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The Young Human Rights Lawyer



Human Rights Lawyers Association
Young Lawyer's Committee

THE YOUNG HUMAN RIGHTS LAWYER

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Dear Reader,

Welcome to the inaugural edition of the Young Human Rights Lawyer. The purpose of this Journal is to provide a platform for young lawyers to publish their work on human rights topics. The articles in this year's Journal cover a wide range of areas including European Law, regional human rights protection, international criminal law, and arguments about the protection of human rights domestically. We hope that it inspires you to inquire into the human rights issues in your particular area of interest and to seek to utilise the available rights to protect the vulnerable.

The production of this Journal would not have been possible without the generous support of a number of people and organisations. We would like to thank in particular those who have sponsored the Journal; 1 Gray's Inn Square; Church Court Chambers; and Shoaib Khan. Without their support this Journal would not have come into existence. We would also like to thank the Executive Committee of the Human Rights Lawyers Association for their support and Nicola Jeffrey, Anna Tkaczynska, Emma Fenelon, Dervla Simm, Daniel Denman, Shoaib Khan, and Angela Patrick who took time out of their busy schedules to act as our editorial board. A special thank you is also due to Lord Pannick QC who produced the foreword which addresses interesting and pertinent question about possible developments in Human Rights protection in the United Kingdom. I would also like to thank my fellow members of the Young Lawyers Committee (a sub Committee of the HRLA) who have put a lot of hard work into getting this project off the ground, they are: William Horwood (Secretary), Matthew Allan (Communications Officer), Asma Nizami, Chetna Varia, Ben Stanford, Chucks Golding, and Alexandra Nelia.

Thank you for reading the Journal. We hope that this is the first of many and look forward to receiving contributions for our 2nd Edition.

Yours faithfully,

Michael Polak

Chair, Young Lawyer's Committee of the Human Rights Lawyers Association

The Human Rights Lawyers' Association ("HRLA") was created and set up in order to provide a means of promoting the effective legal protection of human rights in the United Kingdom, to assist in education and training in the field of human rights law and practice, and to strive to further the effective implementation of human rights law within the United Kingdom. To this end the Association organises seminars and events at which topical human rights issues and law are discussed and disseminated, and administers a bursary scheme to assist those wishing to pursue a career in human right law obtain valuable experience through undertaking internships. The Association also contributes to consultations where it is deemed appropriate to do so and where this furthers the Associations' objectives. More recently the HRLA has sought to provide additional assistance to students of human rights law wishing pursuing a career in law and develop their skills by providing a twice yearly 'careers day' for students and running a judicial review moot competition, based around a human rights topic. The HRLA is a membership organisation and currently has over 1800 members including solicitors, barristers, judges, government lawyers, legal academics, in-house lawyers, pupils, trainees and law students.

This new Journal is the latest HRLA project, aimed mainly at students and young lawyers and set up and administered by the Young Human Rights Lawyers Committee (a Sub Committee of the HRLA), as a means of encouraging debate and stimulating interest in human rights law. It is very much hoped that it will be of great benefit and interest to all those concerned about the level and degree protection of human rights in the UK.

If you would like to help us to increase knowledge and understanding of human rights and to aid their effective implementation within the UK please consider becoming a member. To find out more about the HRLA please visit our Website at: <http://www.hrla.org.uk/>

Alison Gerry

Chair, Human Rights Lawyers Association Executive Committee

Foreword - Contemplating a British Bill of Rights

Lord Pannick QC¹

It is a pleasure and an honour to be asked to write THE Foreword for this Journal.

The articles which follow demonstrate the importance, the vigour and the scope of contemporary debates in human rights law. They each make a valuable contribution to scholarship, and will assist lawyers arguing such issues in courts and tribunals.

But this Journal is being published at a worrying time for human rights lawyers. We await the Government's draft British Bill of Rights ("BBR") to replace the Human Rights Act 1998 ("HRA"). There are a large number of important questions which the drafting of a BBR will need to address.

Some human rights lawyers object to a BBR in principle. I do not. Other European States have their own constitutional documents, based on national circumstances (historical, cultural, political and legal). Those documents protect human rights perfectly adequately. Indeed, there may be virtues in a British Bill: the HRA is not widely understood or respected and debates on a BBR may, just possibly, promote greater enthusiasm for human rights law in this country.

I also think that it is unobjectionable that the Conservative Manifesto included a commitment to "make our own Supreme Court the ultimate arbiter of human rights matters in the UK". Indeed, it was not the intention of the HRA that British judges should follow judgments of the European Court with which they disagree. Section 2(1) of the HRA simply requires our judges to "take into account" the judgments delivered in Strasbourg. If our judges were to be freed from a self-imposed restraint, they would be able to be more influential when hard cases go to Strasbourg.

Much more troubling is the Conservative Manifesto commitment to "restore common sense to the application of human rights in the UK" and to "reverse the mission creep" in this area of the law. My view of "common sense" and of the "mission" of human rights law is not the same as that taken in the Cabinet. That is why the traditional approach, which I would

¹ The author is a practising barrister at Blackstone Chambers in the Temple, a Fellow of All Souls College, Oxford, and a crossbench peer in the House of Lords.

commend to the Lord Chancellor, Michael Gove, is to let judges, rather than politicians, decide what the fundamental freedoms set out in a Bill of Rights require in particular cases.

All of this begs very difficult questions not addressed in the Manifesto and which the forthcoming policy documents (White Paper? Draft Bill?) will need to address. Will the BBR exclude some rights contained in the European Convention on Human Rights? If so, which of freedom of speech, freedom from arbitrary detention, the right to property etc are not sufficiently "British"? By contrast, are there "British" rights which the drafters of the Convention omitted?

An especially important question is whether Parliament is going to limit the scope of the protected rights in areas where Ministers disapprove of European Court judgments. Will the BBR, for example, recognise the right to family life but exclude the deportation of offenders, or include a right to vote but deny it to prisoners, or exclude the activities of the armed forces abroad (an especially sensitive subject for Conservative Ministers and MPs)?

So to limit the application of the protected rights would be inconsistent with the stated policy of making the Supreme Court "the ultimate arbiter". Indeed, a Bill of Rights should be a statement of values that is above the day-to-day political disputes and controversies. It should not seek to settle scores, real or imaginary, with judges who have made decisions which have upset the Government. A BBR cannot last long if it reads less like a statement of universal values than the grievances of a lawyer who has had a bad day in the European Court or in the Supreme Court.

Perhaps the BBR will instead identify principles for judges to take into account, as the HRA does in relation to the importance of freedom of expression (section 12) and freedom of thought, conscience and religion (section 13), while leaving it to the court to decide on the application of the rights and principles in specific cases. That would be much more acceptable.

Will the BBR retain the effective device in section 3 of the HRA requiring judges to interpret other legislation consistently with human rights "so far as it is possible to do so"? That is important in maintaining a primacy for human rights in statutory interpretation and save where Parliament expressly, or by necessary implication, qualifies or excludes human rights (and pays the political price for doing so). That technique was approved as part of the common law by Lord Hoffmann in ex parte Simms [2000] 2 AC 115, 131 and again, speaking

for the Appellate Committee of the House of Lords, in R (Morgan Grenfell & Co Ltd) v Special Commissioners [2003] 1 AC 563, 607, paragraph 8.

Will the BBR retain the very effective drafting technique in the HRA of allowing judges to declare that statutory provisions breach human rights but retaining Parliamentary sovereignty by denying the judges power to affect the validity of unambiguous legislative provisions?

The HRA is an important part of the constitutional settlement in the Scotland Act 1998, in Wales and in the Northern Ireland Good Friday agreement. Will Westminster repeal the HRA for parts of the United Kingdom against the wishes of their administrations? The BBR may need to be renamed the English Bill of Rights.

Will the United Kingdom maintain its obligation, as a member of the Council of Europe, to implement European Court judgments? To renege from that international law obligation would damage the reputation of the United Kingdom, and our ability to persuade President Putin, and others, to comply with Strasbourg judgments and the decisions of other international human rights courts.

The previous Lord Chancellor, Chris Grayling, told last year's Conservative Party conference on 30 September 2014 that he "supports real human rights", and so opposes "the terrible things done in countries like North Korea". That sets the bar rather low for most people's comfort. Human rights lawyers are hoping that the BBR maintains higher standards.

Case Comment:

Case C-354/13 *Fag og Arbejde* (FOA) (acting on behalf of Karsten Kaltoft) v
Kommunernes Landsforening (KL) (acting on behalf of the Municipality of Billund)
ECLI:EU:C:2014:2463; [2014]WLR(D) 554

Background

The Claimant, Mr Karsten Kaltoft, represented in the proceedings by his union *Fag og Arbejde* ('FOA'), had been employed as a 'childminder' since 1996 by Billund Municipality in Denmark.

Due to Mr Kaltoft's obesity, and as part of its health policy, Billund Municipality provided financial assistance from January 2008 to January 2009 in order for Mr Kaltoft to attend fitness and physical training sessions to improve his health.

Thereafter, a letter dismissed Mr Kaltoft on 22 November 2010. The dismissal took place following an official hearing process applicable to dismissal of public-sector employees. During this process Mr Kaltoft's obesity was discussed. Nevertheless, the parties disagreed as to how Mr Kaltoft's obesity became the topic of discussion during the process, just as they also disagreed that Mr Kaltoft's obesity formed part of the basis for the dismissal decision.

The Defendants, Billund Municipality, asserted that the reason for Mr Kaltoft's dismissal had been decided 'following a specific assessment on the basis of a decline in the number of children'. Obesity was not mentioned in Mr Kaltoft's notice of dismissal, but neither were any reasons specifying why Mr Kaltoft was individually selected for dismissal, as opposed to any other of the several childminders employed by Billund Municipality.

Mr Kaltoft's claim centred on the fact that he was unlawfully discriminated against because of his obesity, as his weight prevented him from performing his duties.

Questions for the Court of Justice of the European Union (CJEU)

Following a reference for a preliminary ruling, the court in Kolding, Denmark, asked for the CJEU's clarification on the following issues:

1. Is it contrary to European Union (EU) law concerning fundamental rights, generally or particularly, for a public sector employer to discriminate on grounds of obesity in the labour market?

2. If there is an EU prohibition of discrimination on grounds of obesity, is it directly applicable as between a Danish citizen and his employer?
3. Is the assessment to be conducted with a shared burden of proof, with the result that the actual implementation of the prohibition in cases where proof of such discrimination has been made out requires that the burden of proof be placed on the respondent/defendant employer?
4. Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC of 27 November 2000 Establishing a general framework for equal treatment in employment and occupation¹? If so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination [on] grounds of disability as laid down in that directive?

Preliminary Opinion of the Advocate General

The Advocate General, Niilo Jääskinen, considered the first three questions together. Initially, he stated that the Court could not extend the law to encompass obesity. Consequently, he dismissed the first three questions, choosing instead to focus on the criteria in question four. Advocate General Jääskinen stated that obesity was not expressly mentioned as a prohibited ground of discrimination within the EU legal framework. However, he noted that severe obesity could amount to a disability in accordance with Article 1 of Council Directive 2000/78/EC, but only when it fulfilled all criteria set out in the Court's case law. It was for the national courts to decide if an obese individual has such a disability. In addition, he disregarded the notion that a self-inflicted disability could be any less worthy of protection.²

The ruling by the CJEU

The Court held that while obesity itself was not a disability protected under EU law, it could be disabling in its effect on the individual. Further, the Court held that the concept of 'disability' must be understood as referring to a limitation which stemmed from long-term physical, mental or psychological impairments which, in interaction with various

¹ Council Directive 2000/78/EC of 27 November 2000 Establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.

