches to security threats

24 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London. pp. 109–110.
25 Zedner, L. (2006) 'Neither Safe nor Sound? The Perils and Possibilities of Risk', *The Canadian Journal of Criminology and Criminal Justice*, 48 (3). p. 423.

might relate to different sorts of risk and she poses questions about the ability to juxtapose, or distinguish, risk-assessment from risk-management. This distinction between risk-assessment and risk-management is crucial to Zedner's critique.

Zedner details how since the mid-1990s there has been a marked shift away from rule-based approaches to risk-based approaches to security. She cites Ericson and Haggerty (1997) and Stenson and Sullivan (2001) to argue that risk-assessment has become the 'central tool in the management of crime and terrorism'.[26] She argues that risk-based approaches have usually been conceived of in terms of legal rules and that, historically, the courts have set the standards by which risk-assessment is determined. However, where risk is prioritised as the key component of policy, there is a general tendency to depart from legal regulation, or play it down, in pursuit of the greater policy focus upon risk. Therefore, safeguards against the likely intrusions of a risk-based policy need to be enshrined in law because the threat to individual freedoms and liberties is all too apparent. Moreover, that even where the risk is potentially great, or immanent, a policy based upon risk must also be proportionate, transparent and legally justified in terms of the measures advocated in respect to their extent and duration. A risk-based policy also needs to be aware of the likely uncertainties, and unknowabilities, of the social world and indeed such uncertainties, and unknowabilities, must weigh as a proper restraint upon those who seek to undermine our basic human rights in pursuit of a risk-based policy. Zedner is sceptical of too scientific an approach to risk as that suggests an ability to calculate the factors at play, which is both unrealistic and furthermore masks broader political drivers. Advocates of a risk-based approach tend to be unrealistic about their capacity to balance the various complex variables at work in any calculation and to oversimplify the determination of risk itself. In other words, that risk calculations, as to risk, tend to be far less precise than their advocates maintain. Zedner argues that not only is an over-reliance upon risk-analysis unhelpful but it hides the deeper political values and assumptions. It is an assessment and prediction game in which the level of risk-assessed will always be weighed against the norms of a given society; those norms which may themselves fluctuate wildly.[27]

What Zedner advocates is the clear delineation of what she terms 'quasi-scientific' processes relating to risk-assessment and the necessarily political process of determining public policy. She does this by drawing a line between *risk-assessment* and the *management of risk*. In this case *risk-assessment* relates to those aspects of risk which are objective and based on credible data; and *risk-management* relates to the broader and more overtly political aspects of risk in

26 Zedner, L. (2006) 'Neither Safe nor Sound? The Perils and Possibilities of Risk', *The Canadian Journal of Criminology and Criminal Justice*. 48 (3). p. 424; Stenson, K. and Sullivan, R. (eds) (2001) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies*. Willan Publishing: Cullompton; Ericson, R. and Haggerty, K. (1997) *Policing the Risk Society*. OUP: Oxford.

27 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London. p. 76.

the decision-making process. Of course, Zedner is alive to the accusation that such a distinction is itself open to the very same charge of over-determination. However, her object is to shine a light upon the political aspects of risk-assessment itself. For example, offender profiling, she argues, is as much a matter of working with value-laden, and pre-existing, categories as it is one of scientific determination. She also points out the intrinsic unfairness of deploying crude utilitarian criteria based on the general welfare because such a rationale tends to play down the disproportionate, and therefore, unfair effects that such a policy generally has on certain individuals and groups. One group of individuals may be profiled, surveyed and interrogated while another group is left entirely alone. The meta-point Zedner makes is that risk-assessment and risk-management are closely related and that it is simply wrong to hold otherwise.

There is no doubt that Zedner is what one might term a *realist*, at least to the extent that she is a pragmatist who understands that risk is a factor in the way we assess the organisation of the criminal justice system, and that this is unlikely to change. She is wary of any determination of risk which denies the intrinsic uncertainty that must be inherent in all such determinations. She rather encourages the widest level of deliberation as possible in matters of risk within the criminal justice system and advocates the sort of deliberative democracy advocated by Dryzek to advance it.[28] In other words, that the political sphere should be used to scrutinise claims made about risk, for example, in relation to weapons of mass destruction (WMD) where such claims can be seen rightly determined to be more politically, than scientifically, determined.[29] In advocating a 'deliberative democracy' approach, she makes explicit the social psychological factors which weigh upon risk-assessments and readily concedes that cultural factors bear upon both the assessment and the social acceptability of risk, as Sparks had long ago maintained.[30] By utilising a deliberative democracy approach, the acceptability, or otherwise, of measures against crime, or terrorism, may be gauged. In such a way the decision-making process affords a democratic legitimacy to any measures enacted. Moreover, she argues that through deliberative democracy there is a process of on-going negotiation with citizens through which the real differences that pertain in any modern and diverse society may, to a large extent, be worked out through deliberation. An example of this might be determining the level and extent of (say) counter-terrorist measures at an airport vis-à-vis a city centre. Zedner is a persuasive writer not least because she is unwilling to accept risk-assessments as being value-neutral or purely scientific, unlike prosecutions for health and safety,

28 Dryzek, J. (1997) *The Politics of the Earth: Environmental Discourses.* OUP: Oxford.

29 Zedner, L. (2006) 'Neither Safe nor Sound? The Perils and Possibilities of Risk', *The Canadian Journal of Criminology and Criminal Justice*, 48 (3). p. 431.

30 Sparks, R. (2001) 'Degrees of Estrangement: The Cultural Theory of Risk and Comparative Penology', *Theoretical Criminology*, 5. pp. 159–176.

environmental pollution or food safety offences. She is alive to the issue of uncertainty and to the merits of deliberative democracy.

Pre-Crime and Post-Criminology?

In this article, Zedner argues that, although historically crime has hitherto been determined in relation to traditional concepts of wrong-doing and the harm done principle, and the response to it has always been post hoc, or after the act, this is no longer the case and there is an emerging *pre-crime* way of thinking taking hold that sees the issue entirely in terms of *risk* and *potential harm*, or loss, and which seeks to undertake *pre-emptive* action; and that this conceives of security (protection from crime or harm) as a commodity to be bought and sold in the marketplace of risk. This reasoning follows that of Dick.[31] However, despite her undoubted reservations about this shift in the way we understand crime and security, she nonetheless is not completely at odds with this new thinking and argues that traditional disciplines, such as Criminology, need to adapt to this new temporal re-ordering of the problem or become less relevant in a pre-crime world. She also relates how:

> A coincidental facet of the temporal shift to pre-crime is that responsibility for security against risk falls not only to the State but extends to a larger panoply of individual, communal and private agents. The shift is therefore not only temporal but also sectorial; spreading out from the State to embrace pre-emptive endeavours only remotely related to crime.[32]

Zedner goes on to state that under a pre-crime system the scope of academic Criminology necessarily broadens to encompass not only the police and public authorities but also private contractors in the security industry, and also the issues of CCTV and general surveillance and community safety. Moreover, the relationship between public and private provision becomes a major consideration, as does the analysis of criminal and civil sanctions against law-breakers and the extent to which order and prosecutorial powers may be delegated by the state to private providers, as Loader has suggested.[33] This is not to say that traditional policing was never, in part, preventative or that hitherto the police have ever enjoyed a monopoly of crime control functions, but rather that the temporal shift towards a pre-crime focus has broadened the scope of such functions, and here Zedner points to the work of Jones and Newburn on the development

31 Dick, P.K. (2002) *Minority Report*. Gollancz: London.
32 Zedner, L. (2007) 'Pre-Crime and post-Criminology?', *Theoretical Criminology*, 11 (2). p. 262.
33 Loader, I. (1997) 'Thinking Normatively about Private Security', *Journal of Law and Society*, 24 (5). pp. 377–394.

of policing systems.[34] Moreover, the shift towards a pre-crime focus was supported by changes in the nature of the perceived threats to citizens (certainly after 9/11 and 7/7) and this forced the public authorities increasingly to think in terms of risk and to act in a pre-emptive fashion. Therefore, as preventive security measures come to the fore they inevitably find themselves in a battle for resources with existing measures aimed at tackling crime and this conflict of rationales becomes, in turn, the subject of criminological analysis. Whereas previously matters of domestic security were once at the margins of criminological speculation, they have become a key aspect of it.

The problems in this move towards a pre-crime rationale are manifold because there is tendency, Zedner observes, to have: 'earlier and earlier interventions, to reduce opportunity, to target harden and to increase surveillance even before the commission of crime is a distant prospect'.[35] This may lead to reactive penal measures aimed at addressing risk and which, in effect, merely seek to incarcerate larger numbers of those deemed to be a risk to society. Moreover, as the issue of actual crime loses its hold on the criminal justice system, people and businesses become less interested in crime, *qua* crime, and more interested in insuring themselves against possible losses through security: and this, in turn, leads to the commoditisation of security, as a product, and the marginalising of policed public space.

The upshot of all this for human rights is a need for us to consider the effects that a pre-crime focus has upon our taken-for-granted notions of civil liberties, protections against undue intrusions into private lives and social justice and fairness. Following John Brathwaite's seminal essay 'The New Regulatory State and the Transformation of Criminology' and Loader and Walker's *Civilizing Security*, Zedner sees such a situation giving rise to the necessity for criminology to take part in what she terms 'normative theorising'.[36] By normative theorising she centrally has in mind detailing: 'the political and economic interests underlying the present pursuit of security as well as the intellectual assumptions upon which security policies are based'.[37] In order to take on this task, she acknowledges that Criminology will need to look to a range of other disciplines, rather than to sociology, such as economics, international relations, moral philosophy and political theory, simply because the task of doing criminological research

34 Jones, T. and Newburn, T. (2002) 'The Transformation of Policing? Understanding Current Trends in Policing Systems', *British Journal of Criminology*, 42 (1). pp. 129–146.

35 Zedner, L. (2007) 'Pre-Crime and Post-Criminology?', *Theoretical Criminology*, 11 (2). p. 265.

36 Zedner, L. (2007) 'Pre-Crime and Post-Criminology?', *Theoretical Criminology*, 11 (2). p. 266; Braithwaite, J. (2000) 'The New Regulatory State and the Transformation of Criminology', in D. Garland and R. Sparks (eds) *Criminology and Social Theory*. OUP: Oxford. pp. 47–69; Loader, I. and Walker, N. (2007) *Civilizing Security*. CUP: Cambridge.

37 Zedner, L. (2007) 'Pre-Crime and Post-Criminology?', *Theoretical Criminology*. 11 (2). p. 266.

will be nothing short of 'establishing the values, principles and human rights that are to be defended in its pursuit'.[38] However, she is also clear in seeing that the move to a pre-crime analysis also poses an existential threat to traditional forms of criminological explanation since the traditional criminological focus will increasingly be marginalised in a world fixated upon pre-crime, risk-assessment and security.[39] This view was echoed by Lippens, who has stated:

> More recently still, in a risk-obsessed age, when even such defensive hopes have been felt to be problematic, critical sensibilities have gradually shifted towards an acknowledgement of the limitations of human rights discourse and politics. The latter often seem to be underpinned by a view that reduces human existence to legal and moral calculation and exchange while they ignore the critical potential of unresolvable and irreducible ethical encounter and hospitality.[40]

Conclusion

Human rights are taking an increasingly prominent place in the criminal justice system and accordingly it features more and more in criminological theory. Lopez-Ray, Cohen and Zedner are but three of the many thinkers addressing the issue. However, what they show us are three very fruitful ways of thinking about human rights in the context of the criminal justice system. Human rights appear as an issue in a variety of places and engage our attention, at the level of reflective speculation, in different ways. In Lopez-Ray we witness an optimistic account which is practical in form. He saw practical engagement with legal mechanisms as a useful antidote to the insecurity of life without realised rights. He believed that embedding human rights criteria would materially alter the focus of the criminal justice system towards the highest ideals of justice, fair treatment and human rights and that would be an improvement for the whole of society. Cohen and Zedner are far less optimistic and they see human rights as fragile. Zedner is alive to the paranoia around risk-assessment and risk-management in the modern world and though she points us towards democratic deliberation as a bulwark against its totalitarian tendencies she certainly does not see the issue of the untoward menace of a risk-based world going away any time soon: it is here for good. Cohen offers the darkest view. Cohen especially sees incremental diminutions of freedom and a growing state ready to widen its net and narrow its mesh as it sucks more and more of us into its ambit. His is, in

38 Zedner, L. (2007) 'Pre-Crime and Post-Criminology?', *Theoretical Criminology*, 11 (2). p. 275.
39 Zedner, L. (2007) 'Pre-Crime and Post-Criminology?', *Theoretical Criminology*, 11 (2). p. 276.
40 Lippens, R. (2009) 'Towards Existential Hybridization' in R. Lippens and D. Crewe (eds) *Existentialist Criminology*. Routledge: Abingdon. p. 269.

effect, an Orwellian vision, certainly one of creeping totalitarianism, selection and de-selection. His concern about who is to be included in this process raises the spectre of the Nazi state and its systematic application of such criteria in the run up to the Holocaust.[41] In their own fashion each of these three writers offers up something of perennial interest to those reflecting upon human rights in the context of the criminal justice system. Each of them offers us a template as we too ask the same questions, as they, now and in the years to come.

41 Cohen, S. (1996) 'Government Responses to Human Rights Reports: Claims, Denials and Counterclaims', *Human Rights Quarterly*, 18 (3). pp. 517–543.

Chapter 2

European Convention on Human Rights and contemporary human rights thinking

Contemporary human rights and the Universal Declaration of Human Rights

One can argue about the origins of our contemporary understanding of human rights and locate its genesis in a variety of places, statutes and historical exigencies: such as the Magna Carta of 1215, which established due process, habeas corpus and equality before the law; or the Petition of Right of 1628, which set out civil liberties and forbade Martial Law in times of peace; or the Peace of Westphalia, which recognised the rights of religious minorities in 1648. These and other great events, and legal milestones, are surely all important parts of the unfolding history of the provision of rights. However, for our purposes the foundational document is the 1948 Universal Declaration of Human Rights, which followed in the wake of Nazi and Japanese war atrocities during the Second World War. It was a time when nations wished to extend human rights and freedom after the evils that were let loose in the world by fascism and militarism. The job of the Universal Declaration of Human Rights was to enshrine in international law the best ideals of the United Nations Charter concerning the 'fundamental rights in dignity and worth of the human person' and 'respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion'. In 1946 the United Nations convened an international commission to draft what was to become the Universal Declaration of Human Rights. The task was not so much legal or philosophical as it was practical. The task was to establish several key points as a foundational jurisprudence for nations to follow in relation to human rights. It was the time of the Cold War but all the nations of the United Nations, of 1948, wished to frame an entirely new world order and international legal settlement. The aspiration was that the world should be governed through a commitment to the general good of all by focusing upon human rights as the measure of good governance at the international level and human dignity, at the level of the person. Human rights would help focus nations on positive plans for their institution; and the Universal Declaration of Human Rights would be *the* consistent measure for that aspiration.

Those human rights set out in the Universal Declaration of Human Rights are established through an understanding of the intrinsic worth of human dignity and are *universal*. They are not derived from any religious view but from a concept of dignity to be found in the original United Nations Charter, which set out the 'fundamental human rights, in the dignity and worth of the human person'. The notion of human dignity is set out only in general terms because the drafters both anticipated an unfolding jurisprudence and also felt that human dignity is to be understood as a by-product of being properly affirmed as a human being. Moreover, as so much else, the shadow of the Holocaust informs the notions of the drafting committee.[1] The Universal Declaration of Human Rights proceeds on the basis of a fair political settlement for, and within, the state. Habermas put it best when he stated that: 'Only membership in a constitutional political community can protect, by granting equal rights, the equal human dignity of everybody.'[2] The rights set out in the Universal Declaration of Human Rights are only extended to individuals and not to corporate bodies, or states themselves.[3] The prime notion is that human rights make a claim upon society, and upon the state, on behalf of the individual. Individual rights presuppose the pre-existence of community. It is anticipated that such individual human rights can, and should, be promoted by collective action. Donnelly maintains that individuals are saturated by their relationship to various community associations when he writes:

> Political participation, social insurance, and free and compulsory primary education, for example, are incomprehensible in the absence of community. Freedom of association, obviously, is a right of collective action. Worker's rights, family rights, and minority rights are enjoyed by individuals as members of social groups or occupants of social roles.[4]

The rights set out in the Universal Declaration of Human Rights are indivisible and may not be traded off one for another. The human rights of individuals should be promoted and implemented by nation states for the benefit of all. What Whelan shows us is how the drafters of the Universal Declaration of Human Rights understood that human rights are the outcome of an interlocking set of rights which are more than the sum of their various individual parts. In order to enjoy a full sense of human dignity an individual would need to have

1 Levy, D. and Sznaider, N. (2004) 'The Institutionalization of Cosmopolitan Morality: the Holocaust and Human Rights', *Journal of Human Rights*, 3 (2). pp. 143–157.
2 Habermas, J. (2010) 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy*, 41 (4). pp. 464–480 (p. 464).
3 Mathias, M.D. (2013) 'The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty', *American Journal of Sociology*, 118 (5). pp. 1246–1283.
4 Donnelly, J. (2013) *Universal Human Rights in Theory and Practice*. Cornell University Press: Ithaca, New York. p. 31.

a full set of rights, not some piecemeal package of some of them.[5] Therefore the Universal Declaration of Human Rights both extends rights to all persons and demands that state actors ensure that mechanisms are in place to guarantee this happens. The Universal Declaration of Human Rights places a duty upon nations to ensure that human rights are promoted. This element begins to set in place international human rights norms wherein duties are internalised, by states, through an international covenant. Moreover, the implementation of human rights is almost entirely done at the nation state level, which has usually been the case historically, and here one might cite those more limited rights claimed following the Petition of Right of 1628, and other such documents from the seventeenth century, to the end of the twentieth century. What is different about the contemporary nation state is that its definition, good or bad, is often given, almost entirely, in human rights terms. In this regard, as Nussbaum argues, human rights can themselves provide the basis for mobilising political action when they are denied or curtailed.[6] The nation state can assist the promotion of universal human rights and this is what citizens, and activists, demand in the post-Universal Declaration of Human Rights world. The state ensures rights are upheld through the outlawing of a range of activities which interfere with the individual's life, such as discriminatory practices and racist activity. This is negative action by the state. The state also promotes positive human rights through ensuring individuals are able to live lives where they can enjoy protection, from the state, and exercise their personal private property rights. The classic formulation was set out by Hart.[7] In political theory terms we can see how thinkers such as Hobbes, Locke, Rousseau and latterly John Rawls all presuppose a contract between individuals, and between the state and individuals, which secures the authority of state, which in turn secures the safety and wellbeing of its citizens. This is a rather circular justification. Obligation is, in different ways, shown as essential to the maintenance of the state and the enjoyment of rights; though the form of the rights and obligation that different theorists outline all follow this simple dualistic format. What is certain is that there is no place for criminality in social contract theory and indeed the criminal is the person denying the human rights of others in this account. It is the criminal who violates his or her obligations to the community and therefore deserves a forfeiture of his or her rights.[8] The notion of a positive state is important for it is not allowed that states should simply do no harm, lay back and have no role

5 Whelan, D. (2010) *Indivisible Human Rights: a History*. University of Pennsylvania Press: Philadelphia.

6 Nussbaum, M. (2011) 'Capabilities, Entitlements, Rights: Supplementation and Critique', *Journal of Human Development and Capabilities*. 2 (1). pp. 23–37.

7 Hart, H.L.A. (1982) 'Legal Rights' in Hart, H.L.A., *Essays on Bentham; Jurisprudence and Political Theory*, Oxford: Clarendon. pp. 162–193.

8 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London and Los Angeles. p. 32.

in society's governance. The state has to intervene and to extend rights, not remain disinterested and trust things will sort themselves out; obviously there is an extended role for the police and the courts in this role of positive state action. In Shue's sense the state has to provide positive *basic rights*, notably the right to security, which the state is best placed to advance.[9] In the case of security, this is set out in Article 3 of the Universal Declaration of Human Rights, and it follows that this function usually falls to the police and the criminal justice system, more generally. In European societies the state, or local state, has a near monopoly in the area of policing and a complete monopoly of the courts and their operation. This view is not new and can be said to derive from Hobbes. In Hobbes, who had in mind the nation state, the basic problem for individuals is how they are to be saved from war of all-against-all, which he termed 'the state of nature'. Hobbes thought individuals could only leave the state of nature through the institution of a strong Sovereign to whom individuals both give rise, through their own deliberation, and who in turn would preserve them. The Sovereign punishes all those who disobey the Law but he does so for the common good. When the Sovereign is successful then no individual will feel threatened, which would be the case in the original war of all-against-all, i.e. the state of nature. The Sovereign's function is to facilitate law-abiding behaviour and civil order. Hobbes' *Leviathan* suggests that there is (what is technically termed) a 'vertical relationship' between the Sovereign and the people.[10] In the modern case the state is given its legitimacy by individuals, whom it seeks to secure and who, in turn, desire its assistance and support.

The intention of the Universal Declaration of Human Rights was to draw a line under the political and legal arrangements which had obtained before the Second World War. It was drafted at a time when empires were being dismantled and when new nations were coming into existence and others were gaining self-determination, often for the first time; and here one thinks of Pakistan and India. The Universal Declaration of Human Rights is a major world landmark on any measure. However, it is not a readily usable document so much as being a statement of the highest possible ideals concerning humankind. Never again could a nation deny the dignity of persons, as had been the case in Nazi Germany. The Universal Declaration of Human Rights was drafted as a declaration to the nations of the world concerning the treatment of men and women. It would be for nation states, and regional organisations, to ensure its ideals were realised in practical terms. They would have to bring their legal and social policy structures into line with the principle of the Universal Declaration of Human Rights and then expedite the exercise of human rights by citizens and non-citizens alike. They would have to uphold the highest value; that of

9 Shue, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*. Princeton University Press: Princeton.

10 Hobbes, T. (1981) *Leviathan*. CUP: Cambridge.

human value and dignity. It follows, therefore, that both human rights theory and practice begin not in some obscure text or rooted within a particular philosophical school or tradition but rather they start with the Declaration, notably in European jurisprudence. For example, the EU Charter of Fundamental Rights has also become an important document. It is an interesting document because it shows off well how integrated human rights thinking has become, inspired by the Universal Declaration of Human Rights, rooted in the provisions of the European Convention on Human Rights and focused upon the concept of human dignity. Indeed Article 4 of the EU Charter, which prohibits 'torture and inhuman or degrading treatment' directly mirrors Article 3 of the European Convention on Human Rights. Therefore, in practical and legal terms, all the case law which refers to 'torture and inhuman or degrading treatment' now obtains straightforwardly in EU law.[11] EU law has extended, and fleshed out, the notion of 'torture and inhuman or degrading treatment' in a variety of cases: and it has done this largely by taking over, and expanding, the rulings given by the European Court of Human Rights so as to create an entirely new European jurisprudence based upon human dignity. Jones has shown how:

> The court has a lot of help if it chooses to use it. The concept of human dignity has been enshrined in over twenty EU member states' constitutions and secured implicitly through case law and judicial interpretation of bills of rights in many more. The legal remit of the human dignity is broadly similar in a number of spheres, including: integrity of the person, equality, security, prevention of torture, privacy, development of personality, fair employment and decent housing. These commonalities are contained within the EU Charter chapter on dignity itself and in the solidarity rights in the EU Charter.[12]

What we have here is an interlocking set of provisions all of which focus upon human dignity and all of which are committed to its extension, in this case throughout the EU.[13] Contemporary theory, in this regard, is fixated upon the decisions of various courts; since these are where the principles are forged and then extended. In a practical way the courts are determining the parameters of human dignity. It is largely the lawyers, and not the philosophers, who are developing contemporary thinking around human dignity.[14]

11 *Pretty v UK* (2002) No. 2346/02. ECHR 3. Para 92.
12 Jones, J. (2012) 'Human Dignity in the EU Charter of Fundamental Rights and Its Interpretation Before the European Court of Justice', *Liverpool Law Review*, (33). pp. 281–300. (p. 299).
13 Besson, S. (2006) 'The EU and Human Rights: Towards a Post-National Human Rights Organisation', *Human Rights Law Review*, 6 (2). pp. 323–360.
14 Gearty, C. (2006) *Can Human Rights Survive?* CUP: Cambridge.

The international and the local

The Human Rights Act of 1998 was a major landmark in British legal history, not least because it set out the ways in which the UK courts are to interpret the rights of the European Convention on Human Rights and this includes how it should interpret European human rights law by stipulating the sources of it. This provision gives priority to decisions of the European Court of Human Rights over and against decisions of the UK courts. The Convention also gives priority to the opinions of the Commission under Articles 26, 27 and 31 of the Convention as well as decisions made by the Council of Ministers, under Article 46 of the Convention over and against the UK courts. It is noteworthy that the UK courts cannot themselves enforce these particular Articles because they are not included in the Human Rights Act of 1998. The effect of passing the Human Rights Act was to enshrine the *European* view of human rights within UK law. Donnelly has reasoned about the scope of European human rights law more generally: '(Europe) has been particularly forceful in its insistence that fundamental human rights … are an essential part of EU law'.[15] However, what really stands behind the Human Rights Act of 1998 is not just the European Convention on Human Rights but what we might term contemporary international human rights law, i.e. a universal legal and moral code applicable to every person that relates to deeper political and philosophical sentiments of justice.[16] Such deeper political and philosophical sentiments are encapsulated in Article 1 of the Universal Declaration of Human Rights, which states: 'All human beings are born free and equal in dignity and rights.' The movement is from the general and abstract to the particular, from the international and general to the regional, national and local with increased specificity and particularity. This is how the matrix of legal human rights protection operates: it is secured at the national level by rights at the international level that establish a political notion of rights but not their precise content or extent. The precise content and extent of human rights standards are determined by nation states acting as sovereign *political* communities in accord with Article 21 of the Universal Declaration of Human Rights. The political theorist John Rawls noted how the content and extent of human rights norms ought to be specified locally by the use of what he termed 'public reason'.[17] The Universal Declaration of Human Rights further notes that the securing of human rights is focused upon 'the just requirements of morality, public order and the general welfare'.[18] This is important because the implementation of the Universal Declaration of Human Rights in international human rights law gave rise to the European

15 Donnelly, J. (2013) *Universal Human Rights in Theory and Practice*. Cornell University Press: Ithaca, New York. p. 174.
16 Griffin, J. (2009) *On Human Rights*. OUP: Oxford. pp. 186–187.
17 Rawls, J. (2005) *Political Liberalism*. Columbia University Press: New York. pp. 213–237.
18 *Universal Declaration of Human Rights* Article 29 (2).

Convention on Human Rights in order to secure the protection of its citizens' fundamental rights and establish them in European law at the regional level; with the protection of the European Court of Human Rights in place to both uphold such rights and safeguard the dignity, equality and fair treatment of persons. The European Convention on Human Rights is a practical document, though it takes its inspiration from the Universal Declaration of Human Rights' foundational commitment to human dignity, rights and freedom. It is important to note here that it is for the European Court of Human Rights to determine the provisions of the European Convention on Human Rights and not the state parties to it, whether they act alone or together with other state parties collectively. A good example of the work of the Court has been in its development of a form of legal reasoning, informed by human rights and cultural sensitivity, that has sought a convergence of practice across judicial systems in the area of legal evidence and proof.[19] It is for the European Court of Human Rights to decide upon the meaning of the words of the Convention and to determine its scope, and in so doing to take full account of the widely divergent national and international situation since the time of the original drafting of the Convention.[20] The Convention is best understood as a living document that enables law to develop, guided by the original jurisprudential thrust of its remit to give effect to the rights established by the Universal Declaration of Human Rights. In practice the European Court of Human Rights operates as a typical higher court which is given over to reflecting upon the human rights of the day in the light of the precepts of its foundational document, in this case the original wording of the Convention. Moreover, the human rights set out in the Convention are inviolable in the sense that no sovereign state, or group of states, can derogate from their implementation or materially alter the definition of such human rights. All the human rights set out by the Convention accrue to all persons, whether they are citizens or not. It is important to bear in mind here that the European Convention on Human Rights is not centrally focused upon matters relating to the criminal justice system, though the criminal justice process obviously throws up issues which are covered by the Convention's precepts, such as the prohibition upon 'inhuman or degrading treatment or punishment', which is set out in Articles 3, 6 and 7 of the Convention. This includes, as Ashworth has noted, considerable safeguards afforded by the Convention for anybody subject to criminal proceedings.[21]

19 Jackson, J.J. (2005) 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment', *Modern Law Review*, 68 (5). pp. 737–764.

20 van den Berghe, F. (2010) 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?', *European Law Journal*, 16 (2). pp. 112–157. For a more technical explanation, see: Valentini, L. (2012) 'Human Rights, Freedom, and Political Authority', Political Theory, 40 (5). pp. 573–601.

21 Ashworth, A. (2006) *Principles of Criminal Law*. OUP: Oxford. pp. 60–64.

The precise content or extent of the human rights set out in the Convention differs slightly between nations since human rights take their final form through political processes of enactment within states. The European Court of Human Rights has jurisdiction over the forty-seven constituent member states of the Council of Europe, which covers not just the members of the EC but also such countries as Azerbaijan, Georgia, Russia, Turkey and Ukraine. There is a requirement therefore that the Court not only has to have regard to the highest ideals of the Convention but also sensitivity to the differing circumstances, culture, history and religion of its constituent states. Human rights are legitimated at the level of the nation state with a 'margin of appreciation' allowing for a minimal standard of *reasonableness* in liberal democratic societies, as Charvet and Kaczynska-Nay have set out in some considerable detail.[22] In any case it is sufficient to say that human rights have a universal character which presupposes the notion that they are 'ultimately a value in themselves'.[23] For our purposes it is not so much the case that the European Convention on Human Rights has supremacy over domestic UK jurisprudence, by its following the decisions of the European Court of Human Rights, so much as it is the case that the Convention sets out a *regional* human rights system, of which the UK is party to. This *regional* human rights system is best understood as a federal politico-legal mechanism for upholding the *universal* rights set out in the Universal Declaration of Human Rights, and which the European Court of Human Rights is set in place to safeguard.[24] Moreover, that this *regional* human rights system and the authority of its claims are legitimised by their relationship to democratic politics at the level of the nation state, as Raz has highlighted in *The Morality of Freedom*.[25] Indeed, the relationship between political ideals and public life, secured through deliberative democracy, establishes, over time, a constitutional consensus around foundational notions of what it means to be a person, i.e. to be a free and equal subject.[26] The European Court of Human Rights, on this basis, is a vehicle for securing that the content and extent of human rights norms are in agreement with the highest ideals of *justice*, in the political sense, as arrived at by public reason. The European Court of Human Rights has the task of relating and interpreting the political sense of *justice*, as expressed in the Convention, in the sphere of law and law-making. The idea of law is a prominent aspect of *justice*, in the political sense, and in the working of

22 Charvet, J. and Kaczynska-Nay, E. (2008) *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*. CUP: Cambridge. pp. 104–109.

23 Charvet, J. and Kaczynska-Nay, E. (2008) *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*. CUP: Cambridge. p. 14.

24 Gardbaum, S. (2009) 'Human Rights and International Constitutionalism' in J.L. Dunoff and J.P. Trachtman (eds) *Ruling the World: Constitutionalism, International Law and Global Governance*. CUP: Cambridge. pp. 230–248.

25 Raz, J. (1986) *The Morality of Freedom*. OUP: Oxford. p. 53.

26 Rawls, J. (2005) *Political Liberalism*. Columbia University Press: New York. pp. 163–165.

the European Court of Human Rights we see how the highest ideals of political thought are expressed through the rule of law. Therefore, there is a developing relationship between the European Court of Human Rights and the politico-legal patterning of individual nation states. It should be noted, in passing, here that being in good standing with the Court is a prerequisite for would-be members of the EC drawn from the Council of Europe; and this point has often been raised against Turkish membership.[27] The European Court of Human Rights is in place to ensure that the fundamental rights of persons are understood as *the* basic legal requirement and its decisions and developing jurisprudence reflect that. The problem arises at the practical international level when the presumed common understanding of rights, derived from political principles, is found wanting and individual states claim, for example, that their notion of rights is rooted in some other prior claim, such as national sovereignty, religious or historical precedent. Wenar sets out this problem in terms of a distinction between the *orthodox* and *practical* notions of rights: wherein the *orthodox* is understood in terms of human rights being grounded in some prior philosophical claim and the *practical* is understood in terms of human rights merely constraining the range of actions legally and morally possible in real-world situations.[28] In the case of the European Convention on Human Rights, because its membership is coterminous with that of the Council of Europe this is a complex task. However, since the states of the Council of Europe have all incorporated, in a variety of different ways, the Articles of the European Convention on Human Rights into their respective legal codes, the job of the Court is to hold them to that incorporation. Both membership of the Council of Europe and the adoption of the European Convention on Human Rights are freely undertaken by the constituent member states. Moreover, the constituent member states agreed, upon joining the Council, to be bound by Court decisions: and therefore the rulings of the European Court of Human Rights should be accepted by them, accordingly.

The European Convention on Human Rights offers the right of individual complaint as well as state complaint. Moreover, *legal* persons, such as corporations or groups, not just individual persons, have the right to demand what they see as their legitimate rights under the Convention to be determined by the Court. Since 1966 the UK government has allowed applicants to petition the Court directly. The European Court of Human Rights pronounces its binding judgement upon such parties, who, in turn, agree under Article 46(1) to: 'abide by the final judgements of the Court in any case to which they are parties' and under Article 41 to also offer satisfaction and restitution, in the form of costs

27 Rumford, C. (2002) 'Failing the EU Test? Turkey's National Programme, EU Candidature and the Complexities of Democratic Reform', *Mediterranean Politics*, 7 (1). pp. 51–68.

28 Wenar L. (2005) 'The Nature of Human Rights' in A. Føllesdal and T. Pogge. *The Real World of Justice*. Springer: Dordrecht. pp. 285–294.

and compensation, where the Convention has been deemed to have been breached. However, the Court has no power to make any constituent member state take *specific* measures aimed at affording a remedy to a breach of the Convention or to prevent further breaches of the Convention. Therefore, the verdicts of the Court are declaratory in nature and its judgements have no formal legal mechanism, either through the Court or the Council of Europe, to ensure their enforcement. It has often been remarked that the Court is similar to the Inter-American Court of Human Rights but this is misleading as the Inter-American Court of Human Rights has much greater powers of enforcement.[29] The judgements by the European Court of Human Rights are transmitted to the Committee of Ministers of the Council of Europe; and the Committee merely informs the party, or parties, in breach of the Convention to detail the procedures they will put in place to comply with their obligations to follow the judgement of the Court. One may imagine that the failure to have in force a legal mechanism for compliance and to rely on declaratory judgements alone would mean that conformity to the Court's pronouncements is likely to be quite low. However, this does not appear to be the case generally, though Russia and Turkey seem to act on decisions least of all.[30] It is important to bear in mind, however, that the *meta*-rationale for the Court is not compliance per se but the promotion of a convergence in the way that public institutions operate through the articulation and development of ideals set out in the Convention and which constituent member states come to apply in their respective national jurisprudence.[31] Compliance is best viewed as a marker of good practice and evidence of the *bona fides* of constituent member states. The Committee of Ministers of the Council of Europe operates through peer pressure as it were. No state wishes to suffer the public ignominy of not redressing a breach of a Convention they are themselves a party to. The European Court of Human Rights is best understood as an international arbiter of good practice in human rights rather than as a mechanism for enforcement per se. It does not demand a particular form of practice by constituent member states nor does it adjudicate on the outcome of specific remedies directly. It does, however, serve as a forum for the development of national, as well as international, law in relation to human rights by holding parties to account in terms of their own commitment to a jurisprudence derived from the European Convention on Human Rights and focused upon the highest ideals of the Universal Declaration of Human Rights. By observing the operation of the European Court of Human Rights we see the linkage of the local with the international and the practical working out

29 Savelsberg, J.J. (2010) *Crime and Human Rights*. Sage: London. p. 110.

30 Livingstone, S. (2000) 'Prisoner's Rights in the Context of the European Convention on Human Rights', *Punishment & Society*, 2 (3). pp. 309–324.

31 Greer, S. (2008) 'What's Wrong with the European Convention on Human Rights?', *Human Rights Quarterly*, 30 (3). pp. 680–702.

of the aspiration for *universal* human rights through a regional politico-legal instrument. It is an enterprise devoted to the extension of human dignity, equality and freedom. The grand claims of the Universal Declaration of Human Rights are framed and focused by the practical wording of the European Convention on Human Rights and it is the job of the European Court of Human Rights to ensure that any person residing within its jurisdiction, citizen or not, is able to live a life that is free and equal in dignity and rights in respect to their humanity. That the Court achieves this, in the overwhelming number of cases, is testament to an overlapping consensus about the highest ideals of justice and the moral force of the European Convention on Human Rights between the judges of the Court and its constituent member states. At the most basic level there is a consensus as to the human right norms to be enjoyed by persons living in European constitutional democracies. Though there is a deal of discussion, both legal and political, regarding the unfolding character of European society, there is a real absence of debate as to the precise nature of the form of *justice* desired at the level of the most *basic* principles of human rights; as set out in the Convention and derived from the Universal Declaration of Human Rights.

Panopticism and the fundamental rights agency of the European Union

The European Court of Human Rights only receives important cases and has no general advisory or oversight function. It is not embedded at the level of general administration. The need for a statutory body to keep an eye on how things are progressing across Europe came to be seen as necessary, within the EU at least. If standards of human rights are set, or aspired to, then progress towards such benchmarks becomes a necessary function at the state and regional level. So in 2007 the Fundamental Rights Agency of the European Union (FRA) came into existence. Its purpose is to *advise* on human rights, as set out in the European Convention on Human Rights, not monitor their institution, as such. However, the FRA also has a governance and coordination function and so it does undertake monitoring and surveillance and so it can also be understood as possessing a panoptican-like function that enables an entirely new form of international governance. Sokhi-Bulley, appropriating a Foucauldian methodology,[32] has termed this process the 'new panopticism'.[33] She raises profoundly worrying issues for the EU and its citizens about the project of human rights by raising

32 Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison*. Penguin: Harmondsworth. Foucault outlines a system of disciplining and governing that is wholly reliant upon surveillance and measurement. Foucault outlined this most acutely in institutions, like prison or school and organisations such as the army. In the world of total observation the subject is reduced by the power of the viewer.

33 Sokhi-Bulley, B. (2011) 'The Fundamental Rights Agency of the European Union: A New Panopticism', *Human Rights Review*, 11 (4). pp. 683–706.

the spectre of human rights itself becoming a form of governmental control by the EU and its agents, in the form of its nation state members.[34] The FRA is a rather complex organisation and we should be alive to its potential for having a degree of power because it has a disciplinary function in the sense that it convenes networks of experts, has a role in the production and promotion of certain statistical indicators and to some extent sets its own agenda inasmuch as it promulgates a notion of a safe and ordered European space secured through a strong human rights agenda. The FRA was set up with the task of systematically observing the implementation of human rights at a variety of levels across the EU; and the slippage into a tool of government, or into some form of governmentality, is obvious. It is in a strong position to 'label' persons, organisations and states as having a stronger or weaker commitment to human rights irrespective of the economic and historical situation prevailing to them. Nowak has argued, in relation to the FRA's advisory role, that it has a normative and agenda-setting function that is, in itself, a form of on-going monitoring.[35] The language of monitoring can easily also be understood as having a disciplinary and governmental function.[36] Sokhi-Bulley has argued that:

> The incitement to rights discourse has recently manifested itself in a less traditional way than through case law and treaty amendments: the birth of the FRA. The panoptic schema (that is, the model of the panopticon and the relations of disciplinary power that it illustrates) can therefore be integrated into a human rights monitoring function, as illustrated by the FRA. The panoptic schema, Foucault argued, was destined to spread throughout the social body and consequently it is '*a great new instrument of government*'. It is, in essence a 'type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organisation, of disposition of centres and channels of power, of definition of the instruments and modes of intervention of power, which can be implemented in hospitals, workshops, schools, prisons'.[37] It is therefore 'applicable to all establishments' and can be integrated into any function. Bentham's vision of the

34 De Burca, G. (2005) 'New Modes of Governance and the Protection of Human Rights' in P. Alston and O. de Schutter (eds) *Monitoring Fundamental Rights in the EU*. Hart: Oxford. pp. 25–36.

35 Nowak, M. (2005) 'The Agency and National Institutions for the Promotion and Protection of Human Rights' in P. Alston and O. de Schutter. (eds) *Monitoring Fundamental Rights in the EU*. Hart: Oxford. pp. 91–107.

36 Wrench, J. (2011) 'Data on Discrimination in EU Countries: Statistics, Research and the Drive for Comparability', *Ethnic and Racial Studies*, 34 (10). pp. 1715–1730; van der Leun, J.P. and van der Woude, A.H. (2011) 'Ethnic Profiling in the Netherlands? A Reflection on Expanding Preventive Powers, Ethnic Profiling and a Changing Social and Political Context', *Policing & Society*, 21 (4). pp. 444–455.

37 Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison*. Penguin: Harmondsworth. p. 205.

> panoptic schema imagined a wide range of uses and Foucault's application of the model extended not only to the reform prisoners but to the confinement of the insane, to supervision of workers, to the instruction of schoolchildren. [It can be argued that] panopticism applies similarly to the FRA.[38]

Sokhi-Bulley makes three key points to support her view. First, that the FRA's human rights discourse of 'respecting, protecting, upholding' and 'progress' is actually a disciplinary discourse of power. Second, that whereas Foucault's *Discipline and Punish: The Birth of the Prison* had the panopticon supervisor being located in a single place, the structure and function of the FRA is far more complex and is characterised by a matrix of connections, at a variety of levels, and this masks its exercise of power. The FRA is necessarily an observing panopticism that is not reliant on a single locus of power. Third, that the main feature of the FRA is that it works with member states to allow continual observation. The upshot of all this is that:

> The FRA is part of the new governance trend that has swept through the EU in recent years.... Panopticism operates even in the absence of a centre of power (that is, 'a' supervisor), meaning that the nature of this disciplinary discourse is self-perpetuating. The discourse of rights is disciplining because it targets the Member States, the citizens of the EU and other bodies of the Agency (for example, NGOs) to produce normalised identities: the identity of the FRA as a promoter and protector of human rights is normalised, as is the understanding of the EU as a safe and secure society, and a human rights organisation. In addition to fulfilling its role as a human rights institution responsible for providing 'assistance and expertise' to the EU and its Member States, the FRA is also, therefore, a great new instrument of government.[39]

The point about the FRA and panopticism is complex. The FRA has set in chain a process which has enabled lots of experts, working in networks, to produce a plethora of statistics about human rights, which themselves go on to define the nature of the human rights settlement, in the EU at least. This settlement is built up around norms and designated categories: even who is designated as marginal is conceived of in terms of this settlement. Moreover, those persons deemed to be marginal (blacks, homosexuals, Roma, for example) are then understood as increasingly out with the norm; as statistics pile up and are then observed and monitored. So whilst the FRA is generally progressive and

38 Sokhi-Bulley, B. (2011) 'The Fundamental Rights Agency of the European Union: A New Panopticism', *Human Rights Review*, 11 (4). pp. 692–693.

