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The Young Human Rights Lawyer

Young Lawyers' Committee

THE YOUNG HUMAN RIGHTS LAWYER

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Dear Reader,

I am absolutely thrilled to be able to introduce the second edition of our journal, the Young Human Rights Lawyer. I hope that this publication will continue long into the future.

I have been lucky to chair the Young Lawyers' Committee of the Human Rights Lawyers Association for the past three years. What made the experience special was the opportunity to work with a dedicated committee of young solicitors, paralegals, and barristers who spend their days helping vulnerable people for pocket change and then, instead of going home to their loved ones, sit in a meeting with me full of wild ideas and tight deadlines. The amount of time they actually spend organising events to help their peers is massive. One such event which took a particularly large amount of time to organise was our careers day event in Leeds where a member of our Committee, Chetna Varia, very successfully organised and ran an inspirational half-day event with talks by well-known human rights lawyers such as Mark George QC , Angela Patrick, and Dr Amanda Cahill-Ripley.

Another event which has taken a lot of work from Committee member and has ended up as a success is the Judicial Review Competition. I was surprised to find a gap in the wide range of moots established for judicial review an area of obvious importance to the protection of human rights in our country. If you are interested in competing in this competition I would encourage you to submit an entry shortly when the problem is published on Hrla.org.uk shortly.

The Journal would not have become a reality without the work of Asma Nizami, who has done a great job compiling all the parts of the journal into the finished product you see today. The sponsors, Anthony Gold Solicitors; Church Court Chambers; and Shoaib Khan of S and S Immigration Solicitors should be thanked for their support and belief in up and coming lawyers and human

rights. The contributors to this Journal should also be proud having been selected from over 40 submissions through a rigorous selection process.

As it is my final year in this role I need to thank William Horwood who has been a very understanding Secretary to the YLC for the past few years and without whom I would have struggled. I would also like to thank Alison Gerry, previous chair of the HRLA and current chair, Eeva Heikkila, for their help and encouragement as well as the whole of the YLC as follows: William Horwood (Secretary), Matthew Allan (Communications Officer), Asma Nizami, Chetna Varia, Caterina Franchi, Ayla Prentice, Jeremy Bloom, Oliver Carter and Chucks Golding.

I hope you enjoy the Journal and that in a small way it encourages and motivates you to take up the fight for human rights which is so important at this time.

Yours Faithfully,

Michael Polak
Chair, Young Lawyers' Committee of the Human Rights Lawyers Association

Foreword – No Time for Apathy

Lord Lester of Herne Hill QC[1]

This is no time for apathy. The Westminster political system has been decaying for decades. Alienation from politics is widespread. Disaffection with Westminster politics is not confined to Scotland. Successive governments have failed to address the causes of popular discontent exploited by the Brexiteers in the EU Referendum campaign. The unity of the UK is threatened by

[1] The author is a British barrister and politician, sitting in the House of Lords as a Liberal Democrat.

nationalism and xenophobia and the absence of a stable constitutional framework.

Human rights lawyers – young and old – should fight and fight and fight again to protect human rights from the threat to weaken and even scrap the Human Rights Act. In the wake of the Referendum fiasco the Government would be foolish to attempt to carry out the threat made in the last Conservative election manifesto to replace the Human Rights Act with a British Bill of Rights.

I warned about this recently in my book – *Five Ideas to Fight For –How Our Freedom is under Threat and Why it Matters* (OneWorld, May 2016). I explained the threat from populist politicians and rightwing media. Since my book was published, the disastrous outcome of the EU Referendum has made it more necessary than ever to defend the right of our fellow citizens to be protected against the misuse of power and the tyranny of the majority.

Unlike the rest of Europe and most common law countries, we have no code of supreme constitutional law. We rely instead on the Human Rights Act anchored in the European Convention on Human Rights as our unique way of combining respect for parliamentary supremacy with access to effective remedies for breaches of the Convention rights. We also rely on EU law.

Our system has worked well, and our judges have been enlightened in using European law to strengthen and not to undermine our common law system and Acts of Parliament. There is an important dialogue between our courts and the Strasbourg Court in which common law is well respected. Time and again European law has come to the rescue where our system lacked sufficient protection of human rights. Free speech, respect for privacy, equality without discrimination, and access to justice have been strengthened by judgments of the Strasbourg Court.

When Parliament made it possible in statutes for Ministers to prevent claims of

sex and religious discrimination from being pursued in UK courts and tribunals on grounds of national security, both European Courts ruled that this violated the fundamental right of access to justice and to effective remedies. The European Commission of Human Rights vindicated the rule of law that had been undermined by Parliament. The same was true when Parliament passed racist legislation taking away the right of British Asian refugees fleeing from East Africa to come and live in the UK. What Parliament did was in breach of a promise made by a previous Government. But Parliament is sovereign and, in the absence of the Human Rights Act the only remedy available at the time was recourse to Strasbourg.

The Parliamentary Joint Committee on Human Rights plays a key role as watchdog over the conduct of government in introducing legislation and in complying with judgments of the Strasbourg Court. Its reports improve the Parliamentary scrutiny of Bills and encourage the civil service to take human rights more seriously. In this way, responsibility for protecting and enforcing human rights is not the exclusive responsibility of the judiciary. The political branches of government share responsibility with the courts.

The 1998 devolution settlements with Scotland, Northern Ireland and Wales limit the powers of the devolved institutions by requiring them to comply with EU and Convention law. In each of the Celtic nations of the UK there is powerful support for Europe and Europe's laws. Just as the victory for Brexit threatens the political unity of the UK by encouraging Scottish separatism, so any attempt to tear up the Human Rights Act and weaken European protection would be in breach of the Good Friday Agreement and would undermine the Union with Northern Ireland that the Prime Minister cherishes.

Any attempt to replace the Human Rights Act with a British restatement of political rights and liberties is fraught with danger. Without a new entrenched constitutional settlement, any British Bill of Rights, shorn of the protection of the Convention and the Strasbourg Court would be much weaker than what

we have now. That is why we must fight any attempt to damage the umbilical cord connecting us to Strasbourg.

Any move towards a British Bill of Rights could only be made after wide public consultation across the UK as a whole – and in the context of a wider constitutional debate. There is no room for complacency. The threat to our rights and to the Union will continue until we achieve an enduring new constitutional settlement. That will not happen during the rest of this Parliament, preoccupied with trying to limit the damage done by the EU referendum and its bitter fruit.

As I wrote at the end of my recent book, the achievements of the past fifty years now stand seriously threatened. There is much to defend and fortify and undo – and so much need for your active involvement in the pursuit of justice. Now it's over to you as our future human rights champions.

Yea Rights! – The Legal Impact of Repealing the Human Rights Act

After failing to repeal the Human Rights Act 1998 (HRA) in the 2010-2015 Parliament whilst in coalition, the Conservative Party, now with a slim majority, is approaching the subject with renewed vigour. The plan was to scrap the HRA and replace it with a British Bill of Rights and Responsibilities by the summer of 2016[1]. The impact of the vote to leave the EU has meant that this issue is not at the forefront of government policy at the present time, but the Prime Minister has in the past made no secret of her dislike of the HRA and it is likely that the government will move against it at some point.

The HRA incorporates the European Convention on Human Rights (ECHR) into UK domestic law. It enables UK citizens to use the ECHR in any UK court, obliges UK courts to "*take into account*" the European Court of Human Rights' (ECtHR) jurisprudence, read national legislation "*so far as is possible*" in line with the ECHR, and allows UK courts to declare that national legislation is incompatible with the ECHR (but only allows for the striking down of secondary, not primary, legislation).

The Government argues that the HRA undermines UK sovereignty and control over human rights issues, that it goes beyond ECHR commitments, and that the ECtHR has developed "*mission creep*"[2].

The Government says that while it wants to repeal the HRA, it would still like the UK to stay within the ECHR; thereby breaking the "*formal link*" between British courts and the ECtHR. However, if the Council of Europe (of which the ECHR is a part) does not agree that the Bill is a legitimate way of implementing the ECHR, then the Government would have the UK leave the ECHR entirely. ECHR withdrawal is a minefield best left for another article.

So what would the legal effects be of repealing the HRA? The short answer is that nobody knows until a draft of the Bill is actually released. However, it is possible to gaze into the post-HRA abyss that the Bill would need to fill.

One thing that would not change would be the UK's obligations under the ECHR. These obligations flow from the UK being a Contracting State to the ECHR. These include the principle that the UK would have to "*abide by the final judgment of the Court in any case to which* [it is a party]" (Article 46(1) ECHR).

However, UK citizens would only be able to use the ECHR at the ECtHR in Strasbourg; not domestic courts. UK courts would no longer be required to take into account ECtHR jurisprudence (though as mentioned the UK would still be

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[1] Mark Leftly, 'British Bill of Rights to be fast-tracked into law by next summer' (*The Independent*, 17 October 2015) <http://www.independent.co.uk/news/uk/politics/british-bill-of-rights-to-be-fast-tracked-into-law-by-next-summer-a6698261.html> accessed on 14 January 2016

[2] Conservatives, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law* (03 October 2014)

bound by decisions in cases to which it is a party), nor would it be possible to declare incompatibility between national legislation and the ECHR. Neither would domestic legislation have to be read in line with the ECHR. That said, some commentators have pointed out that these features are now so ingrained into UK case law that the common law would ensure that these principles remain in practice[3].

A further issue to consider is the effects of repeal in the context of devolution. The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 ('the devolution Acts') make it clear that no legislation can be passed by a devolved Parliament or Executive which is incompatible with ECHR rights. Some experts say this would be unaffected even if the HRA was repealed, although ECHR rights are specifically mentioned as being those outlined in the HRA in the devolution Acts, and the HRA is cited as one of several protected enactments that cannot be altered[4]. This in effect amounts to a second incorporation of the ECHR into domestic law[5].