² Fag og Arbejde (FOA) (acting on behalf of Karsten Kaltoft) v Kommunernes Landsforening (KL) (acting on behalf of the Municipality of Billund) (Case C-354/13) EU:C:2014:2463; [2014] WLR (D) 554, para 58.

barriers, would hinder the participation of the person concerned in professional life on an equal basis with other workers.³

However, the Court did not necessarily disregard the possibility that in certain circumstances, the obesity of a worker could cause a limitation which resulted in physical, mental or psychological impairments. These impairments, in connection with other barriers, might hinder the full and effective participation of that person in professional life on an equal basis with other workers. Furthermore, where this limitation was a long-term one, obesity could come within the concept of 'disability', within the meaning of Directive 2000/78.⁴

Comment

Similarly, the United Kingdom recently held in *Walker v SITA Information Networking Computing Ltd*⁵, that obesity was not in itself a disability under UK legislation, but that it might make it more likely that a person has impairments which are within the confines of the disability discrimination legislation.⁶ As such, it is only when obesity substantially hindered an employee's ability to carry out normal day-to-day activities in comparison to his colleagues that it would be considered to be a disability for the purposes of the EU Equal Treatment in Employment Directive.

Nevertheless, the EU decision shifts the burden of keeping those who are severely obese in the workforce to employers, who must make adjustments to accommodate any special requirements arising from that person's disability. So, where there is an obese worker whose weight hinders their performance at work, they will be entitled to disability protection. This means that employers must make reasonable adjustments for these employees. Although, the contention remains, to what extent would adjustments be reasonable?

Gavin Dingley

³ See *HK Danmark v Dansk almennyttigt Boligselskab* (Joined Cases C-335/11 and C-337/11) EU:C:2013:222; [2013] ICR 851, paras 37-39; *Z v A Government Department* (Case C-363/12) EU:C:2014:159; 18 March 2014, para 76; *Glatzel v Freistaat Bayern* (Case C-356/12) EU:C:2014:350; [2014] RTR 26, para 45.

⁴ *HK Danmark v Dansk almennyttigt Boligselskab* (Joined Cases C-335/11 and C-337/11) EU:C:2013:222; [2013] ICR 851, para 41.

⁵ *Walker v SITA Information Networking Computing Ltd* [2013] UKEAT/0097/12.

⁶ The Equality Act 2010.

'Ullah' overhaul: The Human Rights change we need is already here

The Conservative Party stands poised to repeal the Human Rights Act 1998 ("HRA"), citing in support the dangers of Strasbourg dictating our human rights law. But this fear is misplaced, particularly since it may, at least in part, be traced back to a view of human rights which is already undergoing a subtle revolution; the quiet overhaul of the *Ullah* principle.

Originally proposed by the late Lord Bingham in *R (Ullah) v SSHD*¹, the principle holds that "the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".² This "mirror principle" sets the decisions of the Strasbourg Court as both the baseline and the target for domestic law, making it simultaneously aspirational and limiting.

Laws LJ, in the 3rd Hamlyn Lecture 2013³, suggested that the time is upon us to rethink this once-powerful principle. He remarked, "Lord Bingham's reference [in *Ullah*] to the 'correct interpretation' of the Convention, and his statement that it is in the hands of the Strasbourg court implies that there is such a thing: a single correct interpretation, a universal jurisprudence, across the boundaries of the signatory States. I think that is a mistake".⁴ This article will argue that he was right to say so.

However, his view is not unchallenged. In his 2013 lecture "Constitutional Change: Unfinished Business",⁵ Lord Judge suggested that Parliamentary Sovereignty entails a kind of mirror principle. He proposed that since judges are "bound to apply an Act of Parliament" even where it tells them to apply foreign judicial decisions, so HRA must mean courts are "required by domestic legislation to implement the [ECHR]".⁶

However, HRA provides for persuasive rather than binding application of foreign judicial authority. Section 2(1) HRA imposes a duty on any court or tribunal hearing litigation involving a Convention right to *take into account* any judgment of the Strasbourg Court. Lord Irvine, in his 2011 lecture "A British Interpretation of Convention

¹ [2004] UKHL 26, reported at [2004] 2 AC 323.

² *Ibid* at [20].

³ Available online at <https://www.judiciary.gov.uk/announcements/speech-lj-laws-hamlyn-lecture-2013/>

⁴ *Ibid* at §25.

⁵ www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitution-unit/research/judicial-independence/lordjudgelecture.pdf

⁶ *Ibid* at §34.

Rights⁷ stressed that "take into account" should be given the meaning it would have to "the man on the street"⁸ and expressed consternation at the fact that this phrase has caused controversy. A binding obligation to apply Strasbourg jurisprudence exists only in Article 46.1 of the Convention, which provides that contracting states "undertake to abide by the final judgment of the Court in any case *to which they are parties*" (emphasis added). The status of this Article is that of an international treaty obligation, which - although binding - cannot be enforced by citizens in domestic courts.

The fate of the *Ullah* principle is linked with the often overlooked issue of the meaning of the HRA phrase "Convention rights", since this will determine exactly what it is that our courts are bound to apply. One possibility is that HRA is an incorporating statute so HRA Convention rights are Convention Articles. This would mean that post-1998, the same rights were still in existence, but having been "brought home" citizens could now access them in domestic courts. The Commission on a Bill of Rights proceeded on this assumption as did the Court of Appeal in *Wilson v First County Trust*.⁹ This "incorporation view" of HRA would seem to make the *Ullah* principle a truism, if not absurd, since domestic human rights must, of course, track Strasbourg's ECHR rights, if they are one and the same thing.

However, this view is not supported by the wording of HRA, and it is positively contradicted by the parliamentary history of the Bill. HRA's preamble makes no mention of incorporation, but says only that the Act is to "give further effect to" ECHR rights. Ian Loveland points out that Parliament could have stipulated in the Act that its substantive content should be identical to ECHR but chose not to do so.¹⁰ Lord Irvine LC, at the report stage of the Bill in the House of Lords, stated starkly: "I have to make this point absolutely plain. The ECHR under [the HRA] is not made part of our law... it does not make the Convention directly justiciable".¹¹

The alternative viewpoint, advocated by commentators including Loveland and Timothy Endicott, and politicians including Lord Irvine and Jack Straw, is that HRA does not incorporate but rather creates a carbon copy of the ECHR rights, which is textually identical but capable of developing a divergent substantive meaning. Loveland points out that requirement merely to "take into account" in s.2 is evidence that "Parliament

⁷ www.biicl.org/files/5786_lord_irvine_convention_rights.pdf

⁸ *Ibid* at p.2.

⁹ [2001] EWCA Civ 633, reported at [2002] QB 74.

¹⁰ Ian Loveland, *Constitutional Law* (6th edn, OUP 2012).

¹¹ HLD January 29 1998, c.421.

has...envisaged the possibility that Convention rights and their Convention article counterparts will bear different meanings".¹² Under this "carbon copy" view, any *logical* necessity for mirroring then disappears, and HRA's true construction reveals no *legal* necessity for mirroring either.

Further, mirroring of ECHR and HRA is not an accurate description of recent case law. Roger Masterman has accurately summed up recent UK judgments saying "practice under the HRA reveals a more sophisticated approach to the Convention case law than the *Ullah* mantra would suggest".¹³ *Kay v Lambeth LBC*¹⁴ clarified that the domestic system of precedent holds even when there is a subsequent inconsistent decision of the Strasbourg Court. In *R v Horncastle*,¹⁵ Lord Phillips spoke for a unanimous Supreme Court in using the right not to follow Strasbourg jurisprudence for the first time.

There have been cases where the UK goes further than Strasbourg, including the majority judgment of the Supreme Court regarding what constitutes deprivation of liberty in the recent case of *P v Cheshire West*.¹⁶ Perhaps even more problematic for the *Ullah* principle are cases where the UK does not go as far as Strasbourg, contrary to Lord Bingham's stipulation 'certainly no less'. In *R (Animals Defenders International) v Secretary of State for Culture*,¹⁷ the House of Lords declined to follow *VgT Verein v Switzerland*,¹⁸ despite 'very similar' facts. Despite multiple calls from Strasbourg to lift the UK's ban on prisoner voting, the Prime Minister David Cameron has made it clear that UK prisoners "damn well shouldn't" be given the vote.¹⁹

The Conservative Party may well be correct in some of its arguments as to why it would be legally undesirable for Strasbourg to dictate domestic human rights law. They would be joined in some of those anxieties by judges and commentators. Laws LJ's chief concern with the *Ullah* principle is the threat posed to the "the common law's capacity to draw inspiration from many different sources"²⁰ if unpopular Strasbourg decisions undermine

¹² Loveland (n10), p.640.

¹³ Roger Masterman, "The Mirror Crack'd" UK Constitutional Law Blog (13 February 2013), available online at <http://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/>

¹⁴ [2006] UKHL 10, reported at [2006] 2 AC 465.

¹⁵ [2009] UKSC 14, reported at [2010] 2 AC 373.

¹⁶ [2014] UKSC 19, reported at [2014] AC 896.

¹⁷ [2008] UKHL 15, reported at [2008] 1 AC 1312.

¹⁸ (2002) 34 EHRR 4.

¹⁹ "Prisoners 'damn well shouldn't' be given right to vote, says David Cameron", The Guardian (13 December 2013), available online at <http://www.theguardian.com/politics/2013/dec/13/prisoners-right-to-vote-david-cameron>

²⁰ N3 at §4.

the UK's confidence that the common law is enriched by legal importation from Europe. The Convention currently has 47 signatory states, leading commentators including Masterman to fear that Strasbourg jurisprudence is insensitive to "national quirks or peculiarities".²¹ Lord Hoffman, in *AF v SSHD*,²² felt obliged to "submit" to Strasbourg even though he believed its judgment was not in the UK's national interest.²³ Baroness Hale has expressed concern that the *Ullah* principle poses a threat to the HRA's stated intention - to "bring rights home" - in that it fuels a misconception of human rights as foreign or alien rather than as part of a home-grown jurisprudence.²⁴ Lord Neuberger suggested in *Manchester City Council v Pinnock*,²⁵ that *Ullah* "would destroy the ability of the court to engage in constructive dialogue with the European court".²⁶

However correct these arguments, they are consigned to the realm of the hypothetical if the *Ullah* principle is not in fact descriptively accurate. The Conservative Party would need to look elsewhere for arguments in favour of HRA repeal in an *Ullah*-free legal system.

However, whilst movement away from *Ullah* is gathering momentum, it has so far been uncoordinated. Masterman carried out a survey of "Strasbourg-avoidance techniques" in recent case law and found thirteen different reasons, ranging from Strasbourg being "wrong" to "the court prefers not to follow Strasbourg authority".²⁷ Moving forward, judges could coordinate their rejection of *Ullah*, and their reasons for it. A suitable single line of reasoning may perhaps proceed thus: So long as the UK was not a party to the relevant judgment of the Strasbourg Court the UK is obliged only to "take into account" Strasbourg's decisions. This means Strasbourg case law is one consideration to be weighed amongst others, which may include: national quirks or peculiarities, the protection of UK national interests, the importance of creating a UK culture of rights and the development of the common law by drawing on diverse sources. All justified departures from Strasbourg would be covered by: "the court had good reason, on balance, to exercise its discretion to depart from the Strasbourg line".

²¹ Masterman (n13).

²² [2009] UKHL 28, reported at [2010] 2 AC 269.

²³ Ibid at [70].

²⁴ Baroness Hale, "*Argentoratium Locutum: Is the Supreme Court Supreme?*", Nottingham Human Rights Lecture 2011.

²⁵ [2010] UKSC 45, reported at [2011] 2 AC 104.

²⁶ Ibid at [48].

²⁷ Masterman (n13).

By moving away from the *Ullah* principle in a more unanimous and coordinated way, the courts would simultaneously achieve two ends; clarifying the degree of autonomy which the common law court enjoy and highlighting that the Conservative's assertions of being dictated to by Strasbourg cannot stand as an argument for HRA repeal.

Imogen Proud

Case Comment: Hounga v Allen & Another

Facts

In July 2014 the Supreme Court in the United Kingdom ruled in the case of *Hounga v Allen & Anor*¹.

Miss Hounga was a minor from Nigeria, who received an offer to move to the UK to work for and live with Mrs Allen. In return she was told she would receive £50 a month, food and accommodation and (most importantly to her) she would be sent to school. Miss Hounga accepted the offer and took part in obtaining false documents. She arrived at Heathrow on 28 January 2007 and her passport was issued with a visitor's visa, valid for six months. The appellant was aware that she had secured the right to enter the UK on false pretence and that it was illegal for her to take up employment. Miss Hounga stayed with Mrs Allen for 18 months during which she was unpaid, suffered physical and emotional abuse and was told that if she left she would be imprisoned by the authorities because her stay in the UK was illegal. Miss Hounga was never enrolled in school in the UK. On 17 July 2008 Mrs Allen physically abused the appellant and threw her out the house.