39 Sokhi-Bulley, B. (2011) 'The Fundamental Rights Agency of the European Union: A New Panopticism', *Human Rights Review*, 11 (4). pp. 704–705.

something we may wish to support, it has this unintended consequence of norming and constructing data sets that are, in turn, analysed and then become seen as common knowledge. We may wish to deny these constructions and observations and resist its labels.[40] Moreover, we may wish to do that on human rights terms.

The too-western, too liberal critique(s) of human rights

Marxists have long since argued that talk of rights is no more than a form of code for entrenching capitalist relations of domination and that it is absurd to apply rights equally to a structurally unequal settlement, especially in the realm of property and ownership.[41] Marx maintained that rights are too individualistic, so much so that they can undermine social solidarity. Famously in *On the Jewish Question* he writes: 'Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community.'[42] The important point Marx makes is that rights (and he had in mind a Kantian form of rights) simply:

> protect the self-interested desires of materially acquisitive individuals (consumers in a capitalist economy), as opposed to the rights of citizens per se; and they also seem to presuppose a conflict between persons and the society outside of them, which constrains their freedom and action.[43]

In *On the Jewish Question* Marx argues forcibly that rights are just a 'framework exterior to individuals, a limitation of their original self-sufficiency'.[44] In the Marxist scheme rights are too individualised and offer little to groups and collectives and they are useless in addressing the most important systemic issue in the social structure, the exploitative and coercive nature of capitalism.

The point that those who see human rights as culturally loaded make is not that at some very primitive, or abstract, level human rights cannot be agreed upon, so much as they have in mind real-world processes of power, history and

40 Sokhi-Bulley, B. (2011) 'The Fundamental Rights Agency of the European Union: A New Panopticism', *Human Rights Review*, 11 (4). p. 706.

41 Murphy, J.E. (1995) 'Marxism and Retribution', reprinted in *Punishment: A Philosophy and Public Affairs Reader*. Princeton: Princeton University Press. pp. 217–243.

42 Marx, K. (1987) 'On the Jewish Question' in J. Waldron (ed.) *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, London: Methuen. p. 147.

43 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London and Los Angeles. p. 43.

44 Marx, K. (1987) 'On the Jewish Question' in J. Waldron (ed.) *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, London: Methuen. p. 147.

economic development. These critics are not denying that at a basic conceptual, jurisprudential or philosophical level rights can never be agreed upon, only that human rights are themselves embedded within a historically determined *Weltanschauung* and are utilised in a form of capitalist development. Human rights, in the form of the Universal Declaration of Human Rights and the European Convention on Human Rights are themselves the outcome of a *particular* history of ideas. Nader has looked at human rights in terms of their role in what she terms a 'western and mainly American hegemonic movement' in which Americans and Europeans look at the human rights experience of others, but less so at their own.[45] For example, she draws attention to the plight of North American Indians who need their own land and water for their survival as a *group* and who are not well-served by what she terms the 'normative blindness' of looking to the individual as the site of rights and not the group. Moreover, this situation can be traced right back to 1948 and the Universal Declaration of Human Rights, which excluded indigenous peoples from the original discussion concerning human rights, and which did not address *non*-state derived human rights. Following Said's analysis in *Orientalism* she details how a dominant discourse of cultural superiority typically looks at human rights breaches as happening outside of the West. Furthermore that the media is implicated in this process, rarely looking at, for example, the excesses of the American prison system in human rights terms or acknowledging the horrors of the imperial past. In the international economic development process, too, human rights discourse can seem neo-colonial in practice as they can imply a form of decision-making and governmental structure which is alien and unwanted by non-western people. A good example of this was set out by Barfield when he examined traditional justice in Afghanistan:

> Afghans have a very well-developed structure of law, of morality, of justice, but it is following a different logic than our own.... (W)hile state structures are very underdeveloped, the question of running a society without state structures is highly developed. And that is not something that people in the international community are used to dealing with.[46]

In other words human rights activists may be guilty of ignoring, or overlooking, the existing actions and intentions of persons in non-western societies; and the fact that they are acting under much broader historical and institutional constraints. Rajagopal has argued that the entire post-war discourse of human rights

45 Nader, J. (2007) 'Registers of Power' in M. Goodale and S.A. Merry (eds) *The Practice of Human Rights: Tracking Law Between the Global and the Local.* CUP: Cambridge. pp. 117–129 (p. 118).

46 Barfield, T. (2002) 'On Local Justice and Culture in Post-Taliban Afghanistan', *Connecticut Journal of International Law*, 17. pp. 437–443.

has developed from a Euro-American elite's reaction to the Nazi Holocaust and not out of the struggle against colonialism and for self-determination. Moreover, that because international law (and its attendant jurisprudence) is the way human rights are expressed, and not customary or constitutional law, the hegemonic power of international law and jurisprudence trumps all other forms of discourse and resistance: and here she has in mind non-western nations.[47]

Contemporary liberal theorists, such as James Griffin, have argued that the account given of human rights is reasonable and that individuals are liberated through the possession of human rights. Moreover, that though there may be no comprehensive agreement about morals that is not the same thing as arguing that nonetheless human rights may be grounded in key values without being 'culturally limited'. Griffin's point follows on from Tasioulas' argument against Rawls (who had warned about ethnocentrism in human rights theorising),[48] which maintains that the pursuit of a liberal vision of human rights can, and should, be developed by grounding rights directly in values.[49] Tasioulas and Griffin maintain that, however divergent cultures and traditions may be, it is still feasible to gain agreement at the most basic level about the worth of *human dignity*.[50] The assumption Griffin makes is to maintain that we 'tend to exaggerate the differences between societies … we exaggerate, in particular, the disagreement between societies over human rights'.[51] Griffin, and other liberals, may be guilty here of playing down the differences between persons, cultures and nations; and failing to be culturally sensitive: certainly Griffin displays a certain naivety in underplaying the level of disagreement across, and within, societies.

However, what we witness in this argument between the political liberals, such as Griffin and Tasioulas, and the critical comparatives, such as Nader and Rajagopal, is not so much a dispute over human rights per se, so much as a dispute over whether there can ever be a thick (i.e. universally workable) version of them, and at what level of determination. A limited conception of human rights may likely afford some thin form of agreement and yet a more extensive one none at all. The problem is located not in the possibility of an agreement, rather it is located in the practical usefulness, or otherwise, of any agreement.

47 Rajagopal, B. (2007) 'Encountering Ambivalence' in M. Goodale and S.A. Merry (eds) *The Practice of Human Rights: Tracking Law Between the Global and the Local*. CUP: Cambridge. pp. 274–275.

48 Rawls, J. (1993) 'The Laws of the Peoples', *Critical Inquiry*, 20 (1). pp. 36–68.

49 Tasioulas, J. (2002) 'From Utopia to Kazanistan: John Rawls and the Law of Peoples', *Oxford Journal of Legal Studies*, 22 (2). pp. 367–396.

50 Griffin, J. (2008) *On Human Rights*. OUP: Oxford. pp. 23, 25, 27, 137–142.

51 Griffin, J. (2008) *On Human Rights*. OUP: Oxford. p. 138.

Chapter 3

Human rights in British and European law

'Britain' and the Common Law

The United Kingdom of Great Britain and Northern Ireland ('UK' or 'Britain') is a nation state in international law. History and politics have both caused this nation state to be created out of three separate legal jurisdictions, each of which has its own courts, judges and legal professions. These jurisdictions are: (1) England and Wales – the homeland (and the well-spring) of the 'Common Law of England'); (2) Scotland[1] (which, no less than England – and arguably more so than England – has its own judge-made law); and (3) Northern Ireland.[2] This tri-partite division of the United Kingdom long pre-dates the 'devolution' legislation of 1998[3] and 2006.[4]

A telling example of the independence of the Scottish criminal justice system within the UK is provided by the development of 'diminished responsibility' as part of Scottish judge-made law, so that Scotland recognised this partial defence to murder, long before any such defence was recognised in England and Wales or in Northern Ireland. This defence was first developed by a Scottish judge, Sir George Deas (1804–1887) ('Lord Deas'), in *Her Majesty's Advocate v Dingwall* (1867). Lord Deas allowed the jury to bring in a verdict of 'culpable homicide' (the Scottish equivalent to the English crime of manslaughter) instead of a verdict of murder in a case where the defendant (who was not entitled to the defence of 'insanity') had killed his wife while he was suffering from alcoholism (*delirium tremens*) and epilepsy. (This ruling therefore saved Dingwall from the death penalty.) Lord Deas persisted in allowing this defence to be used in subsequent prosecutions for murder until he retired from the bench. The name 'diminished responsibility' was eventually coined by the Scottish courts in the case of *His Majesty's Advocate v Edmonstone* (1909).

1 Act of Union with Scotland Act 1706.
2 Government of Ireland Act 1920 (as amended); Irish Free State Agreement Act 1922.
3 Scotland Act 1998; Northern Ireland Act 1998.
4 Government of Wales Act 2006.

It is clear from the Scottish cases that 'diminished responsibility' was looked upon as a form of borderline insanity at a time when the English courts were bound by the *M'Naghten Rules* as ordaining the strict test for the defence of 'insanity' at Common Law. This test required the defendant to prove that, at the time of committing the criminal act, he had been suffering from a 'defect of reason from disease of the mind' and that, because of this defect, he either 'did not know the nature and quality of his act' or, if he did know it, that 'he did not know he was doing what was wrong'.[5] Even cases of women killing their new-born children while suffering from post-natal depression were cases which were then dealt with at murder trials until (in 1938) Parliament belatedly recognised that these particular cases of 'infanticide' were, for all intents and purposes, indistinguishable from manslaughter.[6]

Although persons convicted of murder (in any part of the United Kingdom or in any part of the British Empire) could afterwards have their death sentences pardoned or commuted by use of the prerogative of mercy and, in cases of women suffering from post-natal depression, the judges in England and Wales would often tell such distraught females that this prerogative was certain to be exercised in their favour, the decision of the High Court in *Hanratty v Lord Butler of Saffron Walden* (1971)[7] made it clear that the maxim of English law was: 'mercy begins where legal rights end'. Therefore, it must now be recognised that, until Parliament imported the Scottish defence of 'diminished responsibility' into English law (by enacting the Homicide Act 1957), many defendants were convicted and hanged for murder in England and Wales who would not have been convicted of murder in Scotland. Edward Marjoribanks has observed that one such a case[8] (the trial for murder of a respected Chinese businessman who killed his wife and two daughters while suffering from an epileptic seizure) troubled the mind of 'the great defender' Sir Edward Marshall Hall, even when he (Marshall Hall) was on his own death bed: '[Marshall Hall's] memory wandered over his long and successful legal career; yet the case to which he would always return in his talk was not a triumph, but a failure, the case of Lock Ah Tam.'[9]

It was not until 1983, in *R v Sullivan*[10] that the House of Lords ruled (in a case not involving homicide) that an epileptic seizure could be defined as a form of 'insane automatism' for the purposes of the *M'Naghten Rules*.[11] Until then there had been a natural reluctance to define epilepsy (obviously a non-psychiatric condition) as a form of legal 'insanity'.

5 *M'Naghten's Case* (1843) 10 Cl & F 200; 8 ER 718.
6 Infanticide Act 1938.
7 115 SJ 386.
8 *R v Lock Ah Tam*, Chester Assizes, 1926; Marjoribanks, *infra*, pp. 453–461.
9 Marjoribanks, E. (1929) *The Life of Sir Edward Marshall Hall*, Victor Gollancz: London. p. 475.
10 [1983] 2 All ER 673.
11 fn 5.

The need for English criminal law to follow the lead of the Common Law of Scotland in recognising 'diminished responsibility' as a defence to murder became especially pressing after the Court of Criminal Appeal in 1952 made it clear that, even if a defendant was clinically insane, he could not rely on the legal defence of insanity, if, at the time of committing a criminal act – however morally justified he felt it to be – he nevertheless knew that his conduct would be judged 'wrong' in the eyes of the criminal law.[12] This made it easy for prosecutors to confound expert witnesses (called to support 'insanity' defences) by asking them such questions in cross-examination as: 'Would the defendant have committed this act if a policeman was standing there?', or 'Why did the defendant try to hide the evidence of his crime?' The *Notable British Trials* series of transcripts contain many valuable examples of such cross-examinations in cases where defendants in murder trials, even before the decision in *R v Windle*, attempted to rely on the *M'Naghten Rules* – for example, the trials of the sexual sadist Neville Heath (1946), the 'acid bath murderer' J.G. Haigh (1949), the child murderer J.T. Straffen (1952) and sexually motivated murderer J.R.H. Christie (1953). Indeed, it is doubtful whether Daniel M'Naghten himself (who died in Broadmoor Hospital in 1865[13]) would have been entitled to the benefit of those rules if they had been applied at his trial instead of the more ambiguous test used by Tindal, CJ in his direction to the jury, namely: whether the defendant 'had or had not the use of his understanding so as to know that he was doing a wrong or wicked act violating the laws of God and man'.

As it so happened, the overdue statutory recognition of the 'diminished responsibility' defence in England and Wales was not brought about until Parliament was ready to enact the Homicide Act 1957 and to start the process of abolishing the death penalty for murder. Thus it has happened that a defence which originated in Scotland to save defendants from the gallows has endured in England and Wales (as well as in Scotland) as a means of differentiating life imprisonment for murder from the widest sentencing discretion which applies in cases of manslaughter.

Of course, if a defendant is not charged with murder, the (partial) defence of 'diminished responsibility' will not have any relevance to that case because, obviously, manslaughter can only be an alternative verdict to murder. (It cannot even be an alternative verdict to attempted murder.) If, therefore (like *Sullivan*[14]), the defendant is charged with a non-fatal offence of violence, he or she will have to confront (willingly or otherwise) the definition of 'insanity' contained in the *M'Naghten Rules*.[15] Examples of this problem arising outside the

12 *R v Windle* [1952] 2 All ER 1.
13 MacNaghten, A. (1986) 'Daniel McNaughten: Madman of Paid Assassin?', *Justice of the Peace Newspaper* (149). p. 315.
14 fn 10.
15 fn 5.

law of homicide might be (non-fatal) arson committed by a pyromaniac, or shoplifting committed by a kleptomaniac. However much these conditions might be judged (by psychiatrists) to 'diminish' a defendant's criminal responsibility, they cannot be relied upon as a defence to arson or theft in England and Wales. The defendant's condition will be relevant only to sentencing.

The Homicide Act 1957 did not apply to Northern Ireland and so it was a Northern Irish case (*Bratty v Attorney-General for Northern Ireland*[16]) which led the House of Lords to determine what the legal position would be if a defendant, who had unlawfully killed another person, could not produce any explanation or expert evidence (other than some unknown internal cause of mind or body) as to why he or she had done so. In the absence of any expert psychiatric evidence which could satisfy the definition of 'insanity' required by the *M'Naghten Rules*,[17] and in the absence of any available defence of diminished responsibility (in Northern Ireland at the time in question), the House of Lords ruled that it was not permissible for defence lawyers to dress up an inadequate defence of 'insanity' as if it was an adequate defence of 'non-insane automatism' (as might, for example, apply in a case of purely reflex actions). Accordingly, the defendant in *Bratty v Attorney-General for Northern Ireland* was held to have been correctly convicted of murder.

Jersey and Guernsey and Guernsey's dependencies (Alderney and Sark), and the Isle of Man are not part of the United Kingdom.[18] They have a personal connection with the Crown which pre-dates any conception of a British Empire. Jersey and Guernsey (etc.) were, of course, part of the eleventh-century Duchy of Normandy. The Isle of Man has attached to the British Crown by virtue of the monarch being Duke of Lancaster since the fifteenth century. These islands have never been British colonies and they are categorised as 'Peculiars of the Crown'. Each of these 'Peculiars' retains its own legislature, its own courts and its own legal profession. Nevertheless, the United Kingdom remains responsible for their foreign relations, and this includes securing their compliance with the ECHR. Thus the question of whether the 'birching' of juvenile offenders on the Isle of Man contravened Article 3 ECHR (the ban on 'inhuman or degrading punishment or treatment') resulted in *Tyrer v United Kingdom* – a judgement against the United Kingdom[19] in proceedings brought at the European Court of Human Rights (ECtHR), even though this punishment was no longer used within the United Kingdom and was publicly disapproved of by the UK government.

Notwithstanding the separate hierarchy of the courts in each jurisdiction within the UK, the Supreme Court of the United Kingdom (UKSC) – formerly

16 [1963] AC 386; [1963] 3 All ER 523.
17 fn 5.
18 For certain purposes (e.g. Animals Act 1971) they are recognised to be within the 'British Islands'.
19 [1979–80] 2 EHRR 1.

the Judicial Committee of the House of Lords – is the final appellate court, not only for England and Wales, but also for Northern Ireland, and for civil (but not for criminal) appeals from Scotland.[20] Although Scottish criminal cases were excluded from the jurisdiction of the Judicial Committee of the House of Lords, and are therefore still excluded from the jurisdiction of the UKSC, any question relating to Scotland's compliance with the ECHR can still be brought, on appeal from Scotland, to the UKSC, even if that question arises in a Scottish criminal case. This (strictly limited) right of appeal to the UKSC in criminal cases was confirmed by the Scotland Act 2011, which amended the Scotland Act 1998 by 'posting' a new section (s.98A) into that Act. This statutory clarification came after the UKSC had held in *Cadder v H.M. Advocate*[21] that the Scottish legal system had infringed Article 6 ECHR by not allowing a suspect to have access to legal advice during police questioning. Shortly afterwards, the UKSC went on to rule (in *Fraser v Lord Advocate*[22]) that a Scottish conviction for murder should be quashed because the Scottish Court of Criminal Appeal had applied the wrong test for deciding whether or not non-disclosure of evidence (by the prosecution) had caused a 'miscarriage of justice'. Although the UKSC had left it to the Scottish Court of Criminal Appeal to decide whether or not Fraser should face a re-trial (and he was, indeed, afterwards re-convicted of the murder at such a re-trial[23]), the decision of the UKSC provoked the Scottish First Minister (Alex Salmond) to make intemperate criticisms of the UKSC and even to criticise one of the Scottish judges on that court (Lord Hope). These criticisms (which were first made on the BBC television programme *Newsnight Scotland* on 31 May 2011) proved controversial in Scotland and, amongst other responses, there was a strong riposte from Lord Wallace, the advocate general, who remarked:

> Why should Scots not have their human rights protected in the same way as people in the rest of the UK? What no one has yet explained to me is why the Scottish government are suggesting that Scots should have to go straight to the court in Strasbourg where there are no Scottish judges and a 140,000 backlog of applications.[24]

Common Law and the Judicial Committee of the Privy Council

The final court of appeal for civil or criminal cases arising in Jersey and Guernsey (or its dependencies), and in the Isle of Man, is the Judicial Committee of the

20 Constitutional Reform Act 2005.
21 [2010] UKSC 43; [2010] 1 WLR 2601.
22 [2011] UKSC 24.
23 *BBC News Online*, 30 May 2012 (the re-trial had also been televised and an edited version was afterwards broadcast on British television [Channel 4]).
24 *Guardian*, 1 June 2011.

Privy Council (JCPC). For example, in *Warren v Attorney-General for Jersey* [2011] UKPC 10; [2011] 2 All ER 513, the JCPC heard the appeal of defendants who had been convicted in Jersey for conspiracy to import cannabis from the Netherlands. The defendants had unsuccessfully applied to the trial judge ('commissioner') for a stay of the proceedings on the ground that there had been an 'abuse of process' because the prosecution were seeking to rely on recorded conversations (made in a car, without obtaining the permission of the Dutch authorities). After this evidence was used at the trial, the defendants were convicted and their appeal to the Court of Appeal in Jersey was dismissed. On their subsequent appeal to the JCPC in London, that court held that a stay of criminal proceedings could only be granted for one of two reasons: (1) when a fair trial was impossible, or (2) where the trial would offend the court's sense of justice and propriety. The 'impossibility of a fair trial' reason required no balancing of competing interests; but the 'offence to justice' reason required the court to consider a number of factors, namely: (i) the seriousness of any violation of the defendant's rights (or a third party's rights); (ii) whether the police had acted in bad faith or had acted because of an emergency or necessity; (iii) the availability (or otherwise) of a sanction; and (iv) the seriousness of the offence being charged. The JCPC went on to state that, in cases of abduction or entrapment, the court would usually exercise its discretion in favour of a stay of the proceedings. As to the case in question, the JCPC held that, although it was true that there would not have been any trial but for the misconduct of the police, the decision of the commissioner not to order a stay of the proceedings was one which he had been entitled to reach. Although the police in Jersey had committed grave misconduct when they misled the Attorney-General (by not telling him of the lack of consent from the Dutch authorities), the charge against the defendants had been a serious one and the situation had been urgent. Accordingly, the defendants' appeal was dismissed by the JCPC.

The JCPC is a court of immemorial antiquity and it once functioned as the final court of appeal for all parts of the British Empire. This jurisdiction was confirmed by the Judicial Committee Acts of 1833 and 1844. The JCPC now sits in the same building (in Parliament Square, London) as the UKSC and it is largely, and usually entirely, comprised of Justices of the Supreme Court. Indeed, Lord Reed (a Supreme Court Justice) has estimated that about 40 per cent of the caseload of the Supreme Court Justices consists of sitting on the JCPC.[25] (Judges from other Commonwealth jurisdictions still sometimes sit together with Supreme Court Justices as, for example, happened in 2013 when Dame Sian Elias, Chief Justice of New Zealand, participated in *Lundy v The Queen* [2013] UKPC 28, discussed below.) The JCPC also hears appeals from the few remaining British dependent territories outside the British islands.

25 Address to the Association of Law Teachers, Annual Conference, Nottingham Trent University, 25 March 2013.

Indeed, the courts of first appeal for some very small territories are courts which, for convenience sake, sit in London. For example, in *Stevens v R*[26] the Court of Appeal for St Helena, sitting in London, had to decide whether a defendant who was convicted of murder had had the right to claim trial by judge alone (a 'bench trial'), instead of a trial by jury, when he alleged that the whole island of St Helena (population about 5,500) was prejudiced against him. The defendant's appeal against his conviction for the murder of a policeman was dismissed, although he was successful in his appeal against a separate conviction for attempting to murder his own wife. This case afterwards led to a change in the laws of St Helena to permit defendants to elect a 'bench trial'.

The smallest (inhabited) British dependent territory within the appellate jurisdiction of the JCPC is Pitcairn Island (population less than fifty). This dependent territory is in the remotest part of the Pacific Ocean and, for obvious reasons, only bench trials can be held there. After numerous allegations of sexual offences against women and young girls on that island led to investigations by the British police (in and before 2005), the Crown appointed Commonwealth judges (from New Zealand) to hold bench trials on Pitcairn Island. Six inhabitants of that island were convicted of various sexual offences and their appeals (raising, amongst other issues, the legal age of consent to sexual intercourse on Pitcairn Island) were held in New Zealand (see: *Daily Telegraph*, 3 March 2006). After these appeals were dismissed, the defendants appealed to the JCPC (in London), unsuccessfully arguing that British legislation did not apply on Pitcairn Island because the original settlement (in 1790) had been carried out by mutineers from HMS *Bounty* and their Tahitian companions (see: *The Lawyer*, 13 November 2006.). New Zealand itself had abolished appeals to the JCPC in 2003, when it had established its own Supreme Court. However, transitional provisions in that New Zealand legislation had provided that, if applications to the JCPC for leave to appeal against a decision of a New Zealand court had been made before 1 January 2004, those applications could be determined as if that right of appeal had not been abolished (see: s.59(1)(b), [New Zealand] Supreme Court Act 2003). In *Lundy v The Queen* [2013] UKPC 28 (reported in *The Times*, 10 December 2013 as *R v Lundy*) Lord Hope, giving the judgement of the panel of five judges (including the Chief Justice of New Zealand), explained that 'Difficulties in funding an appeal, the lack of legal aid, and problems associated with persuading counsel to act pro bono combined to prevent an application for permission to appeal being made until November 2012' (see: Privy Council Appeal No. 0094 of 2012 Transcript, paragraph 3). Accordingly, the JCPC (in its judgement delivered on 7 October 2013) had to first deal with jurisdictional issues before it could decide (as it did) that the appellant's convictions for two murders should be quashed, and that he should again stand trial

26 [1985] LRC (Crim) 17; see also the commentary by Blake, L. (1986) *Journal of Criminal Law*, 50. p. 247.

for murder (so soon as this could be conveniently arranged). The substantive issues in the appeal related to the emergence of new evidence and the allegedly erroneous way in which the New Zealand Court of Appeal had assessed the possible effect of that evidence on a jury's verdict.

Even though, like New Zealand, most independent Commonwealth countries have abolished appeals to the JCPC, that Committee still hears appeals from certain independent Commonwealth nations which have chosen to retain the right of appeal to London. This appellate route to London is sometimes retained by nations with small populations in order to reassure foreign investors that disputes of law can, if necessary, be heard, as a last resort, in a court of undoubted independence. Because these nations often have written constitutions which protect human rights, the JCPC has occasionally had to hand down judgements on human rights and fundamental freedoms, and to have done so long before the Human Rights Act 1998 came into force, in the UK. For that reason these 'human rights' decisions were far in advance of any decisions which the domestic courts of the United Kingdom had the jurisdiction, or perhaps even the inclination, to decide. David Pannick QC has observed (in *The Times*, 16 January 2014) that: 'For the past 50 years [the JCPC] has given a contemporary interpretation to the fundamental rights written into the constitutions of Commonwealth nations.' In this connection we may note, for example, the decisions of the JCPC in *Pratt v Attorney-General for Jamaica* [1993] 4 All ER 769, and *Guerra v Baptista* [1995] 4 All ER 583 (an appeal from Trinidad and Tobago). In those appeals the JCPC quashed death sentences for murder because of unreasonable delays in carrying out those sentences. The reasoning behind these so-called 'death-row' appeals was that such delays would have been challengeable at Common Law, even in British colonial times. The avoidance of any such delay was presumably the reason why, shortly after losing his appeal to the House of Lords (by a majority of 4:1), William Joyce was hanged for high treason even though the law lords did not give their reasons for their decision until after his execution. (Joyce's appeal was dismissed on 18 December 1945, his execution took place on 3 January 1946 and the law lords' reasons were delivered on 1 February 1946; see: J.W. Hall, editor, *Trial of William Joyce*, *Notable British Trials series*, 1946, p. 39) In the conjoined appeals of *Vasquez v R*; *O'Neill v R* [1994] 3 All ER 674, the JCPC held that it was contrary to the presumption of innocence, and to the right to a fair trial, enshrined in the constitution of Belize (formerly British Honduras), for the Belize Criminal Code to place on the defendant the burden of proving his defence of provocation (in a murder trial), even if he only had to prove that (partial) defence 'the balance of probabilities'. At Common Law, 'provocation' reduced murder to manslaughter but the burden of *disproving* that defence (beyond reasonable doubt) lay upon the prosecution, if – and only if[27] – the defendant had

27 *Mancini v Director of Public Prosecutions* [1942] AC 1.

discharged the much lighter ('evidential') burden of making it a relevant issue for the jury to consider. This Common Law defence has now been replaced (in England and Wales) by the statutory defence of 'loss of control', but the legal burden of disproof still lies upon the prosecution.[28]

All of this, therefore, is of a piece with the 'golden thread' speech of Lord Sankey, LC, who (when presiding over the Judicial Committee of the House of Lords) famously opined as follows in *Woolmington v Director of Public Prosecutions* [1935] AC 462:

> Throughout the web of the English criminal law one golden thread is always to be seen: that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have said about the defence of insanity and subject also to any statutory exception.... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained.

Lord Sankey's reference to 'any statutory exception' must now, of course, be viewed in the light of the Human Rights Act 1998 and, in particular, Article 6 of the ECHR. Whilst the Strasbourg jurisprudence recognises that all legal systems will occasionally, and justifiably, make use of presumptions, Strasbourg human rights jurisprudence is steadfastly against any reversal of the presumption of innocence. Accordingly, statutory provisions which appear to require a defendant in a criminal case to prove certain facts (even on the 'balance of probabilities') will have to be 'read down' so as to make this burden an 'evidential burden' only. Even the defendant's own unsupported evidence can be enough to discharge an 'evidential burden', although, in practice, this may mean that the defendant will (in his own interests) have to give up his 'right to silence'. Lord Sankey's reference to 'no matter where the trial' was, of course, a clear indication that the JCPC would follow the same line of reasoning in appeals from the (then) British Empire. Indeed, in a case not otherwise to be admired (it had allowed the use of non-jury trials for murder and even refused to condemn a local prohibition on using defence lawyers), the JCPC had already, in *Knowles v The King Emperor* (1930),[29] quashed a conviction for murder because a colonial judge (in the Ashanti Region of the Gold Coast) had jumped to the conclusion that the defendant was guilty of murder after rejecting accidental death as an explanation, but had then failed to consider whether the prosecution had also disproved the intermediate possibility of manslaughter.

In more recent times the JCPC has sometimes been praised, and even vindi-

28 Coroners and Justice Act 2009, s.54.

29 *The Times*, 11 March 1930; Leck, A (ed.) (1933) *Trial of Benjamin Knowles, Notable British Trials Series*. William Hodge: London and Edinburgh.

cated in later decisions, for delivering judgements in criminal appeals which have refused to follow relevant precedents of the House of Lords. For example, in the conjoined appeals of *Frankland v R*; *Moore v R* [1988] Crim LR 117, the JCPC held that the controversial decision of the House of Lords in *Director of Public Prosecutions v Smith* (1960) 44 Cr.App.R.261 (seeking to import an objective test of the defendant's conduct as part of the legal definition of 'intention') had never truly represented the Common Law of England. Professor J.C. Smith noted the effect of this decision (which was two appeals from the Isle of Man) in his commentary in the *Criminal Law Review*. He also referred in that commentary to the decision of the JCPC in *Beckford v R* [1988] AC 180 (an appeal from Jamaica), which had upheld the subjective test for the defence of mistake (e.g. mistaken self-defence). Professor Smith commented:

> It is a month for giving thanks to the Judicial Committee of the Privy Council. Not only have their Lordships confirmed [in *Beckford v R*] the authority of *D.P.P. v Morgan* as a 'landmark decision' and its application in *Gladstone Williams* but they have also killed off the notorious decision in *DPP v Smith*. True, their Lordships cannot formally overrule *Smith* but it may now surely be regarded as a case which was wrongly decided and which never truly represented the Common Law.
>
> (see: [1988] Crim LR 119)

Human rights and the Common Law

There is some reason to believe that familiarity with the jurisdiction of the Judicial Committee of the Privy Council (which had exerted its authority over colonial administrators and colonial legislatures) was one of the reasons why the United States Supreme Court felt emboldened to lay claim to such a power in the famous case of *Marbury v Madison* (1803).[30] Although this case was only concerned with whether an incoming Secretary of State could be forced to issue the seals of office to one of the 'midnight judges' appointed by the outgoing President (John Adams), the decision has often been hailed as the origin of 'judicial review' in the United States, even to the extent of enforcing the first ten amendments to the US Constitution (the 'US Bill of Rights' ratified in 1791) and later amendments against Congress itself, and, even more so, after the ratification (in 1868) of the 14th Amendment to the Constitution, against subordinate officials and state legislatures. For example, the well-known 'Miranda warning' (used by US police forces to alert arrested or suspected persons to their constitutional right to silence) derives its name from the decision of the US Supreme Court in *Miranda v Arizona* (1966).[31]

30 1 Cranch (5 US) 137.
31 384 US 436.

The concern of the Common Law with human rights pre-dates (by several centuries) the enactment of the Human Rights Act 1998 and the European Convention on Human Rights ('ECHR'), which it incorporates, and which – it is relevant to note – English and Scottish lawyers largely helped to write. The former Lord Chancellor, Lord Irving of Lairg, put this matter in context when moving a debate in the House of Lords on 19 May 2011:

> My Lords, my purpose is to dispel some of the many myths peddled about human rights. In fact it is the Conservative Party, not Labour, that can make the strongest claim to credit for the European Convention. Its main proponents were Churchill, Macmillan, and John Foster,[32] with some Liberal and Labour support. Its principal author was Sir David Maxwell Fyfe, the future Conservative [Lord] Chancellor, Viscount Kilmuir. The Convention was substantially the work of British jurists with a tradition going back to the Petition of Right 1628 and our own Bill of Rights of 1689.[33]

The reflected light of the Common Law: the US Bill of Rights

The United States 'Bill of Rights' enshrines (and, because of *Marbury v Madison*, effectively protects) many rights which originated in the Common Law of England. For example, the Fourth Amendment to the US Constitution[34] states that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This provision owes its origin to *Entick v Carrington* (1765) 19 St.Tr. 1029 – an English case (outlawing the use of 'general warrants') which has been called (by Prof F.H. Lawson[35]) 'a case to take to a desert island'. Amongst the other (pre-existing) Common Law rights echoed (or enhanced) by the US Bill of Rights are the right of a defendant not to be 'twice put in jeopardy of life and

32 Sir John Galway Foster (1903–1982), international human rights lawyer. See: Rothschild, M. (2004) *Oxford Dictionary of National Biography*. OUP: Oxford. Vol. 50. p. 515.

33 Hansard (House of Lords debates), 19 May 2011, column 1492.

34 The first ten amendments to the US Constitution are collectively referred to as the 'Bill of Rights'.

35 (1897–1983), quoted by Heuston, R. (1964) *Essays in Constitutional Law*. Sweet & Maxwell: London. p. 35.

limb' for the same offence, and 'not to be [compelled to be] a witness against himself'.[36] (It is, however, significant to note that the rule against 'double jeopardy' in criminal cases no longer always applies in England and Wales because of s.75, Criminal Justices Act 2003.)

The Sixth Amendment to the US Constitution impliedly adopts the Common Law rule against the use of hearsay evidence in criminal proceedings by stating that the defendant in such proceedings shall not only 'enjoy the right to a speedy public trial, by an impartial jury', including the right 'to be informed of the nature and cause of the allegation', but shall also have the right to be 'confronted with the witnesses against him'. Whereas the Common Law rule against hearsay evidence in England and Wales had several elegant exceptions to it (and also exceptions to those exceptions), all the exceptions to the hearsay rule today are statutory exceptions (contained in the Criminal Justice Act 2003). The Sixth Amendment also enshrines the Common Law right of a defendant in criminal proceedings to have 'compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence'. The Eighth Amendment even goes so far as to quote, almost verbatim, from the (English) Bill of Rights 1689, stating that: 'Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.' (The English Bill of Rights states: 'that excessive baile ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted'.)

Are human rights sufficiently protected by the Common Law rule that 'everything is lawful unless it is unlawful'?

The traditional approach of the Common Law of England that 'everything is lawful unless it is [expressly defined to be] unlawful' receives nodding acquaintance from the Ninth Amendment to the US Constitution, which attempts to answer the criticism (which has been commonly made of all 'Bills of Rights') – namely that they may be interpreted to be monopolistic, and to exclude all future development – by enacting that 'The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.' But although the European Convention on Human Rights (Article 7) adopts the Common Law principle that there can be 'no punishment without law', this alone says nothing about the need to define and to limit the powers of investigatory authorities. Indeed, in the pre-1998 (Human Rights Act) case of *Malone v Commissioner of Police for the Metropolis (No. 2)* [1979] 2 All ER 620, the High Court held that a suspected handler of stolen goods had no remedy at Common Law against telephone-tapping (carried out at his local telephone exchange) because 'the ear of man cannot commit a trespass' and because the

36 Fifth Amendment to the US Constitution.

police were themselves entitled to take advantage of the maxim that 'everything is lawful unless it is unlawful'.

After the decision of the High Court in *Malone v M.P.C. (No 2)*, the European Court of Human Rights ('ECtHR') held that the United Kingdom had contravened Article 8 of the ECHR (the right to respect for private and family life) because, although such interferences are permissible if they are carried out 'in accordance with the law', this exception required the existence of laws which clearly defined the discretionary powers of public authorities and indicated how they could be lawfully exercised.[37] The Interception of Communications Act 1985 was enacted by Parliament in response to this decision of the ECtHR. Further statutory provisions were enacted in the Regulation of Investigatory Powers Act 2000.

International law and the Common Law

The United Kingdom is a 'dualist' (not a 'monist') nation because it treats international law and national law (usually known as 'municipal law' by international lawyers) as two distinct legal orders. To put this in terms of British constitutional law, a treaty is considered to be an executive act, not a legislative act. A treaty cannot be relied upon in any court, in any part of the United Kingdom, unless it has been, expressly or impliedly, adopted by the United Kingdom Parliament. For this reason, the ECHR (the European Convention for the Protection of Human Rights and Fundamental Freedoms, to give it its full name) did not become part of English law until it was adopted by the United Kingdom Parliament in the Human Rights Act 1998. The 1998 Act did not come into force in England and Wales until two years later but it had already been incardinated into Scottish law by making the Convention one of the 'reserved matters' excluded from the powers of the Scottish Parliament by the Scotland Act 1998.

Although the ECHR could not be directly enforced in the English courts until after the coming into force of the Human Rights Act 1998, there was no bar on it being referred to as a guide to discovering the presumed legislative intent behind British Acts of Parliament and secondary legislation (a state of affairs which still exists with regard to some other international treaties).[38] Long before the Human Rights Act 1998, the House of Lords had held in *Waddington v Miah* (1974)[39] that an alleged illegal immigrant (probably a native of Bangladesh) was not guilty of entering the United Kingdom without leave 'on a day unknown between 22nd October 1970 and 29th September 1972', and using a false passport on 29 September 1972, because although this conduct

37 *Malone v United Kingdom* (1985) 7 EHRR 14.
38 See, for example, footnotes 42–44 below.
39 [1974] 2 All ER 377.

was contrary to an Act of Parliament (Immigration Act 1971) which had received Royal Assent on 28 October 1971, the relevant parts[40] of that statute had not come into force until 1 January 1973.

The House of Lords unanimously upheld the decision of the Court of Appeal Criminal Division to quash the defendant's conviction for both of these offences. After noting that 'for a very long time there has been a strong feeling against making legislation, particularly criminal legislation, retrospective', Lord Reid (a Scottish law lord)[41] continued:

> It is also I think important to bear in mind that the Declaration of Human Rights of the United Nations provides in Article 11(2): 'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Lord Reid also went on to quote the identical prohibition in Article 7, ECHR, and he then stated that, in the light of the United Kingdom's adherence to these international treaties, it was 'hardly credible that any government department would promote, or that Parliament would pass, retrospective criminal legislation'. By the same reasoning that allowed the English courts to take this sideways look at the ECHR before the coming into force of the Human Rights Act 1998, English courts and tribunals now continually consult the international obligations of the United Kingdom in such subjects as immigration and asylum law,[42] extradition law[43] and the rights of the child.[44]

As to the exception, contained in Article 7(2) ECHR, which permits the trial and punishment of acts or omissions which were criminal 'according to the general principles of law recognised by civilised nations', the House of Lords subsequently made use of this exception when ruling (in *R v R*[45]) that the rape of a woman by her own husband was 'unlawful sexual intercourse' (and

40 Sections 24 and 26.

41 Sitting with Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Salmon.

42 For example, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment 1987; the UN Convention Relating to the Status of Refugees 1951.

43 The Convention Against Torture may also be relevant here.

44 The UN Convention on the Rights of the Child was also cited in the English criminal courts when criticising (and abrogating) previous case law which had imposed an objective (adult) test for defining 'recklessness' in criminal damage: see *R v G* [2003] UKHL 50; [2004] 1 AC 1034. But the House of Lords, although influenced by the fact that the defendants in *R v G* were both children, also abrogated the previous objective test, and restored the nineteenth-century test of actual foresight of risks, even in cases of adult defendants.

45 [1992] 1 AC 599.

therefore the crime of rape), notwithstanding earlier legal interpretations of the word 'unlawful' (defining this word to mean 'sexual intercourse outside marriage') because of the modern conception of marriage in the twentieth century.

The European Union

British membership of the European Union ('EU') originated with the European Communities Act 1972. This United Kingdom Act of Parliament was passed to pave the way for, and thereafter to validate, the Treaty of Accession to the 'Treaty of Rome' (as it was then called), which was then signed on 1 January 1973. Unlike the European Convention on Human Rights, there never was a period when the United Kingdom was bound in international law alone (i.e. not by national law) to have regard to the Treaty of Rome. From the very first moment of the UK's membership of the 'European Economic Community' (as the EU was then known), the courts of the United Kingdom were obliged to comply with 'European Community law' and to interpret that law according to its own nature. This obligation brought with it not only the obligation to comply with the treaties, regulations, directives and other 'hard law' sources, but also to enforce the decisions of the 'Court of Justice of the European Communities' sitting at Luxembourg (now known as the 'European Court of Justice').

Whereas the United Kingdom Parliament has retained the power to pass primary legislation which does not comply with the European Convention on Human Rights, provided it does so in sufficiently unambiguous terms,[46] no power to contravene EU law is retained by any member state of the European Union unless a particular derogation from treaty obligations has been agreed with the EU itself.[47] Indeed, so pervasive is the authority of EU law that it not only prevails over national legislation,[48] it can also prevail over the written constitutions of a member state.[49] It has, however, been pointed out by Konstadinides[50] that, whereas UK legislation (and case law) refers to the 'supremacy' of EU law, the more correct translation (and the one used in other member states) is 'primacy'.

46 Human Rights Act 1998, s.4.

47 For example, a Protocol to the Lisbon Treaty (2007) provides that the European Court of Justice 'has no power to hold that the laws, regulations, or administration of Poland or the United Kingdom inconsistent with the E.U. Charter of Fundamental Rights'. This Protocol also stipulates that the (EU) Charter provides 'no new justiciable rights in Poland or the United Kingdom'.

48 *Van Gend en Loos v Nederlandse Belastringadministratie* [1963] CMLR 105.

49 *Internationale Handelsgesellschaft* Case 11/70, 1970 ECR 1125, para 3. Greenland (arguably not a sovereign state) is the only nation to have left the (then) European Economic Community rather than to accept the primacy of European Community law.