There is also the issue of the Sewel Convention, set out in Article 14 of the Memorandum of Understanding between Westminster and the devolved legislatures[6]. This states that Westminster will not normally legislate with regard to devolved matters without the consent of the devolved legislatures. The HRA itself is not a devolved power - human rights in general, however, are[7]. It is possible (though this is disputed[8]) that devolved legislatures may be able to block an HRA repeal unless the new Bill includes a specific provision bypassing the devolved legislatures' consent; or indeed includes amendments to the devolution Acts (which, again, would trigger the Sewel Convention). While the Sewel Convention is not formally binding, there are moves to give it

[3] Joshua Rozenberg, 'Human rights legislation in the UK: a cut-out-and-keep guide' (*The Guardian*, 01 September 2014) <http://www.theguardian.com/law/2014/sep/01/human-rights-legislation-uk-council-european-convention> accessed on 14 January 2015

[4] Iain McIver and Angus Evans, *The European Convention on Human Rights in the United Kingdom* (Scottish Parliament Information Centre Briefing 14/80, 07 November 2014)

[5] Crown Office Row, 'Will devolution scupper Conservative plans for a "British" Bill of Rights?' (*UK Human Rights Blog*, 02 October 2014) <http://ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights> accessed on 14 January 2016

[6] Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (2013)

[7] Kanstantsin Dzehtsiarou and Tobias Lock, *The legal implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights* (Durham University Library, 2015)

[8] Mark Elliott, 'Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights?' (*Public Law for Everyone*, 12 May 2015) <http://publiclawforeveryone.com/2015/05/12/could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights> accessed on 14 January 2016

legislative footing[9]. In any case, to override Scotland on such a fundamental constitutional point could have severe political, as well as legal, consequences.

Following this, there is a possibility that, in the wake of an HRA repeal, the devolved legislatures would establish their own human rights framework. This would lead to asymmetry in UK human rights. Finally, the Northern Irish Good Friday Agreement states as a prerequisite that the ECHR be incorporated into Northern Irish law. If the HRA is repealed, Northern Ireland's participation in the ECHR would have to be maintained through other means - the new Bill would have to cover this. Some commentators believe the Agreement makes it impossible not only to repeal ECHR obligations, but also HRA obligations insofar as they apply in Northern Ireland[10]. The Northern Ireland Human Rights Commission, and the Committee on the Administration of Justice, both claim that repealing the HRA would be a breach of the Good Friday Agreement[11].

In short, any repeal of the HRA (leaving aside for a moment the bitter politics of such a move, as well as the potential loss of Britain's credibility on human rights) would have to deal with the legal fallout surrounding commitments in EU and regional law. It is difficult to see how the proposed Bill would not be swallowed up by the HRA void.

Ben Wild

[9] Harriet Cornell, 'Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland' (*Global Justice Academy Blog*, 13 May 2015) <http://www.globaljusticeblog.ed.ac.uk/2015/05/13/hrarepealmay2015> accessed on 14 January 2015

[10] See 16

[11] BBC, 'Human Rights Act: Tory pledge to scrap law 'breaches NI peace deal'' (*BBC*, 12 May 2015) <http://www.bbc.co.uk/news/uk-northern-ireland-32705020> accessed on 14 January 2015

DRIPA Case Analysis

R (Watson and Davis) v Secretary of State for the Home Department [1]

Facts

In December 2015 the Court of Appeal handed down a judgment concerning the Data Retention and Investigatory Powers Act 2014 ("DRIPA"). This piece of emergency legislation, passed in July 2014, was challenged by MPs David Davis and Tom Watson, represented by Liberty.

Section 1 of DRIPA empowers the Home Secretary to require any public telecommunications operator to retain relevant communications data for up to 12 months. Communications data do not include the content but do reveal the sender, recipient, time, place and method of communication. They can therefore be highly revealing and are increasingly used to combat serious crime and in counter-terrorism. The human rights implications of mass retention of such data prompted interventions from Open Rights Group, Privacy International and the Law Society of England and Wales.

DRIPA requires the data retention to be necessary and proportionate for a purpose in section 22(2)(a)-(h) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), which include national security and crime prevention. There is no requirement for prior judicial or independent authorisation. Access to the retained data is governed by Chapter 2 of Part 1 of RIPA, by which public authorities may by notice require communications service providers to disclose the data to them.

Digital Rights Ireland

On 8 April 2014 the CJEU gave judgment in *Digital Rights Ireland*. The judgment invalidated the Data Retention Directive[2] as it was found to be incompatible with Articles 7 and 8 EU Charter and Article 8 ECHR. The CJEU identified safeguards absent from the Data Retention Directive (especially from [54] to [68]). These included a lack of clear rules governing access to the retained data and specifically the absence of any requirement for prior judicial or independent authorisation for access.

[1] [2015] EWCA Civ 1185
[2] Directive 2006/24/EC

The judgment in *Digital Rights Ireland* has proven ambiguous. Some Member States, including Austria, Slovenia, Belgium and Romania, interpret it as laying down mandatory requirements of EU law. They believe the Court of Justice was not merely pointing out flaws with the Data Retention Directive, but was identifying features required of any data retention legislation, whether at EU or domestic level. This was the submission of the Claimants in the present litigation.

Sweden took the view that the judgment was sufficiently ambiguous to merit a reference to the CJEU on its proper interpretation[3].

The Home Secretary's position is that the Court of Justice in *Digital Rights Ireland* was not laying down mandatory requirements of EU law. It was considering a reference concerning the validity of the Data Retention Directive and so was not required to – and did not - consider the validity of any domestic legislation.

A further area of uncertainty surrounding the judgment is whether the Court of Justice intended to expand the scope of Articles 7 and 8 of the EU Charter beyond the content of Article 8 ECHR.

Divisional Court Judgment[4]

The Divisional Court accepted the Claimants' view that *Digital Rights Ireland* lays down mandatory requirements of EU law applicable to Member States' domestic legislation. Based on this interpretation, it accepted the Claimants' argument that the data retention regime in section 1 of DRIPA is incompatible with Articles 7 and 8 of the EU Charter and Article 8 ECHR. It concluded that section 1 of DRIPA is inconsistent with EU law because some of those mandatory requirements were not met, specifically (i) access to the retained data was not sufficiently strictly limited and (ii) access was not made dependent upon prior judicial or independent review. The Divisional Court's order disapplied section 1 with effect from March 2016.

Court of Appeal

The Home Secretary appealed on the basis that the judgment was based on a misunderstanding of *Digital Rights Ireland*. The Court of Appeal accepted, on a provisional basis, much of the Home Secretary's argument that *Digital Rights*

[3] Pending Case C-203/15 *Tele2 Sverige AB*
[4] [2015] EWHC 2092 (Admin)

Ireland merely invalidated the EU data retention regime without laying down rules for domestic regimes. It also expressed doubt that the CJEU intended to go beyond Strasbourg Article 8 ECHR jurisprudence in interpreting Articles 7 and 8 of the EU Charter.

At the request of the Home Secretary, the Court of Appeal referred the following questions to the CJEU:

(1) Does the judgment of the Court of Justice in Joined Cases C-293/12 and C-594/12 ***Digital Rights Ireland and Seitlinger***, ECLI:EU:C:2014:238 ("***Digital Rights Ireland***") (including, in particular, paragraphs 60 to 62 thereof) lay down mandatory requirements of EU law applicable to a Member State's domestic regime governing access to data retained in accordance with national legislation, in order to comply with Articles 7 and 8 of the EU Charter ("the EU Charter")?

(2) Does the judgment of the Court of Justice in ***Digital Rights Ireland*** expand the scope of Articles 7 and/or 8 of the EU Charter beyond that of Article 8 of the European Convention of Human Rights ("**ECHR**") as established in the jurisprudence of the European Court of Human Rights ("**ECtHR**")?

The Court of Justice was asked to join the reference to the pending Swedish reference on the issue. The Order of the Divisional Court is suspended until further Order of the Court of Appeal.

Comment

DRIPA's sunset clause means the Act expires on 31 December 2016. It is nonetheless crucial to obtain a ruling from the CJEU to clarify the true effect of the judgment in *Digital Rights Ireland*, as it has implications for the validity of Member States' legislation in respect of communications data in counter-terrorism and serious crime. The questions referred by the Court of Appeal (and the Swedish court) provide an opportunity for the CJEU to revisit *Digital Rights Ireland* and either confirm that it did intend to lay down general rules under EU law applicable to all national data retention laws, or clarify that the judgment was not intended to have the dramatic impact it has been found to have by a number of national courts.

Imogen Proud

The Legal Basis for Military Intervention in Syria: sound or spurious?

On 26th November 2015, David Cameron argued the case for airstrikes in Syria before Parliament. Just hours after MPs approved this action, the first of a series of strikes was launched. This paper will analyse the legality of this action, assessing first the content of Mr. Cameron's claims in the House of Commons, before turning to their relationship with international law frameworks. This author's submission is that Mr. Cameron failed to establish satisfactorily the criteria set out by international law, rendering the legal status of the strikes doubtful and susceptible to criticism. The article will conclude by interrogating these issues through the prism of human rights.

David Cameron's Justifications

In his statement to Parliament, Mr. Cameron stated that there "is a clear legal basis for military action against ISIL in Syria"[1]. This assertion is founded upon two distinct bases. Firstly, the Prime Minister referenced UN Security Council Resolution 2249, noting its calling upon Member States to take "all necessary measures... to prevent and suppress terrorist acts committed specifically by ISIL"[2]. This quoting of the statement implies that Mr. Cameron considered that this Resolution provided an authoritative foundation for intervention. He reinforced this by stating that the "legality of UK strikes against ISIL in Syria is founded on the right of self-defence as it is recognised in Article 51 of the UN Charter"[3]. These two separate bases will be examined in turn.