Miss Hounga brought claims for wrongful dismissal, unfair dismissal, unpaid wages and holiday pay and complaints in tort for discrimination and harassment. Mrs Allen relied on the defence of illegality, which provides that a claimant cannot pursue a remedy if the wrong committed arises out of an illegal act.

Judgment

The Supreme Court unanimously agreed that the Court of Appeal was wrong to hold that the illegality defence bared the complaint for the statutory tort of discrimination. It was held that there was no 'sufficiently close connection between the illegality and the tort to bar the claim.'² Lord Wilson held at paragraph 40 that if the test applicable to the defence of illegality involves an inextricable link, then, upon a subjective analysis, the link was absent in the present case. This was because 'entry into the illegal contract (...) and its continued operation (...) provided (...) no more than the context in which Mrs Allen then perpetrated the acts of physical, verbal and emotional abuse by which, (...),

¹ *Hounga v Allen* [2014] UKSC 47.

² *Ibid* [59].

she dismissed Miss Hounga from her employment'³ Moreover Lord Wilson found that the interest of public policy did not support the defence.⁴

The majority of the Supreme Court (Lords Wilson and Kerr and Lady Hale) additionally supported their decision with reference to laws on Trafficking in Human Beings (THB). The latter is of interest for this Commentary as here is where wider importance lies. The majority considered that human trafficking did occur and, even if the present case was not a case of THB, 'it was so close to it that the distinction will not matter for the purpose of what follows.'⁵ The finding of human trafficking assisted the court in addressing the question of whether there was another aspect of public policy to which an application of the defence of illegality would run counter. The court took note of The Council of Europe Convention on Action against Trafficking in Human Beings, in particular Article 15, which provides:

(3) Each party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.

The majority took on an approach that it would be a breach of the UK's obligations under the Convention for the defence of illegality to bar Miss Hounga's claim. This decision was made bearing in mind the current efforts of the UK government to combat THB and protect the victims; namely, the Draft Modern Slavery Bill.⁶ As such the majority found that 'The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront...'⁷ The minority did not agree with the argument, stating that international obligations did not require English law to permit the appellant to recover damages for the statutory tort of discrimination or for the courts to depart from the principle of illegality so as to allow a trafficked individual wages under an unlawful contract of employment.

Commentary

The case concerns, what we can deem in many ways a classic example of THB. Mrs Allen or her family were not prosecuted for their wrongdoings but the Supreme Court's decision sends a message that traffickers will not escape claims against them on the basis

³ Ibid [40].

⁴ Ibid [44].

⁵ Ibid [49].

⁶ Modern Slavery Bill 2014-15, Progress of the Bill, <http://services.parliament.uk/bills/2014-15/modernslavery.html> accessed on 13th October 2014.

⁷ Hounga v Allen [2014] UKSC 47, [52].

of technicalities such as the defence of illegality. The Appellant's "story" is not unusual, and this judgment can help victims of THB obtain compensation for their suffering. In other words, the judgement empowers victims with fundamental labour rights and thus helps counterbalance their vulnerability. At a time when prosecutions of traffickers are few and far between, the alternative legal remedies are welcome.

Furthermore, the judgment clarifies whether, as per the Convention on Action against Trafficking in Human Beings, the provision of compensation is limited to cases of trafficking only or whether it extends onto acts of discrimination. The majority found that compensation could have a wider meaning than just monetary schemes set up for victims. Such a judgment is a victory for human rights; it follows the progressive stance that protecting and assisting a victim of THB should be at the forefront of THB policies, and that this at times may include broadening the scope of international obligations. Countries are often accused of doing the bare minimum with regard to their duties to protect victims, especially when the victims are irregular immigrants. The majority finding shows a sensitive and progressive interpretation of international obligations with regard to compensation.

This judgment appears at a sensitive time, when immigration policies as well as European influence in UK courts are under scrutiny. The court's decision, which considered international law in detail, sends a message that there remains a strong presumption in favour of interpreting English domestic law in line with international legal obligations and international norms.

Julia Murasziewicz

To what extent have the authoritative bodies of Senegal and Liberia fallen short of their responsibilities as concerns Female Genital Mutilation under Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa?

'States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- *creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;*
- *prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;*
- *provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;*
- *protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.'*

(Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa)

Senegal and Liberia lie at two ends of the spectrum in their responses to Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of the Women in Africa ('The Maputo Protocol'). Both countries have ratified the treaty; Liberia did so in 2008 - four years after Senegal. Senegal enacted a law criminalising Female Genital Mutilation ('FGM') even before the Maputo Treaty came into existence while Liberia is one of twenty-one countries to have ratified the Treaty whilst failing to specifically criminalise FGM. This seems to initially suggest an easy answer to the question. However, Article 5 of The Maputo Protocol demands more of state parties than a simple piece of legislation meaning the answer is not so clear-cut. Both countries have

fallen short of their legal responsibilities as well as, incidentally, their social and political responsibilities.

It would be easy to argue that Senegal satisfied its duty to prohibit FGM 'through legislative measures backed by sanctions' given that the practice was criminalised there in January 1999. Article 299 of the Senegalese Amended Penal Code reads:

"Any person who violates or attempts to violate the integrity of the genital organs of a female person by total or partial ablation of one or several of the organ's parts, by infibulations, by desensitization or by any other means shall be punished by imprisonment from six months to five years".

The penalty is the same for 'any person who, through gifts, promises, influences, threats, intimidation, or abuse of authority or power, provokes these sexual mutilations or gives instructions for their commission'. The offence further provides that, if the offence is committed by a medical practitioner, they can expect to receive the maximum penalty and that, if FGM results in death, the perpetrator shall be subjected to hard labour for life. In this respect, Senegal has successfully satisfied its responsibilities to enact legislation backed by prima facie harsh sanctions.

Such thoroughness stands in stark contrast to Liberia's inaction. While FGM may be contrary to the Liberian Constitution which protects 'security of the person' under Article 11, it is hard to see this as evidence of a state party taking 'all necessary legislative measures' to eliminate the practice. FGM is likely to fall under Section 242 of the Penal Code:

"Any person who maliciously and unlawfully injures another by cutting off or otherwise depriving him of any members of his body, or in any way maims him or any part of his body or the members thereof, with intent in so doing unlawfully to disfigure him or to diminish his physical vigour, is guilty of a felony punishable by imprisonment for not more than five years".

Again, this is insufficient. Unlike Senegal's direct legislation concerning FGM, this does not show Liberia's condemnation of what is clearly a harmful practice that 'negatively affect[s] the human rights of women and which [is] contrary to recognised international standards'. While FGM may conveniently be covered by such an offence, it is by no

means the same as directly criminalising FGM to demonstrate the state's desire to eliminate the practice and a refusal to tolerate it. FGM is criminalised in most countries through law against harming others, yet specific offences criminalising FGM are required in order to aid a top-down change in attitude.

However, Article 5 of the Maputo Protocol demands more of a country than just passing a law. A country cannot simply legislate against FGM and then wash its hands of the issue. The need for judicial support in order to support the victim is also stressed if the practice is to be eradicated and this appears to be a shortcoming in both Senegal and Liberia. It is not solely a case of there being few convictions against FGM but also few prosecutions are brought. This is more understandable in Liberia given the lack of explicit criminalisation than in Senegal. The scarcity of information on judicial action is evidence of this in itself. A few months after Article 299 was passed in Senegal, the Public Prosecutor ordered the arrest of two women, the mother and grandmother of a five year old girl, as well as a practitioner of FGM after the father claimed they had ordered FGM to be performed on his daughter. However, the case was dropped following public outcry.¹ Ten years later nevertheless in April 2009, arrests occurred after the police were tipped off by an anonymous caller that a 16 month old child had been cut. The parents were originally sentenced to three months in prison but pardoned while the cutter and grandmother were released after three months despite being sentenced to six months in prison. In this case, there was also significant public outcry with Marabouts speaking out in defence of the cutter and powerful local families demanding that the law should be repealed.² This time the case was not dropped perhaps demonstrating that Senegal needed greater international support such as that provided by the Maputo Protocol in order to resist caving under public pressure. Evidently, there has been an improvement even if it took ten years to begin to ensure convictions and demonstrate that the law will be enforced. If the practice is to be eliminated as required by the Treaty, then it is necessary to provide effective sanctions that will act as a form of deterrent. In failing to provide effective judicial support for their legislation, Senegal's response to Article 5 of the Maputo Protocol has been inadequate.

¹ US Department of State Archive, 'Senegal: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)' <<http://2001-2009.state.gov/g/wi/rls/rep/crfgm/10107.htm>> accessed 16th May 2014.

² United Nations Population Fund, 'Senegal: Human Rights Key to Ending FGM/C' <<http://www.unfpa.org/sites/default/files/resource-pdf/LawSenegal.pdf>> accessed 16th May 2014.

Judicial support has similarly been weak in Liberia. Evidence suggests that a successful case may have occurred in 1994 when a Grebo girl received \$500 in damages (equivalent to US \$11.75) after she was forced to undergo FGM by the Sande Secret Society³. However, the details for this are limited and perhaps a more reflective case is seen in the most recent claim brought by Ruth Berry Peal against two members of the Goia tribe who had kidnapped her and performed FGM on her. They were found guilty in July 2011 of kidnapping, felonious restraint and theft. It is notable that there was no specific conviction for FGM. The defendants were sentenced to three years in prison in February 2013 though reports vary as to whether they served their sentence in part or even at all. However, this case's significance lies not in its demonstration of inadequate sanctions as in Senegal but its failure to support the victim. Following the case, Peal was forced to move to Monrovia without her husband and child – hardly a victory on her part. In addition, the fact that the media refused to report on the case reflects that it has hardly had the result that it should have done and is far from an effort to create public awareness on the topic as it should have been.⁴ This case epitomises Liberia's legal, judicial and social failures as regards the issue of FGM.

The requirements of Article 5 of the Maputo Protocol are extensive. I have attempted to sketch the failures of the legislative bodies and the judiciary while referencing how these failures have had knock on effects in areas such as public awareness and victim support. Despite my criticism of Senegal, I would argue that the country is moving in the right direction and should be praised for that. In 2008, the Prime Minister with the help of the UNFPA-UNICEF Joint Programme on FGM/FGC launched a 'National Action Plan for the Acceleration of the Abandonment of FGM' for 2010 to 2015 and the government has been collecting data on FGM prevalence using household surveys. Such efforts are symbolically significant as they reflect governmental involvement and increase public awareness - a far cry from the lack of unified front presented by the government of Liberia. Despite electing a female President and Nobel Peace Prize winner, President Sirleaf, there has been little action in Liberia on FGM and indeed reluctance to even discuss the subject. When the silence is broken, some encourage citizens to 'resist from

³ A Rahman, and N Toubia, *Female Genital Mutilation: A Practical Guide to Worldwide Laws and Policies*. London: Zed Books in assoc. with CRLP and Rainbo (2000), pp. 178-17

⁴ Trust, 'Kidnappers jailed for forcing Liberian woman to undergo FGM' <<http://www.trust.org/item/?map=kidnappers-jailed-for-forcing-liberian-woman-to-undergo-fgm>> accessed 21st May 2014; Women's Link Worldwide, 'Summary of the Facts: The Ruth Berry Peal Case' <http://www.womenslinkworldwide.org/wlw/sitio/administrador/doc_casos/summary_ruth_berry_peal_case_en.pdf> accessed 21st May 2014.

FGM' (The Minister of Gender Development, Julia Duncan-Cassell)⁵ and others say 'you see children as young as seven walking into the bush [to be circumcised]. Nobody is holding their hand. Nobody is forcing them. This is our tradition, and this is how we live' (Ella Coleman, an Official in the National Traditional Council of Liberia, a government-backed agency)⁶. Yet traditions can be changed and, in this case, should be. Liberia has some big steps to take before it has fulfilled its obligations under Article 5 of the Maputo Protocol. Results in Senegal are evidence that the process is slow but that progress is possible.

