

# Northern Ireland Legal Quarterly

Volume 60 Number 2

EDITOR

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Belfast

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Rights and Justice: Essays in Honour of Professor Tom Hadden

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## Editorial

*Brice Dickson*

Tom Hadden is one of those people for whom the expression “light under a bushel” seems to have been invented. Despite being one of the clearest thinkers and most energetic activists in relation to the troubles of Northern Ireland over the past 40 years, he remains undemonstrative to an extreme. This collection of essays has been compiled by some of the very many admirers and beneficiaries of Tom’s insightfulness and commitment to liberal and scholarly values during that period, including several of his former students. Being so un-self-promoting, he will probably not approve of the venture, and he will certainly take issue with lots of what is said in these pages, but on this occasion it is the contributors who insist that he is wrong and they are right.

Tom was born and reared in Northern Ireland but then spent a year at the Université Libre de Bruxelles before going up to Christ’s College, Cambridge, to take a degree in Moral Science and Law in 1964. He followed this with the postgraduate LLB degree at Cambridge and in 1965 was awarded a research fellowship at Emmanuel College to undertake a PhD in the Cambridge Institute of Criminology. He completed his thesis, on the law relating to company fraud, within two years, and then spent the next two years lecturing at the University of Kent at Canterbury.

In 1969, he returned to Northern Ireland as a lecturer in the Faculty of Law at Queen’s University Belfast where, in 1972, he published his seminal work *Company Law and Capitalism* in Weidenfeld and Nicolson’s ground-breaking “Law in Context” series. He then increasingly turned his attention to the serious civil unrest which Northern Ireland was experiencing at the time and began collaborating with another young law lecturer at Queen’s, Kevin Boyle, and a sociologist, Paddy Hillyard. Their *Law and State: The case of Northern Ireland* (London: Martin Robertson 1974) was a brilliant analysis of how the political and legal structures of the day had failed to respond appropriately to the civil rights campaign and the ensuing violence. The trio followed up this work a few years later with the short but powerful *Ten Years On in Northern Ireland: The legal control of political violence* (London: Cobden Trust 1980). Like the earlier study, this book was based on meticulous research (particularly into the Diplock courts), funded by generous charitable foundations. In 1985, Tom and Kevin again collaborated in an influential “Penguin Special”, *Ireland: A positive proposal*. The duo continued to work together on various submissions to official inquiries (including the Forum for a New Ireland) and in 1994 produced another Penguin, *Northern Ireland: The choice*. The ideas they promoted in the decade 1985 to 1995 were very prescient of the Belfast (Good Friday)

Agreement in 1998. In this period, Tom also found time to co-author a book on *Northern Ireland Housing Law* (Belfast: SLS Legal Publications 1986), his collaborator this time being our colleague at Queen's David Trimble, the future leader of the Ulster Unionist Party, Nobel Peace Prize winner, and member of the House of Lords. Whether David was influenced politically by Tom is, however, another question altogether.

Ahead of his time even then, in 1974 Tom opted to be employed on a part-time contract at Queen's so that he could also focus on his non-academic work as the founding editor of *Fortnight: An independent review for Northern Ireland*. He has remained centrally involved in that invaluable publication ever since, through its many trials and tribulations. In many ways the open-mindedness of the magazine reflects the wide-ranging interests and great expository skills of Tom himself. It bears his stamp in its insistence on clear, penetrating analysis of current affairs as well as thoughtful commentary on Ulster's thriving artistic and literary scenes. In 1990, Tom helped to establish the Fortnight Education Trust, which promotes discussion and debate about peace and reconciliation in Northern Ireland and beyond through the publication of supplements and conference reports. While running *Fortnight* Tom was also quietly working on founding and managing a hostel for the homeless in Portadown, near where he was then living. He had already been centrally involved in setting up a range of pressure groups, such as Shelter and the Committee on the Administration of Justice.

In 1985 Tom was promoted to a Chair in Law, becoming the first ever part-time professor at Queen's. He has continued to write on a variety of legal topics and has held visiting professorships at the University of British Columbia, Magill University, University College Galway, and the University of New South Wales. He carried out public service, too, being a member of the Standing Advisory Commission for Human Rights in Northern Ireland from 1985 to 1990 and a Commissioner on the Northern Ireland Human Rights Commission from 1999 to 2005. As the chair of the latter commission during the same period, I can personally testify to the magnificent work Tom undertook on a range of human rights issues, not least on the commission's consultations on, and draft proposals for, a Bill of Rights for Northern Ireland. There were some difficult times at the commission but Tom was always a rock of integrity and a pillar of wisdom. I can also remember Tom being centrally involved in the establishment of a Human Rights Centre at Queen's in 1989, and in the contemporaneous inauguration of a Masters degree in Human Rights Law, which has gone from strength to strength and is now one of the University's most popular taught postgraduate courses. Tom's energy, hospitality and creativity were all much in evidence then, as they still are today.

In recent years, Tom has undertaken important work at the international level, being a consultant, for instance, for the United Nations Working Group on Minorities. He has produced a number of innovative documents on matters such as the integration of minorities and, for the Office of the UN High Commissioner for Human Rights, policing for diversity. His latest (edited) book is *A Responsibility to Assist: Human rights policy and practice in European Union conflict management operations* (Oxford: Hart Publishing 2009).

In 2008, Tom took on the additional role of Visiting Professor at the Transitional Justice Institute at the University of Ulster, a typically ground-breaking attempt to forge better links between that body and the Human Rights Centre at Queen's. He continues to travel widely, to teach on a broad range of subjects, and to dispense much appreciated advice to innumerable postgraduate students.

Many more people than have done so could have contributed to this collection of essays written in Tom's honour: a lack of space prevented a widening of the circle. The range of

topics covered is itself testimony to Tom's catholic interests. The articles have been brought together as a small recognition of the great respect and affection which Tom commands in academic legal circles. I know they will be of interest to the journal's worldwide readership.

I would also like to acknowledge the support given to this project (as well as to her husband!) by Tom's dynamic wife, Chris Moffat.

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June 2009*



# The United Nations Human Rights Council: politics, power and human rights

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## Introduction<sup>1</sup>

In September 2008 the United Nations Human Rights Council, the new Geneva-based inter-governmental institution charged with global promotion and protection of human rights, put in place the last piece of its architecture, a Minority Rights Forum.<sup>2</sup> This body replaced the Working Group on Minorities of the former Sub-Commission on Human Rights, which had for over a decade operated highly successfully as a vehicle for dialogue between governments and minorities.<sup>3</sup> By his participation in the sessions of the Working Group on Minorities, Tom Hadden made a significant contribution at international level to human rights protection. Operating as an expert through the Office of the High Commissioner for Human Rights (OHCHR), he made many practical suggestions for involving minority participants and prepared influential research papers. His continuing commitment to strengthening minority rights and to establishing their greater visibility within the United Nations human rights system is widely recognised and appreciated by minorities, NGOs and governments.

The United Nations Human Rights Council was created in 2006. It can still claim to be a new body, at least as compared with its predecessor, the United Nations Commission on Human Rights which lasted 60 years before its abolition. But, even at this early stage, for some Western diplomats and human rights activists the good will and hopes invested in the council's creation have dissipated to be replaced with degrees of scepticism and even hostility. Under the Bush administration, the United States had declared a boycott of the

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1 This article draws on the author's chapter, "The United Nations Human Rights Council: origins, antecedents and prospects" in K Boyle (ed), *New Institutions for Human Rights Protection*, Collected Courses of the Academy of European Law (Oxford: Oxford University Press 2009). I am grateful to Koldo Casla, LL.M student at the University of Essex, for research assistance.

2 A/HRC/Res/6/13, 28 September 2007. The forum met for the first time in December 2008.

3 See T Hadden, "The United Nations Working Group on Minorities" (2007) 14 *International Journal on Minority and Group Rights* 285.

council's meetings over the council's disproportionate focus on Israel.<sup>4</sup> That position has now been reversed by President Obama.<sup>5</sup> The source of the problem is politics. The Human Rights Council's newly dedicated room in Geneva, the "Chamber for Human Rights and for the Alliance of Civilisations", has become yet another international forum in which global divisions between the major powers, other states, regions and political blocs have come to dominate. Its predecessor, the Commission on Human Rights, was wound up largely because it was accused of having become irretrievably politicised and of having as a result fatally lost credibility. The Human Rights Council was intended as a fresh beginning with new opportunities given to the world's states to transcend political differences. Yet the same accusations of political considerations subordinating its human rights mission are now being made of the council as were made of the former commission.

The balance of power on the Human Rights Council, which was constituted as a subsidiary organ of the General Assembly of the United Nations, mirrors that of the assembly. The majority of its 47 members are from the developing world, and representatives of the Western developed states make up only a small minority – seven elected members. The council was born at a less than propitious time for global co-operation on improving human rights protection – the aftermath of the 9/11 attacks and the pursuit by the United States of its "War on Terror". The global financial crisis has added a further divisive dimension.<sup>6</sup> But the idea of an apolitical global forum where human rights could be debated and policies agreed without dissension was always unrealistic. The issues which divide the developed and developing worlds, and which for generations have been rehearsed by diplomats in General Assembly debates, have inevitably found their reflection on the floor of the Human Rights Council as they did in the former commission. Western countries have yet to recognise fully that global human rights policy will not for the future be set by them alone. Other regional groupings will have the predominant influence. In order to secure support for their priorities, which include civil and political rights and the rule of law, Western countries must also fully engage with what is becoming a changing global human rights agenda, one that places priority on economic and social rights and on such development issues as foreign debt, trade and migration. Admittedly there are states on the council whose actions seem to be directed at reducing its effectiveness and any international scrutiny of human rights. The response to this challenge lies in deeper co-operation between states serving on the council and other states from all regions committed to human rights. The European Union in particular needs to make more effort to build cross-regional alliances to advance human rights.<sup>7</sup>

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4 A US embassy spokesperson offered the following comment on the decision to an NGO: "The US remains deeply dedicated to human rights around the world but unfortunately the UN Human Rights Council has repeatedly demonstrated an unwillingness to serve that purpose. Instead it continues to refuse to address grave and ongoing human rights violations including Zimbabwe, Iran and taken only weak and ineffective action on Sudan while passing twenty unbalanced resolutions against a single country: Israel." *Human Rights Tribune*, 11 June 2008 [www.humanrights-geneva.com](http://www.humanrights-geneva.com).

5 See, "US posture toward the Durban Review Conference and participation in the UN Human Rights Council", Acting Department Spokesman, Washington, DC, 27 February 2009, at [www.state.gov/r/pa/prs/ps/2009/02/119892.htm](http://www.state.gov/r/pa/prs/ps/2009/02/119892.htm).

6 At the 10th special session of the Human Rights Council, on the global financial crisis, a resolution was adopted by 31 votes in favour from developing countries with 14 abstentions from developed countries; A/HRC/S-10/2, 5 March 2009.

7 On the need for a new European Union approach in the United Nations see, *A Global Force for Human Rights? An audit of European power at the UN*, report by the European Council on Foreign Relations, September 2008, [http://ecfr.eu/content/entry/the\\_european\\_union\\_at\\_the\\_united\\_nations](http://ecfr.eu/content/entry/the_european_union_at_the_united_nations).

This article will return to the politics of the Human Rights Council and its implications for its future. But first it will offer a brief account of the origins of the council and its formative first years, during which, to its considerable credit, a comprehensive institutional foundation for global protection of human rights was negotiated by its members. Admittedly, this was largely built from the inheritance left to the council by the former commission, particularly the institution known as the “special procedures”, the independent and unpaid experts who monitor and report to the council on human rights crises and problems across the world. Space does not allow a focus on this well-established institution of protection.<sup>8</sup> Rather the focus will be on the most hopeful innovation in international human rights protection for many years, the council’s peer review system of the human rights performance of all UN member states, Universal Periodic Review (UPR). It is this mechanism which holds out the promise of at least reducing the political tensions that attend the council’s work and of improving human rights protection in a world that sorely needs such improvement.

### The international protection system

The Human Rights Council is one limb of a three-limb international human rights protection system which in its evolution has hardly reflected any blueprint.<sup>9</sup> The other two limbs are the treaty system and the institution of the UN High Commissioner for Human Rights. The treaty system at global level now comprises some eight multilateral treaties which have been, for the most part, widely ratified and which share a common scheme of implementation. States undertake to secure the treaty’s provisions within their jurisdiction and each treaty establishes a treaty body, a committee of independent experts elected by the states party to the treaty to monitor those commitments. States are obligated to submit periodic reports to each committee on their progress in implementing the instrument and, in turn, through “constructive dialogue” with the relevant government officials who present the reports, the committees offer their assessment and make recommendations for action. A number of the treaties provide an optional complaint mechanism and, where this is agreed to by states, individuals may complain to the committee over alleged violations which they have suffered.

The position of UN High Commissioner for Human Rights, and his or her Office (OHCHR), was created in 1993.<sup>10</sup> The High Commissioner is the principal official of the UN Secretariat responsible for human rights.<sup>11</sup> Appointed by the General Assembly, the High Commissioner is based in Geneva with an office also in New York. The High Commissioner has an independent promotion and protection mandate but at the same time provides secretariat functions to both the Human Rights Council and to the treaty

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8 On the special procedures system, see J Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In search of community* (Aldershot: Ashgate 2006), G Oberleitner, *Global Human Rights Institutions* (Cambridge: Polity Press 2007).

9 For a comprehensive account see P Alston and F Mégret (eds), *The United Nations and Human Rights: A critical appraisal* 2nd edn (Oxford: Oxford University Press 2010). On the work of the different bodies, see the UN High Commissioner for Human Rights website, [www.ohchr.org](http://www.ohchr.org).

10 GA/RES 48/141, High Commissioner for the Promotion and Protection of Human Rights, 20 December 1993. See, K Boyle (ed.), *A Voice for Human Rights: Mary Robinson* (Philadelphia, PA: University of Pennsylvania Press 2006).

11 The current High Commissioner Navi Pillay was appointed on 28 July 2008. She is the fifth appointee to the post and serves for a term of four years which is renewable once.

bodies. OHCHR received a major boost in the 2005 UN summit when states approved a doubling of its budget.<sup>12</sup>

The Human Rights Council, like its predecessor the Commission on Human Rights, has a broad mandate both to prepare new international human rights standards and to respond to human rights violations anywhere in the world. In contrast to the other limbs of the international system, the Human Rights Council is made up of government representatives elected by the General Assembly. Thus, whereas the High Commissioner and her staff are international officials and the treaty bodies are comprised of independent experts, the council is an arena for diplomats who follow instructions from their capitals. It might have been otherwise. In 1946, in the earliest meetings of the former Commission on Human Rights, the case was put for its membership to be comprised of experts rather than government representatives. An independent expert commission, it was argued, could more effectively address human rights violations and state accountability without the political restraints that would face diplomats.<sup>13</sup> Governments would nevertheless remain in control through their membership of the Economic and Social Council (ECOSOC) and the General Assembly, to which the commission would report. But the idea was rejected by ECOSOC.<sup>14</sup> Expertise was, however, provided to the former commission by its establishment of a sub-commission. This expert body made a huge contribution over many years to the development of international human rights standards. It has now been replaced by an Advisory Committee to the Human Rights Council that hopefully will play a similar role.<sup>15</sup> But the most important expert input to the Human Rights Council comes from the system of special procedures, the independent experts it appoints and who are currently responsible for some 30 thematic and eight country mandates. Consideration of their reports constitutes a major activity of the council.

There is no opportunity here to address the question of how far these UN human rights bodies with their different institutional foundations operate as a coherent system. Complimentary rather than competitive roles have been espoused and largely pursued by the different bodies.<sup>16</sup>

### The origins of the Human Rights Council

Dissatisfaction with the former commission had been growing for a number of years, voiced mainly by Western countries, in particular by the United States, as well as by civil society organisations. Some states with notorious human rights records were accused of seeking election to the commission to avoid being the target of criticism or condemnation or better to attack their perceived foes.<sup>17</sup> A further criticism was that the commission was

12 2005 World Summit Outcome, UN Doc. A/60/1(2005), para. 124, see the section headed "Origins of the Human Rights Council", below.

13 P G Lauren, "'To Preserve and Build on its Achievements and to Redress its Shortcoming': the Journey from the Commission on Human Rights to the Human Rights Council" 29 *Human Rights Quarterly* 307, at 314.

14 P Alston, "Re-conceiving the UN human rights regime: challenges confronting the new UN Human Rights Council" (2006) 7 *Melbourne Journal of International Law* 185, at 190.

15 Described as a think tank to the Human Rights Council, the Advisory Committee consists of 18 experts with a set allocation by geographical region and elected by the council. It meets for two weeks only per year and held its second meeting in January 2009.

16 For an analysis of the relationship between treaty bodies and the special procedures, see, N Rodley, "United Nations Human Rights Council, its special procedures and their relationship with the treaty bodies – complementarity or competition" in Boyle (ed.), *New Institutions*, n. 1 above, 49–73.

17 See Report of the High Level Panel, *Threats, Challenges and Change, A More Secure World: Our shared responsibility*, UN Doc. A/59/565 (2004), para. 283.

selective in the countries which it targeted for condemnation, with Israel in particular being constantly in the dock and others, such as China or Saudi Arabia, rarely if ever.

The decision in principle to replace the United Nations Human Rights Commission with a Human Rights Council was formally taken by a summit of world leaders meeting as the General Assembly of the United Nations in September 2005.<sup>18</sup> The abolition of the commission and its replacement with the council was one of a number of reforms of the United Nations that had been prepared for the summit by the former Secretary General, Kofi Annan.<sup>19</sup> Following difficult negotiations, in March 2006 the General Assembly adopted resolution 60/251 establishing the Human Rights Council.<sup>20</sup> The new Human Rights Council held its inaugural session in Geneva from 9–30 June 2006.<sup>21</sup> By the end of its fifth session in June 2007, it had agreed a major document on its institutional architecture, including a formal agenda and programme of work.<sup>22</sup> The council held its 10th regular session from 2–27 March 2009, having held in addition no less than 10 special or emergency sessions since its creation.<sup>23</sup>

### Council compared to commission

The Human Rights Council is comprised of representatives of 47 member states. At its abolition the commission had 53 members. Those promoting the new council, particularly the UN Secretary General and the United States, would have preferred a much smaller body. That proved unacceptable to the majority of states. However, there are a number of features of the council which, taken together, give rise to some optimism for its longer-term prospect of strengthening international human rights protection. First, the council is established as a subsidiary organ of the General Assembly, whereas the former commission was one of a number of subsidiary bodies of ECOSOC. This enhanced status for the council is intended to have the effect of making its deliberations more authoritative, visible and influential within the United Nations as well as outside it. Within five years, the General Assembly will review the status of the council and the original hope of reformers that it might become a full council in its own right alongside the existing Security Council and ECOSOC will be an option.<sup>24</sup> Second, the council is virtually a standing body; it is required to meet for 10 weeks per year over at least three sessions, with the option of holding special sessions at the request of a third of its membership.<sup>25</sup> In contrast, the Commission on Human Rights met for a single six-week session each year. Third, the council, as mentioned, was given a new task of immense potential, that of establishing and conducting for all UN member states a peer review system, the UPR, in respect of their human rights obligations and commitments.

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18 2005 World Summit Outcome, UN Doc. A/60/1 (2005), paras 157–9.

19 Report of the Secretary General, *In Larger Freedom: Towards development, security and human rights for all*, (2005) UN Doc. A/59/2005.

20 GA/RES/60/251, 15 March 2006. The resolution was not adopted by consensus, the preferred approach in the UN. The US represented by its controversial ambassador John Bolton forced a vote. The resolution was passed with the US, and its close allies Israel, the Marshall Islands and Palau voting against; 171 states voted in favour and with three abstentions, Belarus, Iran and Venezuela. For an account of the negotiations see D Hannay, *New World Disorder: The UN after the Cold War: an insider's view* (New York/London: I B Tauris 2008), pp. 211–70.

21 A/61/53 (2006), First Report of the Human Rights Council.

22 A/HRC/RES/ 5/1 Human Rights Council, 18 June 2007.

23 On the Human Rights Council and its sessions to date see OHCHR website, [www.ohchr.org](http://www.ohchr.org).

24 GA/RES/60/251, para. 1.

25 *Ibid.* para. 10.

### Elections to the Human Rights Council

A further important difference between the former commission and the council lies in the system of election of its members and the standards to be met by candidate states. Members of the council are to be elected for the allocated regional distribution of seats “directly and individually” by secret ballot and by a simple majority of the General Assembly’s 192 members.<sup>26</sup> The commission’s membership had been elected by the smaller electorate of ECOSOC, with its 54 members, and was often agreed upon without election from previously agreed regional “clean slates” of candidates. Where this resulted in the presence on the commission of states with questionable human rights records, controversy flared.<sup>27</sup>

When electing members of the council, states are directed to weigh candidate states’ human rights records and voluntary pledges that they have made on improving national human rights protection.<sup>28</sup> No such standards existed for election to the commission. To date all candidates for elections have made such voluntary pledges. All states elected as council members will be considered under the UPR process during their tenure on the council. Where a state elected to the council is responsible for gross and systematic violations of human rights, the General Assembly can suspend that state from the council.<sup>29</sup> To encourage rotation of council members, no state can be elected for more than two terms without leaving the council.<sup>30</sup> One effect of this last-mentioned rule is to put an end to a convention or practice that had operated intermittently under the Commission on Human Rights, whereby the permanent five on the Security Council would be assured of a seat.<sup>31</sup> At present all five are elected members of the new council, with the significant exception of the United States. The United States voted against resolution 60/251 creating the council, on the grounds that the council was flawed.<sup>32</sup> It decided not to stand for election but promised to participate in the council’s meetings and to work constructively with it.<sup>33</sup> The United States did not stand for election in 2007 and in June 2008 it announced an effective withdrawal from the council.<sup>34</sup> As already noted, that policy has been reversed by the Obama administration, a significant signal of the United States’ welcome re-engagement with the United Nations.<sup>35</sup> The US Secretary of State Hilary Clinton and UN

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26 Thus, a state would have to obtain at least 96 votes of support in the secret ballot to be elected.

27 For example, in 2003, Jean Kirkpatrick, who headed the US delegation to the commission’s 58th session, attacked the election of human rights-violating countries to the commission. The US forced a vote, which it lost, on the choice of Libya, nominated by the African Group, to take the chair of the commission. See J Kirkpatrick “UN human rights panel needs some entry standards”, *International Herald Tribune*, 14 May 2003.

28 GA/RES/60/251, para. 8.

29 *Ibid.* para. 8. A two-thirds majority vote of members present and voting is required.

30 *Ibid.* para. 7. However, it seems that absence from the council need be for no more than one year after serving a second term. A term is for a period of three years.

31 The US supported an unsuccessful proposal for permanent seats on the council for the permanent members of the Security Council: G L Burci, “The United Nations Human Rights Council”, *Italian Yearbook of International Law*, vol. 15 (The Hague: Martinus Nijhoff 2005), p. 32.

32 Explanation of vote by Ambassador John R Bolton, US Permanent Representative to the United Nations on the Human Rights Council Draft Resolution, in the General Assembly, 15 March 2006: [www.state.gov/p/io/rls/rm/63143.htm](http://www.state.gov/p/io/rls/rm/63143.htm).

33 US Department of State, “The United States will not seek election to the UN Human Rights Council” (press release, 6 April 2006): [www.state.gov/r/pa/prs/ps/2006/](http://www.state.gov/r/pa/prs/ps/2006/). For the political background to the decision see Lauren, “To Preserve and Build”, n. 13 above, 338–40.

34 See n. 4 above and accompanying text.

35 On 10 March 2009, the Secretary General Ban Ki-moon met with US President Barack Obama. Deeper co-operation for the future with the United Nations was confirmed, UN Press Release SG/SM/1213.

Ambassador Susan Rice jointly announced on 31 March that the United States would stand for election to the council at the next round of elections in May 2009.<sup>36</sup>

### The politics of human rights

That human rights and politics are often intertwined is hardly a novel idea in Northern Ireland or, indeed, the rest of the United Kingdom. The Bill of Rights debate which has been ongoing since the Belfast Agreement has reflected directly communal and political divisions.<sup>37</sup> In Great Britain there have been calls for the Human Rights Act incorporating the European Convention on Human Rights to be repealed.<sup>38</sup> One grievance promoted by the popular press has been over the supposed intrusion of external authority in the form of the European Court of Human Rights into domestic affairs.<sup>39</sup> A remarkable judicial endorsement of this complaint was delivered in a recent lecture by the retiring Law Lord, Lord Hoffmann.<sup>40</sup> At international level the parallel is exact. The entire United Nations human rights system is based on the International Bill of Human Rights and the machinery which has evolved from it to oversee the commitment of states to secure those rights and freedoms within their jurisdictions. To enable such external scrutiny states must accept a diminution of their sovereignty and that remains for many, especially the significant number of UN member states that have experienced colonial domination, a sensitive matter.

### International accountability versus state sovereignty

Thus, an enduring issue that has faced the United Nations from its inception has been how to reconcile its authority and the obligations of its members to address matters of human rights at the international level with the sovereignty of the same member states. The United Nations and particularly its human rights institutions have been and continue to be shaped by the tension between provisions in its Charter which address the issue.<sup>41</sup> Article 1 sets out as one purpose of the body that of achieving international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”. By virtue of Article 55(c) the United Nations is directed to promote “universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion”. In turn Article 56 provides that all member states “pledge themselves to take joint and separate action in cooperation with the Organisation” to achieve this purpose.

Article 2 of the Charter enshrines the principle of the sovereign equality of member states and includes the stricture in Article 2(7) denying the UN authority “to intervene in matters essentially within the domestic jurisdiction of any state or [to require members] to submit such matters to settlement under the present Charter”.<sup>42</sup>

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36 The United States was elected to the council on 12 May 2009. See S E Rice, “Remarks on the election of the US to the Human Rights Council”, [www.state.gov/p/io/rls/rm/2009/123295.htm](http://www.state.gov/p/io/rls/rm/2009/123295.htm).

37 See *Final Report* (Belfast: Bill of Rights Forum, 31 March 2008) available at [www.billofrightsforum.org/borf\\_final\\_report.pdf](http://www.billofrightsforum.org/borf_final_report.pdf).

38 “Cameron calls for repeal of Human Rights Act”, *The Guardian*, 12 May 2006.

39 For an analysis of press treatment of human rights, see R Maiman, “Images of human rights lawyers in the British press”, in A Sarat and S Scheingold (eds), *The Cultural Lives of Cause Lawyers* (Cambridge: Cambridge University Press 2008), pp. 141–70.

40 Lord Hoffmann, “The Universality of Human Rights”, Judicial Studies Board Annual Lecture 2009, available at [www.jsboard.co.uk/aboutus/annuallectures.htm](http://www.jsboard.co.uk/aboutus/annuallectures.htm).

41 UN Charter, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119.

42 Article 2(7) adds the important proviso that “this principle shall not prejudice the application of enforcement measures under Chapter VII”.

Throughout its history member states have proved extraordinarily effective at negotiating, drafting and agreeing norms on human rights and freedoms. However, seeking to address violations of international human rights standards within member states has been an altogether different experience. The original idea was to permit human rights issues to be addressed at the level of principle but not to enable the United Nations to become a forum for inquiry or redress for victims such as would offend the principle of state sovereignty. It had been the great powers which had inserted the shield of Article 2(7) of the Charter, fearing that their internal human rights practices might be a target of criticism or “meddling”.<sup>43</sup> It was the new independent countries in Africa which would first seek to circumvent this restriction in their campaign to challenge South Africa and apartheid and whose efforts would create the foundations on which the Human Rights Commission’s system of special procedures and its complaint mechanism would be built.<sup>44</sup> Thus, the history of international progress on human rights has been built through shifting understanding of the interplay between Articles 1 and 2(7) of the Charter. At a high point of post-Cold War consensus in 1993, the World Conference on Human Rights held in Vienna could agree that “the promotion and protection of all human rights and fundamental freedoms . . . is a legitimate concern of the international community”.<sup>45</sup> But, equally, states emphasised that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.<sup>46</sup>

The process of seeking to apply these principles has proved enormously difficult.<sup>47</sup> No country welcomes external scrutiny. Accusations of selectivity and double standards in the countries that became the focus of the commission’s attention became a staple feature at its meetings. Powerful countries were able to avoid the attention of the commission while the least powerful were not. The resentments which developed over what were experienced as double standards and politicisation undermined the credibility, authority and effectiveness of the commission.<sup>48</sup>

However, the Human Rights Council, just as the former commission, has the responsibility to address human rights violations, including gross and systematic violations, and to make recommendations.<sup>49</sup> With this mandate in mind the founding texts adopted by the General Assembly and by the new council are replete with references to objectivity, transparency, non-selectivity, genuine dialogue and the elimination of politicisation in the work of the council. Hopes for that goal rest, above all, on the system of UPR of states, discussed below.

### Politics and the role of groups

The United Nations Charter enshrines the principle of the sovereign equality of all its members.<sup>50</sup> This principle is reflected in the rule that each member state has the right to

43 The USSR, the UK and the US insisted upon the language of Article 2(7) of the Charter: A W B Simpson, *Human Rights and the End of Empire: Britain and the genesis of the European Convention* (Oxford: Oxford University Press 2001), pp. 264–8; Lauren, “To Preserve and Build”, n. 13 above, pp. 312–13.

44 H Tolley Jr, *The UN Commission on Human Rights* (Boulder, CO: Westview Press 1987), pp. 55–82.

45 A/CONF/157/24 Declaration and Programme of Action, World Conference on Human Rights, para. 4.

46 *Ibid.* para. 5.

47 For a detailed account of the early efforts to address human rights violations see P Alston, “The Commission on Human Rights”, in P Alston (ed.), *The United Nations and Human Rights: A critical appraisal* (Oxford: Clarendon Press 1992), pp. 126–210.

48 Lauren, “To preserve and build”, n. 13 above, at p. 325.

49 GA/RES/60/251, para. 4.3.

50 UN Charter, Article 2 1.

one vote only in decision making. But the United Nations's 192 members do not act in pursuit of their interests only as individual states; rather they operate through a variety of groupings and alliances, in particular regional and political interest groups or blocs.<sup>51</sup> As a universal body, the United Nations is based on the principle of full participation in its work by all its members. Arrangements to ensure such participation in decision making within the organisation are built around the requirement of the "equitable geographical distribution" of membership of committees and positions for all regions of the world organised through elections or rotation.<sup>52</sup>

Equitable representation reflects weighting based on the number of states in each region. The five geographical groupings – Africa, Asia, East European, Latin American and Caribbean, and the group "Western European and Others" (WEOG) – were established in 1963.<sup>53</sup> Since then, these groupings have been used throughout the United Nations system for the purpose of election to seats including to the Security Council, General Assembly, ECOSOC, the former Commission on Human Rights and now the Human Rights Council.<sup>54</sup>

The most evident impact that regional groupings have had over the history of the United Nations has resulted from increased membership mainly from the developing world. Whereas at its creation in 1945, when there were 51 states, the United Nations was predominantly a body of European and Latin American states, there has been a gradual emergence of a new political majority in its 192 members from Asia and Africa. This majority has been able to reflect its concerns and influence across the entire field of United Nations activities and now is dominant in the Human Rights Council. In the distribution of seats in the new council, this dominance has even been strengthened when compared to the former commission. The majority of seats, 26 out of 47, are held by Africa and Asia. The reduction of Latin American and Caribbean seats (eight compared to 11) and the Western Group seats (seven from 10) has meant that even if there is support from all Eastern European countries (six seats) these groups cannot win a vote without the support of at least three other states from the African or Asian groups.<sup>55</sup>

### Political groupings

The nature of "other" states in the WEOG – Australia, New Zealand and Canada – signals clearly that there are more than objective geographical criteria involved in the composition of such groupings.<sup>56</sup> States are linked by political and other interests and affinities which in some cases, such as Africa, coincide with geography, but other groups, such as Eastern Europe, once reflected in its membership the geo-political realities of the former Soviet Union. There are multiple overlapping blocs and political caucuses of states both large and small, inside and outside the United Nations. These include, for

51 For an account of the operation of all manner of groups in the United Nations, see C B Smith, *Politics and Process and the United Nations: The global dance* (London: Lynne Rienner 2006), pp. 53–78.

52 The term "equitable geographical distribution" is used in Article 23(1) of the UN Charter with respect to elections to the Security Council.

53 GA Res 1991 (XVIII) (1963), S Daws, "The origins and development of UN electoral groups" in R Thakur (ed.), *What is Equitable Geographical Distribution in the 21st Century* (New York: United Nations University 1999), pp. 11–29.

54 The groupings and their allocation of seats on the Human Rights Council are: Group of African States (13), Group of Asian States (13), Group of Eastern European States (6), Group of Latin American and Caribbean States (8), and Group of Western European and Other States (7).

55 Y Terlingen, "The Human Rights Council: a new era in UN human rights work" (2006) 21 *Ethics and International Affairs* 167, at 171.

56 The US does not formally belong to any group but participates in the WEOG for election purposes. Israel is a "guest" member of the WEOG.

example, economic groupings such as the “G 8” and the “G 20”, the Council for a Community of Democracies (CCD), the Association of South East Nations (Asean), the Arab League, the European Union, the African Union, and two groupings which have emerged as major forces in the Human Rights Council, the Non-Aligned Movement (NAM) and the Organisation of the Islamic Conference (OIC).<sup>57</sup>

It is the interaction and negotiation between such groupings, regional and political, that have largely shaped the global human rights agenda of the past and will continue to do so for the future. The visibility of regional and political groupings is as evident in the Human Rights Council sessions to date as it was in the former commission. Council members offer collective rather than individual positions on most issues. In the former commission the influence, or indeed control of its membership by regional groups, manifested in block voting on resolutions and initiatives, was much criticised as restricting and frustrating its work. It was and remains, for example, the policy of the African Group that it alone may table a resolution on an African state and the group’s rules require that the state in question should be consulted over any resolution.<sup>58</sup> In the European Union case, policy and voting positions by its small number of members on the council is determined by the EU states as a whole as part of EU common foreign and security policy. In effect, states do not have freedom to act as individual members of the council; solidarity with the positions of regional and political groupings determines votes, especially where a resolution or decision involves another state which is also a member of the group. One result is that groups are controlled by the more extreme members, “who effectively dictate the policy of the whole Group and then, because of group solidarity, every member or almost every member of the Group votes as part of that block”.<sup>59</sup>

Co-ordination between the NAM and OIC blocs in voting on the council ensures a majority for any resolution or decision they favour. The long-running campaign led by the OIC to promote a new norm limiting freedom of expression to prohibit “defamation of religion” has found consistent support from the NAM countries and equally consistent opposition from Western countries.<sup>60</sup> The polarisation between these groups has been most evident in the Special Sessions of the Council, notably over Israel and the Occupied Territories and Sudan.<sup>61</sup>

### Universal Periodic Review

As already noted, the idea of all states submitting to a review of their human rights record was taken up as an answer to the grievances of less powerful states that scrutiny of their problems was unfair when more powerful countries with equally or more serious human rights records avoided such international attention.

57 The NAM grew out of the Cold War representing states unaligned to the West or the Soviet Union. It has 117 members. The OIC is an organisation of 56 Muslim majority countries. For details of these groupings see Smith, *Politics and Process*, n. 49 above, pp. 53–78, and for listing of state membership of groups see [www.eyeontheun.org/view.asp?l=11&p=55](http://www.eyeontheun.org/view.asp?l=11&p=55).

58 M Abraham, *A New Chapter for Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council* (Geneva: International Service for Human Rights and Friedrich Ebert Stiftung 2006), p. 28. It is noteworthy that there has been no discussion of Zimbabwe in the Human Rights Council.

59 Ibid.

60 On this controversy, see the most recent resolution, A/HRC/10/L.2 Rev.1, 26 March 2009, and the joint report of the special rapporteurs on freedom of religion or belief and on contemporary forms of racism to the Second Session of the Human Rights Council, A/HRC/2/3, 20 September 2006.

61 Space does not permit discussion of Special Sessions. See Boyle, *New Institutions*, n. 1 above, and the Human Rights Council website: [www.ohchr.org](http://www.ohchr.org).

The cycle for review of all states is four years, which requires 48 states to be reviewed each year over the three regular sessions of the council. All members of the council are to be reviewed during their period in office. The first session of UPR was held in April 2008. By February 2009, when the fourth session had taken place, the human rights situation in 64 countries had been addressed through this mechanism, that is, one-third of the 192 UN member states.

The UPR process is governed by General Assembly Resolution 60/251<sup>62</sup> and by more detailed modalities adopted by the Human Rights Council in its Resolution 5/1.<sup>63</sup> Resolution 60/251 decided that the Human Rights Council shall:

[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs . . .<sup>64</sup>

#### PRINCIPLES AND OBJECTIVES

Some 12 principles are set out in Resolution 5/1 to guide UPR. Only some can be touched upon here. Participation of the country under review is axiomatic, but the need to involve NGOs as well as National Human Rights Institutions (NHRIs) is noteworthy. UPR should ensure a gender perspective and also take into account “the level of development and specificities of countries”. The review should be conducted in “an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner”. The objectives of the review include improvement of human rights on the ground as well as fulfilment of the state’s human rights obligations and, at the state’s request, enhancement of capacity and technical assistance.

#### SOURCES FOR UPR

Resolution 5/1 provides that there will be three documents generated as the basis of the review of the state. First, a national report is prepared by the state with a maximum length of 20 pages. The second document is to consist of information from treaty bodies and the special procedures prepared by the OHCHR with a maximum length of 10 pages. A third 10-page document, also prepared by the OHCHR, is based on information provided by “other stakeholders”, including NGOs and NHRIs.<sup>65</sup> In Decision 6/102 the council provided guidelines for the preparation of this documentation.<sup>66</sup> States are advised to provide information on what consultation took place within the country in preparing a national report. They are advised *inter alia* to give the legislative background of the country, especially for the promotion and protection of human rights, as well as information on human rights infrastructure, including NHRIs. The states should include information on implementation of international human rights obligations as well as action on voluntary

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62 A/RE/60/251, 3 April 2006.

63 Universal Periodic Review Mechanism, A/HRC/RES/ 5/1, 18 June 2007.

64 Ibid. 5(e).

65 Human Rights Watch submitted reports on 34 of the 64 countries examined in the first four UPR sessions. In the fourth session, in February 2009, Amnesty International submitted comments on 12 of the 16 countries under scrutiny.

66 Decision 6/102, Follow-up to the Human Rights Council Resolution 5/1, adopted 20th meeting, 27 September 2007.

commitments made on election to the council and on its co-operation with other human rights mechanisms. States are also encouraged to identify achievements, best practices, challenges and constraints, as well as saying how they propose to overcome challenges and “improve the human rights situation on the ground”. Finally, states may indicate what their capacity building needs are and any request for technical assistance.

#### REVIEW HEARINGS

The review hearing is conducted in a plenary working group of the council, chaired by the president, with member and observer states being free to participate in the interactive dialogue. NGOs and other stakeholders may attend but may not participate at this stage. The rules provide for three rapporteurs from different regional groups chosen by lot (the troika), who have the task of facilitating the review and preparing the working group report on the state in question. The review hearing is allocated three hours and a further hour is allocated for the adoption of the working group’s report. The outcome report, considered by the plenary council at a later meeting, comprises a summary of the review process along with recommendations and/or conclusions and voluntary commitments. The opportunity is also provided for NGOs to comment at this stage. In addition to recommendations about steps to be taken by the state under review, the Human Rights Council can recommend capacity-building measures in order to implement human rights obligations, including through technical assistance programmes. This has been done in the case of Zambia, Guatemala and Botswana, among others. Prior to the adoption of the “outcome” document of the review, the state is to be fully involved and may make further comments on the draft report. Recommendations accepted by the state in question will be identified and those which it does not accept will also be recorded.

#### FOLLOW-UP

The true test of the effectiveness of UPR will emerge only with evidence of fulfilment of commitments made by states. UPR will be a standing item on the council’s agenda and it is the intention that there should be scrutiny of the extent to which recommendations are implemented by the state reviewed. In formal terms, that must await the second cycle of UPR, namely after four years, when it is planned that the focus will be on the implementation of commitments. Persistent non-cooperation by a state with the mechanism, including failure to fulfil recommendations accepted, will be addressed by the council.<sup>67</sup>

#### ASSESSMENT<sup>68</sup>

While the mechanism is at an early stage, it is clear that states under review and other council members in the three hours of inter-active dialogue have made serious efforts to give the process meaning and depth. The atmosphere in the sessions has been constructive and the issues raised for scrutiny have addressed both strengths and weaknesses of the countries in question. There is evidence, nonetheless, that not all states are committed to the UPR and there have been examples of states indulging in excessive praise of allies rather than in honest questioning. But what is most interesting, and of longer-term significance, has been the extent to which most countries under review have been both self-critical and have accepted recommendations made by other states for positive action, including the ratification of international instruments. Most states have sent high-level delegations from their capitals for their UPR. So far, most recommendations made in the reviews have been

<sup>67</sup> A/HRC/RES/5/1, para. 36.

<sup>68</sup> For a thorough assessment of UPR sessions in 2008, see International Service for Human Rights, Human Rights Monitor No. 66, 2008 (Geneva 2009).

accepted by most states. The Ecuadorian Minister of Justice and Human Rights noted that the “exercise has been useful for the inspiration of public policies in the country”.<sup>69</sup> The United Kingdom accepted most of the recommendations received from the council in the first UPR session,<sup>70</sup> as did Pakistan.<sup>71</sup>

It is a paradox that, while the Human Rights Council has been accused of being as politicised as its predecessor, the potential of UPR rests directly on the political pressure which states can exert on one another in a public forum to take their human rights commitments seriously. Time, and another cycle of review, will tell if they in fact do so. But there can be cautious optimism that the UPR can contribute to positive policy changes at home. The UPR process is likely also to strengthen the parallel human rights treaty system, as many of the recommendations from the UPR have incorporated the conclusions of treaty bodies on measures that a state should undertake. NGOs have found that many states have been willing to respond to their interventions during the dialogue and a positive opportunity has opened up for NGOs and NHRIs in following up at national level on a state’s commitments made in the UPR.<sup>72</sup>

### Conclusion

A perceptive and experienced observer of the transition from Human Rights Commission to Human Rights Council summed up the first year of the council as “neither a mountain nor a mole hill”.<sup>73</sup> That continues to be an apposite verdict after the third year of its existence. The Human Rights Council has neither fulfilled the highest expectations nor has it dashed them completely. The decision of the new United States administration to stand for election to the council is a crucial development. The previous administration had damaged international institutions and international relations with its disregard for human rights and international law. It will be important for the future of the Human Rights Council that the United States should be elected. But the single most important challenge facing the council is reducing the control of individual states by the competing political and regional blocs to which they belong. States are formally elected individually to the council but for the most part thereafter vote as members of groups. Until commitment to international human rights overrides political solidarity and leads to cross-regional voting by enough states, the council will continue to struggle to fulfil the mission entrusted to it.

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69 UPR Working Group on Ecuador, UN doc. A/HRC/8/20, 13 May 2008, para. 58.

70 Views on conclusions and/or recommendations, voluntary commitments and replies presented by the state under review, UN Doc. A/HRC/8/25/Add.1, 13 August 2008.

71 Statement by Ambassador Masood Khan, Permanent Representative of Pakistan, on the outcome report of UPR of Pakistan, UN Doc. A/HRC/8/42/Add.1, 13 August 2008.

72 International Service for Human Rights, n. 68 above, p. 79.

73 R Brett, *Neither Mountain nor Mole Hill: review of the Human Rights Council one year on* (Geneva: Quaker United Nations Office 2007).



# The responsibility to protect: paradigm or pastiche?

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At its core, the notion that every individual state and the “international community” have a responsibility to ensure that individuals are protected from gross crimes and life-threatening situations wherever they live is a moral, even noble, goal. It reflects the increasing humanisation of international relations and is consistent with the ever-increasing commitment by states to human rights.

Unfortunately, the campaign that has evolved in recent years for recognition of a “responsibility to protect” (“R2P” or “RtoP”) as an international norm or even a guiding principle for international relations suffers from serious problems. The vagueness, hyperbole and neo-colonial undertones of R2P may have the unwelcome consequence of making it more, not less, difficult to reach consensus on criteria for humanitarian intervention in the future. In addition, as the responsibility to protect continues to evolve within the labyrinthine corridors of the United Nations, what little potential it might have had as a catalyst for action is diminishing rather than increasing. Finally, it may make it even more difficult to promote and protect human rights, properly understood, if a clear distinction is not maintained between the moral-political aspirations of the responsibility to protect and the legally binding norms of international human rights law.

This brief commentary challenges both the initial concept of the responsibility to protect and its subsequent development. Despite the fact that the concept now has its own scholarly journal<sup>2</sup> and a New York-based think tank,<sup>3</sup> it is submitted that the responsibility to protect has become more a slogan than a programme, and its continued promotion is

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1 Professor of International Law, Fletcher School of Law and Diplomacy, Tufts University (USA). I have no idea whether Tom Hadden, to whom this volume is dedicated, would endorse the ideas or approach of this article, but I am confident that he would analyse “R2P” with the same blend of legal rigour and political pragmatism that has always characterised his work. Tom might never describe a glass as “half full” or “half empty”; instead, he would simply tell us how much water was in the glass and proceed to offer innovative ideas about how to fill it or empty it, depending on one’s goal.

2 The journal, *Global Responsibility to Protect*, appeared in 2009 and is published by Martinus Nijhoff.

3 The Global Centre for the Responsibility to Protect was founded in February 2008 and is housed at the Ralph Bunche Institute for International Studies at the City University of New York Graduate Center. Initial funding for the centre was provided by the governments of Australia, Belgium, Canada, France, The Netherlands, Norway, Rwanda, and the United Kingdom; the John D and Catherine T MacArthur Foundation; the Open Society Institute, and Scott Lawlor. Its International Advisory Board is co-chaired by former ICISS co-chairs Gareth Evans and Mohamed Sahnoun. See <http://globalr2p.org/about.html>.

likely to do more harm than good. The primary criticisms of the concept refer to its vagueness; the exaggerated claims of its sponsors; its breadth; and, ironically, its limitations. The legitimacy of the responsibility to protect is further undermined by its birth in the context of the NATO bombing of Kosovo and Serbia, which continues to colour the concept's interpretation by both supporters and detractors.

### Inherent vagueness

The genesis of the responsibility to protect lies in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), which was created a year earlier by the Canadian government to consider how the international community “should respond in the face of massive violations of human rights and humanitarian law”.<sup>4</sup> The commission argued that substituting the concept of the “responsibility to protect” for that of “humanitarian intervention” better reflected the desired focus on victims, rather than the intervener, and was more likely to be acceptable to states. While the report does contain useful guidelines and discussion of the criteria for the use of force when widespread atrocities occur (under the rubric “the responsibility to react”), it also advocates recognising a responsibility to prevent and a responsibility to rebuild; the last two are discussed in the next section.

Although the ICISS Report has been informally abandoned as the responsibility to protect attempts to enter the international legal and diplomatic mainstream, it is worth recalling its main conclusions regarding what the appropriate response should be to mass killings.<sup>5</sup> On the question of the threshold criteria that would justify a decision to intervene with military force, the report is relatively clear: intervention is permissible to prevent actual or imminent large-scale loss of life or ethnic cleansing.<sup>6</sup> It adds that any intervention should meet conditions of right intention (“overthrow of regimes is not, as such, a legitimate objective”),<sup>7</sup> last resort, proportional means, and reasonable prospects of success.<sup>8</sup> More problematic is the recommendation that there should be “incrementalism and gradualism in the use of force”,<sup>9</sup> in light of the actual or apprehended large-scale loss of life that is required to trigger a legitimate intervention.

On the essential question of who should have the authority to authorise the use of force, the commission fudges just a bit. While it observes that there is “absolutely no doubt that there is no better or more appropriate body than the [UN] Security Council”,<sup>10</sup> it goes on to warn that, if the council fails to act, “it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations”.<sup>11</sup>

4 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre 2001), App. B at p. 81 (hereinafter ICISS Report). The commission was co-chaired by Gareth Evans (former Foreign Minister of Australia) and Mohammed Sahnoun of Algeria (former Special Advisor to the UN Secretary General and Special Representative for Somalia and the Great Lakes); the other members were Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Corral Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein and Ramesh Thakur. The full text of the report and related documents are available at [www.iciss.ca/menu.en.asp](http://www.iciss.ca/menu.en.asp).

5 The ICISS Report includes a convenient synopsis of its main principles at pp. xi–xiii.

6 ICISS Report, para. 4.19.

7 Ibid. para. 4.33.

8 Ibid. paras 4.32–43.

9 Ibid. p. xiii.

10 Ibid. para. 6.14.

11 Ibid. para. 6.39.

Nonetheless, the commission's basic argument that "the debate about intervention for human protection purposes should focus not on 'the right to intervene' but on 'the responsibility to protect'"<sup>12</sup> leaves many questions unanswered. Is a "responsibility" to protect equivalent to an "obligation" to protect? One assumes not, or Canada and like-minded countries would have forces in Darfur and elsewhere, irrespective of the lack of action by the Security Council. References to the "international community" or the "broader community of states" scattered throughout the report are of little help in identifying just who might have what responsibility.

Unfortunately, international consideration of the commission's recommendations was sidetracked in the aftermath of the attacks on the United States on 11 September 2001, and it was not until 2005 that the UN took formal note and gave the first inter-governmental support to this new concept. That support, weak though it was, has reinvigorated those who wish to make the responsibility to protect a touchstone for international relations based on the needs of individuals.

### Hyperbole

I have generally referred to the responsibility to protect as a "concept", which is a rather imprecise term, but many of its proponents are much more enthusiastic. Citing the 2005 World Summit document and the corresponding UN General Assembly resolution, they gushingly state that states have "unanimously endorsed"<sup>13</sup> or "accepted"<sup>14</sup> the responsibility to protect or, as in the brochure for a conference on the responsibility to protect held at Cardozo Law School in March 2008, that "world leaders made an historic decision to embrace" the concept.

Unfortunately, the reality doesn't match the claims, as an objective reading of the World Summit document makes clear. Two paragraphs of the World Summit Outcome Document refer to the responsibility to protect, and it may be useful to quote them in full:

- 138 Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
- 139 The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to

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12 ICISS Report, para. 2.29.

13 R2P Coalition, home page, [http://r2pcoalition.org/component/option,com\\_frontpage/Itemid,1/](http://r2pcoalition.org/component/option,com_frontpage/Itemid,1/).

14 Global Centre for the Responsibility to Protect, home page, <http://globalr2p.org/>.

continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>15</sup>

Paragraph 138 of the Outcome Document affirms that each individual state has the responsibility to protect its population from international crimes. While welcome, this is hardly much of a political or moral advance, since these crimes are prohibited under customary international law; states are already obliged to prevent and/or punish them. Well-established international human rights norms impose a much broader range of obligations on states, and they have been accepted for decades. Thus, paragraph 138 merely reiterates a minimum state obligation rather than breaking new ground.

Paragraph 139 refers to the mythical “international community” as having a responsibility to help protect populations and then does little more than reaffirm relevant provisions of the UN Charter. Its reference to using the Security Council “on a case-by-case basis . . . should peaceful means be inadequate . . .” to combat these crimes adds some clarification to the council’s powers, but such powers have been widely accepted at least since the council authorised the use of force in Somalia in 1992. Securing the political will to use those powers, of course, is quite another matter.

The Group of 77 has formally rejected the concept of unilateral humanitarian intervention at least twice in the past decade in ministerial declarations, and their agreement to the minimalist references in the Summit Outcome Document hardly evidences a major shift in position.<sup>16</sup> While the impression is given by responsibility to protect advocates that UN member states recognised the significance of its inclusion in the Summit Outcome, Kieran Prendergast, former UN Under-Secretary General for Political Affairs, referred tongue in cheek to that inclusion as resulting from the “brilliant humanitarian intervention” by the then Canadian ambassador to the United Nations, Allan Rock, who managed “to slip in a paragraph” on the responsibility to protect into the Summit Outcome.<sup>17</sup>

There is nothing wrong with holding governments accountable for their own hypocrisy; this is a technique that is employed by human rights advocates every day, when they appeal to states simply to live up to their obligations under treaties that they have ratified. However, it is disingenuous, to say the least, to refer to the responsibility to protect as a concept around which there is a consensus or to suggest, in the words of the Global Centre for the Responsibility to Protect, that all that is now needed is “. . . to ensure that this R2P doctrine is understood and put into practice by governments and at the United Nations . . . [and] to promote and catalyze international action”.<sup>18</sup>

15 2005 World Summit Outcome, UN GA Res. A/60/1 (2005), paras 138, 139.

16 See Ministerial Declaration, 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, 24 September 1999, para. 69, available at [www.g77.org/doc/Decl1999.html](http://www.g77.org/doc/Decl1999.html); Declaration of the Group of 77 South Summit, 10–14 April 2000, UN Doc. A/55/74 (2000), para. 54.

17 Interview with Kieran Prendergast, *Frontline*, 29 June 2007, quoted at [www.pbs.org/wgbh/pages/frontline/darfur/interviews/prendergast.html](http://www.pbs.org/wgbh/pages/frontline/darfur/interviews/prendergast.html).

18 <http://globalr2p.org/index.html>. Among the centre’s goals is “to advance and consolidate the World Summit consensus on R2P”.

### Breadth of the concept

While the range of situations in which the responsibility to protect would be activated has been narrowed, the range of international actions to be undertaken is vast. In 2001, the ICISS Report set forth a responsibility to prevent as well as to react to large-scale loss of life, and prevention is underscored in the UN Secretary General's 2009 report on the responsibility to protect.<sup>19</sup> Unfortunately, neither document offers anything new or suggests in which respects preventing truly horrific crimes is any different from preventing less serious crimes, violence, or human rights violations from occurring. In 2009, it is simply not enough to fall back on familiar themes such as early warning, attention to the root causes of conflict, or the ubiquitous "toolbox" of conflict resolution/management techniques – or to conclude with the nostrum that "conflict prevention must be integrated into policies, planning and programmes at the national, regional and international levels".<sup>20</sup>

More alarmingly, the ICISS report also propounded a "responsibility to rebuild", which appears to have been accepted by no one and which has rarely appeared in any subsequent discussion of the responsibility to protect in a UN document. Is a commitment "to helping to build a durable peace, and promoting good governance and sustainable development"<sup>21</sup> truly necessary to stop mass killings? Are even those states that are supportive of the responsibility to protect willing to accept such an open-ended commitment? Will the call for a commitment to rebuild a state make it more or less likely that a state will intervene even temporarily to prevent mass deaths? Promoting good governance and sustainable development are worthy goals, but they broaden the concept of the responsibility to protect beyond recognition.

Linking the responsibility to protect to international crimes is equally problematic, particularly if that linkage implies a responsibility to prosecute the criminals. Prosecuting those accused of genocide or other mass atrocity crimes is important, but what is its connection to an external responsibility to protect civilians? The world was (rightly) happy to forgive the crime against humanity called apartheid, after South Africa decided that a non-prosecutorial response to that crime was preferable, and such deference to local or national judgment is appropriate.

It is too early to judge the effectiveness of the International Criminal Court (ICC), but there is little evidence to suggest that international criminal prosecution deters those who believe that it is unlikely that they will be caught, if that is the justification for including the prosecution of criminals within the scope of the responsibility to protect. The existence of the International Criminal Tribunal for the former Yugoslavia certainly did not prevent the massacre at Srebrenica in 1995 or deter Milosevic four years later from expelling hundreds of thousands of persons from Kosovo after the NATO bombing began – nor has the ICC brought peace to Sudan.

The ICC may be a worthy initiative in and of itself, but its real impact is likely to be minimal for decades. There is no reason to link its success or failure to the urgent need to protect civilians at risk, which should be the primary motivation behind the responsibility to protect. In any event, providing both reconciliation and retribution is likely to be well beyond the capacity of outside intervenors, no matter how well intentioned.

Well-meaning NGOs that focus on various crisis situations have broadened the responsibility to protect even further. For example, the Elders, a group of senior former

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19 See n. 30 below.

20 ICISS Report, para. 3.39.

21 Ibid. para. 5.1.

leaders established by Nelson Mandela, Graca Machel and Desmond Tutu, cited the responsibility to protect in a 2007 report on Darfur as requiring governments and individuals to address “the concerns of the ordinary people of Sudan and to fund efforts to improve access to education for children in the displaced camps and to give them an alternative to the gangs”.<sup>22</sup> The International Crisis Group identified the situation in Zimbabwe in 2005–08 as

a clear instance of . . . [the international community’s] Responsibility to Protect . . . not only to assist the victims of Murambatsvina [a 2005 campaign to clear slums], but more broadly, to encourage active efforts . . . to cope with the political, economic and social problems in Zimbabwe.<sup>23</sup>

Put simply, any concept that includes preventing and halting genocide; rebuilding societies and creating sustainable development; prosecuting international criminals; coping with political, economic and social problems; and improving access to education for children is simply too all-encompassing to be meaningful. It remains to be seen whether this broad popular conception of the responsibility to protect will survive formal UN attempts to restrict its applicability to certain international crimes, but the appeal of the slogan may make it difficult to maintain the narrow definition that seems to be a *sine qua non* for continued UN approval.

### The shrinking scope of the concept

While its advocates initially advanced a broad understanding of the responsibility to protect, the 2005 World Summit Outcome narrowed its scope appreciably by referring only to “genocide, war crimes, ethnic cleansing and crimes against humanity”, presumably when these crimes are widespread, as opposed to sporadic. This minimalisation of the “trigger” for the responsibility to protect to four internationally recognised crimes is a significant step backwards; were the original concept retained, the concept would be both clearer and broader – and we would not need to spend time arguing about whether the Burmese government’s failure to allow international assistance after the 2008 cyclone constituted a “crime against humanity”.<sup>24</sup>

The contemporary UN definition of the responsibility to protect also requires authorisation from the Security Council if force is contemplated, leaving no room, legally or politically, for action by other states in the region acting jointly or separately. Such a reaffirmation of Article 2(4)’s prohibition against the use of force is no doubt welcomed by most countries, but also makes clear that neither the 1999 intervention in

22 The Elders, *Bringing Help, Forging Peace: The Elders’ mission to Sudan* (The Elders Inc. 2007), p. 24, [http://dl.groovygecko.net/anon.groovy/clients/akqa/projectamber/press/sudan/The\\_Elders\\_Mission\\_to\\_Sudan.pdf](http://dl.groovygecko.net/anon.groovy/clients/akqa/projectamber/press/sudan/The_Elders_Mission_to_Sudan.pdf). Tutu is a “patron” of the Global Centre for R2P, as is Mary Robinson, another member of the Elders.

23 International Crisis Group, [www.crisisgroup.org/home/index.cfm?id=4521&l=1#reporting](http://www.crisisgroup.org/home/index.cfm?id=4521&l=1#reporting). Indeed, the Crisis Group’s website now has a separate section devoted to R2P. See [www.crisisgroup.org/home/index.cfm?id=4521&l=1#situations](http://www.crisisgroup.org/home/index.cfm?id=4521&l=1#situations). Gareth Evans is also president and CEO of the International Crisis Group.