50 Konstadinides, T. (2009) *Division of Powers in European Union Law*. Walter Kluwer: New York. Chapter 3.

An early experience of the effect of European Community law (as it was then known) on English law and, in particular, on United Kingdom statute law was provided by *Maccarthys Ltd v Smith* – a case on the right to equal pay for male and female workers (i.e. workers doing the same work, or 'like work', for the same employer). Although United Kingdom statutes had enshrined this right since the Equal Pay Act 1970,[51] the English courts and tribunals (using traditional methods of statutory interpretation)[52] had ruled that this right only benefited a worker who could point to a better-paid contemporary of the opposite gender. It was not enough that the worker could show that a predecessor doing like work for the same employer had been paid higher wages because of his or her different gender. However, on a reference of this case by the Court of Appeal, Civil Division, to the European Court of Justice, the European Court ruled that Article 119 of the EEC Treaty overrode UK statute law and, moreover, that this treaty provision did not have to be interpreted in any literal way. The right to equal pay could be interpreted so as to extend to successors and predecessors in the same employment, provided it could be shown that the employer had taken advantage of the gender difference of the new employee (usually, of course, a female) to pay her lower wages.[53] When the decision of the European Court of Justice[54] was referred back to the Court of Appeal, the employer's argument that they had won under English law, and had only lost under EEC law, availed them nothing. They were ordered to pay the legal costs (as well as the increased wages), including the costs of the earlier proceedings in England (notwithstanding that they had won those proceedings).[55] Lord Denning, M.R. (with whom Lawton LJ and Cumming-Bruce LJ agreed) observed (when ruling on the question of costs) as follows:

> Maccarthys [the employers] had no right to look at our English case law alone. They ought to have looked at the Treaty as well. Community law is part of our law by our own statute, The European Communities Act 1972. In applying it we should regard it in the same way as if we found an inconsistency between two English Acts of Parliament and the court had to decide which had to be given priority. In such a case the party who loses has to pay all the costs. So it seems to me right that Maccarthys should pay all the costs of the appeal to this court.[56]

51 The 1970 Act was afterwards amended by the Sex Discrimination Act 1979.

52 Sir James Fitzjames Stephen (1829–1894) observed that it was not sufficient that an Act of Parliament should be so clear that people reading it in good faith should know what it means. 'It should be so clear that even people reading it in bad faith should know what it means.'

53 *Maccarthys Ltd v Smith* [1979] ICR 785; [1979] 1WLR 1189.

54 Case 129/79.

55 *McCarthys Ltd v Smith* [1981] 1QB180.

56 [1981] QB 180, at p. 201.

Are human rights protected in the UK by 'constitutional statutes'?

The approach (far-reaching though it was in *Maccarthys Ltd v Smith*[57]) of treating European Community law as if it was a conflict between two 'English Acts of Parliament' was probably (even in 1981) in conflict with the requirement that EC law had to be interpreted and enforced according to its own nature. However, the English courts elevated the European Communities Act 1972 (and many other statutes also) to the status of 'constitutional statutes' in *Thoburn v Sunderland City Council* [2003] QB 151. This case (sometimes known as the 'Metric Martyrs case') held that the Weights and Measures Act 1985 had not impliedly repealed regulations made under the European Communities Act 1972. Thus, the High Court held that a market trader had been lawfully convicted of selling bananas in pounds and ounces because the requirement to use only metric measurements stemmed from legislation authorised by the European Communities Act 1972, and this statute was a 'constitutional statute' which was not subject to the ordinary principles of 'implied repeal' by inconsistent provisions in later legislation.

Although Thoburn had been convicted (in 2003) in an English criminal court because of European Community law, it had not, in fact, taken very long after the coming into force of the European Communities Act 1972 before defendants in criminal cases were seeking to use that law as a *defence* to criminal charges. For example, in *R v Henn and Darby*[58] the defendants unsuccessfully (but imaginatively) attempted to use Article 30 of the Treaty of Rome (freedom of movement of goods) as a defence to a prosecution for importing 'indecent or obscene articles' into the UK. (For a pre-*Thoburn* case relating to prisoners' rights,[59] see Chapter 9 on the rights of prisoners.) In reaching its conclusion about the 'constitutional nature' of certain statutes in *Thoburn v Sunderland City Council*, the High Court equally recognised that there were several other statutes of a 'constitutional nature', including not only such history book favourites as Magna Carta 1215, the Bill of Rights 1689 and the Act of Union with Scotland 1707, but also more modern examples, such as the twentieth-century devolution legislation and the Human Rights Act 1989.

The EU Charter of Fundamental Rights

The question now arises whether the United Kingdom is legally bound by the EU 'Charter of Fundamental Rights' (CFR) contained in the Lisbon Treaty of 2007. The United Kingdom government bases its contention that the CFR is

57 See fn 53.
58 [1980] 2 All ER 166.
59 *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115.

not binding on the UK because of a Protocol which it (and also Poland) succeeded in getting appended to the Lisbon Treaty. This Protocol provides that the European Court of Justice 'has no power to hold that the laws, regulations, or administration of Poland or the United Kingdom inconsistent with the E.U. Charter of Fundamental Rights'. This Protocol also stipulates that the EU Charter provides 'no new justiciable rights in Poland or the United Kingdom'.

By contrast, some judges and EU lawyers adhere to the view that the CFR is binding on all member states (including Poland and the UK) whenever that member state comes to implement any other EU laws within its own jurisdiction. This claim to such powers has been criticised as a form of 'steamrolling' by Lord Mance (a Justice of the UKSC) and he has publicly disagreed with earlier comments by a High Court judge (Mostyn, J.).[60] It was only by deciding that there had been no breach of EU law when the UK government refused to fund the legal representation of a UK national appealing against her death penalty for drug smuggling in Indonesia that the Court of Appeal, Civil Division, in May 2013, was able to avoid directly addressing the question of whether the CFR is binding in the United Kingdom: *R (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581; [2013]3 All ER 757. See the webpage of Aidan O'Neill QC, who regularly posts authoritative articles addressing such issues as: *Is the UK's 'opt-out' from the EU Charter of Fundamental Rights worth the paper it is written on?*[61]*; How the CJEU uses the Charter of Fundamental Rights*[62]*; and Charter compatibility as interpretive aid and/or a condition of legal validity?*[63]

The status, therefore, if any, of the EU Fundamental Charter of Rights (and the powers of the European Court of Justice) within the criminal justice system of the UK shows every sign of being as controversial – and, perhaps, as long-running – as has been the dispute about the status of the ECHR (and the powers of the European Court of Human Rights) in the vexed question of prisoners' voting rights, and other criminal justice issues. (See, for example, the comments by the former Lord Chief Justice Lord Judge reported in the press under such headlines as 'European court is too powerful' and 'Parliament must protect our sovereignty, says leading judge'.[64] For case law on prisoners' rights, see Chapter 9.)

60 'European Court "Steamrolling" Britain Warns Leading Judge', *Daily Telegraph*, 18 December 2013.
61 Posted 15 September 2011.
62 Posted 3 April 2012.
63 Posted 26 June 2012.
64 *The Sunday Telegraph*, 29 December 2013.

Chapter 4

Recent court cases and their principles

Notwithstanding the historic contribution of the Common Law of England to human rights jurisprudence prior to the Human Rights Act 1998, those human rights lawyers and judges arguing for the incorporation of the ECHR into the national laws of the United Kingdom identified a number of deficiencies which they felt an incorporation of the ECHR into English, Scottish and Northern Irish law would remedy. Most notably, Lord Scarman (1911–2004), an English law lord, addressing academic staff and students at South Bank Polytechnic, London, in 1979,[1] enumerated three particular deficiencies: (1) the Common Law, in holding, in *Malone v Metropolitan Police Commissioner (No. 2)* [1979] Ch 344; [1979] 2 All ER 620, that 'the eye of man cannot commit a trespass' and, by analogy, that 'the ear of man cannot commit a trespass' did not recognise any free-standing 'right to privacy'; (2) notwithstanding the presumption of innocence and all the procedural safeguards for a fair trial in the United Kingdom, the Common Law did not give sufficient protection to prisoners once they had been convicted and sent into the dark; and (3) the Common Law only recognised the right of the public to use public highways for 'passing and re-passing for all proper purposes' – it did not recognise any right of the public to hold political protests on public highways.

Gearey, Morrison and Jago (in *The Politics of the Common Law*, 2013), in countering the assumption that the criminal justice system is a 'collection of seamless processes', have identified continuing deficiencies, some of which have entered legal history – for example, the mishandling of scientific evidence in murder cases, and some of which have been, or soon will need to be, referenced against the rights and freedoms enshrined in the ECHR. Amongst these perceived human rights issues are the use of police powers against minorities and other groups; the extraordinary laws and powers of counter-terrorism; the 'kettling' of crowds of protestors, and uninvolved pedestrians, in city streets because of apprehended breaches of the peace; the seemingly endless struggle between

1 A lecture attended by Blake, L. (2008) 'Hybrid Bills and Human Rights: The Parliament Square Litigation 2002–2007', *Kings Law Journal*, 19. pp. 183–192 (p. 184).

the executive and the judiciary over sentencing policies; and the overcrowding of prisons. In sum, Gearey, Morrison and Jago, adopting Herbert Packer's analysis,[2] describe the tendency of modern governments to favour a 'crime control' model of criminal justice over a 'due process' model. Indeed, their description of conditions in overcrowded prisons has perhaps not been better or more succinctly summarised since 1898 when Oscar Wilde observed: 'The vilest deeds, like poison weeds, grow well in prison air.'[3] After quoting Helena Kennedy's comment that 'Once people "are the state" or have their hands on the levers of the state they have amnesia about the meaning of power and its potential to corrupt . . .',[4] Gearey, Morrison and Jago warn:

> The state is therefore not benign. The criminal justice process with its institutions to advance their commitment to 'justice' are not benign either. The process may be littered with good intentions but whilst those intentions manifest themselves into practices which marginalise of vilify the few then our imagining of criminal justice soon becomes the darkest of visions.[5]

Police powers and surveillance

Environmental campaigners and political protestors, whatever their race or gender, are sometimes looked upon as groups who need to be the special focus of police surveillance. For example, environmental campaigners sometimes buy shares, even single shares, in public limited companies whose activities they disapprove of in order to disrupt, or at least to embarrass, those companies at their annual general meetings. Whilst persons causing disruption at such meetings may be ejected by private security staff at the request of the chairman of the meeting, the question has arisen in recent years whether the police have any legitimate power to question or to inconvenience such suspected protestors – those protestors will, of course, also be shareholders – before they have committed any such disruption. It can, of course, hardly be lawful for the police to incommode hostile shareholders for 'doing a recce' at annual general meetings because many business rivals, and minority shareholders, would be open to the same allegation. Why, therefore, should it matter if the shareholder's motivation is not one of financial self-interest or trade rivalry but a desire to ventilate political or environmental grievances? In *R (on the application of Wood) v Metropolitan Police Commissioner* [2009] EWCA Civ 414; [2009] 4 All ER 951, the claimant (Wood) was a campaigner against the arms trade. He had no criminal

2 Packer, H. (1968) *The Limits of the Criminal Sanction*. Stanford University Press: Palo Alto.
3 Wilde, O. (1909) *The Ballad of Reading Gaol*. Methuen and Co: London.
4 Kennedy, H. (2004) *Legal Conundrums in our Brave New World*. Sweet and Maxwell: London. pp. 41–42.
5 Gearey, A., Morrison, W. and Jago, R. (2013) *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions*. Routledge: London. p. 302.

record and no record of any previous arrests. He was photographed by members of a 'police evidence gathering team' while attending the annual general meeting of a company in which he had bought a single share. After the meeting, he and others were followed by the police to a London underground railway station and they were asked by the police to identify themselves, but they declined to do so. The police retained the photographs and they afterwards identified Wood. Wood then applied for a judicial review of the conduct of the police in taking and retaining these photographs and, in those proceedings, he relied upon Article 8, ECHR (respect for private and family life). When this application for judicial review failed in the High Court, arguably providing yet another example of the Common Law maxim that 'the eye of man cannot commit a trespass', Wood appealed to the Court of Appeal, Civil Division. The Court of Appeal held that the 'touchstone' for rights under Article 8 was whether, on the facts of each case, the claimant had enjoyed a 'reasonable expectation of privacy'. In this particular case the police, acting visibly and for no obvious cause, had chosen to take, and to keep, photographs of an individual going about his lawful occasions on the streets of London. The reason for this conduct had not been explained at the time: the police subsequently argued that they were seeking to identify persons who might afterwards disrupt a forthcoming arms fair. For these reasons, the Court of Appeal held that there had been a violation of Mr Wood's Article 8 rights. As to whether this violation had been carried out for a legitimate aim, the court held that the police were entitled to argue that they had been taking photographs for the purposes of preventing disorder or crime and/or for the protection of the rights and freedoms of others, as permitted by Article 8(2), ECHR. The final question to be determined in this case, therefore, was whether this conduct of the police, in violating the claimant's Article 8 rights, was proportionate to the apprehended Article 8(2) risks. The Court of Appeal held, by a majority of 2 : 1, that the prevention of low-level disorder was essentially different from the prevention of terrorism or serious crime. The retention of the photographs beyond a few days had been done in this case because of the belief that the claimant might disrupt an arms fair several months in the future. That justification did not bear scrutiny. The police had not been gathering evidence because of any offences alleged to have been committed at the annual general meeting itself. For these reasons, the majority decision of the Court of Appeal was that the conduct of the police had been a disproportionate infringement of Wood's Article 8 rights, and therefore unlawful.

The data collecting state

The question of the retention of photographs and data taken or collected by the police has also arisen in a number of 'data protection' cases. Chief constables are 'data controllers' for the purposes of the Data Protection Act 1998. The Home Secretary relies on data which has been put into, and retained in, the police

national computer ('PNC') by chief constables when performing his (or her) duty, under the Police Act 1997, to provide criminal record certificates ('standard' or 'enhanced'), for example, when applicants are seeking certain employment or applying for citizenship. In *Chief Constable of Humberside Police and others v Information Commissioner (Secretary of State for the Home Department intervening)* [2009] EWCA Civ 1079; [2010] 3 All ER 611, five individuals complained to the Information Commissioner under the 1998 Act because certain old (minor) criminal convictions and reprimands had been retained on the PNC. In the case of one of these individuals this retention of the data was contrary to a previous policy of the police force in question, communicated to her when she was arrested and reprimanded, that the reprimand would be removed from the PNC when she attained eighteen years of age. The Court of Appeal, Civil Division, held that the police were not bound to delete these convictions and reprimands. The Information Commissioner was not entitled to impose his own determination on the chief constables as to the purposes for which this data was processed. The court noted that the European Parliament, and Council Directive (EC) 95/46, contemplated that the police would maintain a comprehensive record of convictions. As to the change in policy relating to reprimands given to young offenders, the court held (by a majority of 2:1) that a new policy of no longer deleting reprimands when a young offender became eighteen did not become unlawful merely because a young offender had been told about the previous policy then in force when she was reprimanded.

In 2011 the Supreme Court considered the effect of a new subsection (s.64(1A)) which had been 'posted' into the Police and Criminal Evidence Act 1984 by the Criminal Justice and Police Act 2001. This amendment permitted the police to retain 'fingerprints, impressions of footwear, or samples' but it only permitted the use of that data 'for purposes related to the prevention or investigation of crime'. *Guidelines* issued by the Association of Chief Police Officers (ACPO) dealt with the question of time-limits for the retention of such data and the procedure for its destruction. These *Guidelines* stated that chief police officers had a discretion to authorise the deletion of any specific entry on the Police National Database and that they were responsible for authorising the destruction of any DNA and fingerprints with that specific entry. But the *Guidelines* went on to narrow down this discretion by adding the words: 'It is suggested that this discretion should only be exercised in exceptional cases.' It was this provision which was challenged in applications for judicial review brought by 'GC' and by 'C': *R (on the application of GC) v Metropolitan Police Commissioner; R (on the application of C) v Metropolitan Police Commissioner* [2011] UKSC 21; [2011] 3 All ER 859. GC's application related to fingerprints and DNA samples taken from him in 2007 when he had been arrested for common assault. He was later informed that no further action would be taken against him. C's application related to data obtained after his arrest for suspected rape, harassment and fraud. Although

he was charged with rape, the prosecution offered no evidence against him and he was acquitted. In both cases the police refused requests for the destruction of this data because their cases were not assessed to be 'exceptional' within the terms of the ACPO *Guidelines*. In their applications for judicial review, 'GC' and 'C' relied on Article 8, ECHR, and upon a decision of the ECtHR (*S and Marper v United Kingdom* [2008] BHRC 557). The Divisional Court refused both applications because it held that it was bound by the earlier decision of the House of Lords in the *S and Marper* case.[6] The Divisional Court had therefore been faced with a conflict between a decision of the highest court in the United Kingdom and a decision of the European Court of Human Rights at Strasbourg. For this reason it gave leave for a 'leapfrog appeal' to the Supreme Court, thus by-passing the Court of Appeal, Civil Division, which would, of course, have been faced with the same dilemma. The Supreme Court held that ACPO was essentially directing that data were to be retained indefinitely, save in 'exceptional circumstances'. If this had been Parliament's intention, it could have easily provided for this, but it had not done so. The Supreme Court therefore concluded that Parliament clearly had not intended that the police should have an unfettered discretion because this would be incompatible with the ECHR. Indefinite or indiscriminate retention of data was not a fundamental feature of section 64(1A). The Supreme Court noted that the Home Secretary, who was an interested party in the appeal, was accountable to Parliament for the scheme and that this, therefore, preserved the democratic principle.

It was, of course, the photographing of environmental campaigners and political activists which had been the issue in the case of *Wood*. After the decision of the Supreme Court in *GC and C*, the High Court considered the question of photographs in *R (on the application of RMC) v Metropolitan Police Commissioner*; *R (on the application of FJ) v Metropolitan Police Commissioner* [2012] EWHC 1681 (Admin); [2012] 4 All ER 510. The High Court held that Article 8, ECHR, could be infringed by any indefinite retention of photographs taken by the police, even after arresting a person (a situation which had not arisen in *Wood*), especially if that person was a young person. However, the court distinguished the taking of photographs from the retention of data about the individual's basic history of his or her involvement with the police. The court held that retention of this data on the PNC was a justified and proportionate infringement of an arrested person's Article 8 rights. Of course, the eventual destruction of such data is always a possibility and the ACPO *Guidelines* for dealing with this procedure are amenable to judicial review, as the decision of the Supreme Court in *GC and C* has clearly demonstrated.

6 *R (on the application of S) v Chief Constable of South Yorkshire Police*; *R (on the application of Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39; [2004] 1 WLR 2196.

The 'kettling' of crowds

Environmental campaigners and political protestors are not the only people who stand to be adversely affected by the use of police powers while going about their lawful occasions in public places. The question of crowd control (particularly by the method commonly known as 'kettling') has frequently come before the higher courts in recent times. For example, in *Austin and another v Metropolitan Police Commissioner* [2009] UKHL 5; [2009] 2 WLR 3, the House of Lords had to consider the 'kettling' (or 'containment' as the police preferred to call it) of crowds in the vicinity of Oxford Circus, London, on 1 May 2001. Crowds had started to arrive at about 2 p.m. on that day after publicity had been circulated about a planned protest at that place. These crowds were estimated by the police to consist, as to 60 per cent, of people who were 'calm' and, as to 40 per cent, of people who were 'hostile'. Ms Austin (presumably categorised as 'hostile') was a protestor who had made speeches through a megaphone. The other claimant in the proceedings (S) had not taken part in any demonstration but had been caught up in the crowd. Both claimants had been detained in the crowd when, at 2.20 p.m., the police prevented anyone from leaving Oxford Circus without their permission. Many people were detained in this 'kettle' for more than seven hours. Austin and S sued the police for 'false imprisonment' contrary to Common Law, and for breach of their rights under Article 5(1), ECHR (the right to liberty and security). At the trial, the judge held that the police had had no alternative but to impose a cordon to prevent violence and damage to property. He also held that the police had reasonably suspected the whole group (namely, everyone within the cordon) of being about to commit a breach of the peace. On appeal, the Court of Appeal, Civil Division, upheld the judge's decision, except as to his finding that 'everyone' within the cordon was reasonably suspected of being about to commit a breach of the peace. The Court of Appeal went on to hold that the police had done what was necessary (and, therefore, also lawful at Common Law) because of 'exceptional circumstances'. Austin appealed to the House of Lords on the ground that her rights under Article 5(1) had been infringed. In dismissing this appeal, the House of Lords held that Article 5 had to be taken together with Article 2 (the right to life) because the public had to be protected from 'mob violence'. Measures of crowd control had had to take account both of the rights of the individual and of the interests of the community. Those measures had to be taken in good faith and had to be proportionate to the risks created by the crowd. The House of Lords held that Austin's appeal should be dismissed because there had been no 'arbitrary' deprivation of her liberty.

The 'kettling' of children

In 2011, the courts had to revisit this problem of 'kettling' in a case arising out of a large demonstration relating to student fees, and they had to deal with the

powers of the police when faced with the unexpected presence of schoolchildren. It became clear from the facts of that case – *R (on the application of Castle and others) v Metropolitan Police Commissioner* [2011] EWHC 2317 (Admin); [2012] 1 All ER 953 – that the police had foreseen the presence of many students but that they had not anticipated the presence of a significant number of schoolchildren. After the containment of the crowd was completed in the area of Whitehall, London at 1.02 p.m., the police made efforts to identify young and vulnerable people. Nevertheless, the claimants, who were two boys aged sixteen and a girl aged fourteen, were not released until 7 p.m. (in the case of the girl) or until 8.30 p.m. (in the case of the boys). Instead of suing in private law for 'false imprisonment', presumably because of the unfavourable decision in *Austin*, the claimants relied on public law and applied for judicial review of the decision to order the containment. They relied on section 11, Children Act 2004, which imposes a duty upon various public authorities, including the police, and states they 'must[7] make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children'. The claimants also relied on the duration of the containment. The High Court held that s.11, Children Act 2004 required the chief police officer to make arrangements which ensured that his or her functions were discharged having regard to the obligation to safeguard and promote the welfare of children, but the court went on to hold that the impact of this statutory duty would depend upon the function being performed and the circumstances in which it was being performed. A police officer was not to be deterred from performing a public duty just because a child was affected.

The High Court also held that any interference with freedom of movement had to be fully justified. Containment ('kettling') would be justified if there had been no other practical steps which the police could take to prevent innocent third parties being affected by a breach of the peace. If the only course of action reasonably available to the police was containment, that course of action would not be judged to be excessive by reason only of an earlier failure of the police to anticipate events. In the present case (*Castle*), the High Court held that the police had complied with their duty to minimise the impact of the containment on innocent third parties and that the containment had not been prolonged for any unlawful purpose.

'Kettling' and innocent victims

Perhaps the most significant part of the judgement in *Castle* is the ruling that the police have a duty, where practicable, to plan for alternatives to containment and to minimise its impact on innocent third parties. It will therefore be necessary for the courts to examine with some minuteness the plans for crowd

7 Modern legislative drafting tends to avoid the word 'shall' when creating statutory duties.

control and the subsequent execution of those plans, particularly if personal injuries are caused to innocent parties and civil or criminal proceedings are brought against the police. The death of a forty-seven-year-old innocent newspaper vendor, Ian Tomlinson, at the hands of a police officer (Simon Harwood) during protests against the G20 Summit in April 2002 eventually led to a verdict of 'unlawful killing' at a coroner's inquest in 2011. Harwood was subsequently found not guilty of manslaughter, although he was subsequently dismissed from the Metropolitan Police due to 'gross misconduct'. Gearey, Morrison and Jago[8] memorialise this innocent victim, not only in their text, but also in a photograph of Tomlinson being attended by the police shortly after the assault on him.

A cautionary tale for those contemplating civil proceedings against the police for personal injuries is provided by the decision of the House of Lords in *Farrell v Secretary of State for Defence* [1980] 1 WLR 172; [1980] 1 All ER 166. In that case, a claim for damages was brought against the Ministry of Defence by the widow of a man (an unarmed footpad) who had been shot and killed by soldiers in Northern Ireland after two warnings to 'Halt' had been ignored. The deceased had been attempting to rob a man who was taking money to the night safe of a bank. In her statement of claim Mrs Farrell alleged that the soldiers who had fired their weapons had been negligent and that they had used excessive force. She did not allege that there had been negligence by senior officers in deploying those soldiers or in planning the operation (arranged to protect the bank from a suspected terrorist attack). After the High Court in Northern Ireland (Gibson LJ and a jury) had held that the soldiers had reasonably suspected the deceased to be a terrorist, Mrs Farrell appealed to the Court of Appeal in Northern Ireland. This court ordered a new trial so that the question of negligence by more senior officers could be investigated. The Ministry of Defence successfully appealed to the House of Lords against this order. The House of Lords held that Gibson LJ had been correct to confine the issues to those pleaded in the widow's statement of claim. Lord Edmund Davies took the view that, notwithstanding the power of the courts to permit amendments to a litigant's written pleadings, circumstances might arise when this would cause an injustice to the other party. He went on to observe:

> To shrug off a criticism as a 'mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and to enable them to deal with it.

8 Gearey, A., Morrison, W. and Jago, R. (2013) *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions*. Routledge: London. Chapter 16.

Interestingly, the Civil Procedure Rules 1998, and not least the amendments following Sir Rupert Jackson's report, emphasise the importance attached by the court to the parties clearly defining their case by reference to issues.

If a person is convicted of an 'imprisonable offence' and wishes to bring a civil claim for a trespass to the person allegedly committed against him (or her) on the same occasion as the offence in question, s.329 Criminal Justice Act 2003 provides that he or she must get permission of the court before that claim can be brought. This statutory provision was the reason for procedural wrangling in *Adorian v Metropolitan Police Commissioner* [2009] EWCA Civ 18; [2009] 4 All ER 227. The Court of Appeal, Civil Division, held that this requirement to obtain prior permission was 'directory', not 'mandatory'. This, in turn, meant that if proceedings were commenced by such a claimant without permission, that procedural defect could be cured, if appropriate, by an application to the court of trial. That court could then reflect its own views when awarding or withholding legal costs. For these reasons, in *Adorian*, the Metropolitan Police Commissioner's appeal against a judge's ruling (in a civil claim relating to injuries received by a protestor convicted of disorderly behaviour and obstruction of the police) was dismissed by the Court of Appeal.

Parliament Square and its 'cordon sanitaire'

In addition to the above-mentioned powers of the police to prevent apprehended breaches of the peace, Parliament has prohibited unauthorised 'demonstrations' in the vicinity of Parliament Square, London, even if those demonstrations are entirely peaceful and even if they are carried out by one person acting alone. These provisions were imposed by sections 132–138, Serious Organised Crime and Police Act 2005 because of the prolonged, and eventually notorious, one-man demonstration carried out by Brian Haw, which he commenced on a little-used section of pavement in Parliament Square in June 2001 in order to protest against the policies of the British government towards Iraq. When Westminster City Council brought proceedings in the High court to evict Haw from Parliament Square in 2002,[9] these proceedings failed because the judge (Gray J) ruled that Haw was lawfully exercising his freedom of expression under Article 10, ECHR and, citing *Nagey v Weston* [1965] 1 WLR 280; [1965] 1 All ER 78, that his behaviour was as reasonable, and as lawful, as using the public highway to sell hot dogs from a van, or to distribute advertising material outside stations, or to collect money for charitable causes on Saturday mornings.

As a result of Haw's continuing demonstration, section 138(2) of the 2005 Act made provision for prohibiting unauthorised demonstrations within a sort of political *cordon sanitaire* to be delineated by 'the Secretary of State' as 'the

9 *Westminster City Council v Haw* [2002] EWHC 2073 (QB).

designated area'. This enabling power provided that no point in that 'designated area' should be 'more than one kilometre in a straight line from the point nearest to it in Parliament Square'. The Interpretation Act 1978[10] defines the 'Secretary of State' as being '[any] one of Her Majesty's Principal Secretaries of State'. The Home Secretary, Charles Clarke, specified the metes and bounds of the 'designated area' on 8 June 2005 and these boundaries were drawn so as to include all of Parliament Square, including pavements and streets but excluding buildings which abutted those pavements. This 'designated area' would also have included some of the pavements in Trafalgar Square if these had not been expressly excluded by the terms of the statutory instrument, in conformity with an undertaking given to Parliament on 6 April 2005.[11] The 2005 Act[12] created a new offence of organising a demonstration, or taking part in a demonstration, or carrying on a demonstration in a public place in the designated area if authorisation had not been given by the time that demonstration started. The Metropolitan Police Commissioner was required, by s.134(2) of the 2005 Act, to authorise such a demonstration if notice had been given under s.133(2) of the Act. This notice had to be given to the police six clear days before the demonstration was due to start 'if reasonably practicable', and, in any event, not less than twenty-four hours before that time. The Metropolitan Police Commissioner was under a duty to authorise a demonstration if proper notice had been given, but he was empowered to impose such conditions as were, in his reasonable opinion, 'necessary' for preventing one or more specified hindrances, disorders, dangers and disruptions. None of these risks was ever thought to be a likely consequence of Brian Haw's conduct but the Parliamentary Under-Secretary of State for the Home Department, Caroline Flint, informed the House of Commons in February 2005 that police officers from Charing Cross Police Station regularly made visits to Parliament Square to 'check behind paraphernalia for devices left, not by people who are protesting, but by people who might use the protest for their own motives to cause a security problem'.[13]

The pre-existing demonstrator in Parliament Square and the 'legerdemain with dates'

The provisions of the 2005 Act relating to the procedure for giving notice of demonstrations, and for obtaining authorisations for them, came into force on 1 July 2005 by a Commencement Order made on 7 June 2005.[14] The remainder of sections 132–137 came into force on 1 August 2005. The Commencement Order

10 Schedule 1.
11 *Hansard* (HL) vol. 671, col. 770 (Baroness Scotland of Asthal).
12 Section 132(1).
13 *Hansard* (HC) 7 February 2005, col. 1291.
14 Serious Organised Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) Order 2005, SI 2005/1521 (C66).

provided that the words 'demonstration starting' in sections 132(1) and s.133(2) of the 2005 Act were to be references to demonstrations 'starting or continuing' on or after 1 August 2005[15] and that, for the purposes of giving notice of a demonstration which was 'due to start or continue' on or after 1 August 2005, the Act would come into force on 1 July 2005.[16] The effect of this 'legerdemain with dates'[17] was to enable Brian Haw to argue that, because he could not 'call back yesterday, bid time return',[18] he could not (on 1 July 2005) give any notice prior to the 'start' of his demonstration which had, of course, started in June 2001 and which had, since then, been continuing without interruption for more than four years. In *Westminster City Council v Haw*[19] the trial judge had recited a passage from Haw's witness statement in which he (Haw) claimed to conduct his protest on a 24-hours-a-day basis every day and the judge had also stated in that case that Haw 'sleeps and eats' on the pavement in Parliament Square. Haw's legal position in continuing with his demonstration after 1 July 2005 would therefore come to depend on whether the courts would adopt, in Haw's favour, a literal interpretation of the legislation (including such words as 'demonstration starting'), or whether they would discern an underlying legislative purpose to deprive Haw of his existing rights and even (such as it was) of his 'home', without payment of compensation. Rather than waiting to be prosecuted, Haw applied to the Divisional Court of the High Court, on 15 July 2005, for a declaration against the Home Secretary and the Metropolitan Police Commissioner that sections 132–138 of the 2005 Act did not apply to him. This application succeeded, with Simon J dissenting, in *R (on the application of Haw) v Home Secretary* [2005] EWHC 2061 (Admin); [2006] QB 359. Bearing in mind that the Home Secretary's interpretation of the legislation would have had the effect of turning Haw's previously lawful demonstration, which he never needed anyone's authorisation to commence, into a criminal offence on the midnight hour of 31 June/1 July 2005, there is much to be said for this approach. Not only is it consistent with the maxim of the late Sir Hugh Forbes that 'wherever there are fine lines to be drawn, I always draw them on the side of the accused',[20] it is also consistent with the decision of the House of Lords in *Waddington v Miah*,[21] another case where a defendant could not be guilty of doing something without permission

15 *Ibid*. paras 3(5) and 4(2).
16 *Ibid*. para 3(1)(p).
17 Blake, L. (2008) 'Hybrid Bills and Human Rights: The Parliament Square Litigation 2002–2007', *Kings Law Journal*, 19. pp. 183–192 (p. 188).
18 Shakespeare, *Richard II*, Act III, scene ii.
19 See fn 9, para [5].
20 A remark made by Forbes J when he rejected an interpretation of the criminal law which prosecuting counsel had admitted to be 'drawing a fine line': Maidstone Crown Court in 1973, witnessed by L. Blake.
21 [1974] 2 All ER 377.

when this conduct (entering the UK 'without leave') did not require permission on the date when he did it.

On appeal to the Court of Appeal, Civil Division, that court preferred a purposive approach to interpreting the primary and secondary legislation relating to the 'designated area'. The Court of Appeal held that Parliament had intended the relevant sections of the 2005 Act to come into force so as to apply to demonstrations which had started before its commencement 'as surely as [to] those starting after'.[22] Haw was refused permission to appeal to the House of Lords against this decision.[23] It has already been argued by Blake[24] that, because Haw, in June/July 2005, was the only person who had already acquired rights to 'eat, sleep, and have his being' on a pavement in Parliament Square, and had already vindicated those rights, and his rights under Article 10, ECHR, in High Court litigation,[25] he was (in the language used by the Examiners of Private Bills) outside the germane 'category or class' of persons intended to be aught by sections 132–138, Serious Organised Crime and Police Act 2005. That 'category or class' was a class of future demonstrators who, after the coming into force of the legislation, could apply to the police for authorisation 'before' their demonstrations were 'due to start'. This, of course, is not to say that Parliament would have been powerless to deprive Haw of his existing rights but, if that had been the true purpose of Parliament, it would then have to have used the procedure for 'hybrid bills', enabling Haw to plead his cause before Committees of either House, because he was being treated 'in a manner different from the private or local interests of other persons or bodies in the same category, so as to attract the provisions of the standing orders applicable to private business'.[26] Even leaving aside Article 8, ECHR (respect for private and family life, and for 'home', and correspondence), and leaving aside also Article 1 of the First Protocol to the ECHR (peaceful enjoyment of 'possessions'), both the Common Law and the ECHR (Article 7) prohibit retrospective criminal legislation. The Common Law also operates a presumption that property cannot be taken or damaged by the Crown, even in time of war, without compensation unless Parliament expressly excludes the right to compensation: *Burmah Oil Co v Lord Advocate* [1965] AC 75. Although it must seem strange to anyone that the law could ever recognise that a person can make his 'home' on a public highway, this was the decision of Gray J in *Westminster City Council v Haw*, and was also the undisputed facts in *R (on the application of Haw) v Home Secretary* – especially

22 *R (on the application of Haw) v Home Secretary* [2006] EWCA Civ 532; [2006] QB 780 [24].

23 [2007] 1 All ER xix.

24 Blake, L. (2008) 'Hybrid Bills and Human Rights: The Parliament Square Litigation 2002–2007', *Kings Law Journal*, 19. p. 183.

25 *Westminster City Council v Haw* [2002] EWHC 2073 (QB).

26 Sir William Mackay (ed.) (2004) *Erskine May's Treatise on the Law, Privileges and Usage of Parliament* (23rd edn). Butterworths: London. p. 566.

after Article 10, ECHR prevented Haw from being treated as a person who was obstructing the highway, 'without lawful authority or excuse', contrary to s.137, Highways Act 1980, or as a person who was 'sleeping rough', and 'not giving a good account of himself', contrary to s.4, Vagrancy Act 1824. Gray J had also held that Haw's political placards – these being his methods of continuing his occupation of the site even when he was temporarily absent from Parliament Square – were not 'advertisements' and therefore did not infringe the Control of Advertisement Regulations or s.224 of the Town and Country Planning Act 1990. In sum, after the decision in *Westminster City Council v Haw*, it is submitted that, contrary to the decision of the Court of Appeal in *R (on the application of Haw) v Home Secretary*, the only legitimate way of removing him from Parliament Square was after the payment of proper compensation.

In addition to the controls over demonstrations in Parliament Square, later legislation, in Part 5 of the Police and Social Responsibility Act 2011, gave to the police and 'authorised officers' (of local authorities) powers to forbid structures and amplified noise in Parliament Square. In *R (on the application of Gallestequi v Westminster City Council* [2012] EWHC 1123 (Admin); [2012] 4 All ER 401, the High Court held that the fact that a protestor had permission from the Metropolitan Police Commissioner (under s.134, Serious Organised Crime and Police Act 2005) to demonstrate in Parliament Square was outweighed by the different legislative objectives of the 2011 Act, as also were the protestor's rights under Articles 6, 10 and 11 of the ECHR. The High Court held that the restrictions imposed by the 2011 Act were proportionate, and therefore legally valid. Local authorities can also exercise powers by reason of being the 'highway authority' for their area. They also have powers under s.222, Local Government Act 1972 to apply for an injunction to put a stop to any public nuisance or other breach of the law in their area. When anti-capitalist protestors occupied pavements forming part of the public highway near St Paul's Cathedral, the City of London Corporation sought possession of the pavements and applied for an injunction to prevent the erection of tents on neighbouring land. The Court of Appeal, Civil Division, held that the relevant factors which could limit the right of lawful assembly, and the right of protest, on public highways included considerations of time and space – in particular, the duration and extent of the protest; the importance of the location to the protestors; and the interference with the rights of landowners and members of the public. In this particular case, the Corporation's claim was successful because of the significant interference caused to the rights of others, and because of significant breach of the Highways Act 1980; and because of considerations of public health: *City of London Corporation v Samede and others* [2012] EWCA Civ 160; [2012] 2 All ER 1039.

'Freedom of expression' *versus* 'harassment'

In addition to the political dimension to public order questions, Parliament and the Common Law have both become increasingly aware, in recent years, that

harassment is an offence against the victim's person and, therefore, a serious breach of the victim's human rights. Even though the Offences Against the Person Act 1861 uses elegant Dickensian language, such as, in section 20, 'malicious inflicting grievous bodily harm', the courts have now recognised that a human being is not a 'ghost in a machine' and that just as injuries to the body can, directly or indirectly, cause mental health problems, injuries to the mind can be categorised nowadays as also being a form of 'bodily harm'. Most authoritatively, and independently of the Protection from Harassment Act 1997, the House of Lords held in *R v Ireland* [1998] AC 147 that malicious, silent, phone calls could be successfully charged as 'assault occasioning actual bodily harm' if this caused, and the defendant foresaw that it could cause, the victim to fear immediate unlawful personal violence.

In *Jones v Director of Public Prosecutions* [2010] EWHC 523 (Admin); [2010] 3 All ER 1057, the defendant was charged with racially or religiously aggravated 'threatening and abusive words', contrary to the Public Order Act 1986 and s.28, Crime and Disorder Act 1998. The defendant had abused a neighbour while he (the defendant) was apparently drunk. The magistrates decided that they would have convicted him of threatening behaviour, but that they were not satisfied as to the racial aggravation. This, therefore, led the prosecution to appeal to the High Court on a point of law. The High Court held that s.28(1)(a) of the 1998 Act did not require the court to examine the defendant's intention or motivation. It only required the court to decide whether the defendant's words 'demonstrated' racial hostility. The test was therefore an objective test. But s.28(1)(b), by contrast, required the prosecution to prove the defendant's motivation, whether the victim was present at the time or not. The problem of a journalist's freedom of expression conflicting with criminal laws against harassment arose in *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB); [2012] 4 All ER 717. The High Court held that the courts had an obligation to give effect to the Protection from Harassment Act 1997 in such a way that was compatible with the rights of journalists. Nevertheless, the court held that repeated mocking references to a person's appearance or sexuality could amount to 'harassment' of that person. However, in the case of Ms Trimingham, who was the press officer to a government minister, and was having a clandestine affair with him, the court held that she had no reasonable expectation of privacy.

Section 1(3) of the Protection from Harassment Act 1997 provides a statutory defence (to both civil and criminal proceedings) if the person accused of the alleged harassment shows that his 'course of conduct' was: (a) 'pursued for the purpose of preventing or detecting crime', or (b) 'pursued under any enactment or rule of law. . . .', or (c) 'reasonable' in the particular circumstances. The fact that the defence of 'reasonable' conduct is listed as an alternative to the other two defences in s.1(3) must leave open the possibility that Parliament was foreseeing the possibility of some conduct of the police officers, local government officers and other law-enforcement agents acting unreasonably (perhaps

like Inspector Javert in *Les Misérables*) but nevertheless still being entitled to immunity from civil or criminal proceedings for harassment. If it were otherwise, Parliament would have inadvertently created an easier cause of action for litigants to pursue than the more appropriate tort of 'malicious prosecution'. The precise scope of the statutory defence of seeking to prevent or detect crime had to be examined by the Supreme Court in *Hayes v Willoughby* [2013] UKSC 17; [2013] 2 All ER 405. In that case the defendant's numerous complaints of fraud, embezzlement and tax evasion against the manager of a company which had formerly employed him were all rejected as without foundation by the Official Receiver, the police and the Department of Trade and Industry. The defendant's conduct continued and went on to include intrusions into the claimant's privacy and his personal and family affairs. When the claimant sued the defendant for harassment, the claimant relied upon his subjective belief that he was preventing or detecting crime. The trial judge ruled that, although the defendant's conduct had been unreasonable, he was still entitled to rely upon the statutory defence because the test created by Parliament was a subjective one, and it did not require the defendant's belief to be objectively reasonable. After the Court of Appeal, Civil Division, had reversed that decision, the defendant appealed to the Supreme Court. That court unanimously held that both the wholly 'subjective' approach and the wholly 'objective' approach to the defendant's state of mind were inconsistent with the language and purpose of the 1997 Act. The defence in question (the 'law-enforcement' defence) did not, therefore, have to be based upon reasonable beliefs. Nevertheless, the defendant's conduct had to be 'rational' and, after the appropriate authorities had investigated and told the defendant (in increasingly strong terms) that there was no basis for his allegations, the defendant's conduct ceased to be rational. Accordingly the defendant's appeal against the decision of the Court of Appeal was dismissed.

Privacy and anonymity *versus* 'open justice'

Although litigants and witnesses to civil proceedings often wish to avoid the coverage of those proceedings in the media, the Court of Appeal, Civil Division, has held that the 'requirement of open justice' includes the right of serious journalists to inspect skeleton arguments, affidavits, witness statements and correspondence which has been put before the judge; see: *Guardian News and Media Ltd v City of Westminster Magistrates' Court (United States Government intervening)* [2012] EWCA Civ 240; [2012] 2 All ER 551. As to whether a defendant in criminal proceedings can expect (like some witnesses) to be given the benefit of an 'anonymity order', that perceived right of the defendant also conflicts with the requirement of open justice and with the freedom of expression of journalists. In *R (on the application of the Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434; [2013] 1 All ER 1361, the Court of Appeal, Criminal Division, considered a case where the defendant had been

convicted of rape and the trial judge had made an order (under s.4(2) of the Contempt of Court Act 1981) prohibiting the publication of 'anything relating to the name of the defendant'. The judge's reason for making that order was his concern about the consequences to the complainant, if the identification of the defendant indirectly led to the complainant being identified also. After being persuaded by a representative of the press that section 4 did not apply, the judge continued the order under s.1(2), Sexual Offences (Amendment) Act 1992 (namely that there should be no publication of the defendant's name for the life-time of the complainant). The Press Association appealed, arguing that the responsibility to comply with s.1(2) rested with reporters and editors and that a court could not make such an order. The Court of Appeal held that s.4 of the Contempt of Court Act 1981 did not apply because the defendant had already been named, tried and sentenced in public. As to the Sexual Offences (Amendment) Act 1992, the Court of Appeal held that this statute did not give a court an express power to restrict publication of the defendant's name in order to protect, or to enforce, the complainant's existing right to anonymity. That right already existed under section 1 of the 1992 Act. It was for editors and reporters to use their judgement as to how they were to avoid criminal liability for infringing the complainant's right to anonymity. Judicial observations could not amount to an order which was binding on them. The Court of Appeal also noted that the case in question was not one where the defendant's own life or the safety of his family was at risk.