Lily Pinder

⁵Think Africa Press, "'This Needs to Stop': Tempers Flare over the Practice of Female Circumcision in Liberia' < <http://thinkafricapress.com/liberia/stop-female-circumcision-sande-press-freedom> > accessed 21st May 2014.

⁶ The Globe and Mail, 'Liberian effort to end female circumcision runs into fierce opposition' < <http://www.theglobeandmail.com/news/world/liberian-effort-to-end-female-circumcision-runs-into-opposition/article4353672> > accessed 21st May 2014.

EU'S ACCESSION TO ECHR - TWO STEPS FORWARD, ONE STEP BACK

*Now whether it be
Bestial oblivion, or some craven scruple
Of thinking too precisely on th' event –
A thought which, quarter'd, hath but one part wisdom
And ever three parts coward – I do not know*
Hamlet, Act IV, scene 4, 39-43

The process towards the European Union's (EU) accession to the European Convention on Human Rights (ECHR) has been something of a roller-coaster ride over 35 years.¹ Two major steps forward were: the entry into force of the Lisbon Treaty in 2009 with Article 6(2) TEU, and the conclusion of the Draft Agreement on Accession of the European Union to the European Convention on Human Rights in 2013.²

On 18 December 2014, the Court of Justice of the European Union (CJEU) finally handed down its Opinion 2/13, rejecting accession on the terms of the Draft Agreement. It is regrettable that the CJEU has taken us a step back, and one gets the impression that the refusal to give the green lights is one part wisdom, and three parts reluctance to subject itself to the European Court of Human Rights (ECtHR). It is this author's submission that a general reluctance to be subject to the ECtHR is unjustifiable, and the reasoning in the Opinion is unconvincing. The way forward is to seek clarifications on ambiguities and to accept Strasbourg's confined scrutiny.

The legitimacy of ECtHR scrutiny

Human rights protection depends on the rule of law and independent judicial scrutiny.³ As Judge Spano observed extra judicially, 'the whole point of judicial review, whether national or international, is to provide a check on democratic decision-making as it may, disproportionately, restrict individual human rights'.⁴ The primary review is certainly domestic, but the failures of domestic courts to stop human rights abuses during World War II precipitates the deficiency of domestic judicial protection.⁵ Thus, an added level of

¹ See Memorandum on the Accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 April 1979, Bulletin of the EC supp 2/79.

² See the Final Report to the CDDH, 10 June 2013, 47+1(2013)008.

³ See Lord Bingham, *The Rule of Law* (Allen Lane 2009), Ch 9.

⁴ Judge Robert Spano, 'Universality or Diversity of Human Rights?' (2014) 14 HRLR 487, 488.

⁵ See George Letsas, 'In Defense of the European Court of Human Rights' <www.ucl.ac.uk/human-rights/news/documents/prisoners-vote.pdf> accessed 30 December 2014.

supranational protection is necessary with a 'collective guarantee' of human rights,⁶ for 'the protection of human rights is not purely a matter of domestic concern'.⁷ The legitimacy of supranational human rights scrutiny applies *mutatis mutandis* to EU institutions. There is no *a priori* justification for the EU to be exempt. Indeed, given the wide-ranging impact of EU law, there should *a fortiori* be heightened scrutiny.

The legal lacuna in human rights protection is well-rehearsed,⁸ and the *Kokkelvisserij* case⁹ is paradigmatic of the lack of an effective remedy for violations by the EU. Member States, too, are placed in a dilemma when they are held responsible for infringements mandated by EU provisions or procedures, as in *Matthews*¹⁰ and *Connolly*.¹¹ This is coupled with the CJEU's restrictive interpretation of ECHR rights as compared to Strasbourg's approach¹² – the supposed 'floor of protection'.¹³

In the end, the EU itself is a supranational body 'founded on the values of... the rule of law and respect for human rights' under Article 2 TEU, and the EU's Charter of Fundamental Rights (with equal status as the Treaties under Article 6(1) TEU) itself rests on the legitimacy of supranational human rights scrutiny. The EU cannot justify its rejection of supranational oversight without at the same time undermining its own foundations.

⁶ Michael O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 German Law Journal 1862, 1867.

⁷ See Judge Robert Spano, 'The European Court of Human Rights: anti-democratic or guardian of fundamental values?' (Speech at Chatham House, 13 October 2014) <<http://ukhumanrightsblog.com/2014/11/19/the-european-court-of-human-rights-anti-democratic-or-guardian-of-fundamental-values-judge-robert-spano/>> accessed 30 December 2014.

⁸ See eg David Hart QC, 'EU judges oppose accession of EU to ECHR' (*UK Human Rights Blog*, 22 December 2014) <<http://ukhumanrightsblog.com/2014/12/22/eu-judges-oppose-accession-of-eu-to-echr/>> accessed 30 December 2014; also Aidan O'Neill QC, 'Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty' (*Eutopia Law*, 18 December 2014) <<http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/>> accessed 30 December 2014.

⁹ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v Netherlands*, app no 13645/05, 20 January 2009.

¹⁰ *Matthews v United Kingdom*, app no 24833/94, 18 February 1999 (electoral regulations based on EU law).

¹¹ *Connolly v 15 Member States of the EU*, app no 73274/01, 9 December 2008 (CJEU proceedings non-compliant).

¹² For instance, cf Case 159/90 *The Society for the Protection of Unborn Children Ireland v Grogan* [1991] ECR I-4685 and *Open Door and Dublin Well Woman v Ireland*, app nos 14234/88; 14235/88, 29 October 1992.

¹³ See Article 52(3) of the Charter on Fundamental Rights.

Compatibility of the Draft Agreement with the EU Treaties

The recurring theme in the Opinion is that accession undermines the autonomy of the EU legal order and the CJEU's role as the arbiter of EU law. It is this author's submission that none of the CJEU's arguments, whether taken individually or collectively, are convincing.

(i) Primacy of EU law

The CJEU begins by asserting that the specific characteristics of EU law has been neglected. This is premised on the fact that the ECHR 'would form an integral part of EU law',¹⁴ with the consequence that the EU institutions *including the CJEU* would be bound by all ECtHR decisions. However, accession does not entail the integration of the ECHR and EU legal orders, as the EU is only permitting limited human rights scrutiny, not wholesale amalgamation.¹⁵ The CJEU is not strictly bound by decisions of the ECtHR, just as the UK need only take into account ECtHR decisions, and it is certainly not bound by decisions not addressed to the EU.¹⁶

The Opinion specifically denounces the adoption by Member States of higher human rights standards as threatening the primacy and unity of EU law.¹⁷ This is questionable because Article 53 of the Charter intends to 'maintain the level of protection currently afforded within their respective scope by... national law',¹⁸ and the aim of human rights instruments is to *maximise*, not *minimise*, protection. As Sir Nicholas Bratza opined, it is 'right and positive for the protection of human rights that the national courts... should sometimes consciously leap ahead of Strasbourg'.¹⁹ This maintains a meaningful dialogue with Strasbourg.²⁰

The CJEU carried this argument further, relying on the principle of mutual trust between Member States.²¹ With respect, this essentially precludes any external human rights

¹⁴ Opinion 2/13 [180]-[181].

¹⁵ See Hans Krüger, 'Accession of the European Union to the European Convention on Human Rights' (Sir Thomas More Lecture 2004, Wildy, Simmonds & Hill Publishing 2008) pp 20-21.

¹⁶ Article 46 ECHR.

¹⁷ Opinion 2/13 [188].

¹⁸ Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 35.

¹⁹ Nicholas Bratza, 'Opinion: The relationship between the UK courts and Strasbourg' [2011] EHRR 505, 512.

²⁰ *Ambrose v Harris* [2011] UKSC 43 [130] (Lord Kerr).

²¹ Opinion 2/13 [191]-[193].

scrutiny and presumes the EU is infallible. It empties accession of all its purpose and value. As Steve Peers remarked, 'from the perspective of international human rights law, it's shocking'.²² Moreover, the CJEU has misrepresented the purpose of accession – it is not to allow Member States to challenge the validity of EU law, but only to allow 'any person' to complain to Strasbourg about an EU measure.²³

(ii) CJEU as arbiter of EU law

The Opinion is at pains to stress that the CJEU is the sole arbiter of EU law under Article 344 TFEU, arguing that the preliminary ruling procedure and the CJEU's autonomy would be undermined by the possibility of an ECtHR advisory opinion under Protocol 16 ECHR, the allocation of responsibility under the co-respondent mechanism, and the limitation of the prior involvement process to the assessment of *validity* of EU legislation.²⁴

These arguments reflect anxieties over the necessary inconvenience of external scrutiny. First, as emphasised in paragraph 66 of the Draft Explanatory Report to the Draft Agreement, the CJEU would *very rarely* be bypassed – guidance can be given to national courts on preliminary references. Secondly, the prior involvement process is precisely intended to remedy this anomaly, and this can easily be extended to requests for the ECtHR's advisory opinion. While it is accepted that the CJEU should be able to rule on the proper interpretation and scope of EU legislation, this can be achieved by rephrasing paragraph 65 of the Draft Explanatory Report.

The concerns over the allocation of responsibility is similarly misguided. The co-respondent mechanism is, as paragraph 62 of the Draft Explanatory Report states, intended to avoid gaps and allow joint responsibility, and the test is whether a provision of EU law is called into question. It normally remains open for the EU to allocate responsibility for remedying a breach to Member States, with follow-up enforcement actions under Article 258 TFEU.

²² See Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (*EU Law Analysis*, 18 December 2014) <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>> accessed 30 December 2014.

²³ See the Preamble to the Draft Agreement (n 4).

²⁴ Opinion 2/13 [194], [198], [212], [234], [247].

The CJEU's intransigence effectively excludes any analysis of the requirements of EU law in the process of assessing compatibility with the ECHR. A fine distinction between interpretation of the ECHR and interpretation of EU law is 'impossible to observe in practice',²⁵ effectively rendering all external scrutiny incompatible with EU law.

(iii) Competence creep

Perhaps the most unsettling aspect of the Opinion is the CJEU's argument that the EU's competences would be illegitimately extended, due to the effect on reservations by Member States and the CJEU's own lack of jurisdiction over CFSP matters.²⁶ The first point is easier to dispense with – where a violation with an EU element is specifically attributed to a Member State, it would be able to rely on its reservation provided that it is not of a general character, whereas if the EU is responsible for taking steps to rectify the measure, then the reservation is simply not relevant.

The CFSP issue is normatively problematic. Although Article 24(1) TEU excludes most CFSP matters from the CJEU's jurisdiction, this cannot create a legal black hole. Moreover, the ECtHR's jurisdiction is not *conferred* by the CJEU, but by the Member States' consent to accession. This is consistent, as Steve Peers observed, with the provision for 'an area of freedom, security and justice *with respect for fundamental rights*' in Article 67(1) TFEU.²⁷

²⁵ See Hart (n 9).

²⁶ Opinion 2/13 [227]-[228], [255].

²⁷ See Peers (n 25).

Conclusion

It is high time for the CJEU to acknowledge that there is no issue of subordination in accession. As Dr Hans Krüger emphasised, '[t]he Strasbourg Court is in no sense a higher court than, for instance, the House of Lords or Germany's Constitutional Court. It is simply a "more specialised" court' limited to assessing compliance with human rights,²⁸ having due regard to subsidiarity as reiterated in the new Protocol 15 ECHR. One can only hope that upon realising this, the CJEU would no longer be concerned that accession would 'displace the Court of Justice as the apex Court for the European Union'²⁹ and take the last step forward. As things currently stand, it is difficult to see how any accession agreement would ever pass the test. In truth, the EU is put to the test – how European is the European Union?

Mathias Cheung

²⁸ Krüger (n 15) p21.

²⁹ See O'Neill (n 8).

Why Does Britain Need a Codified Constitution?