24 Cf. G. Evans, “Facing up to our responsibilities”, *The Guardian*, 12 May 2008.

Kosovo nor any potential intervention by outside actors in Sudan is legal – absent the council's authorisation.<sup>25</sup>

This narrowing appears to be the price of continued support, often tacit or grudging, from many developing countries. As Prendergast observed, two years after the adoption of the Summit Outcome, the responsibility to protect remains

a very neuralgic concept for the Third World . . . [t]he truth is that when it comes to it, the great majority of the member states don't mean it. They attach much more weight and importance to maintaining the principle of national sovereignty and noninterference than they do to any responsibility to protect. I'm sorry to say it. I mean, I don't like it, but nevertheless, it is the truth.<sup>26</sup>

A similar observation was recently offered by the UN High Commissioner for Refugees: "Most of the developing world sees the R2P as a conceptual camouflage designed to enable the Western states to pursue their interests by interfering in less prosperous countries."<sup>27</sup>

Yet one of the strongest elements in the ICISS Report was its willingness to address the essential political and legal criteria for armed intervention in unusually understandable and non-technical terms. The two "just causes" that could trigger intervention were 1) "large-scale loss of life, actual or apprehended, with genocidal intent or not" or 2) "large-scale 'ethnic cleansing', actual or apprehended".<sup>28</sup> Thus, the focus was correctly placed on the plight of the victim, and the commission's "responsibility to react" would have been engaged whenever the state in which the loss of life was occurring either caused the loss of life or neglected or was unable to act to prevent or stop it.

One should not pretend that gaining acceptance of criteria that would legitimise armed intervention will be easy, but that acceptance will surely not occur if responsibility to protect proponents continue to ignore or obfuscate the issue. Defining international crimes remains a frustrating, often technical, exercise that shifts the focus to individual criminal responsibility rather than on saving lives. The Security Council's referral of the situation in Darfur to the ICC is not a victory but a sham – whatever satisfaction may be gained by ultimately holding President al-Bashir and others accountable for the atrocities they

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25 This interpretation is accepted by the International Crisis Group, one of the most vocal supporters of R2P, in a report on the Russian–Georgian war over South Ossetia: "The 2005 GA Outcome Document makes it clear beyond argument that any country or group of countries seeking to apply forceful means to address an R2P situation, where another country is manifestly failing to protect its people and peaceful means are inadequate, must take that action through the Security Council . . . The Russia–Georgia case highlights the dangers and risks of states, whether individually or in a coalition, interpreting global norms unilaterally and launching military action without UN Security Council authorisation. The sense of moral outrage at reports of civilians being killed and ethnically cleansed can have the unintended effect of clouding judgment on the best response, which is another reason to channel action collectively through the United Nations. The Russian references to similar action by other P5 members in other theaters may reinforce doubts about those other instances but does not justify the Russian actions in Georgia. Indeed they reinforce the dangers of vigilante justice across borders." International Crisis Group, "The Georgia–Russia Crisis and the responsibility to protect", available at [www.crisisgroup.org/home/index.cfm?id=4521&l=1#situations](http://www.crisisgroup.org/home/index.cfm?id=4521&l=1#situations).

26 Ibid.

27 A Guterres, "Millions uprooted: saving refugees and the displaced" (Sept/Oct 2008) 87 *Foreign Affairs* 90, at 93. The reluctance of developing and other countries to embrace the concept is detailed in C Focarelli, "The responsibility to protect doctrine and humanitarian intervention: too many ambiguities for a working doctrine" (2008) 13 *Journal of Conflict and Security Law* 191.

28 ICISS Report, para. 4.19. "Apprehended" is implicitly defined in the preceding paragraph as "imminently likely to occur". Ibid. para. 4.18.

encouraged or condoned will be of little comfort to those who have died since the council's refusal to take meaningful action in 2003 and 2004.<sup>29</sup>

### Confusion with human rights

As noted above, a state's responsibility to protect its population from harm extends far beyond the four crimes mentioned in the 2005 Summit Outcome, as recognised in the Secretary General's 2009 report on the responsibility to protect.<sup>30</sup> However, the 2009 report curiously adds the phrase "and violations" to most mentions of the four crimes, apparently as a means of tying the 2005 Summit Outcome's version of the responsibility to protect against crimes to the broader responsibility of states to respect, ensure, and recognise international human rights.<sup>31</sup>

This newly coined phrase of "crimes and violations" provides a context for the broad discussion of human rights that makes up the bulk of the 2009 report, which is organised around the concept of three "pillars", that is the protection responsibilities of the state, international assistance and capacity-building, and timely and decisive response.

Discussion of the first pillar includes the observation that states "need to move from identity-based politics to the effective management, even encouragement, of diversity through the principle of non-discrimination and the equal enjoyment of rights".<sup>32</sup> This somehow should lead states to assist the UN Human Rights Council in "sharpening its focus" and to ratify relevant instruments on human rights, humanitarian law and refugees.<sup>33</sup> Among other wide-ranging recommendations are preventing sexual and gender-based violence,<sup>34</sup> ending impunity,<sup>35</sup> "[c]andid self-reflection" and "searching dialogue",<sup>36</sup> training<sup>37</sup> and fostering individual responsibility<sup>38</sup> – all to help prevent the mass atrocity crimes that fall within the responsibility to protect.

The second pillar, international assistance and capacity-building, is equally broad, ranging from "dialogue, education and training on human rights and humanitarian standards"<sup>39</sup> to addressing "development deficits"<sup>40</sup> to the preventive deployment of UN peacekeepers.<sup>41</sup>

29 The Security Council has referred to the responsibility to protect only twice since 2005, both times in the context of the protection of civilians in armed conflict. Res. 1674 (28 April 2006) "reaffirms" paras 138 and 139 of the World Summit Outcome Document, and Res. 1706 (31 August 2006), on the situation in Darfur, simply recalls Res. 1674, including that reaffirmation.

30 See *Implementing the Responsibility to Protect*, Report of the Secretary General, UN Doc. A/63/677 (2009) [2009 SG Report], para. 10(b): "The responsibility to protect applies . . . only to the four specified crimes . . .".

31 The phrase "crimes and violations" is repeated on numerous occasions in the report; see, *ibid.* paras 10(b), 10(d), 17, 18, 19, 23, 29, 32, 35, 38, 43, 49, 50, 54, 56, 57, 58, 59, 60, 66 and Annex, paras 1, 4, 5 and 7.

32 *Ibid.* para. 14.

33 *Ibid.* paras 16, 17.

34 *Ibid.* para. 17.

35 *Ibid.* para. 19.

36 *Ibid.* para. 21.

37 *Ibid.* para. 25.

38 *Ibid.* para. 27.

39 *Ibid.* para. 33.

40 *Ibid.* para. 43.

41 *Ibid.* para. 41. The report refers to Macedonia, Burundi, Sierra Leone, and the Democratic Republic of the Congo as instances of successful deployments, although each pre-dated any UN reference to R2P; one wonders, then, what the added value of the term might be. *Ibid.* para. 42.

What is most needed, from the perspective of the responsibility to protect, are assistance programmes that are carefully targeted to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect.<sup>42</sup>

Unfortunately, as the report notes, we don't "understand fully what works where and why".<sup>43</sup>

The third pillar, a timely and decisive response, encompasses the whole range of "tools" that the international community has developed over the years to assist in conflict management or resolution, such as on-site investigations, fact-finding, targeted sanctions, restricting arms flows, and the unspecified role of "individuals, advocacy groups, women's groups and the private sector".<sup>44</sup> States are encouraged to consider "the principles, rules and doctrine that should guide the application of coercive force in extreme situations",<sup>45</sup> as well as the possibility of developing a rapid-response military capacity,<sup>46</sup> but there is no substantive discussion of these issues.

By intertwining post-2005 attempts to invigorate the responsibility to protect with decades-old attempts to hold countries accountable for human rights violations, the Secretary General does little more than repeat well trodden ground that diplomats and human rights activists have debated for years. By linking the unpopular concept of the responsibility to protect to the widely accepted concept of state responsibility for human rights (evidenced by the thousands of ratifications of human rights treaties), the Secretary General risks undermining the latter for no apparent reason. By promoting the idea that the responsibility to protect encompasses all that is good and desirable, the United Nations has embellished it with everything from human rights to humanitarianism, and it is difficult to imagine that the platitudes that infuse the 2009 report will be given content in some future iteration.

Implementing human rights is difficult enough without the baggage of the responsibility to protect, and joining the two concepts is unlikely to help either gain adherents.

### Kosovo

Some advocates trace the origins of the responsibility to protect to the 1994 genocide in Rwanda, but its true genesis is in the illegal NATO bombing of Kosovo and Serbia in 1999. The International Commission on Intervention and State Sovereignty was created a year later, in 2000, and it reflected a desire to find legal cover, even if *ex post facto*, for a use of force that many in Europe and North America viewed as legitimate and even morally required. Unfortunately, the fact that most of the same NATO members who bombed Kosovo in 1999 have recognised the independence that Kosovo declared in 2008 confirms the worst fears of those who see theoretically "humanitarian" intervention as a first step to overthrowing governments and breaking up the territorial integrity and independence that many states won only a few decades ago.

The most serious problem with Kosovo as a model or excuse for the responsibility to protect is that the intervention itself fell well outside the parameters of the ICISS Report's subsequent formulation of "just cause", proportionality, and "right authority". The

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42 Ibid.

43 Ibid.

44 Ibid. paras 49–59.

45 Ibid. para. 62.

46 Ibid. para. 64.

Independent International Commission on Kosovo, hardly biased towards Serbia, concluded that the level of abuses in Kosovo prior to the commencement of the NATO bombing “were comparable with those of numerous other recent counter-insurgency wars, for example Colombia or Turkey”.<sup>47</sup> The commission believed that the use of force was based not on an immediate threat but on “a weaving together of past experiences and future concerns”.<sup>48</sup> Is this what should trigger a bombing campaign?

Similarly, the OSCE, in a report on Kosovo released in December 1999, found arbitrary killings of non-combatants by both sides. It stated that the Racak massacre of 45 civilians in January 1999 was “indicative” of what was to follow after the bombing began, but the “more frequent occurrence in the period of the OSCE-KVM’s presence in Kosovo [OSCE’s monitoring mission, from October 1998 to June 1999] was, however, killings on an individual basis”; the report referred specifically to only 70 Serb and four UCK (the Albanian language acronym for the Kosovo Liberation Army, or KLA) killings from mid-October 1998 until the NATO bombing campaign began on 20 March 1999.<sup>49</sup>

There is no doubt that serious repression, human rights violations and international crimes were committed in Kosovo. However, if responsibility to protect advocates believe that Kosovo is a good example of the concept in action – and that the independence of Kosovo is to be welcomed – then they must be prepared to deal with perhaps several dozen similar situations around the world. The potential scope for intervention that this suggests is unlikely to persuade many countries to join the cause, even with the limiting language adopted in the 2005 Summit Outcome.

### Conclusion

I am a human rights lawyer and professor, and I do not believe that sovereignty is sacrosanct. I support the proposition that intervention to prevent massive loss of life is morally justifiable and should be legal under international norms. I therefore am uncomfortable criticising a concept and campaign that could potentially save lives, if it were truly embraced by states.

However, by initially casting their nets too widely or vaguely in terms of the authority necessary to authorise intervention and the obligations imposed on the interveners, many responsibility to protect advocates risked alienating potential allies in both the north and south. The scope of intervention called for with regularity by organisations such as the International Crisis Group and others would lead to a situation that would resemble the neo-colonisation of much of Africa – even if this time it might be more honestly based on a humanitarian understanding of the “white man’s burden” to protect Africans from themselves. While this is, of course, an overstatement, one need only imagine what Africa would look like if the “international community” did, in fact, intervene everywhere that intervention based on the responsibility to protect has been promoted by crisis-oriented NGOs.

Responsibility to protect advocates now emphasise the need for prevention, technical assistance, and capacity building in order to implement the concept, and such measures

47 Independent International Commission on Kosovo, *Kosovo Report* (Oxford: Oxford University Press, 2000), p. 136. The members of the commission were Richard Goldstone (co-chair), Carl Tham (co-chair), Grace d’Almeida, Hanan Ashwari, Akiko Domoto, Richard Falk, Oleg Grinevsky, Michael Ignatieff, Mary Kaldor, Martha Minow, Jacques Rupnik, Theo Sommer and Jan Urban.

48 Ibid. p. 159.

49 Organization for Security and Cooperation in Europe, *Kosovo/Kosova, As Seen, As Told*, available at [www.osce.org/kosovo/documents/reports/hr/part1](http://www.osce.org/kosovo/documents/reports/hr/part1), ch. 5.

must surely be welcomed. Unfortunately, repetition is not the same as innovation, and there is little in post-2005 discussions of the responsibility to protect that differs from earlier attempts to promote observance of the entire range of human rights responsibilities that states have accepted, as opposed to merely preventing a few serious international crimes.

Those who view the glass as half full interpret the 2005 Summit Outcome as a welcome acceptance by the General Assembly of the legitimacy of Security Council action to prevent international crimes, and there may be merit to this observation. In fact, however, the General Assembly simply declined to expand the available legal justifications for the use of force, and there is no doubt that many R2P advocates inside and outside of government continue to believe that intervention might be legitimate (moral? legal?) in emergencies, if the Security Council fails to act.

Using force to prevent or stop the widespread loss of life is the key issue, and throwing all that is “good” into the responsibility to protect distracts from realistic consideration of how intervention can be defined and accepted by the “international community”, not just by Canada and its allies. Attempts to refocus the R2P debate on prevention and capacity building have added nothing to long-standing debates about how such proposals might be implemented. Substituting the responsibility to protect mantra for real debate over how to prevent and respond to mass atrocities will lead nowhere, and, in its present form, responsibility to protect proponents appear to be doing little more than trying to breathe life into a slogan.



# Being “realistic” about human rights

STEVEN GREER\*

## Introduction

It has been my good fortune to sit at the feet of some of the great late 20th-century Anglo-American legal thinkers, not least Dworkin, Raz and Finnis at Oxford. But, as my PhD supervisor at the Faculty of Law at Queen’s University Belfast in the early 1980s, Tom Hadden was, and remains, one of the most formative influences on my thinking and career. I am delighted, therefore, to be able to submit what follows as a modest acknowledgment of the enormous debt I owe to him.<sup>1</sup> Like other contributors to this collection I cannot claim that Tom would endorse everything I have to say here. For one thing, having been bound by an undertaking to keep this venture secret in order not to spoil the surprise, none of us was able to consult him directly in advance. However, I hope that at least the orientation of this article accurately reflects some of the many things I learned from Tom in the four or so years I spent under his supervision. Six of these stand out in particular: the importance of conceptual clarity, historical sensitivity, doctrinal rigour, an awareness of political and social context, ensuring conclusions are well-supported by appropriate evidence, and seeking to identify realisable policy implications rather than indulging in mere negative critique, much less tub-thumping denunciation.

Tom has never been an ivory tower scholar. On the contrary, his academic life has always been inseparable from tireless campaigning across an enormous range of fields linked by the quest for deliverable social justice – the kind which requires hard-headed realism, negotiation and compromise between competing conceptions of what is possible and desirable. Tom has, indeed, been far ahead of his time in several areas, two of which have

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1 This article derives from a conference paper, “Human Rights Realism: the Challenge for Legal and Political Systems”, delivered at the International Seminar on Comparative Law (ISCOM 2008) – Towards Interaction and Convergence of Legal Systems, Faculty of Syariah and Law, Islamic Sciences University, Putrajaya, Malaysia, 18–20 November 2008, and four lectures each entitled “What’s Wrong with Human Rights?”: my inaugural as Professor of Human Rights in the School of Law at the University of Bristol, 8 March 2008; a guest lecture at St Mary Redcliffe and Temple School Sixth Form, Bristol, 27 April 2008; a public lecture at Lander & Rogers (Solicitors) in association with the Institute of Legal Studies, Australian Catholic University, and the Human Rights Law Resource Centre, Melbourne, Australia, 12 December 2008; and a lecture to students and staff at the Faculty of Law, University of Split, Croatia, 3 April 2009. I would like to express my gratitude to all those who made these contributions possible and for the stimulating discussions which ensued. The usual disclaimers apply.

been close to my own professional interests. First, with a few others, he long advocated the kind of inclusive settlement of the “Troubles” which has, in fact, eventually emerged, often a lonely position in the not-so-distant past between the two hitherto colliding juggernauts of the more militant versions of Irish nationalism and Ulster Unionism. Second, in the early 1980s, when I arrived as a PhD student in Belfast fresh from an MSc in Sociology at LSE, Tom was already advocating human rights, not only as the key to the resolution of the conflict in Northern Ireland, but also as the framework for solving many other political, legal and social problems. But back then this was still a view fairly marginal to academic and political debate in the UK and Ireland. Indeed, my only acquaintance with human rights then stemmed from a single topic in the public international law option I’d taken as an undergraduate, itself a subject considered by many to be, at best, on the periphery of legal scholarship and, for some, not even real “law” at all. The mainstreaming of human rights in both international and national legal and political debates since, including in both the UK and Ireland, also reveals how ahead of the times Tom’s thinking then was. However, Tom’s conception of human rights has never embraced abstract theorising which pursues its own logic in a universe parallel to the experience of real people, nor the dry formalism of some human rights law textbooks which too often squeeze the life out of the vision, nor the utopian and sentimental version which sadly motivates some contemporary “human rights fundamentalists” and which brings the whole project into disrepute. Instead, Tom’s has always been a vibrant “human rights realism”, affirming the importance of the international human rights ideal as a set of universal standards, while simultaneously acknowledging that implementation requires compromise and customisation.

Therefore, since “realism” has been one of the hallmarks of Tom’s academic and campaigning life, I thought it might be appropriate to celebrate his achievements with the following attempt to explore what being “realistic” about human rights might mean. We should begin by noting that the idea of fundamental rights – “human” or “natural” – has been deeply contested since the birth of modernity in Europe in the 17th century. Indeed, it would not be an exaggeration to say that the history of the West, and increasingly the world since this time, can be characterised as a series of ideological, political and military struggles over the place fundamental and inalienable individual rights should occupy in modern political, economic and legal systems. The historical landscape might be mapped in various ways. But the current terrain cannot accurately be characterised as a simple contest between those who are “for” and those who are “against” human rights. On the contrary, five contemporary normative perspectives can be identified. We can be indifferent to, or we can ignore human rights (“indifference”). We can be hostile towards them and reject them in their entirety (“hostility”). We can be ambivalent or sceptical about them or accept them but only subject to significant reservations (“scepticism”). We can endorse them realistically (“realism”) or we can endorse them excessively (“perfectionism”). These are, however, poles on a continuum rather than fixed positions, and the debate around them is in a constant state of flux. While some commentators and views are easy to locate, others are much less so. And, like sub-atomic particles in the quantum field, some even seem to occupy more than one position at once.

An attempt will first be made to show why indifference and hostility towards human rights are no longer tenable, if they ever were, and why human rights should be at the core of all legitimate contemporary legal and political systems both national and international. It will then be argued that “human rights realism” is to be preferred to “scepticism” and “perfectionism”. Finally, some of the key challenges which “being realistic” about human rights presents will be discussed.

### Indifference and hostility

Of the four least tenable normative positions on human rights, indifference is the easiest to dispose of since, for two reasons, it is simply not legally, politically, or intellectually credible in the contemporary world. First, the human rights ideal has an undeniably high profile in contemporary debates about law, politics and society, both national and international. In their turn these also impact on a diverse range of fields, including, amongst others, medical ethics, counter-terrorist policy, international relations and poverty, to name but a few. Therefore, no one who has the slightest interest in the contemporary world could seriously maintain that human rights can be ignored. No government or state can be indifferent to, or can ignore, them, because the human rights ideal is built into the very fabric of the international system, not least as a result of the numerous references to it in the UN Charter.<sup>2</sup> But this does not, of course, mean that states are effectively compelled to honour these commitments, a problem to which we will return later. But there is a second argument against indifference towards human rights. The only people in the world today who can afford to be in such a position are those whose human rights are already well protected. Their indifference, therefore, entails an intellectual and moral contradiction because it presupposes, and is sustained by, its very object.

What of hostility towards human rights? Some people in the world today, and some contemporary ideological movements, are wholeheartedly opposed to the very idea of human rights. These include religious fundamentalisms of various kinds and other anti-liberal and anti-democratic conceptions of how power can legitimately be held and exercised. An example of a particularly strident rejection of human rights within the Western philosophical tradition can be found in the claim made by British philosopher Alistair MacIntyre that “the truth is plain: there are no such rights and belief in them is one with belief in witches and in unicorns” because “every attempt to give good reasons for believing that there *are* such rights has failed”.<sup>3</sup> However, this opinion was expressed in 1981. In the contemporary West, views such as these have effectively been consigned to the margins of both intellectual and political debates for a very good reason. The challenge, which no contemporary Western thinker or political movement, including MacIntyre, has yet been able to meet, is to find an alternative set of values with anything like the same capacity to become a viable value system for Western public institutions. In other words, no one has been able convincingly to propose what other normative foundations should underpin Western public institutions, or what should replace them and their foundational values if they were to be abolished.

The centre of gravity in the Western debate about human rights has therefore shifted. It is now much less between “exponents” and “opponents” and is, instead, much more a three-cornered debate between “realists”, “sceptics” and “perfectionists”. The experience of the UK provides an illustration of the underlying trend. In the early 17th century, claiming the “divine right of Kings” and rejecting both democracy and natural rights as constraints, the only limitation on its power the Crown acknowledged was that of God. However, from the late 17th century until the end of the 20th century the British constitutional system was “sceptical” of fundamental rights in the sense that, although acknowledged as important statements of value, they did not provide effective legal limits on the supreme public power in the land, now Parliament rather than the Crown. But since the enactment of the Human Rights Act in 1998 the UK has embarked on its own experiment with “human rights realism”, the nature of which will be considered more fully later.

2 E.g. Articles 1, 13, 55, 56, 62, 68 and 76.

3 *After Virtue: A study in moral theory* (London: Duckworth 1981), p. 69 (italics in original).

### Scepticism and perfectionism

“Realists”, “sceptics” and “perfectionists” all agree that human rights matter. But they disagree about why and about what follows. It is important, therefore, to consider why human rights should be taken seriously. Many answers have been given in a complex debate which, in various forms, now spans nearly four centuries. It has been argued, for example, that human rights are natural, that they are God-given, that they derive from reason, that they stem from the best instincts in human intuition and imagination, or that they originate in particular kinds of human institution at a particular stage of social evolution.<sup>4</sup>

My own personal synthesis comes down to this. The reason human rights matter is because, without them, we have little hope, in our increasingly integrated but diverse world, of making coherent moral sense of ourselves, our relationships with each other, and with the national and international institutions and systems which exercise power over us. In particular, without human rights, we are unlikely ever to respond appropriately to two features of the human condition which can be regarded as both self-evident and universal. First, every human being wants to avoid suffering, particularly where it is caused by the avoidable and unjustified conduct of those who exercise power. Second, we all want to live our lives in ways we ourselves find fulfilling, whether this be a life of unbridled hedonism or asceticism. Both propositions are self-evident because it is difficult to imagine how any properly developed person could seriously deny either for themselves. Each is also universal because there is no obvious reason why any human being should have a greater claim to their realisation than any other. And by being universal they are, therefore, equally open to all. This is the basis of the human rights ideal. It expresses the notion that everyone possesses a set of individual entitlements, linked to the most fundamental aspects of our well-being, which recognise and give substance to our equal intrinsic worth, and which we possess independently of any other badge of demarcation, be it gender, race, religious or other belief, sexual orientation, etc.

Thus conceived, the human rights ideal has four particular implications. First, human rights are reciprocal and not egotistical, selfish and antagonistic as some have argued.<sup>5</sup> In other words, if any one of us can claim these entitlements for ourselves we are logically and morally compelled to acknowledge them for all others since they stem from our common humanity. Our primary moral and political obligations are, therefore, the obverse of our own human rights, namely to respect and promote the human rights of others. Second, any right which derives from a specific feature of our identity over and above our common humanity – for example from gender, race, ethnicity, etc – cannot, by definition, itself be a human right. Strictly speaking there is, therefore, no such thing as “women’s human rights” or “gay people’s human rights”, or “disabled people’s human rights”.<sup>6</sup> However, while women, gay people, disabled people and other minorities have the same human rights as every other member of the human race, disadvantaged groups may require additional rights to enable them to overcome specific obstacles which prevent them from being able to exercise their human rights as effectively as others. But these other rights are facilitative rights, or “rights about human rights” and not, strictly speaking, human rights themselves. Third, since human rights are, by definition, individual rights possessed by real flesh and blood human beings, collective rights cannot be genuine *human* rights either.

4 See e.g. J Donnelly, *Universal Human Rights in Theory and Practice* 2nd edn (New York: Cornell University Press 2003), ch. 1; A Clapham, *Human Rights: A very short introduction* (Oxford: Oxford University Press 2007), ch. 1; M Freeman, *Human Rights: An interdisciplinary approach* (London: Polity 2002), chs 1–5.

5 This claim is strongest in the Marxist tradition, see e.g. S Lukes, “Can a Marxist believe in human rights?” in S Lukes (ed.), *Moral Conflict and Politics* (Oxford: Clarendon Press 1991).

6 Donnelly, *Universal Human Rights*, n. 4 above, chs 12 and 13.

Interests such as national self-determination or economic development can more accurately be regarded as collective goods or other kinds of right, but not human rights as such. Alternatively, they can be seen as preconditions for the fulfilment of a flourishing system of individual human rights which would include specific civil, political, social and economic rights. Finally, because human rights are universal in the sense indicated, all legitimate legal and political systems, institutions and activities must embody a commitment to their realisation in some shape or form.

“Scepticism”, or the “partial endorsement of human rights”, means a reluctance to put human rights at the centre of our political morality and legal systems, nationally and internationally. The many versions each express the common claim that “human rights are OK but . . .” or that “human rights are OK provided . . .”. For example, some feminist authors are ambivalent about the language of rights as a vehicle for advancing women’s interests. As Smart puts it, while

it is difficult to abandon the rights discourse . . . its efficacy is undoubtedly waning and it is becoming all the more urgent to reformulate demands which are grounded in women’s experiences rather than in abstract notions like rights which are increasingly defined as unjustified and selfish prerogatives.<sup>7</sup>

Others maintain that human rights are OK as long as they do not obstruct the exercise of popular sovereignty. For example, in an editorial introduction to a collection entitled *Sceptical Essays on Human Rights*, Tomkins states:

All the participants endorse the importance of human rights within any democratic system of government, but question whether the primary responsibility for the articulation of these rights ought to be taken away from the normal political processes of representative government.<sup>8</sup>

Communitarian commentators also argue that individual rights should be counter-balanced by collective rights and the stronger affirmation of responsibilities. Etzioni, for example, states:

Correcting the current imbalance between rights and responsibilities requires a four-point agenda: a moratorium on the minting of most, if not all, new rights; re-establishing the link between rights and responsibilities; recognising that some responsibilities do not entail rights; and, most carefully, adjusting some rights to the changed circumstances.<sup>9</sup>

In the UK, scepticism about human rights tends to centre on the Human Rights Act to which we will return later.

Many states are also sceptical about human rights, or are only prepared to endorse them with significant reservations. For example, some cynically sign up to international human rights treaties in their entirety with little or no intention of honouring their commitments.<sup>10</sup>

7 C Smart, *Feminism and the Power of Law* (London: Routledge 1989), p. 159. Similar sentiments are expressed by, amongst others, C McKinnon, “Feminism, Marxism, method and the state: towards feminist jurisprudence” (1983) 8 *Signs* 635–58 and C Gilligan, *In a Different Voice: Psychological theory and women’s development* (London: Harvard University Press 1982).

8 A Tomkins, “Introduction” in T Campbell, K D Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press 2001), p. 2.

9 A Etzioni, *The Spirit of Community* (London: Fontana Press 1993), p. 4.

10 See e.g. O A Hathaway, “Do human rights treaties make a difference?” (2002) 111 *Yale Law Journal* 1935; R Goodman and D Jinks, “Measuring the effects of human rights treaties” (2003) 14 *European Journal of International Law* 171; T Dunne and N Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press 1999); T Risse, S C Ropp and K Sikkink (eds), *The Power of Human Rights: International norms and domestic change* (Cambridge: Cambridge University Press 1999).

And they can do this with virtual impunity because of the defects of international human rights law to which we will also return. Others cherry-pick the parts of human rights treaties they like while openly and expressly opting out of the rest. For example, according to a recent report from the think tank, the European Council on Foreign Relations, Europe and the United States – whose public institutions are most formally underpinned by constitutional rights – are losing influence over the development of the UN's human rights policy to Russia, China, India and other non-Western states.<sup>11</sup> The report claims that, a decade ago, European human rights policies received the support of 72 per cent of UN members, but the endorsement of only 48 per cent in 2007, while the US suffered a steeper decline from 77 per cent to 30 per cent. However, “non-Western states” comprise a highly heterogeneous group, which includes westernising states, states claiming uniquely Islamic, Asian or Chinese conceptions of human rights,<sup>12</sup> underdeveloped countries which set a high premium on economic development,<sup>13</sup> and Russia, a partly westernised prosperous, secular, industrialised giant suspicious of human rights but with no particularly coherent alternative.

The main defect of human rights scepticism is one of emphasis rather than fundamental error or misconception and lies in paying insufficient attention to the moral primacy of individuals and to the procedural and institutional implications which this suggests. Indeed, the view taken here is that the interface between realism and scepticism provides more fertile ground for debate than that between realism and perfectionism.

But what are “human rights perfectionism” and its most extreme form, “human rights fundamentalism”? It would be a mistake to suggest that there are many genuine human rights “perfectionists” or “fundamentalists” around. This perspective is more like a pole exerting a kind of gravitational attraction for some scholars and activists than a position many would self-consciously claim for themselves. Nevertheless, some contributions to the debate regrettably point in this direction, undermining more than advancing the human rights cause. While hostility towards human rights is closely associated with the “right wing” of the now increasingly redundant modern, Western, political spectrum, human rights perfectionism is closely associated with the anti-capitalist and anti-liberal left. In the post-Cold War era it has become the home of many of those who refuse to acknowledge that the project of the far left has failed, not only politically and economically, but morally and intellectually. Some of its key hallmarks include the following.

First, there is a reluctance to connect alleged human rights abuses with concrete norms in international human rights law. Instead, the point of reference tends to be the commentator's own moral intuitions. The general complaint is often along the following lines – “I don't like how those people are being treated over there, therefore, their human rights are being violated.” But, the problem with moral intuitions is that they vary significantly from person to person. Human rights standards in international law are not the last word on any given human rights issue either. In fact, there are many things wrong with international human rights law to which we will come later. But its great virtue is that it is the result of years, often decades, of deliberation and wide consultation and, therefore, represents the closest thing there is to global value consensus.

Second, human rights perfectionism tends to be associated with the lop-sided view that the worst abuses of human rights in the world today are perpetrated by Western capitalist liberal democracies and, in particular, by the United States. Some commentators even

11 See e.g. European Council for Foreign Relations report, *A Global Force for Human Rights? An audit of European power at the UN*, 17 September 2008.

12 See e.g. A E Mayer, *Islam and Human Rights: Tradition and politics* 4th edn (Boulder: Westview Press 2006); M Svensson, *Debating Human Rights in China: A conceptual and political history* (Lanham: Rowman & Littlefield 2002).

13 B Crossette, “The battle for human rights: a clash of visions between North and South” (2008) 287 *Nation* 20.

suggest that the human rights ideal has itself become a vehicle for oppressive US global domination.<sup>14</sup> It would, however, be equally lop-sided to claim the opposite, that only non-Western, non-democratic states violate human rights. The Abu Ghraib scandal, the treatment of suspects in Guantanamo Bay, the interrogation technique used by the Americans known as “waterboarding” and the US practice of “extraordinary rendition” – taking terrorist suspects for interrogation to countries where torture is condoned – put this beyond doubt. But three things are clear about the West and human rights. First, no Western liberal democracy has a perfect human rights record on its own turf and some have a compelling case to answer for their conduct in other parts of the world. However, secondly, the states which have the best human rights records in the world by any credible criteria, Norway and Denmark, for example, are all Western democracies. Thirdly, as a matter of history, without Western liberal democracy there would be no international human rights ideal at all. This is because, of all the world’s many civilisations, only the West developed the social, political, economic, legal, cultural and intellectual conditions necessary for the contemporary human rights ideal to emerge. And it would not have been institutionalised in the international system as it has been had it not been for the victory of the allied cause in the Second World War and later the Western cause in the Cold War. Other civilisations have, undeniably, espoused noble values,<sup>15</sup> attempted to enshrine them in law and policy, and have contributed to the development of international human rights law, particularly in the post-Cold War era. But they have not effectively institutionalised human rights in their own public institutions – not least because of a commensurate lack of success with democracy and the rule of law – nor have they been the main force behind the modern project of enshrining human rights in international law, nor of the contemporary global extension of the international human rights ideal.<sup>16</sup>

A third feature of human rights perfectionism is that those whose analysis is oriented in this direction rarely see the need to provide any empirical evidence for claims that any given country’s general human rights record, or its record in relation to a specific human right, is worse than that of another. Leaving aside the wide consensus on the clusters of states which have the best and the worst overall human rights records, the relative ranking of those in between is not easy, and may even be impossible to determine because the measurement of human rights violations is a much more difficult and controversial exercise than it might seem.<sup>17</sup> For one thing, many human rights violations are invisible and are only known to the violator and the victim. And even where this is not such a problem, what counts as a “human rights violation” is rarely an objective fact but more commonly a matter of evaluation and judgment. Of course, relatively objective estimates can be given for the most severe official abuses such as genocide, mass disappearances, and the systematic use of torture which, in the final analysis, amount to grisly body counts. But when it comes to more subtle human rights like the right to fair trial or the scope for religious freedom, measurement becomes much more problematic. It may even be impossible because one person’s conception of “fairness” or “freedom” may plausibly differ from another’s, in spite of each being referenced to the same concrete international human rights standards.

A fourth problem with human rights perfectionism is that it tends to be associated with an excessive commitment to respecting human dignity which can result in a well-intentioned

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14 C Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism* (Abingdon: Routledge-Cavendish 2007).

15 See e.g. B G Ramcharan, *Contemporary Human Rights Ideas* (London: Routledge 2008), pp. 8–15.

16 See J Donnelly, “The relative universality of human rights” (2007) 29 *Human Rights Quarterly* 281.

17 For a review of the debate, see S Greer, *The European Convention on Human Rights: Achievements, problems and prospects* (Cambridge: Cambridge University Press 2006), pp. 61–9.

but unwelcome form of paternalism. For example, in September 1994 the police authority in Bonn, Germany, banned a company called Omega from operating a “laserdrome” where “laser sport” was practised. “Laser sport” is a physically harmless combat game where participants, wired with electronic tags, shoot each other with sub-machine-type laser guns.<sup>18</sup> Omega contested the ban in the German courts. But it lost. The courts held that the simulated killing involved in laser sport is a violation of everyone’s basic human right, protected by the German constitution, to have their human dignity respected. And this right is so fundamental it cannot be waived even in the context of otherwise harmless entertainment. There is, of course, a debate to be had about the desirability of combat games of different kinds. But the language of human rights is not obviously the right framework within which to conduct it. The core problem with the decision in the Omega case is that the courts did not take adequate account of three things. First, participation in laser sport is voluntary, therefore, banning it constitutes a restriction on freedom which requires a compelling justification, for example, that it causes harm or palpably violates other rights. Second, the ban does not rest on any credible evidence that laser sport does in fact cause any real harm either to those who practise it or to anyone else. The damage to dignity is at best an ethereal, an exaggerated, or even an imaginary harm. Third, the banning of laser sport is difficult to reconcile with the fact that boxing and martial arts remain legal in Germany.<sup>19</sup> Why do these activities which involve the deliberate infliction of physical pain but not simulated killing, not violate the right to dignity, while laser sport, which involves simulated killing but not the infliction of physical pain, does? The ban on laser sport, therefore, amounts to an incoherent and unjustified restriction of a concrete human right, liberty, in the name of protecting a much more intangible one, dignity, the latter of which is also at least equally “violated” by comparable activities which remain legal.

A final problem is that human rights perfectionism greatly downplays the fact that few human rights are absolute and, therefore, greatly underestimates the extent to which they can, and do, clash with each other and with collective goods such as economic development or national security. This is an issue which will be returned to later.

### Realism

The term “realism” means different things in many different disciplines – including art, law, international relations and physics – which there is insufficient opportunity to explore thoroughly here. What it might mean for human rights is open to debate on two levels. First, there is plenty of scope for considering how “human rights realism” differs from “perfectionist” and “sceptical” approaches, and, second, for debate between human rights realists over its detailed implications. In my view, five of the central characteristics of human rights realism are as follows.

First, although human rights must be taken seriously and installed at the very centre of the emergent global value system, realism acknowledges that they can never be fully

18 An English language account can be found in the judgment of the European Court of Human Rights, on a preliminary reference from the German Federal Administrative Court, which held that “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that the activity is an affront to human dignity”, *Omega Spielhallen-und Automatenaufstellungs-GmbH*, C-36/02, 14 October 2004, para. 42.

19 Following the Winnenden school massacre on 11 March 2009, when 15 people were killed by former student Tim Kretschmar, an enthusiast for paint-balling and violent video and computer games, the German government proposed legislation tightening gun control and banning the use of air rifles to fire paint-filled pellets at opponents (*The Guardian*, 9 May 2009).

20 See, e.g. Donnelly, *Universal Human Rights*, n. 4 above, ch. 8.

implemented. This is not because of the innate wickedness of people, those who exercise power, or the institutions and systems within which we all live our lives. It is because determining what full implementation means will always be a matter of controversy since human rights are by nature vague, imprecise and open to competing interpretations even by those who are fully committed to them. We have, in other words, to be realistic about how close we can get to the fulfilment of the ideal.

Human rights realism is based, second, on a full commitment to anchoring debates about human rights, including and especially about their profile in national legal and political systems, in concrete norms of international human rights law. But, as already intimated, the fact that there are significant problems with international human rights law cannot be denied. The most serious of these is the huge gulf between, on the one hand, the massive international bureaucracies which now exist to tell us what human rights we have, and to monitor whether states adhere to them, and, on the other, the chronically weak mechanisms of enforcement.<sup>20</sup> The United Nations now has over a dozen principal agencies working in human rights related fields.<sup>21</sup> These include its main political organ, the 47-member Human Rights Council, the eight expert committees created by specific treaties and several administrative agencies, such as the Office of the High Commissioner for Human Rights, UNICEF and the UN High Commissioner for Refugees. The administrative agencies carry out vital field work, particularly in humanitarian crises. The others, on the other hand, produce mountains of reports, declarations, and recommendations but, sadly, very little else. The tragedy is that international human rights law is generally only effective with respect to those states which want it to be effective since, in most circumstances, it lacks any real coercive power.

The Human Rights Council provides a particularly sorry illustration of what is wrong with human rights at the UN.<sup>22</sup> The council was created in March 2006 to replace the discredited UN Commission on Human Rights which was wound up because of political bias. The election of Libya to the chair in 2003 was the last straw. However, in its first 17 months, the new Human Rights Council fared no better. Only 25 of its 47 member states are democracies. Dominated by a group of Arab and African nations which vote *en bloc*, it issued 13 condemnations, 12 of them against Israel, while refusing to condemn the regimes in Burma, Sudan, or Zimbabwe for the huge human rights crises they currently preside over. While the balance has since been slightly redressed, the bias still remains.

There are no easy solutions to these problems. But three observations can be made about them. First, the fact that there is such a thing as international human rights law is something to be celebrated in spite of the problems about enforcement. The main reason, as already indicated, is that this constitutes the closest thing there is to global value consensus and provides relatively objective standards against which official conduct can be judged by anyone wishing to do so. But second, research indicates that the international human rights system is most effective when dynamic relationships are established with official and unofficial institutions, groups and processes at the sub-national level and that this would be much more difficult to achieve without agreed international standards.<sup>23</sup> Third, economic carrots and sticks often produce better results than political and legal instruments. Take, for example, the case of Turkey which had a terrible human rights record for decades in spite of having ratified the European Convention on Human Rights in 1954.

21 J E Mertus, *The United Nations and Human Rights: A guide for a new era* (London: Routledge 2005).

22 R Farrow, "The UN's human rights sham", *Wall Street Journal Online*, 29 January 2008.

23 See, e.g. T Risse and S C Ropp, "International human rights norms and domestic change: conclusions" in T Risse, S C Ropp and K Sikkink (eds), *The Power of Human Rights: International norms and domestic change* (Cambridge: Cambridge University Press 1999).

The situation only began to improve in the early 21st century when Turkey embarked on negotiations to join the European Union.<sup>24</sup>

A third feature of human rights realism is the commitment to enshrining international human rights as constitutional rights in national legal systems. But this, in its turn, raises two problems. First, it tends to turn human rights into formal legal doctrines developed by lawyers and judges more in accordance with doctrinal logic than with their underlying purpose. An example can be found in the UK's Human Rights Act which makes it illegal for public authorities to violate the European Convention on Human Rights. The question – what kinds of body can be considered “public authorities” for this purpose? – has given the legal profession a great deal of trouble.<sup>25</sup> This problem has been compounded by the fact that, since the 1990s, many public functions have been delegated to private contractors, for example, charitable organisations providing care for elderly people. Judges, lawyers and jurists have sought in vain for the appropriate distinction between “public” authorities on the one hand, and “non public” or “private” ones on the other, by reference to various criteria to do with their function, character, and the nature of the service provided. However, the real issue lies in identifying the consequences for vulnerable people of holding, or refusing to hold, a particular body legally accountable under the Human Rights Act for its conduct. Fortunately, legislation has recently been passed to address some of these difficulties.<sup>26</sup>

The second problem with the national institutionalisation of human rights is that it creates huge political dilemmas about the role of judges in the legislative process. The relationship between courts, governments and parliaments can be structured in several ways in democratic states.<sup>27</sup> At one end of the continuum, judges, such as those sitting on the US Supreme Court, may have the power to annul legislation where they believe constitutional rights have been infringed. At the other end, as in New Zealand, courts are limited simply to interpreting legislation by reference to fundamental rights. Various models can be found in between, including the UK's Human Rights Act which, amongst other things, allows courts to alert the government to the need to refer legislation back to Parliament where there are problems concerning its compliance with the European Convention on Human Rights. This power has, however, been used just over a dozen times since October 2000 when the Act came into force.<sup>28</sup> Those on the left of the political spectrum in the UK tend to regard the Human Rights Act as a failure because, they believe, it has changed so little.<sup>29</sup> Others, on the political right, regard it as a failure because they think it has changed too much. For example, certain sections of the press are campaigning for the repeal of the Human Rights Act on the grounds that it has tilted the balance in favour of criminals, foreigners, minorities, immigrants etc. at the expense of the human rights of the long-suffering silent majority.<sup>30</sup> The Conservative Party advocates replacing the Human Rights Act with a tailor-made British Bill of Rights but has yet to reveal the

24 See Greer, *The European Convention on Human Rights*, n. 17 above, pp. 94–103.

25 R Drabble, “Public authorities and the Human Rights Act” (2006) 11 *Judicial Review* 38; N Bamforth, “The application of the Human Rights Act 1998 to public authorities and private bodies” (1999) 58 *Cambridge Law Journal* 159.

26 Health and Social Care Act 2008, s. 145.

27 For a useful summary see, The Constitution Unit, *Human Rights Legislation* (London: Faculty of Laws, University College 1996), paras 55–87.

28 R Clayton, “The Human Rights Act six years on: where are we now?” (2007) 13 *European Human Rights Law Review* 11.

29 See e.g. K D Ewing, “The futility of the Human Rights Act” (2004) *Public Law* 829; K D Ewing and J-C Tham, “The continuing futility of the Human Rights Act” (2008) *Public Law* 668.

30 Clapham, *Human Rights*, n. 4 above, pp. 2–4.

details.<sup>31</sup> Responding to this debate, but indicating that it will not propose legislation before the next general election, the government has published a Green Paper on a British Bill of Rights and Responsibilities which would assemble, in a single document, fundamental rights and responsibilities currently scattered across the legal and political landscape.<sup>32</sup> But, in order to avoid undermining the Human Rights Act, the intention is that this should function as a set of guiding principles for courts and Parliament rather than providing the basis for fresh justiciable claims.<sup>33</sup>

Over the past eight years or so, the Human Rights Act has also attracted more than its fair share of myths.<sup>34</sup> Here are just three examples. First, it is a misconception to think that the daily work of the courts is full of human rights challenges.<sup>35</sup> In fact the Act is virtually invisible in the routine legal process, featuring, for example, in only 2 per cent of reported appellate cases.<sup>36</sup> While the success rate of applications to the House of Lords for leave to appeal in human rights cases is high, only one in three results in a victory on the merits for the original applicant.<sup>37</sup> The Human Rights Act is, however, referred to in about a third of House of Lords cases although only substantially affects the results in about one-tenth.<sup>38</sup> Another type of misconception stems from often outrageous challenges to administrative decisions, ostensibly on human rights grounds, which ultimately fail precisely because they are outrageous. Typically, the press report the challenge itself as an indicator of the bankruptcy of the Human Rights Act, while the fact that it ultimately flounders is ignored. But by then a misleading impression has already taken root in public consciousness. A good example is the application made in 2001 by the convicted serial killer Denis Nilsen, who complained that his human right not to suffer inhuman or degrading treatment had been violated by a decision of the prison governor to deny him access to gay pornography.<sup>39</sup> An incandescent press fulminated at the application and at the Human Rights Act for allowing it to happen. But the fact that the application failed at the first legal hurdle was ignored. Finally, there is absolutely no truth in the rumour that the Human Rights Act has fuelled the so-called “compensation culture”, for the very simple reason that there are only three known cases of compensation being awarded for a successful Human Rights Act claim. The courts have, instead, preferred other remedies.<sup>40</sup>

There are good reasons for regarding the Human Rights Act as a successful exercise in human rights realism. It integrates European Convention standards into national legislative and adjudicative processes without the dislocating and unpredictable consequences which could have ensued had it been used by the courts radically to restructure whole territories of substantive law. It is doubtful if the UK needs a “rights revolution”. But even if it did, the courts would not be the place to achieve it. What the UK requires instead is a firmer commitment to human rights realism, that is, a much more informed debate about how

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31 See e.g. *The Guardian*, 28 February 2009.

32 *Rights and Responsibilities: Developing our constitutional framework* Cm 7577 (London: Ministry of Justice (March) 2009).

33 *Ibid.* pp. 8–10.

34 *Review of the Implementation of the Human Rights Act* (London Department for Constitutional Affairs, Justice Rights and Democracy (July) 2006), p. 5.

35 *Ibid.* See also J Raine and C Walker, *The Impact on the Courts and the Administration of Justice of the Human Rights Act 1998*, Lord Chancellor's Department Research Series, No. 9/02 (London: LCD 2002), p. 53.

36 *Review of the Implementation of the Human Rights Act*, n. 34 above, p. 10.

37 S Shah and T Poole, *The Impact of the Human Rights Act on the House of Lords*, LSE Law, Society and Economy Working Papers 8/2009 (London: LSE Law Department 2009), pp. 23–4.

38 *Review of the Implementation of the Human Rights Act*, n. 34 above, p. 10.

39 *Ibid.* p. 30.

40 Clayton, n. 28 above, p. 26.

human rights could be more effectively protected and further progress towards the realisation of this goal.

A fourth feature of human rights realism is the importance of recognising that human rights conflict with each other and with other public goods in ways which cannot be settled objectively even by the best laws and the best courts. The conflict between liberty and dignity, addressed so problematically in the German laserdrome case, has already been noted. But there are many other examples, ranging from the tension between liberty and security in the struggle against terrorism, to controversies such as those over the publication of *The Satanic Verses* and the Danish cartoons of the Prophet Mohammad. But a particularly troubling case, which sparked a huge public controversy in Germany cutting across the usual party political lines, provides a particularly graphic illustration of the merits of realism over both scepticism and perfectionism.<sup>41</sup>

On 27 September 2002, a little boy called Jakob von Metzler, the 11-year-old son of a Frankfurt banker, was abducted on his way home. Not long after, the family received a letter demanding a ransom of one million Euros and made arrangements for the kidnapper to collect it from a specified tram stop. During the night, three days later, Magnus Gäfgen, a 32-year old law student and acquaintance of Jakob's sister, picked up the money and wasted no time in ordering a new Mercedes and booking a holiday abroad. But unbeknown to Gäfgen the tram stop had been under police surveillance. Shortly after he collected the ransom, the police arrested Gäfgen and his girlfriend. Gäfgen was told he was suspected of having kidnapped Jakob and was informed about his rights, including to remain silent and to consult a lawyer. Some of the money was also recovered from Gäfgen's flat and later from his bank account. But there was no sign of Jakob. A note planning the crime was also discovered at the flat. When the police confronted Gäfgen with the evidence against him, he changed his story several times. At first he claimed he had found the ransom by chance. Then he admitted to having been involved in the kidnapping but only as the courier. He named others as accomplices. But police checks proved this part of his story to be false.

The public having been informed of Jakob's disappearance, a search party of 1000 volunteers combed a nearby wood. But nothing was found. The situation was now getting desperate. The police realised that if Gäfgen and his girlfriend had kidnapped Jakob by themselves, the fact that they were both in custody meant that Jakob might be dying alone wherever they had taken him. So another tactic was tried. Jakob's mother was brought to the police station to plead with Gäfgen. Gäfgen was unmoved. So, at 5:30 the next morning, 1 October 2002, the deputy chief of the Frankfurt am Main police ordered a subordinate police officer to threaten Gäfgen with a severe beating if he continued to refuse to disclose Jakob's whereabouts. The subordinate police officer not only issued the threat, but also hit Gäfgen's chest with his hand and shook him so that his head hit the wall. Ten minutes after this session of questioning began Gäfgen told the police that Jakob's body could be found under a jetty at a pond near Birstein. The police took Gäfgen there immediately and discovered that it was true. Tests later showed that Jakob had died from suffocation. Tyre tracks matching those of Gäfgen's car, and shoe prints matching his shoes, were also discovered at the scene. When questioned on the way back to the police station Gäfgen confessed to having kidnapped and killed Jakob. Acting on information Gäfgen provided, the police later recovered some of Jakob's belongings and the typewriter used to type the ransom demand.

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41 D Schroeder, "A child's life or a 'little bit of torture'? State-sanctioned violence and dignity" (2006) 15 *Cambridge Quarterly of Health Care Ethics* 188.

Gäfgen subsequently repeated his confession, not only to the police, but to a public prosecutor, a district judge, and finally before the regional court on the second day of his trial for abduction and murder in July 2003. He was found guilty and was sentenced to life imprisonment. His appeal was rejected by the Federal Constitutional Court. However, the deputy chief police officer who had ordered Gäfgen to be threatened and the subordinate officer who had issued the threat and had hit him were also tried and convicted for coercion and incitement to coercion. Nevertheless, although these offences carry a maximum sentence of five years' imprisonment in Germany, the court merely imposed suspended fines. Each officer was also transferred to duties unconnected with criminal investigation and the deputy chief was later promoted.

Gäfgen sued the state of Hesse for compensation but without success. Before this claim was settled, he also complained to the European Court of Human Rights that the police threats and the assault violated his right, under Article 3 of the European Convention on Human Rights, not to be tortured or inhumanly or degradingly treated or punished and that his right to a fair trial under Article 6 had also been breached by the events which had subsequently unfolded, including his various confessions. On 30 June 2008, the court concluded, by a majority of six to one, that there had been no violation of either provision.<sup>42</sup> As far as Article 3 was concerned it was held that the applicant had indeed been subjected to inhuman treatment in the course of police questioning on 1 October 2002 and that this constituted a violation of Article 3. However, by the time he petitioned Strasbourg, before his claim for compensation was settled by the German courts, the European Court of Human Rights decided that Gäfgen could no longer be considered a victim of this violation. It was held that the conviction of the police officers concerned, and the sentences they received, constituted appropriate and adequate redress from the German legal system, given that the abuse amounted to no more than a threat and a relatively minor physical assault. As for Article 6, the court concluded that the proceedings as a whole had not been unfair since the applicant had been convicted entirely on the confession made at trial, which he claimed was motivated by remorse and which, unlike his initial confession, was not tainted by the treatment he received in the police station. The court added that the items of physical evidence discovered as a result of Gäfgen's initial admission to the police – Jakob's body and his belongings together with the tyre tracks, the shoe prints and the typewriter used to type the ransom note – could be deemed to have been obtained as a result of police misconduct. But their effect was merely to confirm Gäfgen's guilt as proven by evidence independent of how he had been treated by the police, namely his courtroom confession supported by other untainted evidence such as the plan of the crime found in his flat.

Of the three positions on human rights under consideration here, realism most fully addresses the moral and legal dilemmas in this case. Perfectionists would take the view that threats of abuse to suspects in police custody must be outlawed and severely punished in all, including these, circumstances. They would, therefore, reject the decisions of the German courts and the European Court of Human Rights on the grounds that the violation of the applicant's rights under Article 3 of the European Convention on Human Rights had not been adequately remedied by the lenient punishment the police officers received. But the problem with this approach is that it ranks the right of a murder suspect to be protected from even the threat of mild physical abuse, higher than the right of a

42 *Gäfgen v Germany*, judgment of the European Court of Human Rights, 30 June 2008, referred to the Grand Chamber on 1 December 2008. Judge Kalaydjieva dissented on the grounds that, although the punishment of the police officers and any compensation the applicant might subsequently receive could be seen as remedying the direct effects of the breach of Article 3, the applicant nevertheless continued to be the victim of a violation of Article 6 because the coercion resulted in both self-incriminatory statements and evidence which irretrievably affected the fairness of the proceedings and justified a re-trial.

kidnapped child to be rescued from the risk of death. Sadly Jakob was already dead when Gäfgen was abused by the police. But nobody except Gäfgen knew this. Would anybody seriously advocate severely punishing the police officers concerned even if the information Gäfgen provided had in fact led to Jakob's life being saved? Human rights sceptics, on the other hand, would not feel so constrained by Article 3 and, while recognising the appropriateness of these standards in most circumstances, would advocate an even more flexible approach than that taken by the relevant courts, involving, for example, refraining from punishing the officers at all, not removing them from criminal investigation work, and possibly even rewarding them for their conduct. However, the difficulty here is that without some official sanction, even in these circumstances, there is an unacceptable risk that the abuse of suspects in police custody might become more routine.

However, for the human rights realist there is no perfect moral or legal solution since each of the alternatives suffers from significant flaws. Nevertheless, the decision taken by the German courts, as confirmed by the European Court of Human Rights, can be commended as the "least bad". In effect, this means that the prohibition against minor inhuman or degrading treatment or punishment found in Article 3 of the European Convention can only be said to be absolute in a formal sense. It can, in other words, effectively be overridden by the competing right to life of a hostage, particularly, perhaps, a kidnapped child. But, several uncommon conditions need to be fulfilled. First, there must be overwhelming evidence that the suspect was involved in the abduction. Second, there must be compelling reasons for believing that the hostage faces an imminent risk of death unless immediately rescued. Third, there must be very good grounds for believing that the suspect is likely to have information which could facilitate a rescue. Fourth, physical coercion must only be applied by law enforcement officials as an absolute last resort. Fifth, this must not be severe. And, finally, those who applied it must be formally, though leniently, punished afterwards.

Finally, human rights realism recognises that although human rights are universal in the abstract sense discussed earlier in this article, there is considerable scope for their institutionalisation in national legal and political systems in ways which are sensitive to features of the particular context provided these do not cause or compound avoidable human suffering, and provided any restriction on liberty is in order to avoid causing physical or psychological harm to others. But an unresolved question, even amongst Western democracies, is when human life begins and therefore, when human rights are acquired, an issue which crystallises in the debate over abortion. Some European countries take a liberal approach, permitting termination in most circumstances up to the point of foetal viability outside the womb. Others have much more conservative regimes which outlaw abortion in virtually all circumstances except where the pregnancy seriously jeopardises the life of the mother. Although the European Commission of Human Rights heard several cases in the 1980s and 1990s, it was not until 2004 that the court considered the matter.<sup>43</sup> In *Vo v France*,<sup>44</sup> medical negligence resulted in the termination of a pregnancy of between 20 and 24 weeks. The mother complained of a breach of the right to life under Article 2 of the European Convention on Human Rights on the grounds that the doctor had been acquitted by the French courts of the crime of causing unintentional injury because the foetus was not considered fully human by that stage of the pregnancy. A majority of the Grand Chamber of the European Court of Human Rights ruled that there had been no violation

43 *H v Norway* (1992) 73 DR155; *Paton v United Kingdom* (1981) 3 EHRR 408; *Briggemann and Scheuten v Germany* (1981) 3 EHRR 244. B Hewson, "Dancing on the head of a pin? Foetal life and the European Convention" (2005) 13 *Feminist Legal Studies* 363.

44 (2005) 40 EHRR 259.

of Article 2. It was held that the domestic legal protection afforded the applicant was adequate, and the requisite procedural requirements had been fulfilled, particularly since it had been open to her to bring civil and/or administrative proceedings in respect of the accident. The majority observed that the Convention is silent as to when human life attracting the protection of Article 2 begins. It also concluded that there is, at best, a consensus in Europe that embryos and fetuses are part of the human race with the potential to develop into persons with full legal rights. But, because there is no consensus on when, legally and scientifically, human life begins, member states must be permitted some latitude in finding their own answers to this question. The majority, therefore, declined to decide whether the foetus in this case was a person or not. Nor was there any need to speculate on possible conflicts between the respective rights of foetus and mother, given that, in this case, they coincided. Because, as the court noted, the Convention does not clearly determine when the right to life is acquired, it follows that, provided national laws are democratic and comply with the principle of legality, the Convention permits abortion up to the point of viability of a foetus outside the womb but does not mandate it. Therefore, the content of national abortion laws may vary from state to state and still be Convention-compliant.

### Conclusion

The idea of human rights represents one of the noblest of human aspirations and, in a diverse but increasingly integrated world, offers a clearer and more coherent vision of a better future for all than any of its rivals. For this reason alone it should be institutionalised in all legitimate legal and political systems, both national and international. However, “human rights realism”, which I hope Tom Hadden would endorse, provides a better model for institutionalisation than either “scepticism” or “perfectionism” since only realism adequately acknowledges the benefits and drawbacks. The primary benefit is that the moral primacy of the individual is given formal institutional recognition and protection. But, there are several inescapable problems. The meaning and implications of human rights will always be matters of interpretation, controversy and dispute because they are, by nature, abstract and imprecise. Human rights conflict with each other, and with other social goals, in ways which cannot be settled objectively nor, therefore, totally insulated from the risks of legal formalism, on the one hand, or from cultural assumptions or political partisanship, on the other. Finally, there is the irresolvable paradox that, while human rights are universal in an abstract sense, their institutionalisation can and will legitimately vary from state to state, providing the intrinsic equal worth of all individuals is properly recognised.