The question of press (and other media) reporting of criminal cases which have been referred to the Court of Appeal, Criminal Division, by the Attorney-General arose in the case of a defendant who had been acquitted of rape in 1999. He had been acquitted because the trial judge ruled that certain DNA evidence was inadmissible and the prosecution then offered no evidence against him. The Attorney-General referred the case to the Court of Appeal and the point of law was afterwards referred to the House of Lords. On 24 December 2000 the House of Lords ruled, in *Attorney-General's Reference (No. 3 of 1999)*,[27] that this DNA evidence had been legally admissible. Under the law as it then stood, a re-trial was not possible. The case being a reference by the Attorney-General and not, of course, an appeal by the defendant who had been acquitted, the House of Lords made an order forbidding the identification of that defendant. After the coming into force of Part 10 of the Criminal Justice Act 2003, re-trials became permissible if the Court of Appeal was satisfied that there was 'new and compelling evidence' and that a re-trial was 'in the interests of justice'. Prior to any re-trial of the defendant in this rape case, the BBC applied for the order of the House of Lords to be lifted so that they could refer to underlying events of the defendant's case. The defendant claimed that this publicity would infringe his rights to a private life under Article 8, ECHR. The House of Lords therefore had to weigh the defendant's

27 [2001] 1 All ER 577.

rights under Article 8 against the rights of the BBC under Article 10 (freedom of expression). The House of Lords held, in 2009,[28] that the BBC was entitled to have the order lifted and that it could afterwards take the risk of being sued by the defendant for defamation. In sum, Article 10 prevailed over the defendant's Article 8 rights. The House of Lords also took the view that there was 'no sensible risk' that the BBC's programme would prejudice any possible re-trial of the defendant for rape.

In December 2013 an anonymity order which was made by Judge Peter Hughes at York Crown Court in order to prevent the risk of two defendants, Asha Khan and her brother Kashif Khan (Muslim lawyers charged with attempting to pervert the course of justice), 'being shamed in the eyes of their community' and to allow the female defendant to give evidence without fear of 'family repercussions', was afterwards lifted by the same judge after an appeal by the *Daily Mail*. After a two-day hearing, the judge ruled that 'the principle of open justice was more important than saving the embarrassment of a defendant'.[29] Similar cultural (and, indeed, religious) problems have arisen in the case of Muslim defendants and witnesses who wish to remain fully veiled in court. The *Equal Treatment Bench Book* published by the Judicial Studies Board in March 2004 advised judges, magistrates and chairpersons of tribunals that:

> the issue of head covering and dress is sensitive. Many Muslims prefer to interpret the guidelines exhorting modesty in a strict manner, despite the diversity of dress codes in different Muslim cultures. Witnesses who choose to cover themselves should not be asked to remove their clothing in court as this would be considered extremely oppressive and possibly amount to an abuse of the right to freedom of religious practice.[30]

The November 2010 (internet version) of the *Equal Treatment Bench Book* revised this wording so as to include the provision:

> As the niqab involves the full covering of the face, the judge may have to consider if any steps are required to ensure effective participation and a fair hearing, both for women wearing the niqab and other participants in the proceedings. This is a difficult and sensitive matter about which guidance will soon be published in the form of a Practice Direction by the Lord Chief Justice.

In *R v Dawson* (2013–2014) a female defendant, charged with witness intimidation, refused to remove her *niqab* (full face veil) for religious reasons at her trial (at

28 [2009] UKHL 34; [2010] 1 All ER 235.
29 *Daily Mail*, 30 December 2013; *The Times*, 31 December 2013.
30 Judicial Studies Board. (March, 2004) *Equal Treatment Bench Book*. pp. 3–47.

Blackfriars Crown Court). After a pre-trial hearing in 2013 (principally concerned with establishing the defendant's identity), Judge Peter Murphy ruled, at the start of the trial on 22 January 2014, that Ms Dawson could wear the niqab while appearing as a defendant but that she would have to remove that veil if she elected to give evidence at her trial because it was 'vital for jurors to see [her] demeanour, reaction, and … expressions'.[31] The emphasis here is presumably on the fact that the case involved trial by jury, not trial by judge alone (or by a bench of magistrates). The appointment to the judiciary of lawyers who are completely blind has been possible since the appointment of Sir John Wall to be a Chancery Master and Dr Majid, of London Metropolitan University, to be an immigration judge.

In *R v Secretary of State for the Home Department v AD (No. 2)* [2010] UKSC 26; [2010] 4 All ER 259, the Supreme Court held that 'anonymity orders' were available, and might be appropriate, when a person who was subject to counter-terrorism controls (then known as 'control orders') brought proceedings to challenge those controls under the Prevention of Terrorism Act 2005. The Supreme Court held the granting or withholding of that anonymity would be dependent upon the facts of each case but that it was necessary for the court (or tribunal) to decide whether there was a 'sufficient general public interest' in publishing a report of the proceedings, identifying the controlled person, so as to justify curtailing his, and his family's, rights under Article 8, ECHR. The granting of anonymity to persons who have been made the subject of 'terrorism prevention and investigation measures' ('Tpims') – the successors to 'control orders' – has been controversial, particularly after one such individual escaped the country after earlier featuring in the law reports (as 'CC') in *CC v Commissioner of Police of the Metropolis* [2011] EWHC 3316 (Admin); [2012] 2 All ER 1004 – a case about the (limited) powers of the police to detain arrivals at Heathrow Airport under Schedule 7, Terrorism Act 2007. The issue became topical again when the two-year time-limit on Tpims was due to expire but the protection of anonymity orders was predicted to last for life-times: *Daily Telegraph*, 18 January 2014 ('Terror suspects given lifetime anonymity'); *Daily Telegraph*, 27 January 2014 ('Human rights leave Al-Qaeda bomb maker free to roam our streets anonymously').

The duty of the courts to protect vulnerable and intimidated witnesses in criminal cases also raises issues of how far their rights (for example, their right to 'special measures' and sometimes even to total anonymity) can be legitimately balanced against the defendant's right to a fair trial under Article 6, ECHR. It must, of course, be borne in mind that not all witnesses are 'victims' (sometimes even the defendant himself stands in need of 'special measures') and, while giving prosecution evidence, witnesses can only ever be alleged 'victims'.

31 *Daily Telegraph*, 23 January 2014. The defendant subsequently refused to testify rather than remove her niqab. When the jury failed to reach a verdict, she changed her plea to guilty: *Daily Telegraph*, 31 January 2014.

Chapter 5

Race and gender issues and human rights

The concepts of race and gender mobilise both political support and an infrastructure of organisations which are dedicated to their advancement, not least in relation to the criminal justice system. As human rights discourse and its attendant legislative implementation gather pace, there is a question as to whether the existing race and gender-based political support and the infrastructure of organisations that currently exist will be supplanted by human rights synonyms, or augmented by them. In any case the existing settlement on race and gender is likely to alter over time. In the European Convention on Human Rights and other European documentation rules as to racial and gender equality are each understood to be straightforward questions of human rights. However, as is especially true in the case of terrorism following 9/11, any sharp focus upon human rights which ignores other considerations can easily become a vehicle for racial bias. Similarly, in the case of gender, a narrow focus upon human rights can easily ignore the subjective experience of women and overlook the nature of particular histories of oppression. Because human rights encompass a broad category of rights, and are essentially normative in character, it is important to realise that, with regard to race and gender issues, these issues can have limitations because of their failure fully to grasp the specificity of the lives and the historical contexts of individuals. In other words the broadness of human rights discourse can be understood as simply being another aspect of a liberal political *Weltanschauung*, and this has been noted by numerous contemporary scholars.[1]

Race: the expanded role of state security in the USA

After the 9/11 attacks the US government took unto itself the right indefinitely to detain many thousands of people held incommunicado and without the right to any court process: still greater numbers were deported. These people were

1 Hall, S. (2002) 'Reflections on Race, Articulation and Societies Structured in Dominance' in P. Essed and D.T. Goldberg (eds) *Race: Critical Theories*. Blackwell: Oxford. pp. 449–454; Mooney, J. (2000) *Gender, Violence and Social Order*. Palgrave: London.

overwhelmingly Muslim men from Africa and the Middle East.[2] The US government, since 9/11, has successfully lobbied for several hundred new laws, and amendments to existing laws, with the aim of increasing the powers of the state over the lives of citizens in order to facilitate a *war on terror*. The result of all this legislative action has been to restrict the rights of US citizens, and immigrants, to go about their lives unhindered by the state, even though this has always been balanced by the need for national security. It is important to note here that this whirlwind of legislative action ushered in a plethora of measures which had been requested by the military, police and security agencies, but hitherto denied to them by the executive arm of the US government.[3] These new laws were drafted so as to give the public authorities the maximum latitude when interpreting such terms as 'terrorist organisation' and 'giving material support'. The aim of these new laws was to preserve and uphold the hard-fought-for foundational elements of American public life, freedom and democracy. However, there is another American history which runs alongside the noble struggle for freedom and democracy and this history embraces slavery, segregation, the mass incarceration of black men, the repression of civil rights organisations and the denial of citizenship and judicial protection on racial grounds. The *war on terror* has not impacted on US citizens equally and, in any case, it has been criticised for being conducted in a polity that routinely uses the criminal justice system as a tool of social control and which engages the police and security agencies in actions aimed at monitoring and suppressing organisations that challenge the status quo.[4]

Like all nations, the United States of America has its own founding myths and official histories. The USA often invokes the notion that it is a country of immigrants where new people are welcomed with open arms. The reality is rather different and the USA actually has heavily policed borders, including a national security entry and exist registration network and a system of oversight for the newly settled, and all of these powers have been stepped up after the 9/11 attacks and coordinated by the Department of Homeland Security.[5] The USA is equally a nation of heavily guarded borders, caps, quotas and settled communities who were themselves long ago descended from migrants. The notion of a country of immigrants completely, and wilfully, overlooks the history of slavery which brought innumerable Africans to America against their will and the genocide of thousands of native Americans. Although, the decision of the US Supreme Court in *Worcester v Georgia* (1832) recognised the

2 Paust, J. (2003) 'Judicial Power to Determine the Status of Rights of Persons Detained Without Trial', *Harvard International Law Journal*, 44 (2). pp. 503–532.

3 Quinivet, N. (2005) 'The World after September 11: Has It Really Changed?', *The European Journal of International Law*, 16 (3). pp. 561–577.

4 Paust, J. (2003) 'Judicial Power to Determine the Status of Rights of Persons Detained Without Trial', *Harvard International Law Journal*, 44 (2). pp. 503–532; Tadros, V. (2007) 'Justice and Terrorism', *New Criminal Law Review*, 10 (4). pp. 658–689.

5 Cole, D. (2002) 'Enemy Aliens', *Stanford Law Review*, 54. pp. 953–1004.

sovereignty of the Cherokee nation, US President Andrew Jackson refused to enforce that judgement, allegedly with the remark: '(Chief Justice) John Marshall has made his judgment, now let him enforce it.' Jackson later supported the enforced movement of the Cherokees to Indian Territory and many of them died during this process, known as the *Trail of Tears*.[6] African Americans were legally excluded from citizenship until 1868, and most of them until 1924, and they were denied full rights until the 1960s.[7] The link to 9/11 is important because the review of borders and of national security, instigated by the Bush administration, was targeted at African and Middle Eastern men and persons from the Islamic world. This targeting also jeopardised the rights to regular judicial process and equal protection enshrined in the US Constitution. These rights historically were afforded to persons, not only citizens. Though such action around issues of immigration and settlement have long since been protected from the oversight of Supreme Court by the so-called doctrine of plenary power, which goes back to the nineteenth century, and the exclusion of Chinese immigrants into the USA in the latter part of that century. The Chinese, over a century ago, were deported, excluded, imprisoned without charge and subject to forms of surveillance and oversight that would have otherwise been illegal without the backing of the 'plenary power' doctrine. Therefore we must conclude that, although the targeting of specific groups (African and Middle Eastern men and persons from the Islamic world) in terms of immigration and settlement is draconian, it is nonetheless in keeping with the original 1875 US immigration laws which were brought in to address Chinese immigration, as Alexander Aleinikoff has convincingly argued in his seminal book *Semblances of Sovereignty: The Constitution, the State and American Citizenship*. Aleinikoff makes a convincing case for continuity in this area.[8] In the Second World War, 120,000 Japanese-Americans were interned as *internal enemies*, but not the far more numerous Italians and Germans of European descent. This was racial discrimination on a grand scale, pure and simple.[9]

The outcome of this state-sanctioned disparity of treatment has been a huge rise in hate crime directed against Arab-Americans and Muslims following 9/11. It is hard to escape the conclusion that race plays a major part in who is considered 'American' or that a person's racial characteristics play an enormous part in their subsequent relationship with the US criminal justice system and the state more generally, at the economic level. As Blauner has detailed, whether the war is on crime, drugs or terror, much of the focus seems to be directed at

6 Wunder, J.R. (1992) 'Cherokee Cases' in K.L. Hall (ed.) *The Oxford Companion to the Supreme Court of the United States*. OUP: New York. pp. 685–694.

7 Bogen, D.S. (2003) *Privileges and Immunities: A Reference Guide to the United States Constitution*. Greenwood Publishing: Portsmouth, NH.

8 Alexander Aleinikoff, T. (2002) *Semblances of Sovereignty: The Constitution, the State and American Citizenship*. Harvard University Press: Cambridge, Mass.

9 Hayasi, B.M. (2008) *Democratising the Enemy: The Japanese-American internment*. Princeton University Press; New Haven.

blacks and other minorities.[10] The succession of public policy wars has always impacted overwhelmingly upon blacks and other minorities. In an important intervention on the 'so called war on drugs', Noam Chomsky, one of America's leading public intellectuals, has commented that:

> (It) was aimed directly at the black population. None of this has anything to do with drugs. It has to do with controlling and criminalizing dangerous populations.... The more you can increase the fear of drugs and crime and welfare mothers and immigrants and aliens and poverty and all sorts of things, the more you control people.[11]

Incarceration rates for black males in the USA is many times greater than that for whites, with over 20 per cent of all black males having spent time in prison by their thirties, as opposed to 3 per cent of white males.[12] Even if we accept that incarceration rates are the outcome of a range of social and economic factors, it is difficult to avoid the weight of criminological, legal and sociological research that points to imprisonment being used as a method of upholding the pre-existing class and racial hegemony of contemporary America.

The *war on terror* has been partly enabled by the very broad police powers that were ushered in by the *war on drugs*. The US policing and security services had maintained a steady growth in personnel since the Nixon era. However, following 9/11, this growth was intensified, as was expenditure on hardware.[13] The USA suffered two major terrorist atrocities in the 1990s – the bombing of the World Trade Center in 1993 and the Oklahoma City bombing of 1995 – and these atrocities resulted in Congress passing the Anti-Terrorist and Effective Death Penalty Act (AEDPA) of 1996. AEDPA is often overlooked but it brought in sweeping powers against giving 'material support' to organisations considered hostile to the USA and it allowed secret evidence to be used in deportation cases. It also granted the US Secretary of State new powers to outlaw groups. AEDPA set the scene for further extensions to state powers following 9/11.[14] In 1996 Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act, which allowed even lawful immigrants to be

10 Blauner, B. (2001) *Still Big News: Racial Oppression in America*. Temple University Press: Philadelphia.

11 Chomsky, N. (2002) 'Drug Policy as Social Control' in T. Herivel and P. Wright (eds) *Prison Nation*. Routledge: New York.

12 Pettit, B. and Western, B. (2004) 'Mass Imprisonment and the Life Course: Race and Class Inequality in US Incarceration', *American Sociological Review*, 69 (2). pp. 151–169.

13 Bayley, D.H. (1994) *Police for the Future*. OUP: New York; Bayley, D.H. and Weisburd, D. (2009) 'Cops and Spooks: The Role of the Police in Counterterrorism' in D. Weisburd, Th. Feucht, I. Hakimi, L. Mock and S. Perry (eds) *To Protect and Serve: Policing in an Age of Terrorism*. Springer: New York. pp. 81–100.

14 Cole, J. and Dempsey, J.X. (2006) *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. New Press: New York.

deported because of their political affiliations or for a raft of minor criminal convictions. Taken together AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act not only represented a deepening of a siege mentality in the USA, but enabled a climate of fear of outsiders to take hold so much that only three days after the 9/11 attacks, the highly complex USA Patriot Act was drafted (which enhanced, still further, the powers of the police and security agencies and widened the remit of state surveillance whilst simultaneously reducing judicial oversight of them). Liz Fekete has shown how European nations have targeted Muslims for deportation. She has demonstrated that: 'throughout Europe, immigration reforms are being introduced which tie citizenship and residence rights to constraints on freedom of speech. For those who breach these constraints, the punishment can be deportation.'[15] However, the situation is now even worse, with many European states, including the UK, extending their border control procedures far beyond their own *actual* territorial boundaries through a complex network of cooperative working arrangements with other states and by developing a sophisticated matrix of laws, rules and agreements in order to prevent persons ever reaching their home territory.[16] It is noteworthy that this increased border regulation and hardening of immigration controls across Europe, the USA and Canada, in the aftermath of 9/11, is overwhelmingly directed at non-Europeans.[17]

This new post-1996 era has meant that immigrants, especially those from Africa or the Middle East and those maintaining an Islamic faith, feel vulnerable at a time when the state's right to deport or indefinitely to detain has been so considerably expanded. The net has been widened, the mesh thinned and the moral panic has begun.[18] In the USA, the concept of national security has become tightly interwoven with notions of allegiance, membership of groups and racial and religious identity. The successive wars on crime, drugs and terror have created a climate of suspicion and fear and have been used to enact draconian legislation and to further extend the role of the police and security agencies in public life. The United States has at this time become a carceral state looking up record numbers of individuals, notably black men; a point Wacquant has called 'carceral affirmative action'.[19] The practical outcome of a campaign, said

15 Fekete, L. (2006) 'Europe: Speech Crime and Deportation', *Race and Class*, 47 (3). pp. 82–92 (p. 82).

16 Costello, C. (2012) 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', *Human Rights Law Review*, 12 (2). pp. 287–339.

17 Arbel, E. and Brenner, A. (2013) *Bordering on Failure*. Harvard Immigration and Refugee Law Clinic Program: Cambridge, Mass.

18 Garland, D. (2008) 'On the Concept of Moral Panic', *Crime, Media and Culture*, 4 (1) pp. 9–30.

19 Wacquant, L. (2009) *Punishing the Poor*, Duke University Press: Durham NC; Weaver, V.M. and Lerman, A.E. (2010) 'Political Consequences of the Carceral State', *American Political Science Review*, November. pp. 1–17.

to be aimed at upholding long-held American values of democracy, equality and freedom, is a bifurcation of experience in racial terms. It is not the people that are protected as much as the general status quo. This publically guarded status quo undoubtedly masks enormous racial injustice and intolerance and a social and political fissure around the experience of civil and human rights. Moreover, though we have taken here the American example, much the same case could be advanced in the United Kingdom. One of the major problems with human rights discourse is that it is essentially normative in nature and deals with generalities of persons, thresholds of entitlement and the like, rather than with particulars of experience, and this failure is shown up by the experience of blacks, other ethnic minorities and Muslims following the 9/11 attacks on America. In a way, Sivanandan, commenting after the London bombings of 7 July, has argued that the rights and civil liberties of non-white citizens were under attack in the *war on terror* and that the promise of metropolitan multiculturalism has been replaced by a sense of alienation and victimisation amongst a large number of non-white British citizens as a result of that war.[20] Moreover, after the 7 July bombings, Londoners felt: 'they too were potential victims of mistaken identity: that they were not equal citizens. A practical policing issue was really, at heart, a political consideration.'[21]

Race: the black and ethnic minority experience of street policing in the UK

If we were to think of the United Kingdom as reasonably homogeneous until the 1950s, we would have overlooked a whole series of experiences, events, histories and lives; nonetheless it would be a less diverse society than pertains today. It is to some extent this lack of ethnic and racial diversity that has enabled theorists such as Gilroy to use the term *the other* to explain the black experience, notably in relation to the criminal justice system.[22] Gilroy also links the *othering* of blacks with the historical practice of slavery.[23] The notion of *the other* has been used extensively by social scientists, following its formulation by Emmanuel Levinas and Edward Said. Levinas used the term *autrui* in his writing, which means the *others*. He wrote extensively on *the other*, notably two books, *Totality and Infinity* and *Otherwise than Being*. For Levinas, proximity to the other entails a response set in subjective terms and therefore subjectivity itself is seen to arise only when confronted with *the other*. He argued that: 'Proximity,

20 Sivanandan, A, (2006) 'Race, Terror and Civil Society', *Race and Class*, 47 (3). pp. 1–8.
21 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London and Los Angeles. p. 60.
22 Gilroy, P. (2000) *Against Race: Imagining Political Culture, Beyond the Color Line*. Harvard University Press: Cambridge.
23 Gilroy, P. (1992) *The Black Atlantic: Modernity and Double Consciousness*. Harvard University Press: Cambridge.

difference which is non-indifference, is responsibility.'[24] For Levinas, *the other* is always the object of our value judgements.[25] Edward Said, the late Palestinian literary theorist and public intellectual, developed Levinas' work notably in his work on the meaning of Orientalism.[26] Said advanced the case that marginalised groups were understood as *the other* in such a way that legitimised the perceived strength and rightfulness of the dominant group. Said argued that this was certainly the case with Palestinians and Arabs but maintained that the process of *othering* could be carried out against any minority group. In *Orientalism*, Said demonstrates a process in which culture, through a variety of texts and representations, comes to construct groups of *others* as backward, degenerate, primitive and most of all inferior. In such a way culture becomes a major part in the marginalising of certain groups of people. Said's work had a big influence on Stuart Hall and Paul Gilroy, in relation to race, and Judith Butler and Adrienne Rich, in relation to sexuality, though many groups have laid claim to Said's basic insight and methodology. In terms of contemporary thinking about race, arguably *othering* was elaborated best by Spencer, when he wrote how using the terms *us* and *other* affords: 'ideals and typifications and the other present us with tests and measures for these ideals'.[27] In other words by employing the notion of the *other* it is possible to conduct a range of activity, be it defining the *other*, maintaining a boundary between *us* and the *other* and elaborating a typology of difference which might take the form of developing a hierarchy around notions of difference. The notion of the *other* is useful in understanding the reality of racism in relation to the experience of individuals in regard to crime, identity and public space. The concept of the *other* is then useful in regard to the analysis of policing, which is always, in large measure, an: 'issue of upholding law and order, the existing authority and the institution of private property (whilst being) largely uncritical of the status quo'.[28] Of course, the policing function is far more than this but the police are, of necessity, followers of the dominant laws, morality and general outlook of the society they serve. This can be an issue when the notions of public order and public space along with conceptions of rightful authority are challenged by the community, or elements of it, being policed. It is, though, fertile ground for the activity of *othering*. Gilroy, following Hall *et al.*, has demonstrated how this situation was made worse throughout the period of the 1970s and 1980s when the news media linked blackness with criminality.[29] Gilroy makes the point that it was during this period that the *othering*

24 Levinas, E. (1981) *Otherwise Than Being*. Nijhoff Publishers: Boston. p. 139.
25 Levinas, E. (1969) *Totality and Infinity*. Duquesne University Press: Pittsburgh. p. 262.
26 Said, E. (1977) *Orientalism*. Penguin: London.
27 Spencer, S. (2006) *Race and Ethnicity: Culture, Identity and Representation*, Routledge: London. p. 8.
28 Amatrudo, A. (2009) *Criminology and Political Theory*, Sage: London and Los Angeles. p. 52.
29 Hall, S., Critcher, C., Jefferson, T., Clarke, J. and Roberts, B. (1978) *Policing the Crisis*. Macmillan: London.

of black youth took hold. The popular press underscored every incident of black crime and cumulatively the linkage of crime and blackness became established.[30] Black youth became the archetypical *other*. This linkage of crime and black *otherness* established itself in an overwhelmingly white police force and, as Bowling and Phillips have shown, it gave rise to the controversial activity of stop and search. The targeting of black youth through a policy of stop and search in London by officers of the Metropolitan Police has often been disproportionate and discriminatory and focused on inner city black youth, not on serious criminals, per se.[31] The practice of stop and search has lately been extended from suspected crime to encompass immigration monitoring places where 'foreigners' can be more explicitly targeted.[32] This stop and search activity has become resented by a large proportion of Londoners, not only black youth, because it appears to be demonstrably unfair and producing little by way of public reassurance or achieving crime control. However, stop and search raises the issue of police culture and just how an organisation can persist in an activity that generates so little and jeopardises the entire relationship between the police and the community, supposedly so important in modern policing.[33] Waddington has noted how:

> Stop and search generally is notoriously imprecise with less than 10% of interventions yielding evidence of any offences, still less of serious criminality. Yet police officers are obliged to have formed a genuine and honest belief that all those stopped and searched *are* behaving suspiciously. How, then do they justify the barrenness of their suspicions? The answer is that they work hard rhetorically to convince themselves and others that whilst the demanding standards of legal process were not satisfied, the person was really guilty of an offence.[34]

We note from all of this the hegemonic role of *othering* and the wilful self-delusion, as Waddington noted, in terms of the police ability to undertake a task at once both oppressive and unproductive. It is informative to note that although the unpopular 'sus' law (suspected persons 'loitering with intent',

30 Gilroy, P. (1982) 'The Myth of Black Criminality' in M. Eve and D. Musson (eds) *The Socialist Register*, Merlin: Monmouth. pp. 47–56; Gilroy, P. (1987) *Ain't No Black in the Union Jack*. Hutchinson: London.

31 Bowling, B. and Phillips, C. (2007) 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search', *Modern Law Review*, 70 (6). pp. 236–961.

32 Bowling, B. and Weber, L. (2011) 'Stop and Search in Global Context: An Overview', *Policing and Society*, 21 (4). pp. 480–488.

33 Garland, D. (1996) 'The Limits of the Sovereign State: Strategies of Crime Control', *British Journal of Criminology*, 36 (4). pp. 445–471.

34 Waddington, P.A.J. (2011) 'Cop Culture' in T. Newburn and J. Peay (eds) *Policing: Politics, Culture and Control*. Hart Publishing: Oxford. p. 101.

contrary to S.4, Vagrancy Act, 1824) was abolished by S.8, Criminal Attempts Act, 1981, Parliament has repeatedly decided that the police still have equivalent powers.

Human rights discourse relies on the notion of a threshold of equal treatment for all persons. It maintains that all persons are to be treated equally and respected as individuals in their own right. It cannot unfortunately usurp the unfairness inherent in human interactions, structured as they are by economics, history and social conditioning. Race is an area in the criminal justice system where the human rights rhetoric and human rights practice seem to be out of kilter whether we look at prisons or policing or any other aspect of the criminal justice system. It remains the case that blacks, and other ethnic minority groups, are unduly represented in the criminal justice statistics. This is not a reason to advocate a wholesale abandonment of human rights principles but it is surely evidence that some form of racial *othering* is working itself out in the criminal justice system.[35] The existence of a system of human rights does not undo the practice of racism, including institutional racism, so easily. It does show up, however, the difference between the strict legal equality of rights and their fair implementation in a world of differential power relations. A commitment to basic human rights does not lessen the necessity of addressing basic human unfairness and prejudice, nor does it undo, by itself, historical and structural inequality.

Gender: issues around human rights

The point many feminist legal theorists, including Hilary Charlesworth and Nicola Lacey, continue to make is that the liberal conception of law and human rights holds to a clear demarcation between the public and the private spheres.[36] The private sphere relates to the domestic home and the public sphere relates to those economic, legal and political actions that go on in the world outside of the home. This demarcation, it is argued, favours men, who dominate in the public sphere and, leaving aside the safety and protection of women in the private sphere, is discriminatory because it prioritises the importance of the public over the private sphere. The notion that human rights prioritise public space is not confined to feminist thought. Habermas has written how all public space has always been prioritised in law.[37] Feminist theorists have often argued that this preoccupation of

35 Palmer, S. and Pitts, J. (2006) 'Othering the Brothers: Black Youth, Racial Solidarity and Gun Crime', *Youth and Policy*, 91 (Spring). pp. 5–22.

36 Charlesworth, H. (1994) 'What are Women's International Human Rights?' in R. Cook. (ed.) *Human Rights of Women: National and International Perspectives.* University of Pennsylvania Press: Philadelphia. pp. 68–73; Lacey, N. (2004) 'Feminist Legal Theory and the Rights of Women' in K. Knop (ed.) *Gender and Human Rights.* OUP: Oxford. pp. 21–22.

37 Habermas, J. (1989*) The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society.* MIT Press: Cambridge, Mass.

human rights with the public world tends to neglect private spaces, notably the domestic sphere.[38] This neglect of private spaces is a particular concern, given the seriousness and extent of domestic violence, for women. In their seminal article 'Nothing Really Happened: The Invalidation of Women's Experiences of Sexual Violence', Liz Kelly and Jill Radford examined the notion of public and private space in relation to the experience of domestic violence in the criminal justice system and how this often dictates what is included or excluded in relation to sexual crimes against women. Moreover, Kelly and Radford showed how this division of public and private is such a dominant mode of thinking that women often conceive of their own experiences of violence as outside the sphere of the public, and therefore not covered by law.[39] This bifurcation of public and private space has implications for policing and personal safety and the fact that so much harm disproportionately happens to women in the domestic realm can be understood both as a deficit in human rights theory and as evidence of patriarchy: the more so since the majority of domestic violence is perpetrated by men upon women. Carol Smart has argued:

> Law does not stand outside of gender relations and adjudicate upon them. Law is part of these relations and is always already gendered in its principles and practices. We cannot separate out one practice … and for it to cease to be gendered as it would be a meaningless request. This is not to say that we cannot object to certain principles and practices but we need to think carefully before we continue to sustain a conceptual framework which either prioritises men as the norm or assumes genderlessness (or gender blindness) is either possible or desirable.[40]

Certain forms of criminal behaviour have had gendered effects and impact disproportionately harshly upon women. Bloom, Owen and Covington have argued in relation to the so-called *war on drugs* in the USA that: 'it is clear that women have suffered disproportionately to the harm their drug behaviour represents. Inadvertently, the war on drugs became a war on women, particularly poor women and women of colour.'[41] An emphasis upon judicial punishment,

38 Boling, P. (1996) *Privacy and the Politics of Intimate Life*. Cornell University Press: Ithaca, NY; Boyd, S.B. (1997) 'Challenging the Public/Private Divide: an Overview' in S.B. Boyd (ed.) *Challenging the Public/Private Divide: Feminism, Law and Public Policy*. Toronto University Press: Toronto. pp. 3–33.

39 Kelly, L. and Radford, J. (1990) 'Nothing Really Happened; The Invalidation of Women's Experiences of Sexual Violence', *Critical Social Theory*, 10 (30). pp. 39–53.

40 Smart, C. (1990) 'Feminist Approaches to Criminology or Post-Modern Meets Atavistic Man' in L. Gelsthorpe and A. Morris (eds) *Feminist Perspectives in Criminology*. Open University Press: Buckingham. p. 80.

41 Bloom, B., Owen, B. and Covington, S. (2004) 'Women Offenders and the Gendered Effects of Public Policy', *Review of Policy Research*, 21 (1). pp. 31–48.

instead of medical or psychological treatment, has tended to affect low-income females unduly in terms of increased levels of incarcerations and higher levels of fines. In the past, such women would have been given a community-based sentence for many drug offences, whereas now the expectation is in terms of a custodial sentence. In the USA, the use of mandatory sentences has exploded the number of women in the US prison system.[42] A similar model of practice obtains in the UK.[43]

The lives of women are intricately tied up with their relationship with childbirth and raising children; and that, in turn, further relates to such issues as education, employment, housing and welfare benefits. It is the case that overwhelmingly women, and not men, are the primary carers for children. If a woman is incarcerated, that has a consequence for the human rights of her children in terms of their subsequent life chances and access to education, health and housing. Children are the hidden victims in the criminal justice system.[44] To understand the reality of the lives of offending women, it is useful to consider some salient statics from the leading UK campaigning organisation for incarcerated women, *Women in Prison*, to show the reality of women's lives around offending. Over 50 per cent of all women prisoners report having suffered domestic violence. In 2010, 24 per cent of women prisoners were serving sentences for drug offences. Eighty-one per cent of women prisoners have committed a non-violent offence. Thirty-one per cent of women in prison have spent time in local authority care. Forty per cent of all women prisoners are mothers.[45] The lot of women prisoners is materially different from that of men in the prison system. Moreover, as Jacobs has shown, it is more difficult for a woman to re-enter society after a period of imprisonment, partly because a lot of the systems are set up for men and partly because a woman released from prison has to care for children.[46]

It can be argued that there are some core features in the feminist account of the state: for example, that the world is best understood as being constituted by gender relationships characterised by subjugation and domination, that the state is skewed in favour of male interests and that it is a basic function of law to 'confuse and oppress those who threaten its legitimacy'.[47] Famously Dobash and Dobash wrote: 'It is impossible to use law and legal apparatus to confront patriarchal domination and oppression when the language and procedures of these social processes and

42 Belknap, J. (2001) *The Invisible Woman: Gender, Crime, and Justice*. Wadsworth: Belmont, California.

43 Fawcett Society (2007) *Women and Justice: Third Annual Review of the Commission on Women and the Criminal Justice System*. Fawcett Society: London.

44 Matthews, J. (1983) *Forgotten Victims*. NACRO: London.

45 *Women in Prison* website: http://womeninprison.org.uk, accessed 26 December 2013.

46 Jacobs, A. (2001) 'Give 'Em a Fighting Chance: Women Offenders Re-enter Society', *Criminal Justice Magazine*, 16 (1). pp. 44–47.

47 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage Publications: London and Los Angeles. p. 9.

institutions are saturated with patriarchal beliefs and structures.'[48] However, such sociological criticism of the legal and human rights by some feminists needs to be balanced against the undoubted advances made by women through the mechanism of human rights, especially at the level of international standards. Under the United Nations Charter, women have equal rights to men.[49] However, since the gap between the grand words of various charters and covenants was understood as far removed from practical matters of discrimination against women on the ground, the United Nations General Assembly drew up CEDAW (the *Convention on the Elimination of all Forms of Discrimination Against Women*) in 1979. The purpose of CEDAW was to ensure that member states prohibit discrimination against women but also that they take positive affirmative action to address issues of underlying inequality. Moreover, under the *Convention on the Elimination of all Forms of Discrimination Against Women*, a committee was set up to monitor the progress made by state actors. CEDAW did not mention violence against women and in 1993 it was augmented by the *Declaration on the Elimination of Violence Against Women*, though it is not legally binding. It is certainly the case that, whilst it is easy to criticise the work of the United Nations, and its grand-eloquent statements, it is undoubtedly encouraging that women's issues are now prioritised in international law. In addressing such issues at the international level, the United Nations certainly lays down a marker for domestic legislation to follow and underscores the importance of women's rights being protected by those who wish to be seen as upholding the highest standards internationally.

John Rawls, liberal theory and the underplaying of power relations

One thing that is common in the analysis of the categories of race and gender is that they both have an expanded conception of power and how it is structured in the criminal justice system and in society generally. Human rights discourse is a liberal theory and, as such, tends to assume there is a particular human nature common to all persons, namely that all persons choose their own ends. This is partly what defines us as free and equal rational beings and is embodied, for example, in John Rawls' principle of equal liberty. No other political theorist has been more influential in both theoretical and public policy terms than Rawls, certainly in the areas of choice and equal freedom. Rawls understood relations of equal liberty and personal choice as foundational in political terms. It is this ability to choose our own ends which is threatened in the relationship of power and

48 Dobash, R.E. and Dobash, R.P. (1992) *Women, Violence and Social Change*. Routledge: London. p. 147.

49 See *Universal Declaration of Human Rights* Article 2; *International Covenant on Civil and Political Rights* Article 2.1; *International Covenant on Economic, Social and Cultural Rights* Article 2.2.

subordination – for example, between rich and poor, white and non-white or male and female. It is a major drawback in the liberal view of the world which, though well placed to opine about universal things (such as rights), is less good at dealing with particular accounts, histories and experiences. Rawls, and other liberals, are willing to guarantee our existence as free and equal rational beings by characterising it as an essential aspect of our human *Being*. Rawls stated: 'Men exhibit their freedom, their independence from the contingencies of nature and society, by acting in ways they would acknowledge in the Original Position.'[50] We note how he wants to guarantee a situation in which all people are equally free to pursue their own ends, within the framework of a society whose basic structure is just, or defined by what reasonable persons would rationally come to in the Original Position.[51] This is the manner in which we display our respect for others. The notion that we are equally able to live independent and self-sufficient lives is an important, yet implicit, assumption in Rawls' work. Identifying this implicit assumption assists us in identifying a crucial weakness in liberal theories more generally. It does, however, recognise that the Rawls and Dworkin type 'right-based' theories which seek to defend certain individual claims against utilitarian calculus of social interests 'both rely on a theory of the subject that has the paradoxical effect of confirming the ultimate frailty, perhaps even incoherence, of the individual whose rights they seek above all to secure'.[52] What Rawls does not offer is an account that explains why human beings are able to harm one another.[53]

Liberal theory finds it hard to articulate the moral significance of the social relationships of power. Rawls is concerned that principles of justice have to be, what is technically termed, 'antecedently derived' if we are to be able to guarantee 'the freedom of choice that justice as fairness assures to individuals and groups within the framework of justice'.[54] This depends upon an expanded conception of independence and self-sufficiency. Incidentally, it is a conception that Kant had earlier questioned with regard to how the rich and poor relate to one another. For Rawls, and normative liberal theorists, these relationships are morally inconsequential since individuals choose their own ends. Rawls maintained:

> For when society follows these principles, everyone's good is included in a sense of mutual benefit and this public affirmation in institutions of each man's endeavour supports men's self-esteem. The establishment of equal liberty and the operation of the difference principle are bound to have this effect.[55]

50 Rawls, J. (1971) *A Theory of Justice*. OUP: Oxford. p. 256.
51 Rawls, J. (1955) 'Two Concepts of Rules', *The Philosophical Review*, 44. pp. 3–32; Rawls, J. (1971) *A Theory of Justice*. OUP: Oxford. pp. 17–22.
52 Sandel, M. (1982) *Liberalism and the Limits of Justice*. CUP: Cambridge. p. 138.
53 There is a wealth of writing on this point but the classic point was made Barry. See Barry, B. (1995) *Justice as Impartiality*. OUP: Oxford. pp. 57–61.
54 Rawls, J. (1971) *A Theory of Justice*. OUP: Oxford. p. 447.
55 Rawls, J. (1971) *A Theory of Justice*. OUP: Oxford. p. 178.

However, this is to assume that individuals can meaningfully abstract themselves from relationships of power. It also underplays, and marginalises, that most human of political activities – that is, the quest for personal autonomy. The autonomy and independence that persons enjoy in the moral realm is somehow taken to guarantee the independence people have to work out their own conceptions of the good. Rawls is left without a moral language in which to explore how people can be undermined and their autonomy threatened through the workings of relationships of power. Rawls assumes that autonomy is compatible with persons choosing their own ends, taking account of their position and relations in a society whose basic structure is presumed to be just. In such a society, power relations would be compatible with justice. This brings the issue of autonomy into sharp focus and in practical terms it also raises matters of power, certainly in regard to race and gender.

Rawls' liberal theory, by prioritising in the need for the public institutions within society to express the equal value of all citizens, also notes a connection with human rights discourse. However, Rawls' idea of the way this is worked out, in recognition that people should have an equal liberty to pursue their own conceptions of the good, is an expression of his liberal theory. We are left powerless to theorise a distinction between human needs and wants and so investigate different ways people can be hurt, denied, negated, etc. Even though individuals will differ over how to define a conception of shared human needs, we should not thereby think this is the same thing as defining our individual ends. This could be no less contingent than the other features, which Rawls takes to be common to all human beings. Rawls wanted to restrict the description of the parties in the Original Position to those characteristics which all human beings share as free and equal rational beings. Rawlsians might well want to think again about such assumptions of independence and self-sufficiency, especially since they are said to buttress our conception of ourselves as rational choosers who are existentially free and equal rational beings too.

We should be able to concede easily that things that are good for one person may not be good for another, without thereby thinking we have dissolved the possibility of an investigation into human needs. Rawls acknowledged that in different situations different kinds of agreements are called for. Rawls states that:

> individuals find their good in different ways, and many things may be good for one person that would not be good for another. Moreover, there is no urgency to reach a publicly accepted judgement as to what is the good of particular individuals. The reasons that make such an agreement necessary in questions of justice do not obtain for judgements of value.[56]

56 Rawls, J. (1979) *A Theory of Justice*. OUP: Oxford. p. 448.

Of course, recognising the moral importance of an investigation of human needs is not connected to drawing up a list which all people can agree to. This quest has often been misplaced because it has classically conceived human needs as given prior to people's relationships in society. In traditional contract theory, it is conceived that we enter society to fulfil pre-given needs.[57] Against this, it has been taken as a strength of deontological liberalism that it does not depend upon any particular conception of human nature. Thus Rawls can claim that the key assumptions of justice as fairness involve 'no particular theory of human motivation'.[58] Likewise, Dworkin can say, 'liberalism does not rest on any specific theory of personality'.[59] But as Dworkin makes clear, the force of this is in the idea that liberals can be 'indifferent to the ways of life individuals choose to pursue'.[60] Contemporary versions of liberalism take pride in the fact that these versions do not depend upon any particular theory of the person, at least in the traditional sense that they do not attribute a determinate nature to all human beings. What Rawls argues in *A Theory of Justice* gives us the archetype of this sort of liberalism and it might well be juxtaposed with, for example, Marxist or Anarchist accounts which offer elaborated accounts of the person. Rather than being a strength, this turns out to be a fatal flaw.

The deep antagonism between morality and a creation of reason and our emotions, feelings, desires and needs still organises our liberal moral consciousness. It is embodied in Rawls' conception of us as 'free and equal persons'. Even though Rawls wants to connect our principles of justice to the empirical conditions of human conduct, he still assumes that the contingent social and natural conditions are morally irrelevant, at least in the sense that they are irrelevant to the determination of what is just. Rawls takes himself to be developing a theory of justice that is fair between persons; only those contingencies that differentiate people from each other need to be ruled out. This helps him develop a thin theory of the good in which we can think of respect and self-respect, say, as primary goods that people will want whatever their individual ends and goals happen to be. Their inclusion does not threaten the basic idea of ourselves as beings that are free to choose our own ends. But of course this is not enough to develop a substantive theory of the person antecedent to social institutions. For Rawls, the worth of persons has to await the creation of social institutions with the power to create legitimate expectations.