Introduction

While Britain has a constitution, it is one of a very few states which lack a “codified” constitution. This simply means that Britain has no single official document, which “sets out the fundamental principles and rules, and prescribes and regulates the powers of government and the rights and duties of the citizen”.¹ Instead, there are many scattered provisions, in a daunting number of places including legislation, judicial decisions, statements about constitutional conventions, EU law, etc. which deal with constitutional issues; but, there has been no disposition to bind them together and shape them into a single coherent instrument.² In Lord Bingham’s words, although “we have no single constitutional instrument, suitable for display in a glass case, we do have a plethora of statutes governing most of the matters which would feature in a constitution if we had one”.³ But for many, it is a real question that “why should Britain *not* have a codified Constitution?”⁴

It however can be claimed that Britain's constitution has been a success in terms of democracy, human rights and stability.⁵ In fact, Britain’s democracy has functioned properly for centuries, while its constitution happens to be uncoded and, in part, unwritten. But is this a “bare accident of history”⁶ that provides an argument to alter the legal form of its constitution and adopt a codified one? This is clearly a complex question. There are quite a number of arguments both for and against an encoded constitution. The advantages of having such instrument for a state, however, seem obvious.

¹ Zelman Cowen, ‘Written Constitution or None: Which Works Better? Great Britain and the United States protect individual rights in very different ways’ (Fall 1987) 11 Update on Law-Related Education, 9.

² Ibid.

³ Lord Bingham, ‘A Written Constitution?’ (2004) Speech as the Judicial Standards Board annual lecture, 14, available at:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Bingham_2004_JSB_Annual_Lecture_2004.pdf> accessed 18 Oct 2014.

⁴ Vernon Bogdanor, Tarunabh Khatian and Stefan Vogenauer, ‘Should Britain Have a Written Constitution?’ (October-December 2007) 78 The Political Quarterly 4, 500.

⁵ N.W. Barber, ‘Against a Written Constitution’ (Spring 2008) 11 Public Law, 17.

⁶ Ibid.

For a Codified Constitution

First and foremost, it fulfils a natural expectation that the main rules of governance of a state should be known to any citizen⁷ and provides a sufficient amount of clarity in regard to people's rights and freedoms. It also creates certainty by introduction of formal and binding rules of constitutional law.⁸ For example, it will remedy the lack of clarity about a constitutional requirement for Parliament to approve significant, non-routine deployments of the armed forces into armed conflicts which has been raised following the precedent of the House of Commons vote before the Iraq war⁹ and Syrian conflict.

More importantly, it shows the importance of constitutional rules over other rules in the legal system.¹⁰ Under our current system, there is no "higher law" which limits the scope of new legislation, and Parliament – meaning, in practice, the government of the day – can pass any law it likes.¹¹ In contemporary Britain, the government of the day does not see the need to draw any distinction between changes to the constitution and changes in, for example, banking or education policy.¹²

It is also argued that a codified constitution has become necessary as the old checks and balances, as once recognized and applauded by Blackstone,¹³ "have diminished to vanishing point".¹⁴ Now supreme power is to be found in the political party which provides the majority in the House of Commons.¹⁵ One commentator even suggests that Britain's democracy is not safe anymore and "our constitutional insurance is weak, limited and fragile".¹⁶

⁷ Rodney Brazier, 'How Near is a Written Constitution' (2001) 52 Northern Ireland Legal Quarterly, 7.

⁸ Ibid.

⁹ Bogdanor and others (n 4) 499.

¹⁰ Brazier (n 7) 7.

¹¹ The Constitution Society, 'A Written Constitution?' available at:

<<http://www.consoc.org.uk/discover-the-facts/do-we-need-a-written-constitution/>> accessed 12 Oct 2014.

¹² Ibid.

¹³ William Blackstone described the partnership in power of the Crown and the Parliament as "the excellence of the English government that all the parts of it form a mutual check upon each other." Blackstone, Commentaries on the Laws of England 1, 154 (1765 ed.), in Lord Scarman, 'Why Britain Needs a Written Constitution' (January 1993) 19 Commonwealth Law Bulletin, 321.

¹⁴ Ibid

¹⁵ Ibid.

¹⁶ Ibid.

Against a Codified Constitution

On the other hand, there are those who are against a written constitution and try to show that the adoption of a codified constitution would be dangerous and unnecessary.¹⁷ They believe that not having an encoded constitution has proved to be more efficient and practical than having one. For them, the flexibility and convenience that an unwritten constitution provides is a major advantage. This is partly because the provisions of an uncodified constitution could be changed relatively easy as there is no entrenched provisions, which require a special procedure if they were to be changed.¹⁸ This, however, has caused some to assert that the, “Constitution is what happens”¹⁹ and “the British Constitution is whatever the government can get away with”²⁰.

Conclusion

Overall, it seems that not having a codified constitution is problematic and there is clearly a strong case for one. First of all, as Lord Bingham argues, citizens should be entitled to know the framework of law, which governs them, and this must apply to the constitution of the state as well. At present, many British Citizens grow up with a high degree of confusion and ignorance in regards to the status of the “British constitution”, and the existence of a constitution would inculcate a constitutional sense and awareness, which are now lacking.²¹ “The citizen lacks a constitution which he can read and understand and which enables him, if need be, to claim a right which he can enforce.”²² It is even suggested that, “if the only benefit of codification of the constitution is clarity and easier access for the public, that (this) would be a good reason to do so”.²³ It would also be true to say that the process of producing a written constitution, or even the debates about the constitution and production of suggested texts,²⁴ is likely to create the opportunity for the

¹⁷ See: Barber (n 5) 11.

¹⁸ Bogdanor and others (n 4) 501.

¹⁹ John Griffith, in Martin Loughlin, *The British Constitution: A Very Short Introduction*, (2013) Oxford University Press, 38.

²⁰ The Labour MP Austin Mitchell, from David Allen Green, ‘Does the United Kingdom Need a Written Constitution?’ 12 Nov 2013, available at: <<http://blogs.ft.com/david-allen-green/2013/11/12/does-the-united-kingdom-need-a-written-constitution/>> accessed 2 Oct 2014.

²¹ Lord Bingham (n 3) 14.

²² Lord Scarman (n 13) 319.

²³ Ibid 317.

²⁴ There has been a number of attempts to produce a model codified constitution, for example a draft constitution prepared by John Macdonald QC on behalf of the Liberal Democrats in 1990; a draft prepared by Tony Benn in 1991; and a draft prepared by The Institute of Public Policy Research (IPPR), also in 1991.

public and specialists to discuss the issues and highlight some problematic constitutional matters exposing these issues in mainstream conversations.²⁵

In addition, considering that Britain continues to increase its diversity as it becomes more multicultural, complex, and plural, and frankly speaking, divided and troubled, it is doubtful that the freedoms and rights of all members of the society of today will be safeguarded without the legal protection of an encoded basic constitution.²⁶ For many individuals and minority groups the legal protection of a written constitution “could be of real value-salvation”.²⁷ A codified constitution can also serve as a new unifying force that contributes in knitting together people with different languages, religions, cultures, histories and traditions.²⁸

Further, there are serious concerns for human and individual rights under modern government and there is a real risk that governmental policies fail to protect human rights and freedoms of *all* people. This is while some of these policies enjoy specific support.²⁹ For example, the Immigration Bill which finished its passage through the House of Commons on 30 January 2014, has, *inter alia*, a devastating impact on the right to appeal wrong immigration decisions and gives an even greater power to the Executive.³⁰ This shows that “a codified constitution is needed if defenceless and grossly under-represented groups are to have their human rights and their freedoms safeguarded”.³¹

It is also becoming more and more evident that the checks and balances of our existing constitution is not sufficient to protect people. Quite a few commentators argue that the checks and balances inherent in the 1688 settlement have “gone”³² and “ceased to operate”.³³ Holding authorities as powerful as the Prime Minister to account through

²⁵ Barber (n 5) 11.

²⁶ Lord Scarman (n 13) 321.

²⁷ Ibid 321-2.

²⁸ Historically, the unifying force in British life has been the Crown, not the flag, and certainly not the constitution. But it would seem that the Crown may no longer be as potent a symbol as it was. See: Lord Bingham (n 3) 17.

²⁹ Lord Scarman (n 13) 322.

³⁰ The third reading ought to have been a last chance for MPs to consider the impact of the removal of the right to appeal wrong immigration decisions, the enormous accretion of powers to the executive, without whose consent judges may not grant bail in certain circumstances, or consider new grounds of appeal. See: Frances Webber, Immigration Bill Passes Through Commons, (7 Feb 2014) Institute of Race Relations, available at:

<<http://www.irr.org.uk/news/immigration-bill-passes-through-commons/>> accessed 11 Oct 2014.

³¹ Lord Scarman (n 13) 322.

³² Ibid 321.

³³ Lord Bingham (n 3) 12.

traditional ways, for example by the House of Commons (or, in truth, the Executive, supported by a solid House of Commons majority)³⁴, no longer brings the same level of assurance and certainty.

Broadly speaking, the era of entrusting all the authorities and responsibilities to a “protector”,³⁵ and putting a high degree of trust in those who exercise power,³⁶ is long over. There is a place to ask the question, “is the ‘protector’ worthy of such trust?” This trust could be bolstered through the formation of an instrument containing not much more than what he claims he is already doing.

Furthermore, many constitutional debates miss the actual use and value of a constitution. Similar to a contract, “a constitution is not there for when things are going well, but to regulate the consequences of things going badly. And it should be remembered that things *will* go badly, or at least this is what the absence of a good constitution should presuppose.³⁷ When things are running smoothly, the constitution may attract little attention, or even will be ignored. But when doubt arises or difficulties occur, it is the time for the constitution to be consulted. It is therefore necessary that a proposed constitution set out the various means by which such conflicts could be dealt with and yield a clear and decisive answer.³⁸ In Anthony King’s words, “the test of a good constitution is not that somehow its provisions mean that a polity is in happy equilibrium, but how useful it is in addressing when elements of the polity are in disequilibrium”.³⁹

Finally, this is not to suggest that the liberties of people in Britain are in so much danger as to call for a radical step⁴⁰. Neither does this mean that a piece of paper would work as a “magic bullet”⁴¹, as “some of the most repressive regimes have had some of the most laudable constitutions”.⁴² It is, therefore, absolutely absurd to think that adoption of a

³⁴ Ibid.

³⁵ See: Ibid 8.

³⁶ Loughlin (n 19) 36.

³⁷ David Allen Green, ‘Does the United Kingdom Need a Written Constitution?’ 12 Nov 2013, available at: <<http://blogs.ft.com/david-allen-green/2013/11/12/does-the-united-kingdom-need-a-written-constitution/>> accessed 2 Oct 2014.

³⁸ Lord Bingham (n 3) 13.

³⁹ Green (n 37).

⁴⁰ Cowen (n 1) 10.

⁴¹ Linda Colley, ‘Why Britain Needs a Written Constitution’ (4 Nov 2011) The Guardian, available at: <<http://www.theguardian.com/books/2011/nov/04/why-britain-needs-written-constitution>> accessed 2 Oct 2014.

⁴² Green (n 37).

codified constitution would resolve all the problems that the constitutional structure of Britain is faced with. The most that could plausibly be claimed is that “such a constitution might well help”.⁴³ Written constitutions, at their best, will help to regulate Executive power and afford some security to rights.⁴⁴ In addition, similar to incorporation of the European Convention in 2000, even principles and rights which already exist, will become more real when written down in a single, readily-digestible document.⁴⁵

Mohammad Nayyeri

⁴³ Lord Bingham (n 3) 18.

⁴⁴ Colley (n 41).

⁴⁵ Lord Bingham (n 3) 18.

LGBT Rights 2014
1 Step Forward, 3 Steps Back

The legalisation of same-sex marriage in the UK on 29 March 2014 was a convincing step towards true equality for the LGBT community in the UK. The Marriage (Same-Sex Couples) Act 2013 ensured that in one more aspect of daily life, the LGBT community would not be treated differently. Since 5 December 2005, civil unions have granted the same economic and social benefits as marriage to same-sex couples. However, during the interim eight years, UK law failed to reflect that marriage, for many people, is symbolic - a means of protecting and valuing a relationship. Equal marriage rights show that the UK wants to value homosexual and heterosexual relationships equally.