What does international law say?

Article 2(4) of the UN Charter is the starting point for all determinations of legality for the use of force. It reads: "[A]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"[4]. There are three exceptions to this rule, two of which Mr. Cameron relies upon. The first relates to consent or invitation, which constitutes the basis for airstrikes taking place in Iraq[5], but in the absence of Syrian government invitation, this will not be discussed here. Another exception pertains to Security Council authorisation under Chapter VII of the Charter, which allows the Council to permit "such action by air, sea, or land forces as may be necessary to maintain or restore international peace

[1] Memorandum to the Foreign Affairs Committee from David Cameron, 'Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria' HC (2015-16) 15
[2] United Nations Security Council Resolution 2249 (20 November 2015) UN Doc S/RES/2249
[3] Memorandum to the Foreign Affairs Committee (n 1) 15
[4] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI article 2
[5] See Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council (20 September 2014)

and security"[6], according to specific modalities. Finally, the "inherent right of individual or collective self-defence" is enshrined in article 51 of that Chapter.

(i) Security Council Resolution 2249

Veronika Fikfak has noted that in "his address to Parliament, David Cameron insisted that the UN SC Resolution provides a legal basis for military action"[7]. However, it is submitted that this resolution provides only political, not legal, support for the airstrikes. Although the resolution "represents a forceful collective statement urging action against ISIS"[8], it "does not actually authorize any actions against IS, nor does it provide a legal basis for the use of force against IS either in Syria or in Iraq"[9], comparable to resolutions 1368 and 1373 (2001) supporting but not authorising military action in Afghanistan. Critically, "the resolution does not use the "acting under Chapter VII" formula that is usually used to signal that the Security Council intends to take binding action"[10]; specifically, "the language used … is merely hortatory ('calls upon') and does not refer to Chapter VII"[11]. Indeed, the resolution insists that action should be taken "in compliance with international law", which, unless this is interpreted as a wholly circular addition, implies that an international legal justification is required *independent of* the resolution itself. Hence, as Akande and Milanovic assert, the "creative ambiguity in this resolution lies not only in the fact that it does not legally endorse military action, while appearing to give Council support to action being taken, but also that it allows for continuing disagreement as to [its] legality"[12]. We must therefore turn to self-defence to find a sound legal basis for Britain's military action.

(ii) Self-defence

In order to establish that the criteria for self-defence (collective or individual) are met, states must prove that there has been either an armed attack on the territory in question, or that one is imminent, with the action being necessary and proportionate. Britain's airstrikes arguably satisfied none of these conditions.

In relation to an armed attack, the International Court of Justice has determined that even following an attack, there is no right to use force in self-defence that

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[6] Charter of the United Nations (n 4) article 42
[7] Veronika Fikfak, 'Voting on Military Action in Syria' (*UK Constitutional Law Blog*, 28 November 2015) <https://ukconstitutionallaw.org/2015/11/28/veronika-fikfak-voting-on-military-action-in-syria/> accessed 23 March 2016
[8] Harriet Moynihan, 'Assessing the Legal Basis for UK Military Action in Syria' (*Chatham House*, 26 November 2015) <https://www.chathamhouse.org/expert/comment/assessing-legal-basis-uk-military-action-syria#sthash.HMwRYdoa.dpuf> accessed 23 March 2016
[9] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (*EJIL: Talk*, 21 November 2015) <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 24 March 2016
[10] ibid
[11] Moynihan (n 8)
[12] Akande and Milanovic (n 9)

is unnecessary to prevent ongoing or future attacks[13]. Hence it is for the Prime Minister to demonstrate that an armed attack on either Iraq or the UK was imminent, irrespective of the attacks that took place in France, which triggered this process. For *Schachter*, it "is important that the right to self-defence should not freely allow the use of force in anticipation of an attack"[14]. It is necessary that any further delay will render the state unable to counter any incoming attack. Further, there is a danger that force in response to an attack will constitute an unlawful 'reprisal'. This "is a right that presents a very narrow window of opportunity … almost never exist[ing] in the context of terrorist attacks"[15]. While it is possible that this criterion was made out before the UK commenced airstrikes, imminence was not discussed by Mr. Cameron in his parliamentary address, so the legality of the action in relation to this stringent requirement is uncertain.

Further, it is submitted that the Prime Minister did not go far enough to establish that the requirements of necessity and proportionality were satisfied. For necessity to be made out, there has to exist no practical alternative for the UK to take to counter the threat. When considering the UK's place within a large alliance intent on striking Syria (the Commons' Foreign Affairs Committee itself named nine other states[16]), the proportionality and necessity enquiries are left in doubt. Mr. Cameron did not articulate specifically why UK intervention would help counter the threat extrinsic to any other action taken by allied states, nor whether the precise *extent* of involvement was strictly required and proportionate. Moreover, regarding collective self-defence of Iraq specifically, it appears that the decision to take military action was responsive to attacks in France; the relevance to the defence of Iraq is therefore unclear. In particular, it is necessary to establish that attacks upon *Syria* were necessary to prevent damage being done to *Iraq*, a question left unanswered by Mr. Cameron.

Military action in Syria from a human rights perspective

All individuals engaged in military activities under a state flag are protected by the laws of war, notably the Geneva Convention and later treaties. A soldier, or a non-combatant situated within the territory of a warring nation, has a comprehensive set of human rights. The situation is less clear for non-state combatants, or non-combatants proximate to a conflict involving non-state warring parties. The law pertaining to non-state conflict is nebulous and still embryonic, which means the rights of, for example, civilians who might be

[13] See *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v US*), [1986] ICJ 14 and *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion), [1996] ICJ 226, 245 para 41

[14] Oscar Schachter, 'The Right of States to Use Armed Force' [1984] Michigan Law Review 1620, 1634

[15] Greg Travalio, 'Terrorism, International Law, and the Use of Military Force' [2000] 18 Wisconsin International Law Journal 145, 145

[16] Report from the Foreign Affairs Committee of the House of Commons, 'The extension of offensive British military operations to Syria' HC (2015-16) 9 (footnote 22)

harmed or killed by these airstrikes are precarious. With this in mind, it can be seen that Britain's military intervention in Syria, without its legality being demonstrated as being solid and credible, risks creating a deleterious precedent from a human rights perspective. Given that international law is non-hierarchical and customary, any action taken by states can produce new and influential legal norms. To execute airstrikes without proper legal foundation carries the worrying implication that military action resulting in the deaths of both combatants and civilians falls not within the ambit of determinable legal frameworks, but instead within the impulses of individual states. Britain's military action could be interpreted as implying that the rights of individuals in non-state combat are not governed by law, but by caprice.

Conclusions

The imprecision of the norms in this area of law mean that it is unclear whether Britain's airstrikes violate international law. What is clear, however, is that David Cameron did not go far enough to satisfy onlookers, domestically and abroad, that he had fully considered what was required before he permitted the UK military to begin bombing in Syria. This may well create dangerous legal and customary precedents for comparable conflicts in the future, and should therefore concern those interested in the protection of human rights across the globe.

Finnian Clarke

Autonomy: A Means of Achieving a CRPD Compliant Capacity Regime

Introduction

Mental capacity is assessed in England and Wales through the functional test and diagnostic threshold, under section 2(1) Mental Capacity Act 2005 ('MCA'). The diagnostic threshold requires the presence of 'an impairment of, or a disturbance in the functioning of, the mind or brain.' This must then cause an inability to understand, retain, use, weigh and communicate information (the functional test). The Section 4 best interest assessment follows if the person is found to be lacking capacity to ensure the proposed action is appropriate on an objective and subjective basis.

The MCA's non-compliance with the Convention on the Rights of Persons with Disabilities ('CRPD') is widely accepted.[1] This article aims to propose a means of compliance, which will maximise the individual's autonomy. There are numerous theories that give competence, informed consent and capacity prominence in acting autonomously.[2] This article, however, engages autonomy in its simplest form of being able to act upon one's current wishes.

Part One: A Brief Overview of Non-Compliance

The MCA, contrary to Article 12 (2) CRPD, allows for the denial of legal capacity and substitute decision-making on a discriminatory basis where an individual has 'an impairment of, or a disturbance in the functioning of, the mind or brain'[3] that hampers 'use, retention or the weighing of information'.[4] A person who lacks mental capacity under the MCA will be stopped from being a 'player in civil society' who has legal capacity, at least in making the one decision in question.[5]

The lack of safeguards, in the best interest assessment, violates Article 12(4) of the CRPD, which requires *'measures relating to the exercise of legal capacity [to] respect the rights, will and preferences of the person.'* The best interest assessment, therefore, does not meet the CRPD's standard as the individual's wishes and feelings under the MCA are just one of many factors. [6] The courts have sometimes approached the best interest assessment in a way that is compatible

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[1] See for example Wayne Martin et al. Achieving CRPD Compliance: is the Mental Health Capacity Act of England and Wales compatible with UN Convention on the Rights of Persons with Disabilities? If not, what next?. Essex Autonomy Project (2014) <http://autonomy.essex.ac.uk/uncrpd-report> accessed 02 February 2016;

[2] See David DeGrazia, Thomas Mappes and Jeffrey Ballard, *Bimedical Ethics* (7th edition, McGraw-Hill Education 2010); Tom L. Beauchamp and James F. Childress, *Principles of Biomedial Ethics* (7th edition, Oxford University Press 2012);

[3] Mental Capacity Act 2005, s2(1);

[4] Ibid, s3(1);

[5] Wayne Martin et al. (2014) 13, <http://autonomy.essex.ac.uk/uncrpd-report> accessed 02 February 2016.