# Tightening the noose of central government control over policing in Ireland: innovations in the Garda Síochána Act 2005

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## Introduction

There is a long tradition of central government control over policing in Ireland.<sup>1</sup> This was continued and, if anything, strengthened after independence despite the replacement of the Royal Irish Constabulary with the Garda Síochána. The established concept of a national police force was retained,<sup>2</sup> as was its subordination to central government.<sup>3</sup> Although the legislation actually appeared to leave the Garda Commissioner with unfettered discretion over the direction and control of the force,<sup>4</sup> the intention was always that he would function as the servant of the government. When introducing the legislative proposals in the Dáil, for example, the Minister for Justice (Kevin O’Higgins) linked the national status of the force with the necessity for direct government control as follows:

As the force is not local, but is an organised National Police Force, it is essential that it should not exist out of the immediate authority of the Executive Council.

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1 See S H Palmer, *Police and Protest in England and Ireland 1780–1850* (Cambridge: Cambridge University Press 1988), pp. 92–190, 198–269, 323–75, 403–8, 472–509; T Bowden, *Beyond the Limits of the Law* (Harmondsworth: Penguin 1978), pp. 169–73; T Salmon, “The civil power and aiding the civil power: the case of Ireland” in J Roach and J Thomaneck (eds), *Police and Public Order in Europe* (London: Croom Helm 1985); R Hawkins, “Dublin Castle and the RIC 1916–1922” in D Williams (ed), *The Irish Struggle 1916–1926* (London: Routledge Kegan Paul 1966); K Boyle, “Police in Ireland before the Union” (1973) 8 *Irish Jurist* 323.

2 The Garda Síochána was formed in 1922 to replace the Royal Irish Constabulary throughout the state, with the exception of the Dublin metropolitan area where the Dublin Metropolitan Police (DMP) was retained temporarily. The DMP and the Garda Síochána were merged as the Garda Síochána by the Police Forces Amalgamation Act 1925. For a history of the DMP, see J O’Herlihy, *The Dublin Metropolitan Police: A short history and genealogical guide* (Dublin: Liffey Press 2001).

3 For an account of the establishment of the Garda Síochána, see C Brady, *The Guardians of the Peace* (Dublin: Gill & Macmillan 1974); L McNiffe, *A History of the Garda Síochána* (Dublin: Wolfhound Press 1997); G Allen, *Policing Independent Ireland 1922–1982* (Dublin: Gill & Macmillan 1999).

4 See D P J Walsh, *The Irish Police: A legal and constitutional perspective* (Dublin: Round Hall Sweet & Maxwell 1998), p. 107.

A provision that all officers should be appointed by the Executive Council will give a proper constitutional derivation to their authority, and a proper direction to their allegiance.<sup>5</sup>

For at least the first five decades, this position was sustained primarily through the government's budgetary control and power of hire and fire over officers from commissioner all the way down to and including the middle management rank of superintendent.<sup>6</sup> In the period from August 1922 up to the end of the 1970s, two commissioners were sacked following a change of government, while another two were appointed directly from positions as senior officials in the Department of Justice. By the end of the 1960s it was generally acknowledged that the degree of central government/political control over the Garda Síochána was a problem that needed to be addressed.<sup>7</sup>

During the 1970s, the English concept of constabulary independence<sup>8</sup> began to take hold in Ireland as central government increasingly promoted the image of the police as a semi-autonomous public service, at least in matters not affecting the security of the state. This was reflected in the persistent refusal of the minister to accept responsibility in Parliament for questions on or criticisms of operational policing policies, practices and incidents.<sup>9</sup> Unfortunately, this was not accompanied by a refusal to impose party political preferences and demands on the force when the need arose.<sup>10</sup> The net effect was that government was able to use the national police force as its servant, while retaining the option of being able to throw up the screen of police operational independence when it wanted to avoid responsibility for unpopular, incompetent or unlawful police policies, practices or actions. This was made possible by the lack of specificity on the governance of the Garda Síochána in its founding legislation.

Surprisingly, the legislative framework which was fashioned in difficult circumstances in the newly independent Irish State of the 1920s survived right through to the early years of the 21st century. Ultimately, growing public alarm over policing methods provided the impetus for a major legislative revision in the form of the Garda Síochána Act 2005.<sup>11</sup> Comment on this Act has tended to focus, understandably, on the new independent complaints procedure that it establishes.<sup>12</sup> The Act, however, also had a much broader and more ambitious objective of effecting the first complete overhaul of police governance in Ireland since the 1920s. When introducing it as a Bill in the Dáil, the Minister for Justice, Equality and Law Reform said that:

5 *Dáil Debates*, vol. 4, c. 1688 (1923).

6 See Walsh, *The Irish Police*, n. 4 above, chs 2 and 5.

7 See Commission on the Garda Síochána, *Report on Conditions of Service* (Dublin: Stationery Office 1970); Brady, *Guardians of the Peace*, n. 3 above, ch. 14.

8 See Royal Commission on the Police, *Final Report Cmnd 1728* (London: HMSO 1962); *R v Commissioner of the Police of the Metropolis, ex parte Blackburn* (No. 1) [1968] 2 QB 118; L Lustgarten, *The Governance of Police* (London: Sweet & Maxwell 1986); G Marshall, *Police and Government* (London: Methuen 1965); N Walker, *Policing in a Changing Constitutional Order* (London: Sweet & Maxwell 2000).

9 See Walsh, *The Irish Police*, n. 4 above, at ch. 12. Note also the criticism in the first Morris Report that the department was “now utterly isolated from Garda Headquarters” in the sense that it rarely raised queries about Garda operations; *Report on Explosives “Finds” in Donegal* (Dublin: Stationery Office 2004), at para. 13.07.

10 Walsh, n. 4 above, *The Irish Police*, at ch. 5. See also the example of accessing confidential Garda files at p. 176 below.

11 For a summary of police practices and actions that gave cause for concern, see D P J Walsh, *Human Rights and Policing in Ireland: Law, policy and practice* (Dublin: Clarus Press 2009), Part 2.

12 For a notable exception, see B Vaughan, “A new system of police accountability: the Garda Síochána Act 2005” (2005) 15(2) *Irish Criminal Law Journal* 18.

it contains the most important legislative proposals on policing ever to come before the Houses of the Oireachtas . . . It will act as a modern constitution for a modern and even more professional police force at the beginning of a new century.<sup>13</sup>

This “constitution” redefines the relationship between the force and the minister, the government and the Oireachtas in a manner which, it is submitted, formalises and strengthens central government control over policing in Ireland to an unprecedented degree.

Many of the changes introduced by the Act seem to have been imported from England, Wales and Northern Ireland, where they have been a feature of police governance and accountability for well over a decade in the context of regional police forces and a tripartite structure of governance.<sup>14</sup> In Ireland they will operate in the very different environment of an established national police force that has always been subject to the dual control of the Garda Commissioner and the Minister for Justice, Equality and Law Reform.<sup>15</sup> The changes in question include: ministerial directives, priorities and performance targets; annual policing plans and multi-annual strategy statements; new accountability arrangements; and a Garda Inspectorate.<sup>16</sup> In this article, each will be outlined in turn, followed by a brief acknowledgment of some counterbalancing forces in the form of local policing committees and the Garda Síochána Ombudsman Commission. With particular reference to Garda strategy statements and policing plans, it will be suggested that the new architecture enhances central political and institutional control over policing, without necessarily delivering commensurate dividends in transparency, accountability and community engagement.

### Retention and strengthening of existing controls

The 2005 Act retains the commissioner’s statutory power of direction and control over the force,<sup>17</sup> but qualifies it in a manner which expresses the commissioner’s subordination to the minister and the government to an extent that was not apparent in the previous legislation.<sup>18</sup> A similar approach is taken to the other established mechanisms of government control. The power to remove the commissioner, for example, is expressed in terms which leave no doubt that the commissioner is expected to follow government orders. The statutory grounds upon which he or she can be removed expressly include a failure to have regard to any relevant policies of the minister or the government or any

13 *Dáil Debates*, vol. 597, c. 953.

14 There is now an extensive literature on the police governance and accountability reforms that have been introduced in England and Wales and Northern Ireland from the 1990s. See e.g. N Walker, *Policing in a Changing Constitutional Order* (London: Sweet & Maxwell 2000); I Loader and A Mulcahy, *Policing and the Condition of England: Memory, politics and culture* (Oxford: Oxford University Press 2003); S Savage, *Police Reform: Forces for change* (Oxford: Oxford University Press 2007); R Reiner and S Spencer, *Accountable Policing* (eds) (London: IPPR 1993); E McLaughlin, *The New Policing* (London: Sage 2007), ch. 7; R Reiner, *The Politics of the Police* 3rd edn (Oxford: Oxford University Press 2000), ch. 6; T Jones, “The accountability of policing” in T Newburn (ed.), *Handbook of Policing* 2nd edn (Cullompton: Willan 2008), ch. 26; B Loveday, “New directions in accountability” in F Leishman et al. (eds), *Core Issues in Policing* (Harlow: Longman 2000), pp. 213–31; I Loader, “Plural policing and democratic governance” (2000) 9 *Social and Legal Studies* 323–45; A Mulcahy, *Policing Northern Ireland: Conflict, legitimacy and reform* (Cullompton: Willan 2006).

15 Central government control over policing in Ireland has never been shared with a police authority or policing board/commission.

16 In so far as there is a domestic blueprint for these “innovations”, it is to be found in the proposals of the *Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána* (Dublin: Government Stationery Office 1997).

17 Garda Síochána Act 2005, s. 26(1).

18 E.g. the Act states that in the performance of his or her functions the commissioner must have regard to, *inter alia*, any relevant policies of the minister or the government: *ibid.* s. 26(2)(c).

written directive issued to the commissioner by the minister (see the next section below).<sup>19</sup> In addition, the commissioner, and any officer right down to superintendent rank, can be removed by the government where it is of the opinion that that would be in the best interests of the force.<sup>20</sup> While a literal interpretation of the previous legislation suggests that the power of removal was absolute, a more limited interpretation was offered by some of the Supreme Court judges in *Garvey v Ireland*,<sup>21</sup> where Commissioner Garvey successfully challenged his removal on the grounds of natural justice.<sup>22</sup>

The one established control mechanism that has been dispensed with is the designation of the Secretary General of the Department of Justice, Equality and Law Reform as the Accounting Officer for the force.<sup>23</sup> The Act confers this status on the Garda Commissioner,<sup>24</sup> thereby affording him or her greater freedom and flexibility in the management of the Garda budget and, by extension, in the planning and management of policing policies, operations and decision-making. The commissioner is no longer obliged to clear decisions having budgetary implications with the department. That, of course, may simply be an exercise in bringing the law into line with practice, as the commissioner has been generally free of departmental interference in operational matters over the past few decades. Nevertheless, it does have some implications for the status of the commissioner and the independence of the Garda. Designating the chief officer as the Accounting Officer brings the Garda Síochána into line with semi-state bodies and suggests that the force can no longer be understood simply as an appendage of the department. It does not follow, however, that this is part of a wider agenda to remove the Garda from the direct control of the minister and the government. Other provisions of the Act suggest that it is little more than an administrative division of labour which is not meant to detract in any way from central government control over policing.

### The directive power

The 2005 Act introduces several innovative mechanisms through which the minister can impact directly on Garda policies, priorities and operational decision-making. The one which represents the most clearcut break with the established theory of Garda independence from ministerial control is undoubtedly that which empowers the minister to issue directives to the Garda Commissioner. The Act stipulates that, following the approval of the government, the minister may issue written directives to the commissioner concerning any matter relating to the Garda Síochána.<sup>25</sup> The commissioner is statutorily obliged to comply with any such directive<sup>26</sup> and must inform the minister of the measures that have been taken to comply with a directive within the time specified by the minister.<sup>27</sup> As will be seen, there is some uncertainty over the full scope of this power. That, however, does not detract from its overall significance in redefining or clarifying (depending on one's interpretation of the pre-existing position) the division of power in policing matters between the Garda Commissioner and the government of the day. Now, the latter enjoys

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19 Garda Síochána Act 2005, s. 11(1)(a).

20 Ibid. ss. 11(1)(c) and 13(2).

21 [1981] IR 77.

22 For discussion, see Walsh, *The Irish Police*, n. 4 above, pp. 122–4.

23 On the general subject of the accounting officer and the broader implications of designating the secretary general or the commissioner as accounting officer, see *ibid.* pp. 134–9.

24 Garda Síochána Act 2005, s. 43.

25 Ibid. s. 25(1).

26 Ibid. s. 25(2).

27 Ibid. s. 25(5).

an unequivocal power to determine and direct Garda policies, priorities, strategies and even operational decisions. The explicit inclusion of such a power in the Act is of immense significance. In effect it is an official declaration that the Garda and its members are the servants of the government, as distinct from the state or the people.<sup>28</sup>

It is important to acknowledge that there are limits to the minister's directive power. The Act states specifically that it cannot be used to limit the independence of a member of the Garda Síochána in performing functions relating to the investigation of a specific offence or the prosecution of an offence.<sup>29</sup> The extent to which this protects Garda independence from ministerial control is not entirely clear. It is likely, however, that it is nothing more than an affirmation of the fact that police powers are conferred directly on each individual member of the Garda and can only be exercised at the discretion of each member, and not at the direction of a more senior officer or external authority such as the minister.<sup>30</sup> Accordingly, the directive power does not authorise the minister to order the arrest (or release from Garda custody) of an individual or the search of specified premises or the prosecution of an individual. There can be no doubt, however, that the directive power can be used to require the commissioner to implement a particular policy, priority or strategy. Equally, there is no reason why it cannot be used to compel the commissioner to pursue a particular operation, even if that operation entailed the investigation of the alleged criminal or the political activities of an individual or organisation. This will be permissible so long as it stops short of usurping a member's discretion over whether to exercise a coercive power against a specific individual or property. It follows that it would be lawful, for example, for the minister to give the commissioner a directive to use all available resources to prevent protestors from restricting access to a designated area such as an industrial site, business premises or public offices.

In the Dáil debates on the Bill the minister attempted to quell fears that the introduction of the directive power would usher in partisan political control of the force. He explained that the power was necessary to enable the government to respond decisively and effectively to protect the interests of the state.<sup>31</sup> As an example of its potential use he described a scenario in which it would be necessary for the government to issue a directive to the Garda Commissioner to close the border in response to an outbreak of foot and mouth disease in Northern Ireland. According to the minister, such a decision could not be left to the discretion of the commissioner. The reality, of course, is that the commissioner would respond immediately to any such request conveyed by the government irrespective of whether it was in the form of a directive. More likely examples might arise from the government's desire to respond to: threats of major disruption posed by protestors at a high profile meeting of EU leaders in Dublin; the prospects of severe social and economic dislocation resulting from strikes in essential services; or a media-generated panic over the challenge presented to the administration of criminal justice by feuding criminal gangs.

The legislation itself acknowledges that the power might be used in a manner which impacts on state security or the investigation of an offence. It stipulates that where the minister issues a directive, a copy must be laid before each House of the Oireachtas unless

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28 Paradoxically, the contents of the declaration specified in s. 16(1) of the 2005 Act to be made by each member on appointment to office makes no mention of serving the government, while its predecessor expressly committed him or her to "render good and true service and obedience to Ireland and its constitution and government as by law established" (emphasis added); see Police Forces Amalgamation Act 1925, s. 11 and Sch. 4.

29 Garda Síochána Act 2005, s. 25(4).

30 See Walsh, *The Irish Police*, n. 4 above, pp. 65–72.

31 *Dáil Debates*, vol. 597, cc. 955–6.

compliance with that requirement might prejudice the security of the state or impede the prevention, investigation or prosecution of an offence – in which case it will be sufficient to lay a written statement to the effect that a directive has been issued.<sup>32</sup> This confirms that the power can be used to direct Garda policy and/or practice in a particular operation. More disturbing is the fact that it is in such highly sensitive aspects of policing that the minister can avoid the transparency and accountability checks and balances otherwise associated with the power. Not only is it a key instrument in securing political control over policing operations, it also has the potential to harness police power in the service of a governing party's interests over those of their opponents or local communities.

The availability of this directive power reflects a more concentrated degree of central government control over policing, relative to that applicable in some other jurisdictions such as England and Wales, Northern Ireland and New Zealand. In Northern Ireland, the Secretary of State has no power to issue directives on operational policing matters. The most he or she can do in this respect is to set long-term policing objectives, issue codes of practice to the Chief Constable on the discharge of his or her functions and promulgate regulations on the use of specified facilities, equipment or services by the force.<sup>33</sup> The Home Secretary's powers over police forces in England and Wales are more substantial. The Home Secretary can respond to an adverse inspection report on a force by giving directions to a local/regional police authority to take remedial measures, which may include the adoption of an action plan with a view to promoting the efficiency and effectiveness of its force.<sup>34</sup> While this power, together with a range of other powers and devices,<sup>35</sup> is being used very effectively by the Home Secretary to impose Home Office priorities, policies and standards on police forces generally,<sup>36</sup> it still falls short of the Irish power to issue directives on operational policing matters.

New Zealand offers a very apt comparator to Ireland not just because it is policed by a single national force similar in size to the Garda Síochána, but also because it has recently undertaken a fundamental overhaul of its policing legislation along the lines of the Garda Síochána Act 2005. It stipulates that the Police Commissioner is responsible to the minister for a range of matters, including giving effect to any lawful ministerial directions.<sup>37</sup> Critically, however, it goes on to state that the commissioner is not responsible to, and must act independently of, any Minister of the Crown regarding: the maintenance of order in relation to any individual or group of individuals; the enforcement of the law in relation to any individual or group of individuals; the investigation and prosecution of offences; and decisions about individual police employees.<sup>38</sup> The Act also stipulates that no police employee may, when exercising any power or carrying out any function or duty, act under the direction, command or control of a Minister of the Crown.<sup>39</sup> This reflects a very clear

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32 Garda Síochána Act 2005, s. 25(3).

33 Police (Northern Ireland) Act 1998, s. 40 and Police (Northern Ireland) Act 2000, ss. 24–7.

34 Police Act 1996, ss. 40, 41A and 41B.

35 See e.g. the provisions on the adoption of a national policing plan, the issuing of codes of practice on the discharge of the functions of chief constables with a view to promoting the efficiency and effectiveness of the force or forces concerned, and the promulgation of regulations requiring all police forces to adopt particular procedures or practices and regulations on equipment to be used by police forces: Police Act 1996, ss. 36A, 39A, 53 and 53A.

36 See, T Jones, "The accountability of policing" in *Handbook of Policing*, n. 14 above, ch. 26; N Walker, *Policing in a Changing Constitutional Order* (London: Sweet & Maxwell 2000), ch. 7; Savage, *Police Reform*, n.14 above.

37 Policing Act 2008, s. 16(1).

38 *Ibid.* s. 16(2).

39 *Ibid.* s. 30(4).

intent to prevent police law enforcement or public order maintenance operations from falling under ministerial direction or influence. Ireland, by comparison, conveys a distinct preference for enhancing direct ministerial control in these matters.

In practice, of course, it is unlikely that the Irish minister would have to resort formally to the directive power on a regular basis to satisfy his or her policing requirements. The mere existence of the power should be sufficient in itself to deliver a compliant commissioner. As in England and Wales and in Northern Ireland, there are other provisions in the Act which will enable the minister to shape Garda policies, priorities and strategies to his or her liking in a less public and confrontational manner. The minister can determine and revise priorities for the Garda and establish and revise performance targets from time to time.<sup>40</sup> The minister must consult with the Garda Commissioner in these matters,<sup>41</sup> and supply the commissioner with a copy of the determined priorities, established targets and any revisions thereto.<sup>42</sup> As soon as practicable after their adoption, a copy of these priorities and targets must be laid before each House of the Oireachtas.<sup>43</sup> The commissioner must have regard to these priorities and targets in performing his or her functions and must inform the minister of the measures taken to achieve them.<sup>44</sup> When combined with the directive power, these provisions reflect an architecture with a heavy emphasis on strong central government control over policing.

### Strategy statements and policing plans

Strategy statements and policing plans provide another vehicle for ministerial control. The Act requires the commissioner to formulate a strategy statement every three years and an annual policing plan.<sup>45</sup> Both are subject to ministerial control. The strategy statement must be in such form and manner as the minister may direct, and its contents must reflect relevant government policy and ministerial priorities.<sup>46</sup> It must also include an identification of issues of concern to Departments of State and other state agencies, together with a plan for managing those issues.<sup>47</sup> A similar subordination to ministerial and government requirements applies to the preparation and contents of the annual policing plans.<sup>48</sup> The commissioner must submit the statement/plan in draft form to the minister for approval.<sup>49</sup> The latter must approve them as submitted, or with such amendments as may be determined after consulting the commissioner.<sup>50</sup> Once approved, copies are laid before each House of the Oireachtas.<sup>51</sup> Ultimately, the commissioner must have regard to them when performing his or her functions.<sup>52</sup> One concession to a community input to policing plans that is not present in the strategy statement is the facility (expressed in

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40 Garda Síochána Act 2005, s. 20(1).

41 *Ibid.* s. 20(2)(a).

42 *Ibid.* s. 20(2)(b). The wording actually refers to determined priorities and established priorities. Presumably the latter should read "established targets".

43 *Ibid.* s. 20(3).

44 *Ibid.* ss. 26(2) and 20(4).

45 *Ibid.* ss. 21(1) and 22(1).

46 *Ibid.* s. 21(2) and (3).

47 *Ibid.* s. 21(2)(c).

48 *Ibid.* s. 22(2).

49 *Ibid.* ss. 21(1) and 22(4).

50 *Ibid.* ss. 21(4) and 22(5).

51 *Ibid.* s. 21(5) and 22(6).

52 *Ibid.* s. 26(2).

optional terms) to have regard to the most recent report from each joint policing committee (see the final section below).<sup>53</sup>

Annual policing plans have been a statutory requirement in police governance in England and Wales from the 1990s.<sup>54</sup> For the most part, they were part of a broader drive to deliver greater managerial efficiency, performance accountability and value for money in policing and in the public services generally.<sup>55</sup> In the case of the police, they have combined with codes of practice, action plans, performance targets, directions and budgetary decisions emanating from the Home Secretary in a manner which has enhanced central government control at the expense of the local/regional Police Authorities.<sup>56</sup> Similar provisions were introduced to Northern Ireland from 1998.<sup>57</sup>

In Ireland, the strategy statements have been introduced in the context of a national police organisation that was already characterised by an acute degree of political and institutional centralisation and a lack of transparency. In one sense, therefore, they reflect only a minor realignment in the police power relationship between central government and Garda management.<sup>58</sup> On the other hand, they do have the potential to inject a greater degree of democratic participation in, and accountability for, policing priorities, strategies and performance. They still are the only regular source of public information on these matters. In their absence, the Garda Commissioner would enjoy the freedom to formulate his or her own preferences hidden from public view and subject only to the possibility of ministerial directives or, more likely, government representations behind the scenes. The obligation to prepare and publish statements and plans offers scope for dialogue between the police and the policed.<sup>59</sup> The former will have to set out publicly in advance the priorities they will pursue and the strategies they will deploy in pursuing them for the benefit of the latter. The minister's involvement invites the prospect of accountability in Parliament for the substance of these priorities and strategies and the Garda's performance in delivering them. This represents at least the potential for significant change from how these matters were handled during the first 85 years of the state's existence.

53 Garda Síochána Act 2005, s. 22(3).

54 Police Act 1996, s. 8 and Police (Northern Ireland) Act 1998, Part II. See Home Office, *Police Reform: A police service for the twenty-first century* (London: HMSO, Cm 2281, 1993). In 2002 these local annual policing plans were complemented by three-year strategy plans and annual national policing plans; Police Act 1996, ss. 6A and 36A.

55 See, Savage, *Police Reform*, n. 14 above; I Loader and A Mulcahy, *Policing and the Condition of England* (Oxford: Oxford University Press 2003); R Reiner and S Spencer, *Accountable Policing: Effectiveness, empowerment and equity* (London: Institute for Public Policy Research 1993).

56 See, Jones, "The accountability of policing", n. 36 above, ch. 26; Reiner, *The Politics of the Police*, n. 14 above, ch. 6; Walker, *Policing in a Changing Constitutional Order*, n. 36 above, ch. 4; E McLaughlin, *The New Policing* (London: Sage 2007), pp. 182–7. The House of Lords' decision in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418 illustrates the impact that the Home Secretary's national policing plans and objectives can have in shaping the operational decisions of a chief constable through the medium of a local policing plan.

57 See Police (Northern Ireland) Act 1998, ss. 14–17, 38, and 40; Police (Northern Ireland) Act 2000, ss. 24–7.

58 The Garda Commissioner had been publishing strategy statements since 1993. The 2005 Act formalised this practice by imposing a statutory duty to publish them and by subordinating them to advance ministerial approval.

59 The Act imposes an obligation on the commissioner to make arrangements for obtaining the views of the public about matters concerning policing and the state of crime: Garda Síochána Act 2005, s. 27(1). Unfortunately, there is no express obligation to take account of these views in the plans. There is provision for the commissioner to have regard to the most recent report of each joint policing committee when preparing a plan, but it is expressed in discretionary terms: s. 22(3).

Although the statutory obligation to promulgate strategy statements was first introduced by the 2005 Act, the Garda Commissioner had been issuing them as a matter of practice since 1993. There have been two statements spanning the years since the enactment of the 2005 Act; the first for the period 2005 to 2007 inclusive, and the second for the period 2007 to 2009.<sup>60</sup> These statements and associated annual plans offer a useful, albeit limited, insight into how and the extent to which the concentration of control over policing at the centre is impacting on Garda priorities. A comparison between the statements and plans immediately before and after the enactment of the Garda Síochána Act 2005 is particularly useful for shedding light on the impact that the governance reforms may be having in this context.

The 2000–04 statement lists six key strategic goals: enforcing the laws relating to drugs; investigating crime; ensuring an immediate response to emergencies; providing help and support to victims of crime; contributing to improving road safety and the reduction of casualties; and maintaining state security.<sup>61</sup> These are accompanied by a list of broad enabling strategies, which add very little of substance to the goals, and a list of Garda actions which, presumably, are meant to be performance indicators. The first five goals are uncontroversial examples of what might be expected from expressions of community preference. Indeed, it is stated that the priority listing of these five reflected the results of the public consultation exercise held by the Garda prior to the development of the strategic plan.<sup>62</sup> Significantly, the statement does not say that state security is ranked sixth in the community's priorities.<sup>63</sup> Instead, it asserts that state security was also mentioned as one of the things that the public wanted the Garda to do. The clear implication is that it was far from a priority among the public and that it was slipped in at six to accommodate government and institutional priorities. More ominously, it is made clear in the statement that in future the Garda will canvass regularly not just the community, but also the government, the Department of Justice, Equality and Law Reform and gardaí, on what the Garda should be doing. The results of this subtle swing away from a community to a government and institutional focus are reflected in the listing of national/international security as the number one strategic goal in all subsequent strategy statements and policing plans.

Equally disappointing from a broader community policing perspective is the failure to include specific strategic goals on matters such as: identifying and addressing the policing needs and concerns of local communities, ethnic minorities and other vulnerable groups; promoting compliance with the highest standards of human rights in the discharge of the policing function at an institutional level and in dealing with individuals and groups who are targeted for Garda attention; ensuring maximum cooperation with external supervision and accountability mechanisms; subscribing to the highest standards of transparency compatible with the delivery of an efficient and effective police service; and maximising the enjoyment of civil rights and freedoms by all individuals and groups including, in particular,

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60 The reference to 2007 in the second statement is confusing as that year was already covered in the first statement. It follows that the second statement can only cover two years, even though the Act specifies a three-year period as the norm: Garda Síochána Act 2005, s. 21(3). Interestingly, the Act empowers the minister to issue a direction for a statement to be submitted at an interval of less than three years and to cover a period less than three years: Garda Síochána Act 2005, s. 21(6). While it is not stated explicitly in the 2007–09 statement, it might be assumed that such a direction was given, perhaps in response to the revelations of the Morris Tribunal of Inquiry on Garda corruption. Significantly, the 2007–09 statement is entitled “A time for change: the Garda Síochána corporate strategy 2007–2009”.

61 An Garda Síochána, *Corporate Strategy 2000–2004* (Dublin: Garda Síochána 1999), p. 7.

62 *Ibid.* p. 13.

63 Presumably, public order and anti-social behaviour, which are surprising omissions, would have ranked much higher than state security in the community's priorities.

those who wish to protest publicly and peacefully against the practices and policies of government and other powerful interests.<sup>64</sup>

The disproportionate emphasis on government and security concerns is reflected in a section on environmental factors and, paradoxically, a section on “putting people first”. The former is focused almost exclusively on developments which will require enhanced crime control and more intrusive roles for the Garda.<sup>65</sup> Critically, the environmental factors begin with “political factors” which are dominated by internal and external state security concerns.<sup>66</sup> There is no reference at all to the development of civil and political rights. Even the development of audiovisual recording of the interrogation of Garda suspects is presented as a threat to effective crime control.<sup>67</sup> State security is also given an enhanced status under the heading of “putting people first”. Significantly, it is presented as “protecting you and the State”. This assimilation of the policing needs of the individual and the state reflects a subtle attempt to infuse centrally directed state security policing with the traditional legitimacy associated with community-based policing. By persuading the individual to see state security policing as an integral part of community-based policing, opposition to coercive measures adopted to promote the former will be neutralised. In effect the threat of terrorism is used to encourage the individual to surrender judgment and control over policing to the wisdom of central government. This, in turn, creates the conditions in which traditional police authority and legitimacy can be hijacked by central government as an instrument to protect and promote the vested interests of select political and economic elites.

The post-2005 strategy statements do not depart fundamentally from the style and substance of the pre-2005 statement. However, there are some significant differences which reflect an increased emphasis on governmental and institutional priorities, such as state security and external cooperation over immediate community concerns and human rights values. Standard community policing concerns around crime prevention and public safety are still heavily represented, while values associated with public confidence and community engagement are given more prominence. These are overshadowed, however, by the increased prominence given to the strategic goal on national/international security which, significantly, is moved into the first position. Its contents are much more compatible with a state security and intelligence service than a community police service. One of its two primary objectives, for example, is to keep the minister “updated and briefed with timely intelligence”. In the 2007–09 statement, this goal extends beyond its previous focus on terrorism to include the disruption of the interface between organised crime gangs and

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64 These issues are not ignored entirely. Many of them are acknowledged in a set of guiding principles which are meant to inform how gardaí should discharge their functions. Unfortunately, they are not given the status of strategic goals, nor is it clear how they will translate from rhetoric to reality. Human rights values are acknowledged in a section on “putting people first”. This includes a commitment to increase Garda training in this area and to focus on reducing complaints. Confidence in this commitment is undermined somewhat by the inexplicable failure to cite correctly the title or the year of regulations governing the treatment of persons in Garda custody. They are cited as the Treatment of Prisoners Regs 1986, instead of the Criminal Justice Act 1984 (Treatment of Persons in Garda Síochána Stations) Regs 1987.

65 The statement acknowledges that “the structures for delivering an appropriate level of accountability to local people and communities are not sufficiently developed in An Garda Síochána”. It is vague, however, on how that challenge will be addressed. This situation is not helped by the fact that the text refers to the introduction of new levels of accountability as being one of the reasons that “service to the community” is a key strategic goal for the force. The reality is that “service to the community” is not actually cited as one of the six strategic goals. It appears as one of eight “Garda Síochána Values” which are listed elsewhere in the document, but not actually explained or discussed.

66 An Garda Síochána, *Corporate Strategy 2000–2004*, n. 61 above, p. 8.

67 *Ibid.*

subversive groups and individuals. Its expansion into territory previously occupied by the crime goal reflects an official mindset in which part of the Garda's ordinary crime control function is now seen as part of its state security function.

Another notable feature of the state security goal post-2005 is the direct role afforded to the Garda in European and international cooperation on security matters. It commits the Garda (as distinct from the government) to consult and engage "with our European and international partners regarding security issues", to participate actively "in international policing activities to facilitate intelligence gathering", to "develop further organisational capability in the management of national and international security and cooperation with our EU and international partners" and to "implement EU agreed policy/developments" in the area. Internally, it also commits itself to provide "training programmes aligned with emerging national and international security threats, making fullest use of EU programmes". Significantly, in the 2007–09 statement, this EU and international cooperation is extended beyond the traditional confines of the national and international security goal to the strategic goal on crime prevention. It is stated there that the Garda "will work in partnership with national and international enforcement agencies to identify and profile drugs trafficking networks". There is no question that the Garda must cooperate with police forces in other jurisdictions to combat the illicit drugs trade and other such transnational crimes. The wording, however, is unnecessarily broad and sets a precedent for further chunks of the Garda's domestic crime-fighting function to be reclassified as European and international cooperation and, hence, more distant from government and democratic control.<sup>68</sup>

These developments facilitate the evolution of the Garda as a constituent of an emerging European security network which is largely insulated from the traditional democratic checks and balances applicable to community policing.<sup>69</sup> In other words, through its role in combating terrorism and organised crime, the Garda is acquiring the capacity to set its own security agenda and to operate autonomously, free from the need for prior direction or oversight from the government, let alone any other democratic checks and balances.

Further evidence of the development of the Garda as an independent centre of power in crime and security matters is provided by another interesting innovation in the 2007–09 statement. The national and international security goal includes an initiative to "develop public/private partnerships to support our national/international security operations". The notion of the Garda entering into private partnerships to pursue national or international security operations raises huge accountability and control issues. There is a very real danger that they could entail Garda policies and practices being shaped by the requirements of powerful and unaccountable private interests at home and abroad. Equally, they could entail Garda powers and resources being applied for the benefit of such private interests. Ultimately, there is a very real danger of the Garda pursuing its own security agenda through such partnerships in a manner which dilutes government control, let alone control by and accountability to the community. In such a scenario, the police may develop the capacity to function beyond the reach of the democratic state.

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68 S. 51 of the Garda Síochána Act 2005 makes provision for gardaí to be assigned for duties outside the state with Europol, law enforcement agencies of other states and international organisations. The 2005 Act and associated regulations will continue to apply to gardaí in the course of such duties. The real problem, of course, concerns accountability and oversight in respect of operations led by these external agencies.

69 See, generally, J Sheptycki, *In Search of Transnational Policing: Towards a sociology of global policing* (Aldershot: Ashgate 2002).

The Garda's annual policing plans generally reflect the style and substance of its associated strategy statements. In many respects, the plans are a vehicle for a more detailed annual roll-out of the goals set out in the statements. Nevertheless, they frequently incorporate new matters which have been projected on to the policing agenda since the preceding statement was formulated. It is also important to note that the annual plans reflect a much more direct ministerial input. Indeed, they actually list the government's policing priorities for the year as communicated to the commissioner by the minister. The fact that these are clearly reflected in the Garda's strategic goals as set out in the plans is confirmation of central political control over policing strategy. This must be qualified, however, by an acknowledgment of a significant change in style and content between the annual plans linked to the 2000–04 strategy statement and those linked to the statements from 2005 onwards.

The annual plans up to and including 2004 reflect some commendable concessions to consensus policing values. In identifying and prioritising the strategic goals for 2003, for example, the plan pays due regard to public preferences as expressed in the Garda Public Attitude Survey of 2002. Several of the public preferences are represented in the choice and ordering of the 12 strategic goals listed for that year. Indeed, the first strategic goal of "ensuring immediate response to emergencies", reflects the top priority in the list of public preferences disclosed by the survey. Nevertheless, the political and security preferences of the government and the Garda organisation are still protected through the inclusion of several such priorities that would not have qualified on public preferences. Significantly, these include state security (goal 8) and immigration (goal 10). Conversely, key consensus policing values, such as respect for the human rights of individuals targeted for Garda action, protecting the exercise of civil liberties, responding to the needs of vulnerable minorities, and tackling Garda corruption and accountability, hardly feature at all.

One of the more attractive features of the annual policing plans up to and including 2004 is the detail offered on the content of the strategic goals. Each goal is accompanied by an explanatory text which sets out the current position with respect to the delivery of Garda services in the subject area in question, as well as an outline of the aims and objectives for the coming year. Performance indicators are also included. The net effect across all 12 strategic goals is to provide a useful insight into the police service being committed to by the Garda in key subject areas in any particular year and across the years from 2000 to 2004 inclusive. That in itself is a major contribution to transparency and, by extension, consensus policing values.

Unfortunately, there is a distinct tilt away from these values in the plans from 2005 onwards. This is most immediately obvious in the changed style. The explanatory materials that embellished and informed the strategic goals from 2000 to 2004 have disappeared from 2005 onwards. They are replaced in each goal by a clinical list of actions or targets to be taken or met over the coming year. No attempt is made to place these in the context of current Garda structures or policies. Nor is any attempt made to relate them to each other or to broader events, or to shed light on how they will be implemented. Indeed, their content and style is so sparse and functional that it is difficult for anyone outside of the relevant management specialists within the Garda to determine their significance.

Another striking change from 2005 onwards is the alignment between the goals in the annual policing plans with those in the strategy statements. The 14 goals of the 2004 policing plan, for example, are replaced by six goals in the 2005 plan. These six goals match the six goals in the strategy statement for 2005–07. This approach has been continued to the present. The net effect is that the democratic legitimacy that was claimed for the plans before 2005 has been jettisoned largely in favour of a mixture of government and Garda

priorities. Significantly, national and international security has been promoted to goal number one, just as it is in the strategy statements from 2005. There is not even the pretence that public attitude surveys have informed the choice and ordering of priorities. On a more positive note it should be acknowledged that at least the contents of the projected actions in the plans from 2005 onwards reflect a heavier emphasis on promoting public confidence and accountability than their predecessors.

### Accountability to the minister

The provisions in the 2005 Act reposing direct political powers over policing in the hands of central government are complemented by an array of provisions which render the Garda Commissioner accountable to the Minister for Justice, Equality and Law Reform. Prior to the Act, the commissioner enjoyed an extraordinary degree of statutory freedom from such accountability requirements, even to the extent of being under no obligation to submit an annual report on the management of the force or the policing of the state.<sup>70</sup> This situation has changed utterly pursuant to the 2005 Act, which imposes a raft of accountability obligations exceeding those applicable to most, if not all, other statutory public bodies.

In addition to the standard obligation to submit an annual report and reports on any matters specified by the minister,<sup>71</sup> the commissioner must submit a three-yearly review of the efficiency and effectiveness of the management and deployment of Garda resources<sup>72</sup> and an annual report on the activities of the Garda's Professional Standards Unit.<sup>73</sup> The commissioner is also under a general obligation to keep the minister and the secretary general of the department fully informed of a number of things, including: significant developments concerning the preservation of peace and public order in the state; the protection of life and property in the state; the protection of the security of the state; and significant developments that might reasonably be expected to affect adversely public confidence in the Garda Síochána.<sup>74</sup>

More striking is the fact that for the first time in the history of the state the commissioner is rendered statutorily accountable to the minister for the performance of his or her functions and those of the Garda Síochána.<sup>75</sup> As if to emphasise the point, the Act states later that the commissioner must account fully to the government and the minister for any aspect of his or her functions.<sup>76</sup> The accounting should be done through the secretary general of the department. It includes a duty to provide on request any document in the power or control of the Garda Síochána, including material in the form of Garda records, statements made by members of the Garda and by other persons, and reports.<sup>77</sup> This is an alarming provision, especially as it does not expressly admit of any exceptions. In effect it places the government in a position whereby it can call on the Garda at any time for any

70 In practice, the commissioner has been submitting an annual report since the 1940s. Up until 1993, however, they were confined to crime data. Since then they have included a rather superficial treatment of aspects of the management and performance of the force generally. In the past few years they have been confined to the latter as responsibility for the publication of crime data has been transferred to the Central Statistics Office.

71 Garda Síochána Act 2005, s. 41(2) and (3).

72 *Ibid.* s. 23.

73 *Ibid.*, s. 24(2). This unit was first introduced by the 2005 Act with a statutory remit to examine and review the operational, administrative and management performance of the Garda at all levels, to propose performance enhancing measures to the commissioner and to promote the highest standards of practice in operational, administrative and management matters within the Garda: s. 24(1).

74 *Ibid.* s. 41(1).

75 *Ibid.* s. 26(3).

76 *Ibid.* s. 40(1).

77 *Ibid.* s. 40(2).

confidential document or record which has been compiled through the use of Garda powers and resources. While there may be situations in which it would be legitimate and proper to place such a power in the hands of government, it must be acknowledged that, in the absence of express limitations, it can also be used for more sinister reasons. In effect this power enables the government and/or the minister to use the Garda as a resource to pursue a partisan political agenda against, or at the expense of, the reputation or welfare of an individual or body.

That this is no fanciful scenario in Ireland is confirmed by the example of the minister accessing Garda intelligence on a journalist which he then supplied to another journalist who used it to publish a story linking the former journalist with suspected IRA activity. The minister followed this up by making a statement in the Dáil which openly alleged that the journalist was engaged in activities that posed a threat to national security.<sup>78</sup> The sinister backdrop to all of this is that the journalist was the Executive Director of the Centre for Public Inquiry, an independent non-governmental body with a mission “to independently promote the highest standards of integrity, ethics and accountability across Irish public and business life, and to investigate and publicise breaches of those standards where they arise”. The centre’s work proved politically embarrassing for the government. As a result of the ministerial intervention, however, the centre lost its primary source of funding and had to close down.

### The Garda Inspectorate

Ireland has come very late to the concept of an independent police inspectorate to oversee standards in police management, equipment, structures, processes and operations.<sup>79</sup> It even came late in the context of the 2005 reforms, as provision for the inspectorate was only added to the Garda Bill at the committee stage in its progress through the Seanad.<sup>80</sup> Prior to the 2005 Act, the inspectorate functions were a matter for the Department of Justice and the Garda Commissioner. In practice, they were left to the latter, as the former did not carry out regular inspections.<sup>81</sup> The 2005 Act changed this arrangement by introducing an independent three-member<sup>82</sup> inspectorate with a statutory remit to:

ensure that the resources available to the Garda Síochána are used so as to achieve and maintain the highest levels of efficiency and effectiveness in its

78 *Dáil Debates*, vol. 612, cc. 381–99.

79 An inspectorate was introduced in England and Wales in the mid-19th century: County and Borough Police Act 1856, s. 15.

80 The minister linked the inspectorate proposal to a Morris Report recommendation that the department must work in conjunction with the Garda Commissioner to address the structural defects and deficiencies outlined in the report, and that the department must be empowered by knowledge in this matter: see *Report on Explosives “Finds” in Donegal*, n. 9 above, para. 13.96. This is a rather tenuous peg on which to hang the introduction of the inspectorate concept.

81 There have been occasional inquiries into aspects of Garda management and operations, e.g. *Report by the Committee to Recommend Certain Safeguards for Persons in Custody* (Dublin: Stationery Office 1978); Commission on the Garda Síochána, *Report on Conditions of Service* (Dublin: Stationery Office 1979); Garda Training Committee, *Report on Probationer Training* (Dublin: Stationery Office 1986); *Report of Committee to Inquire into Certain Aspects of Criminal Procedure* (Dublin: Stationery Office 1990); *Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána* (Dublin: Stationery Office 1997); *Reports of the Morris Tribunal of Inquiry into Certain Gardai in the Donegal Division* (Dublin: Stationery Office 2004–08).

82 Garda Síochána Act 2005, ss. 114–15. The members are appointed because of their professional experience, qualifications, training or expertise and must not be members or former members of the Garda. Currently, the Chief Inspector is Kathleen O’Toole, former police commissioner of the City of Boston. The two members are Robert Olson, former chief of police for the City of Minneapolis, and Gwen Boniface, former commissioner of the Ontario Provincial Police.

operation and administration, as measured by reference to the best standards of comparable police services.<sup>83</sup>

Commendably the inspectorate's reports must be laid before Parliament,<sup>84</sup> although the minister may exclude from them material which in his or her opinion would be prejudicial to the interests of national security or which might facilitate the commission of an offence or prejudice a criminal investigation or jeopardise the safety of any person.<sup>85</sup> To date, the inspectorate has published five reports.<sup>86</sup>

When the inspectorate concept was introduced in England and Wales in the mid-19th century, it was seen as a device to enhance central government control over standards in local police forces.<sup>87</sup> Given the national police force and its subordination to direct government control, there was not the same need for such a device in Ireland. Indeed, its introduction here could even have the effect of diluting government control by opening up an external, independent voice on police management, operations, standards and performance. In reality, however, it is meant to do the reverse. It is perceived as a device to supply the minister and the department with the objective information that they need to ensure the proper functioning of the force.<sup>88</sup> In other words, it removes their dependence on the self-serving information supplied by the Garda Commissioner in these matters and thereby enhances their management capacity in policing matters at the expense of the commissioner. This intention is reflected in the statutory delimitation of the inspectorate's functions and in its subordination to the minister.

Significantly, the Act does not charge the inspectorate directly with the task of carrying out an annual or regular audit of Garda efficiency and effectiveness, or other regular inspections on its own initiative.<sup>89</sup> Instead, it stipulates that the inspectorate shall carry out inspections or inquiries at the request, or with the consent, of the minister.<sup>90</sup> The intention

83 Garda Síochána Act 2005, s. 117(1).

84 Ibid. s. 117(4). The Chief Inspector can also be called before a committee of either House in connection with the subject of a report.

85 Ibid. s. 117(5). It would appear that the Official Secrets Act 1963 applies to inspectorate reports: s. 118(5). Given the scope of prohibitions imposed by that Act, it could be used as a potent restriction on the capacity of the inspectorate to promote open and frank public discussion on weaknesses in Garda management and operations and how they might be remedied.

86 The first concerned practices and procedures for the management of barricade/siege operations: *Review of Garda Síochána Practices and Procedures for Barricade Incidents* (Dublin: GSI (February) 2007). The second addressed senior management structures in the Garda: *Garda Síochána Senior Management Structure* (Dublin: GSI (October) 2006). The third offers a broad critique of the current Garda administration and operations with a view to identifying reforms necessary to bring them into line with best international practice: *Promoting Excellence and Accountability* (Dublin: GSI (August) 2007). The fourth addresses the challenges of roads policing: *Roads Policing Review and Recommendations* (Dublin: GSI (November) 2008). The fifth addresses missing persons: *Missing Persons Review and Recommendations* (Dublin: GSI (March) 2009).

87 County and Borough Police Act 1856, s. 15. As a means of promoting higher standards across the country, it has been described as "one of the greatest inventions of the nineteenth century": J J Tobias, *Crime and Police in England 1700–1900* (New York: St Martin's Press 1979), p. 101.

88 *Dáil Debates*, vol. 597, c. 962.

89 By comparison, in England, Wales and Northern Ireland, HM Inspectorate of Constabulary is statutorily charged with the duty to inspect and report annually on the efficiency and effectiveness of police forces: Police Act 1996, s. 54, and Police (Northern Ireland) Act 1998. Nevertheless, it would appear that over the past two decades the inspectorate has functioned as a vital instrument for the countrywide promotion of central government priorities, policies and standards in policing. See, Jones, "The accountability of policing", n. 36 above; Reiner, *The Politics of the Police*, n. 14 above; and B Golding and S Savage, "Leadership and performance management" in Newburn (ed), *Handbook of Policing*, n. 14 above, pp. 744–7.

90 Garda Síochána Act 2005, s. 117(2). It can also be required to provide advice to the minister with regard to best policing practice.

is that it should examine Garda systems and performance in specific subject areas or over a specified period as requested by the minister from time to time, or as identified by itself and approved by the minister. Its programme of activities is clearly controlled by the minister. Of the five reports prepared to date, two were expressly prepared on the direction of the minister and one was suggested to the minister by the inspectorate, while the derivation of the remaining two is not clear.

While the inspectorate is generally independent in how it carries out any such examination and in the conclusions it reaches or advice that it gives,<sup>91</sup> it is not entirely free from ministerial influence. It is statutorily prohibited from questioning or expressing an opinion on the merits or objectives of any policy of the government or of a government minister.<sup>92</sup> In practice, this may prove a major limitation on the capacity of the inspectorate to deliver an independent and professional assessment of Garda operational and administrative efficiency. Given the degree of central government control over these aspects of the Garda organisation and operations, the inspectorate could find itself politically censored from identifying and recommending remedial measures for practices that fall below the best standards of comparable police services.

In short, the inspectorate concept has the potential to promote higher professional standards in Garda organisation and efficiency and to dilute the ministerial and Garda monopoly in these matters. The body is composed of individuals selected for their international track records in the field. It has produced a number of reports which have already enhanced standards in specific aspects of Garda organisation and practice and whose recommendations, if fully implemented, will produce further dividends. Ultimately, however, its subordination to ministerial direction is likely to stunt its full potential and might even expose it to the risk of being used as a tool to satisfy the short-term political needs of the government of the day.

### Counterbalancing forces

Although this article is focused on the 2005 Act's contribution to the concentration of power in the hands of central government, it is appropriate to acknowledge that it also includes some long overdue provision for a local community input to policing in Ireland. Unlike England and Wales, Ireland has never had a tradition of local input to policing in the form of police authorities.<sup>93</sup> Significantly, there has been a renewed interest in strengthening local input in England, Wales and Northern Ireland over the past decade, at least partly as an antidote to the stifling bureaucratic effects of increasing managerialism and direction from the centre.<sup>94</sup> It should be no surprise therefore, that the centralising forces in the Garda Síochána Act 2005 are accompanied by some concession to local input.<sup>95</sup> This takes the form of committees established at local authority level comprising elected representatives, gardaí and nominees from other public bodies and community

91 Garda Síochána Act 2005, s. 117(7).

92 Ibid. s. 120(2)(a).

93 In the past decade or so, initiatives have been taken on the ground, especially in parts of Dublin, to develop local police–community consultation fora primarily in response to the drugs problem: see Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on Community Policing* (Dublin: Houses of the Oireachtas 2005).

94 See HMSO, *Policing: Building Safer Communities Together* (London: HMSO 2003); *A New Beginning: Policing in Northern Ireland: a report of the Independent Commission on Policing in Northern Ireland* (Belfast: HMSO 1999); McLaughlin, *The New Policing*, n. 56 above, pp. 187–94.

95 While the Act was going through the Oireachtas, the Joint Committee on Justice, Equality, Defence and Women's Rights held hearings and produced a report with recommendations on how police–community engagement could be enhanced: see *Report on Community Policing*, n. 93 above.

groups.<sup>96</sup> Their remit is to advise the local authority concerned and the Garda on how they might improve safety and quality of life and prevent crime, disorder and anti-social behaviour in their area.<sup>97</sup> A committee can also establish neighbourhood committees to pursue these at a more local level.<sup>98</sup> They are expected to sit in public, and they are required to host public meetings on policing in their respective areas.<sup>99</sup>

Given the historical absence of formal provision for local democratic input to policing in the state, these provisions can be seen as a positive development in countering the excessive concentration of police power at national level.<sup>100</sup> It would be a mistake, however, to interpret them as heralding a significant dilution of that power. They are established through the combined actions of the Garda Commissioner and the local authorities, rather than the latter alone.<sup>101</sup> The minister controls their establishment, composition and *modus operandi*, including the choice of what community groups should be represented on them. The minister has exercised this power to create a situation whereby nominees from community groups are a small minority relative to gardaí, Oireachtas members and nominees from the local authorities.<sup>102</sup> Moreover, the ministerial guidelines position the committees as a resource to assist the Garda in delivering national priorities and strategies on crime.<sup>103</sup> Interestingly, they are still a pale version of the local reforms being pioneered in England and Wales which, in turn, represent a dilution of the initial proposals to strengthen community input at the expense of central government direction.<sup>104</sup>

It is also worth mentioning the Garda Síochána Ombudsman Commission that was introduced by the 2005 Act to replace the Garda Síochána Complaints Board. The former provides an independent check on the propriety of Garda actions and omissions. Although aimed primarily at complaints of unlawful and improper conduct on the part of individual gardaí, its existence and operations help ensure that accountability in these matters is not the exclusive preserve of the minister and the Garda Commissioner. Moreover, there is also a novel provision for the Ombudsman Commission to examine and report on a Garda practice, policy or procedure which is generating complaints.<sup>105</sup> Once again, however, it must be acknowledged that even the independent complaints procedure is not fully insulated from the minister or from institutional Garda interests.<sup>106</sup> As was the case with its predecessor,<sup>107</sup> its performance is heavily dependent on the resources that the minister chooses to make available to it. Both the minister and the commissioner can use state security as a trump card to limit the efficacy of an investigation in certain circumstances. Most disappointing of all in this context is the fact that the Ombudsman Commission's

96 See Walsh, *Human Rights and Policing in Ireland*, n. 11 above, pp. 377–83.

97 Garda Síochána Act 2005, s. 36(2).

98 Ibid. s. 36(2)(d).

99 Ibid. s. 36(2)(c).

100 Their potential contribution is enhanced by the Garda practice of producing divisional policing plans.

101 Garda Síochána Act 2005, s. 36(1).

102 The Ionann human rights audit on the Garda Síochána had recommended a strong independent membership of these committees to complement the local authority members: Ionann Management Consultants Ltd, *An Garda Síochána Human Rights Audit* (June 2004), p. 26.

103 See *Garda Síochána Act 2005 Joint Policing Committees Guidelines* (Dublin: Department of Justice, Equality and Law Reform, September 2008).

104 HMSO, *Building Communities, Beating Crime* Cm 6360 (London: HMSO 2004); McLaughlin, *The New Policing*, n. 56 above, pp. 192–4.

105 Garda Síochána Act 2005, s. 106.

106 See Walsh, *Human Rights and Policing in Ireland*, n. 11 above, pp. 340–8.

107 See D P J Walsh, "Twenty years of handling police complaints in Ireland: a critical assessment of the supervisory board model" (2009) 20 *Legal Studies* 305.

power to examine and report on a Garda practice, policy or procedure can be exercised only when requested by the minister. The significance of this restriction was illustrated recently when the commission sought permission to examine the Garda policing of the controversial Corrib gas pipeline project in County Mayo. Not only did the minister refuse permission, but the only explanation he gave was that it was not appropriate for him to request such an examination at that time.

### Conclusion

It is undoubtedly the case that the legislative framework for the Garda Síochána, laid down at its inception in the 1920s, dealt wholly inadequately with the relationship between the force and central government. The paucity of the Act's provisions on this vital subject facilitated the situation whereby the Garda Commissioner could find him or her self autonomous, a ministerial agent of government or somewhere in between in the direction and control of the force. In practice, all three possibilities have featured over the first 80 years of the force, but without any of them delivering credible dividends in terms of transparency and accountability. Given that context, the 2005 Act's contribution of a more comprehensive and detailed governance framework for the force is to be welcomed. Unfortunately, this may not produce significant improvements in transparency and accountability.

The architecture provided by the Act reflects an exceptional concentration of power in the hands of central government. The obfuscation of the previous arrangements has been blown away by: strengthening the government's powers of hire and fire; giving the minister powers to demand reports, to issue directives and to set strategies, priorities, standards and performance targets; and providing the minister with the machinery to assess Garda compliance with his or her own requirements and against international standards. It can be argued, of course, that this unequivocal concentration of power in the hands of the minister will provide a firmer democratic foundation for policing with associated dividends in terms of accountability, transparency and community participation. So far, however, there is no clear evidence that this is happening in practice. The Garda strategy statements and annual policing plans, for example, reflect a heavy bias in favour of government and institutional priorities. While further research is needed before any definite conclusions can be drawn, it seems that the Dáil is still not managing to play a meaningful role in scrutinising and shaping police practices. The joint policing committees are undoubtedly a welcome innovation, but they will never be able to bridge the democratic deficit at the heart of Irish policing on their own. There is immense room for further reform.<sup>108</sup>

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108 See e.g. the arguments for the adoption of pluralised, multi-lateral or nodal conceptions of police governance to replace the state-centred model. Although these arguments have been presented in the context of centralising and managerial tendencies in British policing, they have equal relevance to Ireland post the 2005 Act. See L. Johnston, *Policing Britain: Risk, security and governance* (London: Longman 2000); I Loader, "Plural policing and democratic governance" (2000) 9 *Social and Legal Studies* 323; C Shearing, "A nodal conception of governance: thoughts on a police commission" (2001) 11 *Police and Society* 259.

# Designing a Bill of Rights for Northern Ireland

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## Introduction

This special issue of the *Northern Ireland Legal Quarterly* is dedicated to Professor Tom Hadden. Professor Hadden has been involved in the debate on a Bill of Rights for Northern Ireland over an extended period. He combines both keen scholarly interest with dedicated practical engagement, the latter being demonstrated by his membership on the Standing Advisory Commission on Human Rights (SACHR) and, later, the Northern Ireland Human Rights Commission from 1999–2005. He has put his scholarly resources to use in public life through his efforts to guide the debate on a Bill of Rights.<sup>1</sup> This article is written with the example of Professor Hadden's consummate scholarly work, animated as it is by practical concerns, firmly in mind.

The aim here is to examine the Bill of Rights process in Northern Ireland and unearth lessons that might be derived from it. In order to address this question, three themes are dealt with: first, the history of the process; second, the role of the Northern Ireland Human Rights Commission; and third, debates on rights relating to culture and identity. Our argument is that *any* Bill of Rights must be reflective of international standards *and* pay attention to the particular circumstances of the society within which it will operate if it is to gain recognition and acceptance. The Northern Ireland experience is an example of how this has been attempted in a society seeking to emerge from violent conflict. Ultimately, we offer some arguments as to how the circumstances of Northern Ireland (specifically, ethno-national division) ought to inform the substance of its Bill of Rights.

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1 See e.g. K Boyle and T Hadden, *Northern Ireland: The Choice* (London: Penguin Books 1994), pp. 181–6; K Boyle and T Hadden, *Ireland: A positive proposal* (Harmondsworth: Penguin Books 1985), pp. 80–3; K Boyle, T Hadden and P Hillyard, *Law and State: The case of Northern Ireland* (London: Martin Robertson 1975), note that Chapter 2 of this book is entitled “Civil rights: the failure of law and of lawyers”. See also T Hadden and E Craig, *Integration and Separation: Rights in divided societies* (Belfast: Fortnight Educational Trust 2000).

### History of the Bill of Rights process

The idea of a Bill of Rights for Northern Ireland predates the Belfast (Good Friday) Agreement by over 30 years.<sup>2</sup> The evolution of that idea can be divided into two distinct phases: the pre-Agreement phase and the post-Agreement phase. As we shall see, the content of the proposals for the Bill of Rights differs considerably between these two phases. In the first phase, proposals were generally focused on the classic liberal package of individual equality, civil liberties, and due process rights. In a few cases, these proposals also included rights to proportional representation in Northern Ireland's legislature as part of a political settlement to the conflict.<sup>3</sup> Generally speaking, however, the first phase of proposals was targeted at redressing the legacy of religious and political discrimination in Northern Ireland and the extraordinary measures employed by the state to combat paramilitary violence. By the time of the Agreement in 1998, however, these concerns were being addressed (or would soon be) through other mechanisms, either via ordinary equality legislation or the enactment of the Human Rights Act 1998.<sup>4</sup> Not surprisingly then, proposals for the Bill of Rights in the post-Agreement phase have broadened in scope to include not only classic liberal human rights, but also socio-economic rights. In addition, proposals in the second phase have drawn upon the Agreement's references to principles of "parity of esteem" and "mutual respect for the identity and ethos of both communities", identifying these as values that ought to be reflected in a Bill of Rights for Northern Ireland.<sup>5</sup> Furthermore, the burgeoning development of international minority rights norms, in particular the Council of Europe's Framework Convention for the Protection of National Minorities, has provided a new source of discussion.