Russia

Russia has the polar opposite aim. On 29 June 2013 Vladimir Putin amended a law to suppress any expression of homosexuality to people under the age of 18. This apparently protects children from information which could 'damage their health and development'.¹ The amendment seeks to prevent the spread of 'distorted ideas' that 'society places an equal value on traditional and non-traditional sexual relations'.²

The amendment explicitly expressed itself to be discriminatory. In light of Russia's Constitution and the country's ratification of the European Convention on Human Rights, to do this on the amendment's front cover (literally) was bold. However, the Duma denied that any constitutional rights were breached. Banning all homosexual 'propaganda' is to protect 'people who are incapable, due to their age, of critically assessing this information on their own'.³ It is ironic that this law claims to protect minors from propaganda. Three words spring to mind: Pot. Kettle. Black.

The Winter Olympics, held in February 2014 in Sochi, Russia, invited the world to show its contempt for this amendment. Some called for a boycott of the Olympics, but the Russian LGBT Network appealed for the international community to 'Speak Up, Not Walk Out'. And they tried. The Games opened with the International Olympic Committee's President, Thomas Bach's speech, in which he declared that it is possible to

¹ Explanatory Notes to the Amendment on Federal Law: "On the protection of children from information liable to be injurious to their health and development".

² Ibid.

³ Ibid.

live together 'with tolerance and without any form of discrimination for whatever reason'.⁴ Barack Obama chose two gay athletes to represent the USA at the Game's opening and closing ceremonies. Some athletes chose to give a six finger salute whilst competing to draw attention to the sixth fundamental principle of Olympism – that any form of discrimination is incompatible with the Olympic movement.

It is difficult to see how these small acts can change the view of a nation. Although homosexuality has been legal in Russia since 1993, it is not widely accepted by society. The memories of punishment in the Gulags are too raw. The preaching of the Russian Orthodox Church is too frequent. Russia's history, religion and culture all fuel convictions that homosexuality is associated with paedophilia and rape.⁵ The amendments, in this case, are a reflection of society's beliefs.

Forcing countries to enact or repeal legislation is extremely challenging, especially if the change in the law is wholly incompatible with society's view. Even if international campaigners could achieve this, it could take years for the physical and verbal attacks on homosexuals to end.

Singapore

In countries where society has become accepting of human diversity, laws relating to homosexuality can be improved more easily. In such circumstances, it is crucial that governments take opportunities to align domestic laws with international human rights standards without delay. Singapore missed one such chance. On 29 October 2014, Singapore's Court of Appeal upheld the constitutionality of s 377A of the Penal Code, which criminalises homosexuality⁶ and is a painful hangover from when British colonies occupied Singapore. Men who engage in sexual intercourse with other men face up to two years imprisonment for 'gross indecency'.

In July 2014, Tan Eng Hong, a gay man charged with 'gross indecency', and Lim Meng Suang and Kenneth Che Mun-Leon, a gay couple seeking legal reform, challenged the law. The applicants' principal argument was that under Article 12 of Singapore's Constitution 'All persons are equal before the law and entitled to the equal protection of

⁴Speech delivered by Thomas Bach.

⁵S Pappas, 'Why Russia is so anti-gay', *Livescience* (11 February 2014) at www.livescience.com/43273-why-russia-is-anti-gay.html.

⁶*Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2014] SGCA 53.

the law'. Turning Article 12 on the applicants, the Court stated that discrimination is only expressly prohibited on grounds of religion, race, descent or place of birth. As there is no mention of sex, gender or sexual orientation, there is no right of protection on these grounds.

The Court denied that it was unjust to criminalise certain people for innate attributes by reasoning that there is no definite conclusion that gay men cannot be 'converted'. When challenged about the differentiation between gay men and lesbians (the law only criminalises male homosexual acts) the Courts crudely maintained that female homosexual acts 'were either less prevalent or perceived to be less repugnant than male homosexual conduct'.⁴

The case condemns gay men to life under the constant threat of imprisonment, as if on lifelong parole. This seems backwards in light of Singapore's reputation as the world's fourth largest financial centre. International businesses need to consider that gay employees, who may even be legally married elsewhere, could face prosecution when in Singapore.

The Court of Appeal's judgment also contradicted the strong indication that Singapore is progressing towards a more liberal society in relation to sexual orientation. Events like Pink Dot, an annual gay rights rally which was attended by an estimated 26,000 people in 2014, are now permitted.

Uganda

This cannot be said for Ugandan society where the threat of attacks and lynching terrorises the LGBT community.

In February 2014, the Ugandan Parliament ratified the Anti-Homosexuality Act 2014 (the 'AHA'), an extreme anti-gay law. The AHA was fiercely challenged by national and international campaigners. On 1 August 2014 the AHA was declared null and void, even if only on procedural rather than substantive grounds.

Any celebrations were short-lived. Within less than two months a new bill, The Prohibition of Promotion of Unnatural Sexual Practices Bill (the 'USP Bill'), was proposed. Not only does it allow invasion into every aspect of a gay person's, a lesbian's or a transsexual's life, it also imposes a positive duty on society to facilitate this, and

exclude and ostracise LGBT people. The USP Bill introduces a range of criminal activities prohibiting association with the LGBT community. It will affect the LGBT community's access to housing, healthcare and international support. Non-compliance warrants up to seven years in prison.

If passed, the USP Bill could force the LGBT community into homelessness. It would be a crime for any person to lease, sublease, use or allow to be used any premises for the purpose of engaging in 'unnatural sexual practices'.⁷ Landlords, family and friends all risk imprisonment by sheltering homosexuals. The LGBT community could be evicted from rented property or banished from their homes.

The USP Bill could deny sexual healthcare and education to the LGBT community. HIV/AIDS clinics and educational centres would be closed to the LGBT community under the offence of advertising, publishing, printing, broadcasting or distributing information intended to or likely to facilitate 'unnatural sexual practices'. This may also impact on the ability of advocacy groups and LGBT activists to freely promote and protect the rights of the LGBT community.

Funding or sponsoring another person with intent to promote 'unnatural sexual practices' would also be a crime. Punishment is not limited to Ugandan citizens and therefore, it could affect the ability for foreign aid (financial or otherwise) to reach the LGBT community in Uganda.

It is proposed that any person convicted under the USP Bill should be ineligible to apply for adoption, custody, guardianship or fostering of children in Uganda. Whilst the full extent of this proposal has not yet been clarified, it appears that it could potentially affect custody rights of parents whether or not they are divorced, separated or married. At the very least it will further blackmail society into obedience and silence protests against the USP Bill.

Legal Change

Legal change can be a gradual process. Homosexuality was decriminalised in the UK in 1967 and yet, it took almost 50 years for same-sex marriage to be legalised. Discriminatory laws, such as those discussed, suppress the development of an open-

⁷'A sexual act between persons of the same sex, or with or between transsexual persons'.

minded and accepting society. To protect the fundamental rights and freedoms of the LGBT community, three safeguards should be closely monitored: freedom of expression, freedom of association and prohibition of discrimination.

The gay rights movement continues to build momentum, empowered by positive legislative change in national jurisdictions such as the UK. Progression in national laws sets a precedent for the application of human rights standards and paves the way for other jurisdictions to review and amend their laws in relation to homosexuality. Critically, it also creates opportunities to forcefully challenge, on an international level, restrictive or discriminatory national laws.

Sally-Ann Morrison

The Year of Reckoning of the International Criminal Court

The end of 2014 marked a critical juncture for the International Criminal Court (ICC). On 5th December 2014, Prosecutor Fatou Bensouda formally withdrew the charges against Mr Uhuru Kenyatta, President of Kenya.¹ A week later, Prosecutor Bensouda suspended investigations against Omar al-Bashir, President of Sudan, whilst his indictments for genocide, war crimes and crimes against humanity remain unchallenged. Both cases tested the ICC's ability to adjudicate in contexts where it could not rely on the state's cooperation.

After more than a decade in operation, both outcomes have severely damaged the ICC's credibility, resulting in committed supporters losing faith in the viability of the Court. During the investigations the ICC found little support for its efforts to hold heads of state to account despite an explicit mandate in its constitution, and has been portrayed in both cases as 'anti-African' and worse, weak and ineffective.

Darfur, Sudan was the first situation referred to the ICC for investigation by the UN Security Council and led to the first indictment against a sitting head of state in 2009. At the time, significant attention was paid to the atrocities committed in Darfur and there was strong resulting international pressure for action. The ICC was held to be a solution to ending impunity for gross human rights violations. The subsequent referral by the UN Security Council appeared to reflect international support for the ICC and furthermore, a broader commitment to end impunity.

The initial promise of justice through the ICC, however, was short-lived. President al-Bashir remained defiant of the ICC investigation, denouncing its jurisdiction and continued to travel outside Sudan including to ICC member states Chad and Kenya. Since the initial referral, Darfur has dropped out of international focus and the UN Security Council has declined the Prosecutor's invitation to take further action. In her report to the UN Security Council, Prosecutor Bensouda said that although the situation

¹ F. Bensouda, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Ms Uhuru Muigai Kenyatta, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx

in Darfur is deteriorating, she could not continue the investigation until the Council changed its approach.²

Although the indictments remain in place, President al-Bashir has considered Prosecutor Bensouda's decision a victory, stating, *'the Sudanese people have defeated the ICC and have refused to hand over any Sudanese to the colonialist courts.'*³ Even if her intention is to force the Security Council's hand, the court has still come out appearing impotent.⁴

The second major test case – the investigation into post-election violence in Kenya – was the first time the ICC unilaterally flexed its muscles and used its powers to initiate an investigation *proprio motu* (on its own initiative). The investigation led to an indictment in 2011 against Mr Uhuru Kenyatta, who was sitting as Deputy Prime Minister at the time. The indictment did not affect his subsequent election to presidency in 2013.

Whilst Sudan was content to ignore the ICC, President Kenyatta mounted an effective campaign to discredit it which has been far more damaging. Employing a veneer of cooperation by attending the court (ostensibly in a personal capacity and not as President), President Kenyatta simultaneously undermined the Court by frustrating the investigation. As the Prosecutor was forced to withdraw the case for lack of evidence, she complained of the lack of cooperation by the Government of Kenya with requests for evidence, witness intimidation and harassment, false media reports on the cases, and a social media campaign to expose protected witnesses.⁵ There have been further independent reports of witness intimidation and at least one witness has admitted to being bribed.⁶

² Security Council inaction on Darfur "can only embolden perpetrators" – ICC prosecutor, available at: <http://www.un.org/apps/news/story.asp?NewsID=49591#.VKQmlWSsUjw>

³ K. Abdelaziz, *Sudan's President Omar al-Bashir claims victory over ICC after it drops Darfur war crimes investigation* (The Independent), available at: <http://www.independent.co.uk/news/world/africa/sudans-president-omar-albashir-claims-victory-over-icc-after-it-drops-darfur-war-crimes-investigation-9924471.html>

⁴ D. Smith, *ICC chief prosecutor shelves Darfur war crimes probe* (The Guardian), available at: <http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan>

⁵ F. Bensouda, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Ms Uhuru Muigai Kenyatta* (ICC website), available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx; E. Gekara, *Key ICC Witness in Kenya case was bribed, alleges Prosecutor* (Africa Review, 28 February 2013), available at: <http://www.africareview.com/News/Key-ICC-witness-in-Kenya-case-was-bribed/-/979180/1707092/-/1ok1pyz/-/index.html>

⁶ C. Stewart, *ICC on trial along with Kenya's elite amid claims of bribery and intimidation* (The Guardian), available at: <http://www.theguardian.com/world/2013/oct/01/icc-trial-kenya-kenyatta-ruto>

These two cases are a significant blow to the ICC. They demonstrate the Court's dependence on state cooperation and have failed to shake the immunity enjoyed by sitting heads of state. Furthermore, whilst the ICC explicitly excludes any immunity for crimes within its jurisdiction, President Kenyatta's appearance at the ICC demonstrates that it is not his immunity which is the major barrier but rather his control of the state. As President he has used the Government of Kenya to block the effective investigation and prosecution of his case.