[6] See Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67, para 3.28;

with the CRPD's standard. In *St George Healthcare NHS Trust*,[7] for example, the court adhered to the wishes and feelings of the individual by giving weight to his strong belief in the sacred nature of life as a Sunni Muslim and, as a result, found that he would have wanted to live as long as possible. However, the case of *E*[8] is troubling. E held a clear and reasonable wish to live the remainder of her life as she wanted and to die with dignity but this was denied by the courts showing insufficient compliance with Article 12(4).

People can lack in the functional test[9] but mental incapacity will only be found when the diagnostic threshold[10] is also met. This is most likely to be a mental disorder or mental disability and, therefore, amounts to disability discrimination under Article 5 CRPD because of the focus on that social group.

Article 12(4) CRPD also states that all '*measures [should be] subject to regular review by a competent, independent and impartial authority or judicial body.*'[11] The MCA system fails again to be compliant with this provision as substitute decisions, ranging from diet choices to removing life support, are made daily without such review of all measures.

Part Two: Achieving Compliance with the CRPD Through Autonomy

A person of equally poor 'functioning' who does not have 'an impairment of, or a disturbance in the functioning of, the mind or brain' will not be considered as mentally incapacitated. This cannot continue if compliance with Articles 5 and 12(2) is to be achieved as the legislative framework needs to apply equally to disabled and non-disabled persons, without disproportionately affecting the latter. The new legislative framework should not make reference to disability, mental disorder or impairment, making the diagnostic threshold redundant. Instead, the new framework should refer directly to the severely affected capacity of the person. This should be reserved for those who are unconscious and cannot communicate wishes or feelings. In this situation, the court should determine the person's best interests using the current framework set out in Section 4 MCA. This would be applied on an equal basis in order to comply with the CRPD and ensure equality.

The wishes and feelings of those who are conscious need to be given effect in order for any legislative framework to comply with Article 12(4) CRPD. This, in effect, gives the individual full autonomy. Bach and Kerzner[12] propose a three-tiered model that could move the legislative framework towards

[7] St George's Healthcare NHS Trust v P&Q [2015] EWCOP 42;
[8] [2012] EWHC 1639 (COP);
[9] Mental Capacity Act 2005, 2(1);
[10] ibid;
[11] Also see Great Britain. Department for Constitutional Affairs. (2007). Mental Capacity Act 2005: Code of Practice. London: TSO, para 6.18;
[12] Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Law Commission of Ontario 2010), <http://www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf> accessed 02 February 2016;

compliance. Those three tiers are: legally independent status (where no support is required); supported decision-making status (where support is required); and facilitated decision-making status (where a form of substitute decision-making would be employed). The third tier should only be used when the individual is unconscious. In relation to the second tier, the wishes and feelings of most of those we currently regard as lacking mental and thus legal capacity would have to be respected. One may contend, however, that this model gives too much weight to the person's past wishes and feelings and may prevent the person from changing their mind. Whether autonomy and self-determination lie with the past-self or present-self is discussed by Jaworska[13] and Dworkin.[14] The consensus lies in giving authority to one's past-self but one's values and needs change over time, particularly if one's circumstances alter drastically.

Present wishes and feelings, therefore, should be given more significance than that proposed by Bach and Kerzner. The MCA does require the best interest assessor to 'permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him' so far as reasonably practicable.[15] There remains, however, a significant tendency to substitute a decision instead of supporting the individual to be autonomous and a 'player in society'. A stronger commitment to supported decision-making and a greater emphasis needs to be place on the autonomy of all persons. People think in different ways and the current legal approach is insufficient in protecting such variants. A test for mental capacity is a legal construct that does not necessarily assess competence. A focus on supported decision-making will require government support to ensure sufficient resources. This is evident from cases such as *DE*[16] and *K*.[17] DE received 14 one-hour sexual relations and contraception education sessions delivered by a nurse trained in learning difficulties and a clinical psychologist. A psychologist and social worker similarly sat on K's flat floor and drew pictures with him for 3 days.

A further acceptance that society cannot and should not protect people from themselves is needed. This reform is questionable as one can ask what would happen to those with severe mental disorders and whether they would get the support they need. The answer is: it depends if they want help and they are not a danger to others (the latter being a matter for criminal law). This approach is focused on autonomy and its primary aim is to ensure that all persons keep their right of self-determination. There will, of course, be cases where the person decides to take a life-ending course when compulsory treatment may

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[13] Agnieszka Jaworska,(2009), 'Advance Directives and Substitute Decision-Making' in Edward N. Zalta (ed.), The Stanford Encyclopedia of Philosophy (2009 Summer Edition), <http://plato.stanford.edu/archives/sum2009/entries/advance-directives/> accessed 02 February 2016;

[14] Ronald Dworkin, 'Life's Dominion: an argument about abortion, euthanasia, and individual freedom' (2nd edition, Vintage Books 1994), ch. 7;

[15] Mental Capacity Act 2005, S5(4);

[16] A NHS Trust v DE [2013] EWHC 2562 (Fam);

[17] LBX v K & Others [2013] EWHC 3230 (Fam);

have allowed a full recovery. It is not for us to be paternalistic over another's life and their autonomy has to be respected. We should create a support system that helps people to make their own choices rather than substituting their decision with another's because we view it as being more rational.

Compliance with Article 5 of the European Convention on Human Rights (ECHR) will need to be achieved once the diagnostic threshold is removed as restricting liberty can only be justified in this context on the basis of 'unsound mind' informed by objective medical evidence.[18] There would be fewer occurrences of deprivation of liberty with the proposed legislative framework as the person will be supported in making their own decisions. For cases where an individual's will and preferences cannot be given or found, the UK should argue for a new understanding that moves away from mental disorder and the medical model to community care and the social model. The ECHR and its Court takes influence from the developments and commonly accepted standards of penal policy of the Council of Europe members,[19] other international treaties[20] and decisions by bodies applying them.[21] The UK, in its argument, should highlight the shift towards the social model and its obligations under the CRPD. The ECHR should allow a deprivation of liberty where the individual cannot provide wills and preferences and it is in their best interest regardless of whether there is an 'impairment of the mind'. This would also achieve the ECHR's compliance with the CRPD.

The reduction in deprivations of liberty would make it easier to review all measures in place. This could be done in the Court of Protection since it would only hear cases where a person's will and preferences were being ignored and when they cannot be ascertained. This would allow the new legislative framework to be compliant with Article 12(4). There could also be an independent body that helps to resolve disputes and ensures that the person's will and preferences were being respected. The viability of this approach is beyond the scope of this article.

Part Three: Conclusion

Achieving compliance with the CRPD and ECHR, whilst difficult, is possible by changing the way those with mental disorders are perceived. This involves moving away from paternalism and towards autonomy, even when the end result is perceived as undesirable. The focus should be placed on supporting people to make their own choices. This should apply equally to all persons rather than concentrating on those with mental disorders. This, too, requires a change in the way mental disorder is viewed in order to allow for an appreciation for alternative methods of thinking. Compliance with the CRPD, therefore, is dependent on a movement away from paternalism towards

[18] Winterwerp v Netherlands (1979) 2 EHRR 387, para. 37;
[19] Tyrer v UK A 26 (1978) 2 EHRR 1;
[20] Al Adsani v UK 34 EHRR 273 GC in relation to the UN Torture Convention;
[21] Magdalena Forowicz, 'The Reception of International Law in the European Court of Human Rights', (1st edition, Oxford University Press 2010);

supported autonomy regardless of the consequences. This does raise unanswered questions, however, since many people are appreciative of compulsion as it was a driving force in their recovery. These questions will have to be answered if the new legislative regime is to achieve positive outcomes. Respecting autonomy is a step in the right direction towards achieving compliance and protecting the self-determination of those with mental illness.

Daniel Holt

Let's not skirt the issue: reflections on Klaedes v Cyprus (2015)

Ms. Andrianna Klaedes's gender mistreatment claims before the ECtHR last September came to an abrupt end when her case was deemed inadmissible. [1] Despite the case not reaching substantive consideration however it would be unwise to dismiss it as not worthy of further attention. Gender is increasingly prevalent in human rights discourse and the challenges under Articles 3 and 8 ECHR raised interesting and pertinent points which no doubt will in future find wider application in this world of increased gender questioning and fluidity. This paper therefore considers how, had it heard them, the ECtHR might have dealt with Ms Klaedes' complaints, and argues that substantive findings would have advanced gender protection within international human rights law.

Case background

Born intersex, Ms. Klaedes was legally registered male. However, as a teenager she underwent a feminising surgical procedure and thereafter appeared and was known socially as female. In 2006, after it became possible to do so in the UK, she legally registered her female status.

Sometime after qualifying as a lawyer in the UK Ms. Klaedes moved to Cyprus. There, she registered as a lawyer using a male name. She initially appeared before the courts dressed as a man but in 2009 began appearing before the courts in 'female attire' (i.e. a skirt).[2] On 11 and 24 September 2012, notably after her UK change of legal gender, Ms. Klaedes appeared before Judge M. in the Cypriot criminal courts as a female; the first times she had done so. On both occasions Judge M. refused her an audience, stating variously that as a man she could not appear before him wearing a skirt, he would not have her "masquerading" as a woman in his court and she would need to provide him with a certificate from the Supreme Court identifying her as a woman before he would accept her in female attire. Both times, persons present in court laughed, Judge M. requested that Ms. Klaedes leave the courtroom and she did, feeling humiliated and degraded. These events subsequently received media publicity, adding to the humiliation felt by Ms. Klaedes.

Ms. Klaedes challenged the actions of Judge M. before the ECtHR. She claimed that Judge M.'s public disclosure of her gender details breached her rights under Article 8 and that Judge M.'s comments regarding her gender amounted to degrading treatment in breach of Article 3. Unfortunately, however, the Court decided that Ms. Klaedes had not yet had exhaustive recourse to internal Cypriot grievance mechanisms and deemed her case inadmissible.