#### THE PRE-AGREEMENT PHASE

The first concrete proposals for a human rights instrument particular to Northern Ireland came from Shelagh Murnaghan, a member of the Stormont Parliament, who proposed a Human Rights Bill on 27 May 1964.<sup>6</sup> The Bill would have made it an offence to discriminate against any person "on the grounds of race, creed, colour or political belief", and it would have established a Human Rights Commission to investigate allegations of discrimination. That Bill was defeated on its second reading by a vote of 17 to 23.<sup>7</sup> Later, a separate proposal for a Bill of Rights for Northern Ireland was presented at Westminster to both the House of Lords and the Commons on 12 May 1971 by Lord Brockway and Arthur Latham MP, respectively.<sup>8</sup> In this proposal, the idea of a Bill of Rights was linked to broader reforms geared towards achieving a political settlement to the conflict in Northern Ireland, a link that would persist throughout many of the subsequent proposals, including the Belfast (Good Friday) Agreement in 1998.<sup>9</sup> The original Bill proposed five elements for reform: (1) the prohibition of discrimination on the ground of religion; (2) the right to advocate peacefully for a united Ireland and a prohibition of oaths of allegiance;

2 The first concrete proposals for a Human Rights Bill came in 1964 (see n. 6 below).

3 See nn. 6 and 21 below.

4 For an overview of Northern Ireland equality legislation see C McCrudden, "Equality", in C Harvey (ed.) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart Publishing 2001). The Human Rights Act 1998 came into force on 2 October 2000.

5 Agreement reached in multiparty talks (The Agreement), "Rights, safeguards and equality of opportunity", para. 4.

6 See Northern Ireland Parl. Debs, 27 May 1964, vol. 57, p. 1296.

7 See Northern Ireland Parl. Debs, 16 June 1964, vol. 57, p. 1989.

8 Hansard HC Debs, 12 May 1971, vol. 817, cc. 383-94; HL Debs, 12 May 1971, vol. 318, c. 1067.

9 The Agreement, "Rights, safeguards and equality of opportunity", para. 4.

(3) proportional representation in public authorities; (4) due process rights and the repeal of emergency powers (especially the Special Powers Act); and (5) “that discussions should be authorised between Northern and Southern Ireland”.<sup>10</sup> Although the Bill passed its first reading at the Lords, it was defeated by a Tory three-line whip at the House of Commons and, on 15 June 1971, it was defeated in the Lords on its second reading.<sup>11</sup>

Despite early floundering, the idea of a Bill of Rights for Northern Ireland proved to be both resilient and contagious. This was especially the case in left-wing circles, where the campaign for a Bill of Rights was continued by the Northern Ireland Civil Rights Association (NICRA). NICRA would go on to publish its own draft proposal for a Bill of Rights for Northern Ireland in 1975.<sup>12</sup> But the idea proved to be a popular one in more “mainstream” circles as well. The Northern Ireland Office published a discussion paper in 1972, *The Future of Northern Ireland – A Paper for discussion*, in which it expressed qualified support for a Bill of Rights for Northern Ireland.<sup>13</sup>

Following up on the discussion paper, the Northern Ireland Office returned to the idea of a Bill of Rights in its 1973 report to Parliament, *Northern Ireland Constitutional Proposals*.<sup>14</sup> The report envisaged a “Charter of Human Rights” as part of a comprehensive package of reforms, most of which would later be enacted in the Northern Ireland Constitution Act 1973.<sup>15</sup> Significantly, the report lacked proposals for due process rights and the repeal of emergency powers, focusing instead on issues of equality and discrimination.<sup>16</sup> Specifically, the 1973 report proposed legislative provisions that would prohibit religious or political discrimination in both the use of the assembly’s law-making powers and in the use of executive power.<sup>17</sup> The courts would be given the power to strike down any offending legislation or executive action as *ultra vires* and to grant a range of legal remedies.<sup>18</sup>

Proposals for a Bill of Rights for Northern Ireland continued throughout the 1970s. A committee chaired by Lord Gardiner (the “Gardiner Committee”), was tasked to consider “in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland”.<sup>19</sup> Although beyond its specific mandate, the Gardiner Committee’s report in January 1975 recommended that “[c]onsideration should be given to the enactment of a Bill of Rights” as part of a general political solution to the conflict in Northern Ireland.<sup>20</sup>

In April 1975, NICRA followed up with its own draft proposals for a Bill of Rights.<sup>21</sup> These drew extensively from the International Covenant on Civil and Political Rights

10 HL Bill 157 1970/71. See Hansard HL Debs, 15 June 1971, vol. 320, cc. 538–75, at 539.

11 Hansard HL Debs, 15 June 1971, vol. 320, cc. 538–75. Lord Brockway attempted to reintroduce a partially amended Bill on 23 June 1972, this time limited to the repeal of emergency powers, the prohibition of discrimination on the grounds of religion, the right to advocate peacefully for a united Ireland, and the prohibition of oaths of allegiance. Lord Brockway withdrew his motion, however, after debate persuaded him that the timing was inappropriate. See Hansard HL Debs, 23 June 1972, vol. 332, cc. 531–57, at 557.

12 Northern Ireland Civil Rights Association, Bill of Rights (Northern Ireland) Act 1975 (Belfast: NICRA, 1975).

13 Northern Ireland Office, *The Future of Northern Ireland – A paper for discussion* (London: HMSO 1972).

14 Northern Ireland Office, *Northern Ireland Constitutional Proposals* (London: HMSO 1973).

15 See Northern Ireland Constitution Act 1973.

16 Northern Ireland Office, *Northern Ireland Constitutional Proposals*, n. 14 above, p. 24, para. 91.

17 Ibid. p. 25, para. 95.

18 Ibid. p. 25, paras. 95–6.

19 See *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (London: HMSO 1975).

20 Ibid. para. 21.

21 See n. 12 above.

(ICCPR), which the United Kingdom had signed on 16 September 1968, but did not ratify until 20 May 1976. Several provisions were also more tailored to political disagreement in Northern Ireland. These entailed rights to political expression, including rights to propagate, associate, or advocate for either maintaining Northern Ireland as an integral part of the United Kingdom or for the “establishment of a single parliament for the whole of Ireland”, the right to propagate or advocate “republican” and “loyalist” opinion, as well as the right to “display flags or emblems of any country in friendly relations with the United Kingdom”.<sup>22</sup> In addition, the draft Bill prohibited the requirement of oaths of allegiance that might offend the conscience of anyone who wished to maintain Northern Ireland as part of the United Kingdom, establish “a single parliament for the whole of Ireland”, or advocate one or more sovereign parliaments for Northern Ireland “independent of Westminster”.<sup>23</sup>

Not long after NICRA’s draft Bill was published, the idea of a Bill of Rights for Northern Ireland was the subject of debate in the Constitutional Convention of 1975, where representatives from Northern Ireland’s political parties (excluding Sinn Fein) convened to discuss possible options for a political settlement to the conflict.<sup>24</sup> There, the main unionist parties (who had previously grouped together as the United Ulster Unionist Council to oppose the Sunningdale Agreement) proposed “a general Bill of Rights and Duties to protect the rights of the individual citizen”.<sup>25</sup> The Social Democratic and Labour Party (SDLP) proposed that the European Convention on Human Rights (ECHR) be incorporated into the domestic law of Northern Ireland and that Part III of the Northern Ireland Constitution Act 1973, which outlaws religious and political discrimination, should be retained.<sup>26</sup> The Alliance Party proposed a Bill of Rights based on the Universal Declaration of Human Rights.<sup>27</sup> The Northern Ireland Labour Party preferred that there be a uniform bill of rights throughout the United Kingdom as “an essential badge of common citizenship”.<sup>28</sup> Brian Faulkner’s Unionist Party of Northern Ireland preferred that human rights legislation be enacted locally by the Northern Ireland legislature.<sup>29</sup>

Subsequently, SACHR went on to publish a discussion paper in March 1976.<sup>30</sup> The discussion paper outlined various issues for consideration concerning the scope and application of a Bill of Rights, including the sufficiency of existing protections under domestic law and the ECHR, whether the Bill should apply across the entire United Kingdom or be limited to Northern Ireland, whether or not it could bind Westminster, and whether or not the Bill should be entrenched against regular legislative amendment.<sup>31</sup> The discussion paper also flagged the issue of whether or not there should be a special court tasked with enforcing the Bill of Rights.<sup>32</sup> The paper invited submissions to the Commission on these questions.

Meanwhile, the apparent consensus in favour of a Bill of Rights for Northern Ireland expressed at the Constitutional Convention inspired Lord Brockway to introduce a new

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22 *Report of a Committee*, n. 19 above, p. 9, cl. 9(1).

23 *Ibid.* p. 9, cl. 9(2).

24 See Northern Ireland Constitutional Convention, *Report* (London: HMSO, 20 November 1975).

25 *Ibid.* para. 124.

26 *Ibid.* para. 129.

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 SACHR, *Bill of Rights: A discussion paper* (Belfast: HMSO, 5 March 1976).

31 *Ibid.* pp. 13–15.

32 *Ibid.* p. 15.

draft Bill at the House of Lords in February 1976, drawing in part upon NICRA's draft Bill of Rights of 1975.<sup>33</sup> Lord Brockway subsequently withdrew his motion for a second reading that March, in light of the fact that Lord Wade had already presented a draft Bill that would apply to the entire United Kingdom and because SACHR was in the process of taking evidence with a view to a full report on a Bill of Rights for Northern Ireland.<sup>34</sup> Prior to SACHR's report, however, Lord Brockway presented a revised Bill of Rights on 1 March 1977.<sup>35</sup> His purpose this time was to generate discussion of his proposals. Following the lead of earlier proposals from the SDLP, this Bill marked the beginning of a new impetus to incorporate the ECHR into the law of Northern Ireland. It also took up NICRA's proposal for a special constitutional court that would sit as a panel of five judges. In addition, the Bill provided for derogations in a state of emergency where "the United Kingdom Parliament, or, eventually, a Stormont Parliament, so decided by a three-quarters majority".<sup>36</sup> Lord Brockway withdrew his motion for a second reading on 26 May 1977, after he was satisfied he had generated the desired debate.<sup>37</sup>

When SACHR's report was eventually published in November 1977, it marked a definite change in approach to the idea of a Bill of Rights for Northern Ireland.<sup>38</sup> First, the report noted that the "consensus on the need for a Bill of Rights expressed in the Report of the Northern Ireland Constitutional Convention was more apparent than real".<sup>39</sup> As it explained, an "[e]xamination of the various views expressed by those supporting a Bill of Rights in fact revealed a variety of different approaches and emphases, particularly in relation to the scope and character of the rights and freedoms to be guaranteed and the means by which a Bill of Rights should be enforced".<sup>40</sup> Nevertheless, according to the report, there was a "substantial majority" who favoured the introduction of a Bill of Rights for the entire United Kingdom, as opposed to one limited to Northern Ireland.<sup>41</sup> It noted, for example, that while the SDLP preferred a Bill of Rights as part of an overall constitutional settlement package, it had also accepted the idea of a UK-wide Bill as a viable alternative.<sup>42</sup> The view of many others, however, was that it was "unjustifiable to treat Northern Ireland as a separate part of the United Kingdom requiring a separate Bill of Rights".<sup>43</sup>

The report went on to say that "a substantial body of opinion favoured the incorporation of the European Convention on Human Rights" into the legal system, preferably on a UK-wide level, to be enforced directly by the courts.<sup>44</sup> This was seen to be more practical from both a legal and a political perspective than the alternative of a free-standing Bill of Rights, particularly in the absence of a devolved government.<sup>45</sup> The report did note, however, that, in the event of the restoration of a devolved government, the enabling legislation ought to include "a clear and enforceable Charter of Rights for Northern Ireland", more comprehensive than the ECHR and "framed in the light of

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33 Hansard HL Debs, 26 February 1976, vol. 368, c. 816.

34 Hansard HL Debs, 25 March 1976, vol. 369, cc. 818–39.

35 Hansard HL Debs, 1 March 1977, vol. 380, c. 502.

36 Ibid.

37 Hansard HL Debs, 26 May 1977, vol. 383, cc. 1428–60.

38 SACHR, *The Protection of Human Rights by Law in Northern Ireland* (Belfast: HMSO November 1977).

39 Ibid. p. 25, para. 4.04.

40 Ibid. p. 25, para. 4.05.

41 Ibid. p. 25, para. 4.07.

42 Ibid.

43 Ibid.

44 Ibid. p. 26.

45 Ibid. p. 28, para. 4.17.

whatever at the time seem to be the special needs of the people of Northern Ireland".<sup>46</sup> The report also flagged the clarification and codification of police powers, as well as reforms in administrative law to increase the rights and freedoms of individuals in relation to public authorities, as two possible areas for further rights-based reforms.<sup>47</sup>

Following SACHR's report, subsequent proposals for a Bill of Rights in Northern Ireland throughout the late 1970s and 1980s were generally supplanted by, or subsumed under, the campaign for a Bill of Rights for the United Kingdom as a whole (a detailed account of the wider campaign for a United Kingdom Bill of Rights is beyond the scope of the present discussion).<sup>48</sup> This is not to say that the idea of a Bill of Rights specific to Northern Ireland dropped off the map altogether. The idea was periodically raised in the Commons and the House of Lords throughout the 1980s and early 1990s.<sup>49</sup> SACHR, in its 1990 report on religious and political discrimination, also suggested adopting "legislative or constitutional measures to recognise and accommodate the rights and identities of the two major sections of the community, and possibly other minority groups".<sup>50</sup> In addition, the Committee on the Administration of Justice (a Northern Ireland human rights NGO) continued to campaign for a Bill of Rights for Northern Ireland, eventually publishing its own draft in May 1993.<sup>51</sup> Nevertheless, the Northern Ireland Office ceased to pursue any concrete proposals during the 1980s and the issue received only a passing reference in the Anglo-Irish Agreement of 1985.<sup>52</sup>

#### THE POST-AGREEMENT PHASE

The idea of a Bill of Rights for Northern Ireland began to gain momentum again in the multi-party talks leading up to the Belfast (Good Friday) Agreement. Indeed, at one time or another representatives of every major political party in Northern Ireland have expressed support for the idea of a Bill of Rights for Northern Ireland.<sup>53</sup> Following on from their earlier work, it was also a key element of Professor Hadden's and Professor Kevin Boyle's suggestions for reform in their influential book, *Northern Ireland: The Choice*, published in 1994.<sup>54</sup> Again, as we shall see, this apparent consensus masked several sharp points of disagreement on content. All the same, the political climate in the late 1990s was right for a return to the idea of a Bill of Rights as part of a durable and comprehensive constitutional settlement.

46 SACHR, *The Protection*, n. 38 above, p. 76, para. 10.

47 Ibid. p. 76, para. 15.

48 For a recent overview of the debate see Joint Committee on Human Rights, "Twenty-ninth Report: A Bill of Rights for the UK?" (10 August 2008) HL 165-I/HC 150-I; see also M Zander, *A Bill of Rights?* 4th edn (London: Sweet & Maxwell, 1997).

49 See Hansard HC Debs, 6 May 1980, vol. 984, c. 43W; HC Debs, 25 March 1982, vol. 20, c. 1083; HL Debs, 28 October 1986, vol. 481, cc. 606–8; HC Debs, 10 March 1988, vol. 129, cc. 521–33; HC Debs, 22 June 1989, vol. 155, cc. 479–81; HC Debs, 7 November 1991, vol. 198, c. 232W; HC Debs, 29 October 1992, vol. 212, cc. 1119–20; HC Debs, 17 February 1994, vol. 237, c. 990W; HC Debs, 27 October 1994, vol. 248, c. 787W; HC Debs, 24 October 1994, vol. 248, c. 452W; HC Debs, 11 July 1996, vol. 281, c. 313W.

50 See SACHR, *Second Report: Religious and political discrimination and equality of opportunity in Northern Ireland* (Belfast: HMSO March 1990), p. 89.

51 Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland* (Belfast: CAJ May 1993).

52 Anglo-Irish Agreement 1985, Article 5(a), available at <http://cain.ulst.ac.uk/events/aia/aiadoc.htm>.

53 See Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland through the Years – The views of the political parties* (Belfast: CAJ July 2003).

54 Boyle and Hadden, *Northern Ireland: The Choice*, n. 1 above. The suggestion is also made in *Ireland: A positive proposal*, n. 1 above, p. 83: "These various protections would be given greater force if they were incorporated in a general Bill of Rights for Northern Ireland covering both individual and communal rights . . . Specific reference to the need for such a Bill of Rights . . . should be incorporated in the proposed Anglo-Irish Treaty, as should appropriate provisions for the joint monitoring of performance."

The Agreement provided for the establishment of the Northern Ireland Human Rights Commission, which was to replace SACHR and “advise on the scope for defining, in Westminster legislation” a Bill of Rights for Northern Ireland.<sup>55</sup> Following the Agreement, the Human Rights Commission was established under the Northern Ireland Act 1998.<sup>56</sup> The Commission began its work on the Bill of Rights in 2000. On 1 March 2000, the Human Rights Commission launched a series of outreach measures in an effort to raise awareness and promote discussion of the proposed Bill of Rights. These efforts included training and education, promotional pamphlets, and consultations with political parties, NGOs, women’s groups, and children and young people.<sup>57</sup> The Commission also established nine advisory working groups to produce reports to the Commission on different areas of rights. The areas covered by the working groups were: Children and Young People; Criminal Justice; Culture and Identity; Education; Equality; Implementation Issues; Language, Social and Economic Rights; and Victims’ Rights.<sup>58</sup> Over the next two years, the Commission would receive over 600 written submissions from political parties and non-governmental/civil society organisations.<sup>59</sup>

In September 2001, the Human Rights Commission published its preliminary views in a document entitled *Making a Bill of Rights for Northern Ireland*.<sup>60</sup> It included draft clauses on democratic rights; “rights concerning identity and communities”; equality/non-discrimination; women’s rights; rights to life; freedom from torture, inhuman or degrading punishment; freedom from slavery and forced labour; due process rights; rights of victims; rights to family and private life; rights of children; educational rights; rights to freedom of thought, expression, information, and association; language rights; and socio-economic and environmental rights.

The consultation document quickly attracted criticism from NGOs and political parties from both sides of the communal divide.<sup>61</sup> The two nationalist parties argued that the Commission had adopted an overly individualistic approach to human rights at the expense of guaranteeing parity of esteem for the two main communities.<sup>62</sup> Along with the nationalist parties, the Equality Commission was also concerned that the proposals might even undermine existing equality protections.<sup>63</sup> Others argued that the Commission had exceeded its mandate by including proposals for rights that went beyond “the particular circumstances of Northern Ireland”.<sup>64</sup> Still others argued that the Commission had failed to have sufficient regard for international norms and (consequently) had not gone far enough towards addressing the concerns of disadvantaged groups.<sup>65</sup> The Commission’s

55 The Agreement, “Rights, safeguards and equality of opportunity”, para. 4.

56 Northern Ireland Act 1998, s. 68.

57 See Northern Ireland Human Rights Commission, *Taking Forward a Bill of Rights for Northern Ireland* (Belfast: NIHRC February 2005), pp. 8–11.

58 *Ibid.*, p. 8.

59 See Northern Ireland Human Rights Commission, *Summary of Submissions on a Bill of Rights* (Belfast: NIHRC July 2003).

60 Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland* (Belfast: NIHRC September 2001).

61 See Northern Ireland Human Rights Commission, *Progressing a Bill of Rights: An update* (Belfast: NIHRC April 2004), pp. 8–9.

62 See Sinn Féin, “Submission” 269, [http://www.borini.info/submissions/submission\\_269.pdf](http://www.borini.info/submissions/submission_269.pdf); and SDLP, “Submission” 217, [http://www.borini.info/submissions/submission\\_217.pdf](http://www.borini.info/submissions/submission_217.pdf).

63 The concern here was that the proposed right not to be treated as a member of a particular community might threaten aspects of equality legislation that require monitoring of communal background. See Equality Commission, “Submission” 343, p. 7, [http://www.borini.info/submissions/submission\\_343.pdf](http://www.borini.info/submissions/submission_343.pdf).

64 For an overview of these criticisms, see *Progressing a Bill of Rights* (n. 61 above), p. 9.

65 *Ibid.*

first draft also attracted academic criticisms.<sup>66</sup> Professor McCrudden described the proposals as “woefully under-theorized in the post-Good Friday Agreement context”.<sup>67</sup> One of McCrudden’s key criticisms was that the Commission had failed to explain how its proposals related (or not) to the circumstances of Northern Ireland’s ethno-national conflict and the constitutional settlement thereof.<sup>68</sup>

The Commission continued outreach efforts in order to promote debate on its proposals. Based on these, a second and partially revised set of proposals was published in April 2004, entitled *Progressing a Bill of Rights for Northern Ireland*.<sup>69</sup> These proposals were responsive to some of the criticisms of the Commission’s earlier proposals, particularly with respect to the proposed rights to culture, identity and language. In the meantime, the Commission had also invited and received advice from the Organisation for Security and Cooperation in Europe’s High Commissioner for National Minorities<sup>70</sup> and from experts from the Council of Europe,<sup>71</sup> although the interventions of these organisations attracted further controversy.<sup>72</sup>

Amidst the controversy around the Bill of Rights and the Human Rights Commission, the idea of a roundtable/forum, involving Northern Ireland’s main political parties and various civil society groups was proposed to help build consensus and political support for the work of the Human Rights Commission.<sup>73</sup> The UK and Irish governments endorsed that idea in their Joint Declaration of April 2003.<sup>74</sup> Plans for a roundtable/forum remained stalled, however, while the Northern Ireland Assembly was suspended between 14 October 2002 and 7 May 2007. In the meantime, in February 2005, the Human Rights Commission produced a new progress report for incoming commissioners, *Taking Forward a Bill of Rights for Northern Ireland*, again with some revised proposals for the Bill of Rights.<sup>75</sup> The document was written as a “briefing document” for the new Chief Commissioner and commissioners on progress thus far on the Bill.<sup>76</sup>

The St Andrews Agreement, reached in October 2006, cleared the way for the restoration of Northern Ireland’s devolved government and the establishment of a Bill of Rights Forum.<sup>77</sup> Consultation on the make-up and mandate of the forum was launched on 14

66 See C McCrudden, “Not the way forward” (2001) 52 *NILQ* 372, at 378–9; See also A Morgan, “What Bill of Rights” (2001) 52 *NILQ* 269.

67 McCrudden, “Not the way forward”, n. 66 above, pp. 372–3.

68 *Ibid.* p. 377.

69 *Progressing a Bill of Rights*, n. 61 above.

70 Office of the OSCE HCNM, *Note on the Possible Use of Terminology in the Process of Incorporating Into Domestic Law International Standards for the Protection of Minorities*, 31 January 2003, [www.nihrc.org/index.php?option=com\\_content&task=view&id=53&Itemid=72](http://www.nihrc.org/index.php?option=com_content&task=view&id=53&Itemid=72).

71 A W Heringa, G Malvinerni and J Marko, *Comments by Council of Europe Experts on Certain Aspects of a Future Bill of Rights for Northern Ireland* (Strasbourg: 3 February 2004), [www.nihrc.org/index.php?option=com\\_content&task=view&id=53&Itemid=72](http://www.nihrc.org/index.php?option=com_content&task=view&id=53&Itemid=72).

72 See C McCrudden, “Consociationalism, equality, and minorities in the Northern Ireland Bill of Rights debate: the role of the OSCE High Commissioner on National Minorities”, in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition, and Human Rights* (Oxford: Oxford University Press 2007), pp. 342–52.

73 Professor Brice Dickson, the Chief Commissioner at the time and therefore in a position to know, suggests that the idea for the forum first emerged from the SDLP, see “Where now for the Bill of Rights?”, *Fortnight*, February 2009, p. 11.

74 Joint Declaration by the British and Irish governments, April 2003.

75 *Taking Forward a Bill of Rights for Northern Ireland*, n. 57 above.

76 Professor Monica McWilliams took up the post of Chief Commissioner in September 2005.

77 Agreement at St Andrews, [www.standrewsagreement.org/agreement.htm](http://www.standrewsagreement.org/agreement.htm).

November 2006.<sup>78</sup> The forum itself was established on 12 December 2006,<sup>79</sup> beginning its work on 18 December 2006. The forum consisted of 28 members, 14 from the main political parties of Northern Ireland (three each from the Democratic Unionist Party (DUP), Sinn Féin, Ulster Unionist Party (UUP) and SDLP, and two from the Alliance Party), and 14 representatives from a range of civil society organisations.<sup>80</sup> The forum's inaugural meeting was held on 18 December 2006. Chris Sidoti, Director of the International Service for Human Rights, and a former Australian Human Rights Commissioner, was appointed as the independent Chair of the Bill of Rights Forum on 15 March 2007. Working groups were soon established in various areas to assist the forum in its deliberations. The forum met a total of 17 times, releasing its *Final Report* on 31 March 2008.<sup>81</sup>

The forum's report revealed persistent disagreement amongst the political parties and civil society groups. In nearly every area of rights protection, the report set out divergent and competing approaches, often echoing the disagreements that had previously beset the work of the Human Rights Commission.<sup>82</sup> The DUP and the Catholic Church, although having participated throughout the forum's process, chose to boycott the release of the report in protest over the issue of reproductive rights.<sup>83</sup> Clearly, the forum failed to build consensus as was hoped. The forum was helpful, however, in gauging support for the alternate proposals and clarifying the positions of the political parties and civil society groups. It might also be argued that the *process itself* was of value, particularly in bringing political parties and civil society together to discuss human rights. The work of the forum would provide a reference for the Human Rights Commission's subsequent work in formulating its advice on the Bill of Rights.

### The role of the Northern Ireland Human Rights Commission in finalising the Bill of Rights advice

The establishment of a commission in Northern Ireland was reflective of broader international trends, as well as the dynamics of a peace process. An increasing number of national human rights institutions have emerged in recent times.<sup>84</sup> Discussion continues on the nature and significance of these national institutions, and the existence of other such institutions has been a source of international advice and support for the Commission. The Commission is now only one of three such bodies in the UK, with the Scottish Human Rights Commission<sup>85</sup> and the Equality and Human Rights Commission.<sup>86</sup> The idea of a Bill

78 Northern Ireland Office, *A Forum on a Bill of Rights for Northern Ireland: Consultation paper*, 14 November 2006.

79 Northern Ireland Office, *A Forum on a Bill of Rights for Northern Ireland: Response to consultation*, 12 December 2006.

80 See Bill of Rights Forum, *Final Report* (Belfast: 31 March 2008).

81 Ibid.

82 There was consensus on technical provisions concerning the general limitations to rights (ibid., pp. 165–6), legal standing in relation to the Bill of Rights (ibid., pp. 172–3), legal remedies (ibid., p. 178), harmonisation with and non-diminution from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ibid., p. 179), and government support for the implementation of the Bill of Rights (ibid., p. 186).

83 BBC, “Bill of rights blueprint launched”, [http://news.bbc.co.uk/1/hi/northern\\_ireland/7322501.stm](http://news.bbc.co.uk/1/hi/northern_ireland/7322501.stm).

84 See Bertrand G Ramcharan (ed), *The Protection Role of National Human Rights Institutions* (Leiden/Boston: Martinus Nijhoff Publishers 2005). See also the National Human Rights Institutions Forum's website, <http://nhri.net/>.

85 Established by the Scottish Commission for Human Rights Act 2006.

86 Established by the Equality Act 2006.

of Rights is also no longer confined to Northern Ireland, and has resurfaced again in the British context, with discussions of a UK-wide Bill of Rights and Responsibilities.<sup>87</sup>

As noted, the Northern Ireland Human Rights Commission had the task of consulting and advising on a Bill of Rights. Even such general statements conceal the level of debate around this work. For example, whether the requirement to consult and advise on the “scope for defining” supplementary rights meant work on a Bill of Rights, and if it did, what was intended by that. Should the Commission draft a Bill of Rights? Should it recommend a concise range of additional rights only? What form might the “advice” take? Each element of the Commission’s mandate was subjected to analysis, and the lack of consensus around its meaning suggested at the start the difficulties that would emerge later.

The landmark stages in the process have been mentioned up to the point of the handover of the forum’s recommendations. It is worth focusing now on the final advice, submitted on 10 December 2008, and in particular the process followed to deliver it.<sup>88</sup> In the final phase, much depended on the work of the Bill of Rights Forum. When the forum reported in March 2008, it was then for the Commission to take forward the next step. A decision was taken to set a deadline that would provide additional symbolism – the 60th anniversary of the Universal Declaration of Human Rights. In its submission to the Bill of Rights Forum, the Commission provided a hint of how it viewed the mandate.<sup>89</sup> The submission acknowledged the need for a generous interpretation – and given the constitutional significance of its origins this was a defensible position. It was also recognised, however, that there were real limits to what could gain acceptance. The submission was significant for two reasons.

First, it confirmed that the Commission would be holding to the Agreement’s mandate for the process, and regarded it as important to provide additional clarity on its meaning. There were other options. One option – which might be termed the “literalist” approach – would be to advance a conservative and literal interpretation of the mandate, combined then with the use of the Commission’s more general power to offer advice to government.<sup>90</sup> The advantage of this approach would be to avoid potentially overloading the mandate with provisions its meaning could not accommodate. The disadvantage would be to neglect the “constitutional” significance of a generous interpretation, to accept a narrow reading of the mandate and erode the formal basis for the whole project. In the end, the Commission opted for the “constitutional and human rights” perspective, reading the mandate purposively and inclusively, but recognising the need to justify those rights included with reference to the Agreement’s provisions. Although adopting this view – that the Agreement underpinned the advice – the Commission did, in its final document, include “additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland”.<sup>91</sup> Interpretative limits were acknowledged and it was accepted that elements which did emerge during the process could simply not be accommodated within even the most generous “constitutional” reading of the mandate.

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87 Ministry of Justice, “Rights and responsibilities: developing our constitutional framework” Cm 7577 (Norwich: TSO March 2009). See also Joint Committee on Human Rights, “Twenty-ninth Report”, n. 48 above.

88 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State* (Belfast: NIHRC 2008).

89 Northern Ireland Human Rights Commission, *Submission to the Round Table on a Bill of Rights for Northern Ireland* (Belfast: NIHRC 2006).

90 Northern Ireland Act 1998, s. 69(7).

91 NIHRC, *A Bill of Rights*, n. 88 above.

Second, the Commission sought to outline how it interpreted and viewed the mandate. This signalled a desire to hold close to its prescribed task and attempt to explain the Commission's view of what was intended, a position which was more fully reflected in the final document.

This last point is confirmed when the methodology adopted by the Commission is examined. In June 2008, the Commission agreed a detailed methodology – in the form of guidelines – for discussing the final advice (the Commission had accepted the need for an overarching framework from 2001, when key principles to inform the process were adopted). The approach assisted the Commission in paying attention to the mandate, while also generating a discussion of justifications for the recommendations included. The guidelines start with “particular circumstances”, move on to the legal aspects and the principles of mutual respect and parity of esteem, and also include a section on “the interests of the people of Northern Ireland”.<sup>92</sup> The guidelines then go into more detail on how to deal with the particular circumstances of Northern Ireland, and an interpretation of “reflect the principles of mutual respect for the identity and ethos”, described as “particular elements of the guidelines to which the Commission may have regard in its discussions”.<sup>93</sup> This demonstrated an acute awareness of the need to be able to justify externally the approach adopted (it was generally well received), as well as providing guidance to commissioners facing the challenge of deciding which rights would merit inclusion. If this is considered alongside the scale of the process from 2000, it demonstrates the importance placed by the Commission, from its inception, on promoting a widespread and extensive debate.

The role of the Northern Ireland Human Rights Commission was established via the Belfast (Good Friday) Agreement, and the Northern Ireland Act 1998 refers expressly back to the relevant paragraph, making the connection clear.<sup>94</sup> The St Andrews Agreement 2006, which was of significance in the restoration of devolution and in providing for the creation of the Bill of Rights Forum, did not alter the terms of the process. The two main process elements were to consult and to advise on the scope for defining potential rights. The Commission consulted widely during the eight-year process and the final advice has been submitted. Discussion continues on the adequacy of the consultation, as well as the content and substance of the final advice. The diversity of opinions involved has made the process an extensive and at times highly contested one. We now turn to how debates on rights relating to culture and identity have marked that process and why, in our opinion, the ultimate conclusions of the Commission on these rights embody a coherent and defensible approach to culture, identity, and the accommodation of minorities.

### Debating culture and identity in the Bill of Rights

In an article published in the *Critical Review of International Social and Political Philosophy* in 2007, Professor Hadden observes that the approach to the protection of minorities in international human rights law and political practice tends to oscillate along a continuum, with individual rights on one end and the rights of communities on the other, creating a cyclical progression “rather like a pendulum”.<sup>95</sup> As he explains, this “pendulum effect” is exhibited in the movement from the political philosophies of the American and French revolutions, which stressed the inalienable rights of the individual, through the nationalist and class-based politics of the 19th century and early 20th century, where communal

92 NIHRC, *A Bill of Rights*, n. 88 above, Appendix 1.

93 Ibid.

94 Northern Ireland Act 1998, s. 69(7).

95 T Hadden, “The pendulum theory of individual, communal and minority rights” (2000) 77 *Critical Review of International Social and Political Philosophy* 81.

interests took centre stage, and then back again to an individualistic approach, with the Universal Declaration of Human Rights, following the Second World War.<sup>96</sup> In the 1990s, the pendulum seemed to swing back again, with several international human rights documents focusing on the rights of groups.<sup>97</sup>

A similar pendulum effect can be observed in the debate on rights to culture, identity, and language throughout the latest phase of Northern Ireland's Bill of Rights process. Over the years, the Human Rights Commission and more recently the Bill of Rights Forum have advanced various proposals for rights pertaining to culture, identity, and language. As we will see, these proposals have oscillated between a "generic" and "individualistic" approach to minority rights, on the one hand, and what might be called a "targeted" or "group-differentiated" approach, on the other.<sup>98</sup> According to the generic/individualistic approach, minority rights are ascribed to individuals and are equally accessible to all without any distinction based on membership in this or that group. Conversely, according to the targeted/group-differentiated approach, minority rights are differentiated with reference to the varying circumstances of different types of minorities. The central distinction in a group-differentiated approach is between "new" ethno-cultural minorities on the one hand, and "old" autochthonous or "national" minorities on the other, with different rights being ascribed according to the different types of claims and interests associated with these groups.<sup>99</sup> Now, with the Human Rights Commission's latest advice on the Bill of Rights, the pendulum appears to have swung round in favour of a group-differentiated approach.

As he would likely concede, Professor Hadden's "pendulum theory" is a simplification of a more complex empirical reality. As with the evolution of minority rights in general, many of the proposals in the Bill of Rights debate are not purely individualistic or purely communitarian in character, but often combine aspects of both these paradigms. Indeed, it is a key feature of the group-differentiated approach that it allocates universal individual rights alongside rights that pertain only to certain groups. Moreover, Professor Hadden's description of the "pendulum effect" begs the question: what makes the pendulum move? It is our contention here, at least within the Bill of Rights debate, that the latest movement towards a more group-differentiated approach is driven by the strength of the better argument; the group-differentiated approach to minority rights really is the more desirable and intellectually coherent approach. The alternative rests on the false premise that minority interests are all essentially of the same kind, a view that is insensitive to the actual circumstances of different groups.

Rights to culture, identity and language were controversial from the outset of the latest phase in the Bill of Rights process. On the one hand, the Commission's mandate under the Belfast (Good Friday) Agreement explicitly stated that the Bill of Rights should "reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem".<sup>100</sup> This would suggest that such principles ought to inform the proposed Bill of Rights, perhaps as enforceable provisions in their own right. Furthermore, the emphasis on "both communities" here suggests a "group-differentiated" approach, where special rights

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96 Hadden, "Pendulum theory", n. 95 above, p. 82.

97 As examples, Professor Hadden cites the International Labour Organisation's Convention 169 on Indigenous and Tribal peoples of 1989, the Copenhagen Document of the OSCE of 1990, the UN Declaration on the Rights of Persons Belonging to National or Ethnic Minorities of 1994 and the European Convention on the Protection of National Minorities of 1994. See *ibid.* p. 83.

98 The terminology here is borrowed from W Kymlicka, *Multicultural Odysseys: Navigating the new international politics of diversity* (Oxford: Oxford University Press 2007), p. 77.

99 See W Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Clarendon Press 1995), ch. 3.

100 The Agreement, "Rights, safeguards, and equality of opportunity", para. 4.

attach to the two main communities alongside whatever protections might apply to individuals or other minority groups. As was noted earlier, SACHR, of which Professor Hadden was a member, had previously suggested legislative or constitutional mechanisms along these lines.<sup>101</sup> Professors Hadden and Boyle also seem to endorse such an approach in *Northern Ireland: The Choice* and in *Ireland: A positive proposal*; in the latter work a call is made for a Bill of Rights that would include *both* individual and communal rights.<sup>102</sup> On the other hand, some (including some members of the Commission) have argued that the Bill of Rights should avoid further “entrenching” communal identity and should instead aim to vindicate “the rights of all on an equal basis”.<sup>103</sup> An underlying concern here is that the Agreement’s focus on the “two communities” is flawed and risks reifying ethno-national difference at the expense of individuals who do not fit neatly into either communal box or may feel stronger connections to other “mixed” or “fluid” identities.<sup>104</sup>

For the most part, the Human Rights Commission’s first consultation document, *Making a Bill of Rights for Northern Ireland*, adopted an individualistic and generic approach to minority rights.<sup>105</sup> This approach was supported by the advice of the Culture and Identity Working Group (of which Professor Hadden was also a member), who had recommended that “[r]ights-bearers in the bill should be defined in individualistic terms”, as “persons belonging to national, ethnic, religious, linguistic, cultural or other communities”, and that “[t]he bill should make clear that such rights-bearers are equal and are not confined to ‘both communities’ but extend to persons belonging to a range of communities”.<sup>106</sup>

In keeping with the working group’s advice, the Commission’s only proposal specifically targeted at persons belonging to the two main communities was a right of individuals born in Northern Ireland “to identify themselves and be accepted as Irish or British citizens, or both, as they may so choose”.<sup>107</sup> This right effectively duplicates Article 1(vi) of the Agreement between the UK and the Republic of Ireland.<sup>108</sup> It should also be noted that this provision understands national identity in terms of citizenship, as opposed to guaranteeing a more general right to parity of esteem or equality of treatment as between British and Irish national identities. Otherwise, the Commission’s proposals followed a generic approach. Drawing on Article 27 of the ICCPR, the Commission proposed a provision guaranteeing that “[e]veryone belonging to a national, ethnic, religious or linguistic community shall have the right in common with other members of that

101 See SACHR, *Second Report: Religious and political discrimination and equality of opportunity in Northern Ireland* (Belfast: HMSO March 1990), ch. 8.

102 Boyle and Hadden, *Northern Ireland: The Choice*, n. 1 above; Boyle and Hadden, *Ireland: A Positive Proposal*, n. 1 above, p. 83.

103 Northern Ireland Human Rights Commission, *Making a Bill of Rights*, n. 60 above, p. 19.

104 See Report of the Bill of Rights Culture and Identity Working Group, p. 1; see also Northern Ireland Human Rights Commission, *Making a Bill of Rights*, n. 60 above, p. 19; See also R Taylor, “Northern Ireland: consociation or social transformation?”, in J McGarry (ed.), *Northern Ireland and the Divided World* (Oxford: Oxford University Press 2001), p. 45; see also R Wilson and R Wilford, “Northern Ireland: a route to stability?”, p. 11, <http://cain.ulst.ac.uk/dd/papers/dd03agreview.pdf>. Worth noting in this general context is Professor Brendan O’Leary’s reference to “Professor Hadden (and other liberal unionists) . . .” in a discussion of the flying of flags. See J McGarry and B O’Leary, *The Northern Ireland Conflict: Consociational engagements* (Oxford: Oxford University Press 2004), p. 361.

105 Northern Ireland Human Rights Commission, *Making a Bill of Rights*, n. 60 above.

106 Report of the Bill of Rights Culture and Identity Working Group, p. 12.

107 Northern Ireland Human Rights Commission, *Making a Bill of Rights*, n. 60 above, cl. 1, p. 21.

108 The Agreement, “Constitutional issues”, para. 1(vi).

community to enjoy his or her own culture, to profess and practise his or her own religion and to use his or her own language”.<sup>109</sup>

The proposals also drew substantially from the Council of Europe’s Framework Convention for the Protection of National Minorities. Largely inspired by Articles 4, 5, and 6 of the Framework Convention, the Commission proposed provisions requiring that, with respect to “persons belonging to national, ethnic, religious or linguistic communities”, government and public bodies must promote equality in all areas, promote “the conditions necessary for them to maintain and develop their culture”, and “preserve the essential elements of the identity of such persons, namely their religion, language, traditions and cultural heritage”.<sup>110</sup> In addition, government and public bodies would have a duty to “promote tolerance, mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of their cultural, ethnic, religious or linguistic identity, in particular in the fields of education, culture and the media”.<sup>111</sup>

The Commission also drew upon Article 3(1) of the Framework Convention, proposing a right to self-identify (or not to identify) “as a member of what might otherwise be perceived to be their national, ethnic, religious or linguistic community and no disadvantage shall result from this choice or from the exercise of the rights which are connected to this choice”.<sup>112</sup> To assuage concerns that the right to self-identify might undermine Northern Ireland’s equality monitoring measures (which allow a person’s perceived communal background to be attributed to them where they refuse to identify as such), the Commission proposed a clause stating that the right could not be used “to negate equality commitments, including positive action provisions in the Bill of Rights or in legislation”.<sup>113</sup>

A minority within the Commission felt that this proviso was not enough, and, feeling that the Agreement’s cross-community voting mechanisms were also potentially jeopardised, it recommended including an explicit statement that nothing in the above provisions could be used to “negate voting mechanisms designed to ensure representivity in political institutions and decision-making”.<sup>114</sup> The minority also proposed, as an alternative, a clause requiring government and public bodies to “adopt effective and appropriate measures to ensure: mutual respect for all people in the diversity of their identities and traditions; and parity of esteem and just and equal treatment for the identity, ethos and aspirations of both communities”.<sup>115</sup> It added that the programmatic provisions of the Framework Convention on the Protection of National Minorities would be used as a “guide” to the implementation of that duty.<sup>116</sup>

As was noted earlier, the Commission’s first set of proposals on rights to culture, identity, and language attracted various criticisms. In light of these criticisms, the Commission’s second consultation document, *Progressing a Bill of Rights*, proposed some important changes to the proposals concerning culture, identity, and language rights.<sup>117</sup> First, the generic right to cultural enjoyment, religion and language was to apply to persons “belonging to a national, ethnic, religious or linguistic or cultural minority or

109 Northern Ireland Human Rights Commission, *Making a Bill of Rights*, n. 60 above, cl. 2, p. 23.

110 Ibid. cl. 5, p. 23.

111 Ibid. cl. 5(c), p. 23.

112 Ibid. cl. 4, p. 23.

113 Ibid. cl. 1, p. 23.

114 Ibid. p. 23.

115 Ibid. p. 24.

116 Ibid.

117 Northern Ireland Human Rights Commission, *Progressing a Bill of Rights*, n. 61 above.

community”.<sup>118</sup> The earlier proposal had only referred to “persons belonging to a national, ethnic, religious or linguistic community”. As the Commission explained “[t]he terms ‘minority’ and ‘community’ have both been included in order to avoid any doubt that Catholics/nationalists/republicans or Protestants/unionists/loyalists would enjoy the rights in question”.<sup>119</sup> Similarly, the use of the word “cultural” minority or community was intended to capture both unionism and nationalism, “even if they are not already deemed to be protected by the terms ‘ethnic’ or ‘religious’ minority or community”.<sup>120</sup>

The Commission’s second document also went further in proposing some “group-differentiated” provisions. While the new proposals did not include a specific right to “parity of esteem”, they did include a clause requiring that the law in Northern Ireland “shall ensure just and equal treatment for the identities, ethos and aspirations of both main communities”.<sup>121</sup> The Commission argued that “parity of esteem” was difficult to define, and that, in any case, the phrase “just and equal treatment” captured what was meant by “parity of esteem”.<sup>122</sup> It left the meaning of “identities, ethos, and aspirations” open, to be developed by case-law “if necessary”.<sup>123</sup>

In the area of language rights, the Commission’s second consultation also proposed some “group-differentiated” provisions. There was no consensus on these, so three alternative approaches were laid out. The first approach would have granted equal status to both English and Irish as official languages in Northern Ireland.<sup>124</sup> The second approach would have designated English as the “first official language” and Irish as the “second official language”, leaving it to legislation to prescribe situations in which Irish could be used officially.<sup>125</sup> The third approach was a generic provision, simply stating that legislation would be adopted to “prescribe the situations in which people have the right to use the language of their choice”.<sup>126</sup> Section 14(4) of the proposals also provided for a programmatic duty to enact legislation to meet the commitments to the Irish and Ulster-Scots languages already made in the Belfast (Good Friday) Agreement and the European Charter on Regional and Minority Languages.<sup>127</sup>

The above proposals illustrate some movement in the thinking of the Commission towards a “group-differentiated” approach to minority rights. Nevertheless, the second set of proposals also retained (and arguably strengthened) some of the “individualistic” elements from the earlier proposals. In *Making a Bill of Rights*, the Commission had chosen to adapt Article 3(1) of the Framework Convention as a right to self-identify. That provision was accompanied, however, by a clause to protect equality monitoring schemes and positive action measures. In *Progressing a Bill of Rights*, the Commission chose instead to incorporate the Framework Convention on the Protection of National Minorities wholesale.<sup>128</sup> The Commission explained that its intention was to make the whole of the convention enforceable in Northern Ireland. But this time the Commission’s proposals omitted any limitations clause that would have insulated monitoring and positive action schemes from

118 Northern Ireland Human Rights Commission, *Progressing a Bill of Rights*, n. 61 above, s. 3(3), p. 30.

119 *Ibid.*, p. 32.

120 *Ibid.*

121 *Ibid.* s. 3(2), p. 30.

122 *Ibid.* p. 32.

123 *Ibid.*

124 *Ibid.* s. 14(1), p. 67.

125 *Ibid.*

126 *Ibid.*

127 *Ibid.* s. 14(4), p. 68.

128 *Ibid.* s. 3(4), p. 30.

challenge under Article 3(1) of the Framework Convention. The Commission stated that its understanding was that Article 3(1) would not render such schemes unlawful, but that it would merely give individuals the right “to insist that their chosen community affiliation will be recorded, as well as any perceived community background”.<sup>129</sup>

Despite the movement towards a “group-differentiated” approach seen in the Commission’s second consultation document, the pendulum seemed to swing back towards a generic approach with the Bill of Rights Forum’s *Final Report*.<sup>130</sup> The report’s proposals on culture, identity, and language were divided into two alternative options, reflecting lines of disagreement within the forum. Both options contained a generic right to enjoy one’s culture, profess or practise one’s religion, and use one’s own language.<sup>131</sup> Both options also included a right against “coercive cultural assimilation”.<sup>132</sup> Neither option provided for any rights that would apply specifically to the two main communities, except in the area of language rights, where both options proposed programmatic provisions for public authorities to promote indigenous minority languages.<sup>133</sup> Option A also provided that persons belonging to a linguistic minority or community that is indigenous would have the right to be educated in and, where appropriate, through their language.<sup>134</sup> Option B sought to give recognition to Irish and Ulster-Scots as indigenous languages by granting them “special status”, in line with “the mutual respect for the identity and ethos of both communities and parity of esteem”.<sup>135</sup>

The Human Rights Commission’s final advice pushes the pendulum back again towards a more “group-differentiated” approach.<sup>136</sup> This is not to say that the latest proposals do not also retain many generic rights provisions. As we noted earlier, a group-differentiated approach has room for both generic and group-specific rights. Like the earlier reports, the latest proposals include a generic right of everyone belonging to a national, ethnic, religious, linguistic, or cultural minority to enjoy (individually or in community with other members of their group) their culture, profess or practise their religion, and to speak their own language in private or public.<sup>137</sup> In addition, as in earlier proposals, the advice includes a duty upon public authorities to encourage a spirit of tolerance and dialogue and to promote mutual respect, understanding, and co-operation among all persons in Northern Ireland.<sup>138</sup>

The Commission’s latest advice also retains a basically generic approach to language rights, in the sense that the rights apply without distinction to both indigenous and non-indigenous minority languages.<sup>139</sup> The only aspect of the Commission’s latest proposals to give special recognition to indigenous languages is the requirement that public authorities

129 Northern Ireland Human Rights Commission, *Progressing a Bill of Rights*, n. 61 above, p. 34.

130 Bill of Rights Forum, *Final Report*, n. 80 above.

131 *Ibid.* Option A, cl. 1, p. 67, and Option B, cl. 1, p. 68.

132 *Ibid.* Option A, cl. 3, p. 67, and Option B, cl. 5, p. 69.

133 *Ibid.* Option A, cl. 6, p. 67, and Option B, cl. 7, p. 69.

134 *Ibid.* Option A, cl. 5(a), p. 67.

135 *Ibid.* Option B, cl. 6, p. 69.

136 NIHRC, *A Bill of Rights*, n. 88 above.

137 *Ibid.* cl. 4, p. 41.

138 *Ibid.* cl. 5, p. 41.

139 The latest proposals provide for a right of “[e]veryone belonging to a linguistic minority has the right to learn or be educated in and through their minority language where there are substantial numbers of users and sufficient demand” (*ibid.* cl. 1, p. 42). The latest proposals also provide for a generic right “to access services essential to life, health or security through communication with a public authority, assisted by interpretation or other help where necessary, in a language (including sign language) and a medium that they understand” (*ibid.* cl. 2, p. 42).

must “as a minimum, act compatibly with the obligations undertaken by the UK government under the European Charter for Regional or Minority Languages in respect of the support and development of Irish and Ulster-Scots”.<sup>140</sup> While this does nothing to add to the substance of the obligations under the European Charter for Regional or Minority Languages, it does open up the possibility for the development of a local jurisprudence based on the charter but enforceable by domestic courts.

But alongside generic provisions, the Commission’s latest proposals include rights that are specifically targeted at Northern Ireland’s two main ethno-national groups. Like the earlier reports, the latest proposals include rights to identify as Irish or British or both and to hold either or both British and Irish citizenship, with no detriment or difference in treatment of any kind.<sup>141</sup> The new proposals also include a right against being compelled to take an oath or “to take an oath in a manner” that is contrary to one’s religion or belief, or that requires that one express a belief that one does not hold.<sup>142</sup> Arguably the most “group-differentiated” feature of the Commission’s latest proposals on minority rights is, as in the Commission’s second consultation document, the inclusion of a duty upon public authorities to “fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland”.<sup>143</sup> This last provision marks a clear movement back towards a “group-differentiated” approach, providing a broad basis for a rights-based jurisprudence specifically addressing the communal identities of “both main communities”. Sensitivity to group dynamics in Northern Ireland is also reflected in other sections of the advice. For example, the sections on democratic rights make express reference to the safeguards under the Belfast (Good Friday) Agreement and recommend that equivalent protections be created for the new arrangements for local government.<sup>144</sup> This recommendation on democratic rights relates directly to the particular circumstances of ethno-national division in Northern Ireland.

The final question to be addressed here is why this last movement in the pendulum, the shift back towards a more “group-differentiated” approach, is justified. The answer hinges on recognising that the circumstances of “national minorities” (understood here as autochthonous minorities whose members possess a distinct sense of political community)<sup>145</sup> are different in kind and cannot be adequately addressed under the rubric of generic minority rights. Because generic rights are intended to apply to all minorities they have to abstract from the specific circumstances of these groups. They cannot presume any specific substantive ends, since the substance of the aspirations of different groups (i.e. the degree of language rights, public recognition of political identity, group autonomy, and multicultural integration) will vary considerably between them. In other words, generic minority rights treat all individuals belonging to minorities as having essentially the same interests. Consequently, generic minority rights tend to be framed in negative terms, as rights against state interference with one’s cultural enjoyment or the use

140 NIHRC, *A Bill of Rights*, n. 88 above, cl. 3, p. 42.

141 *Ibid.* cl. 1 and 2, p. 41.

142 *Ibid.* cl. 6, p. 41.

143 *Ibid.* cl. 3, p. 41.

144 *Ibid.* cl. 4, p. 35: “A Bill of Rights for Northern Ireland recognises the safeguards contained in the Belfast (Good Friday) Agreement 1998 for inclusive, proportionate and equitable participation in regional government and recommends, by means to be determined in legislation, equivalent safeguards for local government.”

145 On the distinctiveness of national minorities and the theory behind their constitutional accommodation, see generally S Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004); see also F Requejo, *Multinational Federalism and Value Pluralism* (London: Routledge, 2005); and W Norman, *Negotiating Nationalism: Nation-building, federalism, and secession in the multinational state* (Oxford: Oxford University Press 2006).

of one's own language.<sup>146</sup> Where there are positive obligations imposed on the state, these tend to be framed in a vague and programmatic style, as in a general duty to promote multiculturalism or tolerance.<sup>147</sup>

As Will Kymlicka has argued, rights to cultural enjoyment and programmatic duties to promote multiculturalism might be appropriate to the circumstances of "small and half-assimilated minorities", allowing them "to negotiate their integration into the dominant society with a certain amount of dignity and security".<sup>148</sup> However, these measures do little to address the distinctive concerns of national minorities.<sup>149</sup> In the case of national minorities, the sense of having long-standing ties to a given territory and a distinct sense of political community gives rise to special types of claims.<sup>150</sup> One such claim is the claim to self-determination. With the Belfast (Good Friday) Agreement this issue has now been cast within an agreed constitutional framework, requiring that the governments of the United Kingdom and the Republic of Ireland give effect to the "right of self-determination on the basis of consent" of the people of the island of Ireland as a whole, subject to "the agreement and consent of a majority of the people of Northern Ireland".<sup>151</sup>

But another type of claim arising from the circumstances of national minorities is the claim for equal recognition in the public sphere. The modern state inevitably promotes some construction of collective identity at the expense of other constructions. As Margaret Moore puts it, "state policies, and state boundaries, are necessarily implicated in the recognition (or non-recognition) and reproduction of national groups".<sup>152</sup> Thus, even where there is no discrimination, difference-blind laws and policies can often favour state-centred identities by default.<sup>153</sup> As such, a just and pluralistic public sphere, one in which multiple national identities can peacefully co-exist on fair terms, may require positive schemes of accommodation and recognition with respect to sub-state national identities. This means accommodating national identities in a "group-differentiated" way, doing justice to their distinctive interests alongside those of other ethno-cultural groups.

The parties to the Agreement appear to have recognised this last point in providing that, regardless of which government holds sovereignty over Northern Ireland, public power "shall be exercised with rigorous impartiality", founded, *inter alia*, on the principles of "parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities".<sup>154</sup> So far, however, the approach to the accommodation of culture,

146 See e.g. Article 27 of the UN's International Covenant on Civil and Political Rights.

147 See e.g. Article 6(1) of the Council of Europe's Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995.

148 Kymlicka, *Multicultural Odysseys*, n. 98 above, p. 214.

149 *Ibid.*, p. 216.

150 For example, Kymlicka argues: "All else being equal, national minorities should have the same tools of nation-building available to them as the majority nation, subject to the same liberal limitations. What we need, in other words, is a consistent theory of permissible forms of nation-building within liberal democracies." W Kymlicka, *Politics in the Vernacular: Nationalism, multiculturalism and citizenship* (Oxford: Oxford University Press 2001), p. 29.

151 The Agreement, "Constitutional issues", para. 1.

152 M Moore, *The Ethics of Nationalism* (Oxford: Oxford University Press 2000), p. 18; see also Kymlicka, *Multicultural Citizenship*, n. 99 above, p. 108.

153 See S O'Neill, "Justice in ethnically diverse societies" (2003) 3 *Ethnicities* 369.

154 The Agreement, "Constitutional issues", para. 1(v).

identity, and language in Northern Ireland has been piece-meal, with various and sometimes contradictory strategies being scattered across a range of legislative instruments, judicial rule-making, and government policies.<sup>155</sup>

One of the potential benefits of a Bill of Rights for Northern Ireland then would be its capacity to help bring some coherence and unity to otherwise disparate approaches to culture, identity, and language. This would be the point of including a right to “just and equal treatment for the identity, ethos and aspirations of both communities”. On the symbolic level, this would provide recognition that the accommodation of the Irish/nationalist/republican community in Northern Ireland cannot simply be subsumed under the generic minority rights paradigm. More significantly, however, the right would provide a mechanism to correct imbalances in the way public bodies are either repressive or expressive of national identity in their dealings with people.

### Conclusion

In this article we have used the example of the Bill of Rights process in Northern Ireland to stress the importance of context. Such constitutional measures should draw upon international instruments and experience, but they also need to be crafted in ways that acknowledge the particular circumstances of the society within which they must operate. A Bill of Rights that fails to pay attention to national and local contexts may struggle to gain the grounding needed to function effectively. Any Bill of Rights process which genuinely attempts to produce proposals with this in mind will inevitably provoke disagreement and debate, precisely because it will be facing into societal controversy rather than seeking to avoid it.

We have drawn on the example of the final advice of the Northern Ireland Human Rights Commission to suggest that it is possible to do this in a reasonably coherent and defensible way. In our view, a Bill of Rights can address the main particular circumstance in Northern Ireland – ethno-national division – in ways that accord fully with persuasive modern understandings of culture and identity and which do not hamper the desire to promote full respect for human rights. While we do not expect Professor Hadden to agree with all of our arguments here, we do hope to have persuaded him (and others) that the “pendulum” has indeed swung back again in the right direction.

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155 For a helpful overview of some of these strategies see D Bryan and G McIntosh, “Symbols and identity in the ‘New’ Northern Ireland” in P Carmichael, C Knox, and R Osborne (eds), *Devolution and Constitutional Change in Northern Ireland* (Manchester: Manchester University Press 2007), pp. 125–37.



# The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights process

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I was privileged to work as a research assistant with Tom Hadden in the late 1990s on a project exploring how issues of integration and separation were being addressed both internationally and in other divided societies.<sup>1</sup> At that time it appeared that the idea of Bill of Rights for Northern Ireland would soon become a reality. The Belfast Agreement of 1998 had of course envisaged that the Northern Ireland Human Rights Commission (NIHRC) would

consult and advise on the scope for defining in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience.<sup>2</sup>

The project therefore appeared especially timely and focused in particular on rights guarantees in developing international standards such as the Organization for Security and Co-operation in Europe's (OSCE) Copenhagen Document of 1990,<sup>3</sup> the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, and the Council of Europe's Framework Convention for the Protection of National Minorities 1995. It was clear that these instruments contained principles and goals that were particularly relevant to the developing peace process in Northern Ireland, but their limitations have also come to the fore during the course of the last decade. The Framework Convention has been the focus of particular attention in Northern Ireland and this article examines the unique role that this instrument has played in the Bill of Rights process so far, focusing in particular on the drawbacks of placing too heavy a reliance on the Framework Convention as an instrument that can be easily "incorporated" into domestic law.