Following the Prosecutor's decisions, Ethiopia's Prime Minister, Halle Mariam Desalegn, called for all African countries to withdraw from the ICC.⁷ This was not mere rhetoric; in September 2013, Kenya's Parliament voted to withdraw from the ICC.⁸ The African Union is also a strong critic of the ICC and there is deepening resentment among African states regarding the fact that there are no open cases outside the African continent.⁹

On the diplomatic front, Kenya has actively promoted the image of the ICC as a neo-colonial court used to advance the interest of 'the West'; further supported by President al-Bashir's assertions that the ICC is a tool of western imperialism.

Although half of the cases are self-referrals, the Prosecutor at the ICC has missed opportunities to open cases in countries outside the African Continent. If the ICC is to maintain international legitimacy, then all member states must be open to equal scrutiny and accountability. For example, the Office of the Prosecutor (OTP) received 141 communications on the situation in Colombia, a member state since 2002. The OTP published a report in 2012 recording gross violations of human rights but the Prosecutor has to date not opened a case.¹⁰ Similarly Afghanistan, a member state, has only been subject to preliminary investigations.

⁷ Leadership Agency Report, *Selective Justice: Ethiopian PM Wants Africa to Withdraw from ICC* (Leadership), available at: <http://leadership.ng/news/398370/selective-justice-ethiopian-pm-wants-africa-withdraw-icc>

⁸ BBC News, *Kenya MPs vote to withdraw from the ICC* (BBC News Africa, 5 September 2013), available at: <http://www.bbc.co.uk/news/world-africa-23969316>

⁹ BBC News, *African Union urges ICC to defer Uhuru Kenyatta Case* (BBC News Africa, 12 October 2013), available at: <http://www.bbc.co.uk/news/world-africa-24506006>

¹⁰ ICC, *Colombia*, available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/colombia/Pages/colombia.aspx; D. Kavalik, *The ICC and Colombia: Massacres under the Looking Glass* (Counterpunch, 12 December 2012), available at: <http://www.counterpunch.org/2012/12/12/massacres-under-the-looking-glass/>

The Kenyatta and al-Bashir cases not only present critical challenges to the ICC but also to the global movement to end impunity for the most serious crimes. The ICC was the culmination of efforts, which trace as far back as 1872¹¹ to realise a permanent international tribunal to hear the 'most serious crimes of concern to the international community.'¹²

The establishment of ad-hoc international tribunals for Rwanda and the Former Yugoslavia and Special Courts for Cambodia and Sierra Leone reinforced the need for a permanent international tribunal and furthered the aims of ending impunity for the most serious international crimes. However, each court followed the event rather than ensuring accountability for crimes when there was no major change in administration. The ad-hoc courts were also unlikely to deter future crimes as they were seen as situation specific. Consequently, the ICC's mission is to ensure a broader scope for accountability and justice and to act as a deterrent.

The Kenyatta and al-Bashir cases threaten the very mission of the ICC to realise accountability even when perpetrators remain in positions of power. In both cases, criticisms of the ICC have been used to undermine the legitimacy of the cases against the accused and detract from the crimes themselves. If accountability for the most serious crimes is to be achieved, there needs to be a major reassessment of the ICC from within as well as from member states.

After more than a decade, it is time for the Office of the Prosecutor to take stock of its caseload and progress to date. In the past 12 years, the court has opened 21 cases and secured only two convictions. Both Kenyatta's and al-Bashir's cases were questioned by even the most devoted supporters who doubted the strategic value of taking on the cases at this stage in the court.

With the two biggest cases now shelved or collapsed, Prosecutor Bensouda has the opportunity to take on new cases in other situations broadening the geographical focus of the ICC, in addition to being able to reflect on how to improve the speed and efficacy of investigations and prosecutions.

¹¹ C. Hall, *The first proposal for a permanent international criminal court* (ICRC, No. 322, ICRC, 31 March 1998), available at: <https://www.icrc.org/eng/resources/documents/misc/57jp4m.htm>

¹² Preamble to the Rome Statute of the International Criminal Court, 1998.

Much attention has been directed to the limitations of the Prosecutor and the ICC; they are not, however, solely attributable to the ICC. It is also time for member states must reassess their commitment to the ICC and aspirations to end impunity. Commitments to ensure accountability are meaningless unless there is genuine support for the ICC backed by political pressure on states to surrender individuals regardless of their position. Member states must also win the support of influential regional bodies such as the African Union to back the ICC; this means addressing the unbalanced geographical focus of the ICC regardless of the reasons which have led to the focus on Africa.

In addition, member states must reflect on who should be brought before the court. If the ICC is to establish itself as a credible and legitimate court, all members must be equally accountable, and difficult cases will need to be taken on irrespective of political alliances. UN Security Council inaction in Sudan is attributed to China's support for Sudan, whilst some commentators have noted that the ICC's most vocal supporters in Europe have been largely silent in the case of Kenya.

A recent resolution to refer Syria to the ICC was blocked by China and Russia, while the UK and the USA have indicated that they would block any referral of the Occupied Territories of Palestine.¹³ The USA has continued to insist that any UN referral include a clause reiterating that its citizens cannot be brought before the ICC. State interests continue to dominate international politics and influence international law and the ICC could be said to reflect that reality. However, if any progress is to be made to address impunity, member states will need to act collectively, setting aside divisive state interests.

The past year has been a difficult year for the ICC, particularly since it is still struggling to establish itself. It is not too late for the ICC to prove its relevance; however, it will take a major effort from within the court and reconsideration by the international community of its priorities in order to do so.

Shanthi Sivakumaran

¹³ M. Kersten, *The Security Council's Appalling Record of Referring Situations to the ICC (Justice in Conflict, 23 May 2014)*, available at: <http://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/>

How has torture been sanctioned in the 'war on terror'?

Torture is an internationally recognised crime. The shock publication of the United States Senate report on the Central Intelligence Agency's Detention and Interrogation Program,¹ confirmed fears that torture is indeed being used in the 'war on terror'. This paper will discuss the way in which torture regulations have been manipulated and bypassed to sanction the use of torture.

International Torture Prohibition

The first binding torture provision resulted from the adoption of the International Covenant on Civil and Political Rights (ICCPR). Article 7 in particular acknowledges and forbids the practice of torture, as well as inhumane and degrading treatment or punishment.² State parties are obligated to act in accordance with the prohibition of such practices.

It is important to note at this point the significance of Article 4 of the ICCPR which declares that certain provisions are not to be derogated from; even in times of emergency. Indeed, it is expressly stated that Article 7 must be upheld at all times, and cannot be derogated from.

The international landmark prohibition is found in the United Nations Convention against torture. The Convention strengthens the existing articles opposing torture; more significantly, states which ratify the Convention are conferred specific duties and obligations. The Convention further requires each state party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.³ It is also expressed within the Convention that there are no exceptional circumstances whatsoever; whether a state of war or a threat of war, internal political instability or any other public emergency - none may be invoked as a justification of torture.⁴

¹ United States Senate: Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Findings and conclusions, (Dec 3 2014).

² International Covenant on Civil and Political Rights 1966.

³ Article 2(1) Convention Against Torture 1984.

⁴ Ibid, Article 2(2).

Similarly to the ICCPR, The Convention against Torture (CAT) is clear in its stance on derogation; it provides important clarification that there are no circumstances which justify torture.

The Geneva Conventions are also relevant in the 'war on terror' since they regulate humanitarian conduct during war and expressly prohibit torture. Article 17 of the Third Geneva Convention, relative to the treatment of prisoners of war, states that 'no physical, or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.'⁵

Furthermore, the four Geneva Conventions share a common Article 3 which asserts:

"Persons taking no active part in hostilities shall be treated humanely...The following acts are and shall remain prohibited - violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...outrages upon personal dignity, in particular humiliating and degrading treatment."⁶

It is evident an international prohibition against torture exists. However, this has not prevented torture practices occurring in the current 'war on terror' and shock revelations from the recent Senate report have confirmed the stark reality: torture is occurring. The next section of this paper will therefore outline the ways in which torture has, in recent times, been legitimised.

Bypassing International Torture Regulations

(i) Torture versus Interrogational Torture

As a State party to the ICCPR and the CAT, a state is bound to act in accordance with obligations outlined by the provisions. Before ratification the United States expressed reservation to unequivocal binding and reserved the right to withdraw from international obligations. They agreed to be bound provided this was consistent with the Eighth Amendment of the United States constitution, which refers to torture as a form of punishment. The term 'interrogational' was used to draw a distinction between standard torture and interrogational torture. They argued that interrogational torture is used as a

⁵ Article 17, III Geneva Convention 1949.

⁶ Article 3, I, II, III and IV Geneva Conventions 1949.

tool to gain intelligence; it does not constitute torture since it is not punishment, and is therefore not officially recognised as torture.

It is problematic that such a reservation was upheld; it clearly places national interests above international law and demonstrably contradicts international provisions that call for the prohibition on torture to be upheld at all times. The use of interrogational torture violates Article 2(2) of the CAT and Article 4 of the ICCPR, and goes against the guidance criteria released by the High Commissioner for balancing human rights and combating terror.⁷

(ii) Redefining Torture - Interrogational Torture

Torture is defined as;

“Any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person...”⁸

Jay Bybee used this definition to argue that interrogational torture falls outside the definition of torture; measures employed by the United States did not equate to torture. He argued the torture prohibition should be reserved only for the infliction of extreme pain, that which is equivalent to the pain accompanying severe physical injury, such as organ failure, impairment of body function, or even death.⁹ Thus, Bybee denotes the definition of torture does not cover all cases of deliberate infliction of pain in the course of interrogation; only those which cause severe injury.

The assessment of severe pain and suffering is subjective and therefore problematic. Although Bybee attempts to clarify what constitutes torture, his definition is narrow and wrongly assumes that the infliction of non-severe pain and suffering is lawful. He states that certain acts may be cruel, inhuman or degrading, but that they fail to produce pain and suffering of the requisite intensity to fall within the proscription against torture.¹⁰

⁷ UN Doc CN.4/2002/18.

⁸ Article 1(1) Convention Against Torture 1984.

⁹ Memorandum for Alberto R. Gonzales Counsel for the President, *Standards of Conduct for Interrogation under*, (Office of the Assistant Attorney General, Washington DC 20530), p.5, available at <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>

¹⁰ Ibid p.1.

Measuring torture by the intensity of pain takes the onus off the torturer and his intention to harm. Further, it is problematic that the intention to cause harm becomes lawful provided severe injury is not caused.

Bybee's constricted definition of torture was approved and consequently a number of interrogational techniques were sanctioned, including: prolonged isolation, sleep deprivation, severe humiliation/sexual torture, use of threats of beatings or electrocutions, the use of military working dogs to induce fear of death or injury and use of mock executions, hooding, restraints and stress positions, exposure while hooded to loud music, noises and temperatures.¹¹

These coercive methods fell outside Bybee's narrow interpretation of torture, as they did not constitute torture per se, but interrogational torture. Arguments for interrogational torture were paralleled with intelligence gathering and a strong patriotic need for protection; this enhanced requirement for security made it easier to justify modifications to the definition and torture policies which sanctioned interrogational torture.

(iii) Inapplicability of the Geneva Conventions

The 'war on terror' label – although socially manufactured – automatically renders the Geneva Conventions applicable. A prisoner of war includes members of militias and organised resistance movements, whether or not they are operating within their own territory.¹² To be granted prisoner of war status one must fulfil four requirements: they are being commanded by a person responsible for his subordinates; they have a fixed distinctive insignia recognisable from a distance; they openly carry arms; they conduct operations in accordance with the laws and custom of war.¹³

John Yoo argued the Geneva Conventions did not apply to detainees. 'Certain individuals have fallen into our hands as captives who do not have the precise attributes that the Geneva Conventions stipulate for persons protected by the prohibitions...'¹⁴ He further concluded, 'the textual prohibitions on maltreatment do not apply to these

¹¹ Nimisha Patel, *Torture, Psychology and the War on Terror: A Human Rights Framework*, in Ron Roberts (ed), *Just War Psychology and Terrorism* (Cromwell Press, 2007) p.76.

¹² Article 4, III Geneva Convention.