Rawls' *A Theory of Justice* is basically concerned to guarantee our equal freedom to follow whatever ends we have chosen for ourselves. It is essentially a liberal vision in its critical assumptions that people are independent and self-sufficient enough not only to formulate their own conceptions of happiness, but

57 Heller, A. (1976) *The Theory of Need in Marx*. Allison and Busby: London.
58 Rawls, J. (1971) *A Theory of Justice*. OUP: Oxford. p. 129.
59 Dworkin, R. (1977) *Taking Rights Seriously*. Duckworth: London. p. 142.
60 Dworkin, R. (1977) *Taking Rights Seriously*. Duckworth: London. p. 143.

also to realise them. This book is suspicious of any conception of needs, since this seems to threaten people with an external judgement of what they should value. But if we can respect the insight of the liberal vision and the crucial importance of the freedom for people to develop their own understanding of themselves, this is equally true of our individual and collective needs, wants and desires as it is of the ends we set for ourselves. We can quote Mill that: 'If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.'[61] If people do not have their basic needs met and do not have control over their means of livelihood, then it is hard for them even to visualise their own individual ends. This is what Kant faced in his discussion of the relationship between rich and poor. Autonomy and independence cannot be taken for granted in any theory. Our autonomy and independence have to be fought for by individuals, given power relations in the real world.

Liberal political theory would seem to guarantee our freedom to pursue our ends without thinking that, unless we develop what Marxists call a *critical consciousness*, we are likely to accept tacitly the values, ends and aspirations we have inherited from others. This means challenging the Kantian inheritance, which assumes that it is through reason alone that we discern the true significance of our lives, and in recognition of an identity between reason and morality. In Rawls we seem to be offered the idea that reason will also give us our ends and values. In both accounts, it becomes impossible to recognise a distinction between our wants and our needs and the significance of their denial for our developing sense of identity.

In liberal theory, our rights are supposedly guaranteed through the independent workings of reason. However, this is built upon Kant's notion that it is only in the exercise of our reason that we can express our choice and so also our freedom. Rawls wants us to think of our conception of our happiness, goals and ends as a similar exercise of our freedom. Though, at other times, only when we use our reason to articulate our rights and sense of justice are we expressing our nature as free and equal rational beings: but our experience remains essentially fragmented so long as our emotions, feelings and desires are to be discounted as a genuine source of knowledge. Moral theory ought to illuminate the nature of the difficulties which persons have in living autonomous and independent lives, but the universalism of Kantian ethics militates against that type of theorising.

Liberalism is open to the charge that it ignores the issue of power (and interdependence) and adopts an over-simplified account of the moral life. Whilst this central insight may be readily understood, it nonetheless cries out for a better account of moral life. Without doubt, the issue of power is a challenge, not only to human rights discourse, but also to all liberal theories. It might be that to

61 Mill, J.S. (1986) *On Liberty*. Penguin: London. p. 197.

address this challenge will be a call to change the world. The highlighting of the issue of power is not to advocate an abandonment of human rights criteria but to maintain that the world is not fully captured by human rights discourse. Certainly, as we have seen in relation to Rawls' work, the neglect of the issue of power, and how it structures issues of race and gender, rather undermines the *practical* appeal of human rights in matters relating to the operation of the criminal justice system.

Chapter 6

Victims, victimology and human rights

Introduction

These are interesting times for the study of victims' rights and what Ashworth wrote in 2000 still holds true today, namely that there are:

> two movements – towards greater penal severity and integrating a victim perspective … so the two different political relationships between escalating sentence severity and developing restorative justice point to two different dangers, which we might call 'victims in the service of severity' and 'victims in the service of offenders' … these dangers remind us of the need to ensure that the growing interest in promoting the victim perspective should not reduce our vigilance and proper standards and safeguards in criminal justice.[1]

Ashworth was surely right to set out the precarious, and on-going, balance to be struck between the interests of the wider community and those of the victim. However, our contemporary thinking about human rights has, at its core, a practical notion that those rights can, and should, be upheld by the community at large and that this mechanism needs to be underpinned by a legally backed framework of enforcement. In academic circles the view has taken hold that victims' rights (i.e. the rights of the victims of *crime*) are simply another form of human rights. In other words, it is the victim that has the claim upon his or her fellow citizens because they have been wronged: and, because they have been wronged, redress requires that the broader community has to work together, through the mechanism of the criminal justice system to make amends. Therefore, we express our broad support for human rights when we support victims' rights via the mechanism of the criminal justice system. Victims' rights discourse is intrinsically political and activist. Matua has stated:

1 Ashworth, A. (2000) 'Victim's Rights, Defendants Rights and Criminal Justice' in A. Crawford and J. Goodey (eds) *Integrating a Victim Perspective within Criminal Justice*. Ashgate Publishing: Farnham.

> The basic purpose of the human rights corpus is to contain the state, transform society, and eliminate both the victim and victimhood as conditions of human existence. In fact, the human rights regime was designed to respond to both the potential and actual victim, and to create legal, political, social, and cultural arrangements to defang the state. The human rights text and its discourse present political democracy, and its institutions of governance, as the *sine qua non* for a victimless society.[2]

We all have the duty to support the rightful claims of victims on this reading. Rorty famously located this requirement to ameliorate victims, in human rights terms, specifically in terms of our innate ability to proffer affection and sympathy for other people, and in an implicit human understanding of the lives of others. Moreover, we should all recognise ourselves as *potential* victims and, accordingly, we all ought to expect support when wronged.[3] Habermas articulated how this process requires law; and he framed the recent debate in terms of what we might call Kantian universalism and set out that all forms of rights become most prescient during times of social change and unrest.[4] What is certain is that in addressing the rightful claims of victims, the law (i.e. the legally constituted political community that addresses and upholds rights) collectively expresses the highest legal, moral and political values. This was well put by Bassiouni when he argued: 'By honouring victims' rights to benefit from remedies and reparation, the … community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law.'[5] Victims' rights should be understood as foundational in terms of their place in the criminal justice system. Indeed victim's rights are, according to some, the reason there is a criminal justice system at all. It has been argued that the entire criminal justice system is built upon victim's rights.[6] There is a developing academic acknowledgement that victims can, and should, play a more active role in the criminal justice system than has historically been the case.[7] The treatment of victims in the criminal justice system has, arguably, become the most important focus for the integration of human rights and criminal justice procedures and the surest way to settle issues of legal and moral responsibility.[8] Those working to

2 Matua, M. (2001) 'Savages, Victims, and Saviors: The Metaphor of Human Rights', *Harvard International Law Journal*, 201 (42). pp. 1–35.
3 Rorty, R. (1993) 'Human Rights, Rationality and Sentimentality' in S. Shute and S. Hurley (eds) *On Human Rights: The Oxford Amnesty Lectures*. Basic Books: New York.
4 Habermas, J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Polity Press: Cambridge.
5 Bassiouni, M.C. (2006) 'International Recognition of Victims' Rights', *Human Rights Law Review*, 6 (2). pp. 203–279.
6 van Camp, V. and Wemmers, J. (2011) 'La justice reparatrice et les crimes graves', *Criminologie*, 2. pp. 171–198.
7 Cassell, P.G., and Joffee, S. (2011) 'The Crime Victim's Expanding Role in a System of Public Prosecution', *Northwestern University Law Review*, 105. pp. 164–183.
8 Duff, A. (2009) 'Legal and Moral Responsibility', *Philosophy Compass*, 4 (6). pp. 978–986.

advance the cause of victims are involved in an activity which has at heart a deeper political struggle to advance the scope of human rights. However, as Doak has stated: 'Whereas human rights discourse has traditionally been perceived as liberal or left-wing, and even apathetic towards victims of non-state crime, victimology has paradoxically been perceived as being a conservative or right-wing force, entrenched in ideas of retributivism and vengeance.'[9]

Human rights as victims' rights

The Common Law conceived victims of crime as little more than witnesses to a crime. Crime, as such, was typically understood as an act against the state and its laws. This treatment is sometimes unhelpful because victims generally have no developed role in the criminal justice system; and scholars have long since noted how this can lead to a sense of frustration and exclusion.[10] The treatment of victims seems at odds with the way human rights have developed since the Universal Declaration of Human Rights, although this is not taken with crime victims per se. The foremost issue for many victims (of crime) who hope for redress in the criminal justice system is their need to exercise their *rights* through the legal system. In short, victims are citizens who enjoy certain rights and crime constitutes a *prima facie* violation of their authority and their basic rights; as well as being a crime against the state, and a breach of penal laws. So whilst it is true, for example, that the Universal Declaration of Human Rights does not explicitly mention the victims of crime, it can be seen that, nonetheless, it sets out a series of rights that pertain to victims, or which could be viewed from the victim's perspective. Moreover, it is *universally* acknowledged that victims have legal dignity and are entitled to recognition in proceedings. In a more practical way, the Universal Declaration of Human Rights does state that victims should be made aware of the progress of any cases that involve them and it secures their privacy and safety. It upholds the right of victims for reparation, both from the state and the perpetrator. However, the Universal Declaration of Human Rights is a not binding upon individual judicial systems and this has led to a deal of frustration on the part of victims. Robert Doak has argued that the European Convention on Human Rights (ECHR) has been proactive in suggesting that those who draft policy should have in mind that the principle victim's rights are *ipso facto* human rights. An example of this might be the UK Human Rights Act, which allows victims of ECHR violations to seek redress in the UK courts. The upshot is that public bodies, notably

9 Doak, J. (2003) 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals', *Legal Studies*, 23 (1). pp. 1–32 (p. 3).

10 Shapland, J. (1985) 'The Criminal Justice System and the Victim', *Victimology: An International Journal*, 1 (4). pp. 585–599; Wemmers, J.-A. (2012) 'Victim's Rights Are Human Rights: The Importance of Recognizing Victims as Persons', *Temida*, June. pp. 71–84.

criminal justice organisations such as the police, are under an obligation to respect the human rights of victims, in line with the European Convention on Human Rights.[11] Wemmers has argued:

> Victims' rights, like human rights, are only meaningful if they confer entitlements, as well as obligations, on people. Otherwise, they are not rights and they will ultimately fail to empower victims. Legal protection of rights is necessary in order to defend victims' rights. It is the ability to exercise our rights, using our free will and rational choice, which gives meaning to the notion of 'human dignity'. Without this ability, victims will remain voiceless objects of the criminal justice system who are forced to forfeit their individual human rights in the interest of the society.[12]

This is the core issue: whether, and to what extent, victims may exercise their *rights* as legitimate actors in the judicial process: and whether a person's human rights extend into the judicial sphere to become victims' rights.

The lessons of the *Crime Victims' Rights Act* in the United States

It is instructive to look at the case of the *Crime Victims' Rights Act*, also known as the CVRA, in the United States. The CVRA upholds the centrality of victims in federal criminal proceedings. It also extends the protection of the courts to the role of victims in US federal justice. It over-turned a tradition based on the exclusion of victims from federal proceedings, and in this regard, it was both humane and progressive. However, critics of the CVRA point to many years of tradition and hold to a more conservative jurisprudence. In setting out the CVRA in historical and legal terms, the arguments for, and against, the extension of victims' rights in proceedings are shown in sharp relief. The CVRA came at the end of a long battle for the promotion of victims' rights in terms of giving victims greater access to the criminal justice process and, notably, in terms of increased involvement in plea bargaining and sentencing. This battle began in earnest in the 1980s and continued throughout the 1990s and 2000s and initially it was characterised by the passing of amendments to statutes. However, after 1996 and the failure to pass the *Federal Victim's Rights Amendment*, the advocates of extending rights to victims sought to gain support for a more broadly focused Bill. In effect the guerrilla war being fought in terms of securing

11 Doak, J. (2008) *Victim's Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. Hart Publishing: Oxford; Wemmers, J.-A. (2012) 'Victim's Rights Are Human Rights: The Importance of Recognizing Victims as Persons', *Temida*, June. pp. 71–84.

12 Wemmers, J.-A. (2012) 'Victim's Rights Are Human Rights: The Importance of Recognizing Victims as Persons', *Temida*, June. pp. 71–84.

a plethora of amendments was set aside for the greater goal of securing victims' rights in a single Bill. The *Crime Victims' Rights Act* was always intended as a major piece of legislation to be enacted as the basis for a totally new conception of how to address the rights of victims in federal cases. The *Crime Victims' Rights Act* was passed in 2004 to guarantee victims a series of rights in federal criminal court proceedings. Specifically it sets out eight rights. These are: (a) the right to be reasonably protected from the accused; (b) the right to reasonable, accurate, and timely notice of any public court proceeding, or of any parole proceeding, involving the crime or any release or escape of the accused; (c) the right not to be excluded from any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (d) the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (e) the reasonable right to confer with the attorney for the Government in the case; (f) the right to full and timely restitution as provided in law; (g) the right to proceedings free from unreasonable delay; (h) the right to be treated with fairness and with respect for the victim's dignity and privacy.[13] In practical terms it prioritised the right of victims to be heard in relation to plea bargaining and sentencing and, for the first time, it allowed those victims who believed their rights to have been violated to have recourse to review in the appellate courts.[14]

However, almost immediately the CVRA came into force, the rights newly granted to victims of crime came under sustained attack on both procedural and substantive legal grounds. Critics of the CVRA have made a series of points against the CVRA but the substantive point is that to award victims of crime ordinary appellate review in cases where their rights are denied would not only jeopardise the typical discretion prosecutors have in criminal cases but such a development can actually 'threaten the fair and just adjudication of a criminal case'.[15] The CVRA was conceived to completely redraw the criminal justice process vis-à-vis the participatory rights of victims. The attack mounted by critics upon the CVRA was broadly formulated and it was couched in terms of a conservative view that saw it as overturning the historical rights in and practices of the American federal system and the notion of the public good that it embodies. The CVRA became the site of a politico-jurisprudential battle as to the definition of the *public good*, as expressed in statute. As so often, the progressive position turns out to be the view with the best historical credentials. Victims have always played a role in the American federal court system and, indeed, they have brought private prosecutions. This was set out very well by William F. McDonald at the time of the bicentennial in

13 Crime Victims' Rights Act, §3771 (a; 1–8).
14 18 U.S.C. §3771(d) (3) (2006).
15 Levine, D. (2010) 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution', *Northwestern University Law Review*, 104. p. 361.

his classic essay 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim' in a special edition of the *American Criminal Law Review*.[16] McDonald shows how in the early American example, as in England, the victim acting as a private prosecutor, and not the state, brought prosecutions. This continued until the 1860s.[17] McDonald showed how the victim shouldered the cost of his or her attorney and had to pay for the full cost of prosecution, including the cost of having an indictment drawn up.[18] Moreover, the newly formed republic was so keen to avoid the tyranny of the colonial government that it had fought to overcome that this factor, along with cost, appealed to a nation unwilling to mount costly public prosecutions.[19] Levine points out that the role of victims was reduced after the Constitution and that thereafter the federal government took charge of prosecuting crime.[20] However, this is not entirely true and, in fact, private prosecutions carried on right up to 1875, and beyond that date. Levine simply takes the institution of a new class of prosecutor (the office of public prosecutor) as being evidence of the end of private prosecutions. This does not appear to have been the case; though, over time, the concerns of the early Republicans seemed to have been fulfilled because gradually the office of public prosecutor and the drift of subsequent legislation came to emphasise public prosecutions.[21] It was also the case that a system of private prosecutions by victims resulted in a great many cases being abandoned due to cost and other factors.[22] The persistence of private prosecutions by victims of crime, right up until the last quarter of the nineteenth century, does point to two very modern concerns: those of a lack of trust, by victims, in the prosecutorial commitment of public prosecutors (which we witness today notably in domestic violence cases[23]) and the need to have equal levels of representation with that available to defendants.[24] What can be said, with

16 McDonald, W.F. (1976) 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', *American Criminal Law Review*, 649. pp. 651–653.
17 McDonald, W.F. (1976) 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', *American Criminal Law Review*, 649. pp. 651–656.
18 McDonald, W.F. (1976) 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', *American Criminal Law Review*, 649. p. 652.
19 McDonald, W.F. (1976) 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', *American Criminal Law Review*, 649. p. 653.
20 Levine, D. (2010) 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution', *Northwestern University Law Review*, 104. pp. 339–340.
21 Ireland, R.M. (1995) 'Privately Funded Prosecution of Crime in the Nineteenth-Century United States', *American Journal of Legal History*, 39. p. 43.
22 Levine, D. (2010) 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution', *Northwestern University Law Review*, 104. pp. 335–361 (p. 338).
23 Cattaneo, L.B. and Goodman, L.A. (2010) 'Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims', *Journal of Interpersonal Violence*, 25 (3). pp. 481–502.
24 Ireland, R.M. (1995) 'Privately Funded Prosecution of Crime in the Nineteenth-Century United States', *American Journal of Legal History*, 39. pp. 43–46.

certainty, is that, after the Constitution came into effect, victims had rights in the federal justice process, but that they also could bring their own criminal prosecutions and that, over time, their role in the prosecutorial process was reduced, albeit that this took over a century.

The CVRA was not only concerned to reinstate the victim as an active agent in federal proceedings but also to develop a public policy focused on the concerns of victims. Whether or not it was good public policy to enable all victims of crime to bring prosecutions in historic times, the pressing issue is really whether it ought to do so in modern times. Many critics wanted to restrict the role of victims because they saw them as upsetting the highly technical system of prosecutions and the judge's office.[25] They have advanced an argument which sees victims of crime as a problem in the effective working of the federal court system and not as being integral to it. The treatment of victim impact statements is useful to look at in this regard. Mary Giannini noted in the *Yale Law and Policy Review*:

> The victim gains access to a forum that directly and individually acknowledges her victimhood. The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocute signals both society's recognition of victim's suffering and their importance to the criminal process.[26]

Giannini frames the situation well and outlines the usefulness of having an open and inclusive settlement for victims of crime. It was these sentiments that persuaded the Congress to pass the *Crime Victims' Rights Act*. The understanding was that in the modern world, and leaving aside the historical precedents, the whole enterprise of justice is jeopardised if victims of crime are seen to be outside that enterprise; for this reason the opponents of the *Crime Victims' Rights Act* were seen to lose the argument on legal, moral and public policy grounds. The victory gained in securing, and protecting, victims' rights in federal and state criminal prosecutions is now widely seen as part of the *public good*. It seems unlikely now that these progressive developments will be lost because they seem part of a tide of history (following the Civil Rights era) and the voices massed against them seem shrill, perhaps even a little inhumane.

25 Levine, D. (2010) 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution', *Northwestern University Law Review*, 104. p. 361.

26 Giannini, M.M. (2008) 'Equal Rights for Equal Rites? Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act', *Yale Law and Policy Review*, 26. pp. 431–452.

Private prosecutions in England and Wales today

In *R (on the application of Gujra) v Crown Prosecution Service*[27] the Supreme Court held that the right of an individual to institute a private prosecution had been affirmed by Parliament in section 6, Prosecution of Offences Act 1985. However, the court also noted that this procedure was subject to the statutory duty of the Director of Public Prosecutions to take over certain specified prosecutions, and his power to do so in all (non-specified) prosecutions.

The policy of the Director of Public Prosecutions which prevailed in 2012, with regard to whether or not he would exercise his discretion to take over a private prosecution and then discontinue it, was that he would do so if he was of the view that the prosecution in question had 'no reasonable prospect of success'. The Supreme Court held (by a majority of 3:2) that this particular test did not frustrate the policy and objects of section 6, Prosecution of Offences Act 1985, even though the previous policy of the Directorate had been more favourable to private prosecutors. The previous policy, as to the strength of the prosecution case,[28] had been that prosecution would be taken over and discontinued if, and only if, it disclosed that the defendant would probably succeed (at the close of the prosecution case) with a submission of 'no case to answer'.[29] In the light of the new, less favourable policy, it was held that Mr Gujra was not entitled to challenge the decision of the Director of Public Prosecutions to take over (and to discontinue) a private prosecution which he had initiated.

It should be noted that corporate bodies (such as department stores prosecuting shoplifters) and charities (such as the RSPCA) are also entitled to commence private prosecutions: perhaps with less likelihood of the Director of Public Prosecutions intervening to discontinue them. The RSPCA has, however, been criticised for using some (allegedly over-zealous) private prosecutions as a way of raising funds, both from the costs awarded against defendants by the courts and from additional donations which the publicity of such cases might stimulate from the public.[30]

In Scopelight Ltd and others v Chief Constable of Police for Northumbria and another, the Court of Appeal Civil Division considered the use of police powers to seize and retain evidence when a private prosecution was in the offing.[31] The court held that the decision of the Crown Prosecution Service not

27 [2012] UKSC 52; [2013] 1 All ER 612.

28 The DPP can, of course, take over and discontinue a private prosecution on other grounds, e.g. public interest grounds.

29 A result commonly known by criminal lawyers as getting the case thrown out 'at half time'.

30 See, for example, 'RSPCA Urged to Give up Prosecutions', *Daily Telegraph*, 8 August 2013 and (by way of a reply) 'The Notion That We Take on Prosecutions for PR is Offensive', *Sunday Telegraph*, 11 August 2013.

31 [2009] EWCA Civ 1156; [2010] 2 All ER 431.

to prosecute a defendant would not conclusively determine that a prosecution was against the public interest. It was therefore lawful for the police to retain property (under s.22, Police and Criminal Evidence Act 1984) if that property was relevant to a private prosecution, or to any defence to such a prosecution. The court held that the reasons of the Crown Prosecution Service for not bringing a prosecution would be a relevant consideration, as also would be the identity and motive of the potential prosecutor and the gravity, or otherwise, of the charge.

The quality of victim participation rights

In 1977 Nils Christie opened up a discussion on the participation of the victims of crime and a more victim-focused justice system.[32] The issue Christie highlighted was the type and form of participation required in the criminal justice system and not participation per se. This is an important point because though human rights (and rights in general) tend to derive from a grand political and jurisprudential narrative, in practice these values are often too broadly conceived to furnish a practical guide to their precise implementation. Moreover, though there may be a level of agreement as to the *fact* of victim involvement in the criminal justice system; nonetheless the *quality* of it may be a contentious issue. For example, because not all persons are like-situated this must hold also true for the victims of crime. It is not appropriate to treat all victims of crime in the same way and to ignore their differing psychological attributes and needs.[33] Herman has shown how victim involvement in the criminal justice system often only serves to compound and extend the anguish felt by victims of crime, notably females.[34] Although victims of crime have gained increased rights of participation, it remains the case that those rights are also still controlled through the criminal justice system. The victims of crime are often made to tell, and re-tell, their accounts at the behest of the prosecutors and counsel for the defendants and this can be seen not in terms of participation, but as a form of victimisation and re-victimisation.[35]

On the other side of the ledger, victim participation (rights) may be said to affect sentences and the granting or denial of parole.[36] The victim impact

32 Christie, N. (1977) 'Conflicts as Property', *The British Journal of Criminology*, 17. pp. 1–15.

33 Herman, S. and Wasserman, C. (2001) 'A Role for Victims in Offender Re-entry', *Crime & Delinquency*, 47. pp. 428–445.

34 Herman, J. (2005) 'Justice from the Victim's Perspective', *Violence Against Women*, 11. pp. 571–602.

35 Moriarty, L. (2005) 'Victim Participation at Parole Hearings: Balancing Victim, Offender, and Public Interest', *Criminology and Public Policy*, 4. pp. 385–390.

36 Morgan, K. and Smith, B. (2005) 'Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings', *Criminology & Public Policy*, 4. pp. 333–360.

statement, it could be argued, brings into play questions of fairness towards defendants. It may be argued it is too emotional a document and that it may well depart from fact.[37] Moreover, it has been argued that the primary issue for criminal justice is that of the seriousness of crime and not the impact it has on victims: that serious crime is treated more seriously and less serious crimes be treated less seriously, and that to depart from this maxim because of the impact on one or more results in judicial unfairness. This view was formulated best by von Hirsch.[38] The issue becomes one of balancing competing claims and competing rights and of trying to accommodate victims while also doing justice to defendants. This is a question of the extent to which victims are involved, by right, in criminal proceedings.[39] Ashworth has argued: 'the right to submit a victim impact statement may be high in profile but low in improving genuine respect for victims'.[40] The point Ashworth makes is profound: the exercise of a victim's right (in this case, the right to make an impact statement) need not necessarily improve the quality of justice or a respect for the victims. Therefore, advocates of increased victims' rights may be correct in extending the level of rights afforded to victims but they cannot necessarily hold that this will be 'subsumed under the general public interest'.[41] The role, and quality, of victim participation, including its extent, is a site of contestation within the criminal justice system. The state must surely consider the role of crime victims but it also necessarily has far broader concerns about the nature of justice: and that extends beyond victims to include offenders and the immediate and wider community. So we see that the victim's rights can never be straightforward. The calls to extend the role of victims in the criminal justice system are always *political* in that they are also about a particular conception of justice just as much as calls to restrict the role of victims are.

Victimology: or how to *understand* the victim within Criminology

The academic study of victims, *victimology*, has come in for a lot of criticism in the UK. Paul Rock called it a 'lunatic fringe'[42] and Elizabeth Burney

37 Reeves, H. and Mulley, K. (2000) 'The New Status of Victims in the UK: Opportunities and Threats' in A. Crawford and J. Goodey (eds) *Integrating a Victim Perspective within Criminal Justice*. Ashgate Publishing: Farnham.
38 von Hirsch, A. (1993) *Censure and Sanctions*. Clarendon Press: Oxford.
39 Marquart, J. (2005) 'Bringing Victims In, But How Far?' *Criminology and Public Policy*, 4. pp. 329–332.
40 Ashworth, A. (1993) 'Victim Impact Statements and Sentencing', *Criminal Law Review*. pp. 498–509 (p. 509).
41 Garland, D. (2000) 'The Culture of High Crime Societies', *British Journal of Criminology*, 40 (3). p. 357.
42 Rock, P. (2002) 'On Becoming a Victim' in C. Hoyle and R. Young (eds) *New Visions of Crime Victims*. Hart: Oxford. p. 3.

purloined Thomas Carlyle's derogatory name for Economics 'dismal science' to describe it.[43] It is generally agreed that the term 'victimology' arose after the Second World War, initially at an academic conference in Bucharest in 1947, and in print in 1949, when the term was used by Frederick Wertham.[44] Wertham looked at the vulnerability of victims, notably victims of murder. He argued that whilst murderers had been the subject of repeated academic, medical and scientific attention, the victim was largely a forgotten figure. Wertham's focus was on abnormal psychology but soon after his *The Show of Violence* was published in 1949, the subject of victims was taken up by social workers, psychiatrists and especially by criminologists. After Wertham used the term *victimology*, Hans von Hentig soon followed up and published his book *The Criminal and his Victim* in 1948, beating Wertham into print.[45] The criminological endeavour has carried on consistently since the 1950s and has been seen in a variety of writing – for example, the Left Realism movement with its concern to place the victim at the heart of criminological scholarship and its fondness for crime surveys.[46] Elias has made the point that victimology is characterised as being both heterogeneous and too narrowly focused.[47] Elias' point holds true today and, essentially, the term 'victimology', though sometimes associated with this or that group, is best understood as referring to *any* treatment that focuses upon the victim in the criminal justice system. In an attenuated way, victimology, to a greater or lesser extent, is in focusing on victims and is asserting their priority in the criminal justice system. In this way victimology may be said to be *political* because it upholds the priority of victims over and against the perpetrators of crime and even against the state and its agents. It asserts the priority of victims' rights claims over those of the perpetrators of crime: and rather than giving up on victimology as a distinct area, it is useful to distinguish several different approaches to the treatment of victims, which though heterogeneous (in Elias' terms) nonetheless have useful things to say in terms of contributing to our understanding of the criminal justice system and the competing claims of victims, and others, with regard to it.

Positivist victimology

Basia Spalek has noted that the: 'defining characteristics of positivist victimology are considered to be the discovery of factors that influence a non-random

43 Burney, E. (2003) Book Review, *Howard Journal*, 42 (4). pp. 405–406.
44 Wertham, F. (1949) *The Show of Violence*. Doubleday: New York.
45 Von Hentig, H. (1948) *The Criminal and His Victim*. Yale University Press: New Haven.
46 Young, J. (1986) 'The Failure of Criminology: The Need for a Radical Realism' in R. Matthews and J. Young (eds) *Confronting Crime*, Sage: London. pp. 4–30.
47 Elias, R. (1994) 'Paradigms and Paradoxes of Victimology' in C. Sumner, M. Israel, M. O'Donnell and R. Sarre (eds) *Collected Papers of 27th International Victimology Symposium*, Canberra. pp. 9–34.

pattern of victimisation, the examination of how victims contribute to their victimisation and a focus upon interpersonal crimes of violence'.[48] In this analysis she follows Miers.[49] The positivist approach may be said to be, broadly speaking, conservative in that it looks at crime in essentialist terms without reference to such factors as gender, race or class or other 'relationships of power'.[50] It typically looks for statistical patterns of victimisation without being critical of the conditions that gave rise to the data. Moreover, this type of reasoning hides a plethora of assumptions about the nature of victims, to say nothing about issues of policing or the system of reporting crime or community relations; and nothing about the socio-economic basis of victimisation itself. The issue of the patterning of criminal victimisation by positivist victimology has long since come under attack because it can often amount to blaming the victim for their victimisation. Spalek has put the positivist case well:

> Individuals whose lifestyles increase their likelihood of victimisation can be monitored and suggestions can be given on how to reduce their likelihood of falling victims to crime. Critics have argued that crime prevention strategies emerging out of the notion of repeat victimisation do not address the wider structural processes that influence victimisation, holding victims responsible for their plight ... the method advocated does not blame the victim but rather attempts to induce lifestyle changes so as to reduce the likelihood of being victimised. Similar to heart attack victims being encouraged to stop smoking or lose weight, crime victims can be encouraged to reduce their risks of being re-victimised.[51]

It is not that the positivist case is completely wrong; it is more a case that it offers a reductive and non-problematic treatment of the victim, which seems theoretically inadequate. The task of addressing the bigger picture was taken up by radical victimologists unsatisfied by an account of victimisation that neglected the economic and political spheres.

Radical victimology

The sobriquet *radical* indicates, at the outset, a certain engagement with the socio-economic situation of victims. It can be dated back to the mid-1970s but

48 Spalek, B. (2006) *Crime Victims: Theory, Policy and Practice*. Macmillan: Basingstoke. pp. 33–34.
49 Miers, D. (1989) 'Positivist Victimology: A Critique. Part 1', *International Review of Victimology*, 1 (1). pp. 1–29 (p. 3).
50 Walklate, S. (2007) *Imagining the Victim of Crime*. Open University Press: Maidenhead.
51 Spalek, B. (2006) *Crime Victims: Theory, Policy and Practice*. Macmillan: Basingstoke. p. 38.

the early key text is surely Quinney's *Class, State and Crime*, of 1980, which made the case that criminologists were wrong to focus on conventional crimes alone because this merely reified the existing capitalist view of victimisation and unduly curtailed the field of study. Quinney wanted criminologists to make common purpose with victims and to show how the system of capitalist social and economic relations was the key to understanding the thing that was creating victims through its inherent injustice. It did pay attention to rights, however problematic that is within an essentially Marxist framework.[52] Elias noted that: 'A victimology which encompasses human rights would not divert attention from crime victims and their rights, but would rather explore their inextricable relationship with more universal human rights concerns.'[53] As Spalek points out, there was a notion at work which equated infringements of human rights with criminal action. The victim in this scheme is understood simply as the person who was infringed.[54] This type of reasoning at once shifted the criminal action towards the state and, in any case, exploded the conception of victim to include those affected by ecological disaster, war and those affected by breaches which would otherwise be non-criminal, such as exploited workers and those living under unfair social systems, which may well include everyone.[55] The problems here are obvious; leaving aside the numerous technical issues of terminology, political theory and jurisprudence in relation to rights, by expanding the ambit of victimhood to such an extent, thinkers like Friedrichs rendered it meaningless in most practical cases. The analysis (such as it was) immediately moved away from the tangible world of lived experience to the intangible world, i.e. the means of production, the system of capital accumulation or some such.

Left Realism, it is often claimed, sprang forth from the radical womb.[56] Its main proponents – Jock Young, Roger Matthews, John Lea, Richard Kinsey and Geoffrey Pearson – have been extensively criticised for neglecting issues of race, especially in the context of their work being almost entirely conducted in the inner city, and more especially in the London of the 1980s and 1990s.[57] They have been criticised for being insensitive to issues of gender, notably by Walklate, who made a technical point about their favoured method, the crime survey. She argued that the methodology of crime surveys fails to capture the lives of

52 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London and Los Angeles. pp. 42–43.

53 Elias, R. (1985) 'Transcending our Social Reality of Victimisation: Towards a New Victimology of Human Rights', *Victimology*, 10. pp. 6–25 (p. 17).

54 Spalek, B. (2006) *Crime Victims: Theory, Policy and Practice*. Macmillan: Basingstoke. p. 39.

55 Friedrichs, D. (1983) 'Victimology: A Consideration of the Radical Critique', *Crime and Delinquency*, 29 (1). pp. 283–293.

56 Dignan, J. (2005) *Understanding Victims and Restorative Justice*. Open University Press: Maidenhead. p. 33.

57 Sim, J., Scraton, P. and Gordon, P. (1987) 'Introduction: Crime, the State and Critical Analysis' in P. Scraton (ed.) *Law, Order and the Authoritarian State*. Open University Press: Milton Keynes. pp. 1–70.

women and how they relate their experiences as 'victims'.[58] In the same essay, 'Appreciating the Victim: Conventional, Realist or Critical Victimology?', Walklate makes the telling point that, in concentrating upon what is termed *conventional* or *street* crime, far from being *radical*, the Left Realists did not expand or seriously critique crime in the way that Elias had wanted to do. It was little more than just another form of Criminology that focused upon the crimes of the poor and weak and had little, usually nothing, to say about the crimes of the rich and powerful. Moreover, in championing the survey, the so-called Left Realists inadvertently furnished conservative, and reactionary, politics an anonymous platform, as Hough and Mayhew long ago noted in their seminal work on the British Crime Survey.[59] Left Realism declined as a force in UK Criminology; notably following Young's relationship with New Labour, which rather tarnished the brand, and its claims to radical politics.

Feminist victimology

Feminist thinking has, undoubtedly, made a huge impact upon our contemporary notions of victims and in linking victimisation to political notions of rights, equal freedom and liberty. Moreover, since feminists are interested in private, as well as public, space, they have enabled a better picture of the extent of victimisation to emerge: one that includes violence and rape in domestic settings, crimes often not reported to the police or which often go undetailed in crime surveys.[60] The key aspect of feminist victimology that relates to human rights is that of detailing the occurrence of male violence and conceiving of it in terms of broader notions of women's experience of patriarchy, which explains the everyday reality of male economic and political dominance and interpersonal violence.[61] Feminism, more generally, aims to develop a distinctive set of strategies for female resistance to patriarchy and to detail a radical view of female agency. In such a way, feminist criminologists have sought to show how women are more than victims of patriarchal domination; instead conceiving of women as organising their lives in terms of resisting and structuring their agency in terms of the threat of male violence. Female lives are understood as ones of

58 Walklate, S. (1992) 'Appreciating the Victim: Conventional, Realist or Critical Victimology?' in J. Young and R. Matthews (eds) *Issues in Realist Criminology*. Sage: London.

59 Hough, M. and Mayhew, P. (1983) *The British Crime Survey: First Report*. HMSO: London.

60 Donovan, C. and Hester, M. (2011) 'Seeking Help From the Enemy: Help-seeking Strategies of Those in Same Sex Relationships Who Have Experienced Domestic Abuse', *Child and Family Law Quarterly*, 23 (1). pp. 26–40; Westmarland, N. and Alderson, S. (2013) 'The Health, Mental Health and Well-being Benefits of Rape Crisis', *Journal of Interpersonal Violence*, 28 (17). pp. 3265–3282.

61 Dobash, R.E. and Dobash, R.P. (2009) 'Out of the Blue: Men Who Murder Intimate Partners', *Feminist Criminology*, 4 (3). pp. 194–225.

struggle against a denial of their rights to equal freedom and liberty. In this sense, feminist victimology is inevitably political and wrapped up in the cause of human rights.

A changed criminal justice landscape

Victimology in its various guises has a claim on human rights. It works with the notion that there is a power imbalance between victim and perpetrator and that the state, in the area of the criminal justice system, is necessary to make amends for a wrong, or harm, done. Moreover, victimology understands that in addressing the wrong, or harm, done a basic entitlement, or right, is being exercised. The underplaying of a victim's rights necessarily seems unjust in this regard. Work in the area of victims' rights, within the legal profession, and victimology has begun to transform the criminal law, with, for example, the institution of various sorts of victim impact statements now standard. The wealth of research into the experience of victims has undoubtedly been a spur to both political action and legal review to the extent that victim participation has become part of the day-to-day experience of the criminal justice process. There is a far greater recognition of the need for perpetrators to be held accountable to victims and that victims need to be embedded in the pre-trial, trial and post-trial processes. The police are now far more sensitive to victims than was hitherto the case.[62] At the international level, there are now measures to ensure victims are heard during proceedings and that victims are only questioned in relation to narrow criteria surrounding the proceedings.[63] Moreover, as in other areas of law covered by the European Convention on Human Rights, the development of new sorts of procedures can be understood as evidence of a consensus around such matters internationally.[64] The victim is increasingly understood in terms of harm and not culpability. The notion of harm itself is changed away from notions of the easily quantifiable towards wider notions of how the victim and their community view the seriousness of the harm done. This is especially true in the area of domestic violence where victims have themselves reconceived of the definition of harm.[65] There has been a wholesale shift in the moral world we all inhabit around notions of fault, harm and responsibility.[66] The victim is increasingly involved in his or her own experience of the criminal justice system and it is unlikely we shall ever return to a criminal justice system where victims were rarely seen and hardly ever heard.

62 Hough, M., Jackson, J., Bradford, B., Myhill, A. and Quinton, P. (2010) 'Procedural Justice, Trust and Institutional Legitimacy', *Policing*, 4 (3). pp. 203–210.
63 Notably Article 3, EU Framework Decision relating to victim participation.
64 Volger, R. (2005) *A World View of Criminal Justice*. Ashgate: Aldershot.
65 Dobash, R.E. and Dobash, R.P. (1992) *Women, Violence and Social Change*. Routledge: London.
66 Von Hirsch, A. and Simester, A.P. (2011) *Crimes, Harms and Wrongs*. Hart Publishing: Oxford. pp. 10–11.

Chapter 7

Terrorism

Terror and its implications for human rights

Introduction

The existence of terrorist activity is, perhaps, the greatest challenge to our system of legally embedded human rights and, more generally, liberal political governance. The issues for our purposes are related to the reaction of states to the existence of terrorism and how that affects citizens. Therefore, the problem is one of juggling competing claims of security, fairness and proportionality in the *counter*-terrorism response. Governments faced with the threat of terrorist atrocities may, in addressing the needs of security, nonetheless enact measures that undermine personal liberty and restrict the human rights of citizens. This need to balance the competing demands of security and liberty has exercised both the courts and academics working in this area, notably Gearty and Zedner.[1] This need to balance competing claims is unavoidable in one sense but also fallacious in another, since democracies are characterised by a commitment to values of openness, freedom and human rights and those cannot simply be traded off against the value of security. So typically governments argue as to what are the least invasive actions that they can take to address terrorism and still maintain openness, freedom and human rights. However, the tension between the values of openness, freedom and human rights and the demands of security is a perennial one. Hans-Jorg Albrecht noted that: 'In the rearrangement of the balance between the principles of security and human rights … security is undoubtedly ascendant.'[2] David Garland has written about the political manipulation of this process in terms of how the public authorities define what elements are placed 'up' or 'down the policing agenda'.[3]

1 Zedner, L. (2007) 'Pre-Crime and Post-Criminology?', *Theoretical Criminology*, 11 (2). pp. 261–281; Gearty, C. (2006) *Can Human Rights Survive?* CUP: Cambridge.

2 Albrecht, H.-J. (1999) 'Die Determinanten Der Sexualstrafrechtsreform', *Zeitschrift Fur Die Gesamte Strafrechtswissenschaft*, 111. pp. 863–888 (p. 876).

3 Garland, D. (2001) *The Culture of Control: Crime and Social Order in Contemporary Society.* OUP: Oxford.

The human rights most contemporary theorists are defending are generally Kantian in nature and it can hardly be a coincidence that Kant's writings roughly correspond with early notions concerning human rights expressed in the American and French Revolutions, later embodied in statute, which sought to prioritise the concept of human dignity. A human dignity most pithily stated in the Categorical Imperative: 'act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means'.[4] The corollary of dignity is respect and likewise Kant, in the *Metaphysics of Morals*, maintains that 'every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other'.[5] Kant specifically links this to the notion of rights, famously stating: 'Do not let others tread with impunity on your rights.'[6] This human worth, or value, is the basis of our system of rights. However, though it is easily argued other views about human dignity are compatible with the Universal Declaration, it is the Kantian conception that roots it to a foundation in human dignity. Moreover, he expresses, what we might term, a modern natural law view that our equal natural right to liberty (and possessions) cannot be fully realised in a state of nature, but requires a state to secure the benefits of law. Kant's political insight is liberal. In Kant states are only just when they align themselves with natural law tenets of equal freedom and dignity: and those tenets need to be expressed by republican government. At the international level, Kant argues for the same natural law principle of equal freedom. As Charvet and Kaczynska-Nay have noted: 'Kant is internationally a liberal universalist who seeks to arrive at the goal of a universal liberal international society through the progressive but voluntary expansion of the republican core.'[7]

One of the biggest threats modern theories of human rights face is from a form of reasoning which we might call the *lesser evil thesis*, to take up Michael Ignatieff's phrase.[8] It is a phrase that unfortunately, and unhelpfully, reintroduces metaphysical language into the practical and secular discourse of rights; not least because such an ethically unsound use of terminology surely cannot be a basis on which to determine legal right. Conor Gearty has attacked Ignatieff's view in the clearest possible terms and is, arguably, his most outspoken critic. Gearty has argued that:

4 Kant, I. (1981; 1785) *Grounding for the Metaphysics of Morals*. Translated by J. Ellington. Hackett Publishing: Indianapolis. p. 429.
5 Kant, I. (1981; 1785) *Grounding for the Metaphysics of Morals*. Translated by J. Ellington. Hackett Publishing: Indianapolis. p. 462.
6 Kant, I. (1981; 1785) *Grounding for the Metaphysics of Morals*. Translated by J. Ellington. Hackett Publishing: Indianapolis. p. 436.
7 Charvet, J. and Kaczynska-Nay, E. (2008) *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*. CUP: Cambridge. p. 71.
8 Ignatieff, M. (2004) *The Lesser Evil. Political Ethics in an Age of Terror*. Edinburgh University Press: Edinburgh.