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[1] *Klaedes v. Cyprus*, ECtHR, Application No. 72491/12, Inadmissibility Decision, 22 September 2015

[2] This language formulation was used by the ECtHR despite female advocates in Cyprus having been allowed to wear trousers in court since the Supreme Court of Cyprus Regulations of January 2005

Article 8 ECHR

Ms. Klaedes' contention that Judge M.'s public disclosure of her personal information breached her rights under Article 8 was strong. Gender identity is an integral part of private life, the conflict between Ms. Klaedes's social reality and her legal gender status made her implicitly vulnerable to humiliation and anxiety and there were no significant factors of public interest to weigh against her rights to privacy. Since *Goodwin v. UK*[3] the Court appears to have become quite comfortable dealing with gender complaints as matters of private life infringement. All indicators are that the ECtHR would have had little hesitation in declaring a violation.

However, while this would have provided Ms. Klaedes with a remedy, reaffirmed the central nature of gender identity to one's personhood and reminded States of the need to protect gender minorities including intersex persons, it is strongly arguable that only a finding of Article 3 violation, with its direct focus on dignity and common humanity, would have adequately given voice to the deep-seated nature of the gender wrong perpetrated by Judge M.

Article 3 ECHR

In 2011 the UN Special Rapporteur on Torture remarked that discrimination on grounds of gender identity may "*contribute to the process of dehumanization*".[4] This being so, Article 3 would surely be the appropriate ECHR provision under which to address gender wrongs. Ms. Klaedes' contention that the comments made about her gender by Judge M. on 11 and 24 September 2012 amounted to degrading treatment in violation of Article 3 could thus be conceived as a bold attempt to secure appropriate recognition and protection of gender mistreatment within international human rights law.

However, Ms. Klaedes would have faced an uphill battle. For her claim to be made out, she would have needed to have established that (1) Judge M.'s refusal to acknowledge and respect that she was a woman amounted to 'degrading treatment' and (2) his dismissal of her gender identity satisfied a minimum threshold level of severity.

<u>Degrading treatment</u>

It is well-established that treatment is 'degrading' under Article 3 when it "*humiliates or debases an individual, show[s] a lack of respect for, or diminish[es], his*

[3] *Goodwin v. UK,* ECtHR, Application No. 28957/95, Judgment, 11 July 2002
[4] UN HRC Report, *Discriminatory Laws and Practices and Acts of Violence against Individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41 at para 34.

or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance."[5] Evidence of an intention to humiliate and debase is relevant[6] but absence of such intention is no bar to a finding of degradation.[7] Some actions are inherently 'degrading' irrespective of the fact that they would have no effect on "*exceptionally insensitive*" persons[8] but no finite list of 'degrading treatment' features can be compiled.[9] Ms. Klaedes's clear evidence was that she felt humiliated by Judge M.'s rejection of her female status. Assuming the Court found her evidence persuasive, the subjective test would have self-evidently been met, leaving the live issue whether it is objectively degrading to deny an individual recognition of their self-identified gender.

Theoretically, the ECtHR could quite readily have found objective degradation. Having previously accepted in the context of homosexuality that in principle a predisposed institutional bias against a minority group could amount to degrading treatment[10] it would be entirely rational and logical to hold that State discrimination against persons self-identifying and presenting as a gender different to their legal assignation is degrading treatment. In fact, the ECtHR's focus on dignity as the core guiding concept in defining 'degrading treatment' would almost compel this conclusion. The ECtHR has consistently viewed degradation in contrast to respect for an individual's personhood; 'degrading treatment' being that which lowers a person and fails to treat them in a way that befits their membership of the human race.[11] As it is surely a fundamental affront to dignity to reject a person's gender identity such treatment is arguably degrading.

Evidence suggests that the ECtHR may relish bringing gender mistreatment within Article 3's scope. In recent years it has shown itself increasingly willing to interpret Article 3 dynamically to maintain a high ideal of human rights and provide effective protection for vulnerable minorities, repeatedly "*capitalis[ing]*

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[5] *Bouyid v. Belgium,* ECtHR, Application No.23380/09, Judgment, 28 September 2015 [45] citing *Ireland v. UK*, ECtHR, Application No. 5310/71, Judgment, 18 January 1978 [167]

[6] *Ranninen v. Finland*, ECtHR, Application No. 20972/92, Judgment, 16 December 1997 [55]

[7] *Labita v. Italy*, ECtHR, Application No. 26772/95, Judgment, 6 April 2000 [120], *Farbtuhs v. Latvia,* ECtHR, Application No. 4672/02, Judgment, 2 December 2004 [58]; *I.I. v. Bulgaria,* ECtHR, Application No. 44082/98, Judgment, 9 June 2005 [67]

[8] *Campbell & Cosans v. UK,* ECtHR, Application No. 7511/76, Judgment, 25 February 1982 [30]

[9] *Tyrer v. UK*, ECtHR, Application No. 5856/72, Judgment, 25 April 1978 [32]

[10] *Smith & Grady v. UK,* ECtHR, Application No. 33985/96, Judgment, 27 September 1999 [121]

[11] Webster, E. '*Humiliation, Degradation, Dehumanization*', Springer (2011) 79-80

on the graduating scale of degrading treatment to diversify its protective scope".[12] Nonetheless, even had the ECtHR taken this step, it remains highly doubtful that it would have gone so far as to find that the factual treatment of Ms. Klaedes by Judge M. attained the minimum level of severity required for a violation.

Minimum Severity

Counterbalancing any generous interpretations of 'degrading treatment' the ECtHR historically has adopted a restrictive approach towards treatment being 'sufficiently serious'.[13] Ms. Klaedes gave clear evidence that she suffered significant harm as a result of Judge M.'s treatment, both in the moment and with long-term effect; the emotional effect of Judge M.'s actions being exacerbated by his occasioning of public ridicule during her professional appearance as a lawyer. However, it cannot be said with any certainty whether this would have been sufficiently grave to satisfy the ECtHR's stringent severity test. It has never ruled that psychological harm occasioned by intrusive and humiliating treatment of homosexual or transgender persons meets the Article 3 severity threshold. Notably, in *L. v Lithuania* , challenging domestic inability to legally register change of gender, the ECtHR ruled that whilst it could understand the applicant's distress and frustration there were "*no circumstances of such an intense degree*" as to warrant Article 3 classification.[14]

The ECtHR accounts, albeit incrementally, for societal change and has not substantively considered a gender case like Ms. Klaedes' in many years. Perhaps in view of societal development on gender matters it might since 2007 have become more amenable to persuasion. But the ECtHR is ever-conscious that the right to be free from torture and other ill-treatment is at the heart of international human rights law. It knows that findings of Article 3 violation have power; States potentially facing high-level repercussions and international condemnation. It seeks always to remind applicants that this provision should not be invoked lightly. Consequently, having enlarged the scope of Article 3's protection by defining more State actions as 'degrading treatment' it will surely remain wary of relaxing too much the standard required for action to be outside this protection.

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[12] Arai-Yokoi, Y. '*Grading scale of degradation: Identifying the threshold of degrading treatment or punishment under Article 3 ECHR'*, Netherlands Quarterly of Human Rights (2003) 385-421, [421]; a notable example is *Bouyid (2015)*

[13] *Selmouni v France,* ECtHR, Application No. 25803/94, Judgment, 28 July 1999 [100] [101] [105]

[14] *L. v. Lithuania*, ECtHR, Application No. 27527/03, Judgment, 11 September 2007 [47]

Conclusion

Frustratingly then, despite it being arguably the most fitting head of claim at present Article 3 is largely closed to the issue of gender mistreatment. There is potential scope for circumstances such that faced by Ms. Klaedes to be defined as 'degrading treatment' but historical jurisprudence suggests that future litigants will struggle to persuade the Court that any particular gender mistreatment was severe enough to fully find an Article 3 violation.

Nonetheless, there is some cause for hope. Even the Court making a principled finding that gender mistreatment is 'degrading' would be a step forward for gender protection, dramatically expanding the scope of Article 3 and communicating to States that gender is a serious concern. Future litigants would thus be encouraged to persevere; perhaps with an amenable Court someone might in due course succeed in persuading the ECtHR to find a full violation. That, more than a hundredfold findings of Article 8 violation, would truly provoke transformative recalibration of how gender is perceived in international human rights law.

Amy Shepherd

Northern Ireland's great 'gay cake' debate – why we must not mistake liberty of conscience for political discrimination

In May 2015, a Belfast court found the owners of a local bakery guilty of political and sexual orientation discrimination for refusing Gareth Lee's request for a cake iced with a pro-gay marriage message. [1] Ashers Bakery, which is run by two evangelical Christians, refused to accept the order on the basis that the message it promoted was contrary to their 'genuine and deeply held religious beliefs.'[2] In this article I will examine the wider implications of the ruling in the context of human rights law and argue that the judge has failed to give adequate weight to the right of the defendants to conscientiously object.

In the 21st Century, public opinion in the UK generally accepts that homophobic views have no place in a progressive society. It is important to remember that this lawsuit intended to challenge homophobia in a country that still does not allow gay men to be blood donors and refuses to recognize gay marriage. In the context of Northern Irish society, the ruling is a powerful, much needed message of tolerance and acceptance for the country's LGBT community. The court's strong stance against anti-gay discrimination undoubtedly sends out a profoundly positive statement regionally, but is nonetheless legally flawed. As highlighted in an opinion published by Aiden O'Neill QC, the court's good intentions have failed to strike the correct balance between equality law and human rights law.

The court ruled that refusing the pro-gay marriage slogan was unlawful, indirect sexual orientation discrimination against Mr Lee. On the question of political discrimination, the judge said Ashers had denied him a service based on his request for a message supporting same-sex marriage. Judge Brownlie reasoned that 'the defendants are entitled to continue to hold their genuine and deeply held religious beliefs…but not to manifest them in the commercial sphere if it is contrary to the rights of others.'