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1 T Hadden and E Craig, *Integration and Separation: Rights in divided societies* (Belfast: Fortnight Educational Trust 2000).

2 Strand 3: Rights, Safeguards and Equality of Opportunity, Human Rights, para. 4 (10 April 1998).

3 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990 (hereafter Copenhagen Document).

### The Framework Convention and its relationship to other minority rights instruments

The Conference on Security and Co-operation in Europe (CSCE), now the OSCE, took the initiative in relation to the development of new minority rights norms following the end of the Cold War, including a specific section (s. IV) on questions relating to national minorities in the Copenhagen Document adopted on 29 June 1990. Its contents were reportedly agreed in a mood of “euphoria and optimism” before the minority rights agenda was overshadowed by developments in Yugoslavia and other areas of central and eastern Europe.<sup>4</sup> The UN General Assembly followed with the adoption of a soft-law Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992.<sup>5</sup> It then fell to the Council of Europe to transform “to the greatest possible extent” the political commitments in the Copenhagen Document into legally binding obligations.<sup>6</sup> This transformation process resulted in a weakening of many of the substantive provisions. For example, only the Copenhagen Document refers to the establishment of autonomous administrations as a means of protecting and creating conditions for the promotion of minority identity whereas the other two instruments limit their focus in this area to guarantees of effective participation in decision-making processes.<sup>7</sup> Nevertheless, the similarities between the three instruments remain striking, with considerable overlap in the substantive issues addressed.

Of the three instruments it was only the Framework Convention that was intended to impose legally binding obligations on states. It was therefore perhaps fairly unsurprising that it became the main focus of attention in discussions over the content of provisions addressing culture, identity and language issues in a future Bill of Rights for Northern Ireland. However, the Framework Convention had other unique characteristics. It was, for example, the only instrument to confer a specific right to choose to be treated or not to be treated as belonging to a national minority.<sup>8</sup> Tom Hadden’s support for the inclusion of a right to self-identification in a Bill of Rights for Northern Ireland is well known and it is not my intention to revisit some of the controversy over its proposed inclusion here.<sup>9</sup> Whilst I would concur with the views of three Council of Europe experts that such a provision should not be included if there is no “broad societal consensus” on the issue,<sup>10</sup> criticisms of “forum shopping” on the part of the NIHR in relation to this and other controversial issues appear rather harsh.<sup>11</sup> This is particularly so given that the Framework Convention only came into force in 1998, with the first Opinions on State reports adopted

4 S Roth, “Comments on the CSCE meeting of experts on national minorities and its concluding document” (1991) 12 *Human Rights Law Journal* 330, at 331.

5 UN GA Res. 47/135 of 18 December 1992.

6 “Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism, 9 October 1993” (1993) 14 *Human Rights Law Journal* 373, at 375.

7 Cf. para. 35 of the Copenhagen Document, n. 3 above, with Article 2 of the Minorities’ Declaration and Article 15 of the Framework Convention.

8 Article 3 reads: “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.” Cf. para. 32 of the Copenhagen Document, n. 3 above.

9 C McCrudden, “Consociationalism, equality and minorities in the Northern Ireland Bill of Rights debate: the role of the OSCE High Commissioner on National Minorities” in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition and Human Rights* (Oxford: Oxford University Press 2007), pp. 315, pp. 337–54.

10 Council of Europe Experts, “Comments on certain aspects of a Bill of Rights for Northern Ireland”, DG II (2004), paras 64–5.

11 McCrudden, “Consociationalism, equality and minorities”, n. 9 above, at 340.

by the Framework Convention's Advisory Committee in September 2000. This meant that other bodies, in particular the OSCE's High Commissioner on National Minorities, played an important role in the interim period in providing guidance to states on implementing relevant international norms as well as on their potential incorporation into domestic law.<sup>12</sup>

Tom Hadden's support for the development of more integrative approaches in relation to education and housing is also well known within Northern Ireland. The Framework Convention is unusual in explicitly recognising in Article 5 the value of a state's general integration policy alongside the need "to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity".<sup>13</sup> It is also the only one of the three instruments to make specific reference to interculturalism, requiring states to "encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation" amongst all persons on their territory, in particular in the fields of education, culture and the media (Article 6(1)). It has been observed that Articles 5 and 6(1) of the Framework Convention are amongst the least specific provisions when it comes to imposing obligations on states parties<sup>14</sup> and that they are expressed in the characteristically vague language of the "economic, social and cultural" rights tradition.<sup>15</sup> Yet together they suggest that voluntary assimilation and voluntary separation remain permissible policy options but that measures aimed at the integration of those belonging to national minority groups into the wider society and at the development of dialogue between groups should be encouraged.

Tom Hadden's work on the promotion of integrative approaches at the international level is perhaps less well known in Northern Ireland but is no less significant.<sup>16</sup> He submitted a number of papers on this issue at annual sessions of the UN Working Group on Minorities and it was recognised by the chair, Asbjørn Eide, that discussion of such matters was of major significance for its work in examining possible solutions to problems involving minorities.<sup>17</sup> More recently, Tom was involved in the development of the thematic work of the Advisory Committee established under the Framework Convention on education,<sup>18</sup> which resulted in the adoption of a Commentary on Education by the Advisory Committee on 2 March 2006.<sup>19</sup>

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12 S R Ratner, "Does international law matter in preventing ethnic conflict?" (2000) 32 *New York University Journal of International Law and Politics* 591, at 623–37.

13 Article 5(2) reads: "Without prejudice to measures taken in pursuance of their general integration policy, the States shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation."

14 G Gilbert, "Article 5" in M Weller (ed), *The Rights of Minorities: A commentary on the Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press 2005), p. 153, at p. 154.

15 P Keller, "Re-thinking ethnic and cultural rights in Europe" (1998) 18 *Oxford Journal of Legal Studies* 29, at 31.

16 On the choices between integration and separation, see "Towards a set of regional guidelines or codes of practice on the implementation of the declaration" (paper prepared by T Hadden for the 9th session of the Working Group on Minorities, 12–16 May 2003), UN Doc. E/CN.4.Sub.2.AC.5/2003/WP.1 and T Hadden, "Integration and separation: legal and political choices in implementing minority rights", in N Ghanae and A Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Dordrecht: Martinus Nijhoff 2005), pp. 173–91.

17 E.g. Working Group on Minorities, "Report on its sixth session" (2000), UN Doc. E/CN.4/Sub.2/2000/27, paras 91–2; "Report of the Working Group on Minorities on its seventh session" (2001), UN Doc. E/CN.4/Sub.2/2001/22, para 158 and "Report of an International Seminar on Autonomist and Integrationist Approaches to Minority Protection", Danish Centre for Human Rights, Copenhagen, 3–4 April 2002, UN Doc. E/CN.4/Sub.2/AC.5/2002/WP.1.

18 Advisory Committee on the Framework Convention for the Protection of National Minorities, 23rd meeting, 24–27 May 2005, CoE Doc. ACFC/MR(2005)003, paras 15–18.

19 CoE Doc. ACFC/25DOC(2006)002.

## A critique of the Framework Convention as a tool for the promotion of minority rights

A particularly notable feature of the Framework Convention is the limited use of rights language. This was intentional on the part of the drafters, who were clear that a deliberate choice was made “for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue” rather than “directly applicable” rights.<sup>20</sup> As well as imposing obligations on states in relation to equality and promotion of cultural identity and of mutual respect and understanding (Articles 4–6), the Framework Convention imposes positive obligations on states in relation to the use of minority languages in relations with administrative authorities (Article 10(2)) and the display of traditional local names, street names and other topographical indications (Article 11(3)) as well as in the area of education (Articles 12–14) and in relation to the creation of conditions necessary for effective participation (Article 15). Other provisions in the Framework Convention are merely adaptations of civil and political rights in the European Convention on Human Rights (ECHR), requiring states to respect individual rights and freedoms that “are particularly relevant for the protection of national minorities”,<sup>21</sup> i.e. the rights to freedom of peaceful assembly, association, expression and thought, conscience and religion (Articles 7–9). However, there are some additional rights recognised. These relate to the use of minority languages in public and private (Article 10(1)), names and signage (Article 11), transfrontier contacts and NGO participation (Article 17), the establishment of private educational institutions (Article 13), as well as the learning of minority languages (Article 14(1)).

When it was first adopted, the Framework Convention was generally perceived as a “weak first attempt” at guaranteeing minority rights in Europe<sup>22</sup> with criticism focused in particular on the failure to define the term “national minority”,<sup>23</sup> the vague formulations of many of the substantive provisions and the envisaged enforcement system.<sup>24</sup> Although the Advisory Committee established under the Framework Convention has worked hard to compensate for these deficiencies, the same deficiencies have led to problems in responding to calls for the “incorporation” of the Framework Convention into domestic law. It is submitted that these characteristics are inextricably linked to the decision to adopt a framework convention dealing with minority issues rather than an additional minority rights protocol to the ECHR. Awareness of these deficiencies is therefore crucial to understanding the Framework Convention’s limitations in the context of debates over the content of a Bill of Rights for Northern Ireland.

It is perhaps fairly unsurprising that the Council of Europe, which had toyed with the idea of a minority rights protocol to the ECHR in the past and had developed a strong reputation as Europe’s “human rights watchdog”, was eager to consolidate its own position

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20 Explanatory Report to the Framework Convention, para. 11.

21 *Ibid.* para. 51.

22 G Gilbert, “The Council of Europe and minority rights” (1996) 18 *Human Rights Quarterly* 160, at 189.

23 According to the Explanatory Report (para. 12): “It was decided to adopt a pragmatic approach [to the definitional issue], based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.”

24 For a particularly strong critique, see G Alfredsson, “A frame for an incomplete painting: comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures” (2000) 7 *International Journal on Minority and Group Rights* 291.

within the “new” Europe by developing its own instruments dealing with minority protection issues.<sup>25</sup> The Parliamentary Assembly of the Council of Europe (PACE) had long been a supporter of the idea of such a protocol and proposed special rights going beyond rights to equality and non-discrimination for national and linguistic minorities as early as 1990.<sup>26</sup> The European Commission for Democracy through Law (or the Venice Commission, the Council of Europe’s advisory body on constitutional matters) had, however, made clear its support for the idea of a European Convention for the Protection of Minorities with its own monitoring committee.<sup>27</sup> This prompted PACE to step up its calls for action on the elaboration of an additional protocol to the ECHR<sup>28</sup> and to instruct its own committees to prepare such a protocol as a matter of urgency.<sup>29</sup>

The adoption by PACE of Recommendation 1201(1993) on an additional protocol on the rights of national minorities to the ECHR<sup>30</sup> was in itself a significant event, not least because of the express recognition of the right of an individual belonging to a national minority “to learn his/her mother tongue and to receive an education in his/her mother tongue at an appropriate number of schools and of state educational and training establishments, located in accordance with the geographical distribution of the minority” in Article 8 and of a right to autonomy in Article 11. Its proposal also included a definition of the term “national minority”, which required residence and citizenship of the state as well as the maintenance of “long standing, firm and lasting ties with that state”. These requirements were introduced in order to ensure the exclusion of migrants, who were subject to a separate and more limited protection scheme under the Council of Europe’s Convention on the Legal Status of Migrant Workers.<sup>31</sup> The citizenship requirement also had the effect of excluding many Russian speakers in the Baltic States.<sup>32</sup>

Although it was clear to members of PACE that states would show greater resistance to the idea of an additional protocol to the ECHR with judicially enforceable rights, its ultimate hope was that “the topical nature and the urgency of minority problems, and pressure of public opinion, would convince all in due course of the need for a truly binding legal instrument”.<sup>33</sup> However, it was the view of the Venice Commission, that “flexible, diplomatic solutions applied by a non-judicial body may prove more effective in this tricky field”,<sup>34</sup> which eventually prevailed. The Vienna Declaration, concluded after the summit meeting of the Heads of State and Government in October 1993,<sup>35</sup> instructed the

25 A Bloed, “The OSCE and the issue of national minorities”, in A Phillips and A Rosas (eds), *Universal Minority Rights* (Abo, Finland and London: Abo Akademi University Institute for Human Rights and Minority Rights Group International 1995), p. 113, at p. 119.

26 PACE Recommendation 1134 (1990) on the rights of minorities.

27 ECommDL, “Proposal for a European Convention for the Protection of Minorities”, reproduced in (1991) 12 *Human Rights Law Journal* 269.

28 PACE Recommendation 1177 (1992) on the rights of minorities (4 February 1992), para. 12.

29 Order No 474 (1992) on the rights of minorities (4 February 1992), para. 4.

30 1 February 1993.

31 CETS No 93 (opened for signature 24 November 1977, entered into force 1 May 1983).

32 H Klebes, “Introduction, Draft Protocol on Minority Rights to the ECHR” (1993) 14 *Human Rights Law Journal* 140, at 142, and Rapporteur Mr Worms, “Explanatory Memorandum, Draft Protocol on Minority Rights to the ECHR” (1993) 14 *Human Rights Law Journal* 146, at 146.

33 Klebes, “Introduction”, n. 32 above, at p. 141.

34 Opinion of the European Commission for Democracy through Law on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on Human Rights concerning the rights of minorities CDL-MIN(1992)008e-restr (7 January 1993), para. 4(bb).

35 Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism, 9 October 1993 (1993) 14 *Human Rights Law Journal* 373.

Committee of Ministers “to draft with minimum delay a framework convention specifying the principles which contracting States commit themselves to respect, in order to assure the protection of national minorities”<sup>36</sup> and “to begin work on drafting a protocol complementing the European Convention on Human Rights, in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities”.<sup>37</sup> The swift progress made in the drafting of the Framework Convention for the Protection of National Minorities as well as the decision to suspend work on an additional cultural protocol, which would have required the new rights to be defined “as individual rights of universal application”,<sup>38</sup> have all been well documented,<sup>39</sup> as has the subsequent development of the Framework Convention and the work of the associated Advisory Committee that has surpassed all initial expectations.<sup>40</sup>

In a previous article published in this journal, I examined the monitoring of developments in relation to Irish-language education in Northern Ireland under both the Framework Convention and the European Charter for Regional or Minority Languages.<sup>41</sup> The rest of this article will focus on the role that the Framework Convention has played in the Bill of Rights process so far and will draw in particular on my experiences as legal advisor to the Culture, Identity and Language Working Group of the Northern Ireland Bill of Rights Forum from October 2007 to March 2008.

### The Framework Convention and its relevance to Northern Ireland

The promotion of the Framework Convention for the Protection of National Minorities as an instrument of particular relevance to Northern Ireland appears to have been strongly influenced by discussions on the protection of human rights and constructive approaches to group accommodation and minority protection at the Dublin Peace and Reconciliation Forum in 1996 with a paper on the former produced by Tom Hadden along with Kevin Boyle and Colm Campbell and a paper on the latter prepared by Asbjørn Eide.<sup>42</sup> Whilst it was clearly anticipated at that stage that Irish nationalists in Northern Ireland would be protected as a “national minority” by the limited minority rights guarantees provided under the Framework Convention, what was significant for Unionist politicians at the time was that this was to be done in a way that ensured respect for existing territorial integrity.<sup>43</sup> The appeal of this stipulation to Unionists should not be underestimated. Indeed, it has even been claimed that it was at Unionist insistence that the UK ratified the Framework Convention in January 1998, just three months before the signing of the Belfast Agreement.<sup>44</sup> However, it was later claimed that the British government ratified the

36 Vienna Declaration, n. 35 above, at 375.

37 Ibid. and “Corrigendum” (1994) 15 *Human Rights Law Journal* 248.

38 F Benoit-Rohmer, *The Minority Question in Europe: Texts and commentary* (Strasbourg: Council of Europe 1996), p. 52.

39 One of the earliest attempts to document these developments was made by Benoit-Rohmer, *ibid.* pp. 36–53.

40 On its development, see M Weller (ed.), *The Rights of Minorities: A commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press 2005) and M Weller (ed.), *Universal Minority Rights: A commentary on the jurisprudence of international courts and treaty bodies* (Oxford: Oxford University Press 2007).

41 E Craig, “Irish-language education and the Council of Europe’s minority treaties: the monitoring of developments in Northern Ireland” (2007) 58 *NILQ* 121.

42 Department of the Taoiseach, “Reconvening of Forum for Peace and Reconciliation” [www.taoiseach.ie/index.asp?locID=478&docID=1011](http://www.taoiseach.ie/index.asp?locID=478&docID=1011) (31 March 2009).

43 Article 21. On the influence of the work of this forum on Unionists, see D Nesbitt, “How is Northern Ireland to be Governed?”, speech to the McGill Summer School, 22 July 2004, [www.cain.ulst.ac.uk/issues/politics/docs/uup/dn220704.htm](http://www.cain.ulst.ac.uk/issues/politics/docs/uup/dn220704.htm) (31 March 2009).

44 C Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press 2000), p. 175.

Framework Convention to underline its commitment to tackling “racism and xenophobia” and its consistent stance has been that its interpretation of the term “national minority” is based on the definition of a “racial group” under the Race Relations Act 1976.<sup>45</sup> It has therefore adopted a much broader stance on the definitional issue than most European States, which have restricted the Framework Convention’s scope of application to indigenous minorities. This has led to the peculiar situation whereby the Framework Convention has been used as a lobbying tool by Unionist politicians, who have repeatedly called for its incorporation into domestic law, and by the ethnic minority sector, rather than the Irish (Catholic) minority it was originally envisaged that it would protect.<sup>46</sup>

The Advisory Committee’s recent opinion on the UK provides a clear indication of its acceptance of the UK’s inclusive approach with specific recommendations adopted relating to the Irish language and Ulster-Scots as well as ethnic minorities and the traveller community.<sup>47</sup> The committee has also made recommendations in relation to the further development of integrated approaches to housing and education (under Article 6) and in relation to employment monitoring (under Article 3) in Northern Ireland. This implies that relations between the two main communities are considered to come within the ambit of the Framework Convention. However, what is not clear is whether the Protestant majority can also claim the protection of the rights guaranteed therein. To some extent this is a moot point at the international level, as speakers of Ulster-Scots are clearly protected under the Framework Convention and guarantees in relation to religion go no further than the guarantees provided under the ECHR and the Human Rights Act 1998. Nevertheless, it is possible that Protestants in Northern Ireland might in the future argue that they are not able to participate effectively in cultural, social and economic life and in public affairs as required under Article 15 and that measures altering the proportions of the population of certain areas are aimed at restricting their rights and freedoms contrary to Article 16.

The initial stance of the NIHRC and of Tom Hadden, who was probably at that time the commissioner with the most expertise in the area, was that the Bill of Rights should include some specific guarantees for the two communities along the lines of the commitments made in the Belfast Agreement and that relevant provisions of the Framework Convention should be incorporated with a view to guaranteeing the rights of members of *all communities*.<sup>48</sup> These included the right of individuals born in Northern Ireland “to identify themselves and be accepted as Irish or British citizens, or both, as they may so choose” and it was suggested that the Bill of Rights might also include a right to choose to be treated or not to be treated as a member of a particular community and a general right to culture, religion and language. In addition, it was envisaged that government bodies would adopt effective and appropriate measures to meet the objectives of Articles 4–6 of the Framework Convention (on equality, minority identity and tolerance). The NIHRC’s 2004 Consultation Document was different in a number of respects.<sup>49</sup> To give effect to the references to parity of esteem in the Belfast Agreement, it proposed in s. 3(2) that: “The law of Northern Ireland shall ensure just and equal treatment for the identities

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45 HC Debs, 23 February 1999, c. 298. The Race Relations Act defines a racial group as “a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origins”.

46 For further information on the Unionist position, see D Nesbitt, “The particular circumstances, the Ulster Unionist Party’s position”, paper submitted to the Northern Ireland Bill of Rights Forum (15 October 2007), pp. 3–7.

47 Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on the United Kingdom, adopted on 6 June 2007, ACFC/OP/II(2007)003.

48 NIHRC, *Making a Bill of Rights for Northern Ireland* (Belfast: NIHRC, September 2001), s. 3.

49 NIHRC, *Progressing a Bill of Rights* (Belfast: NIHRC April 2004), s. 3.

and ethos of both main communities.” It also provided that: “The law of Northern Ireland shall guarantee the rights conferred on minorities, and on individual members of minorities, by the Framework Convention for the Protection of National Minorities.” However, the right to choose to be treated or not to be treated as a member of a particular community was this time omitted.

The NIHRC’s stance in the 2004 Consultation Document was influenced not just by the responses it had received to its initial proposals but also to comments it had received from three Council of Europe experts on certain aspects of a future Bill of Rights for Northern Ireland.<sup>50</sup> For example, the view of the experts had been that the issue of self-identification would be best dealt with outside of the context of the Bill of Rights project<sup>51</sup> and they also suggested that it might be appropriate to include a general clause stipulating that: “The law of Northern Ireland shall give effect to the Framework Convention for the Protection of National Minorities.”<sup>52</sup> In relation to language rights, the view of the Council of Europe experts was that it would be sufficient to provide that: “Language rights will be protected through legislation to implement the commitments made under the Belfast (Good Friday) Agreement, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.”<sup>53</sup> The experts considered that the detail could then be expanded upon in future legislation.<sup>54</sup> However, the stance of the NIHRC in its 2004 consultation document was that certain rights for all linguistic minorities in Northern Ireland should be included as a basic minimum (for example, the right to communicate with any public body through an interpreter, translator or facilitator when necessary for the purpose of accessing information or services essential to his or her life or security and the right to be educated in and through their language where there are substantial numbers of users and sufficient demand).<sup>55</sup> It was clearly not intended that such rights would be restricted to speakers of the indigenous languages, that is Irish, Ulster-Scots and British and Irish sign language.

### The Framework Convention and the work of the Northern Ireland Bill of Rights Forum<sup>56</sup>

To some extent the establishment of the Northern Ireland Bill of Rights Forum in December 2006 was regarded as an opportunity for a fresh start with the Bill of Rights process, yet its members failed to produce agreed recommendations that could be used to inform the NIHRC advice to the government. This article does not intend to criticise the process, although a number of criticisms could be made in that regard, but rather to focus instead on the role of the Framework Convention as a “false friend” to those involved in discussions over the content of a Bill of Rights for Northern Ireland. A lot of the discussions over the Framework Convention in the forum took place within the Culture, Identity and Language Working Group, with a lot of initial enthusiasm within the working group for the principles in the Framework Convention and for the idea of its incorporation into domestic law. This clearly might have been appropriate had an additional minority rights protocol to the ECHR been adopted with the inclusion of rights that were clearly

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50 Council of Europe Experts, “Comments”, n. 10 above.

51 Ibid. para. 69.

52 Ibid. para. 55.

53 Ibid. para. 75.

54 Ibid. paras 57–60, 70.

55 NIHRC, *Progressing a Bill of Rights*, n. 49 above, s. 14.

56 On the Bill of Rights Forum’s work more generally, see [www.billofrightsforum.org/index/what\\_we\\_do.htm](http://www.billofrightsforum.org/index/what_we_do.htm) (31 March 2009).

intended to be justiciable. However, it will be recalled that the Framework Convention makes fairly limited use of rights language and, in fact, refers to a number of rights already protected under the ECHR. It is therefore significant that minority issues are increasingly being addressed under these and other rights provisions in the ECHR, including the education rights in Article 2 of the First Protocol.<sup>57</sup> A more appropriate starting point might therefore have been to start with identifying relevant gaps in the ECHR, drawing as appropriate on provisions of other international instruments and domestic constitutions. For example, it has been generally recognised that a minimal minority rights guarantee in relation to the enjoyment of culture and the use of minority languages should be included using a formulation similar to that found in Article 27 of the International Covenant on Civil and Political Rights 1966 and in Article 2 of the UN Minorities' Declaration.

It was clear from the outset that any general reference to the need for the law to give effect to the Framework Convention would require a clear identification of groups coming within the scope of its protection and would require a decision to be made about whether the term "minority" or the term "community", which is used in the South African Constitution,<sup>58</sup> is more appropriate in the context of Northern Ireland. These of course were not the only issues being addressed within this particular working group, which also discussed questions relating to education as well as looking at the controversial issue of parades. It is therefore unfortunate that insufficient time was given for proper consideration of these issues within the forum plenary. In particular, consideration could have been given to the stance of the Venice Commission in relation to Belgium, namely that

it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, *de iure* or *de facto*, in a dominant or co-dominant position

with co-dominance to be assessed not only at state but also at sub-state (that is regional and local) levels.<sup>59</sup> This might have led to a more meaningful discussion over which communities in Northern Ireland are considered most vulnerable and in particular need of the protection of the minority rights guarantees contained therein.

Whilst international law does not appear to provide a clear answer to the question of whether the two main communities in Northern Ireland could or should be covered under the minority protection provisions of the Framework Convention, what is clear under international law is that preferential treatment for the speakers of indigenous languages and measures to promote such languages are justified. This is particularly apparent in the European Charter for Regional or Minority Languages of 1992, which in Article 1 defines regional or minority languages as languages "traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population" and which expressly excludes the languages of migrants. Meanwhile it is recognised in the Commentary to the UN Minorities' Declaration that "old" minorities

57 On minority rights jurisprudence generally under the core human rights treaties, see A Moucheboeuf (ed.), *Minority Rights Jurisprudence* (Strasbourg: Council of Europe 2006) and Weller (ed), *Universal Minority Rights*, n. 40 above. On minority education rights, see E Craig, "Accommodation of diversity in education: a human rights agenda?" (2003) 15 *Child and Family Law Quarterly* 279, at 281–7.

58 S. 31 reads: "Cultural, religious and linguistic communities: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

59 Venice Commission, "Opinion on Possible Groups to Which the Framework Convention for the Protection of National Minorities Could be Applied in Belgium" (8–9 March 2002), CoE Doc. CDL-AD (2002) 1.

will often have stronger entitlements than the “new”.<sup>60</sup> This is also essentially the position under the Framework Convention, as some of its provisions impose obligations only in relation to areas inhabited by persons belonging to national minorities “traditionally” or “in substantial numbers” (for example, Article 10(2) on the use of minority languages in relations with administrative authorities and 14(2) on minority language education). According to the Explanatory Report to the Framework Convention: “It was considered preferable to adopt a flexible form of wording which will allow each Party’s particular circumstances to be taken into account.”<sup>61</sup>

The differential treatment of indigenous and immigrant minorities has of course been subject to much philosophical debate and is generally considered to be one of the most significant aspects of Will Kymlicka’s liberal theory of minority rights.<sup>62</sup> It is also the aspect that has attracted the most criticism, in particular his assertion that immigrants have voluntarily relinquished the right to live and work in their own culture through immigration.<sup>63</sup> Nevertheless, the argument that such a distinction should be drawn, particularly in relation to the recognition of official language or promotion-orientated rights, is one that remains attractive even to critics of his normative position.<sup>64</sup> For example, Alan Patten has argued that “consent is not the operative normative principle in generating the immigrant/national group dichotomy”<sup>65</sup> but suggests instead that the “operative normative” principles should be the interests of the receiving society “in securing the conditions of a democratic society orientated around the realization of a scheme of justice” and “in maintaining their own languages, as sources of identity, pride, comfort, cultural heritage, connection with the past, and so on”.<sup>66</sup> A proposal that would have given a stronger entitlement in relation to Irish-language education than to education in other minority languages was considered within the working group. However, even this proposal was not accepted within the forum plenary with objections expressed against the idea of any kind of hierarchy in relation to the protection of indigenous and non-indigenous languages.

### Conclusion

Perhaps unsurprisingly, the NIHRc played it fairly safe in the advice it submitted to the Secretary of State on 10 December 2008, particularly in relation to language, culture and identity issues.<sup>67</sup> The term “minority” was preferred to the term “community”, there was no inclusion of a general right to self-identification<sup>68</sup> and it was recommended that “the

60 A Eide, “Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, UN Doc. E/CN.4/Sub.2/AC.5/2001/2, para 11. The commentary was endorsed by the UN Working Group on Minorities, “Report on its tenth session”, UN Doc. E/CN.4/Sub.2/2004/29 para. 66(2)(b).

61 Para. 66.

62 He defines national minorities as “distinct and potentially self-governing societies incorporated into a larger state”. W Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Clarendon Press 1995), p. 19; P Keller, “Justice and ethnicity” (1996) 59 *Modern Law Review* 903, at 911–12.

63 For an insight into the nature of some of these criticisms, see Keller, “Justice and ethnicity”, n. 62 above, at 913–15; B Barry, *Culture and Equality* (Oxford: Polity Press 2001), pp. 217–20; and A Patten, “Who should have official language rights?” (2006) 31 *Supreme Court Law Review* 101, at 105–07.

64 For an early defence of this position, see H Kloss, “Language rights of immigrant groups” (1971) 5 *International Migration Review* 250, at 259–62.

65 Patten, “Who should have official language rights?”, n. 63 above, at 114.

66 *Ibid.* at 110.

67 NIHRc, “A Bill of Rights for Northern Ireland: advice to the Secretary of State for Northern Ireland” (10 December 2008), pp. 41–2.

68 However, it is proposed that the people of Northern Ireland should have the right “to identify themselves and be accepted as Irish or British or both”.

right to learn to be educated in and through their minority language where there are substantial numbers of users and sufficient demand” be applied to all linguistic minorities, although there is at least a reference to the requirement for public authorities to act compatibly with the UK’s obligations under the European Charter for Regional or Minority Languages in respect of Irish and Ulster-Scots.<sup>69</sup> What is particularly notable is how few references there are in the NIHRC’s advice to the Framework Convention<sup>70</sup> with references made instead to the right to culture, language and identity and to recognition of the need for the state to develop a spirit of tolerance and dialogue under Articles 1 and 2 of the UN Minorities’ Declaration and to paragraph 34 of the Copenhagen Document, which addresses minority language education issues.<sup>71</sup> This accords with the argument presented here that the Framework Convention is not an instrument that can simply be transplanted into domestic law and that calls for its incorporation raise a number of complex issues that have not yet been adequately addressed by relevant parties and sectors in Northern Ireland. The points made by Tom Hadden and others in the context of the Bill of Rights process both about the potential tension between the right to self-identification and current equality legislation and about the scope of the Framework Convention raise important issues that it is to be hoped that civil society and politicians in Northern Ireland will be ready to address once a Bill of Rights for Northern Ireland is in place. In the meantime, it is clear from the number of recommendations made by the Framework Convention’s Advisory Committee addressing the situation of a range of different groups in Northern Ireland that effective local, national and international monitoring remains crucial.

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69 NIHRC, “A Bill of Rights”, n. 67 above, pp. 41–2.

70 References are made in passing alongside other international instruments at *ibid.* pp. 101 and 105.

71 *Ibid.* pp. 101–2 and 104–5.



# Many years on in Northern Ireland: the Diplock legacy

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The increased attention given to how states should respond in the wake of the “global war on terrorism” makes it an opportune time to re-focus attention on the strategies that have been deployed in the past to deal with civil disorder and terrorism. The Northern Ireland conflict can be a useful laboratory in this respect.<sup>1</sup> Tom Hadden has devoted considerable energy throughout his professional life to research and commentary on various aspects of the conflict. Much of this work is to be found in the pages of the *Fortnight* magazine which he helped to edit for many years. But it was in an extremely productive collaboration with Kevin Boyle and Paddy Hillyard that we find the most searching critique of the various strategies adopted by the Stormont and British governments in the early years of the conflict as it arose out of the civil rights movement and progressed into a full-scale emergency. The collaboration resulted in three influential publications, *Justice in Northern Ireland – A study in social confidence*, *The Law and State: The case of Northern Ireland* and *Ten Years on in Northern Ireland: The legal control of political violence*.<sup>2</sup>

Looking back now at a time when debate about responses to terrorism has broadened far beyond the confines of Northern Ireland,<sup>3</sup> a number of observations can be made about this work. First of all, one is struck by the depth and sophistication of the analysis. Written from a civil libertarian standpoint with a view to influencing the course of events as they were happening, the work remains a magisterial case study on what happens to law when the state is challenged and its legitimacy is called into question. The study was

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1 See e.g. C Campbell, “Wars on Terror’ and vicarious hegemony: the UK, international law, and the Northern Ireland conflict” (2005) 54 *ICLQ* 321.

2 T Hadden and P Hillyard, *Justice in Northern Ireland – A study in social confidence* (London: Cobden Trust 1973); K Boyle, T Hadden and P Hillyard, *The Law and State: The case of Northern Ireland* (London: Martin Robertson 1973) (hereafter referred to as *Law and State*); *Ten Years On in Northern Ireland: The legal control of political violence* (London: Cobden Trust 1980) (hereafter referred to as *Ten Years On*).

3 A large literature has been building up: see O Gross, “Chaos and rules” (2003) 112 *Yale LJ* 1011; C R Sunstein, “Minimalism at war” (2004) *Supreme Court Review* 47; B Ackerman, “The emergency constitution” (2004) 113 *Yale LJ* 1029; D Dyzenhaus, *The Constitution of Law – Legality in a time of emergency* (Cambridge: Cambridge University Press 2006), O Gross and F Ní Aoláin, *Law in Times of Crisis – Emergency powers in theory and practice* (Cambridge: Cambridge University Press 2006); E Posner and A Vermeule, *Terror in the Balance: Security, liberty and the courts* (Oxford: Oxford University Press 2007).

informed by painstaking empirical investigation of the outcome of samples of cases and a survey of social attitudes, long before socio-legal empirical research and social attitude surveys had become fashionable in the legal academy and the world of social science.

Another observation that may be made is that the models that Boyle, Hadden and Hillyard used to describe the various strategies that may be pursued are as applicable today as they were then. Towards the end of *Ten Years On* they describe a war model, a detention model and a criminal prosecution model and illustrate how semblances of all three models could be evidenced at various stages of the conflict.<sup>4</sup> Similar models may be used to characterise the responses that are to be seen to today's "war on terror".<sup>5</sup> At their heart there is a tension between dealing with the conflict through war and other extra-legal means and dealing with it through the rule of law, what Boyle, Hadden and Hillyard characterised as a "security" response and a "due process" response.<sup>6</sup>

A third observation relates to the enduring nature of the non-jury Diplock courts which came to reflect the dominant security approach that the British adopted towards the conflict after the failings of internment without trial. These have outlasted the "troubles" and become an almost permanent feature of the anti-terrorist landscape in the post-conflict context of Northern Ireland today. The appointment of the Diplock Commission in 1972 represented the beginning of a new strategy which later became known as "criminalisation", whereby paramilitary offenders would be processed through the criminal courts rather than through extra-legal procedures.<sup>7</sup> This strategy meant that the nature of the conflict between the IRA and the British government was re-cast by the British as a threat from criminals rather than a threat from political and military forces. But as Boyle, Hadden and Hillyard chronicle in their work, the policy got off to a bad start as the Diplock Commission failed to make a clear enough distinction between extra-judicial and judicial means of defeating violence. In their view, the Diplock Commission saw its task as one of remedying certain loopholes and inadequacies in the ordinary courts rather than improving the standards of justice being achieved in the courts.<sup>8</sup> The twin-track policy it recommended of continuing detention without trial while trying to encourage the use of the criminal courts was never accepted by the nationalist population. The criminalisation policy ultimately failed and the Belfast Agreement which emerged in 1998 recognised the political aspect to the conflict by permitting the release of all prisoners convicted under the Diplock system.

Yet the Diplock system has not only survived the conflict, it has also survived the post-conflict process. At the time of the publication of a later study of the Diplock courts when Northern Ireland was entering a new phase of more relative peace, it was surmised that the non-jury Diplock trial system no longer carried the same air of permanence as it had during the years of the conflict.<sup>9</sup> Calls had been made and still are made for the

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4 Although the authors acknowledged that the British have always ruled out the adoption of a full-scale war model as a serious policy option, they considered that in the period between December 1977 and November 1978 the army appeared to experiment with a "shoot on sight" policy. See *Ten Years On*, n. 2 above, p. 101.

5 Cf. the various "accommodation models" described by Gross and Ni Aoláin, *Law in Times of Crisis*, n. 3 above. See most recently International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva: ICJ 2009).

6 *Law and State*, n. 2 above, p. 120.

7 For accounts of the "criminalisation" strategy, see *Ten Years On*, n. 2 above, pp. 31–2; T Hadden, K Boyle and C Campbell, "Emergency law in Northern Ireland: the context" in A Jennings (ed.), *Justice under Fire: The abuse of civil liberties in Northern Ireland* (London: Pluto Press 1988), pp. 8–10.

8 *Law and State*, n. 2 above, p. 95.

9 J Jackson and S Doran, *Judge without Jury: Diplock trials in the adversary system* (Oxford: Oxford University Press 1995), p. ix (hereafter referred to as *Judge without Jury*).

dismantling of the entire Diplock regime.<sup>10</sup> Yet although political and legal institutions have been transformed in Northern Ireland as a result of the Belfast Agreement, the Diplock courts remain intact. This is not to say that considerable changes have not been made to the emergency regime in the pre-trial process. Many of the emergency procedures that operated in the interrogation room, including the special rules governing the admissibility of confessions, have disappeared and been replaced by “normal” procedures. The “scheduling” mechanism which determined whether cases were destined for Diplock trial has also been replaced by a greater presumption in favour of trial by jury.<sup>11</sup> But the non-jury system remains intact and, indeed, as a method of trial would seem to be growing in acceptance in neighbouring jurisdictions.<sup>12</sup>

This article seeks to explain the continuing survival of the Diplock system and the legacy that it has left as a means of defeating political violence and terrorism. It will be argued that, despite its inauspicious beginning, a combination of legal professional norms and ethics and exposure to international human rights norms prevented the trials from descending into a rubber stamp for security initiatives. A number of the reforms recommended by Boyle, Hadden and Hillyard have been brought into force but there continue to be defects in the manner in which cases are allocated for Diplock trial. The article first examines the Diplock solution and how the security response associated with it led to a series of security initiatives by the state that undermined due process. It next examines the responses that were made to these initiatives by the paramilitaries, the legal profession, the judiciary and human rights organisations. Finally, the article assesses the future of the Diplock courts as a method of combating terrorism and argues that the method of allocating cases to non-jury trial continues to exemplify the dominance of a security approach over a due process approach.

### The Diplock solution

Until the establishment of the Diplock Commission, internment under the Special Powers Act which dated back to 1922 represented the primary method of dealing with terrorism in Northern Ireland. It was used periodically throughout the history of Northern Ireland by the devolved Northern Ireland Unionist government, most pervasively in 1971 when large numbers of republican suspects were interned in response to the growing campaign of violence mounted by the IRA.<sup>13</sup> This strategy badly backfired, as it had the effect of escalating the violence, and when the British government took direct control of Northern Ireland affairs in March 1972 its initial objective was to phase out the system while seeking a political solution to the violence by negotiation with the IRA and loyalist groups.<sup>14</sup> When

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10 See S C Greer and A White, *Abolishing the Diplock Courts* (London: Cobden Trust 1986). Abolition has been called for by a number of human rights groups. See, most recently, British Irish Rights Watch, *Response to Government Consultation Paper on Retention of the Diplock Courts* (London: British Irish Rights Watch 2009).

11 The call for such a presumption to operate in the Diplock system was made repeatedly by various bodies throughout the operation of Diplock courts. See J Jackson and S Doran, “Diplock and the Presumption Against Jury Trial: a critique” (1992) *Criminal Law Review* 755. But it was not put into effect until 2007 with the passage of the Justice and Security (NI) Act 2007.

12 See Part 7 of the Criminal Justice Act 2003, which makes provision in England and Wales as well as in Northern Ireland for applications for certain fraud cases and cases where there is evidence of a real and present danger of jury tampering to be tried without a jury by judge alone. For commentary see S Doran, “Trial by judge alone” in *Montgomery and Ormerod on Fraud: Criminal law and procedure* (Oxford: Oxford University Press 2009), ch. C5.

13 For discussion of the internment process under the Civil Authorities (Special Powers) Act (NI) 1922, see J McGuffin, *Internment* (Tralee: Anvil Books 1973); D Lowry, “Internment in Northern Ireland” (1976) 8 *Toledo Law Review* 169; *Law and State*, n. 2 above, ch. 5.

14 P Taylor, *Brits: The war against the IRA* (London: Bloomsbury 2001), ch. 10.

a truce arranged with the IRA broke down it became clear that a strategy for dealing with political violence would have to be devised and the Diplock Commission was announced in October 1972 to consider “whether changes should be made in the administration of justice in order to deal more effectively with terrorism without using internment under the Special Powers Act”.<sup>15</sup>

The commission considered that there were serious obstacles in the way of obtaining convictions under the ordinary criminal process. The usual method of obtaining convictions under the adversarial criminal process is by relying on witnesses who testify openly against defendants but, in the context of political violence, the supply of witnesses can dry up because of the fear of intimidation. According to the commission, the only kind of case in which convictions could be obtained by the ordinary processes of criminal law were ones in which there was sufficient evidence against the accused from one or more of three sources: oral evidence of non-civilian witnesses whose protection could be more readily ensured; physical evidence such as finger prints; and an admissible confession. But there were problems with using these sources. Non-civilian witnesses could not easily be the direct source of information about paramilitary activity. Physical evidence was not always available and confessions under the common law were inadmissible unless they were given voluntarily by suspects, something that paramilitary suspects would not willingly provide. The difficulty in obtaining confessions under the common law had indeed been underlined by a decision of the Northern Ireland courts, shortly before the announcement of the Diplock Commission, which had excluded confessions in 1972 on the ground that they had been obtained in a detention centre set up officially to obtain information from persons who would be less than willing to give it.<sup>16</sup> Admissions obtained in this way failed to qualify as voluntary statements. Finally, the Diplock Commission referred to the problem of retaining juries in the existing climate of violence. The commission was unable to point to real cases of jury intimidation but considered that the jury system was under strain and was likely to break down if it were not abolished in paramilitary trials.

Whilst considering that detention without trial was still necessary, the commission proceeded to make a number of recommendations which would enable more cases to be brought before the criminal courts without jettisoning the minimum requirements of Article 6 of the European Convention on Human Rights (ECHR). Firstly, to circumvent the technical rules as to the admissibility of statements which in the commission's view were hampering the course of justice and compelling the authorities to resort to detention instead of the courts, the commission recommended that the law be changed to allow for the admissibility of statements unless they had been obtained by torture, or inhuman or degrading treatment. Secondly, rules reversing the burden of proof in firearms cases and permitting the admissibility of witness statements in certain circumstances were recommended. Finally, trial by jury was to be replaced by trial by judge alone in cases involving scheduled offences.

Although these recommendations were intended to conform with minimum human rights standards, the emergency legislation which implemented them gave the green light for more coercive interrogation than would be acceptable under the voluntariness standard at common law.<sup>17</sup> Moreover, the legislation contained a number of powers which replicated the old Special Powers Act enabling the police to arrest suspected “terrorists” and hold

15 HC Debs, vol. 855, 17 April 1973 (William Whitelaw, then Secretary of State for Northern Ireland). The commission reported in December 1972. See *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* Cmnd 5185 (London: HMSO 1972).

16 *R v Flynn and Leonard* [1972] NIJB (May).

17 See Northern Ireland (Emergency Provisions) Act 1973.

them for questioning up to 72 hours and, in later UK-wide legislation under the Prevention of Terrorism (Temporary Provisions) Act 1974, up to seven days with the approval of the Secretary of State. The security forces were able to switch from the use of internment towards bringing arrested persons before the courts after questioning. Specialised interrogation centres for interrogating terrorist suspects arrested on the basis of intelligence were established,<sup>18</sup> one early in 1977 at Castlereagh and the other at Gough Army Barracks in Armagh in November 1977. It was here that suspects who were held incommunicado, without access to solicitors and friends or relatives, made the confessions which came before the Diplock courts.

Although this strategy produced more confessions, it became clear that they were obtained by ill-treatment. The procedures and practices of questioning and interrogation had been the centre of attention since 1971 when allegations of torture and brutality were made. These allegations were partially upheld in 1978 by the European Court of Human Rights when it ruled that various interrogation techniques amounted to “inhuman and degrading” treatment in breach of Article 3 of the European Convention, although not “torture”.<sup>19</sup> The interrogation centre where this occurred was closed down in 1972 and various directives were issued stressing the need to avoid torture and inhuman or degrading treatment. The Diplock confessions test expressly prohibited such conduct but this did not stop allegations of ill treatment continuing to be made. Indeed the opening of the interrogation centres at Castlereagh and Gough coincided with a major increase in the number of complaints of ill-treatment made against the police – 180 in 1975, 384 in 1976, and 671 in 1977.<sup>20</sup> These complaints were backed up by the concerns of police medical doctors who made formal representations about the number of suspects who showed signs of physical ill treatment. In November 1977, Amnesty International carried out an investigation into a number of cases of alleged ill treatment and in June 1978 it reported that it believed that maltreatment of suspected terrorists had taken place with sufficient frequency to warrant the establishment of a public inquiry.<sup>21</sup>

Despite these allegations, large numbers of defendants were convicted on the basis of their confessions during this period.<sup>22</sup> The courts have been criticised for not taking a more robust stance towards reliance on confession evidence, given the allegations of ill treatment.<sup>23</sup> But they were handicapped in at least three ways by the procedures within which they operated. Firstly, the more relaxed standard of admissibility imposed by Parliament limited their room for manoeuvre. The Court of Appeal made some efforts to tighten up this standard by holding that it prohibited any form of physical violence.<sup>24</sup> The courts also interpreted the legislation so as to preserve a discretion to exclude a confession that was strictly admissible under the standard. But there was a limit to how far this discretion could be exercised. It was stressed that the absence of voluntariness could not automatically warrant exclusion as this would subvert the will of Parliament.<sup>25</sup> The

18 P Taylor, *Beating the Terrorists?* (London: Penguin 1980), pp. 61–3.

19 *Ireland v UK* (1978–80) 2 EHRR 25.

20 Taylor, *Beating the Terrorists?*, n. 18 above, p. 81.

21 *Report of an Amnesty International Mission to Northern Ireland* (London: Amnesty International 1978).

22 See *Ten Years On*, n. 2 above, p. 76.

23 See D. Korff, *The Diplock Courts in Northern Ireland: A fair trial?* (Utrecht: Netherlands Institute of Human Rights: 1984), p. 78; C Walker, “The commodity of justice” (1999) 50 *NILQ* 164, at 168.

24 *R v O'Halloran* [1979] NI 45, at 47. Cf. *R v McCormick and others* [1977] NI 105. Parliament later changed the standard to state that any “violence or threat of violence” would render a confession inadmissible: see s. 11(2) of the Northern Ireland (Emergency Provisions) Act 1987.

25 *R v Tobill* [1974] NIJB (Mar), *R v McCormick* [1977] NI 105.

voluntariness rule had been supplemented in England by Judges' Rules, which laid down further safeguards including access to solicitors. These rules were formally adopted in Northern Ireland in October 1976 but their status remained unclear in the emergency regime and the courts did little to enforce them.<sup>26</sup>

Apart from the legal standard itself, there was the difficulty of deciding who to believe when allegations of ill treatment were made by defendants and denied by the police. At the *voir dire* which was held to determine whether a confession should be admitted, suspects had to give evidence first and judges frequently had to decide between their evidence and that of the police, something they admitted was one of the most difficult issues they had to decide.<sup>27</sup> One of the difficulties was that it was often impossible to believe either the account of the police or the defendant. Defendants would often make allegations which were bizarre while the police claimed that they acted with such propriety that it was difficult to believe everything they said. As professional witnesses, the police were aided by their interview notes but this reduced the ability of judges to evaluate the credibility of their manner and demeanour in the witness box.<sup>28</sup>

Thirdly, the absence of the jury meant that judges had to perform the two roles of deciding on admissibility and deciding on guilt. The presence of a jury would have meant that there was a clearer demarcation between the issue of the admissibility of the confession and the issue of its weight. But when both issues were decided by the same tribunal – the trial judge – they inevitably became “intertwined” at times.<sup>29</sup> This combination of role meant that judges could become privy very easily to inadmissible evidence such as evidence about the accused's record or information about the defendant as revealed by a co-accused's confession. In carrying out their fact-finding role, they could therefore be placed in a very difficult position of having to disregard evidence of guilt when it was their job to determine guilt or innocence. The combination of role also meant that judges were not only responsible for umpiring a contest between prosecution and defence but were also charged with being in the front line of maintaining law and order, as it was ultimately their responsibility to decide whom to convict and whom to acquit.<sup>30</sup>

In this situation it was perhaps inevitable that judges would attract criticism. The judges were to face an even greater challenge to their role as independent dispensers of justice when faced with another security strategy – the use of “supergrasses”. Throughout the conflict, detention came to be used not just to obtain confessions but to gather intelligence, and intelligence gathering became a key reason for arresting persons and questioning paramilitary suspects.<sup>31</sup> In addition, however, in the early 1980s, suspects who faced long prison sentences were offered various inducements including immunity, sums of money and a new identity in return for turning Queen's evidence and implicating members of proscribed organisations in court. Between November 1981 and November 1983, a total of almost 600 suspects were arrested on the evidence of 19 republicans and eight loyalist

26 D S Greer, “The admissibility of confessions under the Northern Ireland (Emergency Provisions) Act 1978” (1980) 31 *NILQ* 205, at 233; J Jackson, *Northern Ireland Supplement to Cross on Evidence* (Belfast: SLS Publications 1983), pp. 154–5.

27 *Judge without Jury*, n. 9 above, p. 218.

28 *Ibid.* p. 237.

29 *R v Brophy* [1980] 4 NIJB.

30 For discussion of this invidious role and how it has impacted on attitudes towards the judiciary, see S Doran and J Jackson, “The judicial role in criminal cases” in N Dawson, D Greer and P Ingram (eds), *One Hundred and Fifty Years of Irish Law* (Belfast: SLS Publications 1996), p. 69.

31 D P J Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (London: Cobden Trust 1983).

“supergrasses”.<sup>32</sup> The fact that so many suspects were able to be picked up and remanded in custody awaiting trial meant that they were out of circulation. But for the strategy to be successful in the longer term they had to be convicted and this was where the Diplock courts were once again put in the forefront of a security strategy.<sup>33</sup>

The supergrass strategy put the spotlight very directly on the judiciary. The use of confessions is not unknown in criminal trials, though they became excessively relied upon in the Diplock trials of the 1970s. By contrast, when the courts decide the fate of large numbers of persons on the uncorroborated evidence of self-confessed offenders who have been granted complete or partial immunity, they are presiding over a much more questionable strategy from a legal and moral point of view. Unlike the case of confessions where the courts were tied by express statutory provisions, the courts had greater freedom to decide what to do with supergrass evidence. At common law the trial judge was required to warn a jury about the dangers of relying on such evidence in the absence of corroboration. In the absence of a jury, judges were prepared at first to convict on the uncorroborated evidence of certain supergrasses. One judgment emphasised the separation of the judiciary from the executive and stressed the distinction between the use of uncorroborated accomplice evidence as a method of prosecution and its use as a method of conviction.<sup>34</sup> But judges’ willingness to convict on uncorroborated testimony led to criticism in an unofficial report into the trials in 1983 by Lord Gifford, who concluded that in handling the supergrass issue, the Diplock courts had behaved in a way which could not be justified by reference to traditional common law standards of fairness and due process.<sup>35</sup> The Court of Appeal later developed the jurisprudence to a position where the evidence of a supergrass was more dangerous than that of an ordinary accomplice with the result that the “sternest criteria” would have to be fulfilled before their evidence could provide the sole basis for conviction.<sup>36</sup> The result of this critical stance by the Court of Appeal seemed to put a halt to the supergrass strategy. To justify the heavy financial, policing and political costs, the strategy required a high conviction rate and when it became clear that the courts were no longer prepared to convict on uncorroborated evidence, the authorities had to revert to different strategies.

The supergrass era posed the most dramatic challenge to the legitimacy of the Diplock courts. After this, the authorities began to put greater reliance on forensic evidence and the courts aroused less controversy.<sup>37</sup> It has been argued that the absence of the jury resulted in an adversarial deficit for the accused both in terms of the pivotal position that the judge occupies in the course of the trial when there is no jury and in terms of the different attitude that judges take towards the enforcement of the criminal law.<sup>38</sup> Yet the record of the Diplock courts suggests that they never succumbed to becoming a mere rubber stamp for security strategies. Although the acquittal rate lagged behind that of juries, it has been

32 S Greer, *Supergrasses: Informers and anti-terrorist law enforcement in Northern Ireland* (London: Clarendon Press 1995), p. 57.

33 There is an extensive literature on the legal implications of the supergrass issue: see Greer, *Supergrasses*, n. 32 above; P Hillyard and J Percy-Smith, “Converting terrorists: the use of supergrasses in Northern Ireland” (1984) 11 *JLS* 335; D Bonner, “Combating terrorism: supergrass trials in Northern Ireland” (1988) 51 *MLR* 23; J Jackson, “The use of supergrasses as a method of prosecution in Northern Ireland” in *Standing Advisory Commission on Human Rights: Annual Report for 1983–1984* (London: HMSO 1984), p. 83.

34 *R v Gibney and others* (1983) 13 *NIJB* 7, at 8.

35 Lord Gifford, *Supergrasses: The Use of Accomplice Evidence in Northern Ireland* (London: Cobden Trust 1984), pp. 30–2.

36 *R v Crumley and others* (1986) 14 *NIJB* 44.

37 *Judge without Jury*, n. 9 above, pp. 93–4.

38 *Ibid.* ch. 10.

very difficult for critics to show that judges simply acquiesced in the prosecution evidence.<sup>39</sup> Even in the darkest hours of the Diplock courts during the confession era of the late 1970s and the supergrass era of the early 1980s the broad statistics do not show any dramatic drop in the acquittal rate.<sup>40</sup>

When the authorities later on attempted to make it easier to obtain convictions by curtailing the right of silence in response to the “wall of silence” that the police were faced with,<sup>41</sup> the courts resisted at the outset any temptation to use silence as means of bolstering weak prosecution cases. Research found that while judges were willing to use the legislation to draw what common-sense inferences they could from a defendant’s silence, in many cases where inferences were drawn they merely had the effect of “copper-fastening” an already strong forensic case.<sup>42</sup> In those cases where the legislation was used to bring a case up to the required standard of proof, there was little evidence to suggest that judges were using it to fill a large evidential deficit in the prosecution case. To understand why Diplock trials did not succumb to the temptation to bow to the demands of security, we need to shift the focus away from the structural changes made to the criminal process towards the ideological forces that shaped the participants in the Diplock process.

### Legitimacy and ideology in the Diplock process

With the deviations that the Diplock system imposed on the ordinary criminal process, it might have been thought that the courts would have suffered a serious crisis of legitimacy that would have incurred as much wrath on the part of politically motivated defendants as occurred in the prisons when prisoners were deprived of special category status.<sup>43</sup> At first it is true that a number of defendants refused to recognise the court and this defiant gesture certainly represented a challenge to the legitimacy of the court.<sup>44</sup> Just as the criminalisation policy was being officially launched, however, republican and loyalist defendants changed their stance of non-recognition and began to contest the charges against them. McEvoy explains this on the practical ground that a “long term armed struggle” needed as many volunteers outside prison as possible.<sup>45</sup> A number were resistant to plea-bargaining but it seemed that they were prepared to go along with the tactic of “adopting the evidence” which entailed pleading not guilty but accepting the case presented in the prosecution statements in return for a lighter sentence. These tactics, undoubtedly produced fruits for those given lighter sentences but such a pragmatic approach also helped to give some legitimacy to the Diplock regime, playing along with the rules of the game rather than refusing to play the game in the first place.

They were encouraged to take this stance by the lawyers who represented their cases. Once the paramilitary tactic of non-recognition changed to one of fighting cases, lawyers played an increasingly influential role. The barristers who appeared in the Diplock courts were well wedded to the traditionalist norms of the Bar such as the cab rank principle,

39 *Judge without Jury*, n. 9 above, pp. 33–6.

40 It is true that during the confession era of the late 1970s the acquittal rate dropped to 35 per cent from the norm of 50 per cent in the early 1970s: *Ten Years On*, n. 2 above, p. 61. But even these figures do not suggest a slavish adherence towards conviction.

41 See Criminal Evidence (NI) Order 1988.

42 J Jackson, M Wolfe and K Quinn, *Legislating against Silence: The Northern Ireland experience* (London: Northern Ireland Office 2000), ch. 6.

43 For the importance of prisons as a site of struggle during the Northern Ireland conflict, see K McEvoy, *Resistance, Management and Release: Paramilitary imprisonment in Northern Ireland* (Oxford: Oxford University Press 2001).

44 *Ten Years On*, n. 2 above, pp. 75–6.

45 K McEvoy, “Law, struggle and political transformation in Northern Ireland” (2000) 27 *JLS* 542.

whereby barristers are expected to take the first brief which comes to them irrespective of where it comes from.<sup>46</sup> Accordingly, a number of barristers defended both republicans and loyalists and appeared for both prosecution and defence. This non-partisan representation on the part of the Bar had two effects. On the one hand, it again gave the Diplock courts a legitimacy that they might otherwise have lacked. On the other hand, it also prevented the courts becoming merely a tool in the hands of the prosecution. There was less scope for rhetoric and histrionics before a judge than a jury. The atmosphere seemed at times more akin to the calm and courteous proceedings that one sees in the appellate courts than to the more highly charged atmosphere of jury trials.<sup>47</sup> But this tranquillity in defence counsel's presentation belied a forensic struggle that demanded the most skilful advocacy in order to prevent judges becoming case-hardened.

At the same time, the judges also displayed a strong sense of independence in judging the hundreds of cases that came before them in the Diplock courts. It would be wrong to suggest that there have not been miscarriages of justice during the Diplock era.<sup>48</sup> Allegations of miscarriage have been made but these have never risen to the scale of those that afflicted the English courts in their attempt to deal with Irish republican violence.<sup>49</sup> We shall see that there has recently been a re-evaluation of the safety of a number of convictions arising out of the courts' reliance on confessions in the early years of the Diplock regime. But, for the most part, judges appear to have scrutinised cases as best as they could, aided by the skilful advocacy of lawyers appearing in the trials. Judges seemed determined to show that they brought an independent judgment to each case. Perhaps the best expression of this independent attitude is to be found in one of the supergrass cases where the Lord Chief Justice, Lord Lowry, made it clear what approach judges had to follow:<sup>50</sup>

Amid the clash of arms the laws are silent: so *Cicero* exclaimed over 2000 years ago. During the greatest conflicts in our history Lord Atkin bravely ventured to contradict this assertion. Now too peace, order and society itself are under fire and constant attack and that is why we must remember Lord Atkin's famous dictum: In this country amid the clash of arms the laws are *not* silent. They may be changed, but they speak the same language in war as in peace. This war is being waged by organisations which style themselves armies and observe military procedures, but it has not invaded and will not be allowed to invade the courts. The rule of law has prevailed and will continue to prevail there.

This "rule of law" ideology seemed to play a part in preventing the Diplock courts descending into a mere tool of security strategy. Although judges were to say in a number of cases they had little doubt about the guilt of defendants, where the evidence pointed to a reasonable doubt they did acquit. Even when they were given the authority to use the

46 B Jorgensen, "Defending the Terrorists: Queens Counsel before the courts of Northern Ireland" (1982) 9 *JLS* 115.

47 *Judge without Jury*, n. 9 above, p. 207.