> The answer is supplied not from within human rights law as such but from within a more general discourse of human rights, one that emphasizes a morality of the lesser evil. In its clearest and most coherent form, this approach asserts that the danger facing our democracies and our culture of human rights is so great, so evil that we are entitled, indeed morally obliged, to fight back. In defending ourselves in this way it may well be that we ourselves have to commit evil acts, to commit harms that run counter to our fundamental principles, but that these actions are nevertheless justified, both as necessary (to save ourselves) and as less evil than what our opponents do (both because we try to ensure our actions are less bad and because we still believe in accountability and legality while our opponents do not).[9]

Gearty's words perfectly capture the way in which a liberal state can undermine its own ethical legitimacy through enacting measures that bring forth problems, if not *evils*, of their own. If we follow Gearty, then the important thing to note is that human rights are attributed to individuals and are essentially liberal in character. The defence of territory (of homeland security and the nation) is a more collective endeavour. The human rights advocate must uphold the individual against the mores of the state, or other collective agents, whereas those who stand by the rights of territory tend to defend whole political systems. For the human rights advocate, there is no good or evil, only individual rights to be upheld; and these do not relate to particular geographical spaces because they are universal. So whereas those voices that argue for 'war on terror' and for 'fighting evil' are vociferous in advocating the diminution of personal liberty and restrictions on rights, movements and residency, in pursuit of a greater operational goal, the human rights advocate can only return, time and again, to legal and moral principles that uphold desert criteria, proportionality and fair treatment. The calmer voices of human rights advocates were there after the 9/11 attack on the World Trade Center and again after the 7/7 bombings in London as more siren voices were calling for exemplary sentences, preventive detention, the rights of suspects and racial profiling. What we have observed, notably following the Al-Qaeda attack on the World Trade Center, is the development of a censorious language of security that has sought to focus upon risk and public safety. This talk of security gained wide support both in government circles and in the media and it was a direct threat to notions of human rights and civil liberties, whose own discourse is concerned not with security so much as the protection of citizens against the power of the state. Human rights discourse is implicitly anti-majoritarian and this too marked a point of difference with those advocates of security who tend towards the defence of territory and

9 Gearty, G. (2007) 'Terrorism and Human Rights', *Government and Opposition*, 42 (3). pp. 340–362.

collective defence.[10] In the last fifteen years, we have seen typical sentencing tariffs rise, terms of imprisonment have considerably lengthened and changes in statutes have allowed a broadening of criminal charges: these are censorious times. The state prosecuting authorities increasingly use *security* as the rationale for pursuing suspects and in so doing they have often lessened the restraints upon themselves imposed by the Common Law. This is most commonly seen in relation to terrorism, though a similar pattern is observed in relation to sexual abuse cases, organised crime and immigration. The prosecuting authorities have increasingly come to rely on the notion of *seriousness* (synonymous with terrorism) to loosen the safeguards built into the criminal justice system, notably around the protection usually given to suspects. At the same time as this shift towards a *risk-security-seriousness paradigm* there has been increased use of surveillance, CCTV, and these are sometimes at odds with the notion of respect for a private life, as exemplified in Article 8 of the European Convention on Human Rights and Fundamental Freedoms. However, as Zedner has pointed out:

> everything can be monitored and recorded at little cost; it is no longer necessary to make resource-led choices about what or who to look at. Mass surveillance is attractive as a tool of security because it dispenses with the need to set priorities in advance.[11]

Of course, those advancing a *risk-security-seriousness paradigm* often argue that human rights are themselves a risk to the safety of civil society.[12] In recent years we have seen that the prosecuting authorities across the globe have secured a complete overhaul of the rules on the admissibility of evidence. In the UK this has often been in conflict with the notion of a right to a private life, as outlined in Article 8, and the right to a fair trial, as outlined in Article 6. It has been argued that: 'It is difficult to justify the move away from the Anglo-American principle that a defendant does not come to a criminal court to answer for his entire past life.'[13]

The idea of security as a basic right

Henry Shue long ago argued that security was a basic right. His aim was to establish that rights, as such, are only secured once certain *basic rights* are in place. Rights are basic 'only if enjoyment of them is essential to the enjoyment

10 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London and Los Angeles. p. 37.
11 Zedner, L. (2009) *Security*. Routledge: Abingdon. p. 75.
12 Beck, U. (2002) 'The Terrorist Threat: World Risk Revisited', *Theory, Culture and Society*, 19 (4). pp. 39–55.
13 Amatrudo, A. (2009) *Criminology and Political Theory*. Sage: London and Los Angeles. p. 37.

of all other rights' and where 'any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating'.[14] This rationale was used by Shue to argue that security must be such a basic right since: 'no one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right'.[15] Moreover, he states that without the guarantee of security a person is open to coercion which 'through the threats of the deprivation of one or other credible threats can paralyse a person and prevent the exercise of any other right'.[16] What Shue tries to establish is termed a negative right of the type which requires others to show restraint. There is a tradition of this type of thinking as between positive and negative rights within political theory, typified by the late Maurice Cranston, writing at the LSE in the 1960s.[17] The other side of Shue's argument relates to basic subsistence where he argues: 'No one can fully if at all enjoy any right if he or she lacks the essentials for a reasonably healthy and active life.'[18] Shue was writing in 1980 but the notion of security as a basic right has been brought into sharp relief by the attacks on the USA on 11 September 2001. In the post 9/11 era, Shue has become an important theorist at a time when many have sought to argue that civil liberties must be curtailed and that state authority to act decisively be enhanced as our existing rights-based claims and procedures are restricted for the sake of security. Shue understands security as a *basic* right for all and since it is a basic right it cannot be curtailed, under his scheme, since denying a right, in this case personal security, in a single case for the benefit of *alleged* others is repudiated in his (anti-Utilitarian) model. Shue's reputation is quite complex, however, since he also penned an important article which could be said to support the sorts of post 9/11 tactics used by the Bush regime.[19] The problem is that legal and political theory has not hitherto furnished us with a rigorous technical account of the nature and extent of security. Shue had in mind personal security i.e. the security of the person, as opposed to those arguments, following 9/11, which are more focused upon the existential threat to territory and national security.[20] The

14 Shue, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*. Princeton University Press: Princeton, NJ. p. 19.
15 Shue, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*. Princeton University Press: Princeton, NJ. p. 21.
16 Shue, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*. Princeton University Press: Princeton, NJ. p. 26.
17 Cranston, M. (1967) 'Human Rights, Real and Supposed' in D.D. Raphael (ed.) *Political Theory and the Rights of Man*. Macmillan: London. pp. 43–54.
18 Shue, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*. Princeton University Press: Princeton, NJ. p. 24.
19 Shue, H. (1978) 'Torture', *Philosophy and Public Affairs*, 7 (2). pp. 124–143.
20 Shue, H. (1980) *Basic Rights: Subsistence, Affluence and US Foreign Policy*. Princeton University Press: Princeton, NJ. p. 168.

issues of personal and national security arise naturally together because they are inextricably entwined in the post 9/11 era. Waldron has pointed this out by relating that:

> True, we might provide security for each individual right-bearer by assigning him a personal bodyguard. But a more efficient and probably a more effective means is to use police forces to ensure a secure environment for everyone. This sort of provision treats security as something like a public good. And under a regime of this kind, individuals benefit from security (in the enjoyment of their rights) not because their own particular security is attended to on a focused one-by-one basis but because threats to security in general are removed or reduced by less personalized means.[21]

This is precisely what Raz had previously argued in *The Morality of Freedom* when he stated that rights may require the pre-existence of public goods. Waldron echoed this later.[22] Following 9/11, we might be said to have a situation where all citizens are directly threatened by a form of terrorism they cannot possibly counter individually. Therefore, the community, at the level of the state, has no choice but to put in place measures to counter such threats to the security of citizens. Whatever one makes of security in the 9/11 age, what is undeniable is that, following Shue, we are discussing our modern polity in terms of the notion of a basic right to our security: personal, national, existential.

Balancing counter-terrorism with human rights

Let us frame our discussions in terms of the relationship between human rights, terrorism and the demands of security. The issues that face citizens in terms of human rights infringements spring mainly from counter-terrorist measures, rather than directly from terrorism, as such, which is a more existential threat. It is worth quoting McCulloch and Pickering here:

> The imperative to prevent terrorist attacks has accelerated and consolidated a long established trend towards anticipating risks or threats and pursuing security in criminal justice. Counter-terrorism advances a 'pre-crime' logic aimed at pre-empting latent threats. Countering terrorism is uniquely suited to a shift to pre-crime frameworks because the term 'terrorism' itself is pre-emptive, existing prior to and beyond any formal

21 Waldron, J. (2009) 'Security as a Basic Right (After 9/11)' in C.R. Beitz and R.E. Goodin (eds) *Global Basic Rights*. OUP: Oxford. p. 213.

22 Waldron, J. (2009) 'Security as a Basic Right (After 9/11)' in C.R. Beitz and R.E. Goodin (eds) *Global Basic Rights*. OUP: Oxford. p. 214; Raz, J. (1986) *The Morality of Freedom*. Clarendon Press: Oxford. pp. 198–207.

> verdict. Terrorism is a label that arises primarily in the arena of politics rather than the courts.... Another key tension is between transparent justice, realized through the presentation of evidence at trial, and covert action designed to disrupt. Counter-terrorism is simultaneously a highly visible public spectacle and a highly secretive and broadly unaccountable function of the state. The rationale for integrating national security into criminal justice and preventing terrorism through pre-crime measures is that the human costs of terrorist incidents are so high that the traditional post-crime due process protection is unreasonable or unaffordable. On this basis, a whole raft of new laws has been passed, which aim to pre-empt harmful acts and manage the risk of terrorism through disruption, restriction and incapacitation.[23]

The underlying existing international legal framework of cooperation against terrorism prioritises deterrence and retribution. We have already noted that the fear of terrorism has led governments around the world to curtail the civil liberties and human rights of citizens; although domestic policing measures and international police cooperation remain the main tools against terrorism. Recent calls for security have often taken precedence over the citizen's right to go about their business unhindered by the state. There is an on-going tussle between the state's duty of protection and the rights of the citizen. The human rights agenda is essentially a legalistic one, albeit one backed by a particular liberal moral and political agenda, and it seeks to support the vulnerable in the face of those advocating a *risk-security-seriousness paradigm*, notably after the Al-Qaeda attack on the World Trade Center in 2001. Human rights are concerned to restrain the state's response to terrorism. At a time when there is talk of a 'war on terror', the rhetorical advantage seems to be with the powerful.[24] The events of 11 September 2001 altered nothing in terms of the principles of human rights, but a number of alterations to state practice were ushered in and here one should note a substantive difference.

Derogation and confusion

There has been a whole-scale reconceptualisation concerning what counter-terrorism consists of by the public authorities in a period of 'war on terror'. It is now typically understood as a form of armed conflict. In such a way, the usual protections of human rights and international criminal law have been replaced by a plethora of rules and regulations which are drafted so as to be more ambiguous than the law pertaining prior to 11 September 2001.

23 McCulloch, J. and Pickering, S. (2009) 'Pre-crime and Counter-terrorism', *British Journal of Criminology*, 49. pp. 628–645.

24 Amis, M. (2008) *The Second Plane*. Jonathan Cape: London.

We have seen a great deal of derogation from international treaties and conventions, which enshrine humanitarian principles of law, and in the case of the United States this has amounted to a policy of USA exceptionalism. In the European case, the European Convention on Human Rights states in Article 15 that:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The central issue with derogation is that it undermines the integrity of the entire package of rights. In derogating, states are effectively withdrawing from a system of human rights, in any given area of derogation. Moreover, the contemporary system of human rights has been developed to be a restraint upon states in the lives of citizens. Derogation puts into jeopardy the core set of rights and values that are beholden of any legitimate democratic and legitimate polity. It is worth noting also that recent derogations have been accompanied by a sustained attack by the United States against the International Criminal Court and the marginalisation of human rights bodies, notably in the area of counter-terrorism. This has been most noticeable in relation to detention and right to fair trial. The rules around detention of suspects have, arguably, given rise to the greatest amount of controversy in relation to breaches of convention and derogation from agreed norms. The use of administrative detention is hardly new but as in Argentina, Kenya and Northern Ireland, with internment in 1971 as part of Operation Demetrius,[25] and elsewhere it is generally associated with breaches of human rights practice. Of course, the rhetoric of the 'war on terror' is uttered whenever derogation is required in the areas of detention without trial and access to a fair trial. This war-like rhetoric of preventive detention, though ostensibly about combating terrorism in a state of emergency, does, of course, amount to a wholesale withdrawal from individualised treatment in the criminal justice system and displaces the typical safeguards demanded by jurisprudence.

The detainees at Guantanamo Bay and the 'enemy combatants' held in Afghanistan and elsewhere are held without charge, with no hope of trial and without the help of legal counsel or family members.[26] We have seen terrorist suspects taken from around the world and transported to secret detention centres. The USA government has denied these suspects are prisoners of war whose treatment is closely regulated by the 3rd Geneva Convention: nor are they deemed to be interned

25 McCleery, M.J. (2012) 'Debunking the Myths of Operation Demetrius: The Introduction of Internment in Northern Ireland in 1971', *Irish Political Studies*, 27 (3). pp. 411–430.

26 Donohue, L.K. (2008) *The Costs of Counterterrorism: Power, Politics and Liberty.* CUP: Cambridge.

civilians, which would grant them the protection of the 4th Geneva Convention. They are not allowed to be heard before a competent tribunal and therefore the regulation and treatment of these suspects is governed not by jurisprudential principle but by an executive policy that can only be described as discretionary, if not arbitrary. Moreover, none of these suspects has been tried for violations of humanitarian law which could, at least, determine their status as terrorists. The entire process of dealing with these suspects is carried out under a regime of executive discretion whose modus operandi is opaque and not subject to any legal oversight. Of course, there may be a need to incapacitate both combatants and civilians during military engagement and this is long since recognised in both domestic and international legal statute – for example, the 4th Geneva Convention allows, under Article 43, for persons to have routine and periodic hearings to determine the need for their continued detention. The jurisprudence of derogation is clear that judicial oversight of detainees is always essential. What has happened with the 'war on terror' (*security-seriousness paradigm*) is that war-like rhetoric has left detainees without the normal protections of the Geneva Convention. In short, the 'war on terror' has undermined the normal conventions of international humanitarian law and left detainees in a sort of legal limbo. This is a concern when basic international human rights law is supposed to guarantee a baseline for treatment whatever the situation. The wilful neglect of human rights by governments in this area (notably by the USA) is very concerning.

What military analysts call pre-emptive action in the form of drone strikes and so-called 'targeted' assassinations were instituted in a way not seen since the Vietnam War.[27] The underlying narrative seems to be that we now live in altered times. The 'war on terror' is different in a plethora of ways from conventional warfare. The 'war on terror' seems to be what President Eisenhower had in mind when he spoke in 1961 of a military-industrial complex.[28] The measurement of success seems to be largely measured in terms of asset seizures through banking transaction monitoring, intercepted electronic communications and general surveillance, all of which seem to be indebted to a handful of large technology companies. The overall success of the 'war on terror' is understood by the lack of attacks. There is widespread support for the notion that there might be terrorists, ordinary-looking folk, in deep cover and so even when there are no attacks the paranoia is ratcheted up. There is what we might term a terrifying peace. The end of this situation, moreover, can only be determined by governments who will decide this on the basis of evidence we will never see and on criteria we will never know.

The issue with derogation in this area is that, though the criteria for it in emergencies in terms of the threat to the nation apply in all cases (i.e. during times of

27 Andrade, D. (1990) *Ashes to Ashes: the Phoenix Program and the Vietnam War*. Lexington Books: Maryland.

28 Hossein-Zadeh, I. (2006) *The Political Economy of US Militarism*. Palgrave Macmillan: Basingstoke.

peace or war), the primary jurisprudence for the United Nations and other bodies, and NGOs, addressing human rights issues relates to internal conflicts (such as civil war); whereas in the modern example in the case of the 'war on terror' the issue is of *international* armed conflict. This problem has forced bodies working in the area of international human rights to completely re-think their approaches to the notion of emergency; and not to just take emergency as a straightforward matter of the determination of states. Here examples might be the duration, and intensity, required for an emergency to be legally instituted and the precise circumstances, and processes, relating to how suspects may be either tried by the courts, including military courts, or deemed to be 'enemy combatants' and dealt with in other ways. What is clear is that following the 'war on terror' there has been a lot of questioning as to the form of derogation standards in the field of human rights. The issue of proportionality is in question when the suspects are alleged to be involved in acts of mass destruction. However, when the issue is an extended detention *in communicado*, then the matter is not open to derogation and this is the case, similarly, where the treatment of non-citizens is in conflict with foundational norms of fairness and is discriminatory.

Neglecting to respect human rights in the 'war on terror'

The whole purpose of human rights is that they are a universal standard for all people and yet international human rights practice has not always been successful in ensuring that they are duly instituted or that international state activity is curtailed in relation to warfare or a state of emergency. Moreover, when action is taken by military, policing or government agency staff in relation to suspected terrorist activity (notably in cases of extra-territorial conflict), it is likely that either human rights or legal conventions have been violated. However, Theodor Meron (President of the International Criminal Tribunal for the former Yugoslavia) has looked at this issue in relation to American intervention, ostensibly on human rights grounds, in Haiti during 1994 and 1995. He has written that:

> In view of the objects and purposes of human rights treatises, there is no *a priori* reason to limit a state's obligations to respect human rights to its own territory. Where agents of the state, whether military of civilian exercise power and authority (jurisdiction or de facto jurisdiction) over persons or national territory, the presumption should be that the state's obligations to respect the pertinent human rights continues. The presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise.[29]

29 Meron, T. (1995) 'Extraterritoriality of Human Rights Treatises', *The American Journal of International Law*, 89 (1). pp. 78–82 (pp. 80–81).

The point he is making remains, that there is inadequate legal authority, by way of settled jurisprudence, to determine exactly when extraterritorial action by military or civil actors does or does not trigger the implementation or otherwise of settled human rights obligations. However, as Monshipouri has shown, the case is worse in relation to Guantanamo Bay where a state actually institutes an entirely new off-shore detention site for the interrogation of 'enemy combatants' who are held indefinitely without charge and whose limited legal counsel has only latterly been instituted.[30]

Securitised migration

One area of human rights law which is inadequately addressed is what is technically termed 'the non-discrimination norm' and, more particularly, the way in which it is applied, or not, to non-citizens. The philosopher James Griffin has pointed out the 'relativity and ethnocentricity of human rights' in the modern world and jurists need to be aware of it.[31] Indeed one of the things that unites the plethora of measures ushered in by the 'war on terror' following the attack on the World Trade Center is the targeting of non-citizens. This is simply because the targeting has been around religious affiliation and ethnic origin. However, existing human rights law does not outlaw all distinctions between citizens and non-citizens. It is allowable but only where the distinction has an objective rationale. The International Covenant on Civil and Political Rights sets the status of non-citizens in international legal practice. It states that rights must be afforded equally to citizens and non-citizens though also allow that a distinction can be upheld between citizens and non-citizens in the cases of national security or where public disorder is a concern for the authorities. The traditional legal settlement is that in times of wartime enemy aliens may be subjected to statutory control and, notably, in the Second World War many tens of thousands of people were interned on this basis. This rationale, however, makes little sense when dealing with a non-state actor such as Al-Qaeda. Here it is important to delineate issues which relate directly to the operation of the criminal justice system from immigration control: the former dealing with matters of prosecution and incarceration and the latter dealing with matters of entry to a given country and deportation. The right to a fair trial may not be denied to non-citizens in a selective manner as this would breach existing derogation standards. The right to a fair trial is *primitive* in terms of both human rights theory and jurisprudence: moreover, to breach the fair trial standard would be to

30 Monshipouri, M. (2012) *Terrorism, Security and Human Rights: Harnessing the Rule of Law*. Lynne Rienner: London. pp. 171–198.

31 Griffin, J. (2008) *On Human Rights*. OUP: Oxford. pp. 129–145.

undermine proportionality conditions, as Croquet has argued.[32] The war commissions and tribunals set up in the wake of the bombing of the World Trade Center on the basis of an emerging 'war on terror' strategy are therefore based on shaky jurisprudence. What is certain is that derogation norms stipulate that all forms of detention must be subject to judicial oversight and supervision (if not control) and that non-citizens may not be detained without reference to norms of discrimination and proportionality, neither of which are open to derogation.[33]

The situation of non-citizens in relation to migration practice and oversight is more complex than the *primitive* statement on fair trial. In the case of migration, it is *primitive* that there is a distinction between citizens and non-citizens. Moreover, states make such distinctions routinely and as a matter of course.[34] This discrepancy between the rationale for conditions for a fair trial and rationale for migration policy has undoubtedly been exploited in the 'war on terror' and we have witnessed arrests, deportations and targeting on the grounds of race and ethnicity of individuals in a wide variety of cases, unrelated to the issue of terrorist activity. Often the authorities have simply used the migration route to deal with those suspected of terrorist offences through expulsion on migration grounds, and in some cases this has involved what is termed 'extraordinary rendition'.[35] The use of domestic migration policy to combat terrorism is an obvious concern for jurists and it opens the door to abuse in relation to legitimate asylum-seekers and refugees fleeing oppression. In effect the migration system has been 'securitised' in terms of the broader 'war on terror' strategy. The notion that migration has been securitised in both the USA and in Europe is widely attested to in the academic literature on migration, notably by Diez and Squire.[36] This is a major problem since terrorism is not a matter of migration policy and surely deportation would be no solution even it was. The issue of terrorism has proven a useful cloak to mask more profound (and domestic) exclusionary policies based on race and ethnicity.[37] Even before the attack on the World Trade Center, there was a linkage, at

32 Croquet, N. (2011) 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights Jurisprudence?', *Human Rights Law Review*, 11 (1). pp. 91–131.

33 See the judgement in *Al-Nashif v Bulgaria*. ECtHR Judgement, June 2002 50963/99; Article 13 of the European Court of Human Rights notes that: 'National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.'

34 Rodriguez, C. (2008) 'The Significance of the Local in Immigration Regulation', *Michigan Law Review*, 106. pp. 567–642.

35 Massineo, F. (2009) 'Extraordinary Renditions', *Journal of International Criminal Justice*, 7 (5). pp. 1023–1044.

36 Diez, T. and Squire, V. (2008) 'Traditions of Citizenship and the Securitization of Migration in Germany and Britain', *Citizenship*, 12 (6). pp. 565–581.

37 Chakrabati, S. (2005) 'Rights and Rhetoric: The Politics of Asylum and Human Rights Culture in the United Kingdom', *Journal of Law and Society*, 32 (1). pp. 131–147.

the level of international political negotiation, being made between migration and asylum and serious organised crime and terrorist activity, notably in Europe.[38] This linkage has been reflected in domestic politics and the popular media in terms of asylum-seekers being represented as criminal and antithetical to the norms of the 'host' community.[39] In recent years the scope of the criminal law has been widened by the development of a range of inchoate offences. Here one could point to such Serious Crime Act (2007) offences as the assistance or encouragement of one person to another to commit a criminal act; regardless of whether, or not, the assisted or encouraged person goes on to break the law. The Terrorism Act (2006) has sections which are not so much focused on terrorist activity per se but make it an offence to 'incite' terrorism, such as might be the case at a religious or community-based meeting. The UK Islamic community (overwhelmingly African and Asian) is not only the most likely to be targeted by counter-terrorist activity but the Anti-Terrorism and Security Act (2001) exacerbated this tendency by allowing foreign nationals to be detained indefinitely, until it was deemed unlawful by the House of Lords.

Pantazis and Pemberton have detailed how the Islamic community in the UK has been the subject of more anti-terrorist measures than any other community; so much so they can be considered a 'suspect community'.[40] The linking of migration issues with terrorism plays into an underlying narrative that understands migrants as an existential threat to the way of life of a 'settled' community; and here one might cite Enoch Powell's 1968 *Rivers of Blood* speech, which conjured up a vision of racial unrest as an example.[41] None of those involved in the attack on the World Trade Center was either an asylum-seeker or a refugee and the overwhelming majority of those detained are not suspected of terrorist offences. The huge chasm between the facts of detention (who is detained) and the strategy for detention (following the 'war on terror' to detain terrorist suspects) is surely a concern for the veracity of asylum policy across the world.[42] The use of loose and imprecise grounds for exclusion along with a condensed timeline for determining a person's status has undoubtedly resulted in persons being improperly excluded.[43] The issue of *refoulement* (the expulsion of

38 Huysmans, J. (2006) *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. Routledge: London.

39 Bowling, B., Phillips, C. and Sheptycki, J. (2011) 'Race, Political Economy and the Coercive State' in T. Newburn and J. Peay (eds) *Policing: Politics, Culture and Control*. Hart: Oxford. pp. 43–68.

40 Pantazis, C. and Pemberton, S. (2009) 'From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation', *British Journal of Criminology*, 49. pp. 646–666.

41 Heffer, S. (1999) *Like the Roman: The Life of Enoch Powell*. Orion Press: London.

42 Dauvergne, C. (2007) 'Security and Migration Law in a Less Brave New World', *Social and Legal Studies*, 16 (4). pp. 533–549.

43 Carey, C., Gibney, M. and Poe, S. (2010) *The Politics of Human Rights: The Quest for Dignity*. CUP: Cambridge.

any person who has the legitimate right to recognition as an asylum-seeker) was set out in the 1954 United Nations Convention on the Status of Refugees. It states in Article 33(1) that:

> No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It is noteworthy that this is very broad for it forbids not only expulsion to the country of origin but any country where the *individual* is likely to suffer persecution. The problem arises in practical cases of *refoulement* in determining formal mechanisms to attribute refugee status. The problem for recent cases of protection from *refoulement* for individuals denied refugee status is that without being afforded refugee status they may be subjected to all manner of human rights violations and this is especially true for those informally rendered. If we observe the case of Afghan refugee seekers following the attack on the World Trade Center, we see the practical issues that arise when the usual protections for refugees are absent. The military action in Afghanistan is, arguably, the clearest expression of the West's 'war on terror' and it is cited repeatedly, by a range of governments, as a reason for derogating from the usual human rights infrastructure that has grown up since the Second World War in the aftermath of Nazi atrocities. The Karzai government was supposed to be a stable regime amenable to the safe return of refugees: in other words, the existence of a safe and stable polity in Afghanistan was meant to undermine claims for refugee status outside of it. It allowed a number of countries, notably Australia, to deny refugee status.[44] The mixture of domestic politics and a securitised migration policy has led Lucia Zedner to argue that the newly securitised Europe is 'an important theme in the creation of a common European identity'.[45] We should not be surprised by this; after all it is generally the case that whenever there are high levels of migration states have expressed anxieties about the coherence of national identity. The process Zedner outlines is merely the latest incarnation of that expression: it is a perennial feature of political discourse.

Human rights crises

The 'war on terror' is but another in a long line of human rights crises. It has nonetheless thrown up a great many problems which require addressing at an institutional level; all of which are particular examples of problems intrinsic to

44 Peyser, E. (2002) 'Pacific Solution? The Sinking Right to Asylum in Australia', *Pacific Rim Law and Policy Journal*, 11 (2). pp. 431–460.

45 Zedner, L. (2009) *Security*. Routledge: Abingdon. p. 57.

any international counter-terrorist strategy. These problems include the ongoing issue of how to realise human rights obligations at the same time as justified anti-terrorist measures are enacted, the demand that coalition allies hold each other to human rights standards and the capability of international and domestic human rights agencies to enforce proper human rights standards. The role of the International Criminal Court (ICC) has proved incapable of trying terrorists for crimes against humanity for a variety of reasons, mainly political, despite being able to do so since July 2002. The USA has made numerous moves to remove its political and military personnel from the ambit of the ICC through action at the United Nations Security Council and latterly by making a string of bilateral agreements with a variety of states and agencies, notably around the issue of rendition.[46] This USA treatment to the ICC is both undermining of the court but it also demonstrates an unwelcome aspect of the 'war on terror', which is USA exceptionalism. A so-called realist foreign policy has allowed those involved in American foreign policy to retreat from international legal norms, not to uphold them. The USA's failure to uphold agreed international legal standards and its refusal to allow itself to be subject to many forms of external oversight or legal constraint has, in effect, undermined the progress of international human rights practice. The case with European states is different because they are bound by the European Court of Human Rights, which will ultimately decide upon the legality, or otherwise, of counter-terrorist measures. The situation with regard to public opinion is similarly divergent and Europeans are typically more taken with the actual human rights repercussions of counter-terrorist measures than is the case in the USA, as Bassouni has shown.[47] However, the power and effectiveness of American counter-terrorist measures has often resulted in democratic governments mentioning USA shortcomings regarding human rights practice *sotto voce*, if at all. The community of liberal democracies has traded, in effect, human rights for security. A similar situation may be observed at the United Nations Commission on Human Rights where realist foreign policies have meant that traditional state interests take preference over broader internationalist concerns for human rights.[48] Moreover, the bodies set up to oversee human rights practice are understaffed and still have no procedural instruments to decide effectively upon derogations or to determine the rightfulness, or otherwise, of counter-terrorist measures. There is also the structural problem as to where treaty bodies sit in relation to international governance. The fact that international treaty bodies are distant from the day-to-day workings of the domestic courts ought not to be an issue since the principle of

46 Drumbl, M. (2002) 'Judging the 11 September Terrorist Attack', *Human Rights Quarterly*, 24 (2). pp. 323–360.

47 Bassiouni, M. (2006) 'International Recognition of Victim's Rights', *Human Rights Law Review*, 6 (2). pp. 203–279.

48 van den Berghe, F. (2010) 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?', *European Law Journal*, 16 (2). pp. 112–157.

subsidiarity should enshrine their protections in domestic criminal justice. In practice, the failure of international treaty bodies to act decisively, including the tentative nature of many of their opinions, has resulted in domestic courts being the arbiters of human rights obligations: a task which they have not always exercised effectively, as Goodale and Engle Merry have exquisitely detailed.[49]

It is easy to maintain that a straightforwardly legalistic treatment of human rights will yield little weight against either those advocating a 'war on terror' or those engaged in terrorism. It is absurd to believe that law alone, cut off from political and moral considerations could ever do that job. Human rights discourse nonetheless has the thankless task of continually restating the maxims it holds to in terms of the dignity of human life. The problem is complicated by a shift in rhetoric away from the language of armed states and conventional warfare towards a crime control and criminal justice management discourse. This shift towards a criminal justice approach has somewhat undercut the extant body of agreed law since most of it until recently was framed in terms of state action, not criminal action. Moreover, the shift to a crime control and criminal justice management discourse has also undercut the human rights response which was hitherto concentrated at the state level and not at the micro-level as is the case with necessary, but particular, counter-terrorist measures.[50] The 'war on terrorism' has ushered in several unwelcomed developments that impact upon the criminal justice system either directly, as with the lack of clear guidelines for interning terrorist suspects and the accompanying breach of derogation norms, or indirectly, as in the case of the undermining of refugee protection and the widespread discrimination by basing decisions on race or ethnic background. It is the corrosive influence that a state of emergency mentality has upon long-cherished criminal justice shibboleths, such as proportionality criteria, non-derogabilty and the international standards of human rights treatment, that we have all to fear.[51]

49 Goodale, M. and Engle Merry, S. (2007) *The Practice of Human Rights: Tracking Law Between Global and Local*. CUP: Cambridge.

50 Tadros, V. (2007) 'Justice and Terrorism', *New Criminal Law Review*, 10 (4). pp. 658–689.

51 Ashworth, A. (2007) 'Security Terrorism and the Value of Human Rights' in B. Goold and L. Lazarus (eds) *Security and Human Rights*. Hart Publishing: Oxford. pp. 203–226.

Chapter 8

The problems of a globalised world

Transnational justice issues

In order to confront the challenge of crime in the 'globalised world' nations have increasingly used extradition, deportation and other 'border controls',[1] and devised and enacted legislation of an extra-territorial scope, especially in cases of counter-terrorism.

International arrest warrants

One aspect of the United Kingdom's membership of the European Union has been the validity in the United Kingdom of 'European Arrest Warrants' ('EAWs'). A Framework Decision of the Council of the European Union was made on 13 June 2002 for the introduction of this international warrant and to speed up 'surrender procedures' between member states (2002/584/JHA). This decision was adopted by the United Kingdom in the Extradition Act 2003. One consequence of this new procedure is that, for a large number of offences, the traditional requirement for 'dual criminality' has been removed. This mean that, in those cases, the offence for which the requesting state seeks a person's extradition from England and Wales (or Scotland or Northern Ireland) does not necessarily have to be an offence under the law of England and Wales (or Scotland or Northern Ireland, as the case might be).

The purpose of the EAW is to abolish formal extradition procedures between member states of the EU.[2] In achieving this there have been hard cases and these have, of course, attracted the attention in the British popular press. For example, in reporting the extradition of Ben Herdman (aged twenty) and four of his friends to Greece, in August 2010, for an alleged attack on a man, which left that man in a coma, the *Daily Mail* used the headline '"Innocent" student

1 See, for example: Arbel, E. and Brenner, A. (2013) *Bordering on Failure: Canada-US Border Policy and the Politics of Refugee Exclusion*. Harvard Law School: Cambridge.

2 Konstadinides, T. (2011) 'The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence' in C. Eckes and T. Konstadidides (eds) *Crime Within the Area of Freedom Security and Justice: A European Public Order*. CUP: Cambridge. Chapter 7.

extradited to Greek prison hell'. The *Daily Mail* could not, of course, go so far as to assert that this was a case where the abolition of the 'dual criminality' rule had made any difference to the extradition process. Instead, the *Daily Mail* drew attention to the inability of those persons arrested under a EAW to challenge the strength of the case against them in any British court and, thereafter, the small chance of them being able to get bail in a country where they had no job, no significant money and no permanent place of abode[3]:

> Lawyers for the five [arrested men] claim that the case against them is 'ridiculously weak', but they were powerless to prevent the extradition as the Greek authorities used the controversial European Arrest Warrant to force them to stand trial. They are likely to spend up to 18 months in a squalid Greek prison until their case is heard…[4]

The *Daily Mail* continued its discussion of the EAW as follows:

> The British Government and courts are powerless to protect anyone who becomes the subject of a European Arrest Warrant. In addition, the accused is denied the right to challenge the warrant before he or she is spirited overseas.… Last year, 1,032 Britons were extradited to face trial but just 98 foreign nationals were brought here to face criminal charges.… Last month Home Secretary Theresa May signed up to the European Investigation Order.… It allows foreign police to travel to the UK and take part in the arrest of Britons, place them under surveillance, monitor bank accounts and demand DNA samples.[5]

In May 2010 an earlier use of a European Arrest Warrant had provoked correspondence in the *Daily Telegraph*. That case involved Gary Mann, a Kent fireman, who was extradited to Portugal to serve a two-year jail sentence for rioting at the Euro 2004 tournament. Roger Helmer MEP, after referring to the earlier case of David Birkinshaw and Matthew Neale, from Derby, 'sent to Riga, Latvia, under the EAW', wrote in a letter to the *Daily Telegraph*[6]:

> Under the EAW, normal extradition safeguards are set aside, and grave injustices can follow. Any one of us can be dragged off to jail in Latvia, Bulgaria, or any other EU member state on the whim of a foreign magistrate and have no protection at all.

3 This problem, as well as other problems, has been continually publicised by the pressure group 'Fair Trials International', originally founded as 'Fair Trials Abroad'.

4 '"Innocent" Student Extradited to Greek Prison Hell', James Mills, *Daily Mail*, 6 August 2010.

5 *Ibid.*, p. 20, 'Victim of the Euro-Warrant'.

6 *Daily Telegraph*, 15 May 2010.

This letter, in turn, received a supportive response from Torquil Dick-Erikson, in Rome. After pointing to 'the lack of *habeas corpus* and protection against double jeopardy in the rest of the EU', Dick-Erikson opined that Pope Innocent III, in 'setting up the Holy Inquisition', had 'unified the role of the prosecutor with that of the judge' and that 'Napoleon adopted and adapted the inquisitorial system but did not change its fundamentals'.

Extradition and human rights

Notwithstanding these criticisms and the fast-track nature of the European Arrest Warrant, any arrest carried out under the authority of such a warrant can nevertheless be challenged under the European Convention on Human Rights and, because the EAW originates as part of EU law, it can also be challenged under the EU Charter of Fundamental Rights.[7] Indeed, in November 2010, a High Court judge (Moses J) went so far as to refuse extradition to Italy, on ECHR grounds, of a 'suspected killer who had fled a Turin prison' because 'even Italian experts did not seem to have "placed any trust" in the procedure which saw Franco Barone jailed for 21 years in his absence'.[8] The Supreme Court subsequently held, in two conjoined appeals[9] in 2012, that Article 6(1), ECHR applied as a possible restraint on the EAW, and other extradition proceedings, against British citizens because of their Common Law right to come and remain within the jurisdiction. However, in the same conjoined appeals (*Luka Swewski* and *Halligen*), the Supreme Court held that Article 5(4), ECHR (the right to a speedy challenge to any deprivation of liberty) did not apply to extradition proceedings. As to whether Article 8, ECHR (the right to a private and family life) has any relevance to extradition proceedings, the Supreme Court has held[10] that extradition is closer to domestic criminal proceedings than deportation proceedings are circumstanced to be. The appropriate test is, therefore, whether the arrested person's rights under Article 8 can outweigh the public interest in extradition. Although the Supreme Court held that 'great weight' would be given to the requesting state's extradition rights, these rights could be diminished, and the arrested person's rights under Article 8 could be commensurately increased, by delays in the extradition process.

A far wider criticism of a European country's criminal justice system than that which was made against Italy in the case of Franco Barone, was made in *Kapri v Lord Advocate* [2013] UKSC 48; [2013] 4 All ER 599. But the country which was applying for extradition in *Kapri* (Albania), although a signatory to the ECHR, was not a member state of the EU. That country was not, therefore,

7 See also Chapter 3, above.

8 *Daily Telegraph*, 20 November 2010.

9 *Luka Szewski v District Court in Torun, Poland*; *R (on the application of Halligen) v Secretary of State for the Home Department* [2012] UKSC 20; [2012] 4 All ER 667.

10 *HH and another v Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v Polish Judicial Authority* [2012] UKSC 25; [2012] 4 All ER 539.

able to make use of the European Arrest Warrant. The Supreme Court held that, although the 'threshold test' for denying extradition on the ground that the claimant would be denied his right to a fair trial in Albania, under Article 6 ECHR, was a high one – namely a 'flagrant breach of the convention right' – nevertheless the allegations made against Albania were sufficiently serious for it to be necessary for the Scottish appeal court to look more closely at the material adduced by the claimant to determine 'how systematic or widespread the problem now was'. Accordingly the Supreme Court returned the case to the High Court of Justiciary at Edinburgh so that that court could be provided with up-to-date information so that it could reach a properly informed decision.

Interpreting European Arrest Warrants

The proper approach to interpreting the text, and the provenance, of EAWs has also troubled the UK courts. In *Asztaslos v Szekszard City Court, Hungary* [2010] EWHC 237 (Admin); [2011] 1 All ER 1027, the High Court held that the court should look at the warrant as a whole, and should interpret it in a 'cosmopolitan sense' and, by so doing, reach a conclusion as to whether the warrant was an 'accusation warrant' or a 'conviction warrant'. Extrinsic evidence as to the intended meaning of the warrant should only be looked at if the wording was equivocal. The High Court went on to state that if the warrant used the same English language wording as was used in the warrant annexed to the EU Framework Decision, there ought to be no scope, or very little scope, for arguments about its intended meaning. As to the status of the person (or body) issuing a EAW, the Supreme Court held, by a majority of 3:2, in the well-publicised case of *Assange v Swedish Prosecuting Authority* [2012] UKSC 22; [2012] 4 All ER 249, that, despite its prosecutorial name, the Swedish 'Prosecuting Authority' was a 'judicial authority' for the purposes of the EAW.[11] After the decision of the Supreme Court in *Assange*, the High Court held that a certificate from the Serious Organised Crime Agency (SOCA) was not conclusive as to whether or not the person or body issuing a EAW was a 'judicial authority'. SOCA was the designated authority which could express its own belief but the final decision had to be made by the appropriate judge applying the provisions relating to extradition offences: *Ministry of Justice, Lithuania v Bucnys and other cases* [2012] EWHC 2771 (Admin); [2013] 1 All ER 1220.

Outside the procedures relating to the EAW, the United States government has also been the subject of criticisms in Parliament and in the British press for its attempts to extradite Gary McKinnon, a forty-two-year-old computer-hacker afflicted by Asperger's syndrome, for gaining unauthorised access to ninety-seven US government computers from his home in London, including computers of

11 Assange afterwards sought, and obtained, political asylum in the London embassy of Ecuador.

the US army, navy and air force, NASA and Department of Defence. The US government alleged that this conduct had been calculated to influence them by 'intimidation and coercion'. After the House of Lords had ruled, in *McKinnon v Government of the United States of America* [2008] UKHL 59; [2008] 4 All ER 1012, that it was only in a 'wholly extreme case' that a regulated plea-bargaining process, such as had been offered to McKinnon by the US prosecutors, would constitute an 'abuse of process', justifying a refusal of extradition, the Home Secretary eventually refused, on Article 3, ECHR grounds, to authorise the extradition because of the perceived dangers which extradition and detention in the USA would cause to McKinnon's mental health.[12] (He was assessed to be a suicide risk.) This, of course, was viewed as a breach of the relevant extradition treaty by the US government.

In *Norris v Government of the United State of America* [2010] UKSC 9; [2010] 2 All ER 267, the successor to the House of Lords as the United Kingdom's highest court, the Supreme Court, considered the effect of section 87, Extradition Act 2003, which expressly required the judge in extradition proceedings to decide whether a person's extradition was compatible with the ECHR. The case in question involved an application by the USA to extradite Norris for alleged obstruction of justice. He was sixty-six years of age and both he and his wife were in poor health. The Supreme Court held that the public interest in extradition had special weight. It was only if there was a 'quite exceptionally compelling feature or combination of features' that extradition would be viewed as 'disproportionate'. Although the nature of the alleged offence would usually have no bearing on the decision to authorise or to prevent extradition, if an offence was 'at the bottom of the scale of gravity', this might be a relevant feature. However, in *Norris* the Supreme Court categorised the charges of obstructing justice as 'very grave'. As to whether the effect of extradition on innocent members of the arrested person's family could render that extradition 'disproportionate', the Supreme Court held that this would only be the case if those adverse effects amounted to the 'gravest interference' with family life. The Supreme Court held that the instant case was not such a case. Likewise, the availability of a prosecution in the UK, as an alternative to extradition proceedings, would only rarely outweigh the UK's treaty obligations. Accordingly, for all of these reasons, Norris's appeal against extradition was dismissed. It was, no doubt, for these reasons that, in February 2014, the Home Secretary wrote to a British couple facing extradition to the United States for alleged expenses fraud, and seeking to rely on Article 8, ECHR, that she (the Home Secretary) was 'powerless to help'.[13]

12 *LIBERTY*, Winter 2012, pp. 6–7.

13 *Daily Telegraph*, 7 February 2014; and, contrasting cases of convicted criminals who have not been deported because of Article 8, ECHR, the *Sunday Telegraph*, 9 February 2014 ('Human Rights for the Guilty but not for the Accused').