¹³ *Ibid.*

¹⁴ Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House*, (Oxford University Press, 2010) p.197.

detainees, and we are back in the military default position – we can do whatever we like.’¹⁵

Yoo’s literal interpretation is flawed; its rigidity lacks legal flair, since methods of analogy, inference and reasoned elaboration, are discounted.¹⁶ It also approaches torture with Hobbesian assumptions; that human nature is barbaric, and warfare and violence are intrinsic features of humankind.

Yoo fails to acknowledge the supra-positive feature of human rights instruments; they are conceived as reflections of non-legal principles that have normative force.¹⁷ The inherent wrong of torture is therefore independent of its embodiment in law. Yoo’s approach denies this and wrongly grants the default as military freedom, assuming that if we had the opportunity to do so, we would all resort to torture. It fails to recognise that there are certain things that should not to be done to humans, not because international regulations restrict us; but simply because they are wrong.

Yoo’s rigid interpretation was upheld; consequently, detainees were denied prisoner of war status and instead broadly categorised as enemy combatants. As a result, they fell outside the scope of protection afforded by the Geneva Conventions.

Freedom from the protective shackles of the Geneva Conventions was also sought through assertions that the ‘war on terror’ was a new, unique war, and the outdated rules of the Conventions did not sufficiently address this current war. Alberto Gonzales used this new war analogy to argue that the Geneva Conventions were obsolete: ‘The nature of the new war [on terrorism] places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists...this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners’.¹⁸

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Gerald Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review*, 1863-1900, p.1892.

¹⁸ Alberto Gonzales, *Memorandum to the President*, 25 January 2002, cited in, A Lewis, ‘Making Torture Legal’ (2004) *New York Review of Books*, p.2.

Conclusion

Freedom from torture is a fundamental human right. The reality that torture is being used is worrying; more worrying still, is the way which international regulations have been bypassed and manipulated.

Distortions made to narrow the definition of torture and the literal construal of the Geneva Conventions, rendering them obsolete have legitimised the use of torture. Ultimately, the dystopia of torture taking place within the parameters of the law is frightening.

Sophia Khalid

The ICJ's reluctance to accept a jus cogens normative hierarchy over state immunity has created a schizophrenic and mercurial role for human rights in both international law and community law.

By way of introduction, this article will critically analyse the mercurial situation regarding the international law hierarchy of different legal doctrines and tools due to a lack of judicial activism in the International Court of Justice ("ICJ").

In effect an argument will be made that state immunity, given its superior status to *jus cogens*, has created a schism in international law whereby the stanchion anchorage of fundamental rights has been uprooted and marginalised in order to protect the subsidiary doctrine of state jurisdiction. However the ensuing negative implications for human rights not only far outweigh state jurisdictional protection but also undermine and overshadow communitarian law entities such as those in Europe. This is all due to the lack of a claimant to pursue a civil suit against a State.

Historically, fundamental rights, held as *jus cogens* on the international law field, have been vehemently developed both worldwide and most specifically in the European community. A reaction to human atrocities from both World Wars left a bitter taste in Europe regarding lack of individual rights against the State. A key example is the Treaty of Paris 1951, when Robert Schuman (the French Foreign minister) clarified the goal of to "make war not only unthinkable but materially impossible".¹

This sprouted, from economic roots, into social, cultural and human rights, as the supranational federalised bodies in Europe helped form multilateral agreements. By using international law bases such as the Vienna Convention on the Law of Treaties ("VCLT"),² these agreements demanded international authority and recognition.

None of the original European major treaties mentioned human rights, due to their primary focus being economic control over coal and steel (goods needed for war). However, many more recent multilateral agreements enshrined not only the core principles but also established physical bodies. For example, the European Union ("EU") has the "Charter of Fundamental Rights of the European Union" ("the EU FR Charter")

¹ "EUROPA - The Schuman Declaration - 9 May 1950". europa.eu.

² Vienna Convention on the law of treaties (with annex).

Concluded at Vienna on 23 May 1969

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>

with its “European Court of Justice” and the “Fundamental Rights Agency”. This supranational framework founded legal bodies whose sole directive was to implement, uphold and protect human rights. All the EU doctrines were crystallised by the 2007 Lisbon Treaty.

The separate institution of the Council of Europe (“CoE”), its European Convention on Human Rights (“the Convention”) and the judicial implementation through the European Court of Human Rights (“the Strasbourg Court”) had a similar founding, based on Churchill’s speech on 19 September 1946 and the creation of the Treaty of London which formed the CoE. Its aim was, according to Article 1(a), “to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”.³

On the international scale, the United Nations’ International Law Commission created the VCLT, helping to form the supranational bodies in Europe, and the ICJ. A major advancement the VCLT made was to hold human rights above all else, including treaties, as stated in Article 53 given that a “peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”⁴ and that if any new right or *jus cogens* comes into existence that conflict with any treaties then the treaty must be held as invalid, made void and terminated.⁵

Therefore, in quick summary, the World Wars acted as a springboard for numerous institutions all with similar objectives – to prevent another World War, and improve and defend liberties and rights. A cascading and rippling effect was created, starting with the UN and international law, filtering through into EU law which then had implications for national law. As such *jus cogens*, given their history and legal focus, can be shown to be at the top of the legal hierarchy.

However, a recent ICJ judgment has threatened to uproot these long established principles. Naturally this has had a negative effect by which fundamental rights, previously established, have now not only been restricted but denied due to the principle of state immunity.

³ Statute of the Council of Europe, available at <<http://conventions.coe.int/>>

⁴ Article 53 Vienna Convention, op cit. n2.

⁵ Ibid Article 64.

In 2012, the ICJ gave judgement on the case of *Germany v Italy*.⁶ The case involved Germany instigating proceedings against Italy for allowing the Italian Court of Cassation to uphold proceedings against Germany for the German mass killing of Italian civilians during WWII. The Judges reasoned that “any entitlement to immunity can be derived only from customary international law, rather than treaty”.⁷ To this effect the Court ruled that:

“there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State’s entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated”.⁸

Thus, It based its decision on the criteria for establishing customary international law; the need for *opinio juris* and state practice.

However it is argued that the Court’s judgement has not taken in the breadth of international law. Accordingly this upset the long-established hierarchy as it sought to place State Immunity above *jus cogens* and fundamental human rights (in this case foreign tort).

In order to clarify, some academics interpreted this as meaning that, the nature of immunity being procedural, it cannot come into conflict with substantive norms and thus even *jus cogens* cannot limit immunity.⁹

This judgement created an outpouring of scholarship criticising the lack of importance the ICJ placed on *jus cogens*. Critics argue that, by their very nature, *jus cogens* deserve a privileged status in the hierarchy of norms whereby lesser subsidiary principles like state immunity could not serve as judicial defence.¹⁰ Thus, immunity simply cannot exist for such a serious breach. This would mean that the distinction between procedural and substantive rules was either irrelevant when the substantive rule being enforced was *jus*

⁶ ICJ 2002 Jurisdictional Immunities of the State (*Germany v Italy*), ICJ 2012.

⁷ Ibid Para. 55.

⁸ Ibid Para. 84.

⁹ Yang, ‘Jus Cogens and State Immunity’ (3 NZYBIL 131, 2006).

¹⁰ A. O, ‘State Immunity and the Hierarchy of Norms: Why the House of Lords Got It Wrong’ (18 EJIL 955-70, 2008).

cogens or the hierarchically superior nature of a *jus cogens* norm inherently “presuppose[d] a procedural rule which guarantee[d] its judicial enforcement”¹¹ irrespective of any conflicting procedural rule of immunity.¹²

Doctrinally, in order for the ICJ to decide, it has to look to customary international law (*opinio juris* and state actions). However, regarding *opinio juris*, a subjective requirement, it is obvious that there is a common attitude,¹³ or subjective elements,¹⁴ towards maintaining *jus cogens* at the top of the hierarchy given the substantial combined efforts of many different groups and the reaction against Germany’s original actions. Thus the ICJ’s ruling would seem to be out of context. In effect they have misplaced their subjective requirement.

Secondly, State practice dictates even more clearly that the ICJ erred in its ruling. Even without contemplating the evidence of a belief as such for *opinio juris*, it can easily be drawn from the numerous advancements made for *jus cogens* and human rights, for example their codification and judicial support mechanisms like the Strasbourg Court or the EU FR Charter. Such a history is very much in line with the legal requirement of “what States say and in what they do, and in what they do not say and do not do”.¹⁵

The result is cataclysmic, whereby *jus cogens* now plays a schizophrenic role given its normative power to treaties, and the defence of derogation forming fundamental roots in all of EU law, yet it is inferior to a principle which can be derogated in cases of *acte jure gestionis*¹⁶ (such as employment or commercial transaction proceedings).¹⁷ What this results in is a public law defence but a private law derogation in the legal system of a public communitarian nature.

Naturally the injured party could find solace in criminal proceedings or their home State supporting a case of diplomatic immunity. However this requires particular effort and resources from the State. Another disadvantage is the political nature of one State suing

¹¹ K. B, B. E, ‘Jus Cogens vs. The State, Round Two: The Decision.

¹² L.B, ‘Case Note on International Law and the International Court of Justice’s Decision in Jurisdictional Immunities of the State’ (13[2] MJIL, 2012).

¹³ North Sea Continental Shelf (Federal Republic of Germany/Netherlands) Judgment of 20 February 1969 ICJ.

¹⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

¹⁵ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) Permanent Court of International Justice.

¹⁶ ‘Acts by right of management’ – activities of a commercial nature carried out by a State.

¹⁷ Section 3 State Immunity Act 1978, available at <<http://www.legislation.gov.uk/ukpga/1978/33>>

another, whereby weaker or dependant States, for example Ukraine and Russia, are simply not willing to antagonise the political setting.

Thus the negative implications for the private litigant entail a restriction of remedy in home courts,¹⁸ 3rd party courts¹⁹ and even the Strasbourg Court.²⁰ In short, a lack of opportunity to enforce their long-established human rights.

In turn, this creates complications for EU law and how it approaches judicial decisions. The very nature of the mechanisms was to uphold human rights as the highest standard. However this new community of privacy and immunity to community party's proceedings threatens to negate the very principles upon which it was built. Indeed there might be no objective in the CoE and the EU if no supranational organisations allow judicial challenges between countries.

Notwithstanding this legal schism, the future may hold as recompense the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted by the General Assembly 2 December 2004. This will once again change the face of this field, hopefully clarifying the issue and this mercurial area of law.

Thomas Morgan Bishop

¹⁸ *Ferrini v Germany*, Corte di cassazione [Italian Court of Cassation], No 5044/2004, 11th March 2004 reported in (2006) 128 ILR 658.

¹⁹ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and others intervening)* [2007] 1 A.C. 270.

²⁰ *Kalogeropoulou v Greece* [2002] X Eur Court HR 415, 428.

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Chetna Varia is Paralegal at the Financial Conduct Authority, having previously worked for Just for Kids Law and Doughty Street Chambers. She is an aspiring barrister, having recently completed the BPTC.

Asma Nizami is a barrister at 1 Gray's Inn Square. She holds an LLM in Public International Law and Human Rights from UCL and a BA in Jurisprudence from the University of Oxford.

Alexandra Nelia works at the International Bar Association's Human Rights Institute where she co-originates international projects aimed at advancement of the independence of the legal profession. She holds an LLB from King's College London.

Ben Stanford is a PhD Fellow at the University of Bedfordshire. His doctoral research focuses on post-9/11 counter-terrorism, emergencies and the right to a fair trial. He is also a part-time research fellow for Rights Watch (UK) working on a project on accountability and oversight of UK counter-terrorist activities abroad.

Chucks Golding is a postgraduate student at the University of London, Institute of Commonwealth Studies studying the MA Understanding and Securing Human Rights. She is also a Company Secretary at a Multi-academy trust and ensures that the MAT is compliant in regards to their company and charity obligations.

Dates for the Diary

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The HRLA Annual General Meeting will take place on 12 January 2016. Elections will take place for the Executive Committee as well as the Young Lawyers Committee. Nominations should be received by 18 December 2015. Please contact administrator@hrla.org.uk to register your interest.

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