An important distinction must be made between discriminating against ideas and discriminating against individuals. The former is an essential freedom in a democratic society. The general manager of Ashers Bakery has explained 'we took issue with the message on the cake, not the customer.' Mr Lee's order was not rejected on the basis that he was homosexual; a heterosexual customer making the same request would also be rejected on the same religious grounds. This has been inaccurately characterised as discrimination against a gay customer when in fact his individual beliefs and orientation were immaterial to the bakery's decision. Northern Ireland's equality laws were designed to prevent denial of access to services based on political opinion but they were never intended to compel service providers to endorse views that they do not agree with.

Article 10 of the European Convention on Human Rights (ECHR) protects our right to freedom of expression and to hold our own opinions, however out of step with the rest of society they may be. The right to 'negative freedom of expression,'[3] that is, the freedom to make up our own minds and not be compelled to endorse another's

[1] Gareth Lee V Ashers Bakery No. [2015] NICty 2
[2] Gareth Lee V Ashers Bakery No. [2015] NICty 2 [27]
[3] Gillberg v. Sweden [2012] ECHR 41723/06 (Grand Chamber, 3 April 2012) [86]

viewpoint, is a fundamental aspect of the right.[4] The facts of the case should be analysed from the perspective of a customer asking the owners to show support for an opinion that they strongly disagree with. The hypothetical example used by the judge was of a homosexual baker being asked to ice a cake saying 'support heterosexual marriage,' however this is not the correct comparator. By removing the right of a service provider to refuse any 'lawful message,' on the basis they conscientiously object, there would be no defence for a Muslim baker refusing a request from a right wing extremist for a cake iced with anti-Islamic terms. Should a Roman Catholic print shop be compelled to put together brochures promoting Satanism, or a Jewish t-shirt printing business obliged to make memorabilia for a neo-Nazi rally? The precedent the case sets down is a dangerous attack of freedom of expression and has overlooked the right to conscientiously object as an intrinsic part of Article 10.

An appeal hearing was recently halted by a last minute request from the Attorney General to make representations about any potential conflict between the country's equality laws and the ECHR. We will have to wait until later in the year to get the latest instalment of what has become known locally as the 'gay cake row,' and however out of touch Ashers' anti-gay views may seem, a legally correct decision must protect them from the changing tide of public opinion.

Maeve Keenan

[4] Aiden O'Neill QC 'The general implications for freedom of conscience and for the protection of freedom of expression arising from the litigation Gareth Lee v. Ashers Baking Company Limited.' [2015] (http://www.christian.org.uk/wp-content/downloads/opinion-re-ashers-bakery-case_12March2015.pdf)

Case Comment: *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015)

'Education is the most powerful weapon we can use to change the world.'
Nelson Mandela

In December 2015, in a landmark judgment, the South African Supreme Court of Appeal overwhelmingly endorsed Mandela's belief in the transformative power of education. In *Minister of Basic Education v Basic Education for All*[1] the Court held that the Department of Basic Education's failure to ensure that every learner had access to the required textbooks was a violation of the constitutional right to basic education.

This case continues the pioneering socio-economic rights jurisprudence for which the South African courts have become renowned.[2] Further, with some arguing that the education system in South Africa has, in certain areas, worsened since the fall of apartheid,[3] the importance of this judgment cannot be overstated.

Background and Parties' Submissions

Section 29(1)(a) of the South African Constitution guarantees everyone the right to a basic education. In 2012, the Department for Basic Education (DBE) brought in a new curriculum, which in turn required that new textbooks be issued. In Limpopo province, the DBE failed to provide the necessary textbooks to all learners. Teachers had to resort to borrowing textbooks from other schools in order to photocopy and write material on the blackboards. This system was inherently flawed as it was impossible to write all the necessary material onto the backboard and photocopying was both expensive and unsustainable.[4] Basic Education for All[5] argued that the DBE's failure to provide textbooks for all learners amounted, *inter alia,* to a violation of section 29(1)(a) of the Constitution.

In response, the DBE argued that there had been logistical difficulties in delivering the textbooks and that the schools in question were partly

[1] *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015). Hereinafter, '*Basic Education for All*'.
[2] See, *inter alia*, *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17 (27 November 1997); and *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 (4 October 2000).
[3] Chris McConnachie, 'The Rise of South Africa's Education Adequacy Movement' (*Oxford Human Rights Hub*, 21 August 2012), available at <http://ohrh.law.ox.ac.uk/the-rise-of-south-africas-education-adequacy-movement/> accessed 2 May 2016.
[4] *Basic Education for All,* para. 19.
[5] Basic Education for All, the first respondent, is a Limpopo voluntary association whose members include teachers, parents, learners and community members. The other respondents included 22 schools and the South African Human Rights Commission, although for ease of reference, all respondents will be referred to herein as Basic Education for All.

responsible for this.[6] Additionally, it was argued that there were budgetary constraints which had prevented more textbooks being provided.[7] The DBE also submitted that, while it aimed to provide textbooks for all learners, it could not be required to provide a textbook to every learner as this was to be held to a 'standard of perfection that could not be met'.[8] It was argued that s.29(1)(a) did not require a textbook be provided for every learner and that, as teachers were able to borrow textbooks, photocopy and write material on the board, this was sufficient to meet the obligation to provide a basic education.[9]

Judgment of the Supreme Court of Appeal

The Court emphasised that, unlike other Constitutional socio-economic rights, the right to basic education is not qualified and is immediately realisable – it is not to be progressively realised nor is it subject to available resources.[10] Further, while s.29(1)(a) does not explicitly state what the right to basic education includes, the Court held that the DBE was incorrect to argue that every learner did not have a right to a textbook. Instead, the Court held that the DBE had, through its own policy, committed to providing a textbook for every learner. To require that it fulfil this policy was not to hold the DBE to a 'standard of perfection' but simply to hold the DBE to the standard it had set itself.[11] The Court was also highly critical of the DBE's logistical and budgetary planning and entirely rejected any argument based on budgetary constraints.[12] In addition to finding that there had been a violation of the right to basic education, the Court found that the failure to provide textbooks also amounted to unlawful discrimination and violated the rights to equality and dignity. In a powerful response to the DBE's arguments, the Court, asked,

> *'Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard … ? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.'*[13]

The Court therefore held that DBE violated the Constitutional rights to basic education under 29(1)(a), to equality under s.9, and to dignity under s.10.[14]

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[6] *Basic Education for All,* para.29.
[7] *Ibid.*
[8] *Basic Education for All,* para.33.
[9] *Ibid.*
[10] *Ibid,* para.36.
[11] *Ibid,* para. 42.
[12] *Ibid*, para. 43.
[13] *Ibid*, para. 49.
[14] *Ibid,* para.53.

Significance of the Judgment

Much of the significance of this judgment lies in the Court's powerful endorsement of the importance of the right to education. Echoing Mandela, the Court stated that 'it cannot be emphasised enough that basic education should be seen as a primary driver of transformation in South Africa.'[15] The South African Constitution was drafted with a view to eradicating the discriminatory effects of apartheid and increasing social mobility. This was not forgotten by the Court which noted at the outset that the learners in question were from poor, rural areas and were almost exclusively black.[16] The judgment in *Basic Education for All* suggests a strong commitment to ensuring that every learner – regardless of their background – has the opportunity to break the cycle of poverty through education.

Seonaid Stevenson

[15] *Ibid*, para. 40.
[16] *Ibid*, para. 3.

Closure orders and eviction under the Anti-social Behaviour, Crime and Policing Act 2014: is there a defence?

The Anti-social Behaviour, Crime and Policing Act 2014 aims to better enable public bodies to tackle anti-social behavior (ASB) in their localities[1]. The guidance for frontline professionals speaks of the importance of early intervention and a multi-agency approach[2], while at the same time affording public bodies the opportunity to take court action expeditiously against perpetrators[3].

One particular area in which the Act enables social landlords to act swiftly is with regard to possession proceedings on the grounds of ASB. Part 5 of the Act inserts an absolute ground for possession for secure tenants into section 84 of the Housing Act 1985 if certain conditions are fulfilled[4]. For example, a family might face eviction for a breach of an injunction for the prevention of nuisance and annoyance (formerly ASBO)[5].

A lesser discussed provision that could also have far-reaching consequences for tenants is that which covers property closure orders. Sections 76 and 80 enable local authorities and the police to close a property on notice for 48 hours and apply to the Magistrates Court for a closure order. This order could then last for up to 3 months and potentially excludes all persons from the property including the tenant. There need not be existing ASB, only the threat of it[6]. Unlike the absolute possession provision which is subject to any defence based on the tenant's Convention rights, there is no such reference in the provisions governing closure orders.

Before granting an order for possession under Part 5, the court must be satisfied that the procedural requirements of an order have been fulfilled and that it would be reasonable to grant it, as under section 84 of the 1985 Act.

Since *Manchester City Council v Pinnock*[7], there is also the requirement that the court undertake a proportionality assessment in consideration of the tenant's Article 8 right to a private and family life[8]. This requires that the court weigh the personal circumstances of the occupiers against the property rights of the owners and the impact of nuisance and annoyance on neighbours[9]. Although an Article 8 defence is likely to be dismissed summarily in the majority of cases,

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[1] Anti-social Behaviour, Crime and Policing Act 2014: Reform of anti-social behaviour powers: statutory guidance for frontline professionals (July 2014, Home Office).
[2] ibid 16.
[3] ibid 54.
[4] Conditions listed in ss.94 (3),(4),(5),(6) & (7) Anti-social Behaviour, Crime and Policing Act 2014.
[5] A policy described by Liberty as "deeply misguided" in their Report Stage Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Commons (Oct 2013) 27.
[6] s.76(1) Anti-social Behaviour, Crime and Policing Act 2014.
[7] [2010] UKSC 45.
[8] Taking into account the considerations set out in Article 8(2) of the ECHR.
[9] *Manchester City Council v Pinnock* [52] and [53].

in exceptional circumstances the court may see fit to refuse to grant the order, or to extend or suspend possession[10]. There may also be a further defence for tenants under the Equality Act 2010 as per *Akerman-Livingstone v Aster Communities Limited*[11].