It must not be thought that it is only the requesting states which will be subject to scrutiny, and perhaps also to criticisms of their criminal justice systems, when extradition proceedings are brought before the British courts. In two conjoined cases[14] (one relating to Poland and the other to Hungary), the High Court held that the United Kingdom's own system for the provision of legal assistance in EAW cases was incompatible with its treaty obligations in the European Council Framework Decision on the European Arrest Warrant. The High Court also held that the UK's system was contrary to the principles of justice because decisions as to an arrested person's legal representation were not being taken within a proper timeframe. Even if the EC Framework Decision had not been given direct effect in the UK by Part 1 of the Extradition Act 2003, that UK statute would have had to be interpreted, so far as was possible, so that it was consistent with the Framework Decision.

Deportation

Although a person's British nationality and/or permanent residence in the UK cannot, in itself, be a viable defence to a claim by a 'requesting state' for his extradition to that state, the possession of British nationality is, of course, a defence to deportation proceedings and a bar to being excluded from the United Kingdom itself. It is for this reason that, in or before December 2013, the Home Secretary revived previously seldom-used powers in the British Nationality Act 1948 (as amended) to make 'deprivation of citizenship orders' against up to 240 'dual nationality Jihadists with dual nationality fighting in Syria'.[15]

In addition to this question of nationality being a bar to deportation, EC Council Directive 2004/08 creates an 'enhanced test', namely 'imperative grounds of public security', which must be satisfied before a decision can be validly made to deport a non-citizen who has 'resided' in the relevant member state of the European Economic Area[16] for at least ten years prior to that decision. In *FV (Italy) v Secretary of State* [2012] EWCA Civ 1199; [2013] 1 All ER 1180, the Court of Appeal, Civil Division, had to consider the case of a man who had been convicted in the UK of manslaughter in 2002. He had arrived from Italy in 1985 and had married a UK citizen and had fathered five children. After his conviction for the manslaughter of his flat-mate (on grounds of provocation), he was sentenced to fifteen years' imprisonment. In 2007, the Home Secretary made a deportation order against him, arguing that this 'enhanced

14 *Stopyra v District Court of Lubin, Poland*; *Debreceni v Hajdu-Bihar County Court, Hungary* [2012] EWHC 1787 (Admin); [2013] 1 All ER 787.

15 *Daily Telegraph*, 23 December 2013.

16 The 'EEA' includes Norway, Iceland and Liechtenstein as well as the member states of the EU.

test' did not have to be satisfied because of his time in a British prison; and that the less strict test of 'serious grounds of public security' was the relevant criterion. This less strict test was applicable to persons who had attained five years' residence in the UK. The Court of Appeal, Civil Division, held that the case law of the European Court of Justice indicated that a term of imprisonment did not automatically mean that a national of the European Economic Area[17] lost the enhanced protection provided by the EC Council Directive. All factors had to be taken into account. The 'touchstone' was 'the centre of the personal, family, and occupational interests' of the person who was facing deportation, and whether or not his 'previously forged links' had been broken. In FV's case, the Court of Appeal held that it would be unjust to require him to deal, so long after the event, with factual issues which arose before 2001. In any event, the case law of the ECJ made it clear that a previous criminal conviction did not necessarily amount to the 'imperative grounds of public security' required by the enhanced grounds of the Directive.

EU law had also to be consulted by the House of Lords in the case of *R (on the application of Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2009] 3 All ER 774. In that case an asylum-seeker from Afghanistan who had first arrived in Greece argued that if the UK sent him back to Greece he would then be sent on to another country where he would suffer inhuman or degrading treatment, contrary to Article 3, ECHR. The House of Lords held that member states of the EU were entitled to assume that other member states (including Greece) would comply with their treaty obligations, including the ECHR. This being so, there was no evidence to conclude that Nasseri would be sent by Greece to a country where his rights under Article 3, ECHR would be infringed. Accordingly the House of Lords held that the High Court had been wrong to make a declaration, under the Human Rights Act 1988, that the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Schedule 3, paragraph 3 was incompatible with Article 3, ECHR.

The Special Immigration Appeals Commission

Deportation proceedings brought on grounds of national security (and the detention of the suspected person during the progress of those proceedings) often raise issues of what facts or allegations, if any, can be disclosed to that person, in the interests of a fair hearing, without at the same time revealing confidential sources, secret methods, or other sensitive information. To safeguard such sensitive information, the Justice and Security Act 2013 has provided that, if in deportation or exclusion proceedings relating to a non-EEA national, the Secretary of State makes a direction that information should not be made public on grounds of national security, any appeal against this direction should be

17 See fn 16.

made to the Special Immigration Appeals Commission (SIAC) itself and that judicial review proceedings should not be available. The Special Immigration Appeals Act 2007 had established SIAC as a 'superior court of record' and the principles to be applied by SIAC when deciding whether or not to set aside the Secretary of State's direction as to non-publication were required to be the principles which would be applied in judicial review proceedings. If SIAC decided to set aside the Secretary of State's direction, it could then make any order or give any relief which could be made or given in judicial review proceedings. The Common Law always looks upon any attempt to oust the jurisdiction of the courts with suspicion, scepticism or disbelief. Accordingly, in *R (on the Application of Ignaoua) v Secretary of State for the Home Department* [2013] EWHC 2512 (Admin); [2013] EWCA Civ 1498; [2014] 1 All ER 649, the Court of Appeal, Civil Division, held that the statutory wording in the 2013 Act, taken together with the requisite commencement order, was not precise enough to terminate existing judicial review proceedings. The Court of Appeal also held that the 2013 Act did not purport to remove the jurisdiction of the High Court to entertain judicial review proceedings, although, in practice, once the relevant SIAC procedures were in force, it was likely that judicial review proceedings would be perceived as a less attractive or appropriate option. In *IR (Sri Lanka) v Secretary of States for the Home Department* [2011] EWCA Civ 704; [2011] 4 All ER 908, the Court of Appeal, Civil Division, held that, in cases of deportation, or exclusion from the United Kingdom, on national security grounds, Article 8, ECHR, did not provide grounds which were equivalent to the procedural requirements of Articles 5 and 6, ECHR. In particular, the deportee had no right to disclosure of information – not even at the 'irreducible minimum' level sometimes permitted by Articles 5 and 6. The only right which the deportee had was a right to 'some form of adversarial proceedings' before an independent body which was competent to review the reasons for the decision and the relevant evidence, with appropriate limitations on the use of classified information. The Court of Appeal held that SIAC satisfied these legal requirements.

In 2009, the House of Lords had also held, in three conjoined appeals, that SIAC was 'peculiarly well-equipped' to resolve issues of fact in immigration decisions involving issues of national security: *RB (Algeria) v Secretary of State for the Home Department*; *U (Algeria) v Secretary of State for the Home Department*; *Othman v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 4 All ER 1045. The House of Lords went on to hold that the statutory right of appeal to SIAC was so satisfactory that it went further even than was required by Article 6, ECHR. Although the only further right of appeal from SIAC was to the Court of Appeal, and this right of appeal was limited to points of law, and could not raise questions of fact, the House of Lords held that there was nothing in the ECHR to prevent this right of appeal being so limited. As to the use of 'closed material' in appeals to SIAC the House of Lords held, in the same decision, that there were 'cogent considerations of policy' which were

capable of justifying its use, unless outweighed by other considerations. The procedures were held to strike a fair balance between these policy considerations and the rights of the deportee. In particular, the House of Lords refused to draw any close comparison between the rights of a deportee and the rights of a person within the United Kingdom who was subject to a 'control order'. If, as in this case, the question for SIAC was whether the deportee would be tortured or otherwise mistreated in the requesting state, the deportee himself was not likely to be helpful to his advocate when that advocate had to consider materials relating to the deportee's treatment in that requesting state. As to whether assurances from a requesting state with a bad human rights record might nevertheless still be believed, the House of Lords held that this could be the case. Before a deportation could be held to violate Article 6, ECHR, there had to be substantial grounds for believing that there was a real risk of a fundamental breach of the principles of a fair trial, leading to a miscarriage of justice itself flagrantly violating the deportee's rights. As to the risk of a foreign trial making use of evidence obtained by torture, the House of Lords distinguished an earlier, more robust, prohibition on that course of action in *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575 – also a decision of the House of Lords. The House of Lords was able to distinguish this earlier decision because SIAC had held, on the facts of RB's case, that there had not been a 'real risk of a flagrant breach of [his] relevant Convention rights'. The House of Lords held that, because of the limited rights of appeal against a decision of SIAC, this decision could only be attacked on the ground that SIAC had 'failed to pay due regard to some rule of law, had regard to irrelevant matters, or were otherwise irrational', or on the ground that the procedures of SIAC had 'failed to meet requirements imposed by law'. Given that the use of 'closed material' by such a specialist tribunal as SIAC did not amount to such a procedural irregularity, the House of Lords held RB's deportation would not necessarily amount to a 'flagrant' denial of justice. The prohibition against receiving evidence based on torture of third parties was not because it was necessarily unreliable or because it would make a trial of the deportee unfair. It was because the state had to stand firm against such conduct. Nevertheless, in deportation cases, the United Kingdom was not obliged to retain a suspected terrorist within its territory at the risk of its own national security.

Although the House of Lords could not challenge the findings of fact made by SIAC in RB's case, the judgement of Lord Bingham in the earlier case of *A v Secretary of State for the Home Department* was regarded, at the time, as a 'landmark judgement'.[18] Lord Bingham remarked in that case:

> The principles of the Common Law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive

18 Dennis, I.H. (2010) *The Law of Evidence* (4th ed.) Sweet and Maxwell: London. Para 8.5.

> to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.

Lord Bingham's judgement was clearly in accord with the jurisprudence of the European Court of Human Rights and, in January 2012, that court held that the United Kingdom could not deport the extremist cleric Abu Qatada (originally known as Othman) to Jordan to face trial for alleged terrorism while there remained a 'real risk' that evidence obtained by torture would be used against him: *Othman (Abu Qatada) v United Kingdom* ECHR 022 (2011).[19] It was not until the United Kingdom concluded a treaty with Jordan in April 2013 excluding the use of such evidence that Abu Qatada agreed to return to Jordan upon that treaty becoming law in that country.

An example of how English law itself 'stands firm' against 'torture, inhuman or degrading treatment, and any use or threat of violence (whether or not amounting to torture)' in its own criminal justice system is provided by s.76(2), Police and Criminal Evidence Act 1984. This provision imposes a duty on the trial judge to prevent any statement obtained from the defendant by such 'oppression' from being used as a confession 'notwithstanding that it may be true'. If such methods were used against some other person (i.e. not the defendant himself) the resulting statement would equally be inadmissible, even if it was not to be excluded as 'hearsay' evidence, because of the prohibition on the prosecution using any evidence which would have 'such an adverse effect on the fairness of the proceedings that the court ought not to admit it': section 78, Police and Criminal Evidence Act 1984.

Anonymity and appeals against deportation

In some asylum and deportation cases it has not only been the Home Office which has wished to rely upon anonymous evidence. In *R (on the application of Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 4 All ER 975, the Supreme Court (unanimously) held that there was no automatic entitlement to anonymity for asylum-seekers. However, in *W (Algeria) and another v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 All ER 699, the question arose again, this time in connection with a witness. The case involved a decision by the Home Secretary to deport seven Algerians on grounds of national security. One of the deportees appealed to the Special Immigration Appeals Commission and applied to adduce evidence from a witness who would assert that all seven deportees would face torture in Algeria. However, that witness required an absolute and irrevocable order, binding even upon the Home Office, to protect his or her confidentiality. It was common ground between all the parties to this case that the Special

19 European Court of Human Rights, Press release [2012] ECHR 817.

Immigration Appeals Commission (Procedure) Rules 2002 were wide enough to permit SIAC to make such an order, binding upon the Secretary of State. Nevertheless, SIAC declined to make such an order and dismissed the appeals. On appeal to the Supreme Court, that court allowed the appeals, even though it held that the power of SIAC to make an anonymity order should be sparingly used. SIAC was directed that it should first require the very fullest disclosure of the evidence and circumstances relating to the witness's fear of reprisals, and should also require what steps the appellants had taken to try to get that witness's evidence using the ordinary safeguards. Nevertheless the Supreme Court held that the 'imperative need' was to maximise SIAC's chances of arriving at the correct decision about the safety of the appellants themselves, if they were returned to Algeria. Lord Dyson (sitting with Lord Brown, Lord Phillips, Lord Kerr and Lord Wilson) observed that the anonymity order would deny the Home Secretary the ability to test the source's reasons and evidence with the help of the Algerian government. He also conceded that the making of such an order without giving the Secretary of State an opportunity to be heard was 'a clear breach of the principles of natural justice' and that any such order required 'compelling justification'. After allowing the appeals, the Supreme Court left it to SIAC to consider whether to re-open the cases and to make any anonymity order.[20]

Border controls

Schedule 7 of the Terrorism Act 2000 has been controversial in recent times, particularly since the detention of a journalist, David Miranda, at Heathrow Airport and the seizure of his computer hardware.[21] In an earlier case,[22] the High Court had noted that Schedule 7 of the 2000 Act gave police[23] far-reaching powers at airports and other entry points to the UK, including the power to detain persons. For this reason those powers had to be strictly construed. The officers had to inform the person who was being detained as to why he was being so detained. The only lawful purpose of the examination of a detained purpose was to determine whether he or she was a 'terrorist' within the meaning of s.40(1)(b) of the 2000 Act. Howbeit, the officers were entitled to act upon prior information or upon their own intuition. In this earlier case (*CC v Metropolitan Police Commissioner*), a 'control order' had been made against CC, who was a UK citizen, under s.2(1), Prevention of Terrorism Act

20 *Solicitors Journal*, 13 March 2012. p. 3.

21 *LIBERTY*, Winter 2013, page 3. For the interim judicial review proceedings, pending an *inter partes* hearing, see*: R (on the Application of Miranda v Secretary of State for the Home Department and Commissioner of Police for the Metropolis* [2013] EWHC 2609 (Admin).

22 *CC v Commissioner of Police of the Metropolis* [2011] EWHC 3316 (Admin); [2012] 2 All ER 1004.

23 Immigration officers and 'designated' customs officers also have these powers.

2005. This order was made in anticipation of CC's deportation from Somaliland. The Security Services then asked the police at Heathrow to use their powers under Schedule 7 of the Terrorism Act 2000 to interview CC on his arrival from Somaliland. CC sought judicial review of the use of these powers because, so he alleged, his ill-treatment in Somaliland was known to the Security Services and they were aware that any evidence obtained from the authorities in that country might be inadmissible. The High Court held that CC was reasonably suspected of being a terrorist, but that the police officers at Heathrow were not entitled to do any more than establish whether or not he was the person who had been the subject of the request from the Security Services. The Security Services had been attempting to use the police to get evidence from CC which would not then be tainted by any torture allegations and which would, so they hoped, confirm the propriety of the control order. Those purposes had nothing to do with the question of whether CC was a 'terrorist'. Accordingly, CC's application for judicial review was allowed. Notwithstanding the criticisms made in *CC*, the High Court subsequently refused, in *Beghal v Director of Public Prosecutions* [2013] EWHC 2573 (Admin); [2014] 1 All ER 529, to declare that Schedule 7 of the Terrorism Act 2000 was unlawful because of the international character of terrorism. The High Court categorised the Schedule 7 powers as the 'first line of defence' against terrorism. The court noted that these powers were subject to 'cumulative statutory limitations', including a Code of Practice and review by an independent referee. The High Court went on to hold that the absence of reasonable suspicion by the police officer, or the other 'examining officer', was justifiable. The powers were described as being applicable only to a 'limited category of people' and could only be exercised for the specified purpose of determining whether the person questioned was concerned in terrorism. Although the powers in Schedule 7 were principally exercised by police officers, those powers were, in reality, an aspect of 'border control' rather than being 'a form of criminal investigation'. The High Court held that the powers in Schedule 7 were 'proportionate' infringements of the rights of the detained and 'examined' person to a private life and a family life under Article 8, ECHR. Most interestingly from a criminal justice standpoint, the High Court also held that Article 6, ECHR, was not engaged because, at the time of the examination, the claimant in question, Mrs Beghal, was not 'suspected' of any crime. She was a French national who was ordinarily resident in the UK and she had been returning from visiting her husband in France, where he was being held in custody in relation to terrorist offences. She refused to be questioned under Schedule 7 until her lawyer arrived. After the lawyer arrived, she was not further questioned but she was cautioned and subsequently prosecuted for 'failing to comply with her duties under Schedule 7'. She had pleaded guilty to this offence at Leicester Magistrates' Court after the District Judge had held that he had no power to stay the proceedings and had also indicated that he was 'highly likely' to find Mrs Beghal guilty of the offence. The discussion of Schedule 7 in this case, and its validity under the ECHR, arose in an appeal 'by way of case

stated'. We may therefore conclude that the duty of the 'examining officer' under Schedule 7 is not, at the opening of the examination, to caution the person in question that they have a right of silence because they are suspected of an offence, but, on the contrary, that they do not have a right of silence because remaining silent will constitute an offence. Even awaiting the arrival of a lawyer will not, so it seems, be a defence to such a charge.

Extra-territorial reach of statutes

It is a principle of the 'comity of nations' that a sovereign state does not seek to criminalise conduct committed by a person wholly within the territory or jurisdiction of another sovereign state, especially if that person is not a citizen of the state which is enacting the legislation in question. A long-established example of Parliament giving jurisdiction to the English courts to try crimes committed by British citizens abroad is provided by section 9, Offences Against the Person Act 1861. This section still gives jurisdiction to the English and Irish courts to try murder or manslaughter committed by a British citizen, 'whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not'. A more recent example of Parliament seeking to deal with serious human rights abuses committed by British citizens, or British residents, anywhere in the world is provided by the Female Genital Mutilation Act 2003. Section 4 of this Act provides that the statutory offences (in sections 1 to 3 of the Act) of 'female genital mutilation', and of assisting such mutilation, are to extend to 'any act done outside the United Kingdom by a United Kingdom national or permanent United Kingdom resident'.

Notwithstanding these, and other, examples of Parliament seeking to criminalise conduct committed abroad, the general rule of the Common Law is that legislation is presumed not to have any legal effect outside the borders of the United Kingdom. This was reiterated by the House of Lords in *Air India v Wiggins* [1980] 1 WLR 815; [1980] 2 All ER 593, where it was held that the British courts had no jurisdiction to permit the criminal prosecution of a foreign airline carrier for the deaths, and previous sufferings, of a cargo of parakeets and mynah birds because all those birds had died before the aircraft entered British airspace. It is observable that Parliament, acting either on its own initiative or in conformity with treaty obligations, sometimes enacts, and perhaps increasingly enacts, legislation which expressly or impliedly rebuts this presumption against 'extra-territoriality' in order to deal with threats originating from aboard, or with human rights abuses perpetrated abroad, even sometimes where the offender is not a British citizen. For example, s.134, Criminal Justice Act 1988 provides:

> (1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the

> performance or purported performance of his official duties … (3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

It was this statutory provision which led to the arrest, in England, of General Pinochet Ugarte, the former ruler of Chile, and eventually led to the decision of the House of Lords in 1999 that he was not entitled to the defence of 'state immunity': *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* [1999] 2 WLR827; [1999] 2 All ER 97. The House of Lords had earlier had to set aside its previous ruling to the same effect because one of the judges, voting with the majority in that appeal, might have been perceived to have had a previous association with the charitable work of Amnesty International, one of the intervening parties.[24] The need for a transnational approach to the problem of terrorism is also a feature of modern legislation. For example, s.8, Terrorism Act 2006 provides that a person commits an offence if he attends 'any place whether in the United Kingdom or elsewhere' knowing or believing that terrorist training is being provided there. Bribery is also an activity which international agreement[25] has required nation states to legislate against, whether their citizens (or companies) commit that activity at home or abroad. Accordingly the Bribery Act 2010 makes it an offence for British citizens, or British companies, to bribe a foreign official, even in that official's own country. Any local custom and practice, authorising the paying or receiving of such bribes, will not be allowed to be used as a defence unless that custom is also a right or duty which is included in the 'written law' of that country.

The crime of conspiracy is, of course, a crime which is commonly committed by terrorists and by international fraudsters. Until the Criminal Law Act 1977, it was a Common Law offence. It was (and still is) a crime which is wide enough in its scope to cover conspiracies hatched abroad if two or more of the conspirators, not being married to each other and not being in a civil partnership with each other, travel to England (or Wales) to carry out that agreement – for example, by importing illegal drugs into the country: *Director of Public Prosecutions v Doot* [1973] AC 807; [1973] 1 All ER 940. A conspiracy hatched in England, with the intention of carrying it out abroad, may also be within the jurisdiction of the courts of England and Wales if the effect of carrying it out would be to inflict loss upon someone within England and Wales: *Attorney-General's Reference (No. 1 of 1982)* [1983] 2 All ER 721 – a case involving an agreement made in London for the fraudulent 'passing off' of whisky in Lebanon so as to cause economic loss to the genuine manufacturers in England. The House of Lords has also held that an unsuccessful attempt to cause

24 See: [2000] 1 AC 119; [1999] 1 All ER 577.

25 Organisation for Economic Cooperation and Development, Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.

economic loss to an insurance company in England will be prosecutable in England, even if the perpetrator of that fraud faked his death abroad and even if he had not entered into any conspiracy with the party who would, on believing herself to be entitled, innocently claim the life insurance money: *Director of Public Prosecutions v Stonehouse* [1978] AC 55; [1977] 2 All ER 909.

Respect for the 'comity of nations' and the Common Law presumption that statutes are not intended to be 'extra-territorial' sometimes leads to very nice quibbles about the exact meaning of single words or phrases in British legislation. For example, in *Treacey v Director of Public Prosecutions* [1971] AC 537; [1971] 1 All ER 110, the House of Lords had to decide precisely where, for the purposes of s.21, Theft Act 1968, a blackmailer 'makes' his demand when he posts his blackmailing letter in England to his intended victim in Germany. The House of Lords held that the threat was made in England and not (or, at least, not only) in Germany. We may, of course, expect Parliament increasingly to have to deal with the nature of modern communications, either criminal in themselves or evidencing other crimes, when those communications are sent from the United Kingdom and received abroad or sent from abroad and received, and 'possessed', within the UK.[26]

Despite the globalisation of crime, such as terrorism and fraud, it must not be thought that extra-territoriality in British statutes is an entirely new development, or that interpretational quibbling over the jurisdiction of the British courts only arises in the case of modern legislation. In the reign of King Edward III, Parliament defined 'treason' so as to include the following possibility, namely: 'if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the king's realm, or elsewhere…' In 1916 the Court of Criminal Appeal held that these words (and the original version written in Norman French) rendered Sir Roger Casement guilty of high treason for 'giving aid and comfort' to the German Empire during the First World War, when he visited Germany and attempted to recruit British and Irish prisoners of war to fight against Britain; see: *R v Casement* (1916) 12 Cr App R 99. In 1946 the House of Lords took this 'extra-territorial' interpretation of the Treason Act 1351 one stage further by ruling that the Nazi sympathiser, and radio broadcaster, William Joyce had committed high treason when he had broadcast radio propaganda from Germany in the Second World War, even though it later transpired (perhaps even to his own surprise) that he was not a British citizen. Nevertheless, because he had applied for, and received, a British passport, the Attorney-General, Sir Hartley Shawcross KC, was able to argue, at Joyce's trial at the Old Bailey, that he had 'enveloped himself in the union jack'.[27] The House of

26 See, for example, Protection of Children Act 1978, as amended, relating to indecent photographs of children.

27 Hall, J.E. (ed.) (1946) 'Trial of William Joyce', *Notable British Trials Series*. William Hodge: London and Edinburgh. p. 53.

Lords afterwards held (by a majority of 4:1) that, until the date when the passport expired, Joyce had been subject to a duty of allegiance to the British Crown because of the ancient law of nations that 'protection draws allegiance, just as allegiance draws protection'.

Terrorism and financial controls[28]

Despite the use of extra-territorial provisions in so-called 'long-arm statutes', the most effective measures against international terrorism and organised crime will always be financial measures. Terrorists and suicide bombers are all too easily replaced. It is their paymasters and their bankers whose resources and services may be very difficult to reinstate.

In 2006 the United Kingdom government made two 'Orders-in-Council' under the United Nations Act 1946 so as to give effect to United Nations Security Council resolutions passed in order to 'freeze, without delay, funds and other financial assets or economic resources of persons who commit terrorist acts....' One of these Orders-in-Council (the 'Terrorism Order') conferred a power on HM Treasury to direct a person to be 'designated' if it had 'reasonable grounds for suspecting that the person may be a person who commits ... acts of terrorism'. Four persons were informed that they had been so designated by HM Treasury. They then applied for judicial review. When the case reached the Supreme Court, that court held that the 'Terrorism Order' was *ultra vires* (beyond the powers) of HM Treasury. By introducing the 'reasonable suspicion' test, the Treasury had exceeded their powers by going beyond what was necessary or expedient to comply with the UN resolution. The Supreme Court also held (by a majority of 6:1) that the second Order-in-Council (the 'Al-Qaeda and Taliban Order') was also invalid to the extent that it prevented a 'designated' person from having any financial means of subjecting the decision of the Treasury to judicial review; see: *Ahmed and others v H.M. Treasury*; *al-Ghabra v H.M. Treasury*; *R (on the Application of Youssef) v H.M. Treasury* [2010] UKSC 2; [2011] 4 All ER 745. In a subsequent hearing (case No. 2[29]) the Supreme Court (also by a majority of 6:1) refused the request of the Treasury to suspend the operation of this judgement. However, in 2011, this decision (*Ahmed*) was distinguished by the Supreme Court in two conjoined criminal appeals: *R v Forsyth*; *R v Mabey* [2011] UKSC 9; [2011] 2 All ER 165. In those two cases both defendants had been charged with (amongst other offences) making funds available to Iraq contrary to the Iraq (United Nations) Sanctions Order 2000, made under the United Nations Act 1946. The maximum punishment was seven years' imprisonment or a fine, or both. At a preparatory hearing, held

28 See also: Avbeli, M., Fontanelli, F. and Martinico, G. (eds) (2014) *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*. Routledge: London.

29 [2010] UKSC 5; [2010] 4 All ER 829.

under the Criminal Justice Act 1987, the trial judge refused to rule that the order to enforce the UN resolution had to have been made at the same time, or about the same time, as the passing of that UN resolution. In fact, the UN resolution had been passed some twenty years earlier, in 1980. On appeal, the judge's decision was upheld by the Court of Appeal, Criminal Division, and afterwards by the Supreme Court. Even the statutory power to create a criminal offence to enforce the UN resolution did not have to be exercised within any stated time-limit.

In addition to controls exerted by the United Nations, s.62 and Schedule 7 of the Counter Terrorism Act 2008 permit the Treasury to make a direction, in an Order, which requires an 'affirmative resolution' in both Houses of Parliament, to restrict financial transactions with the subject of that Order. In *Bank Mellat v H.M. Treasury*, the Court of Appeal, Civil Division, held[30] that these orders were not subject to the 'minimum interference' rule when, as in this case, the legitimate aim of the restrictions was of a very high value, namely the prevention of terrorism, and Parliament had given the decision-maker a wide 'margin of appreciation'. The Court of Appeal was also influenced by the safeguard provided by the 'affirmative resolution' procedure in Parliament, thus showing that Parliament was well aware of the 'Draconian nature' of the power it was giving to the Treasury. As to other human rights issues, the Court of Appeal also held (by a majority of 2:1)[31] that the subject of a proposed financial restrictions direction – an Iranian bank in this case – was not entitled to make any representations before that decision was taken. The 2008 Act was held to have excluded any such Common Law right and Article 6, ECHR was held not to apply at the legislative stage. There had to be a dispute before the requirements of a 'fair hearing' applied. In any event, in addition to the legislative safeguard of the 'affirmative resolution' procedure, there was also a right of appeal to the High Court under s.63 of the 2008 Act. On an appeal by Bank Mellat to the Supreme Court, the question arose as to whether that court had the power to entertain a 'closed material procedure' in order to consider material submitted by, and to hear submissions from, HM Treasury, not only in the absence of the public, but also without Bank Mellat (the subject of the financial restrictions direction) seeing the material or being present. Such a procedure had been used by the High Court at the original hearing of the bank's appeal against the order and 'special advocates' had been cleared to see the closed material and had been allowed to make representations at the closed hearing. The Supreme Court held[32] (by 7:2) that it had power to hold a closed hearing, otherwise the right to appeal against a judgement which had itself been wholly or partially closed

30 [2011] EWCA Civ 1; [2011] 2 All ER 802.

31 Unlike the Court of Appeal, Criminal Division, the Court of Appeal, Civil Division, permits the delivery of separate (concurring or dissenting) judgements.

32 [2013] 4 All ER 495.

would be ineffective. After the holding of a closed hearing, the Supreme Court, in *Bank Mellat v H.M. Treasury (No. 2)* [2013] 4 All ER 533, allowed Bank Mellat's appeal, holding that the Treasury's order had been 'substantively unlawful' and/or 'procedurally unlawful'. The solicitor who acted for Bank Mellat, Sarosh Zaiwalla, afterwards stated in an interview published in *The Sunday Telegraph* on 2 February 2014 that: 'My firm argued that the Treasury had no evidence to suggest the bank had somehow helped Iran's nuclear programme.' After referring to the Supreme Court's decision to hold the closed hearing so that the claims of the Treasury could be heard, Zaiwalla continued:

> It is not surprising that British justice is respected everywhere.... Can you think of any other country in the world where the superior court will rule against its own government in favour of a foreign party belonging to an inimical hostile country? It doesn't happen anywhere else.

Chapter 9

The rights of prisoners

As we have already noted,[1] the perceived deficiencies of the Common Law, with regard to the protection of the rights of prisoners, was used, by Lord Scarman and other judges and human rights lawyers, when they mounted their arguments, in the 1960s and 1970s, for the incorporation of the European Convention on Human Rights into the national laws of the United Kingdom. After the coming into force of the Human Rights Act 1998, few areas of the laws of England and Wales, Scotland, and Northern Ireland than those areas which are concerned with the human rights of prisoners have more clearly demonstrated how deeply embedded in the United Kingdom the culture of human rights has become. For example, it is difficult to envisage how, at Common Law, the BBC, let alone any prisoner, could have challenged the restrictions on prisoners giving interviews to the media. Yet, in 2012, because of the Human Rights Act 1998, and the direct applicability of Article 10, ECHR in the courts of the United Kingdom, the High Court was able to hold, in *R (on the application of the BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin); [2012] 2 All ER 1089 that these restrictions on freedom of expression had to be established as 'necessary' and 'proportionate' before they could prevent the BBC interviewing Babar Ahmed, a prisoner who had been held for more than seven years because of prolonged and contested extradition proceedings, and subsequently broadcasting that interview.

It is likewise difficult to envisage how, even now, except by relying on the right to private life in Article 8, ECHR, a prisoner who wished to undergo gender reassignment surgery could have achieved the result achieved by the claimant, AB, in *R (on the application of AB) v Secretary of State for Justice and another* [2009] EWHC 2220 (Admin); [2010] 2 All ER 151. In that case the claimant had been born male but was later diagnosed to be suffering from gender dysphoria. While serving a 'post-tariff life sentence' in a male prison for the attempted rape of a female, following a previous sentence for the manslaughter of a male partner, AB applied for, and received, a 'full gender

1 See Chapter 4, fn 1.

recognition certificate' as a female. This certificate was issued to AB under the Gender Recognition Act 2004 – an Act of Parliament which itself owed its existence to Article 8, ECHR and to the Strasbourg jurisprudence of the European Court of Human Rights.[2] The gender identity clinic treating AB would not consider her for gender reassignment surgery until she had spent at least two years living in the role of a female. AB therefore applied for transfer to a female prison. The Secretary of State for Justice and the prison governor decided not to transfer her. Resource implications were a factor in the Secretary of State's decision. AB applied for judicial review, relying on Article 8 and also on the narrow concept of '*Wednesbury* unreasonableness'[3] at Common Law. The High Court held that the decision to retain AB in a male prison, albeit treating her as a woman and keeping her in a single cell, breached her Article 8 rights because it interfered with her ability to progress to full gender reassignment and this went to the heart of her identity and appeared to be closely related to her offending behaviour. The Secretary of State had already recognised that AB had been entitled to proceed to gender reassignment under the 2004 Act. The High Court held that the refusal to transfer her to a female prison had not been proportionate and, even having regard to the question of resources, had not taken account of the costs of keeping AB in a male prison.

Prison discipline

Cavadino, Dignan and Mair have observed[4] that 'The disciplinary procedures to which prisoners are subject can substantially increase their period of captivity or worsen its conditions, and yet until recently they lacked many of the safeguards that are normally associated with judicial processes.' It was not until 1978 that the Court of Appeal, Civil Division, held that the High Court possessed the power of judicial review over 'boards of visitors' when those boards were sitting to hear disciplinary charges against prisoners: *R v Hull Prison Board of Visitors, ex parte St Germain and others*; *R v Wandsworth Prison Board of Visitors, ex parte Rosa* [1979] QB 425; [1979] 1 All ER 701. Nevertheless, in the same case, the Court of Appeal also observed, in passing, that the appropriate High Court order for quashing irregular judicial and quasi-judicial decisions (*certiorari*) did not lie against the disciplinary decisions of a prison governor. This was not only because those decisions related to less serious charges than those which were heard by a board of visitors, but because the governor's position when hearing

2 *Goodwin v United Kingdom* and *I v United Kingdom* (2002) 35 EHRR 18.

3 This concept in English administrative law is more akin to 'perversity' than to the ordinary English definition of 'unreasonableness'. It takes its name from a decision of the Court of Appeal relating to cinema licensing: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 1 All ER 498.

4 Cavadino, M., Dignan, J. and Mair, G. (2013) *The Penal System: An Introduction*, 5th ed. Sage: London. p. 210.

those charges was likened to that 'of the commanding officer in military discipline or the schoolmaster in school discipline. His powers of summary discipline are not only of a limited and summary nature but they are also intimately connected with his functions of day-to-day administration' – per Megaw LJ.[5] The Court of Appeal, Civil Division, had also held that it had jurisdiction to hear this case because it ruled that prison discipline was a civil matter, not a criminal prosecution.

After this decision of the Court of Appeal, the High Court became free to hear challenges to disciplinary proceedings heard before boards of visitors if it was alleged that those proceedings failed to comply with the rules of natural justice. Accordingly, in *R v Hull Prison Board of Visitors, ex parte St Germain and others (No. 2)* [1979] 1 WLR 1401; [1979] 3 All ER 545, the High Court quashed the findings of a board of visitors because a prisoner had been improperly refused permission to call witnesses and because of the manner in which the board had handled hearsay evidence.

After the Woolf Report[6] into prison disturbances (1991) new Prison Rules introduced some reforms into prison disciplinary procedures, in 1992, and removed the jurisdiction of boards of visitors, who were often lay magistrates, to be involved in the adjudication of disciplinary proceedings and henceforth required a 'clear differentiation between disciplinary and criminal proceedings'.[7] Criminal offences, such as assault or criminal damage, were to be referred to the police and, through them, to the Crown Prosecution Service. Although the disciplinary powers of governors and deputy governors were, according to Cavadino, Dignan and Mair, 'considerably enlarged', any award of 'additional days' of imprisonment for a disciplinary offence (the maximum allowed by the Prison Rules 2010 is forty-two days) has to be imposed by an independent adjudicator and the prisoner has the right to legal representation.[8] The appointment of a 'Complaints Adjudicator' was recommended in the Woolf Report. The first such appointment, with the more prestigious title of 'Prisons Ombudsman', was made in October 1994.

As has already been observed, the Human Rights Act 1998 obliged the United Kingdom courts to have regard to the Strasbourg jurisprudence on prisoners' rights. Indeed, soon after the coming into force of the Human Rights Act in England and Wales in 2000, the House of Lords had to consider the case of a prisoner who had been required to leave his cell while it was being searched and while his privileged legal correspondence was scrutinised. This policy was held both to be contrary to the Common Law and also to be a disproportionate infringement of the prisoner's rights under Article 8, ECHR: *R (on the application*

5 [1979] 1 All ER 701, at p. 711.
6 Woolf, H. and Tumin, S. (1991) *Prison Disturbances April 1990*, Cm1456, HMSO: London.
7 Cavadino, Dignan and Mair, *ibid*., p. 211.
8 *Ibid*.

of Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532. Of course, even prior to the coming into force of the Human Rights Act 1998 some prisoners had successfully brought proceedings against the United Kingdom in the European Court of Human Rights. For example, in *Golder v United Kingdom* (1979–1980) 1 EHRR 524, a prison governor had stopped the prisoner's letters to his Member of Parliament and to the chief constable about a previous disturbance at Parkhurst Prison and the segregation and other hardships this had caused to him. The prisoner had also been refused permission to transfer to another prison and to consult a solicitor about taking civil action against a prison officer. The ECtHR decided that Article 6(1), ECHR guaranteed access to the courts and that this right (and also Article 8) had been violated in Golder's case. In *Silver v United Kingdom* (1983) 5 EHRR 347, the Strasbourg court held, in a similar case of control of prisoner's mail, that Article 13, ECHR had also been breached because of the lack of a remedy in English law.

Article 8, ECHR was one of the reasons for the decision of the High Court in 2012 condemning the 'inflexible policy' which imposed restrictions on the granting of 'childcare settlement leave' for mothers with sole caring responsibilities for children under sixteen. Mrs Justice Lang observed that the Secretary of State for Justice had adopted 'an inflexible policy … which did not involve consideration of the merits of individual cases and did not permit of any exceptions. This was unlawful.' She also held that the Secretary of State failed to have regard to Article 8 and to the United Nations Convention on the Rights of the Child. Article 3(1) of the UN Convention which stated that the best interests of the child should be a 'primary consideration' in any action taken by a public authority: *R (on the application MP) v Secretary of State for Justice*; *R (on the application of P) v Governor of H.M. Prison, Downview and Secretary of State for Justice* [2012] EWHC 214 (QB).[9]

Young offenders

Notwithstanding the Human Rights Act 1998, the Court of Appeal, Civil Division, has held that there is no implied right in Article 6(1), ECHR for prisoners in a young offenders' institution to associate with other prisoners: *R (on the application of King) v Secretary of State for Justice*; *R (on the application of Bourgass) v Secretary of State for Justice* [2012] EWCA Civ 376; [2012] 4 All ER 44. The court also held that neither the Young Offender Institution Rules nor the Prison Rules confer any such right. Express rights – for example, the right to education – can be provided individually.

The question of how much force can be used in the case of young offenders arose at a coroner's inquest into the death of an offender, aged fourteen, at a secure training centre: The young offender (A) had committed suicide after being

9 See also: *Solicitors Journal*, 21 February 2012.

physically restrained by a 'pain compliant (nose-distraction) technique', which was done to him in order to remove him to his cell when, in a non-violent protest, he had refused to go there. The secure training centre in question was run by a private company. The coroner had refused to give the jury any ruling on the legal position arising under section 9 of the Criminal Justice and Public Order Act 1994 relating to the use of force to maintain good order and discipline. The coroner's jury then returned a verdict in favour of the training centre and its staff. A's mother then applied for judicial review, in *R (on the application of Pounder) v H.M. Coroner for the North and South Districts of Durham and Darlington* [2009] EWHC 76 (Admin); [2009] 3 All ER 150. The High Court in that case held that section 9 of the 1994 Act was not free-standing and that it had to be read as giving a statutory right to use force if, and only if, secondary legislation – the Secure Training Centre Rules 1998 – permitted it. These Rules, in turn, only permitted physical restraint to be used where that was 'necessary' – and where there had been no alternative – in order to prevent escape, or to prevent injury to the detainee or others, or to prevent damage to property, or to prevent the restrained person from inciting others to do any of these things. The High Court held that the use of force against children would violate human rights principles unless that force was strictly necessary. The court held that the force used on A had been unlawful and that it had not been possible for the coroner's jury to decide whether that force was proportionate without clear guidance from the coroner. Accordingly, judicial review was granted and the coroner's inquisition was quashed. A new inquest was ordered.

Prisoners' rights *versus* security in prisons

A claim by an adult prisoner to father a child with his wife by artificial insemination failed in the Court of Appeal, Civil Division, because this restriction on conjugal rights was necessary for the maintenance of security in prisons. Only in exceptional circumstances would the right to found a family (fundamental though it was) prevail over security considerations: *R v Secretary of State for the Home Department, ex parte Mellor* (2001) *Times*, 1 May.

As to the classification of prisoners, the High Court has held that the Common Law duty of procedural fairness applies to decisions about a prisoner's escape risks classification: *R (on the application of Ali) v Director of High Security Prisons* [2009] EWHC 1732 (Admin); [2010] 2 All ER 82. Accordingly a 'Category A' prisoner was entitled to reasons for being classified as, or after revision being maintained as, either a 'high escape risk' or an 'exceptional escape risk'. The minimal requirement of fairness required that the prisoner needed to know whether or not it was worthwhile to challenge the decision. However, the court held the prisoner was not entitled to any opportunity to answer the case before the decision was made or before a review of the relevant materials was undertaken. A review of what, if any, materials could be released to the prisoner needed only to be taken after a reasoned decision had been given, if such a review was then requested.

The question of whether there can be 'false imprisonment' within a prison, during a strike by prison officers, arose in *Prison Officers Association v Iqbal* [2009] EWCA Civ 1312; [2010] 2 All ER 663. In that case a prisoner sued the Prison Officers Association for false imprisonment because a strike of prison officers, held in breach of contract, had confined him to his cell for six hours more than previously allowed by the prison governor. It was common ground between the parties to the case that the prison governor could not be sued. The Court of Appeal, Civil Division, held, by a majority of 2:1, that an action for false imprisonment could only succeed where there had been a direct act by the defendants which had deprived the claimant of his liberty or, in the case of inaction, a specific relationship which created a duty to act. In the present case it had been the governor's decision which had resulted in the claimant's additional loss of liberty. Only if the prison officers had committed misfeasance in public office could such a claim succeed.

Prisoners' wages and prisoners' votes

It is, of course, a principle of liberal penology that prisoners will have a better chance of rehabilitation, and of not re-offending, if they are treated as members of society, not as outcasts from it. In *R (on the application of S and another) v Secretary of State for Justice* [2012] EWHC 1810 (Admin); [2013] 1 All ER 66, the High Court considered whether deductions from prisoners' earnings (while working for private employers), for the purpose of victim support, infringed the prohibition on 'no punishment without law' in Article 7, ECHR. The court decided that Article 7 had not been infringed. The deductions did not follow on as a punishment for the commission of any offence, but those deductions had occurred because of the prisoner's own decision to work outside prison. As to the right to 'peaceful enjoyment' of 'possessions' under Article 1 to Protocol No. 1 of the ECHR, the court held that this Protocol allowed the Secretary of State and prison governors to have the benefit of a wide 'margin of appreciation'. The deductions in question were lawful because they were closely analogous to a tax or to a contributions system for legitimate social purposes.