48 In 1995 it was estimated that there were 35 outstanding cases where there were serious doubts about the safety of the convictions: British Irish Rights Watch and the Centre for International and Comparative Human Rights Law, *Putting Wrongs to Right: Tackling miscarriages of justice in Northern Ireland and the Republic of Ireland* (1995). An informative discussion is to be found in B Dickson, "Miscarriages of Justice in Northern Ireland" in C Walker and K Starmer, *Miscarriages of Justice: A review of justice in error* (London: Blackstone Press 1999), p. 287.

49 It would be difficult to compete with the notoriety that has been given to cases such as the Birmingham Six, the Maguire Seven and the Guildford Four. The most notorious cases to have arisen in Northern Ireland have been the cases of the so-called UDR Four and Casement Trials. See respectively *R v Latimer, Hegan, Bell and Allen*, unreported, 29 July 1992, and Committee for the Administration of Justice, *The Casement Trials: A Case Study of the Right to a Fair Trial in Northern Ireland* (Belfast: CAJ 1992).

50 *R v Gibney and others* [1983] 13 NIJB 8.

silence of defendants against them to make up deficiencies in the prosecution evidence, they seemed reluctant to allow silence to be used in any dramatic way to make up the deficiencies. A number of factors appear to have reinforced this ideology. There was the high professionalism mentioned above that was brought to bear upon Diplock trials by senior advocates acting for both prosecution and defence. Elsewhere, Lord Lowry also spoke of the importance of public accountability.<sup>51</sup> Judges were aware of the glare of publicity that surrounded many trials and they also had to produce written judgments which were scrutinised not just by appellate courts on appeal but, as he put it, by “well-informed and potentially hostile critics”.<sup>52</sup>

Judicial application of the rule of law at trial fell short, however, of the kind of activist judging that would have been required to prevent abuses in the pre-trial stage of criminal proceedings. Judges displayed little willingness to criticise or curtail the emergency. They recognised that they had a discretion to exclude confessions strictly admissible under the emergency test but were consistently reluctant to give this much scope in view of the need to adhere to the will of Parliament.<sup>53</sup> They showed little inclination to apply the Judges’ Rules which remained dormant throughout the emergency regime, and even when suspects in the holding centres were given a right of access to legal advice in 1987 they showed little willingness to challenge police justifications for delaying access.<sup>54</sup> They also displayed little enthusiasm for playing an activist supervisory role over the interrogation process. They apparently blocked the use of judicial officers to review detentions under the Prevention of Terrorism Act which would have avoided the need for the UK government to derogate from the decision in *Brogan v UK*,<sup>55</sup> which effectively held that Article 5 of the ECHR required arrested persons to be brought before a judicial authority within four days of detention.<sup>56</sup>

This rather compliant attitude towards the emergency legislation was also taken by the legal profession as a whole. Although certain groups of lawyers had some scruples about defending detainees before the detention hearings in the early 1970s,<sup>57</sup> few had any scruples about appearing before the Diplock courts. Unlike lawyers in other conflict situations, there has been little tradition of “radical lawyering” in Northern Ireland.<sup>58</sup> Nor has there ever been much public criticism of the Diplock courts on the part of lawyers. More remarkably, there was little public criticism of the ill treatment of suspects in the holding centres or of the fact that solicitors were regularly denied access to suspects held in police custody during the 1970s and 1980s, although the Law Society opposed a recommendation of the Independent Commissioner for the Holding Centres that a list of government-approved lawyers be granted access to the holding centres.<sup>59</sup> Even when controversial changes were made to the law, such as the silence changes, there was little debate within the profession. Some years earlier when similar changes were proposed for England and Wales,<sup>60</sup> the legal profession was so vociferous in its criticism that the proposals were dropped.

51 Lord Lowry, “National security and the rule of law” (1992) 26 *Israel LR* 117.

52 *Ibid.* p. 131.

53 *R v Tobin* (1974) NIJB (Mar), *R v McCormick* [1977] NI 105, *R v Dillon and Gorman* [1984] NI 292, *R v Cowan* [1987] 1 NIJB 15, *R v Howells* [1987] 5 NIJB 10.

54 E.g. *R v Harper* [1990] NI 28, *R v Cosgrove and Morgan* [1994] NI 182.

55 (1988) EHRR 117.

56 C Walker, *The Prevention of Terrorism in British Law* 2nd edn (Manchester: Manchester University Press 1992), ch. 6.

57 *Law and State*, n. 2 above, pp. 66–7.

58 S Livingstone, “And justice for all? The judiciary and the legal profession in transition” in C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart Publishing 2001), pp. 131, 133.

59 See *First and Second Annual Reports of the Independent Commissioner for the Holding Centres* (1994, 1995).

60 Criminal Law Revision Committee, *Evidence (General)* Cmnd 4991 (London: HMSO 1972).

Criticism of the pre-trial process of interrogation came instead from human rights organisations which played an increasingly important role in monitoring the Diplock system. It will be recalled that the Diplock system was premised on the need to guarantee the minimum standards of the European Convention. Although these standards were not enshrined in UK law at the time the Diplock Commission reported, they were closely tied to the legitimacy of the criminalisation policy. When human rights organisations aided by the media uncovered human rights abuses in the interrogation centres in the 1970s, the government was forced to set up a judicial inquiry under Judge Bennett QC, which recommended certain safeguards aimed at preventing physical abuse.<sup>61</sup> These fell far short, however, of what were to become known as the PACE rules introduced in England and Wales and later for “ordinary” non-emergency cases in Northern Ireland.<sup>62</sup> Human rights organisations and foreign bar associations continued to voice concerns about the continuing use of the interrogation centres and the Diplock courts.<sup>63</sup> A crushing blow to the government’s criminalisation policy was delivered by the European Court of Human Rights in *Brogan* and although the UK’s derogation from this international obligation under Article 15 of the convention was subsequently upheld by the European Court,<sup>64</sup> this was an admission that the emergency could not be contained within minimal international protections.

The silence legislation provided further opportunity for human rights challenges. The legislation prompted solicitors to argue for access to their clients in the holding centres. The Bennett Committee had recommended that suspects arrested under the emergency legislation be given access to legal advice at least 48 hours after being in custody, but access was invariably denied during the first 48 hours in custody. Suspects were given a statutory right of access for the first time in 1987, albeit one that could be delayed on fairly broad grounds for up to 48 hours.<sup>65</sup> Figures from the Northern Ireland Office show that from that point on suspects increasingly asked for access to a legal adviser and it was quite common for access to be delayed.<sup>66</sup> A series of legal challenges were then made to these delays in access and although these were largely unsuccessful, they seemed to have the effect of dramatically reducing the number of delays.<sup>67</sup> Then in a landmark decision in 1996 the European Court of Human Rights ruled that in the context of the silence legislation where suspects had to face a “fundamental dilemma” between remaining silent and having inferences drawn against them or breaking their silence and risk prejudicing their defence, the concept of fairness enshrined in Article 6 of the ECHR required that the accused had the benefit of the assistance of a lawyer.<sup>68</sup>

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61 *Report of the Committee of the Inquiry into Police Interrogation Procedures in Northern Ireland* Cmnd 7497 (London: HMSO 1979).

62 Police and Criminal Evidence (NI) Order 1989.

63 See e.g. W E Hellerstein, R B McKay, P R Schlam, *Criminal Justice and Human Rights in Northern Ireland: A report to the Bar of the City of New York* (New York: Association of the Bar of the City of New York 1987); Amnesty International, *United Kingdom Summary of Human Rights Concerns* (London: Amnesty International 1995). In July 1995, the Human Rights Committee of the United Nations recommended that the Castlereagh holding centre be closed.

64 *Brannigan and McBride v UK* (1994) 17 EHRR 539.

65 Northern Ireland (Emergency Provisions) Act 1987, s. 15.

66 See Jackson et al, *Legislating against Silence*, n. 42 above, p. 116.

67 Between 1987 and 1991, for example, delays in access occurred in over 50 per cent of the cases where access was requested but in 1992 this had reduced to 26 per cent and by 1995–97 to under 10 per cent. See Jackson et al, *ibid.*

68 *Murray v UK* (1996) 22 EHRR 29.

After this decision, the focus shifted towards whether lawyers had a right to be actually present in the interview room. The Northern Ireland courts and the House of Lords fell back on the intent behind the emergency legislation, which was that the police should be able to create a situation in which a guilty man is more likely than he would otherwise be to unburden himself to questions and the presence of solicitors would make confessions much more unlikely.<sup>69</sup> Before these rulings came to be challenged before the European Court, however, the Chief Constable bowed to the demand that solicitors should be able to sit in during paramilitary suspect interviews in the same way as they may sit in during ordinary PACE interviews. The logic of the *Murray* case therefore ultimately prevailed, which is that where suspects are told that inferences may be drawn against them for refusing to answer questions, they need the protection of legal advice, and it made no sense to deprive them of this in the actual police interview where they need the protection most.

The effect of this human rights pressure was that procedures in the interrogation centres were brought gradually more into line with ordinary PACE procedures. But the price would seem to be that the procedures became more embedded within permanent counter-terrorist policy. In January 1996, the British government announced a major re-evaluation of the use of emergency laws with the intention of replacing the emergency laws with a single piece of anti-terrorist legislation to cover the whole of the United Kingdom. After this review reported,<sup>70</sup> the government enacted a new Terrorism Act in 2000 incorporating the provisions of the old Northern Ireland (Emergency Provisions) Acts and Prevention of Terrorism (Temporary Provisions) Acts. This Act provided a new framework that claimed to be consistent with the UK's human rights obligations which had been given prominence by the incorporation of the European Convention on Human Rights into UK law under the Human Rights Act 1998. Apart from providing for new detention codes which for the first time permitted legal advisers to sit in at police interviews and required interviews to be audio and video-recorded,<sup>71</sup> one of the major changes in the Act was a new provision requiring judicial extension of detention after persons arrested on suspicion of acts of terrorism have been detained for longer than 48 hours.<sup>72</sup> This obviated the need for the UK to continue to derogate from Article 5 of the ECHR. The result was that the entire emergency law system in Northern Ireland, now re-cast as a counter-terrorist system, could claim to be much more compatible with minimal human rights obligations. Although the Northern Ireland part of the Act including the Diplock courts was time-limited to five years and made subject to annual review and renewal, the fact that these provisions were integrated within a single piece of permanent counter-terrorist legislation covering the entire United Kingdom sent out a strong signal of normalisation. The gap between normal detention and emergency detention procedures was further narrowed in 2002 when the emergency test for the admissibility of confessions was abolished and the PACE test was applied to all cases.<sup>73</sup> At the same time, the period during which terrorist suspects may be

69 *Re Russell's Application* (1996) NI 311, *R v Chief Constable of the RUC, ex parte Begley* [1997] NI 275.

70 See Lord Lloyd, *Inquiry into Legislation against Terrorism* Cmnd 3420 (London: HMSO 1996).

71 See Code of Practice for the Detention, Treatment and Questioning of Persons Detained under the Terrorism Act 2000 and Code of Practice Governing the Video Recording with Sound of Police Interviews of Persons Detained under Section 41 and Sch. 7 of the Terrorism Act 2000 where the Interview takes place in a Police Station.

72 Terrorism Act 2000, Sch. 8, Part III.

73 Terrorism Act 2000 (Cessation of Effect of Section 76) Order 2002.

detained subject to judicial authorisation was steadily increased from seven days to 14 days in 2003 and up to 28 days in 2006.<sup>74</sup>

### The Diplock legacy

Although the Diplock system began with an emphasis on security rather than the rule of law, its most important legacy would seem to be that the criminal courts can provide a workable, reasonably proportionate and now largely human rights compliant solution to the threat of paramilitary violence and terrorism. Over the years, the gap between the Diplock procedures and those that operate in the ordinary courts has narrowed. This is not solely explicable on grounds of Diplock procedures becoming less security-oriented. Some of the security responses such as the curtailment of the right of silence that were adopted in the Diplock courts also made their way into the ordinary criminal process. At the same time the pendulum has swung quite considerably in favour of greater protection for suspects in the pre-trial process. Some of these changes go in the direction that Boyle, Hadden and Hillyard recommended in *Ten Years On*. In an effort to avoid the system of isolation and persistent questioning designed to break the will of suspects, which we have seen was a hallmark of the early Diplock procedures, they had suggested that pre-trial questioning be regulated by suspects appearing before a magistrate or as an alternative that suspects be questioned in the presence of a legal adviser. Although the idea of judicial oversight of interrogation has never taken hold, we have seen that modern procedures permit suspects access to a legal adviser during police interviews. Young suspects are also given access to an appropriate adult in the police station.

In recent years, the Criminal Cases Review Commission has referred a number of early Diplock cases to the Northern Ireland Court of Appeal and the court has quashed the convictions of a number of defendants who were under 18 at the time they made confessions after being questioned continuously in isolation.<sup>75</sup> In these cases, the court has applied the principle that where the only evidence against a defendant is an oral confession which is later retracted and it appears that such a confession was obtained in breach of rules prevailing at the time and in circumstances which denied him or her important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would seem to be at least a prima facie ground for doubting the safety of the conviction.<sup>76</sup> It has been suggested that consideration of the commission's Northern Ireland cases raises the question whether these cases represent the tip of an iceberg of wrongful convictions secured on the basis of coerced and unreliable confession evidence.<sup>77</sup> It may be that, as the number of cases referred by the Criminal Cases Review Commission escalates, there will be a fundamental re-evaluation of the Diplock regime. But the fact that the Court of Appeal is now quashing some of these earlier convictions in the light of modern standards of fairness is an illustration of the seriousness with which the courts are now prepared to scrutinise the fairness of the Diplock procedures. Part of this may be due to the different context in which cases are now scrutinised. It has been suggested that international courts are more prepared to scrutinise alleged human rights violations in post-conflict periods of

74 See Criminal Justice Act 2003, s. 306, and Terrorism Act 2006, s. 23. The Counter Terrorism Bill 2008–09, cl. 22 proposed to extend the maximum period of pre-charge detention still further to 42 days but the government withdrew this proposal. See further B Dickson, "Article 5 of the ECHR and 28-day detention of terrorist suspects", p. 231 of this Special Issue.

75 E.g. *R v Hanna and Hinds* [2005] NICA 36, *R v Adams (Robert)* [2006] NICA 6, *R v Mulbolland* [2006] NICA 32.

76 *R v Ashley King* [2000] 2 Cr App R 391.

77 L. Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (London: Justice 2008), p. 301.

transition towards peace than in periods of war or intense conflict and it may be that domestic courts take a similar stance.<sup>78</sup> But it is also the case that the standards of fairness have themselves changed. The security forces still retain wide arrest powers in Northern Ireland and the periods during which arrested persons may be detained before charge are even longer than they were before. But suspects are now questioned under a very different regime from the one that was in place 10 years ago and the courts are prepared to apply a rigorous scrutiny towards applications for detention to be extended.<sup>79</sup>

It has been argued here that this normalisation of the Diplock system is attributable to two factors – the ideology of those participants who were subject to it and operated within it and the ideology of human rights. Although the maltreatment of paramilitary suspects in the 1970s and the subsequent supergrass strategy in the early 1980s showed that the Diplock system was capable of succumbing to those intent on gaining convictions no matter what, ultimately the other protagonists in the Diplock system saved it from becoming totally discredited as a mere tool of anti-terrorist policy. In a sense then, the Diplock solution of devising a trial system which would deal with paramilitary offenders while keeping within minimum human rights norms worked because the protagonists made it work. Lawyers and judges were able to keep the trial system pure enough to withstand human rights challenges. But they were unable to prevent human rights abuses in the interview room. Maltreatment in the holding centres in the 1970s was not exposed and curtailed by the courts but by non-governmental human rights organisations. Similarly, it was the European Court of Human Rights, not the Northern Ireland courts, which ruled on the length of time suspects could be held in custody before being brought before a court and established the right of lawyers to have access to their clients in the detention centres, although the Northern Irish courts are now having recourse to these modern procedures in reversing convictions during the Diplock era.

Throughout the conflict, however, there was one set of protagonists that seemed at times to operate outside the rule of law and these were the security services. During the 1980s and 1990s security strategy switched from obtaining confessions and using supergrasses in court to infiltrating paramilitary organisations with informers. A clandestine “dirty war” took place that could result in defendants being exposed and brought to court for offences that informers brought to light. An elaborate system of disclosure was put in place under the Diplock system whereby a separate judge was appointed to deal with the disclosure of sensitive information arising in the course of the trial.<sup>80</sup> The prosecuting authorities were obliged to bring any sensitive relevant evidence before the disclosure judge in order that he or she might rule on whether there should be disclosure. The system depended, however, on full disclosure by the security services of all relevant evidence to the prosecuting authorities and there are examples of this failing to happen.<sup>81</sup> This points to

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78 Campbell, “Wars on terror”, n. 1 above.

79 See e.g. *In re Colin Duffy and others* [2009] NIQB 31.

80 See *R v Harper and Abity* [1994] NI 199, *R v McKeown* [2005] NI 301.

81 See the comments of Kerr LCJ in quashing the convictions of a number of defendants who were charged with kidnapping an informant: “It is now clear to us there was directly relevant material on the question whether a trial of the appellants should take place which had not been made available to the Director of Public Prosecutions when he decided that they should be prosecuted for the offences of which they were subsequently convicted.” *R v Morrison and others* [2009] NICA 1, para. 3.

the limitations of the courts when faced with security forces who are determined to circumvent the rule of law.<sup>82</sup>

Now that relative peace has descended on Northern Ireland, there remains the question whether the Diplock solution of abolishing the jury remains a justifiable response to the present terrorist threat. With the cessation of violence and the enactment of a number of confidence-building measures designed to restore confidence in the criminal justice system in the wake of the Belfast Agreement and the recommendations of the Criminal Justice Review established by the Agreement, it might have been thought that the time would have been ripe for the abolition of the Diplock courts. The use of Diplock courts had declined significantly and in response to the Provisional IRA statement of July 2005 which announced an end to the armed campaign, the Secretary of State announced a programme of security normalisation on 1 August 2005. By this time much of the emergency legislation was being mainstreamed into UK-wide anti-terrorist legislation. There remained a risk of jury intimidation. But a provision in the Criminal Justice Act 2003 had already created a system of non-jury trial to deal with the risk of jury intimidation where there was a clear and present danger of jury tampering in any case and this has been extended to Northern Ireland.<sup>83</sup>

In its consultation paper reviewing the replacement arrangements for the Diplock court system, however, the government considered that there was a continuing legacy of terrorism from dissident republican and loyalist paramilitaries and a continuing risk in a closely knit community such as Northern Ireland of intimidation and perverse verdicts.<sup>84</sup> The paper suggested that there should be a shift in favour of a presumption of jury trial but that the decision as to whether there should be a non-jury trial or not should lie with the prosecuting authorities as before, rather than with the trial judge, which is the case under the Criminal Justice Act legislation. Under s. 1 of the Justice and Security (NI) Act 2007, the Director of Public Prosecutions (DPP) for Northern Ireland may issue a certificate that any trial on indictment of a defendant be conducted without a jury if he or she suspects that one of a number of conditions is met and is satisfied that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The relevant conditions extend beyond the involvement of paramilitary activity and include the fact that the offence was committed as a result of or in response to religious or political hostility. More worrying perhaps than the width of these conditions (they include a defendant being an “associate” of a member of a paramilitary organisation), is the fact that the DPP’s decision cannot be questioned in any court of law except on the ground of dishonesty, bad faith or other exceptional circumstances, including, in particular, circumstances relating to lack of jurisdiction or error of law. It was originally proposed that no court could entertain proceedings for questioning the DPP’s decision under any circumstances. The House of Commons and House of Lords Joint Committee on Human Rights objected that such an ouster raised rule of law concerns as it was an indispensable feature of the rule of law that there be a right of access to a court to challenge the legality of government action.<sup>85</sup> The government responded by introducing an amendment which now gives some limited scope for judicial review and the section is now made subject to s. 7(1) of the Human Rights Act 1998 which enables a claim to be made that a public authority has infringed a convention

82 The DPP has powers under s. 35(5) of the Justice (NI) Act 2002 to request the Chief Constable of the Police Service of Northern Ireland to obtain and provide information to the Director relating to any matter appearing to the Director to need investigation. S. 6 of the Justice (NI) Act 2004 also enables prosecutors to refer cases to the Police Ombudsman for investigation.

83 Criminal Justice Act 2003, s. 44. This provision was extended to Northern Ireland on 8 January 2007. See Crown Court (Amendment) Rules (NI) 2006.

84 Northern Ireland Office, *Replacement Arrangements for the Diplock Court System* (Belfast: NIO 2006).

85 Joint Committee on Human Rights, *Fifth Report* (2006–07) HL 46/HC 303.

right. The limited scope for judicial review that is now available may prevent defendants being placed in a “black hole” whereby any decision to submit them to Diplock procedures is outside the review of the court but it is submitted that they are still placed in a “grey hole” in the sense that considerable unreviewable discretion has been given to the DPP on the question, in particular, whether there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.<sup>86</sup>

The government’s response to the Joint Human Rights Committee was to claim that to allow every decision of the DPP to be challenged would result in considerable delay and may lead to cases that are not safe to be tried before a jury having to be so tried because the intelligence on which the DPP’s decision is based could not be disclosed. The government purported to follow the decision of the High Court of Northern Ireland in *Shuker and others*<sup>87</sup> but in fact, as the Joint Committee pointed out, the court expressly rejected the argument that the Attorney General’s decision to certify scheduled offences for jury trial under the old emergency legislation was non-justiciable on the ground that it was frequently based on sensitive material. It is true that the grounds for concluding that one of the conditions for non-jury trial in the legislation is met and that the administration of justice may be impaired may well depend upon the content of sensitive material. Much security effort during the last years of the conflict was spent in infiltrating the ranks of paramilitary organisations through informers whose identity needed to be protected. But in other situations where sensitive information is relied upon it has been possible to impose a degree of judicial control. In his report to the government, the Independent Reviewer of Terrorism considered that any certification for non-jury trial by the prosecution authority should be subject to review by a High Court judge on the application of any defendant in the case.<sup>88</sup> A special advocate should be available for the hearing with rules of procedure similar to those used by the Special Immigration Appeals Commission (SIAC). The special advocate procedures employed by SIAC have been criticised on the ground that they do not enable persons fully to meet allegations against them based on closed material and they have recently been held to be incompatible with the standards of fairness required under Article 5(4) of the ECHR.<sup>89</sup> But they would be an improvement on the present Diplock procedures which do not envisage any meaningful scrutiny of whether the defendant’s case falls within the conditions prescribed for Diplock trial. Parliament should also consider legislation to introduce a more robust special advocate procedure which should also be available in the course of the trial where applications are made to disclosure judges for the non-disclosure of material favourable to the defence.

It has been claimed that fairness is a constantly evolving concept and that standards and perceptions of fairness may change from one century to another but also, sometimes, from one decade to another.<sup>90</sup> One of the reasons why the Diplock system has survived would seem to be because its procedures have been adjusted to take account of human

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86 Dyzenhaus, *The Constitution of Law*, n. 3 above, p. 42, describes a legal grey hole as a legal space in which there are some legal constraints on executive action (it is not a lawless void) but they are so insubstantial that they pretty well permit government to do as it pleases.

87 *In re Shuker and others* [2004] NIQB 20.

88 Lord Carlile of Berriew QC, “Non-jury trial in Northern Ireland” in Northern Ireland Office, *Replacement Arrangements*, n. 84 above, Annex A. See also the recommendations of the *Report of the Committee to Review the Offences Against the State Acts 1939–98* (2002), paras 9.60–77 which examined the review of the decision of the DPP to refer cases to the Special Criminal Court in the Republic of Ireland.

89 See the criticisms in Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (2005), HC 323-1, chs 4 and 5 and *A v UK App No 3455/05*, 19 February 2009. See also *Secretary of State for the Home Department v AF (FC) and another* [2009] UKHL 28.

90 *R v H* [2004] 2 AC 134, para. 11.

rights norms over the years. If the system is to continue to retain its legitimacy as an alternative mode of trial to the jury, it will be important that its procedures are kept constantly under review. This would seem to apply as much to the procedures for determining whether such a mode of trial is necessary as to the procedures that are applied at trial. The Criminal Justice Act 2003 has exported the Diplock mode of trial to England and Wales in cases where there is a danger of jury tampering. Even if it is considered necessary to invoke this mode of trial on broader grounds in Northern Ireland than in the rest of the UK, the decision to do this in a particular case should be the subject of a full judicial determination accompanied by a robust special advocate procedure where sensitive information forms the basis of the prosecution's case for non-jury trial. Without this, the spectre of security considerations overriding the rule of law will continue to cast a shadow on the Diplock system.



# Article 5 of the ECHR and 28-day pre-charge detention of terrorist suspects

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## Introduction

Under the Terrorism Act 2006, a person who has been arrested in the UK on reasonable suspicion of involvement in terrorism can be detained in custody for up to 28 days without being charged with any particular offence. In 2008, the government tried to extend the maximum detention period to 42 days, but a heavy defeat in a vote in the House of Lords prompted it to abandon that proposal, or at least to put it in cold storage. Two years earlier the government had even tried to argue for a maximum period of 90 days, but on that occasion severe opposition from its own backbenchers in the House of Commons forced it to compromise on 28 days.

At the time of these debates, assertions were often made within and without Parliament that a particular maximum period would or would not breach the European Convention on Human Rights (ECHR). The purpose of the present article is to examine that particular issue more closely. It seeks to show that, uncomfortable though it may be for those who hope to find in Convention language and jurisprudence a firm guarantee against lengthy pre-charge detention, the right to liberty as currently understood by the European Court of Human Rights does not embrace the right not to be detained for longer than a specified period prior to being charged. Provided other conditions are satisfied, the European Court seems able to tolerate quite lengthy detentions, especially in terrorist cases. Current UK law enables those other conditions to be satisfied, though of course whether they are or not in any particular case will always depend on the pertinent facts of the particular case.

## Pre-charge detention law for terrorist suspects in the United Kingdom

The detention regime for persons arrested in the United Kingdom on reasonable suspicion of involvement in terrorist activities differs significantly from that for non-terrorist suspects.<sup>1</sup> The police can initially detain terrorist suspects for 48 hours,<sup>2</sup> not just for the 24 or (if authorised by a senior officer) 36 hours allowed for non-terrorist suspects. During that

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1 See, generally, M Zander, *The Police and Criminal Evidence Act 1984* 5th edn (London: Sweet & Maxwell 2005), pp. 133–92.

2 Terrorism Act 2000, s. 41(3).

48-hour period the detention must, as in non-terrorist cases, be periodically reviewed, but the first review has to be carried out “as soon as is reasonably practicable after the time of the person’s arrest”<sup>3</sup> (rather than within six hours) and later reviews are due at intervals of not more than 12 hours<sup>4</sup> (rather than nine). As in non-terrorist cases, reviews can be postponed if one of three conditions is satisfied.<sup>5</sup> If none of those conditions is satisfied but a review is still not carried out when required, the detention automatically becomes unlawful, entitling the detainee to damages for false imprisonment, but not to immediate release.<sup>6</sup>

A review officer can authorise the continued detention of a terrorist suspect not only if either of the two grounds applicable in non-terrorist cases applies – namely that the review officer is satisfied that continued detention is necessary to preserve relevant evidence or to obtain such evidence by questioning the detainee or otherwise<sup>7</sup> – but also if one of five additional grounds applies. Three of these additional grounds relate to situations where the detainee might be deported and they will not be examined further here.<sup>8</sup> The other two are where the review officer is satisfied that continued detention is necessary to await the result of an examination of relevant evidence or of anything the examination of which is being carried out with a view to obtaining relevant evidence,<sup>9</sup> or to await a decision whether or not to charge the detainee with an offence.<sup>10</sup> In all seven situations, with one exception, the review officer also has to be satisfied that the investigation or process in question is being conducted diligently and expeditiously.<sup>11</sup> Remarkably, the exception relates to where detention is extended pending the result of an examination of relevant evidence or of anything the examination of which is being carried out with a view to obtaining relevant evidence.<sup>12</sup> As in non-terrorist cases, the review officer must give the detainee or his or her solicitor an opportunity to make oral or written representations<sup>13</sup> and must supply the

3 Terrorism Act 2000, Sch. 8, para. 21(2).

4 Ibid. Sch. 8, para. 21(3).

5 Ibid. Sch. 8, para. 22(1). The conditions are: (a) that it is not practicable to carry out the review at the time, (b) that the detained person is being questioned by a police officer and the review officer is satisfied that an interruption of the questioning to carry out the review would prejudice the investigation in connection with which the person is being questioned, and (c) that no review officer is readily available.

6 *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 2 All ER 326 (CA). This was not a case involving a terrorist suspect, but it is submitted that its *ratio decidendi* covers terrorist cases too.

7 Terrorism Act 2000, Sch. 8, paras 23(1)(a) and (b). For non-terrorist suspects the wording of the relevant law is slightly different, but not materially so: see Police and Criminal Evidence Act 1984 (the PACE legislation), s. 40(8), incorporating by reference s. 37(2) and (3).

8 Terrorism Act 2000, Sch. 8, paras 23(1)(c), (d) and (e). There are no equivalent provisions in the PACE legislation for non-terrorist suspects.

9 Terrorism Act 2000, Sch. 8, para. 23(1)(ba), inserted by the Terrorism Act 2006, s 24(1). There is no equivalent in the PACE legislation.

10 Terrorism Act 2000, Sch. 8, para. 23(1)(f). This too has no equivalent in the PACE legislation. Potentially it could lead to the Kafkaesque position where a terrorist suspect is lawfully detained without charge just because the police are dithering over whether to lay such a charge.

11 Terrorism Act 2000, Sch. 8, paras 23(2) and (3). Strangely, this is never an explicit requirement in non-terrorist cases.

12 When this ground for extended detention was introduced in 2006 (see n. 9 above) no provision was made for subjecting it to the additional conditions provided for in Sch. 8, paras 23(2) and (3), and no justification for the omission appears to have been given to Parliament during the debates on the Bill. The omission cannot be justified on the basis that forensic examinations are outside the control of the police, because at least one other “process” outside the control of the police (*viz.* a decision by the Home Secretary whether to serve a deportation order on the detainee) does have to be conducted diligently and expeditiously: see Sch. 8, para. 23(3) as it relates to para. 23(1)(e). Moreover, the requirement for diligence and expedition applies when applications are made to extend detention beyond 48 hours (see the text corresponding to n. 20 below).

13 Terrorism Act 2000, Sch. 8, para. 26.

detainee with a written record of the outcome of the review, made (unless there are special circumstances)<sup>14</sup> in his or her presence.<sup>15</sup>

If the police wish to prolong a terrorist suspect's detention beyond 48 hours they have to apply to "a judicial authority" for a warrant of further detention.<sup>16</sup> A prosecutor can also now make such an application.<sup>17</sup> In England and Wales the relevant judicial authority is a senior district judge (Chief Magistrate) or his or her designated deputy, in Scotland it is a sheriff, and in Northern Ireland it is a county court judge or a designated resident magistrate.<sup>18</sup> The judicial authority can then grant one or more warrants of further detention bringing the maximum detention period up to seven days, but can do so only if satisfied that there are reasonable grounds for believing that the further detention of the detainee is necessary to obtain relevant evidence whether by questioning the detainee or otherwise, to preserve relevant evidence, or pending the result of an examination of any relevant evidence or of anything the examination of which is being carried out with a view to obtaining relevant evidence.<sup>19</sup> The judicial authority must also be satisfied that the investigation in connection with which the detainee has been detained is being conducted diligently and expeditiously.<sup>20</sup> The other four grounds which can justify the review officer in authorising detention up to 48 hours no longer apply at this stage. Thereafter, the police or prosecution can apply to the judicial authority for one or more additional warrants of further detention, in chunks of no more than seven days, until a total of 28 days has elapsed since the detainee's arrest,<sup>21</sup> but such warrants can be issued for detentions lasting beyond the first 14 days only by "a senior judge",<sup>22</sup> which means a judge of the High Court or, in Scotland, of the High Court of Justiciary.<sup>23</sup> One of the consequences of involving judges of this level is that their decisions cannot be judicially reviewed.<sup>24</sup>

Originally the maximum pre-charge detention period for terrorist suspects – laid down by the Prevention of Terrorism (Temporary Provisions) Act 1974 – was seven days, but the power to extend the detention from 48 hours to that maximum was entrusted at that time not to a judicial authority but to a Secretary of State.<sup>25</sup> The power was not transferred to a

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14 Terrorism Act 2000, Sch. 8, para. 28(3).

15 Ibid. Sch. 8, para. 28(1) and (2).

16 Ibid. Sch. 9, para. 29.

17 Ibid. as amended by Terrorism Act 2006, s. 23(2).

18 Terrorism Act 2000, Sch. 8, para. 29(4). The designating authority for both England and Wales and Northern Ireland is the Lord Chancellor.

19 Ibid. Sch. 8, para. 32(1)(a) and (1A), the latter having been inserted by the Terrorism Act 2006, s. 24(3).

20 Terrorism Act 2000, Sch. 8, para. 32(1)(b).

21 Ibid. Sch. 8, para. 36(3), as substituted by the Terrorism Act 2006, s. 23(7).

22 Terrorism Act 2000, Sch. 8, para. 36(1A) and (1B), inserted by the Terrorism Act 2006, s. 23(6).

23 Terrorism Act 2000, Sch. 8, para. 36(7), inserted by Terrorism Act 2006, s. 23(10).

24 *R (Hussain) v Hon. Mr Justice Collins* [2006] EWHC 2467 (Admin).

25 Prevention of Terrorism (Temporary Provisions) Act 1974, s. 7(2). In *Brogan v UK* (1989) 11 EHRR 117 the European Court of Human Rights held that the equivalent provision in the 1989 version of this Act (s. 14(5)) was in breach of Article 5(3) of the ECHR because it prevented an arrested person from being "brought promptly before a judge or other officer authorised by law to exercise judicial power". Immediately thereafter the UK government submitted a new notice of derogation to the Council of Europe claiming that, because of the troubles in Northern Ireland, there was a "public emergency threatening the life of the nation" and that a government minister, not a judge, was therefore the appropriate person to decide whether pre-charge detention for up to seven days should be allowed. In *Brannigan and McBride v UK* (1993) 17 EHRR 539, the European Court of Human Rights upheld the validity of that notice of derogation, saying that the power to deprive detainees of any access to a judicial officer for seven days was a proportionate and otherwise acceptable response to what was indeed an emergency. The derogation was still valid in the eyes of the European Court several years later: see *Marshall v United Kingdom* App. No. 41571/98, decision of 10 July 2001.

judicial authority until the entry into force of the Terrorism Act 2000 in February 2001.<sup>26</sup> The Anti-terrorism, Crime and Security Act 2001 left the maximum detention period unaltered, although it did set up an indefinite detention system for non-British nationals which was later found by both the House of Lords<sup>27</sup> and the European Court of Human Rights<sup>28</sup> to be in breach of Article 5 of the ECHR, even though the UK government had again entered a notice of derogation under Article 15.<sup>29</sup> The seven-day maximum was, however, extended to 14 days by the Criminal Justice Act 2003,<sup>30</sup> and then to 28 days by the Terrorism Act 2006.<sup>31</sup> Under s. 25 of the 2006 Act the 28-day maximum was to endure for just one year,<sup>32</sup> unless the Secretary of State made an order disapplying the sunset clause in that section. In 2007 and 2008 the Secretary of State did make such an order, thereby retaining the 28-day maximum for a further 12 months on each occasion.<sup>33</sup> In June 2008 the government won a vote in the House of Commons to allow the Home Secretary to order an extension of the maximum detention period to 42 days,<sup>34</sup> but in October 2008 this proposal was heavily defeated in the House of Lords<sup>35</sup> and the government announced that it would drop it from the Counter-Terrorism Bill but keep it in reserve for future use if necessary.<sup>36</sup> The Counter-Terrorism Act 2008 does not therefore affect the maximum pre-charge detention period, which remains at 28 days.

### What the ECHR says about pre-charge detention

The ECHR engages in some way with the issue of detention in a number of articles, but at no point is it specific as to the permitted duration of detention, whether pre-charge or post-charge. Perhaps for that reason the ECHR has not often been directly invoked during

26 Ss. 29(3) and 36(3). The UK government was then able to withdraw its notice of derogation on 19 February 2001. For copies of the UK's declarations concerning the ECHR see the website of the Netherlands Institute of Human Rights: <http://sim.la.uu.nl/SIM/library>.

27 *A v Secretary of State for the Home Department* [2005] 2 AC 68, a decision by 8 v 1.

28 *A v UK* App. No. 3455/05, 19 February 2009, a unanimous judgment of the Grand Chamber.

29 See, generally, J Wadham, H Mountfield, A Edmundsen and C Gallagher, *Blackstone's Guide to the Human Rights Act 1998* 4th edn (Oxford: Oxford University Press 2007), pp. 44–5.

30 S. 306, which inserts new paras (3A) and (3B) into the Terrorism Act 2000, Sch. 8.

31 MPs voted by 322 to 291 against the government's proposal for 90-day detentions and by 323 to 290 in favour of 28-day detentions: HC Debs, vol. 439, cols 325–85 (9 November 2005).

32 If it were to lapse, the maximum detention period would revert to 14 days.

33 Terrorism Act 2006 (Disapplication of Section 25) Orders 2007 (SI 2007/2181) and 2008 (SI 2008/1745). The 28-day maximum will now disappear on 25 July 2009 unless a further order is made disapplying s. 25. A draft of such an order has already been published.

34 This was during the report stage of the Bill on 11 June 2008: HC Debs, vol. 477, cols 312–400.

35 HL Debs, vol. 704, cols 491–541 (13 October 2008); the vote, during the committee stage of the Bill, was 309 to 118 against extending the maximum pre-charge detention period beyond 28 days, a majority of 191.

36 The then Home Secretary, Jacqui Smith, announced two hours after the vote in the Lords: "I have prepared a new Bill to enable the police and prosecutors to do their work – should the worst happen, and should a terrorist plot overtake us and threaten our current investigatory capabilities . . . The Counter-Terrorism (Temporary Provisions) Bill now stands ready to be introduced if and when the need arises . . . I will place a copy of the new Bill in the Library of the House." HC Debs, vol. 480, col. 624 (13 October 2008).

parliamentary debates on the permitted maximum detention period.<sup>37</sup> We can infer from the jurisprudence of the European Court of Human Rights, however, that the permitted duration may differ depending on the type and nature of the detention in question.<sup>38</sup> Article 5(1) confers on everyone the right to liberty and security of the person, but it then sets out a list of situations in which a person can be deprived of liberty if this is done in accordance with a procedure prescribed by law. One of the situations listed, in Article 5(1)(c), refers to the arrest or detention of persons for the purpose of bringing them before a competent legal authority on reasonable suspicion of having committed an offence, and Article 5(3) goes on to state that any such person “shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial”.<sup>39</sup> In addition, by Article 5(4), anyone so arrested or detained “shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.<sup>40</sup>

At no point does the Convention suggest that the time at which a person is charged with an offence should influence the lawfulness of his or her detention. In fact the only occasion on which Article 5 refers to a person being charged is in paragraph (2), which gives everyone who has been arrested the right to be informed promptly of the reasons for the arrest “and of any charge against him”. In the eyes of the European Court of Human Rights the main significance of someone being charged is that it triggers the application of the specific fair trial guarantees provided for in Article 6 of the Convention.<sup>41</sup> Indeed it seems clear that the main reason for the absence of any reference to the concept of “charge” in the body of Article 5(1) is that the Convention was trying to distinguish between liberty rights and trial rights: the charging of a detainee was not deemed to be relevant to the permitted duration of the person’s detention. Moreover, even within Article 6 the term “charge” has an autonomous meaning that is not necessarily tied to any meaning ascribed to the term within a national legal system. This was made clear by the European Court of Human Rights in

37 In the debate on the report stage of the Terrorism Bill in the House of Commons on 9 November 2005 the then Home Secretary, Charles Clarke, said that he had certified that the Bill was fully compatible with the European Convention, but at no point did he go into detail on Article 5, nor was he pressed on this point by any other MP, except William Cash, who argued that the Law Lords would declare the legislation to be incompatible with the Human Rights Act: see HC Debs, vol. 439, col. 376. In the debate on the second reading of the Counter-Terrorism Bill in the House of Lords on 8 July 2008 Lord Lester of Herne Hill said that the Home Secretary’s argument for a 42-day maximum would not be likely to convince either our domestic courts or the European Court that it was compatible with the fundamental right to liberty in Article 5 of the ECHR (HL Debs vol. 703, col. 654), and in the debate on the committee stage of the Bill on 13 October 2008 Lord Lester urged the government minister to say how he would answer “the view of all independent legal commentators and of the Joint Committee on Human Rights that there will be serious breaches of the convention without a derogation”. Lord West of Spithead replied that he did not intend to go into that in detail: “I simply say that I see nothing at all in what we are doing here that goes against the ECHR. There would have to be a challenge through the courts to show that but I do not believe that it does; I think that we have all the right safeguards in place.” (HL Debs vol. 704, col. 537).

38 I have examined different types of detention, and their consequences under the European Convention, in “The detention of terrorist suspects in Great Britain and Northern Ireland” (2009) 43 *U Richmond L Rev* 927. Detention in a small cell in a police station, for example, could become “degrading treatment” in breach of Article 3 of the ECHR much sooner than it might if the detention were to occur in a prison, with all the facilities normally available there.

39 A case in Strasbourg brought from Northern Ireland has established that the judge or other officer before whom a detainee is first brought does not have to be someone who has the power to order the person’s release on bail: *McKay v United Kingdom* (2007) 44 EHRR 41.

40 Articles 6, 8 and 11 might also be relevant, but they are outside the scope of this essay.

41 C Ovey and R White, *Jacobs and White: The European Convention on Human Rights* 4th edn (Oxford: Oxford University Press 2006), pp. 161–2.

*Deweir v Belgium*,<sup>42</sup> where, relying upon earlier commission decisions,<sup>43</sup> it defined a “charge” as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.<sup>44</sup> In the United Kingdom the police regularly put allegations to a detainee as part and parcel of the normal interrogation process and this may be enough to bring into play the rights conferred by Article 6 even though the police do not formally “charge” the detainee until they have accumulated enough information to be at the very least 50 per cent confident that they will be able to secure a conviction.<sup>45</sup>

The right conferred by Article 5(2) is less extensive than that conferred by Article 6(3)(a)<sup>46</sup> and has been interpreted by many commentators as being focused on the supply of reasons for the arrest or detention.<sup>47</sup> Notification of any charge is required only if such a charge is forthcoming. Cases reaching the European Court from Northern Ireland have helped to clarify that the reasons given to the detainee for his or her arrest can be scant, provided only that the surrounding circumstances of the arrest, or the questions later put to the detainee (provided they are put promptly), are sufficient to allow him or her to deduce the reasons for the arrest.<sup>48</sup> While simply telling a detainee that he or she is being detained on suspicion of involvement in terrorism may not of itself be enough to satisfy Article 5(2), a full charge-sheet certainly does not have to be presented to the detainee. It is enough for the detainee to be informed indirectly of what it is that he or she is reasonably suspected of having done.<sup>49</sup> The court would certainly approach any such question bearing in mind the context involved, namely the threat of terrorism. In *Chraidi v Germany*, for example, the court tolerated pre-trial (not pre-charge) detention lasting for five years and almost six months in a case where the applicant was accused of having prepared a bomb attack on a discotheque in Berlin frequented by members of the US armed forces.<sup>50</sup>

The wording of Article 5(3), as has often been pointed out,<sup>51</sup> is far from ideal. On the one hand, it clearly aims to ensure that people who are arrested or detained on reasonable suspicion of having committed an offence are given an opportunity to convince a judge

42 (1979–80) 2 EHRR 439. See also *Eckle v Germany* (1983) 5 EHRR 1, para. 73.

43 E.g. *Neumeister v Austria* (1979–80) 1 EHRR 91 (decision of 27 June 1968). See, generally, S Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press 2005), pp. 31–6.

44 *Neumeister v Austria* (1979–80) 1 EHRR 91, para. 46.

45 See e.g. *Magee v UK* (2001) 31 EHRR 45, where the conditions endured by the detainee in Castlereagh holding centre in Belfast prior to his being charged (when coupled with the crucial fact that there was denial of access to a solicitor) were held to have contributed to the overall unfairness of his trial.

46 See K Reid, *A Practitioner's Guide to the European Convention on Human Rights* 3rd edn (London: Sweet & Maxwell 2007), p. 140. Article 6(3)(a) reads: “Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.”

47 Reid, *A Practitioner's Guide*, n. 46 above, pp. 510–13.

48 *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, where it was held that the detainee must be told “the essential legal and factual grounds for his arrest” (para. 40); *Murray (Margaret) v United Kingdom* (1996) 22 EHRR 29. In both cases the European Court reversed the European Commission on this point. See, too, *Kerr v United Kingdom* App. No. 40451/98, decision on inadmissibility, 7 December 1999.

49 See e.g. *Murray v UK* (1995) 19 EHRR 193, paras 76–7; *Dikme v Turkey* App No 20869/92, decision of 11 July 2000, para. 56; *Egmez v Cyprus* (2002) 34 EHRR 29, paras 85–6; all cited in Trechsel, *Human Rights*, n. 43 above, p. 461. Trechsel describes the ECHR jurisprudence as “far from ideal” because it could leave a detainee guessing as to why he or she has been detained.

50 (2006) 47 EHRR 47. The court partly justified its decision by saying there were “difficulties intrinsic to the prosecution of offences committed in the context of international terrorism” (para. 55).

51 See e.g. D Harris, M O’Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* 2nd edn (Oxford: Oxford University Press 2009) p. 173.

that, pending the determination of their guilt of that offence, they should not be held in custody. To that extent the paragraph is a provision about bail, as its last few words strongly imply.<sup>52</sup> On the other hand, the paragraph seems to confer a *right* to be released (whether on bail or not) if a trial cannot occur within a reasonable time. But the European Court has for long shied away from this second interpretation, even if it has not always explained very clearly why this is so. In *Wemhoff v Germany*, for instance, the Court said, in what was only its seventh decision,<sup>53</sup> that Article 5(3) should not be read literally because that would mean that by releasing a detainee a member state could evade its obligation to try that person within a reasonable time (although Article 6, of course, still confers the right to a fair and public hearing within a reasonable time). It added:

The Court is quite certain that such an interpretation would not conform to the intention of the High Contracting Parties. It is inconceivable that they should have intended to permit their judicial authorities, at the price of release of the accused, to protract proceedings beyond a reasonable time . . . It is thus mainly in the light of the fact of the detention of the person being prosecuted that national courts, possibly followed by the European Court, must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit, that is to say imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent.

In other words it is the provisional detention of accused persons which must not, according to Article 5(3), be prolonged beyond a reasonable time . . .<sup>54</sup>

The court confirmed this approach to Article 5(3) in its very next decision, *Neumeister v Austria*,<sup>55</sup> where it said that “the purpose of the provision under consideration is essentially to require [the detainee’s] provisional release once his continuing detention ceases to be reasonable”. In *Schiesser v Switzerland* the court expanded upon this by saying:

under Article 5 para. 3 there is both a procedural and a substantive requirement. The procedural requirement places the “officer” under the obligation of hearing himself the individual brought before him . . . ; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons.<sup>56</sup>

In none of the cases on Article 5(3) has the European Court stated that a delay in charging the detainee is itself a ground for finding the detention to be unjustifiable.

Article 5(4) of the Convention has a broader remit than Article 5(3): it applies to all persons who have been deprived of their liberty by arrest or detention (not just those arrested or detained on reasonable suspicion of having committed an offence) and it

52 “Release may be conditioned by guarantees to appear for trial.”

53 (1979–80) 1 EHRR 55, judgment of 27 June 1968.

54 Ibid. paras 4–5. Note the use of the word “prosecuted” in the fifth line of this quotation, which, taken together with the word “accused” in the 11th line, implies that Article 5(3) was intended to apply to people who (in UK terms) have already been charged with an offence.

55 (1979–80) 1 EHRR 91, judgment of 27 July 1968, “The Law”, para. 4

56 (1979–80) 2 EHRR 417, para. 31, citing *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para. 199, although that paragraph does not in fact deal specifically with the nature of the substantive obligation in question. The statement in *Schiesser* was later approved in e.g. *De Jong, Baljet and Van den Brink v The Netherlands* (1986) 8 EHRR 20, para. 47, and the latter was in turn approved in *Aquilina v Malta* App. No. 25642/94, judgment of 29 April 1999.

confers the right on all such persons to have the lawfulness of their detention decided speedily by a court and to be released if their detention is found not to be lawful.<sup>57</sup> There is obviously an overlap between the two paragraphs in that everyone who can claim the right protected by Article 5(3) can also claim the right protected by Article 5(4), but there are still important differences between the two provisions. Article 5(3) requires the detainee to be brought “promptly” before a judge or other judicial officer, while Article 5(4) speaks of the right to take proceedings by which the lawfulness of the detention shall be decided “speedily” by a court. Article 5(3) envisages that the detainee may be kept in custody until a reasonable time has elapsed for a trial to take place, while Article 5(4) requires the detainee to be released if the detention is found on any ground to be unlawful. And Article 5(3) does not imply that a detainee who seeks to be released on bail should have the full panoply of rights that a detainee who relies on Article 5(4) might claim: the European Court has accepted that both provisions “must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required”.<sup>58</sup> The particular judicial character required by Article 5(4) has to be appropriate to the kind of deprivation of liberty in question, but should if possible approximate the basic requirements of a fair trial laid down by Article 6(1) of the Convention.<sup>59</sup> As the Court said in *Schöps v Germany*:

in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon.<sup>60</sup>

In its recent decision concerning detention without trial under the Anti-terrorism, Crime and Security Act 2001 in the United Kingdom, the European Court emphasised that “in view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants’ fundamental rights, Article 5(4) must import substantially the same fair trial guarantees as Article 6(1) in its criminal aspect”.<sup>61</sup> The House of Lords has now followed that decision in a case concerning control orders issued under the Prevention of Terrorism Act 2005,<sup>62</sup> but one cannot necessarily deduce from that that, in a situation where the maximum detention period is 28 days and police investigations are ongoing into whether or not there is enough evidence to charge the detainee, the same strict adherence to the demands of Article 6(1) will be required. The Terrorism Act 2000

57 See, generally, Reid, *A Practitioner’s Guide*, n. 46 above, pp. 532–41. See too p. 456, in the section on pre-trial detention, where Reid observes that complying with Article 5(4) is not enough to ensure compliance with Article 5(3) because the latter requires the review to be automatic, not self-generated, citing *Aquilina v Malta*, n. 56 above, para. 53. This point was also made in *Ireland v United Kingdom*, n. 56 above, para. 199.

58 *Brannigan and McBride v UK* (1993) 17 EHRR 539, at para. 58, citing *Schiesser v Switzerland*, (1979–80) 2 EHRR 417, para. 30; *Huber v Switzerland* App No 12794/87, judgment of 23 October 1990, paras. 42–3; *De Wilde, Ooms and Versyp v Belgium* (1979–80) 1 EHRR 373, para. 78; *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, para. 51; and *Lamy v Belgium* App No 10444/83, judgment of 30 March 1989, para. 28.

59 Reid, *A Practitioner’s Guide*, n. 46 above, pp. 535–6.

60 App. No. 25116/94, judgment of 13 February 2001, citing *Brandstetter v Austria* App. No. 11170/84, judgment of 28 August 1991, pp. 27–8, para. 67.

61 *A v UK* App. No. 3455/05, 19 February 2009, para. 217.

62 *Secretary of State for the Home Dept v AF* [2009] UKHL 28, a unanimous decision of nine Law Lords.

does allow a judge to exclude the detainee or his or her representative from actually being present at any part of the hearing,<sup>63</sup> and even after the House's recent decision there is still scope for that to occur, especially if, as the Parliamentary Joint Committee on Human Rights has proposed,<sup>64</sup> "special advocates" are appointed to assist the detainee.<sup>65</sup>

Article 5, in short, requires the detention of persons reasonably suspected of crimes to be both lawful and reasonable. But the European Court of Human Rights has not given any indication of how many hours or days of detention would in general be reasonable, certainly not as regards the period of detention preceding the laying of any charge against the detainee. Nor has it stipulated that during ongoing police investigations into a crime persons reasonably suspected of involvement in that crime but not yet charged have to be accorded the full panoply of Article 6(1) rights.

### The views of experts on 28-day detentions

In 2003 Parliament's Joint Committee on Human Rights thought that the proposal in the Criminal Justice Bill to extend the maximum detention period for terrorist suspects from seven to 14 days was not in itself a breach of Article 5.<sup>66</sup> It suggested that 14 days would not be arbitrary since there were arrangements to ensure that there were sufficient grounds for detaining the person and that the detention was proportionate both in the period of detention and the conditions of detention. Presumably, the Committee meant that the detention was proportionate relative to the threat being faced by the country. But the Committee did draw Parliament's attention to the fact that, because the proposed Bill envisaged detention being extended on the basis of information not disclosed to the detainee or to any legal representative of the detainee, there was a potential for a lack of fairness.<sup>67</sup>

In 2005, when the proposal was made in the Terrorism Bill to extend the maximum pre-charge detention period from 14 days to 90 days, the Joint Committee concluded that this would breach Article 5 because it would be "clearly disproportionate" and "accompanied by insufficient guarantees against arbitrariness". The Committee also felt that such an extension "risked leading to independent breaches of Article 3 ECHR, and to the inadmissibility at trial of statements obtained following lengthy pre-charge detention".<sup>68</sup> In fact the Committee went on to state that, despite the relevant legal standards not being "very concrete", the proportionality case for *any* increase to the current 14-day limit – even to 28 days – had not been made out on the evidence.<sup>69</sup> It did not, however, rule out the possibility that such evidence might be produced in the future.<sup>70</sup>

In November 2005 no less a figure than Louise Arbour, the then UN High Commissioner for Human Rights, wrote to the UK Permanent Representative to the UN Office in Geneva expressing "grave concern" over how the rights in the ECHR (and in the

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63 Sch. 8, para. 33(3). See, too, para. 34(4).

64 2nd Report of 2007–08, HL 23/HC 156, paras 88–9. See, too, the text at n. 75 below.

65 In *R (Roberts) v Parole Board* [2005] 2 AC 738 the Law Lords held, by 3 v 2 (Lords Bingham and Steyn dissenting), that the Parole Board was able, within the powers granted by the Criminal Justice Act 1991, and compatibly with Article 5 of the ECHR, to withhold material relevant to the appellant's parole review from the appellant's legal representatives and to disclose that material instead to a specially appointed advocate, who would represent the appellant, in the absence of the appellant and his legal representatives, at a closed hearing before the Parole Board.

66 11th Report, 2002–03, HL 119/HC 724, para. 101.

67 *Ibid.* para. 105.

68 3rd Report of 2005–06, HL 75-1/HC 561-I, para. 87.

69 *Ibid.* para. 92 (emphasis added).

70 *Ibid.*

International Covenant on Civil and Political Rights) would be protected if pre-charge detention were extended to 28 days in the United Kingdom. But the High Commissioner did not make a detailed case substantiating her points and in a written Ministerial Statement issued six weeks later the Home Secretary said he was satisfied that 28-day detentions did not breach the country's international human rights obligations.<sup>71</sup> The Joint Committee again disagreed, setting out its reasoning at some length.<sup>72</sup> The Home Affairs Select Committee, on the other hand, accepted the need to move to a 28-day maximum<sup>73</sup> and later repeated that it may be necessary to move beyond the 28-day maximum.<sup>74</sup> Undaunted, the Joint Committee continued to repeat its views in a number of subsequent reports, relying on its interpretation of the European Court's jurisprudence based around Articles 5(1), (2), (3) and (4) of the Convention.<sup>75</sup> Nevertheless, as already noted, Parliament approved of 28-day detentions and the relevant section of the Terrorism Act 2006 (s. 23) came into effect on 25 July 2006.<sup>76</sup>

Section 36 of that Act, replacing s. 126 of the Terrorism Act 2000, requires the Secretary of State to appoint a person to review the operation of both the Terrorism Act 2000 and Part 1 of the 2006 Act, and Lord Carlile of Berriew QC has undertaken that task to date.<sup>77</sup> In his reports on the operation of the Acts during 2007 and 2008, he concludes that overall the provisions were "fit for purpose",<sup>78</sup> but he admits that he has not conducted a detailed analysis of the system whereby judges supervise 14–28 day detentions.<sup>79</sup> He notes that he has not been asked to do this and that it would in any event be difficult for him to do so in any meaningful way without becoming "embedded" in some cases from arrest to verdict. He adds that he expects in due course to see cases in which the current maximum of 28 days will prove inadequate.<sup>80</sup>

In April 2008 the newly created Equality and Human Rights Commission (EHRC) published legal advice from Rabinder Singh QC and Professor Aileen McColgan on the legality of the proposal for a maximum pre-charge detention period of 42 days. The report concluded that 42-day detentions would be likely to result in breaches of Articles 5(1), (2), (3) and (4) of the ECHR, and also of Articles 3, 6 and 14,<sup>81</sup> and many of the arguments

71 HC Debs, 9 January 2006, col 1WS.

72 24th Report of 2005–06, HL 240/ HC 1576, *passim*.

73 4th Report of 2005–06, HC 910-I.

74 1st Report of 2007–08, HC 43-I, paras 6–76.

75 See 2nd Report of 2007–08, HL 23/HC 156, *passim*; 9th Report of 2007–08, HL 50/HC 199, paras 2–21; 20th Report of 2007–08, HL 108/HC 554, paras 6–36; 21st Report of 2007–08, HL 116/HC 635, paras 3–44; 25th Report of 2007–08, HL 132/HC 825, *passim*; 30th Report of 2007–08, HL 172/HC 1077, paras 7–88.

76 Terrorism Act 2006 (Commencement No 2) Order 2006.

77 Lord Carlile first reported on the UK's anti-terrorism laws in 2001. In the second reading debate of the 2006 Terrorism Bill in the House of Lords he expressed support for the 28-day compromise but hinted that he could have supported a longer maximum: "Twenty-eight days offers an improvement, although a modest one, in terms of public safety . . . I hope that time will confirm the democratic wisdom of another place" (HL Debs, vol. 675, col. 1436; 21 November 2005). In the debate on the committee stage of the 2008 Bill he claimed that a 42-day maximum pre-charge detention period would be compatible with the ECHR (HL Debs vol. 704, cols 504 and 506; 13 October 2008).

78 Report on the Operation in 2007 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006 (June 2008), para. 283, and Report on 2008 (June 2009), para. 238. Both reports are available on the Home Office website: [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk). In 2008 only one person was released after being detained for longer than 14 days, and that was after 19 days: Report on 2008, para. 128.