Lord Neuberger stated in the course of his judgment in *Pinnock* that there may be other circumstances in which Article 8 could be reasonably invoked by a tenant[12]. It is submitted that a closure order under section 80 could be one of them. The financial reality of an order is such that it indirectly coerces tenants to terminate their tenancy. If they do not, they face the prospect of 3 months' rent arrears before regaining access, not forgetting potential liability under another tenancy agreement with a new landlord. The effect of this is that tenants will be forced to make a choice between their home and the alternative accommodation they acquire.

Although not possible to appeal a closure notice, provision is made to appeal a closure order[13]. If it can be shown that a closure order does amount to the loss of a tenant's home, it should be possible to invoke an Article 8 defence[14]. It could certainly be argued that temporary closure is disproportionate in exceptional circumstances, such as ill-health or disability, which might also lead to a defence under the Equality Act 2010.

The test of reasonableness under section 84 of the 1985 Act does not feature in the provision on closure orders. However, a notice under section 76 may only be served if the police or local authority is satisfied on reasonable grounds that the criteria relating to nuisance and annoyance are met. Thus, a tenant may still question the decision of the public body on appeal or through judicial review, particularly under the heads of irrationality or procedural impropriety.

In addition, before the application is heard by the Magistrates, there is the option for a 14 day adjournment, where persons ordinarily resident may continue to occupy the property[15]. Given the lack of notice in these proceedings, it is submitted that this adjournment should be routinely exercised. However, in *Pinnock*, Lord Neuberger also stated that there may be opportunity to revisit statutory provisions where the period a possession order can be postponed is limited to 14 days[16]. Perhaps the same might be possible in the case of closure orders.

On the face of it, closure orders do not appear to be a provision tenants can easily challenge. However, the effect of such an order could be profound. It is submitted that closure orders may be similar in effect to eviction orders,

[10] ibid [61] and [62].
[11] [2015] UKSC 15.
[12] *Manchester City Council v Pinnock* [51].
[13] s.84 Anti-social Behaviour, Crime and Policing Act 2014.
[14] *Commissioner of Police for the Metropolis v Hooper* [2005] EWHC 340 (Admin)
[15] s.81(3) Anti-social Behaviour, Crime and Policing Act 2014.
[16] *Manchester City Council v Pinnock* [63].

financial considerations being one way in which this point might be evidenced. As such, it is possible that a tenant might be able to invoke an Article 8 defence, as well as challenging the order through appeal and judicial review.

Ciara Bartlam

Out of Sight, Out of Mind: The Mental Health Act and Prisoners' Rights

Background

Mental health issues are prevalent among prison populations in the UK. A Social Exclusion Unit report has shown that *'72 per cent of male and 70 per cent of female sentenced prisoners suffer from two or more mental health disorders; 14 and 35 times the level in the general population respectively'*.[1] This population is indeed a vulnerable one, whose autonomy is restricted by both illness and the control of the State. Furthermore, mentally disordered prisoners may experience violence and intimidation from other inmates, be the subject of institutional abuse and negligence, and can also be a danger to themselves through suicide and self-harm. The law is therefore a vital tool in protecting their fundamental rights and welfare. Through an analysis of the key cases in this area, this brief essay will examine the extent to which mental health law, in particular the Mental Health Act 1983 ("MHA"), has successfully defended the rights of mentally disordered prisoners. Drawing on this analysis, potential areas for reform in the law will also be considered.

Transfer delays

One area of concern is the potential for excessive delays in transferring prisoners to hospital under S. 47/49 of the MHA. It is stated in the MHA Code of Practice that:

> *Responsible NHS commissioners should aim to ensure that transfers of prisoners with mental disorders are carried out within a timeframe equivalent to levels of care experienced by patients who are admitted to mental healthcare services from the community. Any unacceptable delays in transfer after identification of need should be actively monitored and investigated. (Ch. 33. Para. 31).*

This guideline seeks to encourage expeditious transfers to ensure prisoners receive an equivalent standard of healthcare to the general public (the principle of equivalence of care); however, the MHA itself includes no transfer time limit, which could leave prisoners waiting an excessive amount of time for necessary medical treatment. The European Court of Human Rights ("ECtHR") case *Pankiewicz v Poland* [2] shows that a delay of two months and twenty-five days in transferring a prisoner to hospital amounts to a violation of Article 5 (1) (right to liberty and security). Peter Bartlett and Ralph Sandland provide an opposing view, suggesting *'art 5 is not engaged by transfer decisions because it deals only with the initial detention and not with the conditions in which detention is served (R v*

[1] Jill Peay, 'Mental Disorder and Imprisonment: Understanding an Intractable Problem?' in Anita Dockely and Ian Loader (eds), *The Penal Landscape: The Howard League Guide to Criminal Justice in England and Wales* (Routledge 2013), p. 135.
[2] App no 34151/04 (ECHR, 12 February 2008).

Deputy Governor or Parkhurst Prison, ex p. Hague [1992] 1 AC 58 (HL)'. [3] However, arguably, the MHA could further embody the equivalence of care doctrine by introducing a transfer time limit that is at least comparable to waiting times for non-prisoners.

Suicide

Perhaps the biggest challenge facing mentally disordered prisoners is the risk of suicide. According to the Howard League for Penal Reform: *'Eighty-two prisoners took their own lives during 2014 as the suicide rate behind bars rose to its highest level for seven years.'* [4] There are no provisions in the MHA referring to suicide prevention in prisons or any other public authority domain. Suicide was decriminalised with the Suicide Act 1961 and therefore, in principle, citizens of age and of sound mind have the right to kill themselves. [5] The European Convention of Human Rights ("ECHR"), namely Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment), have however been invoked in a number of cases concerning suicide in prison. One of the most prominent cases on this matter is *Keenan v United Kingdom* [6] where the applicant claimed her son's rights under Article 2 and 3 were breached by the prison in failing to prevent his suicide. The claim under Article 2 was dismissed as:

> *… the scope of the positive obligations [under the Article] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities… For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party.*

However, his Article 3 rights were found to have been breached due to *'significant defects in the medical care provided to a mentally ill prisoner'*. The Convention rights thus appear to reinforce the duties of care owed to prisoners by prison staff. In this regard, as Jill Peay has highlighted, under Article 2 prisoners are owed both a general duty of care *'to diminish the opportunities for self-harm'*, and an operational duty of care *'to protect particular individuals where there is a known risk to them'*. [7] The threshold for Article 2 violations is high and the ECtHR has been reluctant to find them in the cases of prison suicides. [8] The

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[3] Peter Bartlett and Ralph Sandland, *Mental Health Law: Policy and Practice* (OUP 2003), p. 313. (Hereafter Bartlett and Sandland).
[4] 'Suicide in Prison: Media Release', (*The Howard League for Penal Reform*, 22 May 2015) <http://www.howardleague.org/suicide-in-prison> accessed 14 April 2016.
[5] *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWHC 1317 (COP).
[6] App no 27229/95 (ECHR, 3 April 2001).
[7] Peay, *MH & C*, p. 121.
[8] Lawrence Gostin, Peter Bartlett, Philip Fennell, Jean McHale, Ronald Mackay (eds), *Principles of Mental Health Law and Policy* (OUP 2010), p. 155.

cases of *Renolde v France* [9] and *Kilinç and Özsoy v Turkey* [10] are two prominent exceptions however, and the UK ought to take the judgments into consideration to avoid a repeat of *Keenan* in the future. In these situations, the Human Rights Act 1998 ("HRA"), incorporating the ECHR into English law, represents a necessary recourse for mentally disordered prisoners where the MHA is not sufficient.

Degrading treatment

The issue of treatment within prison poses further challenges to the rights of prisoners with mental disorders. Under S. 63 of the MHA an approved clinician can administer medical treatment regardless of whether a detained patient or prisoner has the capacity to refuse the treatment. The practice of force-feeding is one treatment permitted under S. 63, however, under certain circumstances it will also constitute a breach of Article 3 due to its degrading nature. [11] The case of *R v Secretary of State ex parte Robb* [12] shows that mentally disordered prisoners who go on hunger strike may not be force-fed or hydrated if they are capable of rational judgement. The case of *R v Collins and Ashworth Hospital Authority, ex parte Brady*, [13] on the other hand, is an example of where force-feeding was held to be acting in the prisoner's best interests due to his lack of mental capacity. Approved clinicians are thus accorded significant powers under S. 63, which if abused, could breach the rights of patients and prisoners by authorising treatment against their will.