The question of prisoners' voting rights has, notoriously, been a long-running dispute between the European Court of Human Rights and the United Kingdom Parliament. In *Hirst v United Kingdom (No. 2)* (2005) 19 BHRC 546, a prisoner serving a life sentence for manslaughter on the ground of diminished responsibility, whose tariff period had expired without his release, claimed the right to vote in United Kingdom Parliamentary and local elections, notwithstanding that United Kingdom legislation[10] had expressly provided that convicted persons, during the time of their detention in a penal institution in pursuance of their

10 Section 3, Representation of the People Act 1983; section 8, European Parliamentary Elections Act 2002.

sentences, were legally incapable of voting in any election. In both a 'simple chamber' of seven judges, and in the Grand Chamber of seventeen judges, the European Court of Human Rights ruled that such a disenfranchisement affecting, as it did, a group of people generally, automatically and indiscriminately, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances, was not compatible with Article 3 of the First Protocol to the ECHR – the 'right to free elections' and the obligation of the United Kingdom to ensure the 'free expression of the opinion of the people'. In *Greene v United Kingdom* (2010) 53 EHRR 267, a simple chamber of the ECtHR applied the principles in *Hirst v United Kingdom (No. 2)* to complaints about ineligibility to vote in both European and United Kingdom Parliamentary elections. In *R (on the application of Chester) v Secretary of State for Justice*; *McGeoch v Lord President of the Council and another* [2013] UKSC 63; [2014] 1 All ER 963, two prisoners serving sentences of life imprisonment, Chester in England and McGeoch in Scotland, brought proceedings relating to their right to vote. Chester sought judicial review of his denial of a vote in United Kingdom and European Parliamentary elections. McGeoch sought judicial review of his denial of a vote in local municipal and Scottish Parliamentary elections. Chester relied on Article 3 of the First Protocol to the ECHR. McGeoch relied on European Union law. The Supreme Court held that it was required to apply the principles set out in the Strasbourg jurisprudence. Even though the Human Rights Act 1998 only required the United Kingdom courts to 'take into account' any judgement of the European Court of Human Rights, it would be wrong for the Supreme Court not to follow a 'clear and constant line of decisions' of the Strasbourg court if there was no inconsistency with some 'fundamental substantive or procedural aspect of domestic law' and those decisions 'did not appear to overlook or misunderstand some argument or point of principle'. The disagreement between the Strasbourg court and the United Kingdom Parliament did not give rise to any such justification for ignoring the decisions of the European Court of Human Rights on the voting rights of prisoners. However, given that these issues were still under active consideration by the United Kingdom government and Parliament, the Supreme Court held that there was 'no point' in the courts making any further declaration of incompatibility. The United Kingdom legislation was primary legislation and it was not possible to 'read it down' or otherwise to interpret it so as to make it consistent with the Strasbourg jurisprudence. In the future, Parliament might be able to maintain consistency with the ECHR by enacting new legislation differentiating categories of prisoners or providing that a prisoner's voting rights should be withheld only until such time that it was no longer necessary to confine him or her for the safety of the public. As to the argument based upon European Union law, the Supreme Court held that this did not confer any right to vote on Chester in England or McGeoch in Scotland, not even in European Parliamentary elections. Restrictions on prisoners' voting rights existed in a number of EU member states and it was the jurisprudence of the European Court of Human Rights which 'operated as the relevant control', not EU law.

As to whether the United Kingdom courts can disregard decisions of the European Court of Human Rights because that court has appeared to 'overlook' or to 'misunderstand' some argument or point of principle, this unseemly situation had previously arisen in *R v Horncastle*; *R v Marquis* [2009] UKSC 14; [2010] 2 AC 373. In those conjoined appeals, the Supreme Court had taken the view that the Strasbourg court, in *Al-Khawaja v United Kingdom* (2009) 26 BHRC 249, had failed to appreciate the safeguards which English law operated before it allowed hearsay evidence to be used by the prosecution in criminal cases. The question of prisoners' voting rights did not raise any such objections to the approach of the European Court of Human Rights and thus its jurisprudence could not be ignored by the Supreme Court.

'Life' sentences

In July 2013 the Grand Chamber of the European Court of Human Rights ruled, in *Bamber v United Kingdom*, that 'whole life sentences' were 'inhuman and degrading' and therefore contrary to Article 3, ECHR. At the time of this judgement, there were forty-nine prisoners in England and Wales, including Bamber, serving whole life sentences for murder or rape.[11] The decision of the Strasbourg court has held that those presently serving life sentences, with no possibility of parole, should have their cases reviewed after twenty-five years and that then they might be freed, depending on whether or not they posed a danger to society. The court had no such evidence as to the risks, if any, which might be posed by Bamber or any of the other forty-eight prisoners who were serving 'whole life' sentences. In October 2013, Ian McLaughlin, a triple killer, who murdered his third victim while he was on day-release from prison, after serving twenty-one years for two previous killings, was sentenced to life imprisonment with a minimum tariff of forty years after the trial judge (Sweeney J) took the view that he was not able to impose a 'whole-life' term because of the ruling of the European Court of Human Rights in *Bamber v United Kingdom*. In January 2014, the Attorney-General applied to the Court of Appeal, Criminal Division, to set aside this forty-year tariff and to impose a 'whole life' term on the ground that 'the decision of the Grand Chamber is not a matter that should influence a sentencing judge in his assessment of whether a whole life order is appropriate'.[12] Judgement was reserved to a later date.

Release on licence

The decision of the Grand Chamber to categorise 'whole life' sentences as 'inhuman and degrading' has been upsetting to some British politicians because

11 *Daily Telegraph*, 10 July 2013.
12 *Daily Telegraph*, 25 January 2014.

it has followed in the wake of the loss of the Home Secretary's own power over prisoners serving 'life sentences'. He first lost the power to impose, for the purposes of punishment, the minimum period of imprisonment to be served by a person sentenced to 'life imprisonment'. This power was lost after the House of Lords had held, in *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, that it was incompatible with Article 6, ECHR, because it amounted to a punishment imposed by the executive rather than by the judiciary or an otherwise 'impartial tribunal'. In *Stafford v United Kingdom* (2002) 35 EHRR 32, the European Court of Human Rights held that the setting of a 'tariff' for a life sentence was, in effect, a sentencing exercise, and that the Home Secretary should not be able to disregard advice from the Parole Board that a prisoner who had completed his tariff for murder was no longer likely to be violent. It was not a sufficient reason for disregarding the Parole Board's advice that the Home Secretary believed that the prisoner would commit non-violent offences such as theft or fraud.

In *R v Gill*; *R v Eccles*; *R v Abu-Neigh (formerly Wallace)*, the first and second appellants had been convicted of murder in 2002, and the third appellant had been convicted of murder in 1998. In 2002, the above decision of the House of Lords in *Anderson* meant that the Home Secretary's involvement in the assessment of the minimum terms for prisoners serving life sentences was incompatible with Article 6, ECHR. This, in turn, led to the enactment of Schedule 22 of the Criminal Justice Act 2003. Paragraphs 3 and 6 of that Schedule allowed existing prisoners to apply to the High Court for their minimum terms to be fixed by the court, or obliged the Home Secretary himself to make such an application. All three appellants claimed that they had made 'exceptional progress'. This had been the criterion which had allowed the Home Secretary to reduce the minimum term under a previous statute – the Crime (Sentences) Act 1997 – repealed by the 2003 Act. The Court of Appeal, Criminal Division, held that this previous criterion had no application to the post-2003 legislative structure for determining the minimum term of life sentences.

The question of the lack of resources for operating this post-2003 structure arose in 2009. Three applicants for judicial review (James, Lee and Wells) had all been given determinate sentences under s.225, Criminal Justice Act 2003, with tariffs of less than five years. Section 28, Crime (Sentences) Act 1997 had already imposed a duty on the Secretary of State to release prisoners on licence after they had served the appropriate tariff and the Parole Board directed release. The Parole Board was, of course, an 'impartial tribunal' for the purposes of the ECHR. Nevertheless, the Parole Board was not entitled to give a direction for a prisoner's release unless the Secretary of State had referred the case to the Board and the Board was 'satisfied that it was no longer necessary for the protection of the public' that the prisoner should be confined. After the 2003 Act came into force, it transpired that there were not sufficient resources for identifying risk factors in the case of 'short tariff prisoners', nor for providing courses or training for them. The House of Lords held that the Secretary of State's breach of

his public law duty to provide courses and other resources did not, in itself, make a prisoner's post-tariff detention unlawful. It remained the law that the Parole Board could not order a prisoner's release unless it was first satisfied that his or her detention was no longer necessary for public protection. Although the applications for judicial review, in the case of these three prisoners, were dismissed, the Supreme Court held that Article 5(1), ECHR required a 'sufficient causal connection' between a criminal conviction and a prisoner's deprivation of liberty. That link could be broken by defective decisions as to release or continued detention. As to whether prisoners were entitled to assistance in challenging their detention before the Parole Board, the Supreme Court held that Article 5(4), ECHR did not require more than procedural assistance. The Parole Board had to speedily decide whether the prisoner should continue to be detained. It was enough for a fair procedure that the appropriate dossier was made available to the prisoner: *R (on the application of James) v Secretary of State for Justice*; *R (on the application of Lee) v Secretary of State for Justice*; *R (on the application of Wells) v Secretary of State for Justice* [2009] UKHL 22; [2009] 4 All ER 255.

Wrongful convictions

There is no such thing as a right of appeal at Common Law. All rights of appeal originate, directly or indirectly, from statute law. Although the High Court has a supervisory jurisdiction over inferior courts and tribunals, prior to the Criminal Appeal Act 1907, there was no right of appeal against a jury's verdict or against the judge's directions or summing-up to that jury. The only remedy against a wrongful conviction, other than the prerogative of mercy, arose if the trial judge agreed to refer a point of law to a large assemblage of judges (including himself) sitting in the Queen's Bench Division of the High Court. In practice those points of law tended to be those of the most recondite nature, such as whether shipwrecked mariners could kill a fellow crew member, who was also near to death, in order to drink his blood and eat his flesh and thereby save their own lives (held: they were guilty of murder[13]); whether a woman who reasonably, but erroneously, believed her husband was dead would be guilty of bigamy if she remarried within seven years of his disappearance (held: she was not guilty[14]); or whether someone in a crowd is guilty of 'aiding and abetting' an illegal prize-fight if he is there as a mere spectator (held: not guilty[15]). Not only were less important points of law left without any prospect of appeal or review, there was no provision for an appeal on questions of fact. It was therefore only

13 *R v Dudley and Stephens* (1884) 14 QBD 273. (The prerogative of mercy was used in this case.)
14 *R v Tolson* (1889) 23 QBD 168.
15 *R v Coney* (1882) 8 QBD 534.

after much agitation, and well-publicised miscarriages of justice, that Parliament created the Court of Criminal Appeal in 1907, even though there had been a Court of Appeal for civil cases since the Judicature Acts of 1873–1875. In 1966 these two courts became the 'Civil Division' and the 'Criminal Division' of the Court of Appeal.

Although the Court of Criminal Appeal had jurisdiction to hear appeals on questions of fact from cases tried by judge and jury, in practice it has usually been only appeals on questions of law which have had any realistic prospect of success. For example, it was not until 1936 that a conviction for murder was quashed in the absence of any error of law because the conviction was against the weight of the evidence: *R v Wallace*.[16] The 1907 Act was replaced by a new Criminal Appeal Act in 1968 and this, in turn, was replaced by the Criminal Appeal Act 1995. The 1995 Act replaced a procedure which had previously existed, in section 17 of the 1968 Act, authorising the Home Secretary to refer a case to the Court of Appeal, Criminal Division, even if the time-limit for an appeal by the defendant had already passed or even if there had already been an unsuccessful appeal. In fact, although each year there were 'about 730 applications to the Home Office, and its equivalent in Northern Ireland, only 10–12 of those cases reached the Court of Appeal'.[17] According to Elliott and Quinn, who describe particularly the Home Secretary's first referral of the case of the 'Birmingham Six' to the Court of Appeal in 1987: 'The Court of Appeal showed a general reluctance to allow s.17 appeals in cases where it had already dismissed an appeal, and in fact appeared to dislike s.17 referrals generally.'[18] It was not until a second reference of the case to the Court of Appeal in 1990 that the convictions of the 'Birmingham Six' were quashed because the Director of Public Prosecutions did not resist that appeal.

Whilst it was hoped that the Criminal Cases Review Commission would be more willing to refer cases to the Court of Appeal than successive Home Secretaries had been, one perceived weakness of the reform was that, like the Home Secretary, the Commission could only make reference to that court. It could not impose a decision of its own about the correctness of a criminal conviction. The approach of the Commission to the question of whether or not it should refer a case to the Court of Appeal was examined by the High Court in *R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498. In that case the applicant (Maria Pearson) had been convicted of murder in 1987 and her application for leave to appeal against that conviction out of time was dismissed by the Court of Appeal, Criminal Division. In 1994 she applied to the

16 Goodman, J. (1969) *The Killing of Julia Wallace*. Harrap: London.

17 Elliott, C. and Quinn, F. (2013) *The English Legal System*, 14th edn. Pearson: Harlow. p. 609.

18 *Ibid*. p. 609. See also: Mullins, C. (1990) *Error of Judgement: The Truth about the Birmingham Bombings*. Poolbeg Press: Dublin.

Home Secretary to refer the case to the Court of Appeal under section 17, Criminal Appeal Act 1995. She relied on a ground of appeal which had not been raised earlier, namely that she had been suffering from 'battered woman syndrome' at the time of the killing. She was able to submit a detailed psychiatric report in support of this ground of appeal. In 1997 her case was transferred to the Criminal Cases Review Commission. The Commission then declined to refer Maria Pearson's case to the Court of Appeal because it took the view that it did not pass the test in section 9, Criminal Appeal Act 1995, namely that there was a 'real possibility' that her conviction would not be upheld. In an application for judicial review, Pearson's lawyers argued that the Commission had paid 'lip service' to the 'real possibility' threshold and had usurped the function of the Court of Appeal by judging the admissibility and weight of the new evidence. The High Court held that the 'real possibility' test denoted a contingency which, in the Commission's judgement, amounted to more than an outside chance or a bare possibility, even if it amounted to 'less than a probability, or a likelihood, or a racing certainty'. (It is to be hoped that the court well knew that there is no such thing as a 'racing certainty'.) In a case where much depended on whether the Court of Appeal would agree to accept new evidence, it was unavoidable that the Commission would have to try to predict the response of that court. Accordingly, the Commission had not usurped the function of the Court of Appeal and had applied the correct test while remaining 'fully conscious of the respective roles of itself and the Court of Appeal'. It can be observed here that, although the question of whether the Court of Appeal can accept new evidence might be thought to be a question of law, not fact, such a question cannot be answered in isolation from the content, and probable impact, of that evidence, and it cannot only be an examination of the reasons why that evidence was not available, or not used, in the first place. Even the previous reluctance of the appellate courts to hear appeals based upon a defendant's criticisms of his own lawyers seems to be a thing of the past: *R v Ensor* (1989) 89 Cr App R 139; *Boodram v State of Trinidad and Tobago* [2002] 1 Cr App R 12.

In *R (on the application of the Director of the Revenue and Customs Prosecutions Office) v Criminal Cases Review Commission* [2006] EWHC 3064 (Admin), it was not a defendant, but a prosecutor, who sought to challenge a decision of the Criminal Cases Review Commission. In that case, four persons (Mumtaz Ahmed and three others) had been convicted of conspiracy to commit money laundering. These convictions had been based upon the fact that the defendants had had reasonable grounds to suspect that the property in question represented the proceeds of another person's criminal conduct. After appeals against these convictions had been dismissed, or the time-limit for appealing against them had expired, the House of Lords ruled, in another case,[19] that the

19 *R v Saik* [2006] UKHL 18; [2006] 2 WLR 993.

crime of conspiracy to commit money laundering required the prosecution to prove subjective intention or knowledge and that the existence of objective grounds for reasonable suspicion was not enough. The Criminal Cases Review Commission then decided to refer the convictions of Ahmed and his three co-defendants to the Court of Appeal. The Director of the Revenue and Customs Prosecutions Office applied for judicial review of this decision because he argued that the practice of the Court of Appeal, Criminal Division, in so-called 'change of law cases' was only to grant leave to appeal if otherwise 'substantial injustice' would be done. The High Court held that the Criminal Appeal Act 1995 had given the Commission the widest discretionary powers. The Commission itself did not have to act within any statutory time-limit and was permitted to refer a case 'at any time'. In deciding whether the reference to the Court of Appeal had a 'real possibility' of success, the Commission was entitled to consider whether the substantive appeal had such a chance, having regard only to the way in which the Court of Appeal decided whether or not convictions were 'unsafe'. The application for judicial review failed because the Commission had not acted irrationally in disregarding the Court of Appeal's rule of practice about 'change of law' cases.

Compensation for wrongful convictions

The United Kingdom has sought to comply with the International Covenant on Civil and Political Rights 1966 (ICCPR), Article 14(6) by enacting a right to compensation for persons wrongly convicted of a criminal offence. This right has been set out in s.133(1), Criminal Justice Act 1988 as follows:

> When a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction … unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted …

This statutory provision differed from the wording of the Article 14(6) ICCPR only in that it used the phrase 'beyond reasonable doubt' instead of the word 'conclusively'. In *R (on the application of Adams) v Secretary of State for Justice*; *Re MacDermott and another* [2011] UKSC 18; [2011] 2 WLR 1180, the Supreme Court heard claims for compensation after two men had had their convictions for murder quashed. In the first case the Court of Appeal, Criminal Division decided that incompetent defence representation had deprived the defendant (Adams) of a fair trial. In the second case new evidence had come to light indicating that the defendants (McDermott and

another) had been abused or ill-treated by the police before making admissions at an interview. The Secretary of State had refused to pay compensation to both men on the ground that it had not been proved that a 'miscarriage of justice' had taken place. In the case of Adams, the Secretary of State also held that no 'new or newly discovered fact' had been the reason for quashing his conviction. The Supreme Court considered the meaning of 'miscarriage of justice'; and referred to the analysis of the Court of Appeal as to the circumstances in which convictions could be quashed on the basis of the discovery of fresh evidence, namely: category 1: where the evidence (for example, DNA evidence) showed that a defendant was innocent; category 2: where the evidence was such that, had it been available at the trial, no reasonable jury could properly have convicted the defendant; category 3: where the evidence rendered the conviction unsafe because, if it had been available at the trial, a reasonable jury 'might or might not' have convicted the defendant; category 4: where something had gone 'seriously wrong' in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted. The Supreme Court then went on to hold that category 3 (the 'might or might not have convicted' category) could not fall within the ambit of s.133 of the 1988 Act. It did not satisfy the 'beyond reasonable doubt' test (or, even, the 'conclusively' test) and would only have required the Secretary of State to be certain that he was uncertain. The Supreme Court held that the first case (Adams) fell within category 3 and that, therefore, his appeal against the refusal of compensation should be dismissed. The court also held that the second case (MacDermott and another) fell within category 2 because the new facts so undermined the case against those defendants that no conviction could possibly be based upon it, and, accordingly, those appeals should be allowed.

The High Court considered the above four categories in *R (on the application of Ali and others) v Secretary of State for Justice* [2013] EWHC 72 (Admin); [2013] 2 All ER 1055 and confirmed that the test for 'miscarriage of justice' was wider than category 1 but excluded categories 3 and 4. The court held that a readily useful formulation was: 'Has the claimant established beyond reasonable doubt that no reasonable jury (or magistrates) properly directed as to the law could convict on the evidence now to be considered?' The High Court took the view that the Secretary of State should not take a different view of the case from that taken by the Court of Appeal in quashing the conviction, except where the evidence had evolved after the hearing of the appeal. But because the Court of Appeal would have been concerned with the safety of the conviction and not with whether the defendant was innocent, the fact that the court did not express an opinion on innocence or guilt could not disentitle an applicant from qualifying under s.133 of the 1988 Act. What, however, would be of particular significance would be a statement from the Court of Appeal that the case should have been withdrawn from the jury at the close of the prosecution case.

In the famous Scottish miscarriage of justice case of Oscar Slater in 1909, which eventually led to the creation of the Scottish Court of Criminal Appeal,[20] Slater, who had originally been sentenced to death, was awarded £6,000 *ex gratia* compensation in 1928 for his nineteen years' imprisonment.[21] The government of the day defended this amount on the basis that, if he invested this amount in a Post Office annuity, it would have brought him in 'nearly £1 a day for the rest of his life'.[22] The maximum now payable under the new statutory scheme is (since 2006) £1 million.[23] However, in 2007 the House of Lords ruled that deductions could be made from the compensation payable for loss of earnings to take account of the fact that a prisoner does not have to pay for food and 'lodgings': *R (on the application of O'Brien and others) v Independent Assessor* [2007] UKHL 10; [2007] 2 All ER 833. This, of course, is tantamount to stating that a prisoner has to pay for his own imprisonment.

20 More than twenty years after miscarriage of justice cases had led to the creation of the Court of Criminal Appeal in England.

21 Blake, L. (2004) 'Oscar Slater (1872–1948), Victim of Miscarriage of Justice', *Oxford Dictionary of National Biography*. OUP: Oxford. Vol. 50, pp. 914–915.

22 Roughead, W. (ed.) (1950) *The Trial of Oscar Slater*, 4th ed. William Hodge & Co.: Edinburgh and London. p. lviii.

23 Elliott, C. and Quinn, F. (2013) *English Legal System*. Pearson: Harlow. p. 332.

Chapter 10

Conclusion

In a measured conclusion it is right that the authors do not just recapitulate the previous chapter but instead set out something distinctive that underlies the entire content of this book. Undoubtedly, human rights are now the lingua franca of social, political and legal discussion around the criminal justice system. Human rights have almost entirely displaced the language of religion as the mainstay of our contemporary moral discussion. Moreover, as we have argued throughout, the contemporary driver for human rights at the regional and local level is the 1948 Universal Declaration of Human Rights, which sets out the basic claims which are then subsequently fully developed at a more local level. Thus the European Convention on Human Rights, which follows on from the Universal Declaration of Human Rights, informed the 1998 Human Rights Act, which, in turn, informs the day-to-day practice of human rights, especially within the criminal justice system. Human rights are a universal and, therefore, an international aspect of governance. They have now largely displaced previous discussions of some form of difference principle in relation to justice, in the global sense, and certainly since Rawls' *The Law of Peoples* in 1999, the dominant rationale in discussions of global justice is human rights, though the claims for them have grown more and more expansive.[1] Accordingly, it is right that the authors engage in an analysis of the current politico-legal debates about human rights, because these are important to the role of human rights, in the future, within the criminal justice system.

Human rights: one value amongst many

Human rights are now part of our modern world. They are embedded in international law and are incorporated into national law. They govern the minutiae of how the state should treat its citizens and what, in return, citizens should expect from the state. Human rights regulate every aspect of the criminal justice system and no lawyer, probation worker, police officer, prison guard or any

1 Rawls, J. (1999) *The Laws of Peoples*. Harvard University Press: Cambridge.

other criminal justice professional can ignore them. Human rights are the baseline by which rightful treatment is now measured. It is hardly possible to conceive of a situation where human rights will retreat in importance or become abandoned, wholesale, as a measure of civilisation after being instituted, in their recognisably modern form, after the atrocities of the Second World War era. However, they must be safeguarded where they exist and fought for where they do not. There is a danger that the rhetoric of human rights might thrive even though the rights themselves come under threat, as we have witnessed in the so-called war on terror. Isaiah Berlin, long ago, wrote about the nature of human values and related how they can be incommensurate, one with another, whilst perfectly reasonable in their own terms.[2] In our world the value of human rights is daily being weighed against the value of national security, liberty and existential threat, and so on. The issue is whether such human values as equality, happiness and liberty are reducible to a single core value or whether value pluralism is a given in the affairs of men and women, as Williams has argued.[3] The issue of value pluralism continues to divide moral and political philosophy and Berlin's work continues to haunt the development of modern ethical and political discourse in this area.[4] In pinpointing the fact that there are occasions when it is not always possible to make a reasoned choice between plural values, Berlin showed us how good values can and are traded off against other values. In the case of human rights, we have witnessed this in relation to national security, notably since the 9/11 terrorist outrages. This being the case we need to be forever on guard to preserve and extend human rights because the dilemma Berlin has posed us, of having human values incommensurate with one another, is a constant danger. We cannot always expect human rights to win out against such things as national security, especially when some of those rights being defended are extended to criminals. The greater value of human rights vis-à-vis other values cannot be taken for granted.

The role of economics

There has been a movement towards the widening of human rights across the world but at the same time the global justice demands for economic redistribution have been rather undercut. People may have gained a notional human right claim but their overall economic condition may not have been advanced. The claims of those who have suffered under colonialism and historic exploitation have been largely set aside as *individual* human rights have advanced. The shift towards a human rights agenda has been at the expense of

2 Berlin, I. (1969) *Four Essays on Liberty*. OUP: Oxford.
3 Williams, B. (1981) *Moral Luck*. CUP: Cambridge.
4 Andreou, C. (2005) 'Incommensurate Alternatives to Rational Choice', *Ratio* 18 (3). pp. 249–261.

the agenda for global justice in terms of the redistribution of wealth. Moreover, this corresponds with the decline of demands for the industrialised countries to address their own historical exploitation of other nations, by way of redistribution: at the same time as the international community holds the less developed nations of the world to an extensive human rights agenda, with its attendant costs. The burden of global justice is increasingly borne by the weaker nations as the richer industrialised countries detach themselves from their obligation to redistribute wealth to the poorer nations. The human rights agenda is not always a straightforward gain for mankind in global terms, nor is it free from political consideration.[5]

Human rights are typically understood as being political and not merely formally legal.[6] This is important because, this being the case, structural inequality becomes an important aspect of human rights, notably in relation to the power to exercise a given (human) right. A political conception of human rights recognises that there needs to be a fundamental equality between citizens irrespective of the position they hold in society. The political understanding of human rights must operate with basic equality in mind. All modern states must hold to this underlying political, and moral, equality. However, human rights in their modern form are not merely an outgrowth of an earlier tradition of natural rights in Anglo-American and European thought: they are newer and more globally oriented, as Beitz has detailed.[7] Beitz has argued that human rights are rooted in an agreement between states about precisely what is an acceptable form of treatment for persons living in a modern polity, i.e. in the aftermath of the Second World War. This is what motivated the drafters of the 1948 Universal Declaration of Human Rights when they focused upon the equal dignity of persons as the *sine qua non* of good relations between states. In other words, the way a particular state treats its own citizens is the measure of its own acceptance by other states. This model has the states as the enforcers of their own responsibilities, under the Universal Declaration of Human Rights, for human rights. Human rights enforcement is not left to other sovereign nations save *in extremis*, since the drafters of the 1948 Universal Declaration of Human Rights, after all, never envisaged human rights as typically overriding the principle of national sovereignty. This is an important issue for, as Dorsey has argued, sovereign competence and the provision of public goods, and welfare, are inextricably linked and the best way to secure human rights. It may well be that we should cement sovereign competence as the measure of the capacity to advance human rights; rather than try to advance them without the necessary infrastructure in place to effectively do so.[8]

5 Dunn, J. (1978) *Western Political Theory in the Face of the Future*. CUP: Cambridge.
6 Cohn, J. (2004) 'Minimalism about Human Rights', *Journal of Political Theory*, 12 (2). pp. 190–213.
7 Beitz, C. (2009) *The Idea of Human Rights*. OUP: Oxford.
8 Dorsey, D. (2005) 'Global Justice and the Limits of Human Rights', *Philosophical Quarterly*, 55 (221). pp. 562–581.

What of all this for the criminal justice system? Human rights have been allied to 'just ordering' and to be essential within the criminal justice system for the greater good of the wider society. Loader and Sparks have made the case for the notion of a just ordering to drive the sort of liberal society that they advocate. They have argued that:

> From the perspective of just ordering human rights offer basic protections for the individual against the state's coercive intrusions and place necessary constraints on the scope and reach of penal power. They thus form a key means of giving effect to the aforementioned idea of damage control, by placing identifiable limits on the coercive interventions that the state and other governing authorities can make on the lives of individuals. This is first and foremost a matter of legal rules and principles – and a democratic egalitarian politics of crime needs to be able to work effectively in this legal domain. But one is also registering the importance here of fostering police and penal institutions whose working practices are infused by a human rights ethos – institutions whose self-understanding encompasses the idea that part of what it means to control crime and pursue order is to understand that task in human rights terms. Nor today can we confine thinking about human rights to state institutions. We must also explore ways of ensuring the rights protections and a rights ethos inform the practice of private authorities undertaking public functions in the security field, as well as examining further how human rights fit into a schema of just ordering in the international and transnational domain. Human rights protections and associated working cultures are, across these fields, a vital part of what makes ordering just, of sustaining order in ways that treat human beings with equal concern and respect.[9]

The Loader and Sparks analysis is a paean for social democracy and though it seems a reasonable call for more enlightened governance it seems also rather unfocused in seeing human rights as totalising and undifferentiated at the macro and atomic levels. Moreover, their analysis completely fails to address the sort of claims, or rights, surrounding the economic sphere. It is as though such rights as they detail are being understood as existing in a morally neutral space. It is a settlement seemingly conducive to these two university professors, doubtless exercising the deliberative role they advocate within society and protected by an enlightened criminal justice system. One doubts it would seem so realistic for those whose life chances are structured by an unequal economic settlement and in an altogether different relationship with the state. Here is the problem – in confining human rights to aspects of the criminal justice system, the issue of

9 Sparks, R. and Loader, I. (2011) 'Beyond Lamentation' in T. Newburn and J. Peay (eds) *Policing: Politics, Culture and Control.* Hart Publishing: Oxford. pp. 11–41 (p. 29).

crime causation is never really addressed. Unless there is an economically redistributive aspect to the content of human rights, they are all well and good but they are only formal and procedural. Not something one would want to lose but limited in scope all the same. On the Loader and Sparks account, human rights are only a baseline for the likely expectations of entitlement and service provision that persons can hope for. In failing to address the economic and structural inequalities of society and the state's role in enabling them, Loader and Sparks seem complacent at best, if not wilfully unconcerned for those who have no rights against the unjust economic settlement they inhabit. It is hardly a 'just ordering' for the folk at the bottom of the economic pile who are subject most of all to the criminal just system, as perpetrators of crime and as victims of it.[10]

The issue of the extent of human rights and whether they need to be extended to the sphere of social welfare, or limited to the criminal justice system, is something that divides scholars. The extent of economic and social rights is after all a political determination.[11] Shue has outlined huge inequalities between people under a market system and made the case that these are at odds with ideas about equal respect and treatment. Shue points out how this implies certain basic rights in terms of social insurance, food and health provision; and how this is covered in the Universal Declaration under Articles 22 and 25.[12] Moreover, the right to work is covered under Article 23 as an essential element in human dignity, as is the right to private property, which is justified under Article 17 as supporting personal autonomy. It is not the purpose of this book to focus upon economic matters but it would be absurd to maintain that economic factors do not materially impact on the life chances of people, including the relationship of individuals to the criminal justice system, in a range of ways from access to legal services to levels of personal security in housing. It has long been part of the critical criminological and legal traditions that there is a definite, and *proven*, relationship between economics, life chances, risk and the criminal justice system. In Criminology, for example, Robert Merton looked at how social structures impose a definite pressure on individuals to engage in non-conforming, as opposed to conforming, conduct.[13] He made a distinction between those culturally defined goals that were legitimate and those that were not. He saw *strain* occurring whenever there is disjunction between an

10 Box, S. (1987) *Recession, Crime and Punishment*, Macmillan: Basingstoke; Hale, C. (1998) 'Crime and the Business Cycle in Post-War Britain Revisited', *British Journal of Criminology*, 38. pp. 681–698; Reiner, R. (2007) 'Political Economy, Crime and Criminal Justice' in Maguire, M., Morgan, R. and Reiner, R. (eds) *The Oxford Handbook of Criminology*, OUP: Oxford. pp. 341–380.

11 Donnelly, J. (2013) *Universal Human Rights*. Cornell University Press: Ithaca. p. 42.

12 Shue, H. (1980) *Basic Rights: Affluence and US Foreign Policy*. Princeton University Press: Princeton. pp. 19–23.

13 Merton, R.K. (1968) *Social Theory and Social Structure*. Free Press: New York.

individual's culturally defined goals and their means of achieving these. Merton saw American society as over-emphasising material success, i.e. relative to other non-material goals. He saw this material aspiration, and insatiability, as built-in to the American economic model.[14] He followed Durkheim in seeing the relationship between an individual's culturally defined goals and their capacity to obtain them as leading to anomie. Anomie, he argued, occurred within the social structure itself as a measure between goals and means of achieving them. Merton's strain theory was then a thoroughly economically infused theory. What Beck has argued about risk is worth quoting in this regard:

> The history of risk distribution shows that, like wealth, risks adhere to the class pattern only inversely; wealth accumulates at the top, risks at the bottom. To that extent, risks seem to strengthen, not to abolish the class society. Poverty attracts an unfortunate abundance of risks. By contrast, the wealthy (in income, power or education) can purchase safety and freedom from risk.[15]

The relationship of individuals, and communities, to the criminal justice system certainly has economic aspects: the issues relate to how important one considers these to be. The Anglo-American tradition has tended to restrict human rights to individual rights, and to rights of procedure, whereas the political Left has tended to play up the role of economics and the role of the material base in structuring the outcomes of individuals, and groups, and how this shows itself in terms of practical matters; for example, relating to policing, incarceration levels and victimisation. Charvet and Kaczynska-Nay titled their 2008 book *The Liberal Project and Human Rights: the Theory and Practice of a New World Order*, and it is this notion of the efficacy of the liberal project that divides thinkers.

Are human rights universal or are they relative?

Human rights obviously have a universalistic character and the advocates of human rights seek their adoption and extension on that basis. The universal character of human rights imposes differential claims on states. This is problematic when states have differing economic, ethical, moral, political and religious values so there is an obvious cross-cultural dimension to the realisation of human rights. A formal human right has to be exercised from within a given legal, cultural and political territory. Human rights, though ascribed formally, presuppose a level of human equality which does not exist in the reality of our

14 Walsh, A. (2000) 'Behaviour, Genetics and Anomie/Strain Theory', *Criminology*, 38. pp. 1075–1108.

15 Beck, U. (1992) *Risk Society: Towards a New Modernity*, Sage: London. p. 35.

common social experience. This is particularly true in the criminal justice system. Donnelly has devised a novel formula to overcome this practical problem. He has stated:

> The universality of human rights is relative to the contemporary world. The particulars of their implementation are relative to history, politics, culture and particular decisions. Nonetheless, at the level of the concept, as specified in the Universal Declaration, human rights are universal. The formulation 'relatively universal' is thus particularly apt. Relative modifies – operates within the boundaries set by – the universality of the body of interdependent and indivisible internationally recognized human rights. But that universality is largely a universality of possession – universalism above all draws attention to the claim that we all have the same internationally recognized human rights – rather than a universality of enjoyment. And universal human rights not only may but should be implemented in different ways at different times and in different places, reflecting the free choices of free peoples to incorporate an essential particularity into universal human rights.[16]

Donnelly elegantly dances around the gross inequalities that undermine universality, in practice if not in theory. Sumner has made a bold claim the other way in stating that: 'the exercise of rights was converted into crime'.[17] Sumner follows E.P. Thompson, who, as early as 1975, had argued that: 'We can show that offenders were subjected to economic and social oppression, and were defending certain rights, this does not make them instantly into good and worthy social criminals, hermetically sealed off from other kinds of crime.'[18] Sumner sets out how the historical process of acquiring rights in the eighteenth and nineteenth century directly correlates to a time when:

> a series of normative divides or ideological cuts, cuts made in social practice – and the dominant cuts in our society are those made by the rich, powerful and authoritative. It is these distinctions which create the divide between deviance and normality.... Historically these distinctions often settle into custom, law and science.[19]

Sumner's argument follows that set out by Marx in relation to the transformation of the customary rights of the proletariat wherein the poor lose the right to

16 Donnelly, J. (2013) *Universal Human Rights*. Cornell University Press: Ithaca. p. 105.
17 Sumner, C. (1994) *The Sociology of Deviance: An Obituary*. Open University Press: Buckingham. p. 299.
18 Thompson. E.P. (1975) *Whigs and Hunters: The Origin of the Black Act*. Allen Lane: London. p. 193.
19 Sumner, C. (1994) *The Sociology of Deviance: An Obituary*. Open University Press: Buckingham. p. 299.

gather fallen wood to heat their homes as the wood is turned into the property of another. What was once gathered becomes, now, stolen.[20] The working class loses an unregulated way of living and it loses practical customary rights at the same time that the capitalist class obtain new rights which, if they exercise them, to effectively criminalise the poor. On this reading, rights are radically relative to one's class position. Moreover, the provision of rights is set in relation to economic and political power and the censures that are subsequently generated, through this process, disadvantage the poor and privilege the rights of the powerful. Sumner sees rights, including human rights, as pertaining to a fundamentally unfair political and economic settlement. Though they afford formal correspondence to certain legal protections, it is equally true, on Sumner's reading, that they mask fundamental inequalities between persons.

These are recurring themes in the understanding of human rights. How important is the role of economics in realising human rights? Do human rights mask deep inequalities between persons on the one hand whilst upholding a formal equality on the other? These are crucial, critical questions and, arguably, the Social Sciences have been better at addressing them than lawyers.

Human rights and the Common Law

It was argued, in reply to Anthony Lewis's article *The Case for a Written Constitution*,[21] that there would be no need for a written constitution in the United Kingdom if Parliament: 'gave to the House of Lords (howsoever constituted) an absolute veto over Bills of a constitutional nature, and to the courts the power to decide whether or not legislation fell within this category'.[22] Much has happened since then, but there is no doubt that there would have been very little scope for allegations of steamrollering, or loss of sovereignty to the European Court of Human Rights, if this modest suggestion had been followed through. Such legislation would, of course, have required the British courts to start thinking about the nature of *constitutional statutes* several decades before EU legislation about weights and measures caused them to do so. Whether EU legislation now brings with it the 'Charter of Fundamental Rights', enforceable in the UK, notwithstanding the opt-out for the UK in the Protocol to the Lisbon Treaty, remains an open question. It is, however, beyond doubt that British membership of the EU has brought with it a raft of rights and duties, many of which, such as freedom of movement and the ban of sex discrimination in employment, have a human rights dimension. The obligation of the courts of the United Kingdom to refer cases to the European Court of Justice at

20 Sherover, E. (1979) 'The Virtue of Poverty: Marx's Transformation of Hegel's Concept of the Poor', *Canadian Journal of Political and Social Theory*, 3 (1). pp. 53–66.
21 Lewis, A. (1968) *The Spectator*, 8 March.
22 Blake, L. (1968) *The Spectator*, 22 March.

Luxembourg, and thereafter to enforce the judgements of that court, means that it is of little practical importance to know whether EU law has supremacy over national laws or, as Konstadinides has argued, only 'primacy'.[23] In either case, it would take a judicial decision amounting to a 'naked usurpation of the legislative function under the thin disguise of interpretation'[24] before obligations of EU membership could be 'read down' so as to become only an obligation to 'have regard' to the decisions of Luxembourg. But, as we have seen in so many cases relating to criminal justice, including the latest saga on prisoners' voting rights, even the gentle obligation in the Human Rights Act 1998 to 'have regard' to the decisions of the European Court of Human Rights at Strasbourg can have a profound effect on the English legal system and can cause significant problems for the United Kingdom government and Parliament.[25]

Human rights jurisprudence places upon administrators, and ultimately upon lawyers and judges, the duty to maintain a delicate balance of security and the rights of individuals, especially in such places as prisons and in the courts of law if criminal prosecutions are based upon statements from vulnerable or intimidated witnesses. In the wider world, the threats of terrorism in all its forms require a constant tinkering with this delicate balance, so that, on the one hand, the European Convention on Human Rights does not become (in the chilling words of US Supreme Court Justice Robert Jackson) 'a suicide note', and on the other hand, when dealing with suspected terrorists ensuring that, 'the extreme medicine of the constitution' does not become 'its daily bread'.[26] In this regard it is worth quoting the dicta of Lord Hoffmann in discussing the scope of the words (in Article 15, ECHR) permitting derogations from Convention rights if there is a *war or other public emergency threatening the life of the nation*. Lord Hoffmann observed:

> I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out rights which British subjects enjoyed under the Common Law.... There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion [have been]

23 Konstadinides, T. (2009) *Division of Powers in European Union Law*. Wolter-Kluwer: New York.

24 Per Lord Simonds, *Magor and St Mellons R.D.C. v Newport Corporation* [1951] 2 All ER 839, at p. 841.

25 See Chapter 9: 'Prisoners' wages and prisoners' votes'.

26 Burke, E. (1955) *Reflections on the French Revolution*. Everyman's Library: London.

> conferred on the government.... Those powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised.... What is meant by 'threatening the life of the nation'? The 'nation' is a social organism.... The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endures through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War.... I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation ... I have said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend such a power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation in the sense of a people living in accordance with its traditional laws and political values comes not from terrorism but from laws [derogating from the Human Rights Act] such as this.[27]

Where do we go from here?

Whatever is said against the notion of individual human rights, there are few, if any, persons who wish to see the wholesale abandonment of these rights. It is unlikely that there will be any movement to remove human rights, where they exist, in the industrialised world at least. In legal circles human rights are not only here to stay but have embedded themselves in public consciousness. This has happened not only in legal education at universities but also in schools, in the teaching of civics and public responsibility. The starting point for most claims will be on the basis of *prior* human rights entitlement. In terms of the way legislation is drafted, we have seen how this is now related directly to broader principles, to do with human rights, which are enshrined in the Universal Declaration of Human Rights, the European Convention on Human Rights and the Human Rights Act 1998. All secondary legislation *must* comply with the ECHR unless primary legislation has expressly left the law-maker with no choice but to make the legislation in that non-compliant way. Likewise, if Parliament expressly desires to make its primary legislation non-compliant with

27 *A and others v Secretary of State for the Home Department*; *X and others v Secretary of State for the Home Department* [2004] UKHL 56, paras [88]-[97] [2005] 3 All ER 169, at pp. 218–220.

the ECHR, the only remedy will be for the UK courts to make a *declaration of incompatibility*. We have seen this conflict in relation to the question of prisoners' voting rights. Therefore, if Parliament does not wish to take advantage of the fast-track procedure for changing non-compliant primary legislation, which the 1998 Act provides, the result will be a continuing disparity between the national laws of the UK and its obligations under international law. This being the case it will be apparent that, in terms of the presumption of rightfulness, the higher principle enshrined in the ECHR is noted as taking priority (philosophically) and that any non-compliant status afforded to it in a limited number of cases will only be a pragmatic, and perhaps short-lived, accommodation. Human rights are then triumphant in the criminal justice system and they pervade all aspects of policing, probation, prison governance and the criminal law and its procedures. There is no likelihood of this changing in the foreseeable future. The trajectory is in terms of widening the scope of human rights to encompass more and more aspects of human behaviour, including the regulation of education and economic rights. The disaster that the world witnessed in 1945, in the wake of the Second World War, was assuaged by the Universal Declaration of Human Rights in 1948 and a resolution to uphold human dignity as the highest value in the affairs of men and women and of states.

Let us end with a quote from Victor Hugo: 'I advance in life, I grow more simple, and I become more and more patriotic for humanity.'[28]

28 Hugo, V. (2012) *Les Misérables*. OUP: Oxford.

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