79 Report on 2007, para. 103.

80 Report on 2007, para. 109; Report on 2008, para. 128.

81 The 115-page document is available on the EHRC's website: [www.equalityhumanrights.com](http://www.equalityhumanrights.com).

raised in support of this view could apply just as much to 28-day detentions as they do to 42-day detentions. In particular, the authors relied on *Lamy v Belgium*<sup>82</sup> and *Garcia Alva v Germany*<sup>83</sup> to claim that “hearings in the absence of the accused, and/or withholding of information from detainees, give rise to difficulties under Article 5(4) of the Convention, and may prevent a hearing being adequate for the purposes of Article 5(3)”.<sup>84</sup> They also appeared<sup>85</sup> to endorse the view of the Joint Committee that hearings to decide if detention should be extended would only be compatible with Article 5(4) if the police or prosecution were required to satisfy the court “that there is material giving reasonable grounds to believe that the suspect has committed a terrorism related offence in the first place”.<sup>86</sup> The advice conceded, however, that the House of Lords has already decided that at hearings for a warrant of further detention the police are entitled to withhold from the suspect the line of questioning the police intend to put to the detainee.<sup>87</sup>

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe also weighed in with a report in September 2008.<sup>88</sup> This expressed “serious doubts” about the ECHR-compatibility of the proposed 42-day detention regime, yet it acknowledged that “the Convention does not require a formal charge to be taken within a specific time, but only sets out procedural requirements that must be fulfilled during any detention prior to conviction”.<sup>89</sup> It did not specifically condemn 28-day detentions.

### The arguments for incompatibility

The arguments which stand out as having some real plausibility in terms of the incompatibility of 28-day detentions with Article 5 are those based on disproportionality and the lack of a fully adversarial procedure for granting extensions to initial detention periods. But in fact none of them is completely watertight. Those focused on disproportionality ignore the reality that the Convention does not in general concern itself with laws in the abstract but only with how they are applied in practice.<sup>90</sup> When faced with a challenge to a 28-day detention, the European Court of Human Rights will ask itself whether on the facts of the case before it the applicant’s rights under Article 5 have been violated, not whether the law itself is inherently incompatible. In such a context, both the likelihood of terrorism occurring in general, and the possible consequences if it were to occur, are not entitled to be taken into account, for all that matters is whether it can be shown that there are reasonable grounds for suspecting the particular applicant’s involvement in terrorism. A general “top level” security threat would of itself not be enough to justify the continued detention of anyone in the absence of information reasonably linking that person to a suspected terrorist cell, plot or action. Conversely, even if the general security level were extremely low, reasonable suspicion that a particular person was involved

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82 (1989) 11 EHRR 529.

83 (2003) 37 EHRR 12.

84 EHRC document, n. 81 above, para. 45.

85 Ibid. para. 64.

86 9th Report of 2007–08, HL 50/HC 199, para. 94. See also para. 87, cited by Singh and McColgan, EHRC document, n. 81 above, at para. 58.

87 *Ward v Police Service of Northern Ireland* [2007] 1 WLR 3013.

88 See <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11725.htm>.

89 Ibid. para. 31.

90 Cf. the European Court of Human Rights in *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157, para. 31: “The Court’s task, however, is not to review the impugned legislation in abstracto but to examine its application in these particular cases.”

in terrorism could be enough to justify his or her initial, and indeed further, detention.

A variant of the main disproportionality argument is that 28-day detention somehow undermines the need for the existence of “reasonable suspicion” in relation to the initial detention. There are some (very weak) dicta in the judgment of the European Court of Human Rights in *Fox, Campbell and Hartley v UK* which might suggest that the longer detention continues the more doubt is inevitably cast on the reasonableness of the initial detention.<sup>91</sup> But this assumes that the reasonableness of suspicion is a function of how long it takes to substantiate that suspicion, when in fact it is a function of the likelihood that the suspicion will turn out to be well-grounded. Moreover, *Fox, Campbell and Hartley v UK* was primarily concerned with whether arrests founded on mere suspicion (as opposed to reasonable suspicion) were compatible with Article 5(1)(c) of the Convention, so anything said by the Court in relation to any part of Article 5(3), including the meaning of the word “promptly” in that paragraph, must be taken as not necessarily authoritative. Nor is it right that the test for authorising extensions to initial detention in UK law is disproportionately low. Just because detention is extended, it does not follow that the evidence justifying it has to get proportionately stronger. Detention may need to be longer not only because there are *stronger* grounds than before for suspecting the detainee’s involvement, but also because there are *more* grounds for that suspicion that require to be investigated. It is the time required to check those additional grounds that justifies the detention.

It does remain the case, though, on one reading of the current legislation, that at a hearing for a warrant of further detention the judge does not need to be satisfied that the original arrest was based on reasonable suspicion at all. The basis for such a reading is a provision in the Terrorism Act 2000 which says that a detained person “shall be deemed to be in legal custody throughout the period of his detention”.<sup>92</sup> But in a recent case the Divisional Court of Northern Ireland has held that that provision does not excuse a court from examining the legality of the detainee’s original arrest.<sup>93</sup> The court found support for this view in Article 5(3) of the Convention but, with respect, more appropriate support seems to be available in Article 5(4). As noted above, Article 5(3) primarily regulates how quickly a detained person should be brought before a judge for a decision to be taken on whether to grant release on bail. Article 5(4) has a broader scope in that it guarantees to every person who has been arrested or detained (on whatever grounds) the right to take proceedings by which the very lawfulness of the detention shall be decided speedily by a court. Admittedly, Article 5(4) does not expressly require the initial *arrest* of the detainee to be checked in such proceedings, but in practice a domestic court considering the lawfulness of detention is very unlikely to interpret the word “detention” in Article 5(4) narrowly, and so is the European Court. “Detention” in Article 5(4) will be taken as referring to the detention experienced since the moment of the arrest, not to any specific period arising after the arrest.

91 *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157, para. 35: “The fact that all the applicants, during their detention, were questioned about specific terrorist acts, does no more than confirm that the arresting officers had a genuine suspicion that they had been involved in those acts, but it cannot satisfy an objective observer that the applicants may have committed these acts.” But the commission explicitly accepted that in terrorist cases the “reasonableness” of the suspicion underpinning detention can be of a lower standard than in non-terrorist cases, because the authorities cannot disclose their confidential sources “or even facts which could be susceptible of indicating such sources or their identity” (para. 34).

92 Sch. 8, para. 5.

93 *In re Colin Duffy’s Application* [2009] NIQB 31. The court left to a future hearing the question whether a declaration of incompatibility should be issued in relation to provisions in the Terrorism Act 2000. It is submitted here that, as in *Secretary of State for the Home Department v AF* [2009] UKHL 28, the provisions can in fact be “read down” under s. 3 of the Human Rights Act 1998 so as to be rendered compatible with Convention rights.

A 28-day pre-charge detention period may also be regarded as disproportionate in that there are other means at the disposal of the prosecution for dealing with suspected terrorists, but this in turn depends on whether those other means are compatible with Convention rights. To date at least four such alternatives have been canvassed, including by the government itself:<sup>94</sup> (a) lowering the threshold for pressing charges against a detainee;<sup>95</sup> (b) allowing detainees to be held on “holding charges” while more serious allegations are investigated;<sup>96</sup> (c) charging detainees not for acts that have already been committed but for “acts preparatory to terrorism”; and (d) allowing detentions to be charged on the basis of “intercept evidence” even though such evidence may not later be admissible at a subsequent trial. At first glance these suggestions may collectively present a strong case in favour of concluding that 28-day detentions breach Article 5(3) because they are unnecessary. But in relation to the first two options it has to be remembered that the standard for pressing charges can never be reduced to below that of “reasonable suspicion” and that to ensure that the suspect does not abscond the offence charged still has to be serious enough to warrant deprivation of liberty pending trial. As for the last two options, they both presuppose that after being charged the detainee can be questioned further about his or her past or planned involvement in particular activities. At present, however, post-charge questioning is not permitted under English law, because of the risk that it might make the overall trial process unfair under Article 6 of the Convention. It is true that Part 2 of the Counter-Terrorism Act 2008 makes provision for post-charge questioning in all parts of the United Kingdom for periods of up to 48 hours at a time, and that the availability of this power, if the relevant sections are ever commenced, may well make it more difficult for the police to convince a judge that extended pre-charge detention is necessary in a particular case. Even then, though, in some cases there may still be insufficient grounds of suspicion to meet the standard required for the laying of any charge, nor may there be any intercept evidence available, so prolonged pre-charge detention may still be genuinely necessary for a longer period.

Incompatibility arguments focused on the lack of a fully adversarial procedure for granting extensions to initial detention periods presuppose that the police have failed to grant the detainee the range of “fair trial” guarantees protected by Article 5(4). The House of Lords, in its recent nine-judge decision on the regime for issuing control orders, has made it clear that these guarantees will not be satisfied if the controlee in question is not given sufficient information on the case against him or her to enable effective instructions to be given to the special advocate appointed to assist the controlee.<sup>97</sup> One can deduce from this that the information required to be given to *detainees*, whose liberty is at stake in a way that goes beyond what *controlees* have to face, would need to be even more detailed. But if that information is supplied, if the detainee is granted his or her statutory rights of access to a solicitor and to medical examination, and if the police can show that the investigation in question is being conducted diligently and expeditiously, then Article 5(4) will not be breached.

94 Home Office Consultation Paper, *Options for Pre-charge Detention in Terrorism Cases* (July 2007). See, too, the report compiled by Jago Russell for the NGO Liberty, *Charge or Release: Terrorism pre-charge detention – comparative law study* (November 2007). Unfortunately, neither of these reports adequately grapples with the reality that in criminal justice systems based on the French model the concept of being “inculpated” (*inculpé*) does not carry the same significance as being “charged” in the British and Irish criminal justice systems.

95 This is already allowed under the Code for Crown Prosecutors in England and Wales, para. 3.3. See the Joint Committee on Human Rights’ 24th Report of 2005–06, HL 240/HC 1576, paras 122–9.

96 This alternative was rejected by the Joint Committee: 24th Report of 2005–06, HL 240/HC 1576, paras 139–42 (endorsing the view of the Crown Prosecution Service, which saw it as an abuse of state power).

97 *Secretary of State for the Home Department v AF* [2009] UKHL 28.

### Conclusion

It seems, on the basis of the information and analysis presented above, that Article 5 of the Convention envisages pre-charge detention lasting for a reasonable time, and that what is reasonable can depend on a variety of factors, including not only the length of the period in question but also the offence of which the detainee is reasonably suspected, the complexity of the investigation relating to that offence, the ability of the detainee to provide information relating to the investigation, the conditions under which the detainee is held, and the accessibility of the detainee to communication with the outside world, in particular with a legal adviser. The onus, admittedly, is on the authorities that want to prolong detention for as long as 28 days to show that, in all the circumstances, this is justified. If the High Court judge considering whether to extend detention beyond 14 days is satisfied that the pre-conditions laid down in the Terrorism Act 2006 have been met, if the detainee is provided with an Article 5(4)-compliant opportunity to challenge the reasons put forward for the extended detention, and if the detaining authorities have no other course of action available to them to determine whether or not the detainee deserves to be charged with a terrorist offence, then, difficult though it may be to have to concede the point, 28-day detentions are probably compatible with the European Convention.

This position will not change unless and until the European Court of Human Rights asserts, as it has done in relation to the time that can elapse before a detained person has to be initially brought before a judge or other officer authorised by law to exercise judicial power,<sup>98</sup> that there is a notional maximum period that cannot be exceeded before a detainee is charged with an offence. Given the difficulties inherent in defining what “charged” means across all 47 Council of Europe states, the court is unlikely to make that assertion. Alternatively, the UK’s new Supreme Court could decide that the values of English common law require there to be a stated maximum for pre-charge detention periods, even if Convention values do not. But the fact that parliamentarians have argued long and hard over what that maximum should be is very likely to discourage judges from rushing in where angels fear to tread. The Supreme Court will see the matter as one pre-eminently suitable for legislative rather than judicial regulation. Of course, if there is to be a British Bill of Rights and Responsibilities, which both main political parties are now advocating,<sup>99</sup> perhaps the right not to be detained for longer than, say, 14 days before being charged with an offence could be made a part of it.

98 See *Brogan v UK*, n. 25 above.

99 See the government’s Green Paper, *Rights and Responsibilities: Developing our constitutional framework* Cm 7577 (London: HMSO March 2009).

# The media and scandalising: time for a fresh look

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## Introduction

Among the many issues that have increasingly engaged the attention of global free speech campaigners is the strikingly variable manner in which the law of contempt has been applied in different parts of the common law world. Of particular concern to the activists – and to journalists – is the unrelenting vigour with which the offence of “scandalising” judges<sup>1</sup> continues to be used against critics of the judiciary in certain former British colonies even as this offence has all but disappeared from the statute book of the “mother” country.<sup>2</sup> A large number of the modern prosecutions – in countries such as Singapore,<sup>3</sup> Mauritius,<sup>4</sup> Malaysia<sup>5</sup> and India<sup>6</sup> – have resulted in custodial sentences for the defendants concerned, often for utterances and writings that would be considered well within acceptable limits of legitimate criticism in democratic societies.

The consequent “chilling” effect that this stringent approach has had on free speech has been the subject of much activist, professional and academic comment over the past couple of decades.<sup>7</sup> It has been argued, among other things, that the law of “scandalising” has

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1 The offence is also known as “scandalising the court”.

2 The last reported case which resulted in a conviction in England and Wales appears to have occurred in 1931: *R v Colsey*, *The Times* (London), 9 May 1931, and even earlier in Scotland: *Alex Robertson* (1870) 1 Couper 404. An attempt, in 2000, to use the law of scandalising against a businessman who alleged that senior English judges were engaged in conspiring to pervert the course of justice was aborted after the Attorney General decided against taking any action – see C Dyer, “Businessman escapes jail after abusing judges”, *The Guardian* (London), 5 February 2000.

3 E.g. *Attorney General v Lingle* (1995) 1 SLR 696.

4 E.g. *Abnee v DPP* [1999] 2 AC 294.

5 E.g. *Murray Heibert v Chandra Sri Ram* [1999] 4 MLJ 321.

6 E.g. *In re Arundhati Roy*, Contempt Petition (Crim.) No. 10 of 2001, unreported decision of the Supreme Court of India dated 6 March 2002; *In re M K Tayal and others*, Contempt Case (Crim.) No. 7 of 2007, unreported decision of the High Court of Delhi dated 11 September 2007 (copy on file with the author).

7 See e.g. C Walker, “Scandalising in the eighties” (1985) 101 *Law Quarterly Review* 359; T Allen, “Scandalising the court: the impact of bills of rights” (2002) 10 *Asia Pacific Law Review* 1; G Robertson and A Nicol, *Media Law* 5th edn (London: Sweet & Maxwell 2008), pp. 403–62; M K Addo, *Freedom of Expression and the Criticism of Judges* (Aldershot: Ashgate 2000).

outlived its existence and deserves to be pensioned off, not least given the increasing importance that is being attached to freedom of expression around the world as evidenced by both the emerging jurisprudence of international adjudicatory bodies such as the European Court of Human Rights and the strong free speech guarantees contained in post-colonial domestic bills of rights. Whatever the merits of such calls for radical reform, they are not, however, likely to be heeded soon by politicians and legislators in the countries concerned for reasons which will be discussed below. It may consequently be more fruitful to look at alternative ways of lessening the impact of the “scandalising” offence and creating more space for media scrutiny of judicial performance and behaviour.

This article will argue that a strategic strengthening of the defences available to defendants, including the introduction of a new defence of “responsible journalism”, along the lines of the extended qualified privilege defence now available to media defendants in libel actions under English common law,<sup>8</sup> might offer a reasonable way forward. The merits of such a defence are that, while it would expand journalistic freedom to comment on matters concerning the judiciary and thus allow the media to play the “watchdog” role that is expected of it in open societies, it could also ensure that any such comment stays within the bounds of responsible behaviour and is consistent with the preservation of public confidence in the justice system. It will thus leave intact an important weapon in the armoury of the judiciary, to be resorted to in the most serious cases of unacceptable interference with the administration of justice.<sup>9</sup>

### Historical background and scope of “scandalising”

Contempt of court has been called “the Proteus of the legal world”<sup>10</sup> for the many forms that it assumes. The media risks falling foul of the law of contempt in at least two principal ways: by commenting on pending legal proceedings in a manner that is likely seriously to prejudice the outcome of those proceedings (“trial by media”); and by making imputations about judges which are likely to shake the public’s confidence in the independence and impartiality of the courts as dispensers of justice. The latter, called “scandalising”,<sup>11</sup> appears to have its origins in a curious 18th-century case which has been described by a contemporary writer thus:

[I]n 1765, the Crown obtained a rule nisi to attach John Almon for publishing a libel on Lord Mansfield, the Chief Justice. The alleged libel was contained in a pamphlet which stated that Lord Mansfield had acted “officiously, arbitrarily, and illegally” in acting out of court to amend an information against John Wilkes and intending to deprive Wilkes the benefit of the Habeas Corpus Act by requiring him to show cause for his discharge out of custody. The Court was ready to give judgment against Almon when it was discovered that the rule nisi had actually been brought against Wilkes. Wilmot J asked Almon’s counsel to allow an amendment to the rule, but he refused. Accordingly, the proceedings were

8 The defence was first articulated by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, accessible at [www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm); and expanded upon in *Jameel v Wall Street Journal* [2007] 1 AC 359, accessible at [www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee-1.htm](http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee-1.htm) (both last accessed on 4 May 2009).

9 That such cases do exist is evidenced by, for example, the actions of one of Hong Kong’s most popular newspapers, the *Oriental Daily News*, which in the late-1990s engaged in a highly scurrilous and sustained campaign of abuse and intimidation against the territory’s higher judiciary. Those actions led to the editor and publisher of the newspaper being convicted of, and punished for, contempt in 1998: see, *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38.

10 J Muskovitz, “Contempt of injunctions, civil and criminal” (1943) 43 *Columbia L Rev* 780.

11 The offence goes by the name “murmuring judges” under Scottish law.

abandoned. Nevertheless, Wilmot kept the opinion which he had intended to deliver in his personal papers and, after his death, the opinion was circulated widely. It has now become the foundation for the modern law of contempt by scandalising the court.<sup>12</sup>

A variety of definitions have been offered of the concept in recent times. The Privy Council characterised it as

a convenient way of describing a publication which, although it does not relate to any specific case, either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.<sup>13</sup>

The High Court of Australia has held that the offence of scandalising would apply to any published matter that “excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office”.<sup>14</sup> The Court of Appeal of Hong Kong emphasised the interference that “scandalising” would cause to the administration of justice *as a continuing process*: consequently, any act which has the effect of “diminishing the authority of the court, bringing the court into disrepute and reducing public confidence in the system” would be caught by the definition.<sup>15</sup>

It is worth noting that the purpose of the offence is not to protect the dignity or reputation of individual judges. As ancient authority has it, the contempt power exists not “for the sake of judges, as private individuals, but because they are the channels by which the King’s justice is conveyed to the people”.<sup>16</sup> The authors of a more modern commentary on the subject explain the position as follows:

While it is true that the law of contempt is not concerned with the dignity of individuals taking part in the judicial process, or even with upholding respect for the law in any purely deferential sense, the administration of justice needs to proceed in circumstances of calm and dignity in order to be effective.<sup>17</sup>

The offence of scandalising was criticised by Justice Frankfurter as the “English foolishness”.<sup>18</sup> No comparable offence is to be found in the laws of the United States and it is a measure of the unfamiliarity of American judges with the concept that the courts there have sometimes misunderstood its purpose. Justice Dubin of the Court of Appeal of Ontario drew attention to this in a landmark Canadian case, noting the differences of approach between his country and its southern neighbour:

[W]ith respect, the criminal offences of contempt of court, with which we are dealing, is not for the purpose of “preserving the dignity of the bench” as the many cases to which I have referred demonstrate, and, with respect, I think has been misinterpreted in the American jurisprudence. It is apparent in

12 Allen, “Scandalising the court”, n. 7 above, at 1: The case of *R v Almon* is reported at (1765) Wilm 243. Another author, Ian Cram, however, notes that the offence of scandalising was acknowledged a few years earlier in the case of *Roach v Garvan* – also known as the *St James Evening Post* case – (1742) 2 Atk 468 at 471: see I Cram, *A Virtue Less Cloistered: Courts, speech and constitutions* (Oxford: Hart 2002).

13 *Chokalingo v Attorney General of Trinidad & Tobago* [1981] 1 WLR 106.

14 *Gallagher v Durack* (1983) 45 ALR 53.

15 *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38, para. 4 (per Mortimer JCA). The full text of this judgment is accessible at [www.hklii.hk/hk/jud/eng/hkca/1999/CACV000161A\\_1998-09360.html](http://www.hklii.hk/hk/jud/eng/hkca/1999/CACV000161A_1998-09360.html).

16 *R v Almon* (1765) Wilm 243 at 257. This distinction was also highlighted in *In the Matter of a Special Reference from the Bahama Islands* [1893] AC 138.

17 *Arlidge, Eady & Smith on Contempt* 2nd edn (London: Sweet & Maxwell 1999), pp. at 16–18. That the protection of judicial dignity was not the purpose of the law of contempt was also underlined by Lord Denning MR in *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 2)* [1968] 2 QB 150 at 155.

18 *Bridges v California* 314 US 252 at 287 (1941).

reading American jurisprudence that the constitutional tradition and the philosophy underlying the manner in which justice is administered in the United States is different in many ways from that in Canada and throughout the Commonwealth.<sup>19</sup>

Part of the reason for the difference in approach is, of course, the paramount importance attached to free speech by the US Constitution.<sup>20</sup> As the rich jurisprudence of First Amendment cases illustrates, it has almost become an article of faith among American judges to put free speech values over and above other countervailing interests, including the need to insulate the judiciary from scurrilous attacks. As a result, a wide range of comment which would not pass muster even in a relatively liberal country such as England has gone unpunished in the United States. Examples include allegations of racist behaviour, corruption, dishonesty, ignorance, buffoonery, bullying, being drunk on the bench, and partiality on the part of judges.<sup>21</sup>

Nor has the tradition of enforced silence for the sake of judicial dignity taken deep roots in the United States. Such a silence, noted Justice Black of the US Supreme Court, “probably engenders resentment, suspicion, and contempt, much more than it would enhance respect”.<sup>22</sup>

The offence of scandalising has also been attacked on the grounds that it has the potential to violate, or could at least be perceived as violating, an important principle of natural justice. In crude terms, the charge is that the court assumes the twin roles of judge and prosecutor: whilst being the injured party (in terms of being the object of criticism), it is also empowered to sit in judgment over the guilt of its detractor. The results are entirely predictable:

For an institution which is necessarily much concerned with the appearance of impartiality and fairness, there is an obvious danger that a judgment unfavourable to the critic will be taken by some as evidence that the court has placed the protection of its own interests ahead of the public good.<sup>23</sup>

### Need for moderation and tolerance

One of the key principles that has emerged in the English jurisprudence on contempt – and which has passed into exhortatory folklore in the post-war era – is that the power to commit for scandalising should be used extremely sparingly. Lord Atkin’s oft-repeated dictum that “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”<sup>24</sup> encapsulates this principle

19 *R v Kopyto* (1987) 39 CCC (3d) 1 (Ont. CA), (1988) 47 DLR (4th) 213 at 287.

20 Other reasons include, in the opinion of one Australian judge, the variable quality of the state judiciary, the fact that US judges – at both federal and state levels – are able to exercise far-reaching powers of judicial review of legislation, and more generally the “formidable constitutional authority” enjoyed by American courts: see, R Sackville, “How fragile are the courts? Freedom of speech and criticism of the judiciary”, 13th Lucinda Lecture delivered at Monash University, 29 August 2005, accessible at [www.law.monash.edu.au/news/events/lucinda-lecture-2005.html](http://www.law.monash.edu.au/news/events/lucinda-lecture-2005.html) (last accessed on 4 May 2009), p. 12.

21 M H Freedman, “The threat to judicial independence by criticism of judges – a proposed solution to a real problem” (1997) 25 *Hofstra Law Review* 729.

22 *Bridges v California* 314 US 252 at 270–1 (1941). A more recent occupant of judicial office went so far as to declaim that people “should be permitted to say practically anything they please about judges and the courts – even untrue and vicious things” – M H Marshall, “Dangerous talk, dangerous silence: free speech, judicial independence and the rule of law” (2002) 24 *Syd L Rev* 455 at 455.

23 Sackville, “How fragile are the courts?”, n. 20 above, at p. 4.

24 *Ambarid v Attorney General for Trinidad and Tobago* [1936] AC 322 at 335.

admirably, and has received frequent lip-service even in countries where judicial tolerance of public criticism is not very high.<sup>25</sup>

The principle is based partly on the premise that the judiciary, like other public institutions, is expected to function within an environment of reasonable public scrutiny and criticism, and partly on the belief that judges, by virtue of their special – and somewhat sensitive – position, should be content to rely for their reputations and their dignity on the quality of their judgments rather than on open debate or, worse still, slanging matches with their critics.<sup>26</sup>

Judicial training goes some way in hardening judges to public and media criticism. As Cory JA put it in *R v Kopyto*, “the courts are not fragile flowers that will wither in the heat of controversy”.<sup>27</sup> More generally, judges have traditionally been seen as possessing broader backs than other public officials. In the words of the United States Supreme Court, they are “men of fortitude, able to thrive in a hardy climate”.<sup>28</sup> For this reason a distinction is often made between judges and juries, with the law on *sub judice* being applied more strictly to trials involving juries rather than to judges sitting alone. This has given rise to an assumption over the years that judges are, as a rule, not likely to be affected by media comment about their work. Lord Salmon put it in quite emphatic terms in a 1981 case: “I am and have always been satisfied that no judge would be influenced in his judgment by what may be said by the media.”<sup>29</sup>

But that view has sometimes been questioned, not least by judges themselves. Lord Justice Sedley, one of the more outspoken members of the English judiciary, has argued that judges may indeed be “affected in giving their decisions by concern at what the media reaction will be”.<sup>30</sup> He points to the unfettered nature of media comment on matters concerning the judiciary:

In Britain today there is effectively no limit not only to the extent but to the degree of comment to which parts of the press are prepared to subject judges. Within the last few years, to take a simple example, a conscientious and able High Court judge was described by a tabloid journalist – not some hack but a leading political commentator – as a weevil in the body politic because he had given a decision against the Home Secretary in relation to the conditions of imprisonment of IRA prisoners. It’s difficult, by contrast, to remember when one last read an editorial commending a judge for taking an unpopular but principled decision. Ministers for their part have in the not too distant past been prepared to use the lobby system of unattributable briefings, dependant as it is on compliant journalists, to launch attacks on judges whose decisions they have found it easier to criticise than to appeal.<sup>31</sup>

If that analysis is correct, the pendulum of media behaviour seems to have swung quite markedly from one extreme to the other because, only a few decades earlier, it was being

25 Another celebrated dictum that has echoed around the common law world is Lord Salmon’s assertion that “no criticism, however rigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith”: *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 2)* [1968] 2 QB 150 at 155.

26 As often as not, judicial reticence in the matter of public engagement with critics is born of a self-imposed code of conduct rather than any legally enforceable canon of judicial behaviour.

27 *R v Kopyto* (1987) 39 CCC (3d) 1 (Ont. CA) at 14–15 (per Cory JA).

28 *Craig v Harney* (1947) 331 US 367 at 376.

29 *Attorney General v British Broadcasting Corporation* [1981] AC 303 at 342.

30 S Sedley, “Foreword” to M K Addo, *Freedom of Expression and the Criticism of Judges* (Aldershot: Ashgate, 2000), p. x.

31 *Ibid.* p. ix.

said that the effect that the many successful prosecutions which had been brought for scandalising in the earlier part of the 20th century was to engender an “almost unbroken sycophantic praise for judges”.<sup>32</sup>

Be that as it may, there is yet another, compelling, reason why judges are expected to be more tolerant of public criticism than they have ever been in the past. This has to do with the expanding horizons of judicial activism. Beverley McLachlin, the current Chief Justice of Canada, put her finger on the matter when she observed, as far back as 1994, that:

The lawmaking role of the Judge in Commonwealth countries has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, formerly the exclusive right of Parliament and the legislature.<sup>33</sup>

That is certainly true of jurisdictions such as India where the highly controversial practice of “public interest litigation” has led to the judiciary spearheading massive schemes of social engineering, often in blatant disregard of well-established norms on the separation of powers and through orders that are inconsistent, arbitrary and ad hoc in the extreme.<sup>34</sup> It should scarcely cause surprise if such judicial forays into policy-making draw sharp criticism from professional as well as lay sources, sometimes in language that is uncomfortably robust for the judges concerned.

The problem has been compounded by an alarming decline in the standards of competence and/or ethics on the Bench in some of these jurisdictions either as a result of inadequate quality control or unacceptable political interference at the time of judicial appointments. Inevitably, this has led to public dissatisfaction with the judiciary which in turn has found expression in increasingly vigorous critiques of judges and their work. The attacks have sometimes been brought forth by judicial indiscretion, even misconduct, as will become evident from some of the cases described below and, where the judicial behaviour being complained of has gone unchecked by the authorities, the criticism can be seen as a legitimate exercise in calling the judges publicly to account. The use of the contempt power in such circumstances raises a number of serious issues which deserve closer examination.

Quite independently of the above is the policy-laden question as to whether judges should enjoy greater protection than other public figures. That is a question which is beyond the scope of this article and will therefore not be addressed.<sup>35</sup> However, it is worth noting that the special position enjoyed by judges in the common law system is deeply rooted in the historical image of the judge as a high-ranking representative of the monarch – a conception which has surprisingly survived the decline in the powers of the monarchy.

### Place of apology

A curious aspect of the approach to scandalising which has not received as much attention as it perhaps ought to is the importance that common law courts have attached to the expression of contrition by the alleged contemnor. This is reflected in the invariable practice of the courts giving defendants an opportunity to apologise at an early stage, or at

32 B Abel-Smith and R Stevens, *Lawyers and the Courts* (London: Heinemann 1967), pp. 126–7.

33 B McLachlin, “The role of judges in modern Commonwealth society” (1994) 110 *Law Quarterly Review* 260 at 263.

34 For a critique of public interest litigation in India, see V Iyer, “Judicial activism in the Supreme Court of India” in B Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (New York: Oxford University Press 2007), pp. 121–68.

35 The issue has, however, been discussed at some length in works such as I Cram, *A Virtue Less Cloistered*, n. 12 above.

any rate prior to sentencing, and thus “purge” themselves of the contempt. While the practice has helped to temper the rigour of the law with a degree of leniency, its wider purpose is somewhat questionable, as one writer on the subject has pointed out:

Given that the rationale for punishment for scandalising is that the offending remarks undermine the confidence of the community in the administration of justice, it might have been thought that a publicised retraction, rather than an apology to the court – which may not necessarily be publicised – would be the principal ground of mitigation of penalty.<sup>36</sup>

The former course of action appears to find favour with judiciaries in the civil law system.<sup>37</sup>

### Variations in application of the law

A trawl through the jurisprudence on scandalising contempt reveals significant divergences in approach around the common law world. For a start, the offence is one of strict liability in some countries – for instance, England and Wales, Australia, New Zealand, India, Singapore – but requires actual intent in others – for example, South Africa, Canada. For another, the offence has withstood the scrutiny of domestic bills of rights in certain jurisdictions (for instance, Hong Kong) but not in others (for example, Canada).<sup>38</sup> More strikingly, there are significant differences in the tolerance thresholds for criticisms that are the subject-matter of contempt proceedings.

At a semantic level, American jurisprudence appears to exercise a degree of influence on the courts of some Commonwealth jurisdictions but the trend is far from universal. The “clear and present danger” test adopted by the US judges<sup>39</sup> has found an echo in Canada (where the test of “clear, serious and immediate” danger<sup>40</sup> was accepted) but a variant of it (“real, substantial and immediate” risk)<sup>41</sup> was rejected in Hong Kong, with the court believing – as did the Privy Council earlier – that the test should differ “according to the needs of the jurisdiction concerned”.<sup>42</sup>

In practical terms, while there appears to be a consensus that “scurrilous” attacks on judges deserve condign punishment,<sup>43</sup> actual practice on the application of this standard has demonstrated worryingly wide variations, as the following selection of cases demonstrates.

In *R v Kopyto*, the court had to deal with comments from a disgruntled lawyer who, having lost a case that he had fought on behalf of a client, lashed out at the Bench in the following terms:

36 M Chesterman, “Contempt: in the common law, but not the civil law” (1997) *ICLQ* 521 at 536.

37 E.g. in France (Article 434-44 of the French Criminal Code), which allows the court to order the defendant to publicise, at his or her own cost, the proceedings in question.

38 In Australia, a statutory form of the scandalising offence, contained in the Industrial Relations Act 1988, was struck down as violative of the “freedom of political communication” clause of the country’s constitution because it provided for an overbroad protection against any criticism, including fair comment, directed at the Industrial Relations Commission: *Nationwide Pty Ltd v Wills* (1992) 177 CLR 106.5.

39 See e.g. the dictum of Justice Black in *Bridges v California* 314 US 252 (1941) that free speech could only be curtailed where “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about . . . substantive evils” (at 261).

40 *R v Kopyto* (1987) 39 CCC (3d) 1 at 8.

41 *Wang Yeung Ng v Secretary of Justice* [1999] HKCA 38, at para. 33.

42 Ibid. at para. 37. The Privy Council took a similar view in *McLeod v St Aubyn* [1899] AC 549.

43 See e.g. *R v Gray* [1900] 2 QB 36.

This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune as long as someone above you said to do it. Mr Dawson and I have lost faith in the judicial system to render justice. We're wondering what is the point of appealing and continuing this charade of the courts in this country which are wrapped in favour of protecting the police. The courts and the [Royal Canadian Mounted Police] are sticking so close together you'd think they were put together with Crazy Glue.<sup>44</sup>

Although the lawyer, Mr Kopyto, was convicted of contempt, he succeeded in having his conviction set aside on appeal. The Ontario Court of Appeal ruled that the remarks in question, vigorous and highly contentious though they were, did not cross the acceptable bounds of free speech. As to his argument that the law of scandalising contempt was violative of the right to freedom of expression guaranteed by the Canadian Charter on Rights and Freedoms, the court was unable to reach a definitive view.

In a more recent case from Scotland, a radical lawyer, Amer Anwar, one of whose clients had been convicted of terrorism offences, read out a statement outside the High Court in Edinburgh which, among other things, described the evidence led against his client as “farcical” and condemned the verdict as “a tragedy for justice and for freedom of speech and [one which] undermines the values that separate us from the terrorist”. Mr Anwar was charged with contempt<sup>45</sup> and in the trial that followed he advanced the defence that he had merely articulated the views of his client. This defence was given short shrift by the judges, but the court nevertheless concluded that his conduct did not reach the high threshold required for a conviction. Mr Anwar was, however, sharply rebuked for failing to live up to the professional standards expected of a solicitor, and the Law Society of Scotland was asked to consider the need for any further action against him on disciplinary grounds.

Another case which highlights judicial sensitivity to criticism arose in Sri Lanka, where a Member of Parliament and former Cabinet Minister, D M S Banda, was accused of contempt after he was quoted in the media as saying, in the context of a reference that had been made to the Supreme Court of that country for its opinion on a constitutional matter, that he and some of his fellow MPs “would not accept any shameful decision the Court gives”. After a summary trial, Mr Banda was convicted and sentenced to two years’ rigorous imprisonment without any possibility of appeal.<sup>46</sup> One of the consequences of the punishment was that he subsequently forfeited his seat in Parliament and was disqualified from seeking re-election for a period of seven years from the date of completion of his prison sentence.<sup>47</sup> The case became the subject-matter of a complaint to the Human Rights Committee of the United Nations which, in a scathing verdict, expressed the view that

44 *R v Kopyto* (1988) 47 DLR (4th) 213 at 219.

45 The indictment cited an omnibus definition of contempt used in a previous case, viz. “conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself, whether in civil or criminal proceedings”: *Robertson and Gough v HM Advocate* 2008 JC 146 at para. 29.

46 Among the many disturbing aspects of this case was a reported refusal by the Chief Justice to recuse himself from hearing it despite an application from Mr Banda who had, along with a number of other MPs, previously signed a parliamentary motion for the Chief Justice’s removal on grounds of corruption and unsuitability for office. Mr Banda also cited a number of other reasons in support of his contention that the Chief Justice had already been biased against him – see UN Human Rights Committee, views on Communication No 1373/2005, accessible at <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/e3da1d675e92ae1dc12574bc003ea22a?OpenDocument> (last accessed 3 May 2009).

47 Under Sri Lankan law, any MP who absents him or herself from Parliament for a continuous period of three months or more automatically forfeits his or her seat.

neither the summary nature of the trial nor the severe penalty that was imposed on Mr Banda was warranted by his conduct.<sup>48</sup>

Yet another example of what has been regarded as an oppressive use of the contempt power arose in Singapore, where a visiting American academic, Christopher Lingle, was charged and convicted for scandalising on the basis of an article published in the *International Herald Tribune* in which he had expressed the view that certain (unnamed) governments in Southeast Asia had used considerable ingenuity in suppressing political dissent.<sup>49</sup> In particular, Professor Lingle referred to the practice of these governments to use defamation laws to bankrupt opposition politicians with the help of pliant judiciaries. Although the *Tribune* maintained that the criticism was not directed at Singapore, the country's High Court ruled that it did constitute contempt, and it imposed a fine of S\$10,000 against Professor Lingle and smaller fines against the publisher and Asia editor of the newspaper.<sup>50</sup> Prior to conviction, Professor Lingle was subjected to intensive interrogation by the Singapore police which led him to flee the country before the conclusion of the case.

An equally controversial prosecution, and one which resulted in the defendant actually being imprisoned, occurred in neighbouring Malaysia in 1997. Here, a correspondent for the *Far Eastern Economic Review*, Murray Heibert, had published a story which discussed litigiousness in that country and referred to the surprise that had been expressed by many over the speed with which a civil suit that had been filed by the wife of a sitting Court of Appeal judge against an international school had "raced through Malaysia's legal labyrinth".<sup>51</sup> Mr Heibert was immediately charged with contempt and sentenced to three months' imprisonment, with the trial judge holding that the article had "scandalised the court, was calculated to excite prejudice against the plaintiff, and was designed to exert pressure on the court".<sup>52</sup> Although the sentence was subsequently reduced to six weeks and Mr Heibert released after four weeks for good behaviour, the verdict was viewed with serious concern by the media and by free speech campaigners.<sup>53</sup>

The Pacific region has fared no better. In one particularly egregious example involving allegations of forum-shopping in the criminal courts, a magistrate to whom a high-profile incest case had been mysteriously transferred slapped contempt charges against the public prosecutor, a journalist and a leading newspaper after the prosecutor had asked the magistrate for information about the transfer. Midway through the case, the magistrate also approached the accused journalist and asked him to plead guilty in return for a non-custodial sentence and a better job at another newspaper. When these facts were put in the public domain, the proceedings descended into a farce. Mercifully, the High Court

48 UN Human Rights Committee in Communication No 1373/2005, n. 46 above.

49 The article had been written in response to an earlier opinion piece published in the same newspaper by a senior Singaporean bureaucrat who had argued that European governments were in many respects inferior to their Asian counterparts.

50 The remarks also resulted in defamation suits being successfully brought against the newspaper by the former Prime Minister of Singapore, Lee Kuan Yew. Mr Lee further threatened to pursue a similar claim against Professor Lingle – see, Reporters' Committee for Freedom of the Press, *Update*, accessible at: [www.rcfp.org/newsitems/index.php?i=1084](http://www.rcfp.org/newsitems/index.php?i=1084) (last accessed 4 May 2009).

51 "See you in court", *FEER*, 23 January 1997. The suit alleged discrimination by the school against the plaintiff's son, who was a student there, after he had been excluded from the school's debating team.

52 Committee to Protect Journalists, "High Court jails Canadian journalist for contempt", accessible at <http://cpj.org/1999/09/high-court-jails-canadian-journalist-for-contempt.php> (last accessed 4 May 2009).

53 See e.g. "Malaysia sentences journalist from Canada for contempt", *New York Times*, 12 September 1998, accessible at [www.nytimes.com/1999/09/12/world/malaysia-sentences-journalist-from-canada-for-contempt.html?fta=y](http://www.nytimes.com/1999/09/12/world/malaysia-sentences-journalist-from-canada-for-contempt.html?fta=y) (last accessed 4 May 2009).

intervened and administered a sharp rebuke to the magistrate, holding that no case for contempt had been made in the first place.<sup>54</sup>

Much concern has also been expressed in recent years over the contempt prosecutions launched in India against critics of that country's judiciary. Not dissimilar allegations of judicial bias to those raised in *R v Kopyto* were made by a communist politician in India who, echoing the views of Marx and Engels, asserted during a press conference that: "Judges are guided by class hatred, class interests and class prejudice and where the evidence is balanced between a well-dressed pot-bellied rich man and a poor ill-dressed and illiterate man the Judge instinctively favours the former."<sup>55</sup> The Supreme Court of India ruled that the remarks in question merited punishment because of their *tendency* to lower the prestige of judges and courts in the eyes of the people. The contemnor was ordered to pay a fine or undergo imprisonment for one month.<sup>56</sup> Constraints of space do not permit an exhaustive listing of other, more recent, Indian cases, but the following representative samples are indicative of the emerging trend:

- In 1990, the editor of a leading vernacular newspaper, Madhav Gadkari, was convicted and sentenced to six months' imprisonment after he wrote an article alleging misconduct by several unnamed judges of the Bombay High Court. Mr Gadkari's plea that he should be allowed to prove the truth of his allegations was turned down.<sup>57</sup>
- In 2001, the editor and publisher of a news magazine, *Wah India*, were held to have scandalised the judiciary after the periodical published the results of an anonymous survey in which lawyers practising in the Delhi High Court had rated judges of that court on the basis of their knowledge, competence, punctuality, etc. The editor and publisher were let off with a warning after they tendered an apology to the court, but copies of the magazine in which the survey had appeared were ordered to be confiscated and the press enjoined from revealing the findings of the survey.<sup>58</sup>
- In 2002, a writer and human rights activist, Arundhati Roy, was convicted and sentenced to "symbolic" imprisonment for one day and fined Rs 2000 by the Supreme Court of India for criticising, in an affidavit, the court's "disquieting inclination . . . to muzzle dissent, to harass and intimidate those who disagree with it".<sup>59</sup>
- In 2005, a trade unionist, Rajendra Sail, was convicted and sentenced to six months' imprisonment after he denounced a judgment of the Madhya Pradesh High Court which acquitted the alleged murderer of another union

54 *Syed Muktar Shah v Elizabeth Rice*, unreported case, cited in "Contempt of court", paper delivered by Mrs Justice Nazahat Shameem at the Attorney General's Conference, Suva, December 2004, accessible at <http://documents.ag.gov.fj/Contempt-Shameem.pdf> (last accessed 4 May 2009).

55 *E M S Nambodiripad v T N Nambiar* AIR 1970 SC 2015.

56 Bizarrely, the court expressed the view that the contemnor had misguided himself about the true teachings of Marx, Engels and Lenin.

57 *V M Kanade v Madhav Gadkari* 1990 Cr LJ 190. In 2006 the Indian Parliament amended the Contempt of Courts Act 1971 to allow truth to be pleaded as a defence, as long as the alleged contemnor could also show that the impugned statements were made for the public benefit.

58 *Surya Prakash v Madhu Trehan* 2001 Cr LJ 3476 (Del.). It is worth noting that when a similar survey had been carried out – and published – by *Legal Business*, a leading trade journal in England, the English judiciary did not deem it necessary to take any action.

59 *In re Arundhati Roy*, judgment of Justices G B Pattanaik and R P Sethi dated 6 March 2002, unreported, cited in V Venkatesan, "Of criticism and contempt", *Frontline* (New Delhi), 16–29 March 2002, accessible at [www.hinduonnet.com/fline/fl1906/19060270.htm](http://www.hinduonnet.com/fline/fl1906/19060270.htm) (last accessed 4 May 2009).

activist. Mr Sail's allegation that the judiciary had "no guts" to punish the wealthy and the powerful was seen as meriting a custodial sentence.<sup>60</sup>

- In 2007, the publisher, two journalists and a cartoonist of a Delhi-based newspaper, *Mid-Day*, were each convicted and sentenced to four months' imprisonment after the paper carried an article and a cartoon alleging that a former Chief Justice of India had engaged in nepotism and other questionable conduct while in office.<sup>61</sup> This case is notable for the fact that the court disregarded the defendants' plea to prove the truth of their allegations, despite the law specifically allowing them to do so.<sup>62</sup>

It is difficult to resist the conclusion that, in most of the cases considered above, there has been an "oppressive or vindictive use of the court's powers", contrary to the warning administered by the presiding judge in *Milburn* over six decades ago.<sup>63</sup>

### The case for retention

That said, there have been occasions – even if few and far between – when a strong response from the judiciary has probably been justified. A classic example is provided by the behaviour of Hong Kong's largest circulating Chinese language newspaper, the *Oriental Daily News*, which in 1997 launched a vitriolic campaign that targeted some members of the territory's judicial fraternity. Among other things, the newspaper described members of the Obscene Articles Tribunal as "dogs and bitches", "scumbags", and "public enemy of freedom of the press and a public calamity to the six million citizens of Hong Kong"; denounced two senior judges, Rogers J and Godfrey JA, as "British white ghosts" and "pigs"; and threatened to "wipe [them] all out". For good measure, the newspaper also physically hounded Justice Godfrey, with a team of reporters and photographers following him day and night for two days, ostensibly to "educate him in the ways of the paparazzi".<sup>64</sup>

Unsurprisingly, these actions resulted in the editor and publisher of the newspaper being charged and convicted for contempt.<sup>65</sup> A custodial sentence of four months was justified by the court in the following words:

The campaign which the *Oriental Daily News* waged against the Judiciary was without parallel in modern times. The features of this prolonged and sustained campaign which made it so unique include the venom of the language which was used, the outrageousness of the motives which it ascribed to its targets, and . . . the impact which the campaign had on public confidence in the ability of Hong Kong's judges to dispense justice conscientiously and impartially.

60 *Rajendra Sail v Madhya Pradesh High Court Bar Association* (2005) 6 SCC 109. On appeal, the sentence was reduced to one week's imprisonment by the Supreme Court of India.

61 A specific allegation made against the Chief Justice was that he had passed a controversial order in a property-related matter which was calculated to bring material benefit to two of his sons. The article also alleged that the Chief Justice had allowed his sons to use his official residence to carry out their business activities.

62 *In re M K Tayal and others*, Order dated 11 September 2007 in Contempt Case (Crim.) No 7 of 2007, Delhi High Court (per R S Sodhi and B N Chaturvedi JJ).

63 *Milburn* 1946 SC 301 at 315 (per Lord President Normand).

64 *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38, at para. 69.

65 A similar result ensued in another highly publicised contempt case in South Australia in 2006. Here, a popular radio presenter, Bob Francis, told his listeners to "smash" a "judge's face in" after a magistrate had considered a bail hearing for a convicted paedophile. Mr Francis was given a suspended sentence of nine months' imprisonment and asked to post an 18-month good behaviour bond of A\$2000 – see, "DJ avoids jail for contempt", [www.news.com.au/entertainment/story/0,28383,20247560-10388,00.html](http://www.news.com.au/entertainment/story/0,28383,20247560-10388,00.html) (last accessed 4 May 2009).

... [W]hat was at stake in the *Oriental Daily News*' campaign was not the outcome of an individual case but nothing less than the rule of law itself ... It was this ultimate challenge to the rule of law which makes these contempts probably the most serious examples of "media" contempts which the courts in the common law world have ever encountered.<sup>66</sup>

Cases such as these vindicate the view that it might be a step too far to abolish the offence of scandalising, notwithstanding the passionate pleas that are often advanced in favour of such far-reaching reform.<sup>67</sup>

Cultural relativism has loomed large in most discussions on scandalising contempt, much to the frustration of free speech campaigners of the universalist persuasion. The argument that is usually advanced by such campaigners involves a comparison with the United States where, as noted above, no legal protection is offered for the administration of justice as a continuing process. Despite this, argue the campaigners, the American judicial system appears to enjoy a high reputation, and there is no reason why this position cannot be replicated in Commonwealth countries.

The riposte – offered by, among others, Justice Mortimer of the Hong Kong Court of Appeal – is that a combination of Commonwealth tradition and the specific needs of individual countries militates against the universalist model.<sup>68</sup> The latter point was underlined by the Privy Council – albeit in language which is unlikely to endear itself to modern liberal commentators – as far back as 1899: “[I]t must be considered,” said their Lordships, “that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.”<sup>69</sup>

Disregarding the controversial language, it is not difficult to see that there is some evidence to substantiate the argument. It is unlikely, therefore, that the offence of scandalising will disappear quickly from the statute books of those Commonwealth countries where it currently exists.<sup>70</sup>

### Proposal for reform

Given this reality, a more fruitful approach to resolving the problem might be to strengthen the defences that are available to those charged with contempt. Some jurisdictions, such as Australia, already recognise a defence of fair comment. Although this defence is undoubtedly helpful, especially to media defendants, its value is somewhat limited because it covers only comments, not factual assertions of the type that frequently feature in the scandalising cases. A smaller number of countries, including India, allow truth to be pleaded, either on its own or coupled with circumstances where it can be shown that the assertion in

66 “DJ avoids jail”, n. 65 above, judgment of the Divisional Court cited in para. 69 of CA judgment.

67 At least one well-known expert in this field has argued against abolition: see C. J. Miller, *Contempt of Court* 3rd edn (New York: Oxford University Press 2000), p. 596.

68 *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38, at para. 37.

69 *McLeod v St Aubyn* [1899] AC 549 at 561 (per Lord Morris). Tom Allen has called this remark “racist”: see, Allen, “Scandalising the court”, n. 7 above, p. 5.

70 It may be noted, in passing, that at least one official body within the Commonwealth has recommended the abolition of the scandalising offence. In a report published in 1987, the Australian Law Reform Commission argued that there was no justification for the offence in its existing form, and that it should be replaced by a narrower offence of “publishing an allegation imputing misconduct to a judge or magistrate”: Australian Law Reform Commission, *Contempt* (Report No. 35, 1987).

question is in the public interest. This defence would of course cover factual assertions and is therefore of immense benefit to defendants, but its value too is often diminished by the many practical difficulties that those charged with contempt face in adducing proof – for example, of judicial corruption – to the standards required in a court of law.

In the circumstances, the case for a defence of “responsible journalism”, based on the principle of qualified privilege now available to media defendants in defamation cases under English law, appears compelling. This principle has been in use in the area of libel law in England,<sup>71</sup> Australia<sup>72</sup> and New Zealand<sup>73</sup> for at least a decade now, and is seen as capable of adaptation to contempt proceedings.<sup>74</sup>

### Qualified privilege and contempt

The traditional foundation of qualified privilege, namely the presence of a reciprocal duty and interest between the publisher and the recipient of information,<sup>75</sup> has, in *Reynolds* and related cases, been seen as satisfied when a media organ (that is a newspaper or broadcaster) communicates information of public interest to its readers, listeners or viewers. The defence is available as long as the media defendant acts without malice and conforms to certain standards of “responsible journalism” that are calculated to inform public debate of significant public issues: these would include taking reasonable steps to verify the information before publication, making efforts to obtain a comment from the subject of the story (or at least giving a gist of it), checking the credibility of the source of the information, and couching the story in a non-sensationalist tone.<sup>76</sup>

An attempt to confine the defence to “political information”, rather than any information of public interest, was firmly rejected by the House of Lords, which declared that all matters of serious public concern should be protected.<sup>77</sup> This development is particularly pertinent in the context of the proposed extension of the defence to contempt, because the imputations that have traditionally attracted prosecution have covered a field wider than is encompassed by the term “political information”. Typically, the allegations would involve monetary or other forms of corruption, serious misconduct, bias, succumbing to political and other pressures, and extra-judicial conduct of a kind that is likely to discredit the judiciary in the eyes of the public.

71 See, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (House of Lords); see, also, *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 (see n. 8 above), where the principle was developed further.

72 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (High Court of Australia).

73 *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1998] 3 NZLR 424 (New Zealand CA).

74 C J Miller notes that, although “any analogy between defamation proceedings instigated by politicians and proceedings for a criminal contempt of court by scandalising the court is tenuous . . . [it is not] far-fetched”: Miller, *Contempt of Court*, n. 67 above, p. 588.

75 See e.g. *Harrison v Bush* (1855) 5 E & B 344 at 348; *Watt v Longsdon* [1930] 1 KB 130 at 147.

76 These standards were put in the form of a 10-point “check list” by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (see n. 8 above): see “Conclusions” part of His Lordship’s speech (unfortunately, the paragraphs are not numbered in the official online version of the judgment). “Responsible journalism” was defined by the same judge in a later case as “the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals” – *Bonnick v Morris* [2003] 1 AC 300 at 309.

77 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (see also n. 8 above) (per Lord Nicholls). “[I]t would,” asserted his Lordship, “be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today’s conditions, to the importance of freedom of expression by the media on all matters of public concern.”

The advantage of allowing qualified privilege as a defence to scandalising contempt is that it would allow for a responsible airing of such allegations and facilitate an informed discussion of matters touching the judiciary in society at large. It has the potential simultaneously to reduce the room for ill-founded speculation and put the judges themselves on notice that bad behaviour will no longer be shielded from public scrutiny. Well-founded attacks on the judiciary, even if expressed in robust or colourful language, will promote a better understanding of the institution and those who are charged with running it. Such criticism can be seen as one of the many ways in which the courts can be made accountable to the people.<sup>78</sup>

The defence has enormous potential to advance the cause of constructive investigative journalism through the generous allowance it makes for genuine mistakes and wrong-headed – even untrue – assertions, as long as those assertions are sincerely and reasonably believed by those making them.<sup>79</sup> And lest this freedom degenerate into licence, adequate safeguards have been built into the defence to prevent its misuse. The warning administered by Lord Cooke of Thorndon underlined the importance that the House of Lords attached to this aspect of the matter:

Although investigative reporting can be of public benefit, the commercial motivation of the press and other sections of the media can create a temptation, not always resisted, to exaggerate, distort or otherwise unfairly represent alleged facts in order to excite the interest of readers, viewers or listeners.<sup>80</sup>

Understandably, one of the objections that can be taken to the use of the extended qualified privilege defence is that the concept of “reasonable journalism” on which it rests is rather vague and therefore dependant on the subjective view of the judge who presides over a particular trial. This criticism will doubtless be coupled with the more general complaint that is made with regard to contempt litigation, namely, that there is a structural problem of lack of impartiality which remains as stubborn as ever. One commentator has, rather starkly, called it “judicial freemasonry”:<sup>81</sup> it relates to the strong public perception that judges deciding contempt cases often close ranks with their brethren against whom the alleged contemptuous remarks have been directed. Unfortunately, this is a problem which does not readily admit of a solution. As Michael Addo has pointed out, “The factor of inevitability – that is to say, judges alone under the system of government have this responsibility for adjudicating disputes of this nature – makes it impossible to remove the cases involving criticism of their colleagues from their jurisdiction.”<sup>82</sup> The situation can, however, be ameliorated to some extent by a clear and inflexible procedural requirement that

78 Some scepticism was, it needs to be pointed out, expressed over the validity of this argument in the Australian case of *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164, accessible at [www.lawlink.nsw.gov.au/scjjudgments/2005nswca.nsf/ba8ff0f7f4dcfb74ca256739000a724f/8c15e33d0f227c49ca2570040001a50b?OpenDocument](http://www.lawlink.nsw.gov.au/scjjudgments/2005nswca.nsf/ba8ff0f7f4dcfb74ca256739000a724f/8c15e33d0f227c49ca2570040001a50b?OpenDocument) (accessed 4 May 2009), at para. 97.

79 But not, it has to be added, where such belief is absent. See e.g. observations of Lord Hobhouse of Woodborough in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (see also n. 8 above): “To attract privilege the report must have a qualitative content sufficient to justify the defence should the report turn out to have included some misstatement of fact. It is implicit in the law’s insistence on taking account of the circumstances in which the publication, for which privilege is being claimed, was made that the circumstances include the character of that publication. Privilege does not attach, without more, to the repetition of overheard gossip whether attributed or not nor to speculation however intelligent.”

80 *Ibid.*

81 C Warbrick, “The European Convention on Human Rights” (1989) 9 *Yearbook on European Law* 439 at 445.

82 M K Addo, “Are judges beyond criticism under Article 10 of the European Convention on Human Rights?” (1998) *ICLQ* 425 at 431.

forbids any judge who is the target of allegedly contemptuous remarks from being personally involved, however tangentially, in the adjudication of cases arising from such remarks.

As for the criticism that “responsible journalism” is a vague concept, the issue was tackled head on by Lord Hoffmann in *Jameel* thus:

[T]he standard of responsible journalism is as objective and no more vague than standards such as “reasonable care” which are regularly used in other branches of law. Greater certainty in its application is attained in two ways. First, as Lord Nicholls said, a body of illustrative case law builds up. Secondly, just as the standard of reasonable care in particular areas, such as driving a vehicle, is made more concrete by extra-statutory codes of behaviour like the Highway Code, so the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance.<sup>83</sup>

Lord Hope was equally emphatic that the concept of “responsible journalism” offered a judicially manageable standard for the courts to act on:

The duty-interest test based on the public’s right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed. Context is important too when the standard is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context.<sup>84</sup>

At the level of policy, too, context is important. The rapidly expanding conceptions of democracy and public empowerment around the world should dictate a progressive liberalisation of contempt law in much the same way as has happened in the area of defamation law. The time has arguably come for a reappraisal of the rationale for, and objectives of, the contempt power, and in particular the power to punish for “scandalising”.

### Mechanics of reform

Happily, given both the reach and adaptability to change of the common law, reform in this area need not be as painful as it might be in some of the more rigid legal systems. As Lord Cockburn has noted:

Whatever disadvantages attach to a system of unwritten law, and of those we are fully sensible, it has at least this advantage: that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generations to which it is immediately applied.<sup>85</sup>

Where for cultural or other reasons it is felt that the common law may not be an appropriate route to follow, reform can just as easily be achieved through legislation. An

83 *Jameel v Wall Street Journal Europe* [2007] 1 AC 359, at para. 55.

84 *Ibid.* at para. 107.

85 *Wason v Walter* (1868) LR 4 QB 73 at 93.

analogous statute from New South Wales, Australia, offers some guidance.<sup>86</sup> This law provides for a defence of statutory qualified privilege in defamation cases under the following circumstances, namely, where:

- (a) the recipient has an interest or apparent interest in having information on some subject;
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.<sup>87</sup>

Furthermore, the Act offers guidance on how the court might judge the “reasonableness” of the publisher’s conduct. It requires him to establish:

- (a) that, before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right, (where appropriate) by making proper inquiries and checking on the accuracy of his sources;
- (b) that his conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained;
- (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
- (d) that each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers.<sup>88</sup>

These formulations combine precision with comprehensiveness and can usefully be adapted to any new statutory defence of extended privilege.