Martin Curtice and Louisa James have highlighted further areas of concern on this issue: *'Despite being one of the more widely used provisions of the MHA, Section 63 does not require specific formal paperwork for its implementation, and there has been a scarcity of publications on it. This probably reflects the fact that relatively few such cases have actually reached the courts.'* [14] Indeed, as the recent case of *Nottinghamshire Healthcare NHS Trust v RC* [15] shows, engaging S. 63 can have serious ethical implications. This case concerned the validity of an advance decision (under ss. 24 and 36 of the Mental Capacity Act 2005) which assured the prisoner, a Jehovah's Witness suffering from two personality disorders, that he would not be subjected to any blood transfusions, even if his life was at risk. Following severe blood loss through self-harm, his doctor had to decide whether to invoke her powers under S. 63 and override his capacitous wishes (based on religious views) in authorising a blood transfusion. The advance decision made by the prisoner represents an opt out of his Article 2 right to life, which the court saw as valid and therefore the medical staff were made to respect it. S. 63 should perhaps incorporate the rationale behind this judgement

[9] App no 5608/05 (ECHR, 16 October 2008).
[10] App no 40145/98 (ECHR, 7 June 2005).
[11] *X v FRG* (1985) 7 EHRR 152.
[12] [1995] 1 All ER 677.
[13] [2000] Lloyd's Rep Med 355.
[14] Martin Curtice, Louisa James, 'Faith, Ethics and Section 63 of the Mental Health Act 1983' (2015) 40 BJPsych Bulletin 77, p. 80.
[15] [2014] EWHC 1317 (COP).

in allowing the refusal of medical treatment by capacitous patients and prisoners. Yet it is perhaps incorrect to view the provision as a complete threat to the rights of mentally disordered prisoners, as Mostyn J held in this case:

> *At first blush Section 63 strikes one as an illiberal provision, given that it applies to all detained mentally ill patients who may well not lack capacity (as here). However, it can be well justified when one reflects that the treatment in question may be needed not merely for the protection of the patient but also for the prevention of harm to others, given the violent eruptions to which mental illness can give rise.*

As is often the case in mental health law, the rights of the individual must be balanced with the need to protect others. The cases on S. 63 explored above shed light on the interplay of the MHA and HRA. On the one hand, the MHA creates a system whereby prisoners lacking mental capacity are deprived of their right to choose and refuse treatment. On the other hand, although these prisoners are at the mercy of the State, they can rely on the HRA to protect their residual rights. Simply put, the HRA accounts for the mentally disordered prisoners that the MHA neglects.

Conclusion

The cases examined above provide an insight into criminal justice, public health and human rights in the UK, and how the State has attempted to deal with various moral, political and legal issues. On the whole, the MHA provides a fair and reasonable mental health service to prisoners. However, a reform of the MHA in this area should include time limit provisions concerning transfers to hospital, as well as provisions permitting the refusal of treatment by capacitous prisoners. Other challenges facing mentally disordered prisoners are less easily resolved by law reform and exist largely due to a lack of resources and political will. Fundamentally, the MHA should entirely embody the equivalence of care doctrine. As prison populations grow and with it the number of mentally disordered prisoners, the MHA may, without reform, contribute to greater disparity in the provision of healthcare. Where health is concerned, the law must make no distinction between prisoner and patient.

Markus Findlay

State Necessity, Emergency and International Human Rights Law.

International Human Rights Law and the Rhetoric of Emergency:

Discussing necessity and how it relates to international human rights law requires one to address ideas such as the state of exception and derogation. In the modern liberal democratic paradigm, the legal principle of the rule of law is central to the governance mechanisms of society. However, a question that has confronted legal professionals, scholars and politicians alike is how might such a society's governance be affected by a state of emergency? This paper will briefly discuss the complexities of the relationship between the concept of state exception and international human rights law.

The state of exception became prominent in the aftermath of the First World War through the writing of Carl Schmitt who suggested that deviation from democratic principles in times of emergency was inevitable thus creating a state of exception.[1] In view of Schmitt's theory one begins to ask certain questions of the fundamentals of democracy. For example Szymanski asks if an exception to the rule of law is necessary, then is the exceptional state a period in disregard or conflict with the law, or simply a period without law?[2] If one was to answer this question in the affirmative then surely it highlights an internal dysfunctional element within liberal democracies in that it places decisions regarding exception in the hands of a small number of people. In the alternative, is it possible to take the view that such elitist power mechanisms are a necessary evil in maintaining the functionality of our beloved democratic institutions?[3] In purely practical terms it is evident that currently the view of states leans toward the latter due to the existence of emergency provisions in most constitutional instruments.[4] Therefore, based on the possibility of abuse there exist various international oversight mechanisms, including provisions in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), which limit state power in times of emergency. This brings the discussion quite aptly to the international law rhetoric of derogation, which aims to keep intact the idea of human rights in times of emergency.

The Root of the Problem: Theory or Practice?

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[1] C. Schmitt, The End of Law (1st, Rowman and Littlefield, Maryland 1999) 113 -116
[2] C.F. Szymanski, 'The United Nations and the State of Exception ' [2010] BJLP 125 - 129, 125
[3] M. McConkey, 'Anarchy, Sovereignty and the State of Exception ' [2013] TIR 417- 420, 417
[4] G. L. Negretto & J. A. Rivera, 'Exception and Emergency Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship ' [2000] Yeshiva University Cardozo Law Review

When taken at face value it could be argued that the existing legal framework regarding derogation is adequate. Article four of the ICCPR provides that State parties may derogate from the covenant if a situation that threatens the life of the nation arises, and the derogating measures must not go beyond the exigencies of the situation.[5] Article fifteen of the ECHR specifies that states may derogate from the convention in times of war and in situations which threaten the life of the nation. Under both treaties, the state availing of the right to derogate must inform the relevant legal body and adhere to the concept of proportionality. In addition, there exist peremptory norms known as jus cogens. This principle of international law stipulates that there are certain normative values from which States cannot derogate, for example, the right to life and the right not to be tortured.

In view of such a comprehensive legal framework one must ask what is all the fuss about when it comes to international human rights and derogation measures? Indeed, it is accepted among many human rights advocates that derogation from human rights in times of emergency leads to further human rights abuses. More worryingly, concepts such as necessity and emergency can be used to flout the rule of law. An example of such an assertion can be seen in the recent research report released by Human Rights Watch which details how Muslim communities have been affected by France's state of emergency. In January 2016 Human Rights Watch interviewed 18 people who said they had been subjected to abusive searches or placed under house arrest, including human rights activists and lawyers working in affected areas.[6]

For this author proving the legitimacy of such an assertion lies in the gap between theory and practice. It is true that most modern international human rights instruments contain derogation articles. However, one must consider those principles which govern the procedural aspect of derogation. Take for example the normative model of Questiaux who summarises these principles in a UN sub-commission on discrimination and the rights of minorities in 1982.[7] Questiaux's model has subsequently informed much of the thinking on this area quite notably in the Paris minimum standards drafted by the International Law Association in 1984 and the model of emergency laws drafted for the UN

[5] NUI Galway, 'State Practice with Respect to Derogation' (nuigalway 2004) <www.nuigalway.ie/sites/eu-china.../ds0411i/angelika%20siehr-eng.doc> accessed 2/4/15
[6] Anton Sabot, (France: Abuses Under State of Emergency, 03/02/16) <ww.hrw.org/news/2016/02/03/france-abuses-under-state-emergency> accessed 5th February 2016
[7] N. Questiaux, 'Study of the Implications for Human Rights of Recent Developments Concerning Emergency Situations [1982] UN Doc.E/CN.4/Sub.2/15

Special Rapporteur on states of Emergency in 1991.[8] These principles are based on seven core concepts; declaration, notification, exceptional threat, proportionality, non-derogation non-discrimination and finally compatibility.[9]

The procedural obligations of declaration and notification lie at the crux of this matter. In the first instance, states are required to formally declare a state of emergency. Formal declaration implies there must be a constitutional framework in place to support such a declaration. However, this is not always the case as states of a civic libertarian disposition traditionally oppose the idea of permanent emergency legislation.[10] The second of these principles is that of notification, which requires states to inform the relevant body of any derogation. In practice states tend to adopt a dilatory approach in their fulfilment of this obligation.[11] Both the inconsistency of application and varied practice allow states to increasingly push the boundaries of what is deemed acceptable in terms of adherence. The consequences of a lower level of adherence becomes evident in discussing the substantive elements of the Questiaux model;the lower threshold seen in the procedural elements are directly transferable thus creating a derogation system which is not necessarily premised on the state of emergency in its strictest sense. [12]

Conclusion:

The practical application of the right to derogate by states and the lack of meaningful oversight raises questions concerning the focus of human rights advocacy. As Hadden points out there has to be a shift away from monitoring and controlling measures towards helping resolve the underlying causes of the abuse.[13] The implementation of international law on states of emergency is by no means welcomed in terms of the effectiveness of human rights, as it tends to assist states in circumventing rights or passing arbitrary policies in a state of emergency which are constructed under a low threshold of qualification.[14] The basic premise of international human rights law is to protect individuals from arbitrary state power, however the current rhetoric sees states utilise the same

[8] S.R. Chowdhury, Rule of law in a state of emergency: The Paris minimum standards of human rights norms in a state of emergency (1st, St. Martin's Press., New York 1989.) 105- 110
[9] Ibid
[10] T. Hadden, 'Human Rights Abuses and The Protection of Democracy During States of Emergency ' in E. Cortan & A. O. Sherif (eds), Democracy, The Rule of Law and Islam (1st, Kluwer Law International, Netherlands 1999).
[11] Ibid
[12] J. Fitzpatrick, Human Rights in Crisis: The International System for Protecting Rights During States of Emergency (1st, Univ. of Pennsylvania Press, Pennsylvania 1994) 80- 84
[13] T. Hadden, 'Human Rights Abuses and The Protection of Democracy During States of Emergency ' in E. Cortan & A. O. Sherif (eds), Democracy, The Rule of Law and Islam (1st, Kluwer Law International, Netherlands 1999).
[14] Keith, Linda Camp, and Steven C. Poe. "Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration." 26 H RQ 1071 (2004).

body of law to facilitate and legitimise circumvention be it in terms of liberty or those rights considered more sacred.[15] This somewhat disturbing paradox leads one to question the desirability of the current human rights framework from a holistic perspective.

Arron McArdle.

[15] Ibid

WHO WE ARE: THE YOUNG LAWYERS' COMMITTEE OF THE HUMAN RIGHTS LAWYERS ASSOCIATION

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