Important as the proposed reform is, there is one further innovation that is desirable for the liberalisation of the law in this area is to become truly meaningful. This would be to make the proposed new defence available to a wider range of defendants. For understandable reasons, the benefits of the reform introduced by *Reynolds* were confined to media defendants, but, given the history of contempt prosecutions, a plausible case can be made for extending the protection to all critics of the judiciary. This would, for example, cover allegedly contemptuous statements disseminated not only through the media but through, say, a public meeting. Quite clearly, the safeguards that govern the use of the defence – in particular the requirement of “reasonableness” on the part of the person making the statement – should continue to apply in such cases as they would in cases involving the media.<sup>89</sup>

### Prospects for reform

For all the highly persuasive nature of the case in favour of the proposed reforms, the prospects of them being implemented fairly quickly are, it has to be admitted, at best mixed. Despite the geographically wide reach of the common law, there are formidable political and practical obstacles in individual jurisdictions which cannot be lost sight of. The idea will inevitably be received with greater enthusiasm in some countries than in others. Where the

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<sup>86</sup> Defamation Act 1974.

<sup>87</sup> S. 22.

<sup>88</sup> S. 22(1)(c)(4).

<sup>89</sup> It is more than likely, of course, that such statements would in any case be carried by the media, although it is worth noting that there have been occasions when the authorities have been selective in their choice of targets for prosecution, with the media not being named as co-defendants.

matter is left to be dealt with by the judiciary, the fate of reform will vary according to both the level of interest it generates among senior judges and the extent to which the higher judiciary is free of external (for example, political) influence in such matters.

It is highly likely, for example, that the proposal for change will meet with a lukewarm response in a country like Singapore where, among other things, the superior courts have signalled their reluctance to accept decisions such as *Reynolds* in the recent past.<sup>90</sup> A similar result can be envisaged in neighbouring Malaysia where the past few months have seen the emergence, within parts of the judiciary and the political establishment, of a desire to distance the country from its historical heritage of English common law.<sup>91</sup> On the other hand, the proposal stands a good chance of being accepted in a country like India where, despite all the shortcomings of the legal system, the superior courts have shown a remarkable – if occasionally cack-handed – receptivity to ideas from abroad.<sup>92</sup>

In countries where there is no doctrinal or ideological opposition to the reception of such ideas but where, for practical or logistical reasons, reform through the common law is unlikely to take shape quickly, legislation may be the solution. This would also be preferable in jurisdictions where the common law tradition has gradually given way to a culture of codification.

Where neither the judiciary nor the legislature is likely to be receptive to change, the best that can be hoped for is that a sustained campaign, involving both domestic and international pressure groups, might generate the necessary popular momentum for reform, even if only over the medium to long term. The impetus for a radical shift in public attitudes is sometimes provided by one or two high profile cases of gross injustice or widely felt unease over the oppressive use of the contempt power, which can then be used as a rallying point by the campaigners to force change. Often a precipitous decline in the standards of judicial conduct, gross politicisation of the judiciary, or unprincipled judicial activism can act as a catalyst for change.

## Conclusion

For all the high-sounding rhetoric that has emerged from judges and legal policy-makers around the Commonwealth about the need for the power of contempt to be exercised sparingly, actual practice in this area reveals a depressingly illiberal picture. The harsh manner in which this power has been deployed in many jurisdictions, in circumstances where it has had the effect of stifling legitimate criticism of judges and their behaviour, lends credence to the cynical view that the oft-repeated judicial entreaties for restraint are ritualistic and little more than “a conventional nod to a well-meaning sentiment”.<sup>93</sup>

90 This defence was sought to be used in a high-profile defamation case brought by Lee Kuan Yew, the former Prime Minister of Singapore, and Lee Hsien Loong, the current Prime Minister, against the Singapore Democratic Party in 2006, but it was decisively rejected. The justification offered by the court for its rejection was that “The terms of art 14 of our Constitution (right of free speech) differ materially from . . . art 10 of the European Convention on Human Rights”: see reference in [http://presspedia.journalism.sg/doku.php?id=defamation\\_act](http://presspedia.journalism.sg/doku.php?id=defamation_act) (last accessed 4 May 2009).

91 See e.g. “Malaysia considers switch to Islamic law”, *The Telegraph* (London), 1 September 2007, accessible at [www.telegraph.co.uk/news/worldnews/1561896/Malaysia-considers-switch-to-Islamic-law.html](http://www.telegraph.co.uk/news/worldnews/1561896/Malaysia-considers-switch-to-Islamic-law.html) (last accessed 4 May 2009).

92 A good example of such receptivity is to be found in the decision of the Supreme Court of India in *Rajagopal v State of Tamil Nadu* JT (1994) 6 SC 514, where the court accepted the principle – first enunciated in *Derbyshire County Council v Times Newspapers Ltd* [1993] 2 WLR 449 – that governmental bodies should be barred from initiating actions for defamation unless they could show actual malice on the part of the defendants.

93 M Kotsounouris, “Criticising judges in Ireland” in M K Addo, *Freedom of Expression and the Criticism of Judges* (Aldershot: Ashgate 2000), p. 53.

Given this reality, and the increasing incidence of the contempt power being used oppressively against critics of the judiciary – often in circumstances where the justification for such use is at best tenuous – the time is clearly ripe for liberalisation of the law in this area. Calls for the abolition of the offence of scandalising, usually favoured by free speech activists, are unlikely to be heeded by governments for practical as well as political reasons. In the circumstances, a more fruitful – and more realistic – option would be to strengthen the defences available to critics of the judiciary and, in particular, to introduce a new defence of extended qualified privilege analogous to the *Reynolds* defence now available to media defendants in libel actions in some common law jurisdictions.

The introduction of such a defence would offer a principled, workable and doctrinally sustainable solution to this long-standing problem. It would strike a better balance between the competing demands of freedom of expression, on the one hand, and the sanctity of the justice administration system on the other, as required by the growing body of international human rights law and by the expanding conceptions of participatory democracy the world over.

# Gone and almost entirely forgotten: the Watkinson Report

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## Introduction

The aims of this paper are twofold. First I want to extol the virtue of Hadden's *Company Law and Capitalism* because it was a hugely inspiring text on a subject which was routinely seen as "technical, difficult and dull" and without "an intellectual tradition which place[d] . . . rules and doctrines within a broader theoretical framework which g[a]ve meaning and coherence".<sup>1</sup> Second, as the paper's title suggests, I want to consider the Watkinson Report or, as it is more properly described, *The Responsibilities of the British Public Company*, which was issued by the CBI Council in 1973. These two aims complement each other as much of Hadden's commentary reflects the ideas of public interest and non-adversarial industrial relations which are also to the fore in the Watkinson Report. I will consider why some at least of the key responsibilities it identified are no longer seen as part of the remit of corporate responsibility and the consequences of those changes in the areas of economic democracy and occupational pensions. Alongside this, I will also give some thought to why these responsibilities have been replaced with others such as the huge voluntary commitment to corporate social responsibility that now exists in the corporate sector.

At the time the suggestion was made for this special issue, the Watkinson Report was almost exactly 35 years old. It has virtually disappeared from the memory of company law,<sup>2</sup> it appears. However, at a time when the form, role and, ultimately, the responsibility of public companies and their managers, particularly in the financial sector, are being questioned by wider society, there is a certain topicality to looking at how public companies saw themselves in 1973 in relation to that wider society in which they were located. It provides us with a unique set of benchmarks against which the trends in corporate behaviour that have followed, such as the adoption of shareholder value as the predominant credo of corporate existence, and the changes required by transitions to post-fordism and

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1 M Stokes "Company law and legal theory" in W Twining (ed.), *Legal Theory and Common Law* (Oxford: Blackwell 1986), p. 155.

2 Although as Geoffrey Chandler, a long-standing proponent of corporate responsibility and human rights pointed out in a letter to *The Times* in November 1996, the *Tomorrow's Company* document produced by the Royal Society for the Encouragement of Arts, Manufacturers and Commerce (RSA) in 1995 had something of the same flavour about it. Chandler accurately predicted that the fate of the RSA document would be the same as that of the Watkinson Report.

then financialisation, facilitated to a certain extent by states in thrall to the power of mobile multinational capital,<sup>3</sup> can be examined.

The picture that the Watkinson Report paints of the views held by the business elite of the relationship between the corporate sector and the society within which it subsists holds little resemblance with the actuality of corporate practice in 2009. This is not to say, however, that there are not vestiges of the sort of caring paternalism that characterised Watkinson to be found in the years since 1973; the Licence to Operate put forward by the Royal Society of Arts in 1995<sup>4</sup> is an effective example. The difference, of course, is that the Watkinson Report was prepared by the CBI and not by a pioneering charitable body. The Watkinson Report was firmly of the view that private enterprise was not only capable of working out its “own programme of self-reform” but that it must be left to do so. This idea of “self-reform”<sup>5</sup> has become the cultural response of successive governments<sup>6</sup> to failures of corporate governance. There have been relatively few legislative interventions<sup>7</sup> in the last 36 years, compared with, for example, the US or Australia, into the corporate world that were not the result of either EU directives requiring enactment and operating legislation,<sup>8</sup> or consolidating legislation.<sup>9</sup> The credo of the Watkinson Report was that compliance with the demands of legislation and common law was not sufficient for a company to be considered “good”.<sup>10</sup> Law indicated minimum standards only and companies, like citizens, had to take into account the interests of others over and above what was mandated by law.<sup>11</sup> The company should supply goods at a price which, while fair to customers, was also able to support the “adequate” and “equitable” reward of employees, investment in company development and a “proper return” for shareholders.<sup>12</sup> I have used here the same order of

3 Inward and outward direct investment figures are available from the UNCTAD World Investment Report which is published annually, see also S Girma et al, “Who benefits from foreign direct investment in the UK?” (2001) 48 *Scottish Journal of Political Economy* 119.

4 See n. 2 above and also note that Tomorrow’s Company is now a freestanding not-for-profit venture that seeks to promote strategic activity by corporations which appeals to all of its stakeholders.

5 See Watkinson Report, paras 10 and 13.

6 See, for example, *The Financial Aspects of Corporate Governance* (the Cadbury Report) December 1992; the *Greenbury Report on Directors’ Remuneration*, 1995; *Committee on Corporate Governance* (the Hampel Committee), April 1998; *Internal Control: Guidance for Directors on the Combined Code* (the Turnbull Report), 1999; *The Review of the Role and Effectiveness of Non-Executive Directors* (the Higgs Report), 2003; *Guidance on Audit Committees* (the Smith Guidance), 2005. All of these reports can be viewed at [www.ecgi.org](http://www.ecgi.org). The Combined Code on Corporate Governance emerged from the Cadbury Report and has been updated regularly by the reports listed above. The code does not have statutory force but any failures to comply must be disclosed and explained in a company’s annual report as a condition of LSE listing (see LR 9.8.6(6)), commonly referred to as the “comply or explain” doctrine.

7 For example, the Insolvency Act 1986, the Company Directors Disqualification Act 1986, the Companies Act 2006, the Corporate Manslaughter and Homicide Act 2007. There are other pieces of legislation, such as the Enterprise Act 2000, but they can be distinguished on the ground that their rationale is not solely to regulate the life of the corporation.

8 In the text below (nn. 33 and 34), there is reference to the legislative structure surrounding the insertion of Works Councils into UK employment relationships and legislation. Another example would be the area of accounting standards, see D Cairns, “The implications of IAS/IFRS for UK Companies” (2004) 1 *International Journal of Disclosure and Governance* 107 and A Haller, “Financial accounting developments in the European Union: past events and future prospects” (2002) 11 *European Accounting Review* 153.

9 Companies Act 1985.

10 Para. 20. This can be seen as an express rejection of the oft-quoted Milton Friedman comment that the only responsibility of business is to make profits while operating within the demands of the law, see “The social responsibility of business is to increase its profits”, *New York Times Magazine*, 13 September 1970.

11 Para. 61.

12 Para. 84.

interests that the report itself uses. There is no mention of shareholder primacy or shareholder value.

### Hadden's wind of change

Tom Hadden produced two editions of *Company Law and Capitalism* in 1972 and 1977 respectively. The book was the second volume of the Law in Context series published by Weidenfeld and Nicolson with Robert Stevens and William Twining as series editors. As a text on company law, it was unrivalled both in the topics it selected for detailed coverage<sup>13</sup> and those which it did not and the avant-garde nature of its politics. The notion of “in context” was fulfilled by the inclusion of empirical data drawn from government sources and the results of academic work undertaken in other disciplines.<sup>14</sup> Admittedly, my view of it was formed in 1984 when as a 20-year-old undergraduate educated in perhaps the bastion of the doctrinal and formalist tradition of legal scholarship I discovered (literally) the second edition (it was absent, perhaps not surprisingly, from the list of “recommended reading” or “further reading” but was lurking on the shelf of the college law library dedicated to company and commercial law). However, the view I held then is not one that I have departed from subsequently.

The preface to the second edition is used by Hadden to comment on the “triviality” of some topics found on traditional company law courses and to promote his own conception of the organisation of the corpus of company law; a functional account which acknowledges that a number of distinct business types are regulated by the same companies legislation leading to the application of business forms that are not best suited to a substantial number of the commercial entities they regulate. The nature of the book's political ambition should not be underestimated. As a text about company law, it sought to explain capitalism across a variety of different models and socialist conceptions of the market. It mentioned the “M” word which I rather suspect today's undergraduates might think was “M” for market but in fact was “M” for Marxism. Company law texts were simply not like this in the late 1970s and early 1980s – there was no discussion of political or economic models of production that could provide an alternative to the corporate form, there was no discussion of the development of capitalism or of the structure of capitalism as it existed in the UK in the mid-1970s.<sup>15</sup> There were, instead, very large and detailed chapters on the sort of issues that Hadden so rightly regarded as trivial in the grand scheme of the enterprise and an unquestioning assumption that the capitalist status quo was to be

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13 For example, there are (rightly so in my view) only six pages devoted to *ultra vires* (*Company Law and Capitalism* (hereafter CLC) 2nd edn (London: Wiedenfeld & Nicholson)), pp. 112–16 and 147–9, the indoor management rules get two pages (pp. 118–20) and corporate personality receives five pages (pp. 142–7).

14 See, for example, CLC, n. 13 above, p. 443, which uses empirical data gathered by J Goldthorpe et al in *The Affluent Worker* (Cambridge: Cambridge University Press 1968).

15 For example, J Charlesworth, *Charlesworth and Cain* (London: Stevens 1977); A Topham, *Topham and Ivamy's Company Law* (London; Butterworths 1974).

described rather than to be challenged.<sup>16</sup> Not until 1990 did this picture begin to change with the publication of the first edition of *Farrar's Company Law*.<sup>17</sup>

### HADDEN'S MODEL OF THE CORPORATION

In the preface to the second edition, Hadden describes company law as being “tied to a conception of capitalism which is discarded by all but the most ardent free-market economists”. That conception of capitalism now looks positively benign next to the one that emerged over the following 32 years. Free marketers came to the fore and produced an even sharper model which has been on a roller-coaster ride since the arrival of new right politics as a governing force from 1979 or so onwards in terms of the growth of market capitalisation alongside market liberalisation, bubbles, governance reforms and governance failures. To these I will return later in the paper.

The final part of *Company Law and Capitalism*, comprising the last three chapters, looks at possible forward trajectories for the organisation of the company. In this discussion, Hadden is clearly influenced by the political climate and possibilities of the mid to late 1970s.<sup>18</sup> This was a time, probably the last time, when labour as a collective entity enjoyed considerable power and the corporate sector was more aware of its wider responsibilities than it is now.<sup>19</sup>

Developed societies had yet to realise that the long boom really was at an end<sup>20</sup> (even though the intervention of the International Monetary Fund in the UK at the time of the second edition may have been a clue), that all political parties were going to reject Keynesianism sooner or later<sup>21</sup> and that financialisation would prove to be the disastrous response to the end of fordist production that recent events would indicate that it is.<sup>22</sup> Hadden's emphasis was upon finding a form of the managerial corporation which would admit into the governance paradigm an element of worker participation. It was taken as a given that this should occur; the arguments were around its form not its substance. He was writing, after all, in the wake of the draft 5th Directive with its insistence upon the adoption of the German two-tier board structure<sup>23</sup> and its amended version which called for

16 I suspect that there may have been a rather different picture at the law schools that were purposefully following a rather different mission – Warwick and Kent, for example – see M Chesterman, “Legal Explorations in Different Lands” in G Wilson (ed.), *Frontiers of Legal Scholarship* (Chichester: John Wiley 1995), p. 21, at p. 22; R Folsom and N Roberts, “The Warwick story: being led down the contextual path of law” (1975) 30 *J Legal Education* 166, 176–7; G Wilson “The concept of a law degree: getting on with the job” (1968) 10 *JSPPL* 114. Both of those institutions were connected to Hadden's book through the series and through Hadden's tenure at Kent and William Twining's and Peter Fitzpatrick's at Belfast. For an indication of how company law was taught in many law schools as late as 1990 and what was included in the courses see I Snaith, “Company law on degree courses: survey report” (1990) 11 *Company Lawyer* 177.

17 This effort did not meet with approval in all quarters see I D Campbell, “Adam Smith, Farrar on Company Law and the Economics of the Corporation” (1990) 19 *Anglo-American Law Review* 185–208.

18 Some years earlier Hadden was invited to produce a draft company code for Papua New Guinea. This code included industrial democracy and referred to employees as “partners” (conversation with Hadden).

19 Revisionism at a time when neo-liberal capitalism is in crisis has the potential to become self-indulgent and dewy-eyed but there is something of these ideas in M Blair, *Ownership and Control* (Washington DC: The Brookings Institution 1995), at pp. 208–23. See also N Jackson and P Carter, “Organisational chiaroscuro: throwing light on the concept of corporate governance” (1995) 8 *Human Relations* 875.

20 A Glyn et al, “The rise and fall of the golden age”, in S Marglin and J Schor (eds), *The Golden Age of Capitalism: Reinterpreting the postwar experience* (Oxford: Clarendon Press 1990).

21 P Heelas and P Morris, *Enterprise Culture: Its values and value* (London: Routledge 1992), chs 1–12.

22 Boyer presents an interesting retrospective account, with exceedingly accurate conclusions, of this process, see R Boyer, “Is a finance-led growth regime a viable alternative to Fordism?” (2000) 29 *Economy and Society* 111.

23 OJ 1972 C131/49.

industrial democracy to be accommodated within existing national cultures,<sup>24</sup> and the UK response to this in the form of the Bullock Report.<sup>25</sup>

### The demise of economic democracy

Hadden's expectations were not to be realised; the White Paper<sup>26</sup> that was issued subsequent to the Bullock Report did not follow its recommendations and opted instead for a two-tier board system that would be adopted voluntarily over time, in order that a flexible and gradual approach to employee participation could be taken. A change of government followed shortly thereafter in 1979 and the CBI opposition to the idea of worker participation that had been evident in its response to the Bullock report<sup>27</sup> and, indeed, earlier in the relevant section of the Watkinson Report<sup>28</sup> won the day. The idea of worker democracy, in active terms, as part of the governance structure as opposed to, in passive terms, around product quality and development initiatives and worker consultation and information initiatives has never been returned to.<sup>29</sup> The 1982 Employment Act and subsequent employment legislation throughout the following decade illustrated the way in which the balance of power between state, corporate sector and labour was beginning to change. The idea of democracy in relation to trade unions became not something they were fighting to give their members in relation to enterprise owners but something that they were denying to their members in the way in which they conducted their own affairs.<sup>30</sup> The 1982 legislation required corporations to include in their Annual Report details of the steps they had taken to introduce and develop arrangements for "communication, consultation, financial partnership and economic awareness" amongst their employees. However, it also restricted the legal basis of the "closed shop" and opened the way for trade unions rather than individual members to be exposed to civil liability for "illegitimate strikes". A very influential view, and quite an apposite one, of participation arrangements in the UK, prior to the eventual incorporation within the UK of the structures required under EU law, was

24 Commission of the European Communities, *Statute for European Companies*, amended proposal for a regulation, Bulletin of the European Communities, Supplement 4/75.

25 *Committee of Inquiry on Industrial Democracy* (The Bullock Report) Cmnd 6706 (London: HMSO 1977). The Bullock Report recommended that there should be three constituencies represented in unitary company boards: employees and shareholders who together made up two-thirds of the board with the remainder of members being drawn from an independent group agreed upon by a majority of the other two constituencies.

26 *Industrial Democracy* Cmnd 7231 (London: HMSO 1978).

27 J Boswell and J Peters, *Capitalism in Contention* (Cambridge: Cambridge University Press 1997), pp. 132–3.

28 Paras 116–26. I have tried here to give an overview of the chronology of events. The debate between those in favour of participation and those who were not was much more nuanced than this short passage can possibly convey as was the debate among those in favour of participation about the form it should take. The TUC and its member unions did not all share the same position on either of these points. The same is true for employers' organisations. See, for example, the papers from the Symposium debate at Keele University in April 1975 (available from the IR unit there and in most libraries but without a standard catalogue entry as there is no official title or ISSN/ISBN) where Eddie Robertson then chair of the CBI Industrial Relations Committee makes a contribution which by his own admission is at odds with that of the CBI.

29 Unless one counts ESOP (employee share-ownership plan) schemes, always more popular in the US than the UK, see J Wills, "A stake in place? The geography of employee ownership and its implications for a stakeholder society" (1998) 23 *N5 Trans Inst Br Geog* 79; J Gordon "Employee stock ownership in economic transactions: the case of United and the airline industry" in M Blair and M Roe (eds), *Employees and Governance* (Washington: Brookings 1999), p. 317; and A Gamble and G Kelly "The new politics of ownership" (1996) *New Left Review* 62; promoted through tax breaks during the Thatcher years, they were seen as a way of creating loyalty to management through destroying the identity of worker qua worker, see P Riddell, *The Thatcher Era* (Oxford: Blackwell 1991) for both a narrative account and numerical information.

30 S Fredman "The new rights: labour law and ideology in the Thatcher years" (1992) 12 *OJLS* 24.

that expressed by Ramsay.<sup>31</sup> He suggested that corporate management resorted to participation mechanisms as a way<sup>32</sup> of buying off unrest within the corporate structure. This unrest, heralded by worker resistance and challenge, occurred on a cyclical basis within Taylorist-inspired management operations.

Workplace democracy now resides primarily in the care of work councils<sup>33</sup> or joint consultative committees,<sup>34</sup> depending upon the size of a given enterprise. These consultation forums allow for the filtering down of information from the board through management to the workforce, with consultation defined as “the exchange of views and establishment of dialogue between employees’ representatives and central management or any appropriate level of management”.<sup>35</sup> Areas included within the definition of “consulted upon” are wide ranging, from business development through sales and investment to closures of undertakings. The rather chequered nature of UK participation in EU social policy meant that the mandatory force of this directive was only felt in the UK in 1998 when the Social Chapter opt-out ended, with the terms of the directive not actually being the subject of specific UK legislative intervention until 2004.<sup>36</sup> Collective bargaining is now available only to a minority of workers in the UK<sup>37</sup> as union membership continues to fall, not least because of the changes in the nature of employment that I explain below. Downstream information disclosure is a long way from participation in governance. While these institutions may create the opportunity for

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31 H Ramsay “Cycles of control: worker participation in sociological and historical perspective” (1977) 11 *Sociology* 481. Ramsay refined this thesis in “Phantom participation: patterns of power and conflict” (1980) 11 *IRJ* 46 and “An international participation cycle: variations on a recurring theme”, in S Clegg et al (eds), *The State, Class and the Recession* (Canberra: Croom Helm 1983). For his position on European Works Councils, in particular, see “Fool’s gold? European Works Councils and workplace democracy” (1997) 28 *IRJ* 314.

32 For this view see, for example, H Braverman, *Labour and Monopoly Capital* (New York: Monthly Review Press 1974).

33 Directive 94/45/EC of 22 September 1994 which finally received legislative force in the UK by means of the Transnational Information and Consultation of Employees Regulations (2000) SI 1999/3323 as a result of the power contained in the European Communities Act 1972, s. 2(2). The journey from employee participation in works councils as part of German labour law to pan-European institution is well covered by industrial relations and labour law scholars, for a review of relevant literature see S Wheeler, “Ethics in the workplace” (2007) 18 *Law and Critique* 1 and the references contained therein.

34 A similar directive minus the works council requirement to mirror this level of communication in smaller national level undertakings was introduced in 2002, see Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community enacted in the UK by means of the Information and Consultation Regulations 2004 (Great Britain) (SI 3426) as a result of the power contained in the Employment Relations Act 2004, s. 42. It is clear from Article 4 of the directive (the so-called practical arrangements) that a structure akin to a works council may be necessary if the undertaking has no other appropriate mechanisms in place to disseminate information.

35 Article 2(f).

36 See nn. 33 and 34 above, and also M Hall, “Assessing the information and consultation of employees regulations” (2005) 34 *ILJ* 103.

37 D Watling and J Snook, “Works councils and trade unions: complimentary or competitive? The case of Sagco” (2003) 34 *IJR* 260.

networking,<sup>38</sup> transnational friendships<sup>39</sup> and a European identity,<sup>40</sup> they are far from the sort of participative structures envisaged by Bullock.<sup>41</sup>

Little comfort was gained from the Companies Act 2006. This legislation was some 10 years or so in the planning. By the time the government-sponsored but apparently independent Company Law Review<sup>42</sup> had reported and a White Paper<sup>43</sup> was presented it was clear that whatever the much vaunted concept of “stakeholder” – which had been such a prominent rhetoric within Blair’s vision<sup>44</sup> for a labour administration – actually meant in the corporate setting,<sup>45</sup> it did not involve workplace democracy. The launch document for the review was the last time that stakeholding was mentioned in a corporate setting.<sup>46</sup> What transpired was s. 172(1) of the Companies Act (CA) 2006 which imposed a duty on directors to promote the success of their company for the benefit of its members but in doing so they were to have regard to a variety of factors, one of which was the interests of employees. This looks very similar to CA 1985, s. 309,<sup>47</sup> with its sentiment towards employees as passive recipients of corporate consideration and it is likely to be as ineffective; directors only have to give consideration to the interests enumerated and there is no indication of the weight to be given to the different factors which may well, in practice, conflict with each other. There is no right of enforcement other than as a breach of duty owed to the company.<sup>48</sup> We should conclude from this that ideas of workplace democracy have indeed disappeared from the economic agenda.

38 W Lecher et al, *European Works Councils: Developments, types and networks* (Aldershot: Gower 2001).

39 J Stirling and I Fitzgerald, “European Works Councils: representing workers on the periphery” (2001) 23 *Employee Relations* 13–25.

40 M Whittall et al, *Towards a European Labour Identity* (London: Routledge 2007). The break-up of the Rover Group, i.e. the sale of the Longbridge plant by BMW in 2000, caused considerable debate about the usefulness of works councils as opposed to more traditional organisation through domestic trade unions. Whittall’s chapter in this book (pp. 55–73) is a defence of the role of the BMW works council. It is easy to remain unconvinced, however.

41 D Komo and C Villiers, “Are trends in European company law threatening industrial democracy?” (2009) *ELR* 175.

42 DTI, *Modern Company Law for a Competitive Economy* (London: DTI 1998).

43 *Modernising Company Law* Cmnd 5553 (London: HMSO (16 July) 2002).

44 T Blair, *The Third Way* (London: Fabian Society 1998); *Spectator* Lecture, 22 March 1995, Queen Elizabeth Conference Centre; Tokyo Speech, January 1996; Civil Service Conference Speech, Whitehall London, 13 October 1998.

45 Stakeholding in a corporate setting usually has two possible meanings – a wide meaning and a narrow meaning. The narrow meaning confines stakeholders to those who are necessary for the corporation’s survival viz. shareholders, state and customers, see, for example, E Sternberg, “Stakeholder theory exposed” (1996) 2 *Corporate Governance Quarterly* 4 at 6. The more expansive meaning traditionally includes the immediate community and employees, see R Edward Freeman, *Strategic Management: A stakeholder approach* (Boston: Pitman 1984), pp. 31–42. Exactly which of these meanings was meant was never explained. In any event, stakeholding is a status label – it does not include within its meaning an operational mechanism by which this status can be given life to.

46 I Jones and M Pollitt, “Who influences debates in business ethics? An investigation into the development of corporate governance in the UK since 1990” in I Jones and M Pollitt (eds), *Understanding How Issues in Business Ethics Develop* (Basingstoke: Palgrave 2002), pp. 42–66.

47 CA 1985, s. 309 was introduced eventually by the Companies Act 1980, having been suggested in a similar formulation by the Companies Bill 1973 and the Industrial Democracy Bill 1975. It was also recommended by the Bullock Report, n. 25 above, p. 84 or ch. 8, para. 38. It thus has the distinction of being a recommendation of the Bullock Report that actually made it to the statute book.

48 These issues are discussed in much more detail than is possible here in A Keay, “Tackling the issue of the corporate objective: an analysis of the United Kingdom’s ‘enlightened shareholder value’ approach” (2007) 29 *Sydney LR* 577, at pp. 592ff.

They have also disappeared from the academic agenda. Fascination with a law and economic analysis of corporate law that centres on a notion of efficiency as being the creation and maintenance of shareholder value<sup>49</sup> sees employees relegated to the role of fixed claimants for their wages within the firm that employs them. They are also viewed as likely to have no other claims of immediate substance outside this firm. This is somewhat ironic given the rush by corporations to end final salary pension schemes and replace them with defined contribution schemes.<sup>50</sup> This places employees in the position of holding a diversified portfolio dependent on market performance. If this does not ultimately recreate interest in the possibilities offered by economic democracy then it would be surprising. The final part of this paper deals in more detail with this move from defined benefit pension provision to defined contribution provision.

### The rise of corporate social responsibility

Corporate social responsibility (CSR) has replaced economic democracy as the topic catching most attention in discussions of corporate policy. CSR is not mentioned in the Watkinson Report expressly, although one could argue that the sentiments of the Watkinson Report on the duties of the public company were an extremely accurate portent of what was to come. Nor is a discussion of it present in either of Hadden's two editions, as it was simply not a contemporary issue then. CSR has been since the late 1990s the most discussed topic in the area of corporate power and existence. Entire monographs are devoted to definitions of CSR. The one given here will necessarily be rather shorter; it is the recognition that there should be a deliberate inclusion of public interest into decision making within corporations in a manner which is befitting the "triple bottom line" approach to business self-regulation.<sup>51</sup> As McBarnet<sup>52</sup> explains, CSR has become in a very short space of time an institutionalised facet of corporate business practice with cross-sector participation. For example, by 2001, 73 per cent of FTSE 100 listed companies had a code of conduct or a statement of business conduct practice and by 2005 this had risen to 91 per cent.<sup>53</sup>

CSR was, until comparatively recently, located in the realm of "otherness" in the UK. It was certainly not seen as a central feature of corporate policy. It was presented during those years and also now, in retrospect, as being the province of non-conformists such as Congregationalists and Quakers. It is certainly true that the leading examples of corporate social responsibility came, in the first instance, from employers who had these religious beliefs and displayed a paternalism towards their workforces which involved the provision of housing, leisure facilities and pension and savings schemes. Some even created financial participation schemes.<sup>54</sup> However, this has become an easy and over-generalised model

49 D Campbell, "The role of monitoring and morality in company law: a criticism of the direction of present regulation" (1997) 7 *Aus J of Corp Law* 343.

50 These propositions are explained in more detail in S Wheeler, "Labour and the corporation" (2006) 6 *J Corp Law Studies* 361.

51 J Elkington, *Cannibals with Forks: The triple bottom line of 21st century business* (Oxford: Capstone 1998). For an in-depth history of CSR, see C Vurro, "The evolutionary path of the concept of CSR" in F Perrini et al, *Developing CSR* (Cheltenham: Edward Elgar 2006), p. 54, and A Carroll, "Corporate social responsibility – evolution of a definitional construct" (1999) 38 *Business and Society* 268.

52 D McBarnet, "Corporate social responsibility beyond law, through law, for law: the new corporate accountability" in D McBarnet et al (eds), *The New Corporate Accountability* (Cambridge: Cambridge University Press 2007), p. 9.

53 *Ibid.* at p. 10.

54 See B Alford, *W D and H O Wills and the Development of the UK Tobacco Industry 1786–1965* (London: Methuen 1973), pp. 279–93 and T Corley, *Quaker Enterprise in Biscuits: Huntley and Palmers of Reading 1882–1972* (London: Hutchinson & Co 1972), pp. 103–11.

which has ignored or certainly marginalised evidence to the contrary. The cocoa plantations scandal in which the Cadbury family became embroiled in the early part of the last century illustrates cultural relativism at its best.<sup>55</sup> These religious beliefs did not always result in altruistic behaviour.<sup>56</sup> On occasions when they did, the corporations concerned were not necessarily behaving in this way out of a religiously driven altruism only. They saw a link to the greater levels of productivity and employee loyalty that such behaviour might generate,<sup>57</sup> although unlike their American counterparts this was not used as an advertising feature.

There is a divergence here in the homogeneity of Anglo-American capitalism. In the US, corporate social responsibility as a practice developed very much earlier and as a general phenomenon<sup>58</sup> amongst large corporations. American corporations consciously cultivated the image of caring establishments in which workers and customers were held in high esteem. The dominant image was of the pioneer<sup>59</sup> sending his new found wealth back home to those less fortunate. Two ideas have been put forward as underlying the need for the creation of this image of self-advancement and caring. One is that through it the proponents of strict competition regulation<sup>60</sup> would be bought off as they would see “Big Business” as desirable.<sup>61</sup> The second is that it was a marketing device; products produced in an atmosphere of care and concern were apparently less likely to have defects and, as this kept production costs low, such products would be available to the consumer at a lower price.<sup>62</sup> The reality is probably a mixture of both of these explanations.<sup>63</sup> This is not to say that American practice was, from the beginning of the development of large-scale industry, characterised by massive generosity and underpinned by clear structures within corporations. In fact, these did not begin to emerge until comparatively recently.

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55 The Cadbury family sued the *Standard* newspaper for its assertion that the family knowingly purchased cocoa from plantations in Portuguese Africa where slave labour conditions persisted. They won their action on the ground that the *Standard* falsely asserted that the Cadbury family had chosen to ignore what was happening. However, their preventative efforts were judged to be such that they were awarded nominal damages. The story is complicated by the fact that the Cadbury family were owners of a rival newspaper, *The Daily News*, and had used its editorial columns to complain about working conditions in the mines of South Africa, see L Satre, *Chocolate on Trial: Slavery, politics and the ethics of business* (Athens: Ohio University Press 2005).

56 C Dellheim, “The creation of a company culture: Cadburys 1861–1931” (1987) 92 *Am Hist Rev* 13, at 15 esp. n. 9, but cf. J Walvin, *The Quakers: Money and morals* (London: John Murray 1997), ch. 11.

57 J Baddon et al, *People’s Capitalism* (London: Routledge 1989), p. 152. Despite the current interest in corporate social conscience and the search that is being undertaken in various academic disciplines for a new approach to business enterprise there has been little critical examination of this movement. M Rowlinson, “Quaker employers” (1998) 6 *Historical Studies in Industrial Relations* 163 is a welcome exception.

58 F Emerson Andrews, *Corporation Giving* (New York: Russell Sage 1952).

59 A Wicks et al, “A feminist reinterpretation of the stakeholder concept” (1996) 4 *Bus Ethics Quart* 475 at 479

60 See B Thomas, *American Literary Realism and the Failed Promise of Contract* (Berkeley: University of California Press 1998), p. 246, and, in particular, the material Thomas cites at n. 32 in ch. 8. References to specifically legal history as opposed to literary history can be found in H Hovenkamp, *Enterprise and American Law* (Cambridge: Harvard University Press 1991).

61 R Marchand, *Creating the Corporate Soul: The rise of public relations and corporate imagery in American big business* (Berkeley: University of California Press 1998).

62 A Tone, *The Business of Benevolence* (Ithaca: Cornell University Press 1997), pp. 99–139, see, in particular, pp. 130–5.

63 C Harwell Wells, “The cycles of corporate social responsibility: an historical retrospective for the twenty-first century” (2002) 51 *U Kan LR* 78, see, in particular, p. 81 where Harwell Wells comments that “Corporate social responsibility is not a novel solution to an unchanging problem . . . it is an unchanging solution to an ever-new problem.”

## THE REALITY OF CORPORATE SOCIAL RESPONSIBILITY

The link between economic democracy and CSR can be found in Ramsay's cycles of control point which were referred to above to explain the focus on economic democracy as a topic of discussion within and without the corporation. Ramsey's model needs to be refined to emphasise that what corporate CSR policies and interventions are designed to do is not to buy off internal discord but to buy off a wider external general discomfort about the role particularly of large-scale business within society. A decade of legislation post-1979 saw the power of unions largely emasculated and privatisations on a huge scale of formerly publicly held utilities and services. This brought individuals face to face with corporate power in a way not experienced before. Add to this the corporate governance scandals of the early 1990s and the revelation of the size of bonuses being paid to the chief executives of these newly privatised enterprises and what results is a massive decline in trust in business,<sup>64</sup> a real legitimacy crisis for the corporation.<sup>65</sup> Other drivers have been added over the years; globalisation and internet technology make it both harder to hide undesirable business practices and easier to expose them. NGOs have flourished in both these spaces and there is a much bigger story to be told about their emergence, capture and re-emergence.<sup>66</sup> Anti-capitalist protests such as those in Seattle and Genoa can be assembled relatively easily due to cheap travel and easy communications.

The corporate response has been to produce a plethora of initiatives and reports all designed to re-brand corporate activity. This has occurred on an entirely voluntary basis without statutory intervention. What has slowly emerged is competition in the delivery of CSR<sup>67</sup> and to this end larger corporations would presumably not resist the imposition of statutory regulation on CSR as it would give them a further opportunity to drive up expectations and force out competitors for whom the cost of compliance was too great. In addition to competing in areas such as product development, production costs and ultimately price, corporations compete over their social awareness and responsiveness.<sup>68</sup> In some areas, corporations have skilfully managed to link the two; ethical investment and ethical purchasing are growing areas that corporate innovation has created in effect by recognising that an appetite for these products had been created. Advertising of products is now not confined to the sponsorship of glamorous sporting events and advertising hoardings but takes place through links with charities. The idea is that consumers will have faith in the values of the charity and then, through the link with the charity, transfer that faith to the merits of the product or the producer depending on how narrowly the link is focused.<sup>69</sup> Cause-related marketing, as it is known, has resulted in leading supermarket chains, for example, competing over the donations, such as books and computers, that they will make to schools as an incentive to would-be customers to patronise their establishments rather than those of their competitors.<sup>70</sup> These campaigns have gradually moved from one-off short events to long-term relationships in which the identification of the corporation, their charity partner and

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64 See M Moran, "The lost legitimacy: property, business power and the constitution" (2001) 79 *Public Administration* 277 and the empirical information that he cites therein.

65 L Rayman-Bacchus, "Assessing trust in, and legitimacy of, the corporate" in D Crowther and L Rayman-Bacchus (eds), *Perspectives on Corporate Social Responsibility* (Aldershot: Ashgate 2004), p. 21.

66 A Hoffman, "Shades of green" (2009) 7 *Stanford Social Innovation Review* 40.

67 C Smith, "The new corporate philanthropy" (1994) *Harv Bus Rev* 105.

68 K Keilbach, *Global Warming is Good for Business* (CA: Quill Driver Books 2009).

69 M Stork, "Brand aid: cause effective" (1999) 40 *Brandweek* 20.

70 S Wheeler, "Inclusive communities and dialogical stakeholders: a methodology for an authentic corporate citizenship" (1998) 9 *Aust J of Corporate Law* 1, at pp. 13ff. and T Mescon and D Tilson, "Corporate philanthropy: a strategic approach to the bottom-line" (1987) 29 *Calif Manag Review* 49.

their shared values is key.<sup>71</sup> An effective CSR policy for a corporation is a way of developing market reputation and being seen as identifying with current debates in society.<sup>72</sup>

CSR is a way of protecting the interests of shareholders and executives from the disapproval of society at large. It is dominated by the need to produce a win-win situation for both the corporation and the recipient of its largesse. Despite the voluntary honour pledges undertaken by graduating MBA students at Columbia and Harvard Business Schools<sup>73</sup> to “refrain from advancing their own narrow interests at the expense of others”, no-one could seriously suggest that the corporation could be an effective agent for social change or a redistributive mechanism<sup>74</sup> any more than a serious suggestion could be made that substantive change could be brought to the lives of employees by consultation mechanisms. Corporations are not best placed to do this as they have a fundamental conflict of interest between those with a property stake denoted by possession of a share and those who do not, a tension that Hadden recognised.<sup>75</sup> There is still a huge information asymmetry between those who provide and then account for CSR policies in glossy brochures and those who would question them. There is a large gap between the presentation of CSR ventures and the disclosure of all corporate policies and practices. The extraction industry giants such as Shell and BP are easy targets in this respect because of the nature of their core business but when the same dissonance<sup>76</sup> can be found in relation to Coca Cola, a soft drink manufacturer, clearly something is awry.

### The demise of defined benefit occupational pension schemes

If the adoption of CSR policies and their subsequent adaption to fit into a competitive structure represents a race to the top for the corporate sector then the demise of defined benefit occupational pension schemes represents a race to the bottom. Just over 10 years ago, occupational pension schemes were acclaimed as one of the “great welfare success stories of [the 20th] century”.<sup>77</sup> For both the Watkinson Report and Tom Hadden the existence of occupational pension schemes would have been an absolute given. They would have been seen as a labour management device rather than a provision of social justice but, nevertheless, their existence provided retirement security to a huge number of employees. Now the system is in crisis,<sup>78</sup> lurching from the news of one high profile closure to another, for example, in the last few months Royal Mail, Morrisons, British Telecom and Barclays have all made large changes to their pension schemes. Many schemes are now closed to new employees and some even to existing employees. The legislative structure surrounding occupational pensions allows corporations to do this without any recourse from their employees. Once labour is replaced as the dominant force within corporations by the claims of shareholder value, corporations move to compete over who can provide the best

71 S King, *Pink Ribbons Inc* (Minneapolis: University of Minnesota 2006), pp. 9–28.

72 R Gray, “Developing a tight fit is crucial to CRM”, *Marketing*, 4 May 2000, p. 37. Gray’s article cites Dean Sanders (founder of Good Brand Works, a social marketing consultancy, as saying “I wonder how history will judge cause related marketing . . . My instinct is that it will be seen as a catalyst in the wider move to the socialisation of business.”

73 L Wayne, “A promise to be ethical in an era of immortality”, *New York Times*, 29 May 2009.

74 S Banerjee, *Corporate Social Responsibility* (Cheltenham: Edward Elgar 2007), pp. 144ff.

75 CLC, n. 14 above, pp. 25–30.

76 See M Thomas, *Belching Out the Devil* (London: Ebury Press 2008), www.killercoke.org: cf. www.cokefacts.com and www.coca-cola.co.uk.

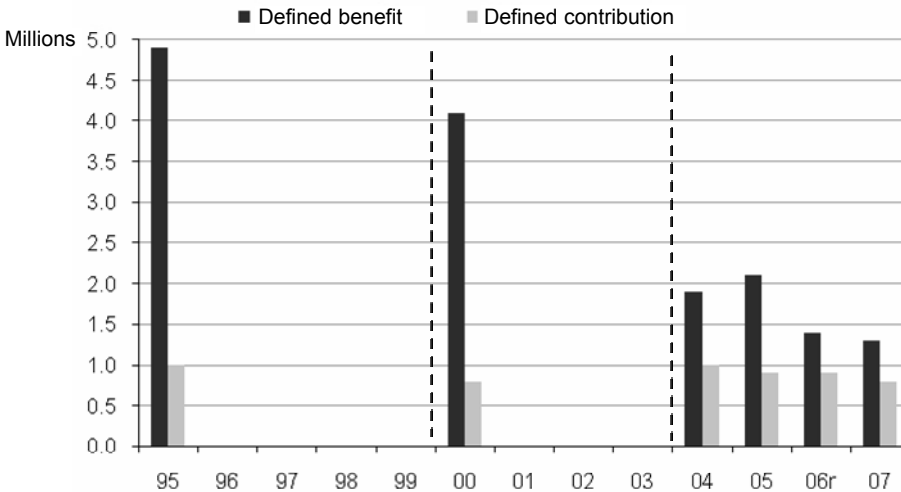
77 *A New Contract for Welfare: Partnership in pensions* Cm 4179 (London: HMSO 1998), pp. 18 and 65.

78 G Clark, “The UK occupational pension system in crisis” in H Pemberton et al (eds), *Britain’s Pensions Crisis: History and policy* (London: Oxford University Press/British Academy 2006), p. 145.

percentage return on capital. Removing the cost of a defined benefit occupational pension scheme boosts this return considerably and so pension funds found themselves starved of investment. Unsurprisingly, they are now severely underfunded.

What is happening here is the death throes of defined benefit (DB) pension schemes. These schemes are being replaced by defined contribution (DC) schemes. In short this move involves a transfer of risk from employer to employee. Employees are moving, through no choice of their own, from the certainty of a final salary scheme to the uncertainty of individualised market return. In simple terms, in a DB scheme the risk of losses and surpluses accrues to the scheme sponsor, the employer: in a DC scheme the amount that has to be saved to achieve a particular income on retirement has to be decided upon by the individual. DB schemes are not risk-free for the employee. There is a possibility of underfunding or of firm insolvency<sup>79</sup> and the consequences of these are often catastrophic for the individual.<sup>80</sup> However, these risks pale considerably when placed next to the decisions that an individual has to make when in a DC scheme. There are two decisions. First what income will be necessary on retirement to attain the desired standard of living and second what investment pattern to choose in order to generate this income.

**Figure 1: Number of active members of open private sector occupational pension schemes: by benefit structure, 1995 to 2007 (United Kingdom)\* † ‡**



\* Due to changes in definition of the private and public sector, estimates for 2000 onwards differ from earlier years. From 2000 organisations such as the Post Office and the BBC were reclassified from public to private sector.

† 1995 and 2000 excludes hybrid schemes.

‡ Figures for 2006 have been revised and are shown as “2006r”. Changes to methodology for 2006 (revised) onwards mean that comparisons with 2005 and earlier should be treated with caution.

Source: Occupational Pension Schemes Survey, ONS 2008

<sup>79</sup> The Pensions Act 2004 established the Pension Protection Fund (launched in April 2005) which creates a fund from a levy taken from extant pension schemes to provide assistance to those whose pension scheme becomes insolvent with insufficient funds to pay its members, see D Blake et al, “Financial risks and the Pension Protection Fund: can it survive them?” (2007) 12 *Pensions* 109.

<sup>80</sup> P Ring, “Security in pension provision: a critical analysis of UK government policy” (2005) *J of Soc Pol* 343 and M Hyde and J Dixon, “Working and saving for retirement: New Labour’s reform of company pensions” (2004) 24 *Critical Social Policy* 270.

## EMPLOYMENT MARKET STRUCTURES, THE REGULATORY ENVIRONMENT AND DB PLANS

Post-war nationalised industries, acting as monopolies or near monopolies, used pension entitlements as part of wage negotiations particularly during the era of wage restraint policies. In the private sector, those who benefited most from these schemes were skilled or technical, largely male, workers who had stability of employment. These industries were privatised in the 1980s and so imbued with the profit motive. Heavy industry has given way to primarily service industries and manufacturing industry continues to relocate to production sites overseas with lower cost regimes. Pension scheme entitlement was the province of union collective negotiations; union membership has been in decline through choice and deregulation for some time.<sup>81</sup> Full-time employment, where occupational pension schemes are most likely to exist, while currently enjoying a period of stability, has declined in availability from the position in the 1970s. Firm-specific skills are less important in service industries than heavy industries and so employers no longer see the need to reward employees in the same way.<sup>82</sup>

For both employee and employer, flexibility of employment is a key concept of post-fordist life. Employment by one employer over a lifetime is much less likely to be possible or even desired as lifestyle choices have expanded.<sup>83</sup> Employee mobility is offered as an excuse for the decline in availability of DB schemes.<sup>84</sup> DB schemes operate off final salary calculations rather than a career average salary so rewarding those who stay with a single employer.<sup>85</sup> DC schemes, broadly speaking the alternative to defined benefit schemes, require, amongst other decisions to be made, an individual to decide what to do with their vested account balance on any change of employment. So, although it might no longer be the case that an individual's pension fund remains locked into the scheme of a previous employer and frozen at the level of the final salary paid in that employment, an individual requires a particular knowledge of the investment market to be able to decide how to maximise the return for retirement on this lump sum.

The regulatory environment for occupational pension provision has changed from one with little regulatory structure to one where there is considerable regulatory intervention<sup>86</sup> which brings with it a cost borne by the pension fund. Additionally, there has been a gradual increase in longevity over the last 20 years. However, it is easy to overstate the impact of increased regulation. There is a considerable chance that it did not spark a radical change in behaviour. Research that has looked at the effect of financial regulation on corporate behaviour has shown that corporations invest in developing avoidance tactics and devising evasive compliance strategies.<sup>87</sup> Anecdotal evidence from Towers Perrin<sup>88</sup> indicates that the

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81 G Gall and S McKay, "Trade union derecognition in Britain, 1988–1994" (1994) 32 *Brit J of Industrial Relations* 433.

82 S Sass, *The Promise of Private Pensions* (Cambridge, Mass: Harvard University Press 1997), p. 238.

83 Wheeler, "Labour and the corporation", n. 50 above.

84 Although this is not a universally accepted factor, see R Disney and C Emmerson, *Choice of Pension Scheme and Job Mobility in Britain*, IFS Working Paper 9 (London: Institute for Fiscal Studies 2002); cf. P Ring, "The implications of the 'new insurance contract' for UK pension provision: rights, responsibilities and risks" (2002) 22 *Critical Social Policy* 551.

85 O Gough and R Hick "Employee evaluations of occupational pensions" (2009) 31 *Employee Relations* 158.

86 Until 1995 there was no regulation of DB pensions, by 2004 there was a levy on all viable schemes and considerable changes in accounting and solvency requirements, for example FRS 17.

87 D McBarnet, "Law and capital: the role of legal form and legal capital" (1984) 12 *Int J of Soc of Law* 231 and D McBarnet and C Whelan, "The elusive spirit of the law: formalism and the struggle for legal control" (1991) 54 *MLR* 848.

88 Towers Perrin Human Resources Services, *Defined Contribution Pension Arrangements* (London: Towers Perrin 2004).

impact of FRS 17 was a factor in switching schemes for only 24 per cent of the employers who responded to a survey they conducted in 2004.

#### CORPORATE BEHAVIOUR

The move from DB to DC schemes is often presented as being the result of the factors described above. However, a closer examination reveals that a much greater part is played by corporate decision making. As I explained above, the move to DC plans cuts across the traditional law and economics divide between residual claimant and fixed-sum claimant and, yet, pension fund beneficiaries have no say in how their funds are managed. Pension fund trustees took full advantage of the products made available through the onset of financialisation and joined in the takeover and merger boom of the 1990s.<sup>89</sup> Financialisation represents the final move away from a production-driven economy. Profits are sought through creating and trading financial products.<sup>90</sup> Put in colloquial terms it is now more important in profit terms to a car manufacturer to sell a customer the finance to buy a car than it is to sell the car itself. Fund managers selected by the trustees see their primary loyalty to the board corporate which has elected the trustees who in turn have chosen them.<sup>91</sup> The consequences of this are that employees are left without even a basic accountability structure

If we add to this the use of supposed pension surpluses to provide generous early retirement provision during the recessions of the early 1980s and early 1990s, the peaks and troughs of the equity market<sup>92</sup> and the employment of high asset values in the early 1990s to take payment holidays then it looks very much as though the decision to switch scheme types is an informed decision made for sound business reasons. Payment holidays have two effects. They boost share earnings and lower employment costs and, as a consequence of these, short-term competitiveness is increased. However, subsequent low asset returns and falling interest rates made the financial consequences of these holidays impossible to claw back.<sup>93</sup> Employers have used the move from defined benefit schemes to defined contribution schemes as an opportunity to reduce their contribution to post-retirement provision thus maximising returns on investment for shareholders.

The race to the bottom in pension provision has largely occurred post-2000 despite the equity market crash of 1987. The clustering of scheme closure post-2000 demonstrates how quickly a market occurs as corporations compete to provide the best return for shareholders and copy from each other the methodology for doing so, just as they did in relation to CSR. Economists term this herd behaviour.<sup>94</sup> While the actual modelling of herd behaviour may belong within micro-economics, at a conceptual level its tools for understanding imitation in firms are relatively straightforward.<sup>95</sup> Two broad categories of explanation exist within the literature – information-based theories of imitation and rivalry-based theories of imitation. Information-based theories suggest that firms follow other firms that they perceive, rightly or wrongly, to possess superior information and rivalry-based theories suggest that firms

89 T Ghilarducci, *Labor's Capital* (Cambridge, Mass: Harvard University Press 1992), p. 130.

90 There are many accounts of financialisation and most of them depend for their starting point on G Krippner, "The financialization of the American economy" (2005) 3 *Socio-Economic Review* 173.

91 This clearly creates an accountability vacuum for employees, see T Ghilarducci et al, "Labour's paradoxical interests and the evolution of corporate governance" (1997) 24 *JLS* 26.

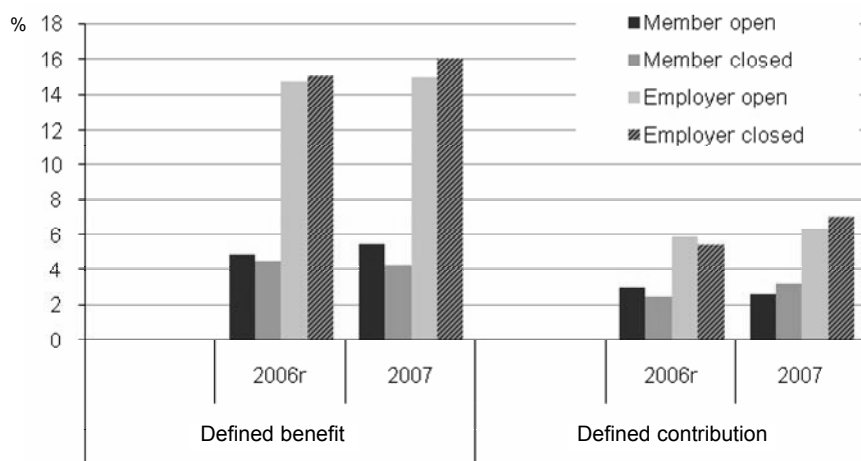
92 P Langley, "In the eye of the 'perfect storm': the final salary pensions crisis and financialisation of Anglo-American Capitalism" (2004) *New Political Economy* 539.

93 For a much more rigorous overview of these issues, see G Clarke and A Monk, "The 'crisis' in defined benefit corporate pension liabilities – Part I: scope of the problem" (2006) 12 *Pensions* 43.

94 A Banerjee, "A simple model of herd behavior" (1992) 107 *Quart J of Economics* 797.

95 M Lieberman and S Asaba, "Why do firms imitate each other" (2006) 31 *Academy of Management Review* 366.

**Figure 2: Member plus employer weighted-average contribution rates to private sector occupational pension schemes: by benefit structure, contributor and status, 2006 (revised) and 2007 (United Kingdom)**



Source: Occupational Schemes Survey 2007, ONS 2008

follow each other either to respond to or to limit competition. These two categories do not necessarily work in isolation and imitation behaviour may occur as a combination of both information and competition. The rise and fall of the dot.com bubble is a very good example of imitation behaviour that draws on information and rivalry. Many businesses rushed to join the world of internet-based business only to find that this was an innovation that was not suitable for their product. Their enthusiasm was based on following others and competing in innovation. Within this paradigm there are “fashion leaders”; those firms who it is supposed have superior information<sup>96</sup> based on size or longevity in the market.

If we consider imitation or herd behaviour in relation to pension schemes then emerging as “fashion leaders” are those long-established and large PLCs and other bodies that closed their defined benefit schemes to new entrants in the late 1990s, for example, Sainsburys, the Abbey National and Age Concern. Crucial to imitation are informal contact situations through which information can cascade. Information cascades when fashion is followed without recourse to personally held or acquired information.<sup>97</sup> Informal networks and contacts between firms could exist in the medium of trade fairs, trade associations and business dinners.<sup>98</sup> A more significant source of informal contact are investment consultants which in the UK form a very small club.<sup>99</sup> Just four firms provide investment consultancy advice to 70 per cent plus of funds with assets of over £25 million pounds. The Towers Perrin survey<sup>100</sup> reports that 39 per cent of employers surveyed switched their pension scheme to match trends in the market, i.e. among other firms.

96 S Bikhchandani et al, “Learning from the behavior of others: conformity, fads and information cascades” (1998) 12 *J Economic Perspectives* 151.

97 D Hirshleifer and S Teoh, “Herd behaviour and cascading in capital markets: a review and synthesis” (2003) 9 *European Financial Management* 25.

98 P Bridgen and T Meyer, “When do benevolent capitalists change their mind? Explaining the retrenchment of defined-benefit pensions in Britain?” (2005) 39 *Soc Pol and Admin* 764.

99 N Kakabadse and A Kakabadse, “Pension funds governance: an overview of the role of trustees” (2004) 1 *Int J Business Gov and Ethics* 3 at 4.

100 Towers Perrin, *Defined Contribution*, n. 89 above.

Table 1: Market share for pension advisers, by size of pension scheme (%) 1999

Adviser	Size of fund						
	£1bn+	£250– £999m	£150– £249m	£75– £149m	£25– £74m	£10m– £24m	< £10m
Watson Wyatt	43.3	29.0	21.9	21.2	15.6	13.0	3.8
William Mercer	15.8	23.9	24.8	32.4	27.7	28.5	34.6
Bacon & Woodrow	16.7	15.4	19.0	17.3	12.4	10.6	3.8
Hymans Robertson	9.2	9.7	6.7	2.8	1.5	2.4	0.0
“Big Four”	85.0	78.0	72.4	73.7	57.2	54.5	42.2
Aon	4.2	5.8	4.8	7.3	10.6	9.2	8.7
Lane Clark & Peacock	1.7	3.1	4.8	4.5	2.1	1.9	1.0
Towers Perrin	0.0	1.9	6.7	3.4	2.1	2.4	0.0
KPMG	0.0	0.0	0.0	0.6	0.9	1.9	1.0
PwC	0.0	0.4	0.0	0.6	0.9	1.9	1.9
Subtotal	90.8	89.2	88.6	89.9	73.7	72.0	54.8
Other	9.2	10.8	11.4	10.1	26.3	28.0	45.2
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>
<b>HHI</b>	<b>2509</b>	<b>1790</b>	<b>1592</b>	<b>1892</b>	<b>1289</b>	<b>1200</b>	<b>1307</b>

Source: Myners Review (from datamonitor analysis of “Pension funds and their advisers”, AP Information Services: Charles River Associates calculations), at p. 65.<sup>101</sup>

### Conclusion

Benevolent capitalism of the type described by the Watkinson Report and criticised by Hadden as being acceptable only to ardent free marketers is dead, sacrificed on the altar of shareholder value. Its demise demonstrates both the tenacity and the flexibility of the corporate form. It is able to cling to life in moments of pressure such as the move to post-fordism and through to financialisation and it is flexible enough to move between interest groups producing a solution or at least a product (CSR *is* a product, DC pension plans *are* products) to satisfy whichever demand is loudest. The current financial crisis is one in a long line of many and it will produce another solution manufactured by corporations which results in pacification of interest groups until the next crisis.

<sup>101</sup> Institutional Investment in the United Kingdom (the Myners Review), 2001.